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SUBJECT INDEX

'A'

@ Suram Singh Page- 276

Appeal against the award passed by M.A.C.T whereby claim petition preferred by appellant has been dismissed. Held- it stands proved on record that incident had occurred where in debris of wall collapsed with hit of bus owned and possessed by respondent No 1 being driven by its employee respondent No 2 had damaged scooty of appellant, respondent No 2 despite having entered in to compromise has denied the occurrence and his undertaking to indemnify the appellant-Respondent No. 02 and his employee has failed to compensate appellant-it is matter of record that quantum of loss has not been proved by leading cogent, reliable and satisfactory evidence. It is hard fact that because of false denial on the part of respondents, appellant has been relegated to MACT as well as Hon'ble H.C. Thus appellant deserves to be compensated at least for that, therefore respondents are liable to pay Rs. 15,000/- in lump sum to appellant- Appeal partly allowed. Title: Sahil Kumar vs. HRTC and another Page-569

Appeal against the findings of trial court and first appellate court vide which suit and appeal filed by appellant have been dismissed- Appellant / plaintiff filed Civil Suit seeking declaration that he has acquired ownership rights by way adverse possession- Notices issued to respondents No.7 Nek Singh and respondent No.18 Kuldeep received back with report that they had expired during pendency of first appeal before Ld. District Judge- Held- It is well settled that decree in favour or against dead person is nullity- for non-substitution of L.R of deceased defendant out of several defendants may cause abatement of appeal against the deceased defendant or as while depending upon the effect of non substitution of L.R. of the deceased defendant on the relief claimed -an application for setting aside abatement and substitution of LRs of deceased defendant should have been made and decided with by the court in which abatement occurred as abatement is automatic irrespective of passing of or not passing of such order by the court and question whether suit to abate in toto or in part has also to be decided by the same court- where during pendency of appeal, one the parties had expired before hearing the arguments and where he was necessary party to the lis and his L.R's have not been brought on record and issues as to whether there was sufficient causes for setting aside the abatement or whether the L.R's of deceased are to be brought on record or not in relation to a suit or appeal ,at the first instance, are also to be decided by the court in which the suit or appeal was pending at the time of death of party or abatement take place. Hence, judgment decree passed in Ld. first appellate court is set aside and case is remanded to first appellate court with direction to allow the appellant to take steps on death of respondent of Nek Singh and Kuldeep respondent No.18 and thereafter to decide question of substitution of their LR's.Title: Shri

Jaishi Ram vs. Shri Manohar Lal and others. Page-359

Appeal against the judgment and decree passed by trial court affirmed by first appellate court vide which suit of plaintiff appellant was dismissed- Plaintiff- Appellant was sanctioned a loan of Rs. 2 lacs by SBP Kullu- Enhanced to Rs. 5 lacks- Plaintiff hypothecated stock, machinery- Defendant No. 2 got an insurance policy from defendant No.3 by depositing the premium from loan account of plaintiff- A report was lodged by plaintiff with Police with due information to defendant No.2 but defendant No.2 failed to claim the amount of loss from defendant No.3 and defendant No.2 failed to pay the same to plaintiff through defendant No.3 causing double prejudice to plaintiff by defendant No.2&3 on account of nonpayment of claim amount which was to be further credited to loan account of plaintiff for adjustment of liability which was not done- Held- No case is made out by appellant that despite due diligence the evidence could not be led before the trial court- application under order XLI rule 27 CPC does not fulfill the criteria laid down by Hon'ble apex court with regard to applicability of provision of order XLI rule 27 CPC- In this case the saw mill which was brunt was neither owned by appellant/plaintiff nor he had taken loan qua the same from defendant No.2 , bank- Neither any insurance policy was taken by defendant No.2 for said saw mill from defendant No.3 for which premium was debited in account of plaintiff- The saw mill happened to be owned by son of appellant plaintiff and he was only a guarantor with regard to loan taken by son of plaintiff qua saw mill- plaintiff failed to place on record any evidence to show against the loan so sanctioned to him by defendant no 2, his stock material was insured and any fire policy was purchased in this regard from defendant No.3 Appeal dismissed.Title: Ram Nath vs. Oriental Insurance Company and others Page-585

Appeal against the refusal of ld single judge to quash the evaluation proceedings and tender process vide which the tender was allotted to respondent no 9-Held once the bid document required a contractor to show that he was in physical possession of a particular kind of machinery in working order –he cannot explain that he would produce the same in future- The essence of civil construction is time limit within which the construction must be completed-The violation of time limit leads to price escalation and throwing out of gear the schedules of so many other units and things which depends upon the project's timely completion. There is no error in the evaluation for declaring the appellant's bid as non responsive and there is no reason to interfere in tender process –appeal dismissed. Title: M/s. Amit Singla vs. State of Himachal Pradesh & others **(D.B.)** Page-578

Appeal- Seeking setting aside the judgment and decree passed by trial court affirmed by Ld. first appellate court whereby suit filed by appellant was dismissed- Held- It is settled law that when a party approaches the appellate

court with an application under order, XLI, rule 27 CPC- then the application has to be decided one way or the other, by the appellate court and same cannot remain undecided on the court record, because none can say as to what would have been the effect of the decision of the same on the final judgment, if the application was allowed by the court- in this case , by not deciding the application under order XLI rule 27 CPC ,first appellate court has committed a material irregularity which renders the judgment and decree passed by it nonest in eyes of law - appeal is allowed- judgment and decree passed by first appellate court is set aside and case is remanded back to first appellate court for adjudication fresh.Title: M/s Himprastha Financiers (P) Ltd. and others vs. Union of India and others Page-368

Appeal- Seeking setting aside the judgment and decree passed by trial court affirmed by first appellate court whereby suit filed by appellant's predecessor was dismissed – Held-Record demonstrates that during pendency of first appeal, appellant filed three applications under order 41 rule 27 CPC. These applications are on record and as integral part of the file of first appellate court -Order 41 rule 27 CPC interalia provides for production of additional evidence in appellate court ,if court from whose decree appeal is preferred, refused to admit evidence which ought to have been admitted or party seeking to adduce additional evidence establishes that notwithstanding the exercise of due diligence such evidence was not within his knowledge or could not after exercise of due diligence be produced by him at the time when the decree appealed against was passed- when an court is dealing with an application under order 41 rule 27 CPC, court to first to decide whether same meets the conditions contemplated under order 41 rule 27 CPC or not-it is settled law that when a party approaches the appellate court with an application under order 41 rule 27 CPC the application has to be decided one way or other by appellate court and same cannot remain undecided in court record because none can say as to what would have been the effect of decision of same on the final adjudication if the application was allowed by the court. The appellate court by not deciding the third application under order 41 rule 27 CPC has committed a material irregularity which renders the decree passed by it nonest in eyes of law -appeal is allowed by setting aside judgment and decree passed by first appellate court and case is remanded back to first appellate court for adjudication fresh. Title: Shri Shanti Swaroop Sardana (since deceased) through his legal representatives Smt. Anju Sardana and others vs. Union of India and another Page-383

'C'

Code of Civil Procedure - Order 22 Rule 3 read with section 151- Respondents / Petitioners filed application for impleading them as Legal Representatives of deceased landlord / petitioner on the basis of will

bequeathing the rental accommodation in their favour – Application was allowed by Rent Controller – Challenged – Held, that pleadings set up in eviction petition clearly demonstrate that the eviction of tenant was sought for personal use and occupation for setting up business of the then landlord and his son/grandsons – Not disputed that property stood bequeathed by original landlord in favour of grandsons – No infirmity in order passed by Rent Controller impleading present respondents as petitioners/landlords in eviction petition – Revision Petition dismissed. Paras (10,11,12) Title: M/s Rikhi Ram Amar Nath vs. Shri Chamba Mal Bhagra (since deceased), through representatives Vishal Sood & another Page-669

Code of Civil Procedure, Section - 100 – Suit for declaration filed by Plaintiff claiming that he, alongwith proforma – defendants have become owners of suit land automatically by operation of H.P. Tenancy and Land Reforms Act, 1975, dismissed by trial court --- Appeal filed by plaintiff also dismissed --- Regular Second Appeal --- Held, that plaintiff approached the Civil Court after initiation of eviction proceedings under P.P. Act with respect to which Civil Court lacks jurisdiction --- Plaintiff had right and opportunity to establish title upon suit land in the proceedings under P.P Act --- The suit land in ownership of Devta Surya Narayan which is diety / idol and a perpetual minor, is incapable of cultivating its holding personally --- No person can acquire ownership rights for tenancy in such land --- No perversity in concurrent findings of fact recorded by the Courts below --- Appeal dismissed. (Paras 56, 62, 64, 65) Title: Prithvi Chand vs. State of HP & others Page-744

Code of Civil Procedure, Section 100 --- Suit for possession for vacation of shop existing alongwith arrears of rent (mesne profit) @ Rs. 2000 p.m. in suit land / filed by respondent against present appellant, decreed by Trial Court --- First appeal partly allowed--- Mesne profits being use and occupation reduced to Rs. 1,300/- p.m. --- Challenge thereof – Held, that no substantial question of law involved in the present appeal --- Findings of fact referred by Learned Courts below based on correct appreciation of pleadings and evidence on record --- Appeal being devoid of merits dismissed. (Paras 9, 10, 12) Title: Harbans Singh vs. Sh. Ramesh Chand Page-722

Code of Criminal Procedure --- Section 127 – Petition under section 125 Crpc filed by respondents compromised in Lok Adalat – Maintenance amount of Rs. 2,000/- per month each was awarded to the respondents from the date of award – Application under section 127 Crpc filed for enhancement of maintenance after six years allowed – Maintenance amount enhanced from Rs. 2,000/- to Rs. 10,000/- p.m. for respondent no. 1 (wife) and from Rs. 2,000/- to Rs. 20,000/- for respondent no. 2 (daughter) which was reduced to Rs.12,000/- in Revision by Ld. Additional Session Judge – Challenge thereof – Held, that there is nothing on record to suggest that respondents have any

other source of income except the maintenance amount – Enhanced maintenance amount in favour of respondents just and proper – Petition dismissed. (Para 4) Title: Harish Chand vs. Sarita Devi & anr. Page-803

Code of Criminal Procedure -- Section 482 ------ Prayer for quashing F.I.R. No. 16/2017 dated 14-01-2017 U/SS 147, 149, 341, 504, 506 & 427 IPC, P.S. Sadar, Bilaspur on the ground that matter has been settled amicably between the parties --Held, that allegations perse in FIR are serious -- Direction under Section 482 CrPC can not be exercised to give benefit to the accused by permitting them to go scot free simply because the matter has been settled between the parties -- Petition dismissed. (Paras 5, 6) Title: Rishi Gautam alias Rishu & others vs. State of Himachal Pradesh & another Page – 674

Code of Criminal Procedure --- Sections 397, 401---Revision against judgment acquitting the accused passed in Criminal case No. ½ of 09/2015 dt. 26-02-2010, titled as State ---- vs. --- Madan Lal & Others by Court of Ld. JMFC Nalagarh and Judgment passed in appeal by Ld. Additional Sessions Judge, Solan upholding the judgment of Trial Court ------- Accused were charged and tried for commission of offences under Sections 380 & 427 read with Section - 34 IPC ----- Held, that in view of findings returned in civil suits between parties disposed by common judgment, Ext, D-1, evidence adduced by prosecution not sufficient to prove possession of the complainant over disputed house as well as the articles lying therein ----- Ld. Trial Court rightly acquitted the accused and appeal also rightly dismissed-----Revision petition dismissed. (Paras 8,9,11) Title: Medh Ram vs. Madan Lal & others Page-677

Code of Criminal Procedure, Section --- 439 --- FIR No. 6 of 2021 dated 10-01-2021, P.S. Padhar, District Mandi registered against Petitioners U/s 20, 29 ND & PS Act --- Prayer made for grant of bail on the ground that as per FSL report, weight of recovered contraband with carrying bag found to be more than 1 Kg. but without envelope it weighted 978 grams which is less than commercial quantity not attracting rigors of Section -37 ---Held, that though quantity of contraband alleged to be recovered from the petitioners is less than commercial but nearer to commercial quantity --- At the time of grant of bail, not only interest of accused, but, that of victim as well as society is also to be taken into consideration --- Petitions dismissed. (Paras 16, 18, 20) Title: Hari Singh vs. State of H.P. Page-735

Code of Criminal Procedure, Section 439 – Petitioner found in possession of 525 grams charas (intermediate quantity) and arrested under Section 21(b) NDPS Act on 17-03-2021 whereas challan presented in the Court on 17-06-2021 – Prayer for default bail under Section 167(2) Crpc made during pendency of Petition – Held, that maximum period of detention which could be authorized in the present case is 60 days which expired on 16-05-2021 –

Challan presented in the court on 17-06-2021 without any extension of time to file challan beyond 60 days – Indefeasible right accrued to the accused under section 167(2) – Petitioner held entitled to "default bail" under section 167(2) and ordered to be released on furnishing bonds and subject to conditions. (Paras 9, 10) Title: Om Prakash vs. The State of Himachal Pradesh Page-813

Constitution of India --Article 226 -- Petitioner appointed as clerk on compassionate basis in the year 1985 -- On account of voluntary transfer sought by petitioner from District Chamba to District Kangra, lost seniority of District Chamba -- Petitioner promoted to the post of Senior Assistant in the year 2015, after he completed his 10+2 in 2014 and not before ----Now, petitioner prays to issue direction to respondents to consider his name for promotion as Senior Assistant from the due date i.e. 2012 after receiving DPC on 10-07-2012 and 05-06-2014 alongwith consequential benefits-- Held, that petitioner initially recruited against the post of clerk on compassionate basis not disputed -- Communication dated 31-03-2005 issued by Financial Commissioner-cum-Secretary Revenue of Govt. of H.P. exempts clerks recruited on compassionate basis from possessing minimum qualification as 10+2 for promotion to the post of Senior Assistant — Non- recommendation of petitioner for promotion to the post of Senior Assistant for not possessing qualification of 10+2 not justifiable in law --- Petition allowed. (Paras 10,12,,13,14) Title: Narinder Kumar Datta vs. State of H.P. & others Page-681

Constitution of India --Article 226 -- Post of Junior Office Assistant advertised by the respondent Commission vide advertisement No. 32-3/2016 - Petitioner's candidature rejected on the ground that the qualification so possessed by him was not valid and result was declared vide order dated 23-02-2019 --- Challenge thereof ---- Held, that eligibility for the post of Junior Office Assistant in advertisement was one year diploma in Computer Science, Computer Application or Information Technology --Petitioner possessed Diploma in Computer Application ---- Respondent / Commission held the petitioner ineligible for consideration having gained Diploma from unrecognized institution on the basis of Report of Committee ----- Act of respondent/Commission arbitrary as no order passed by Commission holding qualification of the petitioner to be invalid ---- Petition allowed ---- Respondent/Commission directed to reassess the candidature of petitioner for the post in issue on the basis of merit secured by him in the recruitment process. (Paras 9,10,11,12) Title: Mahesh Thakur vs. State of Himachal Pradesh & others Page-688

Constitution of India, Article --- 226 --- Prayer made by the petitioner for quashing of the order passed by the Court of Ld. District Judge, Shimla in Execution Petition --- Held, that the judicial orders of Civil Court are not

amenable to the writ jurisdiction --- Petition dismissed being not maintainable. (Paras 5, 6) Title: Shamsher Singh & another vs. State of H.P. & others Page- 695

Constitution of India, Article 226 --- Petitioner No. 1, a Private University is running Petitioner No. 2 Medical College --- Proposal of fee approval for certain disciplines of MD/MS in Medical College for session 2019-20 approved by respondent State while imposing certain conditions --- Four conditions as imposed not acceptable and challenge thereof by way of present Petition --- Held, that respondents cannot impose condition in clause 10 of communication dated 22-04-2020 to charge annual tuition fees in two equal installments --- Clause No. 13 applying the fee approved on 22-04-2020 retrospectively to the academic session 2019-20 not lawful --- Respondents cannot direct the petitioners to reserve 10% seats in all the courses for Himachali Bonafide BPL/IRDP candidates - EWS Candidates --- Respondents at present cannot charge 1% fee (cess) from the petitioners under Section 8(a) of H.P. Private Educational Institutions (Regulatory Commission) Act 2010 and will have to decide by the orders passed in CA 11290/2013 --- Petition allowed accordingly. (Paras 4, 5) Title: Maharishi Markandeshwar University & another vs. State of H.P and others Page-773

Constitution of India, Article 226 --- Petitioners appointed as Sanitary Inspector in Respondent Corporation on contract basis --- Petitioners regularized upon directions issued in Writ Petition preferred by them, but after completion of fourteen years of contract service, now claim entitlement for regularization upon completion of eight years of service --- Held, that Respondent Corporation has regularized service of one Roop Chand and Vinod Kumar upon actual completion of eight years contract service in terms of order dt. 28-06-2017 passed by erstwhile H.P. Administrative Tribunal in Roop Chand --- Vs. --- State of H.P. & Ors. --- Services of certain Junior Engineers also regularized by Respondent Corporation upon completion of eight year contract service --- Petitioners also entitled for regularization of their services as Sanitary Inspector upon completion of eight year contract service with all consequential benefits --- Petition allowed. (Paras 8,9,10) Title: Ram Singh & another vs. State of H.P. & others Page-715

Constitution of India, Article 226 --- Petitioners enrolled for three years as members of Home Guards, were put in reserved force --- Original Application preferred in 2017 before erstwhile H.P. State Administrative Tribunal --- In CWP No. 3628 of 2020 arising out of O.A. No 374 of 2018, in a similar matter, directions were issued to the concerned authority to consider the petitioner therein for his enrolment as volunteer in Home Guard --- Prayer made to consider the case of petitioners being similarly situated --- Held, that being similarly situated, petitioners are also entitled for same treatment as extended

to the petitioner in CWP No. 3628 of 2020 --- Directions issued in said petition shall be mutatis mutandis applicable in the present case for all intends and purposes --- Petition disposed of accordingly. (Paras 3, 4, 5) Title: Rajinder Singh & another vs. The State of H.P. & others Page-741

Constitution of India, Article 226 – Petitioners have sought their induction on completion of 12 years of service as Water Guards (Jal Rakshaks) with 3 years experience of Working with Pump Motors and Electrical accessories against the post of Pump Attendants on contractual basis like other Water Guards – Also, prayer made for striking down condition of educational qualification imposed by respondents for their such induction in erstwhile Department of Irrigation & Public Health now Jal Shakti Vibhag (JSV) – Held, that minimum educational qualification not applicable to the petitioners – Even otherwise, petitioners entitled for appointment to the post of Pump Attendants like other water guards in view of the nature of work performed by them – Respondents directed to engage petitioners as Pump Attendants from retrospective dates with all consequential seniority and monetary benefits – Petition disposed of accordingly. (Paras 16, 17) Title: Jagdish Kumar & others vs. State of Himachal Pradesh & others Page-822

Constitution of India, Article 226 --- Public notice inviting applications from eligible candidates for appearing in counseling for the post of Pharmacist issued by Director Health Services, H.P. --- Petitioner being eligible appeared for counseling and was selected --- Petitioner has claimed that he being physically handicapped, act of the respondent department of not offering him appointment to the post of Pharmacist qua the post reserved for Physically handicapped person is arbitrary --- Held that candidates sponsored by Physically Handicapped Cell did not participate in counseling --- Non - sponsoring of the name of petitioner by Physically Handicapped Cell does not render the candidature of petitioner bad in law --- Petitioner suffering from Locomotor Impairment (orthopedic handicap) was eligible to be considered for appointment against the post in issue --- Petition allowed. (Paras 10,11,12) Title: Hem Raj vs. State of Himachal Pradesh & another Page-698

Constitution of India, Article 226 ---Petitioner joined as a washer boy in respondent Corporation in the year 1986 --- Transferred to Engineering Wing of the Corporation after his request to perform duties of Junior Draughtsman considered on obtaining Diploma in Draughtsman --- Petitioner prays to be appointed as Junior Draughtsman since 1987 and payment of difference of the salary alongwith interest --- Held, that factum of the petitioner actually performing duties of Junior Draughtsman not disputed by respondent Corporation --- Also, petitioner possessed minimum qualification for being appointed as Junior Draughtsman --- Petition allowed and respondent Corporation directed to upgrade the post of Washer boy to that of Junior

Draughtsman and confer upon him the wages and benefits of Junior Draughtsman (Paras 7,8,9) Title: Puran Chand vs. H.P. Tourism Development Corporation Limited Page-704

'D'

During Pendency of RSA- Co-appellant Kishni Devi died on 29.11.2017- delay in moving application for substitution of LRs of deceased condoned and abatement set aside.
The plaintiffs had filed suit for setting aside mutation attested on 24.10.1979 and for declaration that plaintiffs are owner in possession of suit land- Suit partly decreed. The plaintiffs were declared owner in possession of old khasra no. 185 and 307 and further defendants were directed to deliver possession of khasra no. 307 to plaintiffs –both plaintiffs and defendants filed appeals - the appeal of plaintiffs was partly allowed and cross appeal of defendants was dismissed- trial court verdict was modified-plaintiffs were declared owner in possession of old khasra no. 185,307 and 273-entry showing the name of defendants was declared null and void - defendants are restrained from interfering in possession of plaintiffs over suit land –hence R S A- HELD – the land measuring 11 kanals 1 marla was owned and possessed by Kirpa Ram ,the grandfather of plaintiffs and father of defendant no. 1- Kirpa Ram made a will whereby he constituted plaintiffs as his legatees vis –a vis property occurring below the road and also constituted the defendant no.1 as his legatee vis-a vis his estate occurring above the road- plaintiffs laid a claim to old khasra nos.273,310 and 317 on anvil of their occurring below gair mumkin sadak- the road dividing the property of parties passes through khasra no. 272- as per record, the claim of plaintiffs is in consonance with the testamentary disposition and entitled to claimed relief- claim of defendant no.1 vis- a-vis holding their right vis-a vis khasra no.273 was rejected Appeal dismissed. Title: Gagan Singh (since deceased) through his LRs & others vs. Birbal Singh and others Page- 20

'M'

Marriage of parties solemnized on 25.4.2012- couple was blessed with Son on 28.10.2014- for bitterness in relations for so many reasons, Parties had initiated various proceedings under various enactments against each other also involving other family members - In Mediation- Parties agreed not to pursue proceedings in Cr M O No 191 of 2016 and other pending matters between them- With further undertaking in H.M. Petition before ld district judge decree for divorce with mutual consent will be passed on basis of settlement arrived at between the parties and other proceedings shall be withdrawn and custody of son will remain with mother and father to deposit Rs. 3.50 lacs in the name of son- Name of son be rectified in Aadhar Card as

Yuven Kalia @ Advik Sharma- Husband filed Cr, M .P with averments that wife has not taken steps for correcting name in Aadhar Card as compromised and mother is not allowing him visiting rights for non deposit of amount- Pending application father deposited amount in registry of Hon'ble HC – Cr.M.P filed by father of weekend Custody of Child and to know location of Child- Another CMPP to permit the father to have electronic contact with son during lockdown in 2020- Contempt petition was also filed that of father was not allowed visiting rights as agreed between parties- Considering the entire facts and circumstance Child Access and Custody guidelines and parenting plan, observation of hon'ble supreme court All the applications and contempt petitions are disposed of making provision of visiting rights - Mother shall not conceal whereabouts of minor -contempt petition is closed to maintain and continue peaceful and harmonious working arrangement between them. Title: Smt. Sangita Sharma & Another vs. Sh. Rohit Kalia. Page-320

Motor Vehicle Act, Section – 166 – Petitioners being legal heirs of deceased Ramesh Chand, who died in a motor vehicle accident awarded compensation to the tune of Rs. 10,26,000/- by MACT --- Challenge thereof by Insurance Company --- Held, that amount of consortium awarded by Ld. Tribunal is on the higher side and children of the deceased are also entitled for loss of consortium alongwith spouse --- Award modified accordingly to the tune of Rs. 5,31,000/- . (Paras 12, 13) Title: The New India Assurance Company Limited vs. Sarla Devi and others Page-728

'P'

Petition for bail under section 439 Cr.PC in complaint under section 18 (c) & 18 (A) of Drug and Cosmetics Act punishable under section 27 (b) (ii) and 28 of Act- On appearance of petitioner before Ld. JMIC after filing of complaint- Petitioner was arrested and sent to judicial custody- His bail application under section 439 Cr.P.C. rejected by Ld. Special Judge- Held- a new section 36 AC has been inserted providing that offence punishable under section 28 of the Act shall be cognizable and non- bailable- in this section under sub-section (1) (6) the provision identical to section 39 of NDPS Act has been incorporated which provides special consideration to be taken into account by the court before granting bail to a person accused of offence punishable under section enumerated in section 36 AC of Act itself but in proviso to section 36A (i) (b) of Act it has been provided that a person, who is under the age of 16 years or a woman or sick or infirm may be released on bail if the special court directs- section 36AC of the Act creates restriction upon the court to be take into consideration before granting bail ,submission of public prosecutors and also to satisfy itself that there are reasonable grounds for believing that petitioner is not guilty of such offence and he is not likely to commit any offence while on bail- Petitioner is 62 years old – alleged offence was committed by him in

September, 2018 and nothing has been placed on record that since then till date petitioner was found involved in repeating the offence which reflects that petitioner is not likely to commit same offence again while on bail – He has been arrested in January 2020 for commission of offence in September, 2018- He did not flee away but has submitted to jurisdiction of court on the date when he was called to attend the court- Petitioner can be enlarged on bail – Petition allowed.Title: Mohd. Asad vs. State of Himachal Pradesh Page-497

Petition for denial of electricity connection despite deposit of amount of charges and security demanded by respondents, after completion of necessary codal formalities to the premises occupied by the petitioner- Petitioner is not recorded owner of land beneath her house- She claims herself entitled for electricity connection for fundamental right under Article 21 of Constitution of India- Held- From the provisions of electricity Act, 2003 & The Indian Telegraph Act read with works of licensee rules – It is clear that distribution licensee through respondents is empowered to carry out necessary work over and / or under the land of any person in consonance with Act – It is duty of distribution licensee to provide connection to every eligible applicant by taking necessary steps, in the present case finding petitioner entitled for connection, a demand notice has been issued and petitioner has deposited the amount- It appears that influenced by extraneous considerations electricity connection to petitioner has not been provided- in present case petitioner is being deprived from her basic amenity which is integral part of right of life within meaning of Article 21 of constitution of India. The plea of respondent that for want of ownership of land where upon her house is situated the connection cannot be released to her is not sustainable in view of definition of applicant as provided in HPERC which defines applicant means owner or occupier of the premises.Title: Leela Devi vs. H.P. State Electricity Board Ltd. & Others. Page-336

Petition for quashing office order whereby benefit of regularization extended to petitioner w.e.f, 1.1.2002 as per state policy on completion of 8 years continuous service with 240 days in each calendar year has been withdrawn and her date of regularization as complaint attendant has been modified as 30.12.2006 i.e, from the date of appointment/ regularization of similarly situated persons junior to her.- Held- Petitioner was appointed as complaint attendant (Class-III post) on daily wage bases in April 1992- After serving as such for 92 days- She was posted as Inquiry attendant (Class IV post) w.e.f July 1992 till November, 1993 & again appointed as complaint attendant w.e.f November 1993- Petitioner is a daily wager appointed before 1.1.1994 who had completed 240 days in calendar year , as daily wager prior to 31.12.93- As such entitled for benefits of Mool Raj Upadhaya's case for conferment of work charge status or regularization on completion of 10 years continuous service

with 240 days in each calendar year from date of her initial appointment. Petitioner had served as a Daily wager against two posts i.e, complaint attendant (Class-III) and enquiry attendant (Class-IV) - From initial date of appointment i.e, April 1992, she would have been entitled for conferment of work charge status or regularization on completion of 10 years service in April 2002 in lower grade after counting service of both grades. As per 2000 policy, petitioner acquired right of conferment of work charge status or regularization on completion of 8 years service- Petitioner has completed 8 years service in higher grade in September/December, 2001, Period of service against higher grade at any point of time during entire continuous service without any break is to be taken for consideration for deciding the claim of petitioner for regularization / conferment of work charge status against post of higher grade- petition is allowed. Title: Nandini Thakur vs. State of H.P. and others Page- 404

Petition under section 438 Cr.P.C - Anticipatory bail- Petitioner apprehending his arrest in case FIR No 34/2021 u/s 363, 366-A, 370 (4) 506, 120-B IPC- Victim aged 15 years, in class 9th, did not return in the evening after school – Father approached the police with suspicion that someone had abducted his daughter after alluring and misleading her- Held- Keeping in view nature, gravity and seriousness of offence- Manner in which girl had been managed to have travelled from Shimla to a remote village of U.P in an organized manner- Custodial interrogation is justified- Petition dismissed. Title: Mohammad Nazim vs. State of Himachal Pradesh Page-34

Petition under section 438 Cr.P.C- Anticipatory bail- Petitioner has been declared as proclaimed offender- Held- Section 438 Cr.P.C entitles any person who has reason to believe that he may be arrested on accusation of having committed a non-bailable offence to apply to High Court or court of Session for direction that in event of such arrest he shall be released on bail- In the present case- Petitioner is not apprehending his arrest for commission of non-bailable offence rather apprehending his arrest for declaring him as proclaimed offender by the trial court for not attending the court in a complaint u/s 138 N. I Act, after completing procedure under section 138 N. I Act wherein offence is bailable – The petition is not maintainable- Petition dismissed as withdrawn. Title: Sher Singh vs. State of Himachal Pradesh Page-150

Petition under section 438 Cr.P.C- Anticipatory bail- in case FIR 21/2021 u/s 15, 29, 27-A ND&PS Act- Allegations are when truck was intercepted by police on information, person driving the truck, after parking the truck, fled away towards yamuna river taking benefit of darkness and dense fog- On checking truck- 8 plastic bags were found suspected to contain poppy straw- Weight of poppy straw was 200.278 kg-As per owner of truck, he handed over

key of truck to Mohammed Deen at the instance of petitioner- Petitioner evaded to join investigation- Petitioner also approached court of Ld. Sessions Judge for anticipatory bail under section 438 Cr.P.C- His petition was dismissed- Held- considering the material placed before Hon'ble High Court- Nature, gravity and seriousness of offence, quantum of contraband recovered and involvement of number of persons in procuring and transporting huge quantum of contraband, investigation is in progress - custodial interrogation of petitioner is justified- No case made out to enlarge him on bail- petition dismissed. Title: Parveen Kumar vs. State of H.P. Page-108

Petition under section 438 Cr.P.C- Anticipatory bail- in case FIR 34/2021 under section 363, 366A, 370(4), 506, and 120-B IPC- Victim aged 15 years in class 9th, did not return in the evening after school- Father approached the police with suspicion that someone had abducted his daughter after alluring and misleading her- Held- Keeping in view nature, gravity and seriousness of offence- Manner in which girl had been managed to have travelled from Shimla to a remote village of U.P.in an organized manner and for finding or ruling out possibility of amplitude and magnitude of the conspiracy- Custodial interrogation of the petitioner is justified- Petition dismissed. Title: Ibad vs. State of H.P. Page-117

Petition under section 439 Cr.P.C for Regular bail in case FIR No. 34/2021 under section 363, 366 A, 370(4), 506, 120-B IPC- Victim aged 15 years in class 9th, did not return in the evening after school- Father approached police with suspicion that someone had abducted his daughter after alluring and misleading her- Held-in facts and circumstances of case, case of petitioner can be considered differently than other accused involved in the case, some of them have been arrested ,rest are absconding, allegation against her are that co-accused Ibad, her husband is not submitting himself for investigation and she was playing active role for handling minor girl and has been resisting handing over girl to police ,main accused Nazim is her brother and she under dictate of her brother had been facilitating the commission of offence- She was in judicial custody- Considering entire facts and circumstances with respect to role of petitioner coupled with the fact the she is a mother of an infant child dependant upon her breast feeding- Petitioner is entitled to be enlarged on bail. Title: Nasrin vs. State of H.P. Page-99

Petitioner assailed part of order passed by Civil Judge in an application under order 6 Rule 17 CPC filled by petitioner for amendment of plaint whereby application has been allowed partly by permitting the petitioner to plead that suit property is Joint Hindu family coparcenary ancestral property under Mitakshra law and rejecting second proposed amendment to add another property at Yamuna Nagar in the suit property on the ground of res-judicata as property in Haryana was subject matter of suit filed in competent

court at Haryana but was got dismissed as withdrawn unconditionally on 11.7.2016 by the plaintiff. Held- Order dated 11.7.2016 suggests that suit was dismissed as withdrawn on the basis of statement of plaintiff and said statement nowhere suggests that plaintiff had prayed for dismissal of suit unconditionally as condition for withdrawing the suit was stated by plaintiff in her statement in unambiguous terms- The order dated 11.7.2016 was passed by Civil Court Yamuna nagar acting as Daily Lok Adalat- Lok Adalat has no authority to adjudicate the matter on merits. The word unconditionally in order is beyond jurisdiction of Lok Adalat. The statement of plaintiff before Lok Adalat at Yamuna Nagar clearly establishes that suit was withdrawn on account of technical defect with intention to add the suit property of that suit in suit property of present suit, hence, by rejection of amendment proposing addition of property of Yamuna Nagar in suit property of present suit, the trial court has committed material irregularly- Hence, impugned order is modified and part of order rejecting proposed amendment to add property of Yamuna Nagar is set aside. Title: Bharti Sharma and Another vs. Naresh Kumar and Another Page- 139

Petitioner filed suit restraining defendant no 1 Dropti from encroaching valuable portion and dispossessing him from his land, jointly owned by him, defendant no 1 and others till partition of suit land along with application under order 39 rule 1 and 2 CPC. Held- The mere fact that parties are co-owners is not sole criteria for granting or refusing injunction. It may be one of the criteria but has to be considered along with other facts and each case is to be decided in its peculiar facts and circumstances by applying the parameters required to be taken into consideration for grating temporary injunction.

The plaintiff/ petitioner has not disclosed complete facts and detail with respect to entire property jointly owned by him, defendant no 1 and other co-sharer but selected only there khasra Nos, regarding exclusive possession, where of defendant no 1 has placed on record sufficient material- except a bald statement that deft No. 1 is adamant to raise construction of hotel over suit land by occupying valuable portion- no other material has been placed on record to establish that land being occupied by defendant no 1 is more valuable than land occupied by plaintiff comprised in other khasra Nos. owned jointly by parties - how and in what manner, rights of plaintiff are going to be adversely affected on account of construction of defendants has not been reflected either in plaint or documents relied upon by plaintiff—Ld District Judge has rightly appreciated material on record. Title: Chaman Lal vs. Smt. Dropti and others Page-446

'R'

Regular First Appeal --- Land Acquisition Collector awarded an amount of Rs.

3,65,188/- for land of the appellant which stood acquired --- Feeling aggrieved Reference Petition was filed, wherein it was held that landowner not entitled to enhancement of compensation --- Challenged by way of present appeal --- Held, sale deeds (Ext. P-A to Ext. P-C) relied upon by appellant bonafide could not have been discarded by Reference Court --- Being close to the date of acquisition, sale deeds were the best evidence to assess the value of land and fair compensation assessed to be Rs. 15,000/- per biswa --- Appeal allowed --- Enhancement of the award amount awarded in favour of Land owner by LAC ordered. (Paras 15, 16, 17) Title: Manish Bhatia vs. The State of Himachal Pradesh & another Page-709

'T'

The appeal against the order vide which Ld ADJ had dismissed the application under order 39 Rule 1 & 2 IPC for restraining LAO (NHAI) from releasing entire compensation amount in lieu of acquired structure in favour of respondent NO.2 – Held- if any dispute as to the apportionment of the amount or to any person to whom the same is payable, the competent authority shall refer the dispute to the decision of Principal Civil Court of original jurisdiction- suit filed by petitioners on their own was not maintainable in view of section 3 (H) (4) National Highways Act – The suit filed by appellant was not maintainable under section 3 (H) (4) of National Highways Act & dismissed- Direction issued to respondent No 1 to decide the objections preferred by the appellant in respect of his entitlement to receive half share in compensation amount determined in the award towards acquisition of structure with in four weeks. till the decision, the amount of compensation in question determined under the structure, award shall not be released.Title: Sadiq Mohd. Vs. Land Acquisition Page-312

The appellant and deceased respondent No.2 Durgi Devi (plaintiffs) filed a suit for annulling the registered testamentary disposition of deceased Bhadru whereby he bequeathed his estate vis-a-vis the defendant – Suit was dismissed by Civil Judge- Appeal filed before Ld. District Judge by plaintiff also dismissed – The plaintiff filed present RSA- Held- The defendant, pro pounder of will, for discharging onus as cast upon him, examined Mohan Ram (Dw1) only one of attesting witness who was alive. DW made compliance of statutory Dictate in examination in chief- even if the minimal contradiction does exist inter se examination-in-chief and cross-examination as he admitted that testament was written earlier and he was made to sign thereafter he also feigned ignorance of identity of thumb impression existing in red circle Ex DW1/A but effect is not that he had denied the authorship of Ex DW1/A by deceased testator as he has denied the suggestion put to him that Ex DW1/A was not executed by deceased Bhdru moreover Ex DW1/A is a registered document thus it is concluded that Ex DW1/A is legally and validly executed.

Appeal dismissed. Title: Kishan Ram vs. Sh. Diloo Ram and others. Page-28

The application for Bail for commission of offence under section 363,376 IPC and Section 4 prevention of Children from sexual offences Act (POCSO Act) Held-The delay in lodging FIR is immaterial as victim was minor at the time of commission of offence and lodging FIR- The contradictions in the statement of prosecutrix in examination-in –chief- are to be taken into consideration at the time of final conclusion of trial along with other evidence on record- At the time of considering bail application the court should not go into such detail-Minute assessment or evaluation of evidence- Court did not find fit the case for grant of bail- the Bail application dismissed. Title: Lekh Ram @ Suneel Kumar vs. State of H.P. Page-395

The application for condonation of delay in filing the appeal- Delay of 1 year 10 months and 27 days- Reason disclosed for not filing appeal for almost 2 years is that during white wash in house of applicant in March 2018, copy of judgment was misplaced and not traceable. It is only on 15.3.2020 copy was found along with other papers in another almirah of house- Held- The conduct of the applicant indicates that he was not interested in contesting the case for 2 years because when copy was misplaced in March 2018 the applicant had to make an endeavor to obtain another copy but there is nothing on record to show such effort- Rather applicant kept on sleeping till copy was traced in March 2020- The applicant had not taken any over act to assail impugned judgment within reasonable period- The application dismissed.Title: Mohinder Singh vs. State of Himachal Pradesh & Another Page- 148

The challenge to order vide which the objections preferred by the J.D to execution petition filed by Decree holder were partly allowed by executing court where by instead of actual possession, only symbolic possession of suit land has been ordered to be delivered to decree holders- The suit is decreed for vacant possession of suit land- in execution, J.D took objection that decree is in executable as J.D had purchased share in suit land- Held- J.D had proved on record that they had become co-owners of the suit land subsequent to passing of decree sought to be executed. The suit land is jointly owned by them alongwith various co-owners- in such situation, their possession over the suit land can not be treated as illegal and therefore they cannot be ousted from possession. Their possession is now in different capacity from one in which they had suffered decree for possession. Hence, the executing court was justified in not issuing the warrant of actual possession in favour of DH. The petition dismissed. Title: Sh. Parveen Kumar & ors. vs. Smt. Fikki & ors. Page-201

The petition against the order passed by Ld. Special Judge modifying/altering the charge against the petitioner by adding charge for

offence of criminal misconduct u/s 13 (1) (C.) PC Act- held- charge u/s 13 (2) PC Act stood already framed against the petitioner- the trial court by allowing application of State U/s 216 Cr.P.C added Sec 13 (1) (C.) PC Act- no new evidence was intended to be brought on record either by prosecution or defense thus no prejudice whatsoever has been shown to have been caused to accused by the alternation/ modification of the charge -petition dismissed.Title: Jitender Kumar vs. State of Himachal Pradesh Page-613

The petition against the order passed by Ld. Special Judge, modifying/ altering the charge against the petitioner by adding section 13 (1) (C.) PC Act. Held- charge u/s13 (2) PC Act, stood already framed against the petitioner - trial court by allowing application of state u/s 216 Cr. P.C. added section 13 (1)(C.) PC Act- No new evidence was intended to be brought on record either by prosecution or defense- thus no prejudice whatsoever has been shown to have been caused to the accused by alteration/modification of the charge- petition dismissed. Title: Jitender Kumar vs. State of Himachal Pradesh Page-606

The petition filed with prayer that order dated 22.3.2016 passed in O.A No. 4916 of 2015 titled as Budhi Parkash vs. State of HP has not been executed- Held, the direction in order dated 22.3.2016 is to reconsider the case of petitioner – It is undisputed that case of petitioner has been reconsidered- There is no direction to grant any status to the petitioner nothing survives further for consideration- Petition dismissed. Title: Budhi Parkash vs. The State of H.P. & ors. **(D.B.)** Page-80

The petition for bail in case of FIR No. 114/2020 under section 21 NDPS Act(3rd Successive bail application) for recovery of 7 grams of heroin/Chitta allegedly thrown by him in bushes on noticing the police party- Held- No doubt criminal history of accused and his family is an important factor for deciding his bail application but at the same time, the punishment likely to be imposed upon accused on culmination of trial is also an important factor viz-a-viz the period of detention during trial. Considering the conflicting interests of individual and society and also quantum of contraband recovered from the petitioner and possible quantum of sentence which may be imposed upon the petitioner on his conviction – Petitioner is ordered to be released on bail- Petition allowed. Title: Kuldeep Kumar vs. State of H.P. Page- 292

The petition for direction to allot one shop to petitioner in the complex constructed around the stadium on receipt of assessed amount of Rs. 85,000/- Held-The case of the petitioner is that he was running a stall at a place where respondents proposed to construct a sports complex and he was called upon to vacate the spot along with others so that place could be utilized

for sports complex he was assured that he will be allotted a shop in said complex in lieu of vacation of place on depositing of Rs. 85,000/- which, he deposited but his name was arbitrarily removed form list of beneficiaries and amount was returned to him.the eligibility of petitioner for allotment for shop has been denied by respondents. The onus to prove that petitioner was entitled for allotment of shop was upon him who failed to rebut by placing on record any cogent material- the stand of respondents that petitioner was not found running any business in planning area. During spot inspection by S.D.M, petitioner was not found running any business, there is nothing except his bald statement to substantiate his explanation that he was not on the sport at the relevant time due to illness of his mother, hence it is difficult to believe that petitioner was in fact eligible for allotment of shop and his name was arbitrarily deleted from the list of beneficiaries. By simply paying Rs. 85,000/- no indefeasible right has accrued upon him for allotment of shop. The placing on record, teh bazari, receipt will not improve his case as from the receipts it is not clear that petitioner was running business in the planning area.- there is no merit in petititon to issue a writ of mandamus to issue a direction to respondents to offer shop to petitioner The petition is disposed of with observation that if some shops being still vacant, one of shops be offered to petitioner on same terms in view of reply of respondent no. 2. Title: Sh. Tilak Raj vs. Municipal Council, Hamirpur and another Page-467

The Petition for direction to respondents to offer appointment as driver to petitioner being more meritorious to respondents no 3 and 4-As per facts –two candidates selected under general category were less meritorious than candidates selected against S.C as well as S. T. Categories –held-it is settled law that a person belonging to S.C or S.T category ,if on merit ,secures more marks in a competition than a candidate of general category, then such a candidate has to be offered appointment against the post meant for general category and resultant seats reserved for S.C and S.T categories are thereafter to be offered to such candidates who are belonging to reserved categories who can occupy the posts on the basis of merit -The department has violated law by not offering the posts belonging to general category to meritorious candidates of S.C and S.T category who have secured more marks than candidates of general category who are appointed against such posts-petition is allowed with direction to offer appointment to petitioner against a post reserved for S.C. category as from the date other incumbents stood appointed - since selected candidates were selected in 2016 and continuously working ,their appointment is not set aside –The department is directed to be careful in future. Title: Sh. Mohan Lal vs. State of Himachal Pradesh and others Page-474

The petition for direction to state government to convey its approval to

decision dated 30.3.2011 and notification dated 19/21.4.2011 taken by Board of management of University upgrading the posts of personal staff of university- Held- the reason and rational as to why Secretary (Finance) is an ex-officio member of Board of management of university is that whenever any decision is taken by the B.O.M in terms of power so conferred upon it under the statues the Financial aspect of the matter can also be taken in to consideration – He is not a ceremonial representative to be therein B.OM. The only inference which can be drawn from the fact that in 85th meeting B.O.M, had approved its proceeding of 84th meeting in which Deputy Secretary Finance in his capacity as representative of Principle Secretary Finance was present is that before B.O.M gave its approval the financial aspect was discussed and approved. The rejection of proposal of up-gradation of posts from feeder cadre of personal staff on the ground that Finance department had expressed its inability to concur is not just in law-the authority conferred upon the state government qua creation of posts, have to be exercised by government judiciously with due application of mind, which has not been done in present case Finance department is one department of state government and it is not the state government- the state government could take call and not finance department. The view of finance department could have been one of reason but not the sole reason. The petition is allowed to the extent that government shall reconsider proposal and take into consideration proceedings of B.O.M sympathetically.Title: Sh. Vinay Kumar Bharti and others vs. Dr. Y. S. Parmar, University and others Page-262

The petition for quashing decision of University, not to consider additional higher educational qualification i.e. Ph.D obtained by petitioner after issuance of advertisement and direction to consider the same.
It is settled law that where the applications are called for prescribing a particular date as the last date for filling applications, the eligibility of the candidates, has to be judged with reference to that date and that date alone. A person, who acquires the prescribed qualification subsequent to such prescribed date cannot be considered at all- An advertisement or notification issued or published calling for application constitutes a representation to the public and the authority issuing it is bound by such representation and it cannot act contrary to it. The mere fact that the University has extended time limit of the advertisement does not mean that university is bound to take into consideration the higher/additional qualification, that the applicants may have acquired after issuance of original advertisement -there is no allegation of any bias or malafides against any officer of respondent and therefore, in absence of such allegations the court will not interfere with action of respondent- petition dismissed. Title: Dharam Pal Singh vs. Himachal Pradesh University **(D.B.)** Page-531

The petition for quashing FIR No. 2/2020 dated 18.1.2020 lodged against the petitioners under section 420, 406 & 120-B IPC on the ground that once the proceedings under section 138 N. I Act are initiated and pending against the petitioners, therefore in no event FIR for same offence i.e dishonor of cheque could have been registered against the petitioners- Held- The mere fact that in addition to complaint under section 138 N. I. Act criminal cases have now been filed against the petitioners cannot itself be a ground for quashing FIR as the remedy under section 138 NI Act is in addition to the remedy available to a complainant under the provision of IPC or before the Civil Court- Petition dismissed. Title: Gitam Ram and another vs. State of H.P. and another **(D.B.)** Page-309

The Petition for quashing order repatriating the petitioner to his parent department from District Institute of education and training (D.I.ET) and posting respondent No.4 in DIET – Held,- for transferring an employee on receiving a complaint, it is not necessary that inquiry to be conducted by the employer/ Authority must be a regular departmental inquiry However some sort of inquiry, fact verification or preliminary inquiry must be there before taking an administrative decision of transfer in such eventuality. The authority/employer cannot be made to wait till finalization of Departmental regular inquiry for transferring an employee for administrative reasons- Preliminary enquiry or verification of facts are mandatory exercise to be undertaken by employer/ authority before transfer of an employee in pursuance to the complaint so as to ensure that employee must not be transferred for bogus or baseless complaint- transfer or repatriation of an employee is the right of employer/ authority and transfer or repatriation in itself is not a punishment but incidence of service- No employee has a vested right for his posting at a particular place or portfolio- in the present case Competent authorities have undertaken exercise for verification of facts with respect to conduct of petitioner and after application of mind at various levels a prudent decision to transfer and repatriate the petitioner has been taken Which warrants no interference. Title: Dinesh Gulati vs. State of H.P. & others Page-346

The petition for regular bail in F.I.R. No. 11/2021 U/s 21 & 29 N.D.P.S Act- Allegations are that during raid in house of Anchal, Anchal along with her two daughters, including bail petitioner and minor son SARANG was present. His other son Sikander was not present- when courtyard with in boundary of house was dug-digging led to recovery of a steel box containing Rs. 1,74,000/ and at some other place, a carry bag containing brown coloured substance ascertained to be as Heroine weighing 377.8 gm, held- mere presence of daughter bail petitioner, aged 21 years, a student in her home along with her father at about 10 PM in January in a village in district Kangra would not lead

to an automatic inference that she had any knowledge about the contraband allegedly recovered from beneath the courtyard within house belonging to her father Anchal- there is no material on record which can deduce at this stage that the petitioner was in joint possession with other co-accused or in exclusive procession or was in control of place from where contraband was allegedly recovered - in status report there is no linkage of the petitioner to the source of contraband. Though these aspects are to be deliberated by the trial court during trial inter alia complicity of the petitioner would require to be proved in accordance with Law -cumulative effect of these facts are that there are reasonable ground to believe that petitioner is not guilty of offence alleged against her- The observations are only for limited purpose of adjudicating the bail petition in light of rider placed in sec 37 of the Act- petitioner is behind the bars, unmarried girl, 21 year of age, a student, a local resident and has no criminal history - bail petition is allowed subject to conditions on furnishing bonds. Title: Seema vs. State of Himachal Pradesh Page-596

The petition for regular bail in F.I.R. u/s 21,29 NDPS Act- Allegations are that- during raid in the house of Anchal- Anchal along with his two daughters including bail petitioner, minor son SARANG were present the other son of Anchal, Sikandar was not present- when courtyard within boundary of house was dug, digging led to recovery of a steel box containing Rs. 1,74,000/ and from other place, a carry bag was recovered containing a brown coloured substance ascertained as Heroine weighing 377.8 gm Held- mere presence of daughter (Petitioners) aged 20 years, a student in her home along with her father at around 10. P.M. in month of January in a village in district Kangra would not lead to an automatic inference that she had any knowledge about the contraband allegedly recovered from beneath the courtyard with in the house belonging to her father. There is no material on record which can deduce at this stage that petitioner was in joint procession along with other co- accused or in exclusive procession or was in control of place from where contraband was recovered –in status report, there is no linkage of petitioner with source of contraband- though all these aspects are to be deliberated by trial court during trial where inter alia, complicity of petitioner would require to be proved in accordance with law, cumulative effect of these facts is that there are reasonable ground to believe that petitioner is not guilty of offense alleged against her -the observation are only for limited purpose of adjudicating the bail petition in light of rider placed in sec 37 of Act- Petitioner is behind bars, unmarried lady aged 20 years, a student ,a local resident and has no criminal history - Bail petition is allowed subject to conditions on furnishing bonds. Title: Suman vs. State of Himachal Pradesh Page- 457

The petition for regular bail- In F.I.R. u/s 376 IPC, Sec 04 POCSO Act-

Petitioner aged 26 years, letting the victim aged 17 years, who was his friend, take lift in his jeep and after that instead of allowing her to alight ,bringing the vehicle to an isolated place- then after intimidation establishing coitus despite her protest- Held- the victim had left her home, at 10 AM to visit a Doctor and on reaching home, she narrated the incident to her mother. The incident occurred in the day time and not in odd hours, victim arrived home in time. There is no mention of anyone enquiring her about being seen with a boy. This prima facie points towards the genuineness of incident- scientific evidence points towards the presence of blood and semen in victims underwear. As per her statement u/s 164 Cr. P. C, she said 'NO' for sex and accused told her not to cry otherwise he would force himself upon her- in such circumstances of threat and coercion in a secluded area, victim was forced to co-operate which explains, absence of injuries on her body-Neither the absence of resistance nor unwilling submission implies consent in any language-in facts and circumstances of case petitioner fails to make a case for bail –The petition dismissed.Title: Suresh Kumar vs. State of H.P. Page-664

The petition for regular bail in FIR U/s 363, 376 IPC, Sec 6 of POCSO Act Allegations- father of victim aged 16 years, reported that her daughter is missing and on search, realized that petitioner had allured her away- victim is noticed in compound of petitioner's house, told her parents that she had voluntarily left home being in love with petitioner and refused to return home- after that, victim and her parents visited the counselor of child welfare centre where victim told her mother that petitioner allured her- on these allegations case was registered. Held- neither sec 376 IPC nor Sec 6 POCSO Act creates any restriction on grant of bail-undoubtedly victim is minor under 18 years of age, legally neither accused could have taken her from her parent's house nor she could consent to coitus. The girl was bold enough to declare that she was in love with petitioner- it seems that petitioner and victim knew each other and were romantically involved. It is not case of forcible sexual intercourse-instead victim surrendered to him out of her love and affection towards him, therefore, the rigor to reject bail and reasons to continue incarceration are reduced by mitigating factors in present case- kidnapping and rape are indeed very heinous offences. At the bail stage, the court has to consider prima facie under what circumstances the offence is committed by accused, considering the same, petitioner has made out a case for bail- bail granted subject to conditions.Title: Virender Singh vs. State of H.P. Page-648

The petition for writ of Certiorari- Mandamus- Aggrieved by the suspension of his accreditation – The accreditation of the petitioner has been cancelled only on the ground that there are certain FIRs pending against him- Held- The rule 14 (1)- relates to a correspondent, who is liable to be disaccredited / derecognized where as in present case- The accreditation of the petitioner has

simply been suspended till the final outcome of the criminal case in exercise of power under sub rule (2) of rule 4- The owner or editor of newspaper like the petitioner shoulder greater responsibility and in case his own conduct is under scanner then obviously, his accreditation has to be suspended- Petition dismissed direction issued to review and revise accreditation granted- amendments in rules providing for time bound granting/ refusing accreditation and mandatory recording of reasons for rejection. Title: Vijay Gupta vs. State of H.P. and others Page-163

The petition for writ of mandamus directing the respondents to regularize the service of the petitioner as TGT Music who has been working as T.G.T. Music from last 11 years, to renew the contract of service of petitioner as TGT Music w.e.f. 25.04.2017, held-though initially, the petitioner was engaged on temporary basis but she was offered appointment on contact basis, also in continuation of services rendered by her on temporary basis vide appointment letter date 01.04.2009 , period of contract was specified from 03.04.2009 to 02.04.2012. It was mentioned that service conditions of the petitioner were to be governed by AWES Rules & Regulations for Army Schools, thereafter on expiry of every three years petitioner continued to be engaged afresh on contractual basis. The continuation of the petitioner on contract basis by respondent society conferred upon her the right of regularization in term of clause 128 (i) of chapter 7 of 2021 Rules. It is not the case of respondents that either petitioner was not qualified to be TGT Music or that she was not fulfilling the eligibility criteria as per rules. Hence act of respondent society of not regularizing the services of petitioner in terms clause 128 (i) upon completion of specified number of years of service by the petitioner on contact basis is arbitrary, not sustainable in law and colorable exercise of power by respondent-society. The bargaining power of the petitioner cannot be compared with that of respondents. The writ petition is allowed and respondent is directed to regularize the service of the petitioner as TGT Music after completion of five years of service by taking her appointment on contract basis in 2011 when Awes rules come into force. Title: Urmila Chauhan vs. The Managing Director and others Page-503

The petition for writ of mandamus for quashing selection and appointment of respondent No.3 as computer operator development block Nankhari. Selection Committee awarded 15 marks on the parameter of experience. The validity of awarding marks by selection committee is contended fallacious- Held- the experience certificate possessed by co-respondents No.3 is not issued in consonance with norms and awarding of 15 marks by selection committee is annulled- Respondent concerned is directed to thereafter prepare and redraw seniority list and to consider the allotment of marks to petitioner under head BPL norm. Title: Rajesh Kumar vs. State of H.P and others Page- 17

The petition seeking regularization of service by petitioner immediately on completion of 8 years service on daily wages as clerk in Nagar Panchayat Narkanda w.e.f 2.5.2002 whereas he was regularized vide order dated 18.8.2007 with prospective effect after applying regularization policy of Government dated 9.6.2006- Petitioner working against vacant post and appointed as a daily wage clerk in 1994- The claim of petitioner is that in furtherance of the order passed by court to consider the case of Kushal and Bittu in other writ petition the respondents have regularized them immediately on completion of 8 years of their service.-Held, it is not in dispute that petitioner as well as petitioners in other writ petition were serving with Urban Local bodies on daily wage basis and were regularized from prospective date in application of policy dated 9.6.2006 therefore in principle, everything is identical in nature therefore omission and commission on part of respondents not treating the petitioner in similar fashion in which others were considered is discrimination and violation of Article 14. Petition disposed of with direction to consider the case of petitioner for regularization after completion of 8 years of service in terms of earlier judgment.Title: Ranvir Singh Chauhan vs. State of Himachal Pradesh & others Page- 188

The petition seeking setting aside allotment of shops as allotment of shops has not been made on the basis of any rational, valid & legal policy and criteria. Held- the case of the petitioners that they were running their business over the land where shopping complex stood constructed by respondent society has been denied by respondents-Neither with petition nor with rejoinder to replies of respondents any cogent material has been placed on record to demonstrate that they were actually carrying their business over the land where the shopping complex was constructed. As it was the case of petitioners that they were running their business over the said land, onus was squarely upon them to have had proved and substantiated this fact, in the absence of material being placed by the petitioners to this effect the only conclusion which can be drawn that contention of respondents is correct that petitioners were not dislocated or displaced on account of construction of shops as such there is no infirmity in the factum of their names not being included in list of beneficiaries. The petitioners being stranger to the issue otherwise have no local standi to challenge the mode and manner in which shops were allotted or as to why an amount of Rs. 85,000/- was charged from the beneficiaries for the construction of the shops.Title: Sh. Balbir Chand and others vs. The State of Himachal Pradesh and others Page-521

The petition seeking writ of mandamus directing the respondents to release D.C. R.G and to pay compensation for unnecessary harassment- the petitioner retired as Range Forest Officer in Shri Naina Devi Ji Forest division- Certain retiral benefits were withheld- Held- Pension is scour for post retiral period-

Not a bounty payable at will- Also a post retrial entitlement to maintain dignity of employee- On the date of retirement there was neither a departmental enquiry nor any criminal case pending against him- Even FIR No. 1/2018 was registered after his retirement –wherein petitioner has not even been arraigned as an accused- action of respondents in not paying the entire retrial dues is not justified- Petition allowed. Title: Satnam vs. State of H.P. and others **(D.B.)** Page-152

The petition u/s 34 Arbitration & Conciliation Act for settling aside award made by Arbitral tribunal comprising S.E. Arbitration Circle H.P.P.W.D. Solan in respect of disputes pertaining to work of "Construction of pavement on Shimla bye Pass and Providing side drains" Held- the perusal of record shows that when it was on account of acts of omission & commission of respondents that material could not be placed on record to substantiate what transpired in the 25th hearing in arbitration proceedings, there is merit in claim of petitioner that arbitrator has completely ignored the fact of omissions on the part of respondent executive Engineer therefore conclusions drawn by arbitrator are not sustainable.

Ld Arbitrator has not gone into effect of communication mentioning that contractor was required to arrange the stone, bajri etc. from any of quarries, Arbitrator has not dwelled into the aspect that if testing of stone crusher in and around Shimla, was going on, how material could have been procured by the contactor. These facts negate the finding of Arbitrator as findings are not in consonance with evidence. Ld Arbitrator has failed to substantiate his finding by giving reasons, even grounds of claims of contractor have also not been addressed - thus findings are liable to be set aside being in conflict with public policy of India, findings returned by Ld. Arbitrator are contradictory. As such, there is no due application of Judicial mind- petition is allowed by setting aside award passed by the Ld. Arbitrator. Matter is remanded back to adjudicate the same afresh. Title: M/s Five Star Builders vs. State of Himachal Pradesh and another Page-619

The Petition u/s 439 Cr.P.C- For Regular bail- Under section 354-A, 504, 506, 509 & 201 IPC, Section 75 JJ Act and section 12 POCSO Act- Allegations are petitioner being father of victim behaves indecently, on one occasion also showed his private part to her, further maltreated her and her mother and brother and alleged that petitioner takes quarrel with mother on the ground that her brother is not his son rather born from loins of some other person- Held,- Victim prior to filing of present FIR lodged Complaint to police alleging that her father had shown his private part to her then complaint was withdrawn being compromised- The statement u/s 154, 164 Cr .P.C shows that complaint is lodged due to matrimonial discord between mother of victim and Petitioner- Guilt of petitioner is yet to be established-challan filed- the

freedom of petitioner cannot be curtailed for indefinite period- Petition allowed. Title: Ram Kala Chauhan vs. State of Himachal Pradesh Page-50

The petition under article 227 constitution of India filed by defendant against the order turning down application under order.7 rule 11 CPC for rejection of plaint moved at the stage of arguments- Civil suit for declaration that he was owner of suit land -for decree of permanent prohibitory injunction, possession, for recovery of rent and damages, plaintiff is depicted as plaintiff son of Harnam Singh Pathania defendant contends that plaintiff is son of Anant Singh Pathania who never gave plaintiff in adoption to Harnam Singh- The plaint was amended by incorporating the word 'adopted Son' vide order dated 27.6.2017- Order was not assailed by defendant, at the stage of arguments, defendant moved application under order 7 rule 11 CPC for rejection of plaint on the ground that suit was filed by plaintiff being adopted son of Harnam Singh where in judgment in other civil suit it was held that plaintiff was not adopted son of Harnam Singh- therefore entire edifice of present suit goes- Held- Application was not filed by defendant at the first available opportunity- The plaintiff was allowed to amend plaint by incorporating word 'adopted' – order was accepted by defendant- the moving of application at the fag end of the trial was nothing but a ploy to drag the proceedings- The ground raised in application does not fall within purview of order 7 rule 11 CPC- Ld. trial court committed no error in dismissing application under order 7 rule 11 CPC- Petition dismissed. Title: Rajiv Kant and others vs. Govind Singh Pathania Page- 173

The petition under Article 227 constitution of India, 1950, challenging the order dated 15.6.2018 whereby application moved by defendant/ respondent No. 1 under section 65 Indian evidence Act, was allowed and photocopies of original will dated 7.11.1987 were permitted to be placed on record- Defendant No.1 moved application under section 65 I.E Act for taking on record copy of original will on the ground that he after attestation of mutation handed over the will to defendant No.2 Now, defendant No.2 ,hand in gloves with plaintiff, has not produced the will despite repeated requests- in reply to application under order 12 rule 8 CPC, defendant No.2 refused that original will was handed over to him. Held- it is pleaded by defendant No.1 that on the basis of original will dated 7.11.1987, mutation was attested on 15.3.1988- The entire defence of defendant No.1 is based on will- his application under order 12 rule 8 read with section 15 CPC requesting defendant No.2 to produce the will was disposed in view of stand of defendant No.2 denying its possession- Defendants are yet to lead their evidence- defendant No.1 had made a case for leading secondary evidence- Petition dismissed. Title: Shiv Dai and others vs. Rai Singh and another Page-243

The petition under Article 227 of Constitution of India against the order passed by executing court where by objection preferred by judgment debtor to the execution petition filed by DH have been partly allowed and instead of actual possession, only symbolic possession of suit Land has been ordered to be delivered to the decree holder- An exparte decree for vacant possession of suit land was passed- In execution- The J.D stated that JD No.1 had purchased 1/6th share in suit land and JD Bhole Ram also purchased separate share in the suit land – Held- in instant case, JD's/ objectors have proved on record that they had become co-sharers of suit land subsequent to passing of the decree sought to be executed. The suit land is now jointly owned by them along with various co-sharers – In such situation their possession over the suit land cannot be treated as illegal and therefore cannot be ousted from such possession. The JDs and objectors have purchased share in suit land from other co-sharers. Their possession of the suit land is now in capacity different from the one in which they had suffered the decree for possession- in such circumstances ld. trial court was justified in not issuing the warrant of actual possession in favour of decree holder. Petition lacks merit and dismissed. Title: Sh. Parveen Kumar & ors. vs. Sh. Choudary Ram & ors. Page-192

The petition under section 439 Cr.P.C for regular bail in FIR registered under section 452, 392, 307,302, 120-B IPC Held, in the alleged incident, two old persons lost their lives and one person suffered serious injuries- On the date of alleged Incident- Petitioner Baljinder lodged in Gurdaspur jail on account of conviction under section 138 N. I Act- Petitioners are real brothers and there was some old litigation between petitioner and deceased Dilbag Rai and his family on account of ownership of some plywood factory- Allegation are though Baljinder was lodged in jail, he in connivance with Surjeet his brother in-Law-planned & managed attack on parents of complainant- No concrete evidence collected by investigation agency to this effect. The petitioner Lakhbinder in litigation with Baljinder was named in the statement of Vikram Injured – But in statement
of complainant on being told by Vikram there was nothing- Version of complainant under section 154 Cr.P.C totally contradictory to version of vikram under section 164 Cr .P.C- Delay in recording statement, R F S L report nowhere suggests that almirah and locks were broken with hammer, there was no evidence of opening locks with force, statements of material witnesses recorded, remaining witnesses are formal in nature and police officials cannot be won over- in these circumstance till the time, guilt of bail petitioner is not established in accordance with law, there appears no justification to keep them behind bar for an indefinite period during trial especially when they had already suffered for more them five years. Petition allowed- Bail granted. Title: Lakhwinder Singh vs. State of Himachal Pradesh

Page-58

The petition under section 439 Cr.P.C. for regular bail for commission of offences under section 341, 342, 323, 370, 374, 376, 34 IPC & 75, 79 J.J Act and section 8 of POCSO Act- Victim of 14 years of age – Doctor had not ruled out the possibility of sexual intercourse- The mere fact that on medical examination of victim hymen was not found ruptured does not go to rule out the possibility of sexual intercourse – Victim –Thin, lean poorly nourished and as per her, when she felt pain, accused left her- These allegation itself show that accused might not have penetrated his male organ deep enough rupturing hymen- The court is not inclined to grant bail- The petition dismissed. Title: Suresh Kumar vs. State of H.P. Page-398

The petition under section 482 Cr. P.C for quashing FIR No. 37/2018 dated 9.5.2018 under section 363, 366, 376, 506 IPC and section 4 &6 POCSO Act- Held- at the time of eloping with petitioner, respondent No.2 was 17 years and 10 months old therefore for her minority criminal case as registered has been made out and after two months, for attaining the age of discretion by respondent No.2 in the same circumstances, no case would have been made out –not only respondent No.2 but her grandmother has also found petitioner as suitable match for respondent No.2 after knowing about love affair and has organized their marriage -the couple is living happily under one roof with their two years small kid in view of above circumstances this is fit case to exercise power under section 482 Cr.P.C. If the criminal proceedings are allowed to continue, the same will adversely affect married life- Petition allowed- FIR quashed. Title: Ashish Kumar vs. State of H.P. & others Page-283

The petitioner after being declared as a proclaimed offender on 12.9.2019 was arrested on 11.3.2021 in complaint before Ld Special Judge in case arising out of FIR lodged under section 22 (3) 27 (c) 28(A), 36 AC of Drugs and Cosmetics Act- The petition for grant of regular bail- Held- The petitioner was enlarged on bail by ld Sessions Judge on 13.9.2011. The complaint filed by Drug Inspector was registered in court of ld Special Judge on 20.2.2014- It comes to notice of trial court that petitioner and his father was not residing on address given in complaint- Correct addresses were not furnished by Drug inspector- in mechanical manner, bailable warrants and thereafter, non-bailable warrants were ordered to be executed on same address. Since address was wrong, warrants were also received unexecuted for want of correct address -despite this proceedings under section 82 Cr.P.C were instituted with observation that petitioner is deliberately evading service which is not justified- Thus petitioner has made out a case for enlargement on bail on furnishing bonds subject to conditions- Petition stands disposed of. Title: Saurabh Behal vs. State of Himachal Pradesh Page- 296

The petitioner claims, his promotion to the post of Planning and Development Officer along with the pay scale from a retrospective date, on the ground that University in an arbitrary and discriminatory manner, did not exercise the discretionary power to relax the rules in his favour as was done in case of similarly situated employees. Held- It is well settled that exercise of discretion should be legitimate, fair and without any aversion, malice or affection. The discretionary power to relax, should be exercised sparingly to meet exceptional situations warranting such exercise. From the facts it appears that respondent University did not exercise the discretionary power of relaxation in a judicious or in an equitable manner. The Principle that relaxation should be only be an exception and not the rule was not kept in mind. Apparently the principle that adherence to R&P Rules should not ordinarily be considered as a hardship for a person seeking appointment or promotion there under was not followed strictly, the cases of grant of relaxation by University being relied by the petitioner, for claiming similar treatment are neither before the Court nor same can be gone into at this stage however on analogy of exercise of this discretionary power of relaxation, in favour of some incumbents, the respondent University, cannot be directed to exercise same, discretion in favour of petitioner, Exercise of discretionary power of relaxation in one's favour cannot be claimed as matter of right. Therefore, claim of petitioner for retrospective promotion, to the post of planning and development Officer by way of relaxation of requisite length of service under R&P Rules is not tenable.

Further held – the petitioner had admittedly discharged the duties of higher post till superannuation, pursuant to order passed by competent authority petitioner deserves to be granted, the pay scale attached to said post. The petition disposed of. Title: Bishan Singh Chandel vs. Himachal Pradesh University and another Page-549

The petitioner- engaged as daily waged 'beldar' in IPH department in the year 1991 and thereafter completed 240 days of service in each calendar year w.e.f 01.01.1992- The service of petitioner was initially regularized vide order dated 4.1.2007 and subsequently w.e.f. 1.1.2002- The petitioner is aggrieved that as on the date of consideration of his case, the policy of regularization contemplated completion of 8 years service as daily waged as against 10 years when formal policy was formulated, therefore his services were required to be regularized on completion of 8 years service, hence petition for direction to respondents accordingly held- When the benefits have been given to similarly situated employees, the petitioner cannot be discriminated against - it is not in dispute that petitioner had completed 240 days of his service in each calendar year with effect from 1.1.1992 and therefore his services in terms of policy prevalent on the date of consideration were required to be regularized

from 2000 as per policy clearly provided for regularization of services of daily waged workman who had continuously worked for 8 years- Petition allowed. Title: Hem Raj vs. State of Himachal Pradesh and others Page-227

The petitioner initially appointed as inspector Grade-II in Food and Supplies department on 26.8.1988- Respondent No. 3 & 4 were junior to him in seniority list of inspectors Grade-II circulated in 1996- Respondent 3&4 belong to reserved category and promoted to post of inspector Grade-1 on 26.6.1997 & 24.01.2007 by way of promotion- against posts reserved in their category- The petitioner was promoted as inspector Grade-1 on 9.2.2007- seniority list circulated in july 2007 shows respondent No.3 & 4 above the petitioner though they were junior to petitioner in feeder category- Held- It is not in dispute that petitioner was senior to private respondents in the feeder category of inspector grade-II- It is also not in dispute that private respondents were promoted to the post of inspector Grade-I before petitioner on account of roaster point available in promotional category of reserved category however after the petitioner stood promoted to the post of inspector Grade-I he was entitled to regain his seniority over and above the private respondents in the seniority list of inspector Grade-I as per "catch up principle" by not doing so respondent department has committed an illegality and to this extent, seniority list is not sustainable in law- Petition disposed of with direction to respondent department to reflect the petitioner over and above private respondents in the seniority list of inspector Grade-I. Title: Sh. Puran Chand vs. State of Himachal Pradesh and others Page-254

The petitioner sought deletion of its name from array of defendants but same was rejected vide order dated 25.10.2019- Hence revision petition- The petitioner sought deletion of its name on the ground that present mater pertains to forest department and entire record stands transferred to it in view of fact that state government has withdrawn control of forest from purview of M.C.Shimla- Held, There can be no doubt that the plaintiff is the dominus litus and would certainly have a right to implead anyone against whom he or she has a cause of action or any one against whom he or she seeks a relief but the party who is so impleaded, should satisfy at least any one of two tests viz- that of being a necessary or proper party –Held- the state government vide notification dated 15.10.2013 resumed the control of forest from petitioner and now same is under the control of Forest department - the suit was filed in the year 2018- control of the forests was of forest department and not of the petitioner i.e, Municipal corporation- Therefore M. C could not have been impleaded as party only because at some stage the forest was vested with it – Hence, petition is allowed and M .C. is ordered to be deleted from array defendants. Title: Municipal Corporation, Shimla vs. Mathu Ram and others Page-222

The petitioner, a registered Forest contractor- Intending to purchase dry Khair trees from different land owners from their malkiti land and approached, bargained with land owners qua dry Khair trees standing on their land- The applications were submitted by land owners as per procedure through petitioner- The area in question was having status of "Khudro Drakhtan Malkiyat Sarkar" – As per notification dated 11.3.1999 ownership of standing trees on such lands stood vested in owners and entries to this effect were made in revenue papers. As per respondents ,the land having status of" Khudro Darkhtan Malkiyat Sarkar" comes under the definition of Forest and as per guidelines of Hon'ble Apex Court in J.N Godaverman vs union of India, Forest Conservation Act comes into play, separate plan stood prepared, submitted to government- without permission, felling of trees could not be permitted- Held- Before issuance of notification- Forest produce/ trees standing on private land with entry "Khudro Drakhtan malkiyat Sarkar" was considered belonging to government, after issuance of notification land owners became owner of forest produce standing in their land- this right conferred upon the land owners cannot be arbitrarily denied to them by state government by not acting upon the notification dated 11.3.199 till the same is legally in force and respondents are directed to process the case of landowners submitted by petitioner on the strength of notification- The communication addressed by principal CF (HOFF) cannot supersede a duly issued notification of government of H.P. Title: Davinder Kumar vs. State of H.P. and others Page-210

The petitioner, serving as a class IV employee was earlier retired at the age of years 58. Hon'ble H.C. vide judgment dt. 27.10.2010 held in CWP that, petitioner can be continued upto age of 60 years- The petitioner served the department till the age of 60 years but leave encashment, which he was entitled to in lieu of severing till the age of 60 years has not been paid to him & Same was paid only till the age of 58 years. The writ petition for direction to release the differential amount of leave encashment i.e. 11,505/- with interest @ 12% per annum on account of delay in release of the said amount. Held- the petition filed by the petitioner before the Hon'ble H.C. feeling aggrieved by the act of state Govt. of retiring him at the age of 58 years was allowed in his favour therefore for all intent and purposes the petitioner stood retired from service of deptt at the age of 60 years-when the difference in leave encashment is of meager amount of Rs. 11,055/- petitioner, a class IV employee, in interest of justice, the petition is disposed of with direction to pay balance amount of leave encashment of Rs. 11,055/- to paid to petitioner without insisting upon him to pay interest as demanded by the state. Title: Sh. Sant Ram vs. State of Himachal Pradesh and others Page- 481

The petitioners are seeking benefits of Notification dt 28.07.1998 being

denied to who are pre. 01.09.1997 and pre-2006 retirees whereas same is extended to serving as well as doctors who retired on and after 01.09.1997 and 01.01.2006 respectively vide which the benefit of 25% NPA as Basic pay for the purpose of calculating retiral benefits including revised pension w.e.f. 01.07.1997 and further enhancing the basic pay plus NPA limited to Rs. 79,000/- w.e.f. 01.01.2006 and this is discriminatory in nature and hit by articles 14 and 16 of constitution of India and direction is sought to carry out necessary modification to the notification extending benefit to pre 01.09.1997 and pre-2006 retirees. HELD- it is held in Keshav's case that in case of the retirees prior to specified date their pension would be computed afresh in view of liberalized scheme and would become payable in future commencing from specified date and no arrears would be payable prior to it. The act of respondent of denying the benefit of notification to the petitioners on the ground that they superannuated before 1.1.1997 is arbitrary and not sustainable in law. Writ petition is allowed.Title: Dr. D. R. Barwal (now deceased) through his Legal Representatives Smt. Usha Barwal & others vs. State of Himachal Pradesh and others Page-485

The plaintiff filed suit for possession through specific performance of an agreement by way of execution of sale deed. The suit was dismissed by concurrent findings of trial court and 1st Appellate Court- Hence, RSA- Held- The agreement is vague and void, therefore, not capable of being enforced. Plaintiff even otherwise has failed to prove its execution by defendants in accordance with law – No interference in concurrent findings called for – Appeal dismissed. Title: Ram Lal vs. Om Parkash & Anr Page- 82

The plaintiff had obtained an exparte ad-interim order dated 17.3.2021 in her favour despite a caveat petition having been filed by respondents/ defendant on 9.3.2021 prior to passing of such order –Held in such circumstances first appellate court before whom the appeal was filed by respondent committed no irregularity much less illegality in vacating the exparte ad interim order that has been passed in favour of petitioner.Title: Meena vs. Mohit Kumar Gupta and another Page-219

The writ directing the respondents to remove the anomaly/ disparity in fee structure and to maintain parity- Some NRI quota seats for admission to MBBS remained unfilled- Government took decision that unfilled NRI seats in govt medical college shall be filled as paid seats from Himachali Bonafied Candidates in order of merit drawn by HPU on the basis of NEET-UG- Fee shall be at par with fees of State quota in private medical colleges of the State i.e Rs. 5,50000/- p.a- Held – Hon'ble apex held in case titled as Cochin University of Science and technology vs Thomas P. john (2008)8 SCC 82 educational Institution chalks out its own programme year wise on the basis of projected receipts and expenditure & court need not interfere in this purely

administrative matter which is the right of educational institution. NRI students who took admission on certain basic conditions and on a fee structure,can not claim as matter of right reduction in fee to bring them at par with students admitted later in a lower fee structure- In view of above law- Petition- Not maintainable. Title: Shailja Choudhary and others vs. State of H.P. and others **(D.B.)** Page-44

'W'

Writ of certiorari for quashing allotment of shops by respondent No. 3 to 5 in sports complex Hamirpur in favour of respondent No. 6 to 34 and for mandamus directing respondents to make allotment of shops in transparent manner- Held- Government largesse cannot be distributed in the mode and manner in which the same has been done in this case- Amongst the eligible candidates, some transparent criteria ought to have been adopted by the allotting agency so that process was above board and there was no element of arbitrariness in the same- As per attendance resister, petitioners were present in the meeting- Against the names of petitioners, shops were also allotted, petitioners Vijay Kumar , Virender, Suman and Ranjit appended their signature without protest- these petitioners had duly participated in the process without objection ,they do not have locus standi to file the petition- they also entered into agreement . They acquiesced to the process of allotment of shops- their petitions are dismissed. Title: Prem Chand and others vs. State of Himachal Pradesh and others Page-127

Writ of certiorari for quashing the actions of official respondents attaching the property already stands mortgaged with petitioner by respondent no 4 by creating and claiming their first charge upon the property and quashing notice vide which respondents have claimed the first charge over the secured asset of petitioner notwithstanding the fact that mortgagee rights of a borrower prevails upon the tax liability of a defaulting borrower. Held- the Petitioner being "Secured Creditors" has preference over state with regard to the debts due from respondent no 4 - Department cannot claim first charge over secured asset of petitioners, as petitioner has first charge over secured assets in view of provision of SARFESI Act 2002 and Recovery of debt and bankruptcy Act. The provision of Sec 26 of H.P. Vat Act shall have to give way to the provision of Sec 26 E of the SARFAESI Act 2002, Sec 31 b recovery of debt and bankruptcy Act- the petition allowed.Title: Punjab National Bank and another vs. State of Himachal Pradesh and others Page-415

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Ravinder Kaur Grewal and others vs. Manjit Kaur and others (2019)8 SCC 729;
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Satish Kumar Vs Karan Singh & Anr., (2016) 4 SCC 352;
Sau Suman Narayan Niphade and another vs Narayan Sitaram Niphade and another 1995 Supp (4) SCC 243;
Sayed Moinuddin Vs Md. Mehaboob Alam and others. AIR 2016 Karnataka 192;
Serious Fraud Investigation Office Vs. Nittin Johari & Anr., (2019) 9 SCC 165 (3 Judges);
Shakti Bhog Food Industries Ltd. Vs. Central Bank of India and another, AIR 2020 SC 2721;
Shakti Bhog Food Industries Ltd. Vs. Central Bank of India and another, AIR 2020 SC 2721;
Sher Singh and others Vs. Raghu Ram and others, 1981 S.L.C. 25;
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State of Orissa vs. Mahimananda Mishra, 2018 (10) SCC 516;
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Sujit Tiwari Versus State of Gujarat and another (2020) 13 SCC 447;
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Surjeet Kaur vs. Jarnail Singh 1965 PLJ 137;
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Sushila Aggarwal & others v. State (NCT of Delhi) & another, (2018) 7 SCC 731;
Syed Khalid Rizvi and others VersusUnion of India and others, 1993 Supp (3) SCC 575;
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T.M.A. PAI Foundation & others Vs State of Karnataka 2002(8) SCC 481;
Tara Wati and others Vs. Suman & others, Latest HLJ 2018(HP) 1046;
Temple of Thakurji Village Kansar vs. State of Rajasthan and others AIR 1998 Rajasthan 85;
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Tofan Singh vs. State of Tamil Nadu AIR 2020 SC 5592;

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Union of India vs. K.V. Lakshman and others 2016(13) SCC 124;
United India Assurance Company Ltd. vs. Kamla Rani, 1997 ACJ 1081 (P&H);

'V'

Vinay Kumar and others vs. Parshotam Dass and others 1992 PLJ 77;
Virupaksahappa Gouda vs. State of Karnataka, 2017 (5) SCC 406;

'Y'

Y.K. Singla vs. Punjab National Bank and others, (2013) 3 SCC 472;
Y.S. Jagan Mohan Reddy vs. CBI (DB), (2013) 7 SCC 439;

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

Mangal Singh Negi ....Petitioner

Versus

Central Bureau of Investigation ....Respondent.

CRMPM No.321 of 2021
Reserved on : 31.3.2021
Date of Decision: April 1, 2021

Anticipatory Bail- Under Section 438 Cr.P.C- under section 120-B- IPC alongwith sections 409, 420, 467, 468, 471 IPC & section 13 (2)& 13 (1) CCI (d) prevention of corruption Act Petitioner apprehending his arrest during investigation by CBI in scholarship scam – Allegation- opening of accounts of ASA marketing solution & large number of accounts of students during his posting in Allahabad bank Panchkulla, Solan-Chandigarh- Main accused had opened account of firm and large numbers of students- Petitioner- Instrumental of illegal design of main accused to swallow huge amount of scholarship for which students were entitled- Held- cumulative effect of entire circumstances, parameters for grant of anticipatory bail- balance of convenience lies in favour of grant of bail to petitioner.

Cases referred:

Gurbaksh Singh Sibbia & Ors. Vs. State of Punjab, (1980) 2 SCC 565 (Constitutional Bench);
Nimmagadda Prasad Vs. CBI (DB), (2013) 7 SCC 466;
Rohit Tandon Vs. Directorate of Enforcement, (2018) 11 SCC 46 (3 Judges);
Serious Fraud Investigation Office Vs. Nittin Johari & Anr., (2019) 9 SCC 165 (3 Judges);
Siddharam Satlingappa Mhetre Vs. State of Maharashtra and Ors. (DB), (2011) 1 SCC 694;
State of Bihar & Anr. Vs. Amit Kumar alias Bachcha Rai (DB), (2017) 13 SCC 751;
State of Gujarat Vs. Mohanlal Jitamalji, (1987) 2 SCC 364;
State Represented by CBI Vs. Anil Sharma, (1997) 7 SCC 187;
Sushila Aggarwal & others v. State (NCT of Delhi) & another, (2018) 7 SCC 731;
Y.S. Jagan Mohan Reddy vs. CBI (DB), (2013) 7 SCC 439;

For the Petitioner	**:**	Mr. Navlesh Verma, Advocate.
For the respondent	**:**	Mr. Anshul Bansal, Mr. Anshul Attri and Ms Manju Dhatwalia, Advocates. Shri Balbir Sharma, Shri Rajesh Thakur (Deputy Superintendents), Shri Jagat Ram (Inspector) & Shri Rajender Kumar (Sub Inspector), alongwith record.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Instant petition has been preferred seeking anticipatory bail under Section 438 of the Code of Criminal Procedure (in short 'Cr.P.C.') in favour of petitioner in case FIR Crime No.RC0962019A0002 of 2019 registered in SPE Branch CBI, ACB, Shimla, H.P., under Sections 120-B alongwith Sections 409, 420, 467, 468 and 471 of the Indian Penal Code (in short 'IPC') and Sections 13(2) and 13(1)(c) & (d) of Prevention of Corruption Act.

2. Petitioner had joined Allahabad Bank as a Probationer Officer. Thereafter he was promoted as a Manager and as of now he is serving as a Senior Manager in Allahabad Bank (now known as Indian Bank) Hamirpur. In present case, opening of accounts of ASA Marketing Solutions and large number of students, during posting of the petitioner in Branches of Allahabad Bank at Panchkula, Solan and Chandigarh is the fact for considering him as an accused in scholarship scam.

3. Petitioner is apprehending his arrest, during ongoing investigation by CBI being carried out with respect to as many as 26 Institutions, regarding scholarship scams because during his posting at Solan, Chandigarh and Panchkula w.e.f. July 2011 to June 2018, main accused Rajdeep Singh, Krishan Kumar and Babita Rajta had opened accounts of their

Partnership Firm ASA Marketing Solutions and also of large number of students and the petitioner is the officer, who is being considered an instrumental to the ill-design of main accused to swallow huge amount of scholarship for which students were entitled.

4. Status report stands filed, wherein it is stated that petitioner remained posted from July 2011 to July-August 2014 in Panchkula Branch, from July-August 2014 to May 2015 in Chandigarh Branch, June 2015 to May-June 2017 in Solan Branch and June 2017 to June 2018 in Panchkula Branch of Allahabad Bank, now known as Indian Bank and during his posting at Panchkula he had opened bank account of Partnership Firm ASA Marketing Solutions and 28 bank accounts of students out of total 135 bank accounts of students in the said Branch claimed to be students by aforesaid three partners (main accused) in their so called institutions whereas, according to investigation carried out till date, all these institutions were fake having no sanction, approval or affiliation of any competent authority as required under law to run such institutions. As per Investigating Agency signatures of petitioner on account opening forms not only by Smt. Sapna posted as a Clerk in Allahabad Bank but have also been identified by the petitioner himself.

5. It is also case of the prosecution that during his posting at Solan, out of 186 account numbers of students opened in that Branch, 116 accounts were opened by the petitioner and he had also transferred scholarship amount, received in accounts of students at Panchkula to the accounts of ASA Marketing Solutions opened at Solan Branch by him on the basis of a letter of Rajdeep Singh and Krishan Kumar without any authorization from the students but on the basis of so called authority letters alleged to have been issued by the students which was without any date, with no amount mention and without any Branch name of the Bank with which these accounts were opened. According to prosecution, on transfer of petitioner from Panchkula to Solan, main accused Rajdeep Singh and Krishan Kumar with the help of

petitioner had opened a new account in the same bank, i.e. in Solan Branch. It is also reported that during his posting at Chandigarh, petitioner had opened account of four students in that Branch also, and ASA Marketing Solutions was already having account in that Branch. According to prosecution, accounts of the students at Panchkula, Solan and Chandigarh were opened without consent and knowledge of the students, in their absence, but on the basis of documents supplied by Rajdeep Singh and Krishan Kumar, but without verifying the students in person by visiting their institutions or otherwise.

6. According to prosecution, scholarship amount received in accounts of students from the Government was transferred to accounts of ASA Marketing Solutions by petitioner without any enforceable debit authority and without verification of the account holders, their willingness and their identity.

7. Detail of amount, as per status report and record of Investigating Agency, so transferred is as under:-

Sr. No.	Amount transferred	To Account Number	Name of Transferee Account holder	Date of transfer	Amount in Rs.
1.	Various students bank accounts	50168257330	ASA Marketing Solutions	19.12.2013	15,91,200/-
2.	Various students bank accounts	50168257330	ASA Marketing Solutions	19.12.2013	15,33,700/-
3.	Various students bank accounts	50168257330	ASA Marketing Solutions	19.12.2013	20,66,000/-
4.	Various students bank accounts	50168257330	ASA Marketing Solutions	19.12.2013	2,47,600/-
5.	Various students bank	50168257330	ASA Marketing	19.12.2013	15,12,800/-

	accounts		Solutions		
6.	Various students bank accounts	50168257330	ASA Marketing Solutions	19.12.2013	14,97,300/-
7.	Various students bank accounts	50168257330	ASA Marketing Solutions	03.04.2014	Rs. 14,91,900/-
8.	Various students bank accounts	50168257330	ASA Marketing Solutions	03.04.2014	Rs. 30,44,000/-
9.	Various students bank accounts	50168257330	ASA Marketing Solutions	01.11.2017	1,07,480/-
10.	Various students bank accounts	50168257330	ASA Marketing Solutions	01.11.2017	1,32,480/-
11.	Various students bank accounts	50168257330	ASA Marketing Solutions	01.11.2017	1,76,640/-
12.	Various students bank accounts	50168257330	ASA Marketing Solutions	01.11.2017	1,81,770/-

8. It is also claim of the prosecution that for act and conduct of the petitioner, he has been found actively associated with main accused Rajdeep Singh and Krishan Kumar as it has also come in the knowledge during investigation from the account statements of Bank account of ASA Marketing Solutions, Solan, that a payment of `1,50,000/- is stated to have been received by the petitioner on the basis of self cheque issued by main accused Rajdeep Singh and Krishan Kumar.

9. Learned counsel for respondent-CBI has submitted that custodial interrogation of the petitioner is necessary so as to elucidate truth and further information from the petitioner regarding any other amount received by him or on behalf of main accused Rajdeep Singh, Krishan Kumar

and Babita Rajta and, therefore, he has over vehemently pressed for rejection of bail enabling the Investigating Agency to have custodial interrogation of the petitioner.

10. It is also case of the Investigating Agency that statements of Bank employees, who were serving at relevant point of time, in the Branches of the Bank where petitioner was posted during 2011 to 2018 have also been recorded, wherein witnesses have revealed that petitioner had opened the accounts of ASA Marketing Solutions and accounts of large number of students in their absence and without verifying the facts during his respective tenure in above referred stations.

11. It is also case of the prosecution that there was no reason or logic in opening the accounts of students purported to be studying in Chamba, Una, Kangra and Nahan, at Panchkula, Solan and Chandigarh. Prosecution has also produced large number of Account Opening Forms taken into possession from Solan, Panchkula and Chandigarh Branches and on the basis of these forms, it is submitted by learned counsel for the respondent-CBI that forms are incomplete in so many respects and no local addresses of students of Panchkula or Solan or Chandigarh have been mentioned therein. Further that authorization letters attached with these forms have been prepared before opening of the accounts and some of these authorization letters are having a date which is prior in time to the date of opening of the account, whereas in some others column of date is blank. He has also pointed out certain authorization letters, wherein even name of the bank has been mentioned, but without mention of Branch and in none of these authorization letters account numbers of account holders have been mentioned. It is further pointed that petitioner, while serving at Solan, was having no authority or authorization to transfer amount from accounts of students opened at Panchkula to the account of firm of main accused opened at Solan as the authorization letter enclosed with those Account Opening Forms were not only

without mention of account number, but also addressed to the Senior Manager Allahabad Bank, Panchkula.

12. Learned counsel for the respondent-CBI has also referred material communication including that for Bank accounts starting with digit "59" record maker and checker are not found in the system. He has further pointed that most of the account numbers opened at Panchkula are starting with digit "59" and, therefore, he claims that petitioner has opened accounts by, bye-passing system and without following proper procedure, only to facilitate main accused to commit scam of crores of rupees, the amount for which, in fact, was to be disbursed to the students.

13. To substantiate plea for rejection of petition, learned counsel for respondent-CBI has put reliance upon ***Gurbaksh Singh Sibbia & Ors. Vs. State of Punjab, (1980) 2 SCC 565 (Constitutional Bench); State of Gujarat Vs. Mohanlal Jitamalji, (1987) 2 SCC 364; State Represented by CBI Vs. Anil Sharma, (1997) 7 SCC 187; Siddharam Satlingappa Mhetre Vs. State of Maharashtra and Ors. (DB), (2011) 1 SCC 694; Y.S. Jagan Mohan Reddy vs. CBI (DB), (2013) 7 SCC 439; Nimmagadda Prasad Vs. CBI (DB), (2013) 7 SCC 466; State of Bihar & Anr. Vs. Amit Kumar alias Bachcha Rai (DB), (2017) 13 SCC 751; Rohit Tandon Vs. Directorate of Enforcement, (2018) 11 SCC 46 (3 Judges); Serious Fraud Investigation Office Vs. Nittin Johari & Anr., (2019) 9 SCC 165 (3 Judges); Cr.M.P.(M) Nos. 895 of 2018, titled as Ankit vs. State of Himachal Pradesh and other connected petitions; and Cr.M.P. No. 944 of 2020, titled as Freed vs. State of H.P. alongwith other connected petitions.***

14. It is pointed out on behalf of the petitioner that during posting of the petitioner at Panchkula, he as not Incharge of the Branch, but Anu Bhargav and A.K. Verma respectively were posted as Assistant General Managers in these respective stations, who were Incharge of the respective Branches and at Panchkula petitioner had opened account of students after

receiving directions from Assistant General Managers and further that a Firm or a person can open the account anywhere in India on the basis of KYC (Know Your Customer) and at the time of opening of account of ASA Marketing Solutions, they had produced copies of Partnership Deed, Aadhar Card, Passport, Pan Card etc. alongwith Account Opening Form and, therefore, no illegality or criminality has been committed by the petitioner in opening the account of ASA Marketing Solutions. Further that students were also having right to open their account anywhere wherever they like and the accounts opened by the petitioner either at Panchkula or Solan or Chandigarh, were duly proposed and identified by the Institutions and at the time of opening large number of accounts of Institutions, verification/recommendation of such Institutions is considered to be sufficient for opening accounts. It is also submitted that once authority letter authorizing the Bank to transfer the fee of respective students in favour of Educational Institution or Society/Organization running such Institute is given by the student, the Institute is entitled for recovery of fee through bank from accounts of students as authorized by the students themselves.

15. It is also contended on behalf of the petitioner that now statements of witnesses have been recorded and record of the bank has been collected and petitioner has been interrogated after passing of order dated 16.02.2021 by this Court, granting interim bail as petitioner has continuously and regularly joined investigation and cooperated the Investigating Officer which is also evident from the status report, wherein no such allegation has been levelled against the petitioner. Moreover, no prayer for custodial interrogation has been set out in the status report filed on behalf of the respondent-CBI in the present case. It is also contended that petitioner has subjected him for investigation and there is no possibility of his fleeing from justice and he is permanent employee of the Bank, serving on a higher post i.e. Senior Manager and, thus, there is no possibility of his absconding as he

has roots and enjoying good status in the society. Further that there is no criminal antecedents of the petitioner and omission and commission on the part of the petitioner, pointed out for establishing his connivance/conspiracy with main accused for commission of alleged offence, are nothing but mere irregularities committed by the petitioner in good faith.

16. It is also contended on behalf of the petitioner that there is difference between irregularity, illegality or criminality and for alleging criminality degree of veracity of evidence required is higher than in case of irregularity or illegality and for absence of any criminality, petitioner cannot be sated to have committed the offence as alleged. According to learned counsel for the petitioner, at the most, petitioner is a witness to the opening of accounts by main accused either of ASA Marketing Solutions or of students.

17. With respect to payment of `1,50,000/- as recorded in the account statements, to have been released in favour of petitioner, it was stated that it was a self drawn cheque which was duly signed by Rajdeep Singh and Krishan Kumar on its front as well as back side and petitioner had only acted as a passing officer and there is no signature or any other document so as to connect the payment of `1,50,000/- with petitioner and stray entry made in account statements, without any material or evidence on record, cannot be made basis for drawing conclusion of connivance of the petitioner with main accused.

18. History and object of incorporation of provisions of Section 438 Cr.P.C., and also factors and principles to be taken into consideration at the time of considering bail application under Section 438 Cr.P.C. have been discussed in detail in judgment dated 06.07.2020 passed by this Court in Cr.M.P.(M) No.944 of 2020, titled as *Freed vs. State of H.P.*

19. Provisions related to information to the Police and their powers to investigate have been incorporated in Sections 154 to 176 contained in Chapter-XII of the Code of Criminal Procedure ('Cr.P.C.' for short).

20. Section 156 Cr.P.C. empowers Police Officer to investigate in cognizable offences without order of the Magistrate and Section 157 prescribes procedure for investigation, which also provides that when an Officer Incharge of a Police Station has reason to suspect the commission of an offence, which he is empowered to investigate under Section 156, he, after sending a report to the Magistrate, shall proceed in person or shall depute one of his subordinate Officers as prescribed in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender.

21. Chapter V of the Cr.P.C. deals with provisions related to arrest of persons, wherein Section 41 also, inter alia, provides that any Police Officer may, without an order from Magistrate, and without a warrant, arrest any person against whom reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment which may be less than seven years or may extend to seven years, subject to condition that he has reason to believe, on the basis of such complaint, information, or suspicion, that such person has committed the said offence and also if the Police Officer is satisfied of either of the conditions provided under Section 41(1)(b)(ii), which also include that if such arrest is necessary "for proper investigation of the offence". Whereas Section 41(1)(ba) empowers the Police Officer to make such arrest of a person against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years or with death sentence and the Police Officer has reason to believe, on the basis of that information, that such person has committed the said offence, and for commission of such offence no further condition is required to be satisfied by the Police Officer. Therefore, Police Officer/Investigating Officer is empowered

to arrest the offender or the suspect for proper investigation of the offence as provided under Section 41 read with Section 157 Cr.P.C.

22. Article 21 of the Constitution of India provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Arrest of an offender during investigation, as discussed supra, is duly prescribed in Cr.P.C.

23. At the same time, Cr.P.C. also contains Chapter XXXIII, providing provision as to bail and bonds, which empowers the Magistrate, Sessions Court and High Court to grant bail to a person arrested by the Police/Investigating Officer in accordance with provisions contained in this Chapter. This Chapter also contains Section 438 empowering the Court to issue directions for grant of bail to a person apprehending his arrest. Normally, such bail is called as "Anticipatory Bail". Scope and ambit of law on Anticipatory Bail has been elucidated by the Courts time and again.

24. Initially, provision for granting Anticipatory Bail by the court was not in the Cr.P.C., but on the recommendation of the Law commission of India in its 41st Report, the Commission had pointed out necessity for introducing a set provision in the Cr.P.C. enabling the High Court and Court of Session to grant Anticipatory Bail, mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. It was also observed by the Commission that with the accentuation of political rivalry, this tendency was showing signs and steady increase and further that where there are reasonable grounds for holding that the person accused of an offence is not likely to abscond or otherwise misuse his liberty, while on bail, there seems no justification to require him to submit to custody, remain in prison for some days and then apply for bail. On the basis of these recommendations, provision of Section 438 Cr.P.C. was included in Cr.P.C. as an antidote for preventing arrest and detention in false case. Therefore,

interpretation of Section 438 Cr.P.C., in larger public interest, has been done by the Courts by reading it with Article 21 of the Constitution of India to keep arbitrary and unreasonable limitations on personal liberty at bay. The essence of mandate of Article 21 of the Constitution of India is the basic concept of Section 438 Cr.P.C.

25. Section 438 Cr.P.C. empowers the Court either to reject the application forthwith or issue an interim order for grant of Anticipatory Bail, at the first instance, after taking into consideration, inter alia, the factors stated in sub-section (1) of Section 438 Cr.P.C. and in case of issuance of an interim order for grant of Anticipatory Bail the application shall be finally heard by the Court after giving reasonable opportunity of being heard to the Police/ Prosecution. Section 438 Cr.P.C. prescribes certain factors which are to be considered at the time of passing interim order for grant of Anticipatory Bail amongst others, but no such factors have been prescribed for taking into consideration at the time of final hearing of the case. Undoubtedly, those factors which are necessary to be considered at the time of granting interim bail are also relevant for considering the bail application at final stage.

26. A balance has to be maintained between the right of personal liberty and the right of Investigating Agency to investigate and to arrest an offender for the purpose of investigation, keeping view various parameters as elucidated by the court in ***Gurbaksh Singh Sibbia v. State of Punjab,*** **(1980) 2 SCC 565** and ***Sushila Aggarwal & others v. State (NCT of Delhi) & another,*** **(2018) 7 SCC 731** cases and also in other pronouncements referred by learned counsel for CBI.

27. The Legislature, in order to protect right of the Investigating Agency and to avoid interference of the Court at the stage of investigation, has deliberately provided under Section 438 Cr.P.C. that High Court and the Court of Session are empowered to issue direction that in the event of arrest, an offender or a suspect shall be released on bail. The Court has no power to

issue direction to the Investigating Agency not to arrest an offender. A direction under Section 438 Cr.P.C. is issued by the Court, in anticipation of arrest, to release the offender after such arrest. It is an extraordinary provision empowering the Court to issue direction to protect an offender from detection. Therefore, this power should be exercised by the Court wherever necessary and not for those who are not entitled for such intervention of the Court at the stage of investigation, for nature and gravity of accusation, their antecedents or their conduct disentitling them from favour of Court for such protection.

28. Where right to investigate, and to arrest and detain an accused during investigation, is provided under Cr.P.C., there are provisions of Articles 21 and 22 of the Constitution of India, guaranteeing protection of life and personal liberty as well as against arrest and detention in certain cases. It is well settled that interference by the Court at the investigation stage, in normal course, is not warranted. However, as discussed supra, Section 438 Cr.P.C. is an exception to general principle and at the time of exercising power under Section 438 Cr.P.C., balance between right of Investigating Agency and life and liberty of a person has to be maintained by the Courts, in the light of Fundamental Rights guaranteed under Articles 21 and 22 of the Constitution of India, but also keeping in mind interference by the Court directing the Investigating Officer not to arrest an accused amounts to interference in the investigation.

29. Though bail is rule and jail is exception. However, at the same time, it is also true that even in absence of necessity of custodial interrogation also, an accused may not be entitled for anticipatory bail in all eventualities. Based on other relevant factors, parameters and principles enumerated and propounded by Courts in various pronouncements, some of which have also been referred by learned counsel for CBI, anticipatory bail may be denied to an

accused. Requirement of custodial interrogation is not only reason for rejecting bail application under Section 438 Cr.P.C.

30. Nature and gravity of offence, extent of involvement of petitioners, manner of commission of offence, antecedents of petitioners, possibility of petitioners fleeing from justice and impact of granting or rejecting the bail on society as well as petitioner, are also amongst those several relevant factors which may compel the Court to reject or accept the bail application under Section 438 Cr.P.C. It is not possible to visualize all factors and enlist them as every case is to be decided in its peculiar facts and circumstances.

31. In present case, Officer present in Court had submitted that records from three Banks have been taken into possession during investigation and petitioner has been interrogated and statements of witnesses, including statement of the petitioner, recorded during investigation, have also been produced in the Court.

32. It is also a fact, noticed during hearing of the petition, that there are other several accounts of students, which were not opened by the petitioner but through/by other Officer(s) but none of them have been treated as accused and only petitioner has been implicated as an accused. It is yet to be assessed as to whether petitioner is an accused or an easy prey of conspirators for having acquaintance with them or otherwise.

33. Petitioner is serving as a Senior Manager in the Bank and there is no possibility of his fleeing from justice. It is also stated, which is not disputed, that after 3rd March, 2021, petitioner was never called for interrogation and, therefore, has not been associated in investigation thereafter. Statements of witnesses belonging to the Banks have been recorded and relevant documents have been taken in custody by the Investigating Agency and there is nothing on record so as to construe that custodial interrogation of petitioner is required at this stage.

34. It is canvassed on behalf of the petitioner that co-accused, main conspirator in the case, Babita Rajta has been enlarged on bail by a Co-ordinate Bench of this Court, vide order dated 26.3.2021, passed in Cr.M.P.(M) No.369 of 2021 and, therefore, right of petitioner for enlarging him on bail, on the ground of parity, has also been pressed. Co accused, may be main accused, Babita Rajta has been enlarged on bail in a petition filed under Section 439 Cr.P.C. as she was in judicial custody. There may not be any relation with the parameters taken into consideration for granting bail under Section 439 Cr.P.C. with the parameters relevant for considering bail application under Section 438 Cr.P.C. There may be common factors but the factors are always not the same. However, in absence of established necessity of custodial interrogation, it may be relevant to some extent sometimes but not always.

35. Considering the cumulative effect of entire circumstances of present case and relevant factors and parameters, referred supra, I find that balance of convenience lies in favour of granting bail to the petitioner.

36. Accordingly, the petitioner is ordered to be enlarged on bail, on his furnishing personal bond in the sum of `2,00,000/- (rupees two lakhs) with two sureties, each in the sum of `1,00,000/- (rupees one lakh) to the satisfaction of the trial Court/Special Judge, within two weeks from today, subject to the following conditions and upon such further conditions as may be deemed fit and proper by the trial Court/Special Judge:

(i) That the petitioner shall make himself available to the police or any other Investigating Agency or Court in the present case as and when required.

(ii) That the petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to Court or to nay police office or tamper with the evidence. He shall not, in any

manner, try to overawe or influence or intimidate the prosecution witnesses.

(iii) That the petitioner shall not obstruct the smooth progress of the investigation/trial.

(iv) That the petitioner shall not commit the offence similar to the offence to which he is accused or suspected.

(v) That the petitioner shall not misuse his liberty in any manner.

(vi) That the petitioner shall not jump over the bail.

(vii) That in case petitioner indulges in repetition of similar offence(s) then, his bail shall be liable to be cancelled on taking appropriate steps by prosecution.

(viii) That the petitioner shall not leave the territory of India without prior permission.

(ix) That the petitioner shall inform the Police/ Court his contact number and shall keep on informing about change in address and contact number, if any, in future.

37. It will be open to the prosecution to apply for imposing and/or to the trial Court to impose any other condition on the petitioner as deemed necessary in the facts and circumstances of the case in the interest of justice and, thereupon, it will also be open to the trial Court to impose any other or further condition on the petitioner as it may deem necessary in the interest of justice.

38. In case the petitioner violates any condition imposed upon him, his bail shall be liable to the cancelled. In such eventuality, prosecution may

approach the competent Court of law for cancellation of bail, in accordance with law.

39. Trial Court/Special Judge is directed to comply with the directions issued by the High Court, vide communication No.HHC.VIG./Misc.Insutructions/93-IV.7139, dated 18.3.2013.

40. Observations made in this petition hereinbefore, shall not affect merits of the case in any manner and are strictly confined for the disposal of the present bail application.

41. Petition is disposed of in the aforesaid terms.

42. Copy dasti.

Petitioner is permitted to produce a copy of this judgment, downloaded from the web-page of the High Court of Himachal Pradesh, before the authorities concerned, and the said authorities shall not insist for production of a certified copy.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Rajesh Kumar Petitioner.

Versus

State of H.P and others Respondents.

CWPOA No. 175 of 2019
Reserved on: 9.3.2021
Decided on : 10.03.2021

The petition for writ of mandamus for quashing selection and appointment of respondent No.3 as computer operator development block Nankhari. Selection Committee awarded 15 marks on the parameter of experience. The validity of awarding marks by selection committee is contended fallacious- Held- the experience certificate possessed by co-respondents No.3 is not issued in consonance with norms and awarding of 15 marks by selection committee is annulled- Respondent concerned is directed to thereafter prepare and redraw seniority list and to consider the allotment of marks to petitioner under head BPL norm.

For the petitioner: Mr. P.P Chauhan, Advocate.

For the respondents: Mr. Ashwani Sharma, Mr. Narender Guleria, and Mr. Hemant Vaid, Addl. A.Gs with Mr. Vikrant Chandel, Dy.A.G for respondents No. 2.

Mr. M.L Sharma, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The writ petitioner claims, the, making, of, a mandamus upon the respondents, for quashing the selection, and, consequent therewith appointment, of, co-respondent No.3, as, Computer Operator, Development Block, Nankhari, District Shimla, Himachal Pradesh.

2. The gravamen of the afore striving, becomes embedded, in the selection committee, proceeding to, on, the parameter of experience, hence award 15 marks to co-respondent No.3. The apposite abstract of the score-sheet making the afore reflections is appended with the instant writ petition, as, Annexure P-11. The validity of awarding of marks qua therewith, by the selection committee, is contended to be fallacious, as co-respondent No.3 did not, in tandem with the maximum, of, 15 marks allocable, to her, under the parameter of experience, render or perform duties hence relevant to the advertised posts, in any Panchayati Raj institution/ Government Office/undertaking/institution/agency.

3. The afore made contention, does acquire merit, as, the performance(s) by the aspirants concerned, of duties in, the, capacity of computer operator, prior to the apposite selection and consequent therewith appointment being made, enjoined imperative performance(s) thereof, in any Panchayati Raj institution/ Government

Office/undertaking/institution/agency, (i) and, obviously the experience certificate possessed by co-respondent No.3, and, as becomes embodied in Annexure P-12, is not issued, in consonance with the afore stated apposite therewith norm(s), encapsulated in norms, embodied in Annexure P-10. The sequel thereof is that the claim made in the writ petition becomes amenable for acceptance, and, the awarding of 15 marks, by the selection committee concerned, of the respondents, under, the norm "experience", is, annulled.

4. Be that as it may, since it is averred, on affidavit, by co-respondent No.3, that, in the relevant year, in as much as 2008, and, whereat the relevant recruitment hence began, rather thereat (s) with the petitioner rendering work, as, a computer Teacher in Government School, Nankhari, District Shimla, H.P, and, his drawing per mensem salary of Rs.2760/-, thereupon, the awarding of 5 marks, to him, under BPL norm, hence by the selection committee, as unfolded by score sheet, Annexure P-11, becomes also construable to be legally fallible, unless it, is demonstrated by cogent evidence, that despite, drawing(s) of the afore per mensem salary by the petitioner, in the year 2008, whereat, the, recruitment process began, he under, the rules appertaining to the issuance of BPL certificate, did not, qualify to fall within the realm of BPL category.

5. In summa, the allotment of 15 marks to co-respondent No.3 under the parameter of experience, is, annulled and set aside, and, with the aforemade observations, vis-a-vis, the allotment of marks to the petitioner, under, the head "BPL norm", be also reconsidered, and, the respondent concerned is directed to thereafter prepare and redraw, the, Seniority list, appertaining to the selection and consequent therewith appointment, as, made to the advertised post of Computer Operator(s).

In view of the above, the present petition stands disposed of alongwith all pending applications.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Gagan Singh (since deceased) through his LRs & others….

.....Appellants.

Versus

Birbal Singh and others ..... Respondents.

Review Petition No. 129 of 2019 in
RSA No. 405 of 2004 alongwith
cross objections No. 499 of 2004
Decided on : 9.3.2021

During Pendency of RSA- Co-appellant Kishni Devi died on 29.11.2017- delay in moving application for substitution of LRs of deceased condoned and abatement set aside.

The plaintiffs had filed suit for setting aside mutation attested on 24.10.1979 and for declaration that plaintiffs are owner in possession of suit land- Suit partly decreed. The plaintiffs were declared owner in possession of old khasra no. 185 and 307 and further defendants were directed to deliver possession of khasra no. 307 to plaintiffs –both plaintiffs and defendants filed appeals - the appeal of plaintiffs was partly allowed and cross appeal of defendants was dismissed- trial court verdict was modified-plaintiffs were declared owner in possession of old khasra no. 185,307 and 273-entry showing the name of defendants was declared null and void - defendants are restrained from interfering in possession of plaintiffs over suit land –hence R S A- HELD – the land measuring 11 kanals 1 marla was owned and possessed by Kirpa Ram ,the grandfather of plaintiffs and father of defendant no. 1- Kirpa Ram made a will whereby he constituted plaintiffs as his legatees vis –a vis property occurring below the road and also constituted the defendant no.1 as his legatee vis-a vis his estate occurring above the road- plaintiffs laid a claim to old khasra nos.273,310 and 317 on anvil of their occurring below gair mumkin sadak- the road dividing the property of parties passes through khasra no. 272- as per record, the claim of plaintiffs is in consonance with the testamentary disposition and entitled to claimed relief- claim of defendant no.1 vis- a-vis holding their right vis-a vis khasra no.273 was rejected Appeal dismissed.

For the appellants: Mr. Surinder Saklani, Advocate.

For the respondents: Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (oral)

Review Petition No. 129 of 2019 & CMP(M) No. 105 of 2021

During the pendency of RSA No. 405 of 2004, before this Court, co-appellant No.1 (a) Kishni Devi, died on 29.11.2017. Though, some delay has occurred in the institution of the application at hand, however, given the good and sufficient cause made out in the application aforesaid, for, hence condoning the delay in, the, moving of the application before this Court, for begetting substitution of deceased co-appellant No. 1(a) by her LRs, hence the delay, if any, as stands occurred, stands condoned. Abatement, if any, stands set aside. Since the substitution of deceased co-appellant No.1 (a) by her LRs is imperative for a continuation of the lis, hence the application is allowed. Consequently, the LRs of deceased co-appellant No.1 (a) enumerated in paragraph 5 of the application, contents whereof stand supported by an affidavit are permitted to be substituted in her place. Application stands disposed of. Amended memo of parties be filed within one week. No notice need be issued to the newly impleaded LRs of deceased co-appellant No.1 (a), as, they stand represented by Mr. Surinder Saklani, Advocate. Requisite corrections be carried out by the Registry of this Court. Review petition is allowed, and, the judgment strived to be reviewed is nonest, for, the apposite non-substitution of the apposite deceased litigant by her apposite LRs during pendency, of, RSA No. 405 of 2004 a/w cross objections No. 499 of 2004.

RSA No. 405 of 2004 alongwith
Cross objections No. 499 of 2004.

The plaintiffs' suit bearing No. 91/87, preferred before the learned Sub Judge, Ist Class, Court No. II, Una, District Una, H.P., for, rendition of a decree, for, setting aside mutation attested, on, 24.10.1979, and, for rendition, of, a declaratory decree, vis-a-vis, theirs being declared owners in possession, vis-a-vis, the suit land, stood partly decreed, and, partly dismissed, in as much, as, the plaintiffs were declared, as, owners in possession of the old khasra No. 185 corresponding, to, new khasra Nos.412, 413, 416 and 417, and, were also declared to be owners of old khasra No. 307, corresponding to new khasra Nos.568, 569, 570, 571, 608, 609, 610, 616 and 618, situated in village Lakhroon, Tappa Muchhali, Tehsil Bangana, District Una, and, thereafter, the defendants were also directed, to, handover, the, vacant possession of old khasra No. 307, to, the plaintiffs.

2. The plaintiffs being aggrieved therefrom instituted, a, Civil appeal No. 39 of 2002, and, defendants also being aggrieved therefrom hence instituted a Civil appeal No. 41 of 2002, before the learned District Judge, Una, H.P., and, both the afore appeals were decided, under, a common verdict, being recorded thereon, on, 9.6.2004, (i) wherethrough, the plaintiffs' appeal, was partly allowed, and, defendants' cross appeal, stood dismissed, and, the verdict recorded by the learned trial Court was modified, in as much, as, (ii) the plaintiffs become declared to be owners, in possession, of, land comprised in old khasra No. 185 (new khasra No. 412,413,416 and 417), old khasra No. 307 (new khasra No. 568, 569,570,571,608,609,610,616,617 and 618, and, old khasra No. 273 (new khasra No. 601,603,647,655 and 656 situated in village Lakhroon, Tapa Muchhali, Tehsil Bangana, District Una, H.P., (iii) and, the entry to the contrary, showing the name, of, defendant, upon, the aforementioned suit land, stood declared, to be null and void, and, the

defendants, are, further restrained, from, interfering in any manner, over, the possession of the plaintiffs, qua, the suit land.

3. The brief facts of the case are that the plaintiffs filed a suit for declaration to the effect that they are owners in possession of the land comprised in Khewat No. 29, Khatauni No. 31, Khasra Nos. 185 and 307 and half share in Khewat No. 61 min, Khatauni No. 191, khasra Nos. 273, 310 and 317 as per jamabandi for the year 1981-82 situated in village Lakhroon, Tappa Muchhali, Tehsil Bangana, District Una, (for short "the suit land"). On the basis of registered will of 20.3.1979 executed by Kirpa Ram, grand-father of the plaintiffs and defendant No.1 and the consequential mutation No. 436 of 20.10.1979 in favour of defendant No.1 in respect of suit land is void. In effective, with a permanent injunction restraining the defendants from interfering in any manner over the suit land. According to the plaintiffs, the suit land mearing 11 kanal 1 marlas was owned and possessed by Kirpa Ram, grandfather of the plaintiffs and father of defendant No.1 and said Kirpa Ram died in village Hatli on 27.4.1979. Sh. Kirpa Ram, during his life time on 20.3.1979 executed a will in favour of the plaintiffs and defendant No.1. Jaswant Singh and Dhyan Singh and on the basis of the said will Kirpa Ram bequeathed his lands and house situated in village Lakhroonbelow the "Sarak se Nichli" i.e. below the road of the plaintiffs whereas defendant No.1 was given land and houses above the road i.e. sarak se upparli. The other sons of Kirpa Ram, namely Jaswant Singh and Dhyan Singh were given land in village Hatli Patialian. The road dividing the property of the parties passes through khasra No. 272 and suit land is located, thus below the road. The defendant No.1 being an influential person, behind the back of the plaintiffs got attested mutation No. 436 dated 24.10.1979 wrongly in his favour whereas the land below the road has been bequeathed to the plaintiffs. Mutation No. 436 is wrong illegal and void. Emboldened by the wrong entries the defendant No.1 sold land measuring 3 kanal 6 marlas being half share out of the land

measuring 6 kanal 12 marlas comprised in khasra No. 307 to defendants No. 2 to 4 vide sale deed of 21.1.1987. The said sale deed is a fictitious document and does not confer any title. Now the defendants No.1 to 4 are hurling threats of interference in the possession of the plaintiffs for the last one month. The defendants were asked to admit the claim of the plaintiff and to desist from interfering in their possession of the suit land but they declined to do so. Hence the suit.

4. The suit was resisted and contested by the defendants and defendant No.1 filed separate written-statement taking preliminary objections inter-alia the suit being bad for non-joinder of necessary parties, the suit being time barred, estoppel, maintainability etc. Defendant No.1 admitted the factum of will dated 20.3.1979 but denied the plea taken by the plaintiffs regarding bequeathing of the suit property in their favour. The testator Kirpa Ram had bequeathed to the plaintiffs house property know as Rakkar Johr Wali over which the plaintiffs are in possession. The mutation has been sanctioned in favour of defendant No.1 in accordance with law and later on defendant No.1 has sold khasra No. 307 to defendants No. 2 to 4 through registered sale deed for valuable consideration. Defendants No.2 to 4 are bonafide purchaser for valuable consideration without notice after thorough enquiry on the basis of mutation and entry in the revenue record, as such are entitled to remain possession, as, owners. The defendants denied other averments made in the plaint. Defendants No. 2 to 4 did not file any written-statement, and, were declared to be proceeded against ex-parte in the trial Court order of 20.6.1987.

5. In the replication, the plaintiffs have reiterated, and, reasserted the contents, as, enumerated in the plaint, and, have controverted, the, contention(s) raised, in, the written-statement(s).

6. From the pleadings of the parties, the, following issues were framed by the learned trial Court:-

1. Whether the impugned mutation is not in accordance with will dated 20.3.1979? OPP
2. Whether the plaintiffs are owners in possession of the suit land? OPP
3. If issue No.2 is proved, whether the defendants No. 2 to 4 are bonafide purchaser for value of the land purchased by them? OPD
4. Whether the plaintiffs have no locus standi to sue? OPD
5. Whether the suit is bad for non-joinder of necessary parties? OPD

5-A Whether the suit is within limitation period? OPP

5-B Whether the suit is property value for the purpose of Court fee and jurisdiction? OPP

5-C Whether the plaintiff is estoped by his own act and conduct to file the suit? OPD

5-D Whether the suit is not maintainable? OPD

6. Relief.

7. On an appraisal of evidence, adduced, before, the learned trial Court, the learned trial Court, partly decreed and partly dismissed the plaintiffs' suit. In an appeal, preferred therefrom, by the aggrieved, before the learned First Appellate Court, the latter Court, while accepting the plaintiffs' appeal, and, while dismissing the cross appeal preferred, by the defendants, hence modified the judgment, and, decree, of, the trial Court.

8. The defendant No.1, being aggrieved therefrom hence, instituted the instant RSA before this Court, and, the plaintiff No.1, being aggrieved therefrom, also therewithin instituted, Cross objections No. 499 of 2004, before this Court.

9. When the appeal came, up for, admission, on 17.5.2005, this Court, admitted the appeal, on, the hereinafter extracted substantial questions of law:-

1. Whether the decree for possession in respect of the land in question could have been granted in favour of the respondents in view of their specific pleading that this land was in joint ownership and possession of the appellants-defendants and respondents/plaintiffs?
2. Whether the findings of the Courts below that the parties were not in separate ownership and possession of the land inherited by them under the Will of Kirpa ram are dehors the evidence on record?

Substantial questions of law

10. The predecessor-in-interest of the contesting litigants, made a will embodied in Ex. PW-2/A, wherethrough, he made a bequest, and, wherethrough, he constituted, the, plaintiffs, as, his legatees, vis-a-vis, the apposite property occurring below the road, and, also therethrough, he, constituted, the, defendant No.1, as, his legatees, vis-a-vis, his estate, hence occurring above the road.

11. Consequently, the entire lis is rested, upon, the occurrence(s), in, the revenue records, and, appertaining to estate, of, the deceased testator hence bearing conformity therewith, and, therefrom it is to be obviously fathomed, vis-a-vis, the reflected therein lands occurring above the road, or, below the road, (a) for, thereafter making hence determination(s), vis-a-vis, the defendant No.1, or, the plaintiffs, holding the apt empowerment, to, claim a valid right, of, theirs, hence becoming owners in possession thereof, and, also thereafter, for, determining whether the apposite mutation attested, on, 24.10.1979, becoming validly attested.

12. For resting the afore conundrum hence besetting this Court, an allusion is to be made, vis-a-vis, an affirmative, and, conclusive order being made, upon, an application, cast under the provisions of Order 41 Rule 27, readwith Section 151 CPC, application whereof, stood instituted, before the learned first appellate Court, during, the pendency, of, the afore-stated Civil Appeals, (a) and, therein reflections are cast vis-a-vis khasra No. 411,426,

428, 424, 425, 69, 447, 652, 661, 657 and 658 standing reflected, as, "Gair Mumkin Sadak" (b) and the afore reflections, are, in concurrence with the therealongwith appended jamabandi Ex. PC, and, appertaining to the year 1996-97, (c) and, also wherealongwith jamabandi bearing Ex. P-14, stood appended, and, it makes reflections, vis-a-vis, old khasra No. 273, the corresponding thereto new assigned khasra numbers, being 601, 603, 647, 655, 654, and, besides thereto, the, afore jamabandi also denotes, vis-a-vis, old Khasra No. 310, the, newly assigned thereto khasra numbers being 583, 589, 591, 592, (d) and, vis-a-vis, old khasra no. 317, the newly assigned thereto khasra numbers being 564 and 565. Conspicuously, the plaintiffs, had laid a claim, to, old khasra No. 273, 310, 317, on, anvil of theirs' occurring below, the "Gair Mumkin Sadak", and, hence with theirs being constituted legatees qua therewith, hence, the order of mutation, being enjoined, to be corrected. Meeting(s), of, credence thereto, for the relevant purpose, is, befitting, as, the reflections, cast therein, are not rebutted through adduction of potent evidence.

13. However, the plaintiffs also apart therefrom, laid a claim qua khasra No. 273 and 310, on, anvil of the afore khasra numbers, rather falling below the road, and, hence theirs being legatees thereof, and, also theirs holding, a, valid title thereof hence as owners, in, possession.

14. Nonetheless, the afore made espousal of the plaintiffs is amenable for rejection, (i) as, a perusal of copy of Shajra Ex. P-12, and, also a perusal of copy of Aks Musavi, embodied in Ex. P-19, does not bear out, the, espousal of the plaintiffs, vis-a-vis, from old khasra No. 317, hence new khasra Nos. 564, and, Khasra No. 565 being carved, (ii) as reiteratedly theirs' qua therewith claim would be construed, to be validly made, upon, the afore new khasra Nos. 564 and 565, being precisely, depicted in Sajra Ex. P-12, to be falling below the "Gair Mumkin Sadak", and, whereas the afore depiction is grossly amiss therein, (iii) besides further thereonwards, the, further claim of

the plaintiffs, vis-a-vis, old khasra No. 310, whereto hence, the newly assigned khasra Nos. 583, 589,591,592, is, also an invalid claim, and, warrants its rejections, as, Ex. P-12, does not, make, any, disclosure, vis-a-vis, the afore khasra numbers falling, below the road, (iv) and, yet, the, further espousal of the plaintiff, vis-a-vis, khasra Nos. 601, 603, 647, 655 and 654, being the newly assigned khasra numbers qua old khasra number No. 273, is however accepted, as, a perusal of Ex. P-12, rather makes vivid echoings, vis-a-vis, the afore khasra numbers, falling below, the road, and wherethrough, hence the plaintiffs, would, in concurrence with the testamentary disposition, be entitled to claim a relief, vis-a-vis, theirs being validly constituted legatees qua therewith. The afore reflections in the afore exhibit enjoy an aura, of, solemnity given no potent evidence, for, denuding, the reflections carried therein becoming adduced.

15. Consequently the claim of the defendants, vis-a-vis, their holding right of ownership, vis-a-vis, old khasra No. 273 does concomitantly, hence warrant rejection.

16. The upshot of the above discussion is that, the present appeal is dismissed, and, the impugned verdict, is, maintained, and, affirmed, and, consequently, the instant RSA, and, also, the, cross objections are dismissed. Substantial questions of law are answered accordingly. All pending applications stand disposed of accordingly. Records be sent back.

No costs.

BEFORE HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Kishan Ram .....Appellant.

Versus

Sh.Diloo Ram and others ..... Respondents.

RSA No. 6 of 2006
Reserved on: 9.3.2021.

Decided on : 10.3.2021

The appellant and deceased respondent No.2 Durgi Devi (plaintiffs) filed a suit for annulling the registered testamentary disposition of deceased Bhadru whereby he bequeathed his estate vis-a-vis the defendant – Suit was dismissed by Civil Judge- Appeal filed before Ld. District Judge by plaintiff also dismissed – The plaintiff filed present RSA- Held- The defendant, pro pounder of will, for discharging onus as cast upon him, examined Mohan Ram (Dw1) only one of attesting witness who was alive. DW made compliance of statutory Dictate in examination in chief- even if the minimal contradiction does exist inter se examination-in-chief and cross-examination as he admitted that testament was written earlier and he was made to sign thereafter he also feigned ignorance of identity of thumb impression existing in red circle Ex DW1/A but effect is not that he had denied the authorship of Ex DW1/A by deceased testator as he has denied the suggestion put to him that Ex DW1/A was not executed by deceased Bhdru moreover Ex DW1/A is a registered document thus it is concluded that Ex DW1/A is legally and validly executed. Appeal dismissed.

For the appellant: Mr. R.K Gautam, Sr. Advocate with Ms. Megha Kapoor Gautam, Advocate.

For the respondents: Mr. Sanjay Sharma, Advocate, for respondent No.1.

Ms. Komal Chaudhary, Advocate, for respondent No.2 (b).

Respondents No.2 (a) and 2 (c) deleted.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The appellant and deceased respondent No.2 Durgi Devi (for short Plaintiffs), instituted a suit, seeking therethrough, a, declaration for annulling, the, registered testamentary disposition of deceased testator Bhadru, and, as embodied in Ex. DW-1/A, and, wherethrough he bequeathed

his estate, vis-a-vis, the defendant/respondent No.1 herein (for short "the defendant'), suit whereof became dismissed by the learned Civil Judge (Sr. Division), Kullu, District Kullu, H.P, through, a, verdict made thereon on 20.6.2005, and, also the further decree, of, injunction became declined to them.

2. The aggrieved therefrom plaintiffs, cast a challenge thereagainst, by preferring Civil appeal No. 53/05, before the learned District Judge, Kullu, District Kullu, H.P, and, thereon(s), a, verdict affirming and maintaining the afore made verdict by the learned Civil Judge, upon, Civil Suit No. 123 of 2002, became rendered.

3. The aggrieved therefrom plaintiffs,constituted there-against the instant Regular second appeal before this Court. When the instant appeal came up for admission before this Court, on 2.3.2006, it came to be admitted on the hereinafter extracted substantial questions of law:-

> *"Whether the findings of the learned Courts below are against the provisions of Section 63 of the Indian Succession Act read with Section 3 of the Transfer of the Property Act and Section 68 of the Evidence Act?"*

4. Uncontrovertedly in contemporaneity, vis-a-vis, adduction of evidence, appertaining to the issue, of, valid execution of, testamentary disposition Ex. DW-1/A by the deceased testator Bhadru, and, whereon(s) the discharging evidence, became enjoined to be adduced by the defendant, only one of the attesting witness thereto, namely one Mohnu Ram (DW-1) was alive. Consequently, the defendant, the propounder of Ex. DW-1/A, for discharging the afore onus, as, become cast upon him, led him to the witness box. The afore made dependence by the pronounder of Ex. DW-1/A, upon, the sole testimony, of, one of the attesting witness thereto, cannot be construed, to be,

legally fallible, as, (i) the mandate borne in Section 68 of the Indian Evidence Act, mandate whereof becomes extracted hereinafter, (ii) permits adduction of proof of execution, of, a testamentary disposition, by its author, through rather not both the apposite attesting witnesses thereto, being led into the witness box, rather reiteratedly permits discharge, of, apposite onus as becomes cast, upon, the propounder hence only upon one of them, if alive, becoming led into the witness box.

> *"68* ***Proof of execution of document required by law to be attested****-If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence: [Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908) unless its execution by the person by which it purports to have been executed is specifically denied.]"*

Consequently, the deposition of DW-1 one Mohnu Ram, an attesting witness to Ex. DW-1/A, was sufficient, subject to his testimony withstanding the mandate of Section 63, of, the Indian Succession Act, provisions whereof stand extracted hereinafter, or hence was sufficient to sway this Court, to strike an inference qua the apposite onus vis-a-vis valid and due execution of Ex. DW-1/A, becoming therethrough(s) fully discharged, hence by the propounder thereof. Necessarily hence, in tandem therewith one Mohnu Ram was, enjoined to testify that the deceased testator, had in his presence scribed his thumb impression(s) thereon, and further that he too likewise, in presence of the deceased testator, had put his thumb impression thereon. However, the contemporaneous presence of both the attesting witnesses to Ex, DW-1/A, at the stage of its execution by the deceased testator, is, not required.

Consequently, any lack of recollection(s) by Mr. Mohnu Ram vis-a-vis the name of the other attesting witness to Ex DW-1/A, cannot coax, any conclusion from this Court, that hence Ex. DW-1/A being construable to be not validly and duly executed, as, the contemporaneous presence(s) of both rather at the stage of its execution, as afore-stated, is, not statutorily required.

> "63. **Execution of unprivileged Wills –** Every testator, not being a soldier employed in an expedition or engaged in actual warfare [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:-
> (a)The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.
> (b)The Signature or mark of the testator, or the signature of the person signing fro him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.
> (c)The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has been some other person sign the Will, in the presence and by the directionof the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular from of attestation shall be necessary."

5. Be that as it may, yet an imperative dictate became cast upon Mohnu Ram, to, make a testification, that he had seen, the deceased testator to make his thumb impression on Ex. DW-1/A, and, also to thereafter state that he too, in the presence, of the deceased testator, had made his thumb impression(s), upon, Ex. DW-1/A. A reading of his examination-in-chief unfolds that he has made compliance, with, the afore statutory dictate, as, cast upon him. However, in his cross-examination, he has admitted that

Ex.DW-1/A rather was written earlier thereto, and that thereafter he was made to sign the same. Even though, in his cross-examination, he feigned ignorance about the identity of the thumb impression(s) existing in red circle, on, Ex. DW-1/A, yet the effect thereof is qua it, not leading to an inference, that he hence has denied, the, authorship of Ex. DW-1/A by the deceased testator, as he has denied, a suggestion, as, became put to him, that Ex. DW-1/A, was not executed, by the deceased Bhadru.

6. Even if the afore minimal contradiction, does exist, inter-se, the, examination-in-chief, and, the cross-examination of Mohnu Ram, however all effects thereof, becomes completely eroded, from, Ex. DW-1/A being a registered instrument, and, thereon(s) hence existing, the sealed and signatured endorsement(s) of the Registering officer concerned, and, theirs making exemplification(s) that the contents of Ex. DW-1/A being read-over and explained, to the deceased testator and (i) whereafter it becoming accepted for registration besides (ii) with the unchallenged existence(s) thereon(s), of, the thumb impression of the deceased testator further constrains this Court, to, infer that hence the afore endorsement, as, made by the Registering Officer hence becoming sequelled, only after his explaining, the, contents of Ex. DW-1/A, to the deceased testator, and, also his ensuring qua theirs becoming fully comprehended by the latter (iii) whereupon it acquires the utmost tenacious probative sanctity, as, its making remains un-challanged, (iv) thereupon, Ex. DW-1/A, is, unflinchingly concludable, to, be validly and duly executed by the deceased testator. Moreover, since, Mohnu Ram, has also put his un-challanged thumb impression thereon, rather as an identifier, of, the deceased testator, and, with no cross-examination, becoming meted to him, for seeking therethrough(s) elicitation(s) in denial, of, the afore existence(s) thereon, of, the thumb impression of the deceased testator Bhadru, and, also of his thumb impression thereon, thereupon, this Court becomes coaxed to conclude that Ex. DW-1/A becomes proven to be validly and duly executed, and, also hence

its execution, being made by the deceased testator, upon, his holding the apposite compos mentis.

In view of the above, the instant appeal is dismissed, and, the impugned verdict is maintained and affirmed. Substantial question of law answered accordingly.

No costs.

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

Mohammad Nazim ...Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

Cr.M.P.(M) No.620 of 2021
Reserved on: 05.04.2021
Date of Decision: April 6, 2021

Petition under section 438 Cr.P.C - Anticipatory bail- Petitioner apprehending his arrest in case FIR No 34/2021 u/s 363, 366-A, 370 (4) 506, 120-B IPC- Victim aged 15 years, in class 9th, did not return in the evening after school – Father approached the police with suspicion that someone had abducted his daughter after alluring and misleading her- Held- Keeping in view nature, gravity and seriousness of offence- Manner in which girl had been managed to have travelled from Shimla to a remote village of U.P in an organized manner- Custodial interrogation is justified- Petition dismissed.

For the Petitioner: Mr. Rajesh Kumar Parmar, Advocate.

For the Respondent: Mr.Raju Ram Rahi, Deputy Advocate General.

ASI Nasib Singh, I.O. Police Station Sadar, Shimla, present alongwith record.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J (Oral)

Petitioner has approached this Court under Section 438 Criminal Procedure Code (in short Cr.P.C.), seeking anticipatory bail apprehending his arrest in case FIR No.34 of 2021, dated 05.03.2021, registered in Police Station Sadar, Shimla, H.P., under Sections 363, 366A, 370(4), 506 and 120B of the Indian Penal Code (in short 'IPC').

2. Status report stands filed, wherein it is stated that on 05.03.2021 victim, aged about 15 years, who is studying in Class 9th, had left her home at 9.30 a.m. to attend her school i.e. Sanatan Dharam Senior Secondary School, Ganj Bazaar, Shimla, and when she did not return home in the evening, her father, on inquiry, had received information that on that day students were not called in the school. With aforesaid complaint, father of the victim had approached Police Station Sadar, Shimla, with suspicion that someone had abducted her daughter after alluring and misleading her.

3. As per status report, on complaint of father of the victim, case under Section 363 IPC was registered and investigation was started. During investigation, location of mobile number of victim was found in Haryana leading to the clue to the police that victim was travelling towards Delhi. Whereupon, police party was sent to Delhi in search of victim and it was also found that victim was having too many talks on two mobile numbers (96398-21301 and 62382-27896), therefore, CDRs and location of those two numbers were also requisitioned.

4. Investigating Officer, on 06.03.2021, after reaching in Police Station Badarpur, Delhi, started investigation and found that last location of victim, on 05.03.2021 at about 8.19 p.m., was found at Panipat and thereafter her phone was found switched off. From CDRs of two mobile numbers, Investigating Officer had contacted on some mobile numbers, which were found in contact of these two mobile numbers and during this exercise, one

mobile number 95606-42747 was found to be of one Jatin Malik, who in response informed to the Investigating Officer that he is having a Maruti Car bearing registration No.DL9CAP-3819 and on 05.03.2021 he had gone to Ambala from Delhi to drop a passenger and at Ambala a girl had met him, who had disclosed that she was going to Delhi, whereupon, he had been taking that girl to Delhi alongwith him, but near Panipat mobile phone of that girl was switched off and for that reason that girl had contacted someone through his mobile and the person, with whom she had talked, had disclosed his name to him (Jatin) as Zuber and further that Zuber had told him that one boy will send him location from mobile number 96671-56859 and had asked him (Jatin) to drop the victim on that location and thereafter on receiving location of Badarpur, Delhi from the aforesaid number, he had dropped victim at Badarpur NTPC Chowk at about 10.30 p.m. on 05.03.2021, wherefrom a boy had taken her.

5. During investigation, it was revealed that the boy, who had sent the location, was one Ibrahim residing at Badarpur in a room rented in a building known as 'Akash'. During search for Ibrahim, his room was found locked and it came in notice that he was hiding him in some other house in the room of his friend, wherefrom he was taken to Badarpur Police Station and shown to Jatin, and Jatin had identified him the same boy to whom he had handed over the girl on 05.03.2021.

6. During interrogation, Ibrahim had disclosed that on 05.03.2021 he had received calls from Zuber and Nazim @ Sameer (petitioner), boys belonging to his village, who were working with him earlier at Delhi, but presently Zuber was at Chennai, whereas, Nazim @ Sameer was in Kerala. He had further revealed that both of them had informed him that one 'X' named girl would come in some vehicle at Badarpur NTPC Gate and asked him to take her to his quarter and further that on request of these two persons he had taken victim from Badarpur NTPC Gate to his room in 'Akash' building

and had kept her in his room on 05.03.2021 and 06.03.2021 and on 07.03.2021, he had taken victim to Dhakia (village Sahaspur) and as he was in anticipation of his search by police, he was not sleeping in his room but was staying with his friend. Ibrahim had also disclosed that victim, at the time of investigation, was in Dhakia and his elder brother Istiyaak, who is serving at Delhi and living with him in the same room, had also gone to Village Sahaspur (Dhakia) and on his asking he would come to Badarpur alongwith victim. Ibrahim had also disclosed that Nazim @ Sameer was intending to marry victim and Nazim @ Sameer and Zuber had called victim to Delhi, but Zuber was at that time at Chennai and Nazim @ Sameer was in Kerala and, therefore, victim was housed with him.

7. On 08.03.2021 at about 09.30 a.m. Istiyaak brother of Ibrahim and Naasrin (sister of petitioner), on message, had brought victim to Police Station Badarpur, Delhi, who was identified by her father and thereafter victim had identified the places where she was dropped from the car and also the room of Ibrahim.

8. On 10.03.2021, statement of victim was also recorded under Section 164 Cr.P.C. and considering the circumstances revealed during investigation and statement of victim Sections 366A, 370(4), 506 and 120B IPC were also added in the case. As per record age of victim is 14 years 11 months.

9. During investigation in custody, Ibrahim had identified house where he had handed over victim to Naasrin and her husband Ibad. Naasrin and her husband were directed to join investigation in their area's Police Station at Dhidholi. On 13.03,2021 houses of Zuber and Nazim @ Sameer were searched where they were not found at home. In none of these houses any male was found and Mehsar mother of Zuber and Jafree mother of Nazim @ Sameer had also denied any knowledge regarding whereabouts of their respective sons. Naasrin and her husband did not turn up to the Police

Station and on inquiry it was found that they had locked their house and had absconded. Naasrin did not return her home during day and night of 13.03.2021, whereupon Investigating Officer declared that police party is going back to Himachal Pradesh, but, in fact, stayed at a distant place, whereupon, believing that Himachal Police had gone back, Naasrin came back to her house on 14.03.2021 at 9.30 a.m. and on receiving that information, police party reached her home and brought her to Police Station for interrogation and on the same day, at about 2.10 p.m., she was arrested by giving due information to Rahees, Pradhan of Dhakia Panchayat.

10. During investigation, Naasrin had disclosed that Ibrahim had brought the minor victim to her house on 07.03.2021 and on the mobile of Ibrahim, her brother Nazim @ Sameer had also talked with her and her husband, and he and her husband had kept minor in their home on asking of Nazim @ Sameer and despite having knowledge about age of victim, circumstances in which she had reached there and her religion as Hindu, they did not report the matter to the police and when during night they came to know about that staying of victim with them had come in the knowledge of police, Istiyaak brother of Ibrahim had come to their house to take victim to Delhi then, firstly they had resisted, but later on had sent victim to Delhi alongwith Istiyaak. During investigation, Naasrin had expressed her ignorance about mobile number and address of her brother Nazim @ Sameer and also mobile number of her husband and whereabouts of her husband.

11. Learned Deputy Advocate General has stated that after obtaining interim bail petitioner is not cooperating and neither disclosing phone number and mobile phone being used by him nor handing over the mobile phone and sim card to the police, which are necessarily required to be taken in possession for proper investigation and that petitioner is expressing his ignorance about whereabouts of Zuber and Ibad, whereas, all of them were in active contact with each other and Zuber is resident of his village and Ibad is

his real brother-in-law (Jeeja) (husband of Naasrin). It is further stated that Investigating Agency has also come across a piece of evidence which indicates that there was a plan to traffic the victim to Dubai and further that according to CDRs, between the period from 31.12.2020 to 05.03.2021 Nazim @ Sameer was in regular contact with victim and he had talked with her 850 times and on the day of leaving house by victim he was directing, dictating, controlling and monitoring the moment of victim on mobile from Shimla to Delhi with the help of a well connected network of his racket which smacks some big conspiracy amongst accused for trafficking the minor to Dubai after alluring her for marriage by giving false assurances and, therefore, it has been submitted that custodial interrogation of petitioner is warranted.

12. Learned Deputy Advocate General, under instructions, has also submitted that petitioner is a part of racket involved in fishing adolescent girls for throwing them in international flesh trade by trafficking them abroad after alluring them for marriage with emotional and sentimental blackmail under the garb of friendship and fake love affair and, therefore, for revelation and disclosure of actual amplitude and magnitude of such conspiracy, custodial interrogation of petitioner is necessary.

13. Learned Deputy Advocate General has further stated that some of accused are absconding and investigation is at initial stage and non-cooperation of accused persons, including petitioner, is hampering the investigation.

14. Learned counsel for the petitioner has submitted that it is not a case of big conspiracy, but of simple story of love affair where victim herself had left her house and reached Ambala and petitioner had only, in order to ensure her safety, had been making arrangements for her arrival to Delhi in his house and at the time of leaving house by the victim, petitioner was in Kerala and it was not possible for him to kidnap victim or allure her to leave lawful guardianship of her parents. He has further submitted that there is no

overt act on the part of petitioner in leaving of the house by the victim, rather victim had voluntarily left her house and when she reached Ambala, petitioner had only helped her by providing shelter to her and victim was not sexually abused. It is also submitted that there is no past history of petitioner involving in commission of the same nature or any other offence, and Naasrin, sister of petitioner, had been ensuring security of victim and for that reason he was unwilling to send the victim alongwith Istiyaak to Delhi, which indicates bonafide behaviour of petitioner and his relatives, but no conspiracy to traffic the victim for her exploitation.

15. Section 156 Cr.P.C. empowers Police Officer to investigate in cognizable offences without order of the Magistrate and Section 157 prescribes procedure for investigation, which also provides that when an Officer Incharge of a Police Station has reason to suspect the commission of an offence, which he is empowered to investigate under Section 156, he, after sending a report to the Magistrate, shall proceed in person or shall depute one of his subordinate Officers as prescribed in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender.

16. Chapter V of the Cr.P.C. deals with provisions related to arrest of persons, wherein Section 41 also, inter alia, provides that any Police Officer may, without an order from Magistrate, and without a warrant, arrest any person against whom reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment which may be less than seven years or may extend to seven years, subject to condition that he has reason to believe, on the basis of such complaint, information, or suspicion, that such person has committed the said offence and also if the Police Officer is satisfied of either of the conditions provided under Section 41(1)(b)(ii), which also include that if such arrest is necessary “for proper

investigation of the offence". Whereas Section 41(1)(ba) empowers the Police Officer to make such arrest of a person against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years or with death sentence and the Police Officer has reason to believe, on the basis of that information, that such person has committed the said offence, and for commission of such offence no further condition is required to be satisfied by the Police Officer. Therefore, Police Officer/Investigating Officer is empowered to arrest the offender or the suspect for proper investigation of the offence as provided under Section 41 read with Section 157 Cr.P.C.

17. Article 21 of the Constitution of India provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Arrest of an offender during investigation, as discussed supra, is duly prescribed in Cr.P.C.

18. At the same time, Cr.P.C. also contains Chapter XXXIII, providing provision as to bail and bonds, which empowers the Magistrate, Sessions Court and High Court to grant bail to a person arrested by the Police/Investigating Officer in accordance with provisions contained in this Chapter. This Chapter also contains Section 438 empowering the Court to issue directions for grant of bail to a person apprehending his arrest.

19. Section 438 Cr.P.C. empowers the Court either to reject the application forthwith or issue an interim order for grant of Anticipatory Bail, at the first instance, after taking into consideration, inter alia, the factors stated in sub-section (1) of Section 438 Cr.P.C. and in case of issuance of an interim order for grant of Anticipatory Bail the application shall be finally heard by the Court after giving reasonable opportunity of being heard to the Police/ Prosecution. Section 438 Cr.P.C. prescribes certain factors which are to be considered at the time of passing interim order for grant of Anticipatory Bail amongst others, but no such factors have been prescribed for taking into

consideration at the time of final hearing of the case. Undoubtedly, those factors which are necessary to be considered at the time of granting interim bail are also relevant for considering the bail application at final stage.

20. A balance has to be maintained between the right of personal liberty and the right of Investigating Agency to investigate and to arrest an offender for the purpose of investigation.

21. The Legislature, in order to protect right of the Investigating Agency and to avoid interference of the Court at the stage of investigation, has deliberately provided under Section 438 Cr.P.C. that only High Court and the Court of Session are empowered to issue direction that in the event of arrest, an offender or a suspect shall be released on bail. The Court has no power to issue direction to the Investigating Agency not to arrest an offender. A direction under Section 438 Cr.P.C. is issued by the Court, in anticipation of arrest, to release the offender after such arrest. It is an extraordinary provision empowering the Court to issue direction to protect an offender from detection. Therefore, this power should be exercised by the Court wherever necessary and not for those who are not entitled for such intervention of the Court at the stage of investigation, for nature and gravity of accusation, their antecedents or their conduct disentitling them from favour of Court for such protection.

22. Where right to investigate, and to arrest and detain an accused during investigation, is provided under Cr.P.C., there are provisions of Articles 21 and 22 of the Constitution of India, guaranteeing protection of life and personal liberty as well as against arrest and detention in certain cases. It is well settled that interference by the Court at the investigation stage, in normal course, is not warranted. However, as discussed supra, Section 438 Cr.P.C. is an exception to general principle and at the time of exercising power under Section 438 Cr.P.C., balance between right of Investigating Agency and life and liberty of a person has to be maintained by the Courts, in the light of

Fundamental Rights guaranteed under Articles 21 and 22 of the Constitution of India, but also keeping in mind interference by the Court directing the Investigating Officer not to arrest an accused amounts to interference in the investigation.

23. Though bail is rule and jail is exception. However, at the same time, it is also true that even in absence of necessity of custodial interrogation also, an accused may not be entitled for anticipatory bail in all eventualities. Based on other relevant factors, parameters and principles enumerated and propounded by Courts in various pronouncements, some of which have also been referred by learned counsel for CBI, anticipatory bail may be denied to an accused. Requirement of custodial interrogation is not only reason for rejecting bail application under Section 438 Cr.P.C.

24. Nature, gravity and seriousness of offence, extent of involvement of petitioners, manner of commission of offence, antecedents of petitioners, possibility of petitioners fleeing from justice and impact of granting or rejecting the bail on society as well as petitioner, are also amongst those several relevant factors which may compel the Court to reject or accept the bail application under Section 438 Cr.P.C. It is not possible to visualize all factors and enlist them as every case is to be decided in its peculiar facts and circumstances.

25. Considering entire facts and circumstances of the case placed before me and contention of learned Deputy Advocate General as well as learned counsel for the petitioner, and nature, gravity and seriousness of offence for the manner in which girl has been managed to be transported/travelled from Shimla to a remote village of Uttar Pradesh in an organized manner, and also for finding or ruling out possibility of amplitude and magnitude of the conspiracy, I find that prayer for custodial interrogation of the petitioner is justified and thus acceptable. Therefore, petition is

dismissed with direction to the petitioner to surrender before Investigating Officer/police immediately.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J & HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Shailja Choudhary and others ...Petitioners.

Versus

State of H.P. and others ...Respondents.

CWP No. 4756 of 2020
Decided on: 31.03.2021

The writ directing the respondents to remove the anomaly/ disparity in fee structure and to maintain parity- Some NRI quota seats for admission to MBBS remained unfilled- Government took decision that unfilled NRI seats in govt medical college shall be filled as paid seats from Himachali Bonafied Candidates in order of merit drawn by HPU on the basis of NEET-UG- Fee shall be at par with fees of State quota in private medical colleges of the State i.e Rs. 5,50000/- p.a- Held – Hon'ble apex held in case titled as Cochin University of Science and technology vs Thomas P. john (2008)8 SCC 82 educational Institution chalks out its own programme year wise on the basis of projected receipts and expenditure & court need not interfere in this purely administrative matter which is the right of educational institution. NRI students who took admission on certain basic conditions and on a fee structure,can not claim as matter of right reduction in fee to bring them at par with students admitted later in a lower fee structure- In view of above law- Petition- Not maintainable.

Cases referred:

Cochin University of Science and Technology and another vs. Thomas P. John and others 2008) 8 SCC 82;

For the Petitioners: Mr. Vinod Thakur, Advocate.

For the Respondents: Mr. Ajay Vaidya, Senior Additional Advocate General, for respondents No. 1 and 2.

Mr. Neel Kamal Sharma, Advocate, for respondent No.3.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, J.(Oral)

The instant petition has been filed for the grant of following substantive reliefs:

> *"i) That writ in the nature of certiorari may kindly be issued by quashing the office order dated 26.09.2020 (Annexure P-13) and the notification dated 9th August, 2017 (Annexure P-3).*
> *ii) That the writ in the nature of mandamus may kindly be issued by directing the respondents to remove the anomaly/disparity in the fee structures of the petitioners.*
> *Iii) That writ in the nature of mandamus may kindly be issued directing the respondents to maintain the parity in the fees structure and charge the tuition fees as was being charged for the year 2016-17, and is being charged for the year 2018-19 and 2019-20 for the NRI vacant/unfilled seats allotted to state general quota seats."*

2. On 28.06.2017, respondent No.2 invited on-line applications from the eligible and qualified candidates of NEET-UG-2017. On 15.07.2017, merit list was prepared and notified by the Himachal Pradesh University i.e. respondent No.3 and the first counselling was scheduled to commence w.e.f. 18.07.2017 to 26.07.2017. The petitioners were called for counselling on 19.07.2017. After completion of first round of counselling, 20 seats of NRI quota remained unfilled/vacant due to the non-availability of NRI candidates.

3. On 09.08.2017 a notification was issued by respondent No.2 Directorate of Medical Education & Research clearly stating therein that Council had decided to raise the tuition fees at par with the fees prescribed for

the State general quota seat in the private medical college of the State and, accordingly, the fees has been enhanced from Rs.60,000/- to Rs. 5,50,000/-. This notification was assailed by one of the candidate Sunidhi Pathania by filing CWP No. 1840 of 2017. However, the same was dismissed by this Court as being not maintainable on 17.8.2017.

4. Aggrieved by the aforesaid judgment, the said Sunidhi Pathania approached the Hon'ble Supreme Court. The Hon'ble Supreme Court allowed Sunidhi Pathania to continue with the course by paying the fees payable by the general merit candidate. At the same time, one Nidhi Sharma, approached the Hon'ble Supreme Court by filing petition under Article 32 of the Constitution of India. However, the Hon'ble Supreme Court disposed of the said petition by granting liberty to the petitioner to assail the action of the respondents regarding fixation of fees before this Court.

5. For completion of facts, it needs to be stated that a similar petition was filed by one Aakriti Vashishta before the Hon'ble Supreme Court under Article 32 of the Constitution of India, being Writ Petition (Civil) No. 1009/2017. However, the same was dismissed by passing the following order:

> *"We are not inclined to entertain this petition filed under Article 32 of the Constitution of India. The Writ Petition is dismissed."*

6. It is averred that the action of the respondents in fixing exorbitant fees of Rs.5,50,000/- is discriminatory as the respondents themselves for the subsequent years 2018-19 and 2019-20 fixed a fees which is far low I.e.only Rs.60,000/- as compared to the fees levied upon the petitioners, who have been admitted to the course in the year 2017-18.

7. The prospectus of the Himachal Pradesh University, issued by the respondent for admission to MBBS and BDS courses for the Session 2017-18 inter alia provides in Clause 10(ii) of Chapter-III (Distribution of seats and admission criteria) as under:

"10(ii) The vacant/unfilled seats, if any, under NRI Quota will be filled up as per directions of the Government of Himachal Pradesh for which separate notice will be issued in due course of time."

8. Since some of the NRI quota seats for admission to MBBS for the Session 2017-18 remained unfilled, the State Government in its wisdom took a conscious decision in the Cabinet meeting held on 2.8.2017 that the unfilled NRI seats in Government Medical Colleges shall be filled up as paid seats from Himachali Bonafide Candidates in order of merit drawn by the Himachal Pradesh University on the basis of NEET-UG and the fees for all such paid seats shall be at par with the fees for State quota seats in Private Medical College of the State i.e. Rs.5,50,000/- (per student per year).

9. Accordingly, the State Government directed the respondent vide letter dated 9.8.2017 that the unfilled NRI seats in Govt. Medical Colleges shall be filled up as paid seats out of which one paid seat at Nahan and two paid seats at Chamba shall be filled up from Tibetan Refugees on the basis of NEET-UG merit, subject to availability of eligible candidates. All the remaining paid seats (including left out paid seats from Tibetan Refugees) shall be filled up from Himachali Bonafide Candidates in order of merit drawn by H.P. University on the basis of NEET-UG and the fees for all such paid seats shall be at par with the fees for State quota seats in Private Medical College of the State i.e. Rs.5,50,000/- (per student per year).

10. The total number of filled up seats was two, out of twenty-four seats were filled up as said seats in three new Govt. Medical Colleges from General Category and three were filled up from Tibetan Refugees candidates for the academic session 2017-18 from merit rank 418 to 586 as per merit-cum-choice of the candidates. The last cut off merit of General category was exhausted at merit rank of 416. The candidates selected for paid seats were having merit rank 418 to 586. The detail of merit of rank of such candidates is

as 418, 419, 423, 429, 432, 435, 438, 439, 443, 447, 452, 454, 455, 458, 463, 484, 486, 513, 521, 541, 545, 554, 570 and 586.

11. It would be noticed that many of the candidates who were in the merit did not opt for NRI seats due to heavy fee structure.

12. The petitioners admittedly accepted these conditions and knew very well that they are required to pay the fees for the entire course. Therefore, in such circumstances, the moot question arises as to whether the petitioners can maintain the instant petition.

13. A similar issue came up for consideration before three Judge Bench of the Hon'ble Supreme Court in ***Cochin University of Science and Technology and another vs. Thomas P. John and others 2008) 8 SCC 82,*** wherein like in the present case, challenge had been laid to fixing of the fees for the year 1995-96 including from 1995 on the ground that the fees for the subsequent years was far less and thus, it amounts to discrimination. Rejecting the said contention, it was observed by the Hon'ble Supreme Court in para-19 of the judgment as under:

> *"19. In the present case, we find that the NRI students took admission on certain specific conditions and the University has a right to insist that those conditions are observed. To our mind, therefore, it would not be open to the students to contend that notwithstanding that they had been admitted on a certain fee structure they were entitled to claim as a matter of right, a reduction in fee to bring them at par with students admitted later under a lower fee structure. The argument of estoppel in such a case would, thus, be available to an educational institution. The High Court was influenced by the fact that estoppel was a plea in equity and as the right of the NRI students under Article 14 appeared to have been violated, this plea was not available to the University. We do not agree with this submission for several reasons, firstly the NRI students have not been granted admission on their over all merit but on the basis of the 10% reservation in their favour and as such any claim based on equity would be suspect and secondly each set of admissions made year wise*

cannot be said to over lap the admissions made earlier or later. We have also considered Mr. Rao's submission that the fee had the trappings of a capitation fee. We find no merit in this assertion, as the fee is being levied year wise for the course. We have also gone through the judgments cited by Mr. Iyer. To our mind, they are not applicable to the facts of this case."

14. In the said case, the respondents-students were admitted in the B.Tech. Course in the year 1997-98 and 1998-99. They were admitted in the NRI students quota. Fee in the relevant academic year was US$4000 per annum, whereas in the year 1999-2000, earlier provision which was made in the year 1995-96 i.e., fee of US$5000 and in addition to that payment of Rs.20,000/- per semester was reduced. Petitioners filed representation claiming that they are also entitled to have the benefit of reduction of fee on account of reduction of fee in the subsequent years. The High Court allowed the Writ Petition against which judgment the respondent-University filed an appeal before the Hon'ble Supreme Court. The Hon'ble Supreme Court in the said judgment has laid down that an educational institution chalks out its own programme year wise on the basis of the projected receipts and expenditure and the court need not interfere in this purely administrative matter which is the right of the educational institution. The Hon'ble Supreme Court further laid down that NRI students who took admission on certain basic conditions and on a fee structure cannot claim as a matter of right reduction in fee to bring them at par with the students admitted later in a lower fee structure.

15. The aforesaid judgment unequivocally declares that subsequent reduction in the fee structure for the subsequently admitted students cannot withstand a ground to reduction by the students who were admitted on different fee structure in a year.

16. In view of the aforesaid exposition of law, the instant petition is clearly not maintainable and the same is accordingly dismissed, leaving the parties to bear their own costs. Pending application(s), if any, also stands disposed of.

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

Ram Kala Chauhan .....Petitioner

Versus

State of Himachal Pradesh .....Respondent

Cr.MP(M) No.565 of 2021
Decided on: 7.4.2021

The Petition u/s 439 Cr.P.C- For Regular bail- Under section 354-A, 504, 506, 509 & 201 IPC, Section 75 JJ Act and section 12 POCSO Act- Allegations are petitioner being father of victim behaves indecently, on one occasion also showed his private part to her, further maltreated her and her mother and brother and alleged that petitioner takes quarrel with mother on the ground that her brother is not his son rather born from loins of some other person- Held,- Victim prior to filing of present FIR lodged Complaint to police alleging that her father had shown his private part to her then complaint was withdrawn being compromised- The statement u/s 154, 164 Cr .P.C shows that complaint is lodged due to matrimonial discord between mother of victim and Petitioner- Guilt of petitioner is yet to be established-challan filed- the freedom of petitioner cannot be curtailed for indefinite period- Petition allowed. Title: Ram Kala Chauhan vs. State of Himachal Pradesh Page-50

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;

For the Petitioner : Mr. Gaurav Sharma, Advocate.
For the Respondent : Mr. Sudhir Bhatnagar and Mr. Arvind Sharma, Additional Advocates General.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

By way of present bail petition filed under Section 439 Cr.PC, prayer has been made on behalf of the bail petitioner, for grant of regular bail in case FIR No. 11/2021 dated 9.2.2021, under Sections 354-A, 504, 506, 509 & 201 of IPC, Section 75 of JJ Act and Section 12 of POCSO Act, registered at Women Police Station Solan, District Solan, Himachal Pradesh. Respondent State has filed the Status report in terms of order dated 24.3.2021. Smt. Sunita Verma, Ins/SHO Women Police station Solan, District Solan H.P., is also present with records. Records perused and returned.

2. Record/status report reveals that police on 9.2.2021, victim-prosecutrix lodged a complaint at WPS Solan, alleging therein that her father behaves indecently and on one occasion, had also shown his private parts to her. Complainant alleged that her father maltreats her as well as her mother and brother. She alleged that her father repeatedly picks up quarrel with her mother on the ground that her younger brother is not his son, rather has born from the lions of some other person. In the aforesaid background, FIR detailed herein above came to be lodged against the present bail petitioner and since then, he is behind bars. Challan stands filed in the competent court of law and nothing remains to be recovered from the bail petitioner and as such, petitioner has approached this Court in the instant proceedings for grant of regular bail.

3. Mr. Arvind Sharma, learned Additional Advocate General while fairly admitting factum with regard to filing of challan in the competent court of law contends that keeping in view the gravity of offence alleged to have been committed by the bail petitioner, he does not deserve any leniency and as such, prayer made on his behalf for grant of bail deserves to be rejected outrightly.

4. Having heard learned counsel for the parties and perused material available on record, this Court finds that prior to filing of the FIR at hand, victim-prosecutrix had also lodged one complaint to the Police Station, alleging therein that her father had shown his private part to her, but such complaint was subsequently, withdrawn, on account of compromise arrived inter-se parties. In the case at hand, precise allegation of the victim-prosecutrix is that her father behaves indecently and constantly maltreats her as well as her mother and brother.

5. Having carefully perused statements of victim-prosecutrix recorded under Sections 154 and 164 Cr.PC., this Court has reason to presume that complaint lodged against the bail petitioner is result of matrimonial discord *inter-se* mother of the victim-prosecutrix and present bail petitioner i.e. father of the victim-prosecutrix. Moreover, allegation with regard to showing of private parts by the petitioner to the complainant already stands settled on account of compromise arrived inter-se petitioner and the complainant in the earlier complaint filed by complainant, hence, cannot be made basis to reject bail in the instant case. 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 coupled with the fact that nothing remains to be recovered from the bail petitioner, there appears to be no justification to let the bail petitioner incarcerate in jail for an indefinite period during trial. 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.

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. 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 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.***
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> ***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.

11. 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. 50,000/- 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.

12. 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.

13. 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 SANDEEP SHARMA, J.

1. Cr.MP(M) No.136 of 2020
Lakhwinder Singh .....Petitioner

Versus

State of Himachal Pradesh .....Respondent

2. Cr.MP(M) No.22 of 2021

Baljinder Singh Bajwa .....Petitioner

Versus

State of Himachal Pradesh .....Respondent

Cr.MP(M) Nos. 136 of 2020 a/w Cr.MP(M) No. 22 of 2021
Decided on: 26.3.2021

The petition under section 439 Cr.P.C for regular bail in FIR registered under section 452, 392, 307,302, 120-B IPC Held, in the alleged incident, two old persons lost their lives and one person suffered serious injuries- On the date of alleged Incident- Petitioner Baljinder lodged in Gurdaspur jail on account of conviction under section 138 N. I Act- Petitioners are real brothers and there was some old litigation between petitioner and deceased Dilbag Rai and his family on account of ownership of some plywood factory- Allegation are though Baljinder was lodged in jail, he in connivance with Surjeet his brother in-Law-planned & managed attack on parents of complainant- No concrete evidence collected by investigation agency to this effect. The petitioner Lakhbinder in litigation with Baljinder was named in the statement of Vikram Injured – But in statement
of complainant on being told by Vikram there was nothing- Version of complainant under section 154 Cr.P.C totally contradictory to version of vikram under section 164 Cr .P.C- Delay in recording statement, R F S L report nowhere suggests that almirah and locks were broken with hammer, there was no evidence of opening locks with force, statements of material witnesses recorded, remaining witnesses are formal in nature and police officials cannot be won over- in these circumstance till the time, guilt of bail petitioner is not established in accordance with law, there appears no justification to keep them behind bar for an indefinite period during trial especially when they had already suffered for more them five years. Petition allowed- Bail granted.

Cases referred:

Gobind Upadhya v. Sudarshan Singh, 2002 (3) SCC 598;

Prasanta Kumar Sarkar v. Ashis Chatterjee and Another (2010) 14 SCC 496;
Umarmia Alias Mamumia v. State of Gujarat, (2017) 2 SCC 731;
Ash Mohammad. Vs. Shivraj, 2012 (9) SCC 446;
Ranjit Singh vs. State of Madhya Pradesh, 2013 (16) SCC 797;
Neeru Yadav, vs. State of UP, 2014 16 SCC 508;
Virupaksahappa Gouda vs. State of Karnataka, 2017 (5) SCC 406;
State of Orissa vs. Mahimananda Mishra, 2018 (10) SCC 516;
Sanjay Chandra versus Central Bureau of Investigation (2012)1 Supreme Court Cases 49;

For the Petitioner(s) : Mr. N.S. Chandel, Senior Advocate with Mr. Rajesh Verma, Advocate.

For the Respondent (s). : Mr. Sudhir Bhatnagar and Mr. Arvind Sharma, Additional Advocates General with Mr. Kunal Thakur and Ms. Svaneel Jaswal, Deputy Advocates General, for the State.
Mr. Sanjay Jaswal, Advocate, for the complainant.

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (oral):

Bail petitioners namely Baljinder Singh Bajwa and Lakhwinder Singh, who are real brothers, have approached this court in the instant proceedings filed under Section 439 Code of Criminal Procedure, for grant of regular bail in Case FIR No. 251/15, dated 13.12.2015, registered at Police Station Indora, under Sections 452, 392, 307, 302 and 120-B Indian Penal Code. Respondent-State besides filing fresh status report has also made available complete record of investigation. ASI Sunil Kumar, I.O., P.S. Indora, District Kangra, H.P., has come present with records. Record perused and returned.

2. Close scrutiny of status reports, placed on record from time to time as well as record of investigation made available to this Court reveals that

complainant namely Ram Mohamad Issa Singh, got his statement recorded under Section 154 CrPC, stating therein that on 12.12.2015, he had gone to Chandigarh in connection with court cases and returned back home at 10.30 pm. He disclosed to the police that after his return from Chandigarh, he had dinner with his brother Raj Vikram Rai and thereafter, they all went to sleep to their respective rooms at 11:30 pm. Above named complainant alleged that at 6.15am, person namely Jaspal alias Jas, who visits their house daily for milking the cow called out to him that somebody has beaten aunty and uncle and they are lying in a pool of blood. Complainant in his statement disclosed to the police that he opened the door of room of his parents and found that his parents had suffered injuries on their face and head and both were lying on their bed. Complainant further alleged that he also found his brother Raj Vikram lying in pool of blood in his room, and he had suffered injuries on his face and head. Complainant alleged that in both the rooms, locks of almirahs/locker were broken and cash and jewelry lying therein were missing. Complainant specifically disclosed to the police that his brother Raj Vikram whispered to him that he has been attacked by Baljinder's men and 3-4 persons had entered the house and attacked him with sharp edged weapon. Complainant alleged that approximately, cash to the tune of Rs. 3.5 to 4 lakh and jewelry belonging to his mother and sister in law, who at that time had gone to her maternal house, alongwith 32 bore revolver and one gun (wisko) have been stolen. Complainant alleged that this incident happened between 12.00am to 5.00 am in the intervening night of 12/13.12.2015. Complainant disclosed to the police that Baljider Singh Bajwa, who is behind bars, is in litigation with his family on account of land dispute and he had extended threats to eliminate the entire family and as such, he has suspicion that his parents and brother have been attacked by Baljinder Singh Bajwa i.e. one of the petitioners. In the aforesaid background, FIR detailed herein above, came to be lodged against the bail petitioner namely Baljinder Singh. During

investigation police found involvement of persons namely Surjeet Singh, Balbir Singh Bajwa and as such, subsequently, they also came to be named in the FIR and were arrested.

3. Victims/injured namely Dilbagh Rai, Smt. Avinash Rai and Raj Vikram Rai were taken to private hospital i.e. Amandeep Hospital Pathankot in the morning of 13.12.2015. Dilbagh Rai expired at the aforesaid hospital at Pathankot, whereas Smt. Avinash Rai was referred to Amandeep Hospital, Amritsar, but she also expired on 22.12.2015 on account of serious injuries suffered by her. Raj Vikram Rai, who was admitted in hospital at Pathankot was discharged on 22.12.2015. Though, Raj Vikram Rai, was discharged from hospital on 22.12.2015, but his statement under Sections 161 and 164 CrPC were recorded on 8th and 15th February, 2016 respectively, wherein he disclosed to the police that he and his parents were attacked and given beatings on the alleged date of incident by person namely Lakhwinder Singh, Balbir, Surjeet, Surender Singh and other 4-5 persons. On the basis of aforesaid statement made by Raj Vikram Rai, bail petitioner Lakhwinder Singh came to be named in the FIR and he was arrested on 17.2.2016 and since then he is behind bars.

4. Challan stands filed in competent court of law and as of today, 13 out of 38 prosecution witnesses stand examined. Since statements of all the material prosecution witnesses, including the complainant stand recoded, coupled with the fact that both the bail petitioners are behind bars for more than 5 years, petitioners have approached this Court in the instant proceedings, for grant of regular bail, during the pendency of trial before learned court below.

5. Shri Kunal Thakur, learned Deputy Advocate General, duly assisted by Mr. Sanjay Jaswal, Advocate, representing the complainant, while fairly admitting factum with regard to filing of challan in the competent court of law, contended that keeping in view the gravity of offence alleged to have

been committed by the bail petitioners, they do not deserve any leniency, as such, prayer made on their behalf for grant of bail, deserves outright rejection. While making this Court peruse evidence collected on record by the investigation agency, learned Deputy Advocate General, made a serious attempt to persuade this court to agree with his contention that both the bail petitioners in connivance with each other, attacked the old parents and brother of the complainant with an intention to kill them. While referring to the medical evidence adduced on record, especially, post mortem report, learned Deputy Advocate General contended that both Dilbagh Rai and Smt Avinash, died on account of injuries inflicted on their persons by the bail petitioners and their associates. Learned Deputy Advocate General while referring to the statement of Raj Vikram Rai , who is/was one of the injured, submitted that on the date of the alleged incident, the bail petitioner Lakhwinder Singh alongwith other accused, not only attacked two old persons, but also stole valuable articles. Mr. Thakur further submitted that since persons, who died in the alleged incident, had old enmity with bail petitioner Baljinder Singh Bajwa, he while in jail, planned and managed the alleged occurrence, and as such, no leniency deserves to be shown while considering petitions having been filed by bail petitioners. Lastly Mr. Kunal Thakur, contended that since statement of some of material prosecution witnesses remain to be recorded, it would not be in the interest of justice to enlarge the bail petitioners on bail, who in the event of being enlarged on bail, may not only flee from justice, but may also cause harm to the complainant and his family.

6. Mr. N. S. Chandel, learned Senior Counsel representing petitioners while refuting the aforesaid submissions made on behalf of the learned Deputy Advocate General, strenuously argued that the bail petitioners have been falsely implicated and they are behind bars for the last 5 years for no fault of theirs. While making this court peruse statement of complainant

recorded under Section154 CrPC, juxtaposing statement of victim/injured Raj Vikram Rai, who survived the incident under Section 164 CrPC, Mr. Chandel, contended that story of prosecution is highly doubtful and unbelievable and cannot be made basis to conclude guilt of the bail petitioners, who have already suffered for a considerable time. Mr. Chandel, learned Senior Counsel, contended that statements of all material prosecution witnesses including the complainant stand recorded and as such, bail cannot be denied to the bail petitioners on the ground that statements of some of the witnesses remain to be recorded. He contended that all the remaining witnesses are formal witnesses, who otherwise, in no situation, can be won over by the bail petitioners in the event of their being enlarged on bail. Lastly, Mr. Chandel, learned Senior Counsel contended that there are two versions before the Court with regard to the alleged incident, one put forth by the complainant -Ram Mohamad Issa and second by injured-Raj Vikram Rai and both the versions being contradictory cannot be believed.

7. Before ascertaining correctness and genuineness of the submissions made by the learned counsel for the parties, this Court at the first instance, deems it fit to deal with the scope/ power under S.439 CrPC, to grant bail. No doubt, power to grant bail under S.439 is of wide amplitude, but at the same time, it is well settled that though grant of bail involves exercise of discretionary power of court but it is to be exercised in judicious manner and not as a matter of course. In this regard, reliance is placed on judgment passed by the Hon'ble Supreme Court in Ram ***Gobind Upadhya v. Sudarshan Singh***, 2002 (3) SCC 598, relevant para whereof reads as under:-

> ***"3.Grant of bail though being a discretionary order but, however, calls for exercise of such a discretion in a judicious manner and not as a matter of course. Order for Bail bereft of any cogent reason cannot be sustained. Needless to record, however, that the grant of bail is dependent upon the contextual facts of the***

matter being dealt with by the Court and facts however do always vary from case to case. While placement of the accused in the society, though may be considered but that by itself cannot be a guiding factor in the matter of grant of bail and the same should and ought always be coupled with other circumstances warranting the grant of bail. The nature of the offence is one of the basic consideration for the grant of bail more heinous is a crime, the greater is the chance of rejection of the bail, though, however, dependent on the factual matrix of the matter.

4.Apart from the above, certain other which may be attributed to be relevant considerations may also be noticed at this juncture though however, the same are only illustrative and nor exhaustive neither there can be any. The considerations being:

> ***(a) While granting bail the Court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.***
>
> ***(b) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the Court in the matter of grant of bail.***
>
> ***(c) While it is not accepted to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the Court in support of the charge.***
>
> ***(d) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of***

the prosecution, in the normal course of events, the accused is entitled to an order of bail.

8. While determining whether case is fit for grant of bail, court considering bail application requires to balance numerous factors i.e. nature of offence, severity of the punishment and prima facie, view with regard to involvement of accused. Similarly, while determining whether case is fit for grant of bail, court is not required to sift entire evidence available on record because that is a matter of trial, however, court at that stage is required to examine whether there is prima-facie or reasonable ground to believe that accused has committed the offence and on a balance of considerations involved, the continued custody of the accused sub-serves the purpose of the criminal justice system.

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:

(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.

10. Aforesaid judgment in ***Prashant Kumar's case*** (supra) has been consistently followed in ***Ash Mohammad. Vs. Shivraj,*** 2012 (9) SCC 446, **Ranjit Singh vs. State of Madhya Pradesh,** 2013 (16) SCC 797, ***Neeru Yadav, vs. State of UP,*** 2014 16 SCC 508, Virupaksahappa Gouda vs. State

of Karnataka, 2017 (5) SCC 406 and ***State of Orissa vs. Mahimananda Mishra***, 2018 (10) SCC 516.

11. Though while considering bail, court is not expected to assess the evidence in detail, to arrive at a conclusive finding on a chain of causation, but certainly court assessing plea of bail, is required to find a prima facie view of possibility of commission of the crime by the accused and not conclude that the alleged crime was in fact committed by the accused beyond reasonable doubt. It has been repeatedly held by Hon'ble Apex Court that since questions of grant of bail concern both liberty of individual undergoing criminal prosecution as well as interest of criminal justice system in ensuring that those who commit crimes are not afforded the opportunity to obstruct justice, judge while accepting/rejecting prayer for bail, is duty bound to record reasons, which have weighed with court for use of exercise of discretionary power. Merely recording "*having perused the record*" and "*on the facts and circumstance of case*" does not sub-serve the purpose of a reasoned judicial order. Factors, which have weighed in mind of judge while rejecting/granting bail, are required to be recorded in the order to be passed. Since question of grant of bail, directly linked with liberty of individual undergoing criminal prosecution as well as interest of criminal justice system, judges are duty bound to explain basis, on which they have arrived at a conclusion. In this regard, reference is made on the judgment rendered by the Hon'ble Apex Court in case titled ***Mahipal v. Rajesh Kumar @ polia and Anr.***, in Criminal Appeal No. 1843 of 2019 @ SLP (Crl.) No. 6339 of 2019, which reads as under:

> ***23. Merely recording "having perused the record" and "on the facts and circumstances of the case" does not sub-serve the purpose of a reasoned judicial order. It is a fundamental premise of open justice, to which our judicial system is committed, that factors which have weighed in the mind of the judge in the rejection or the***

grant of bail are recorded in the order passed. Open justice is premised on the notion that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The duty of judges to give reasoned decisions lies at the heart of this commitment. Questions of the grant of bail concern both liberty of individuals undergoing criminal prosecution as well as the interests of the criminal justice system in ensuring that those who commit crimes are not afforded the opportunity to obstruct justice. Judges are duty bound to explain the basis on which they have arrived at a conclusion.

24. In Kalyan Chandra Sarkar v Rajesh Ranjan13, a two judge Bench of this Court was required to assess the correctness of a decision of a High Court enlarging the accused on bail. Justice Santosh Hegde, speaking for the Court, discussed the law on the grant of bail in non-bailable offences and held:

> ***"11. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind." (Emphasis supplied)***

25. Where an order refusing or granting bail does not furnish the reasons that inform the decision, there is a presumption of the non-application of mind which may require the intervention of this Court. Where an earlier

application for bail has been rejected, there is a higher burden on the appellate court to furnish specific reasons as to why bail should be granted.

12. If aforesaid judgments rendered by Hon'ble Apex Court from time to time are perused, same suggest that while considering bail, though nature and gravity of accusations are of utmost importance, but same time, court is also required to infer from the material available on record whether there is any prima facie reason or ground to believe that accused had committed the offence. Besides above, court while exercising power under S.439 CrPC, is also required to see the danger of accused fleeing or absconding if released on bail and likelihood of the offence being repeated.

13. Now, in the aforesaid backdrop and law in vogue, this court would proceed to adjudicate the matter on merits.

14. Having heard learned counsel for the parties and perused material on record, this court finds that in the alleged incident, unfortunately two old people namely Dilbagh Rai and Avinash Rai lost their lives and one person namely Raj Vikram Rai suffered serious injuries. Though above named Raj Vikram Rai after having recovered from injuries was discharged on 22.12.2015, but now, he is also stated to have expired on 22.12.2019. It is also not in dispute that on the date of the alleged incident, bail petitioner Baljinder Singh Bajwa was lodged in Gurdaspur jail (Punjab), on account of conviction in a case filed by Dilbagh Rai under Section 138 of Negotiable Instruments Act. Though above named Baljinder Singh Bajwa has already served the sentence in case under S.138 of the Negotiable Instruments Act, but at present, he is behind bars on account of alleged involvement in the case at hand. It is also not in dispute that both the bail petitioners Baljinder Singh Bajwa and Lakhwinder are real brothers, but material on record reveals that

there was some old litigation *inter-se* Baljinder Singh Bajwa, Lakhwinder Singh and deceased Dilbagh Rai and his family, on account of ownership of some plywood factory. Baljinder Singh Bajwa, in his FIR, had also made Lakhwinder Singh an accused alongwith Dilbagh Rai and his family members. Record reveals that on account of dishonoring of cheque, case under section 138 of Negotiable Instruments Act, came to be initiated against Baljinder Singh, wherein court having found him guilty convicted and sentenced him to undergo three years imprisonment.

15. Precisely, the case of the prosecution is that though at the time of alleged incident, Baljinder Singh Bajwa was lodged at Gurdaspur jail, but he in connivance with Surjeet Singh, who happens to be his brother in law, planned and managed the attack on parents of the complainant, but this court has not been able to find any concrete evidence to this effect, if any, collected on record by prosecution, save and except that Baljinder Singh Bajwa while serving sentence was admitted in hospital and there, he had a meeting with co-accused Surjeet Singh. Bail petitioner Lakhwinder Singh, who was in litigation with Baljinder Singh Bajwa pleaded his innocence, but he came to be named in FIR on the statement of injured/victim Raj Vikram Rai, recorded under S.164 CrPC, At this juncture, if statement of the complainant recorded under Section 154 CrPC is perused, it suggests that immediately after the alleged attack, Raj Vikram Rai whispered in the ear of the complainant that he has been attacked by Baljinder Singh Bajwa's men. If the aforesaid statement of complainant under Section 154 Cr.PC., is perused in its entirety, it nowhere suggests that Raj Vikram Rai named the bail petitioner Lakhwinder Singh rather, he categorically disclosed to the complainant-Ram Mohamad Issa that he has been attacked by Baljinder's men. However, subsequently, Raj Vikram Rai in his statement recorded under Section 164 CrPC, alleged that on the date of the alleged incident, the bail petitioner Lakhwinder Singh entered their house with co-accused Surjeet

Singh, Balbir Singh Bajwa and Devinder Kaur, wife of Lakhwinder Singh and attacked him.

16. Version of the complainant recorded under Section 154 CrPC is totally contradictory to the version of Raj Vikram Rai recorded under S. 164 CrPC, especially, with regard to the names of the accused. If Raj Vikram Rai had identified the persons at the time of incident, it is not understood that why he could not disclose all these names to his brother, Ram Mohamad Issa, who immediately after the alleged incident had come to the room. Aforesaid fact gains significance on account of the fact that Raj Vikram Rai in his statement recorded under S.164 CrPC, stated nothing against the bail petitioner Baljinder Singh Bajwa, who was otherwise named at the first instance by the complainant, that too on the basis of information given by Raj Vikram Rai. Leaving everything aside, there is yet another aspect of the matter i.e. Raj Vikram Rai was admitted in Amandeep hospital, Pathankot in the morning of 13.12.2015, when he was declared medically unfit to give the statement. But it is also not in dispute that above named person was discharged from the hospital on 22.12.2015, however, interestingly, his statement under S.161 and 164 CrPC came to be recorded after an inordinate delay of more than one and half months i.e. 8th and 15th February, 2016, respectively. Learned Deputy Advocate General argued that since above named person was declared unfit to make statement, his statement could not be recorded immediately after his discharge. This Court with a view to ascertain opinion, if any, rendered by the medical officer attending upon Raj Vikram Rai ordered respondent-State to produce the record with respect to admission and discharge of above named Raj Vikram Rai. No doubt, perusal of record reveals that on 13th December, 2015, Raj Vikram Rai was declared unfit to give statement, but in discharge certificate issued on 22.12.2015, there is no mention that Raj Vikram Rai is unfit to give statement. If it was so, why police took almost one and half month to record the statement of Raj Vikram Rai,

who was otherwise eye witness/injured to/in the alleged incident. Statement of Raj Vikram Rai recorded under S.164, if read juxtaposing statement of the complainant under Section 154 CrPC, it certainly compels this court to agree with the contention of learned counsel for the petitioner that there are lot of contradictions and inconsistencies, especially with regard to the names of the accused.

17. Apart from above, version put forth by the complainant, in his statement recorded under 154 CrPC, if read in conjunction with his statement recorded in learned trial court, creates suspicion with respect to correctness of prosecution story. If version of the complainant is believed, it suggests that at the time of the alleged incident, though he was in the house but could not hear cries/screams, if any, raised by the victim/injured. In the case at hand, victim/injured were attacked with sharp edged weapons on their faces and heads and some scuffle also took place inter-se attackers and Raj Vikram Rai. If aforesaid version is believed, it is difficult to digest/believe that person living next to the room of the victim did not hear anything. Though, as per prosecution story, all the victims, Dilbagh, Ms. Avinash and Raj Vikram Rai were found lying on their beds in their rooms in pool of blood by the complainant next morning, but if the statement of witness namely Jaspal alias Jas is perused, it suggests that at 6.00 am, he came to the house of the complainant and victim and knocked the door. Once door was not opened by occupants of the house, he peeped from the window of the kitchen and called names of the family members and allegedly, Dilbagh Rai while coming backwards said that ***"everything is finished"***, meaning thereby, at 6.30 am, deceased Dilbagh Rai was conscious and was able to speak. If it is so, it is not understood, that why he did not call other family members, especially complainant Ram Mohamad Issa, who was sleeping in the adjacent room. It has come in the statement of this witness that complainant came to the room of Victim- Raj Vikram Rai , Dilbagh and Avinash after 30 minutes of his

knocking the door that too on the call given by his sister, who was informed by person namely Jaspal alias Jas. Otherwise also, as per prosecution story, attackers, broke almirahs, lockers and stole valuable articles. If aforesaid version is believed, there would have been some noise on account of use of hammer or rod, if any, used by attackers to break lockers/almirahs, but no such noise was ever heard by the complainant, who was present in the house that too in the near vicinity at the time of alleged incident.

18. Leaving everything aside, if report of Scientific Officer, RFSL, Dharamshala, who visited the spot on 13.12.2015, is perused, it nowhere suggests that the almirahs and lockers were broken by using hammer or other tools. Aforesaid report has categorically recorded that no marks of tools on doors and windows of house were found. Aforesaid officer has reported that there is no evidence of opening of the almirahs and lockers using force. No doubt, in the case at hand, two old persons have been murdered and one sustained serious injuries, but till the time, guilt of the bail petitioners is not established in accordance with law, there appears to be no justification to keep them behind bars for an indefinite period during trial, especially, when they have already suffered for more than five years. Since the bail petitioner Baljinder Singh Bajwa was lodged in jail at the time of alleged incident, his complicity in the case cannot be concluded on the basis of evidence, available at this stage. As has been noticed herein above, there is no evidence, that Baljinder Singh Bajwa while sitting in jail, managed attack on the deceased and victim, Raj Vikram Rai , save and except that co-accused Surjeet Kumar had gone to meet him in the hospital, while he was serving the sentence. Similarly, involvement of Lakhwinder Singh in the case at hand, becomes doubtful on account of inconsistent stand of the complainant and victim Raj Vikram Rai. If Raj Vikram Rai had identified Lakhwinder on the date of the incident, he would not have missed to name him, while he disclosed name of Baljinder Singh Bajwa to his brother, immediately after the alleged incident.

Interestingly, in the case at hand, Raj Vikram Rai, while making statement under S. 164, gave clean chit to Baljinder Singh Bajwa, but named Lakhwinder Singh. No doubt, medical evidence adduced on record does indicate that deceased Dilbagh Rai and Ms. Avinash died on account of injuries suffered by them in the alleged incident, but such medical evidence cannot be read in isolation to conclude complicity of the petitioners in the alleged offence, especially when their presence on the spot is doubtful.

19. Though, aforesaid aspects of matter are to be considered and decided by the learned court below on the basis of totality of evidence collected on record by the investigating agency, but keeping in view the discrepancies, as have been taken note herein above, there appears to be no reason to let the bail petitioner incarcerate in jail for indefinite period, especially when they have already suffered for more than five years. Statements of all the material prosecution witnesses including complainant Ram Mohamad Issa stand recorded. No doubt, more than 25 witnesses remain to be examined, but list of witnesses clearly indicate that all the remaining witnesses are formal witnesses, who otherwise being officials, cannot be won-over by the bail petitioners, in the event of their being enlarged on bail.

20. Interestingly, in the case at hand, this Court finds that Raj Vikram Rai, who, apart from being injured, was the sole eye witness, was called once for recording of his statement in court, but before his statement could be recorded, he, unfortunately expired in December, 2019, whereas on one pretext or the order, complainant failed to get his statement recorded in the trial court for a considerable time. Record reveals that complainant repeatedly came to be summoned for recording his statement, but on one pretext or the other, he failed to appear, as a consequence of which, trial was delayed. Finally vide order dated 17.3.2021, passed by this Court, complainant was compelled to remain present before the learned court below for recording his statement on 22.3.2021.

21. As of today, entire case of prosecution hinges upon version put forth by the complainant, Ram Mohamad Issa, who alongwith Jaspal alias Jas was the first to reach the spot of occurrence. Since statement of complainant stands recorded, there is no force in the argument of learned Deputy Advocate General that in the event of petitioner's being enlarged on bail, bail petitioners may tamper with prosecution evidence. Otherwise also, apprehension expressed by learned Deputy Advocate General, can be best met by putting the bail petitioners to stringent conditions.

22. 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.

23. 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."

24. 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 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.

25. Bail petitioners are behind bars for more than five years, but charges are yet to be framed. Accused cannot be kept behind bars for indefinite period pending trial. Delay in criminal trial has been held to be in violation of right guaranteed to the accused under Section 21 of the

Constitution of India. In this regard, reliance is placed on judgment passed by the Hon'ble Apex Court in case titled ***Umarmia Alias Mamumia v. State of Gujarat***, **(2017) 2 SCC 731**, relevant para whereof has been reproduced herein below:-

> ***"11. This Court has consistently recognised the right of the accused for a speedy trial. Delay in criminal trial has been held to be in violation of the right guaranteed to an accused under Article 21 of the Constitution of India. (See: Supreme Court Legal Aid Committee v. Union of India, (1994) 6 SCC 731; Shaheen Welfare Assn. v. Union of India, (1996) 2 SCC 616) Accused, even in cases under TADA, have been released on bail on the ground that they have been in jail for a long period of time and there was no likelihood of the completion of the trial at the earliest. (See: Paramjit Singh v. State (NCT of Delhi), (1999) 9 SCC 252 and Babba v. State of Maharashtra, (2005) 11 SCC 569).***

26. In view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court, petitioners have carved out a case for grant of bail, accordingly, the petitions are allowed and the petitioners are ordered to be enlarged on bail in aforesaid FIR, subject to their furnishing personal bond in the sum of Rs. 1,00,000/- each, with two local sureties in the like amount to the satisfaction of concerned Chief Judicial Magistrate/trial Court, with following conditions:

> ***a. They shall make themselves 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. They shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;***

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

d. They shall not leave the territory of India without the prior permission of the Court.

e. They shall hand over their passports to the investigating Agency.

f. They would report to the concerned police station every 15 days.

g. Petitioners shall not enter the area within the radius of 2 kms of the house of the complainant.

27. It is clarified that if the petitioners misuse their liberty or violate any of the conditions imposed upon them, the investigating agency shall be free to move this Court for cancellation of the bail.

28. Any observations made hereinabove shall not be construed to be a reflection on the merits of the main case and shall remain confined to the disposal of these applications alone.

The bail petitions stand disposed of accordingly.

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BEFORE HON'BLE MR. JUSTICE RAVI MALIMATH, J. & HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Budhi Parkash ....Petitioner.

Versus

The State of H.P. & ors. .....Respondents.

Ex. Petition No. 145 of 2019
Date of decision: April 06, 2021.

The petition filed with prayer that order dated 22.3.2016 passed in O.A No. 4916 of 2015 titled as Budhi Parkash vs. State of HP has not been executed-Held, the direction in order dated 22.3.2016 is to reconsider the case of

petitioner – It is undisputed that case of petitioner has been reconsidered- There is no direction to grant any status to the petitioner nothing survives further for consideration- Petition dismissed.

For the petitioner : Mr. A.K. Gupta, Advocate.

For the respondents : Mr. Ashok Sharma, Advocate General with Mr. Rajinder Dogra, Senior Addl. Advocate General.

The following judgment of the Court was delivered:

Ravi Malimath, *Judge (Oral)*

This petition has been filed with a prayer that the order dated 22.3.2016 passed in O.A. No. 4916 of 2015, titled *Budhi Parkash* versus *State of H.P. and others* has not been executed.

2. Learned counsel for the petitioner has placed reliance on the said order and contends that since the direction therein has not been complied with, appropriate order be passed by this Court.

3. The same is disputed by learned counsel for the respondents by contending that subsequent to the order passed by the learned Tribunal, the case of the petitioner has been reconsidered and order dated 17.8.2016 has been passed, therefore, the order of the court having been complied with and no further orders are called for.

4. We have heard learned counsels for the parties.

5. Para-8 of the order of learned Tribunal reads as follow:

> "8. Consequently, Annexure P-2 is quashed and the respondents are directed to re-consider the case of the applicant for conferment of work charge status after completion of 8 years service with all consequential benefits."

6. The direction therein is to reconsider the case of the applicant. It is undisputed that the case of the petitioner has been reconsidered, however, what is contended by the petitioner is reconsideration means a grant of the work charge status. It is his contention that the entire judgment deals with the said issue and, therefore, there has been disobedience that work charge status has to be granted. Non-grant of work charge status amounts to disobedience and non-compliance of the said order.

7. We do not find that any such interpretation requires to be considered by this Court. This is the petition where the language of the order becomes very important. The direction was only to reconsider, therefore, the respondents have reconsidered. There is no direction to grant any status to the petitioner. When the direction is only to reconsider and the respondents have reconsidered, we do not think it is appropriate for us to go beyond the order passed by the Tribunal. Therefore, we do not find that the order in question has not been followed by the respondents. On the contrary, the direction was to reconsider the case of the petitioner and respondents have reconsidered the same. Consequently, nothing survives further for consideration. The petition is dismissed accordingly. Pending miscellaneous application is also dismissed.

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

Ram lal .....Appellant/plaintiff

Versus

Om Parkash & Anr .....Respondents

RSA No. 87 of 2009
Reserved on: 26.03.2021
Decided on: 01.04.2021

The plaintiff filed suit for possession through specific performance of an agreement by way of execution of sale deed. The suit was dismissed by

concurrent findings of trial court and 1st Appellate Court- Hence, RSA- Held- The agreement is vague and void, therefore, not capable of being enforced. Plaintiff even otherwise has failed to prove its execution by defendants in accordance with law – No interference in concurrent findings called for – Appeal dismissed. Title: Ram Lal vs. Om Parkash & Anr Page- 82

Cases referred:

Kamal Kumar Vs. Premlata Joshi & Others, 2019 (3) SCC 704;
Keshav Lal Lallubhai Patel Vs. Lalbhai Tribumlal Mills, AIR 1958 SC 512;
Mithu Khan, Vs. Ms. Pipariyawali and others AIR 1986 Madhya Pradesh 39;
Pawan Kumar Dutt and Another Vs. Shakuntala Devi and Others, (2010) 15 SCC 601;
Raneegunge Coal Association Ltd. Vs. Tata Iron and Steel Co. Ltd. AIR 1940 Privy Council 151;
Satish Kumar Vs Karan Singh & Anr., (2016) 4 SCC 352;
Sayed Moinuddin Vs Md. Mehaboob Alam and others. AIR 2016 Karnataka 192;
Tilak Raj Bakshi Vs. Avinash Chand Sharma (dead) through LRs & others, 2019 (11) Scale 131;

For the appellant: Mr. Y.P. Sood, Advocate.

For the respondents: Mr. Dheeraj K. Vashisht and Mr. Shubham Sood, Advocates.

The following judgment of the Court was delivered:

***Jyotsna Rewal Dua*, J**

Plaintiff has assailed the concurrent judgments and decrees passed by the learned Courts below dismissing his suit.

2. Facts:

2(i) Suit was filed by the plaintiff for possession through specific performance of an agreement by way of execution of sale deed of land measuring 0-9 marlas out of total land measuring 3 kanal 4 marla bearing Khasra No. 1467 comprised in Khewat No. 30 min, Khatauni No. 82 min, situated in village Kangar, Sub Tehsil Haroli, Tehsil and District

Una, H.P. The foundational facts as set out in the plaint were that the plaintiff and defendants had executed an agreement to sell in respect to the above described land on 6.11.1992. Out of the total agreed sale consideration of Rs. 40,000/-, an amount of Rs.30,000/- was paid by the plaintiff to the

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defendants. Despite stipulation in the agreement that sale deed will be executed on or before 10.11.1993, the defendants did not execute the sale deed. Plaintiff has been ready and willing to perform his part of the contract. Hence, the civil suit with the above prayer was filed. Alternatively, plaintiff prayed for recovery of Rs. 60,000/-

2(ii) Defendants though admitted their joint ownership and possession over the suit land but denied execution of the agreement in question. Their stand was that the agreement dated 6.11.1992, put forth by the plaintiff was a forged document, which did not even bear their signatures. They also pleaded that they alongwith plaintiff were members of a Committee, in which the plaintiff had contributed Rs.28,000/-. The Committee failed and plaintiff started demanding his money back from the defendants. Defendants expressed their inability to pay the amount in lump sum. In this regard plaintiff also moved an application before Police Post Haroli. Eventually, defendants paid Rs.30,000/- to the plaintiff on receipts against due amount of Rs.28,000/-.

2(iii) After considering the pleadings and the evidence adduced by the parties, both the learned Courts below concurrently held that the agreement dated 6.11.1992 was a vague document and incapable of enforcement. It was also held that the plaintiff could not prove the execution of this agreement in accordance with law. Aggrieved, the plaintiff is now taking his third chance by way of instant regular second appeal.

3(i). This second appeal was admitted on 6.3.2009 on following substantial questions of law:-

> "1. Whether the courts below have misread and misinterpreted the agreement to sell Exhibit PW-1/A inasmuch as it clearly identifies the property subject matter of agreement to sell and the findings thus recorded are vitiated?
> *2. Whether the courts below were wrong in dismissing the suit for specific performance by holding it to be hit of Section 9 of the Specific Relief Act and Section 29 of the Indian Contract Act in the absence of any such plea raised by the respondents in the written statement and the findings thus recorded are beyond pleadings?*
> *3. Whether the courts below have misread and mis appreciated the statements of PW-1 and PW-2 and the findings thus recorded are vitiated?"*

3(ii). During hearing of the instant appeal on 4.3.2021, it was noticed that the original agreement dated 6.11.1992 (Ext. PW-1/A) was written in Punjabi script. Its translation either in Hindi or in English was not available in the records of learned Courts below. Since it was a material document around which entire case revolved, therefore, on 4.3.2021, the Registry was directed to get this document translated in Hindi/English from the Official Translator. The English translation of this agreement (Ext. PW1/A) has now been supplied by the Official Translator. The contents of the agreement to sell dated 6.11.19992 (Ext. PW1/A) as translated by the Official Translator reads as under:-

> "That we, Om Parkash and Malkiat Singh, Sons of Mansa Ram, R/o Village Kangar, Tehsil Haroli, District Una, Himachal Pradesh, presently residing at Delhi road, Nandpur, Tehsil and District Ludhiana, do hereby agree to sell a 'Kutcha' house, under our owernship and possession, compromised in an area measuring around 5 biswa at Kangar, Tehsil Haroli, District Una, in favour of Vendee Ram Lal, S/o Banta Singh, S/o Nandu Ram, R/o Kangar, Tehsil Haroli, District Una, presently

residing at Delhi Road, Sahnewal, Tehsil and District Ludhiana, for the consideration of Rs.40,000/- (Forty Thousand Rupees only). On receipt of Rs.30,000/- (Thirty Thousand Rupee only), half of which is Rs.15,000/- in cash as earnest money, we agree to get the same deed registered by appearing before the Sub Registrar, Haroli, District Una, on or before 10.11.1993 and shall receive the remaining amount accordingly. There shall be no objection. Revenue papers regarding Khasra Number, etc., of the house shall be produced at the time of Registration. Failing which, we shall pay double the amount of earnest money and in case the vendee does not execute the sale agreement, the earnest money shall stand forfeited. This agreement has been reduced into writing for the purpose of record. Dated 6.11.1992.

Executants Vendee

Witness Sd/(in Hindi)

Sd/(in Hindi)

Sd/(in Urdu)

Om Parkash Ram Lal

Mahmood Iqbal

Sd/(in Hindi)

Overleaf
No. 2179 dated 6.11.1992 value of stamp paper: 2+1 Name of purchaser: Om Parkash, S/o Mansa Ram, R/o Sahnewal

Sd/-(illegible)
Surinder Singh Stamp Vendor
Kohara Road,
Sahnewal
Ludhiana

4. **Contentions**

Learned counsel for the appellant contended that the agreement dated 6.11.1992 was not a vague document. It reflected clear intention of the executants that a 'Kutcha' house owned and possessed by the defendants at Kangar, Tehsil Haroli District Una was agreed to be sold by them to the plaintiff for a sale consideration of Rs.40,000/-. Since the agreement was executed by the parties at Ludhiana, therefore, the revenue record was not available with them. For this reason, the identity of the land/measurement of the land/survey numbers of the land involved, could not be mentioned in the agreement. Learned counsel further contended that absence of particulars of the land/house, in the agreement to sell would not make the agreement vague. Referring to the written statement filed by the defendants, learned counsel, submitted that the defendants had not taken the plea of agreement being vague rather the defendants had practically admitted that they were owners in possession of the 'Kutcha' house referred to in the agreement located at Kangar, Tehsil Haroli, District Una. Therefore, there was no occasion for learned Courts below to dismiss the suit holding that the agreement was vague & void. In support of his submission, learned counsel for the appellant relied upon AIR ***1940 Privy Council 151***, titled ***Raneegunge Coal Association Ltd. Vs. Tata Iron and Steel Co. Ltd., AIR 1986 Madhya Pradesh 39,*** titled, ***Mithu Khan, Vs. Ms. Pipariyawali and others*** and ***AIR 1991 Kerala 288 P.K. Shamsuddin,***
J. titled ***S.R. Varadaraja Reddiar Vs. Francis Xavier Joseph Periaria.***

Whereas, learned counsel for the defendants argued that the agreement in question was absolutely vague, gave no particulars whatsoever, therefore, it was incapable of being enforced. It was further submitted that plea of vagueness of agreement can be raised at any stage.

Learned counsel for the defendants while arguing that plaintiff had also failed to prove due execution of the agreement, referred to the evidence adduced by the parties and also highlighted that defendant No.2 Sh. Malkit Singh had signed as 'Malkit Ram' in:- **(i)** the written statement dated 17.8.1996, **(ii)** in his examination-in-chief by way of affidavit dated 9.4.2003 and **(iii)** in an another agreement dated 26.8.1992 Ext. DW1/A with respect to return of Rs.28,000/- to the plaintiff. Whereas in the disputed agreement (Ext.PW1/A) his signatures appear as 'Malkit Singh'.

5. **Observations:**

5(a) **Questions of law No.1**:

5(a)(i) As per Section 29 of the Indian Contract Act, 1872, 'agreements', the meaning of which is not certain, or capable of being made certain, are void. Section 9 of the Specific Relief Act, 1963, entitles the defendant to plead by way of defence any ground available to him under law relating to the contracts, where relief of specific performance of contract is claimed under Chapter II of the Act. Before adverting to question of law, it would be appropriate to first notice the precedents in respect of specific performance of valid, enforceable contracts as also in respect of defective contracts.

5(a)(ii) Hon'ble Apex Court in ***(2016) 4 SCC 352***, titled ***Satish Kumar Vs Karan Singh & Anr.,*** held that the jurisdiction to order specific performance of contract is based on the existence of a valid and enforceable contract. Where a valid and enforceable contract has not been made, the Court will not make a contract for the parties. Specific performance will not be ordered if the contract itself suffers from some defect which makes it invalid or unenforceable. The discretion of the Court

will not be there even though the contract is otherwise valid and enforceable. In this regard, it is apposite to extract relevant paragraphs of this judgment:-

> "8 It is well settled that the jurisdiction to order specific performance of contract is based on the existence of a valid and enforceable contract. Where a valid and enforceable contract has not been made, the Court will not make a contract for them. Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable. The discretion of the Court will not be there even though the contract is otherwise valid and enforceable.
>
> 9 This Court in Mayawanti vs. Kaushalya Devi, 1990 3 SCC 1 held thus:-
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> > "8. In a case of specific performance it is settled law, and indeed it cannot be doubted, that the jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract.The Law of Contract is based on the ideal of freedom of contract and it provides the limiting principles within which the parties are free to make their own contracts. Where a valid and enforceable contract has not been made, the court will not make a contract for them. Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceable. The discretion of the court will be there even though the contract is otherwise valid and enforceable and it can pass a decree of specific performance even before there has been any breach of the contract. It is, therefore, necessary first to see whether there has been a valid and enforceable contract and then to see the nature and obligation arising out of it. The contract being the foundation of the obligation the order of specific performance is to enforce that obligation."

10 Exercise of discretionary power under Section 20 of the Specific Relief Act for granting a decree, this Court in the case of Parakunnan Veetill Josephs Son Mathew vs. Nedumbara Kuruivilas Son and others, 1987 AIR(SC) 2328 observed:-

> "14. Section 20 of the Specific Relief Act, 1963 preserves judicial discretion of courts as to decreeing specific performance. The court should meticulously consider all facts and circumstances of the case. The court is not bound to grant specific performance merely because it is lawful to do so. The motive behind the litigation should also enter into the judicial verdict. The court should take care to see that it is not used as an instrument of oppression to have an unfair advantage to the plaintiff. The High Court has failed to consider the motive with which Varghese instituted the suit. It was instituted because Kuruvila could not get the estate and Mathew was not prepared to part with it. The sheet anchor of the suit by Varghese is the agreement for sale Exhibit A-1. Since Chettiar had waived his rights thereunder, Varghese as an assignee could not get a better right to enforce that agreement. He is, therefore, not entitled to a decree for specific performance.

5(a)(iii) ***(2010) 15 SCC 601***, titled ***Pawan Kumar Dutt and Another Vs. Shakuntala Devi and Others,*** was a case where the Trial Court held that the suit for specific performance could not be decreed for want of certainty as to description of suit property. The First Appeal filed by the plaintiff was also dismissed. The High Court did not find any valid ground to take a different view on the concurrent findings of fact recorded by both the Courts below. The Hon'ble Apex Court held that 'Courts are not expected to pass a decree which is not capable of

enforcement in courts of law'. If a decree is to be granted for specific performance, without identification of the suit property, it will not be possible to enforce such a decree. The relevant para from the judgment which also notices theagreement specification is extracted hereinafter:-

> "7.But the position in the present case is different; that a portion out of the total larger extent was agreed to be sold, but, without specification of the area agreed to be sold. It is clear from the suit agreement that no boundaries of the suit property which was sold are specified in the agreement. It is not clear from what point the area is to be measured. It is also not clear that these 4 bighas 2 biswas is a portion of the land situated in the middle of the total land or in one portion or at the extreme end or at a particular place, in other words, there is no clear identity of the property agreed to be sold. The Courts are not expected to pass a decree which is not capable of enforcement in the courts of law. If the argument of the learned counsel for the appellants is to be accepted and if a decree is to be granted for specific performance, without identification of the suit property, it will not be possible to enforce such a decree."

5(a)(iv) In the instant case, agreement to sell refers to a 'Kutcha house' allegedly owned and possessed by the defendants in an area of around 5 biswa at Kangar, Tehsil Haroli, District Una, with further rider that revenue papers regarding Khasra number etc., of the house would be produced at the time of registration of sale deed. Neither the land in question nor the house involved has been identified in the agreement. No khasra number finds mentioned in the agreement. The extent of the area alleged to have been sold by the defendants in the agreement is around 5 biswa, whereas the plaint talks about land measuring 0-9 marlas out of total land measuring 3 kanals and 4 marlas, comprised in specific khasra numbers. Alongwith plaint, a site plan depicting the land referred to in the plaint has also been appended. The plaint is definitely an improvement

over the agreement to sell in respect of identity of land/house. Defendants in their written statement have admitted their joint ownership & possession over the suit land as well as of the house. By relying upon the revenue records (jamabandi for the year 1985-86/Ext.P1), they submit that they are joint owners over the suit land alongwith others. It is further their case that they have never executed the agreement in question. Be that as it may. The fact remains that the agreement to sell dated 6.11.1992 is vague. It does not reflect clear intention of the executants as to what was being agreed to be sold under the agreement. All material aspects which needed to be reflected with certainity have been left in the realms of speculation. Neither the agreement gives out clear identity of the land nor it spells out the boundaries. Even the area of the house-subject matter of the agreement is not correctly recorded therein. No ascertainable or determinative intention can be deciphered from this agreement. Such an agreement to sell is not capable of enforcement. Its specific performance cannot be granted. The judgments cited by learned counsel are based upon facts of individual cases. Substantial question of law No.1 answered, accordingly.

5(b) Question of Law No.2:-

Section 29 of Indian Contract Act entitles a defendant to avoid an agreement if the same is void. Also the defendant is entitled to take the defence of vagueness & void nature of the agreement in order to avoid its specific performance under Section 9 of the Specific Relief Act. Such a defence would essentially revolve around frame of the agreement and its logical interpretation in the facts of the case. Agreement being vague & therefore un-enforceable is a plea, which can be raised by the defendants even without specifically expressing it in the written statement. In ***2019***

(11) Scale 131 titled ***Tilak Raj Bakshi Vs. Avinash Chand Sharma (dead) through LRs & others,*** the Apex Court was inter-alia considering two questions viz i) whether the High Court was right in, without even a plea, holding that the family settlement is vague and unenforceable and void ii) Whether the High Court was right in holding that the Courts could not exercise discretion under Section 20 of the Specific Relief Act 1963 as the contract is not specifically enforceable. While answering the question, the Court reiterated the observation of Apex Court in ***AIR 1958 SC 512*** titled ***Keshav Lal Lallubhai Patel Vs. Lalbhai Tribumlal Mills***:-

> *20. The question is not res integra. A Bench of three learned Judges of this Court considered the very same question in Keshavlal Lallubhai Patel Vs. LalBhai Trikumlal Mills Lts held as follows:*
>
> > "10. There is one more point which must be considered. It was strongly urged before us by the appellants that, in the trial court, no plea had been taken by the respondent that the agreement for the extension of time was vague and uncertain.
> >
> > No such plea appears to have been taken even in the grounds of appeal preferred by the respondent in the High Court at Bombay; but apparently the plea was allowed to be raised in the High Court and the appellants took no objection to it at that stage. It cannot be said that it was not open to the High Court to allow such a plea to be raised even for the first time in appeal. After all, the plea raised is a plea of law based solely upon the construction of the letter which is the basis of the case for the extension of time for the performance of the contract and so it was competent to the appeal court to allow such a plea to be raised under Order 41 Rule 2 of the Code of Civil Procedure. If, on a fair construction, the, condition mentioned in the document is held to be vague or uncertain, no evidence can be

admitted to remove the said vagueness or uncertainty. The provisions of Section 93 of the Indian Evidence Act are clear on this point. It is the language of the document alone that will decide the question. It would not be open to the parties or to the court to attempt to remove the defect of vagueness or uncertainty by relying upon any extrinsic evidence. Such an attempt would really mean 4 AIR 1958 SC 512 the making of a new contract between the parties. That is why we do not think that the appellants can now effectively raise the point that the plea of vagueness should not have been entertained in the High Court." (Emphasis supplied)

21. Therefore, the mere fact that a plea is not taken, that the clause in question is vague, and hence, unenforceable and void will not stand in the way of the Appellate Court looking into the contract and, if on its terms, it finds it to be vague and unenforceable, it can be so held."

Reference in this regard can also be made to ***AIR 1990Kerala 198,*** titled ***K.G. Balakrishnan,J.*** titled ***Kandamath Cine Enterprises (Pvt.) Ltd. Vs. John Philipose.*** Relevant paragraphs whereof are extracted as under:-

"6. The next contention urged by the appellant's counsel is that the terms of Ext. Al are vague and uncertain and, therefore, it is not enforceable in view of Section 29 of the Contract Act. The contention of the appellant is that the description of the property to be sold is not made clear and it is so vague and uncertain. At the outset, I may point out that this plea was not raised before the Court below. No such plea was raised in the written statement. Moreover, the defendant company received Rs. 10,000/- as per Ext. Al receipt and therefore received the entire balance consideration as evidenced by Ext.Al endorsement and the two cheques issued in favour of the defendant. At no point of time the defendant

expressed the view that the terms of Ext Al was vague and uncertain and hence unenforceable. However, I am of the view that the appellant is entitled to raise this plea since it is a question of law.

7. The plea that a particular contract is void for uncertainty under Section 29 of the Contract Act is a question of law and if the terms of the contract are vague and uncertain the contract itself would be void and unenforceable under Section 29 of the Contract Act and that will go into the root of the matter and, therefore, it is a plea that could be raised even at the appellate stage. This view has been exemplified by authorities in Phuljhari Devi v. Mithai Lal, AIR 1971 All 494, Keshavalal v. Lalbhai T. Mills Ltd., AIR 1958 SC 512 at page 517.

8. The learned counsel for the appellant further contended that if the terms of the contract are uncertain no evidence can be admitted to remove the said vagueness or uncertainty in view of Section 93 of the Evidence Act. It is true that if any of the terms of the document is clearly uncertain and incapable of being made certain it may not be open to the parties to attempt to remove that vagueness or uncertainly by adducing other evidence. The learned counsel for the appellant points out that a Commission was taken out in this case to identify the plaintiff's property and the Commissioner prepared Ext. C2(a) plan and he has identified the property as plot "CXJK". The Commissioner identified the |plot with reference to Ext. Al agreement. It is incorrect to say that the Commission-was taken out to identify the property as the recital in Ext. Al was too vague and uncertain. The entire 5 acres and 2 cents of land was lying on the northern side of the public road leading to Engineering College. There is a by lane on the western side of the property. This bylane is being used by people residing on the further north of the defendant's property. It is an undisputed fact that the main public road is on the southern side of the property. When the parties described the property as "1 acre of front land", it clearly means 1 acre of the property lying on the northern side of the Engineering College road. It is difficult to interpret that 1 acre of front land intended by the parties was on the extreme northern side of the entire property or the property lying on the east of the western pathway. From the lie

of the property and the existence of the southern public road it is clear and certain that the 1 acre of land intended to be sold was "CXJK" in Ext. C2(a) plan. It is important to note that the defendant on the date of the agreement received Rupees 10,000/ - and after two months he received the balance consideration. Thus, the defendant accepted several payments towards the agreement without any protest and he acted on the agreement. At no point of time the defendant contended that the terms of the agreement are vague and uncertain and the plaintiff is not entitled to enforce the agreement. PW1, the father of the plaintiff, who acted on behalf of the plaintiff and DW1, the Managing Director of the defendant-company are well educated and they knew each other for a number of years. According to P. W.I, he visited the property several times in the company of DW1 and fully satisfied about the identity of the property".

Question of law No.2 is answered accordingly.

5(c) Question of law No.3

In ***2019 (3) SCC 704 titled Kamal Kumar Vs. Premlata Joshi & Others,*** the Hon'ble Apex Court held that the grant of specific performance is a discretionary and equitable relief and laid down following material questions required to be gone into for grant of relief of specific performance

"7.1. First, whether there exists a valid and concluded contract between the parties for sale/purchase of the suit property;

7.2. Second, whether the plaintiff has been ready and willing to perform his part of contract and whether he is still ready and willing to perform his part as mentioned in the contract;

7.3 Third, whether the plaintiff has, in fact, performed his part of the contract and, if so, how and to what extent and in what manner he has performed and whether such performance was in conformity with the terms of the contract;

> *Fourth, whether it will be equitable to grant the relief of specific performance to the plaintiff against the defendant in relation to suit property or it will cause any kind of hardship to the defendant and, if so, how and in what manner and the extent if such relief is eventually granted to the plaintiff;*
>
> *Lastly, whether the plaintiff is entitled for grant of any other alternative relief, namely, refund of earnest money etc. and, if so, on what grounds."*

Defendants have denied executing the agreement dated 6.11.1992. Their stand is that (Ext.PW1/A) is a forged document, which does not bear their signatures.

With the assistance of learned counsel for the parties, I have gone through the evidence on record. To prove this agreement, plaintiff examined three witnesses. PW-1 Mohd. Iqbal, was not even clear as to whether the agreement was executed in respect to the land or was in regarding sale of house. He was also appears to be confused, as to whether he knew Punjabi language or not. The agreement was scribed in Punjabi language. He stated that the stamp paper was brought by defendant No.2 Om Prakash and the agreement was scribed by Mewa Singh at around 1.02 P.M. at Dana Mandi on 6.11.1992. Agreement thereafter was read out by Mewa Singh for the benefit of all. He himself (PW-1) did not read the agreement. His given version of residence of defendants at the time of alleged execution of the agreement, is at variance with the version of the other witnesses of the plaintiff. PW-2 Mewa Singh, the scribe, did not produce the deed writer register. The stamp vendor was not examined by the plaintiff. Defendant No.2 Malkit Singh while appearing in examination-in-chief stated that Ext. PW1/A, dated 6.11.1992, was a forged document and never executed by the defendants. This witness was not at all cross-examined by the plaintiff in respect of the valid execution of the agreement. No suggestion was given to this witness by the plaintiff that he

had executed the agreement. Burden of proving due execution of the agreement was on the plaintiff, which he failed to discharge. Under the circumstances, there was hardly any necessity for expert opinion about signatures on the document. In this regard, it is apposite to refer to ***AIR 2016 Karnataka 192,*** titled ***Sayed Moinuddin Vs Md. Mehaboob Alam and others.*** Relevant paragraphs are extracted hereinafter:-

> "11. So looking to this oral evidence of plaintiff as well as the witnesses on the side of the plaintiff which has been observed by the Trial Court that, firstly the identity of the property is not clearly established as there are no boundaries mentioned in any of three documents. Not only that even with regard to exact property number, there is no consistent and acceptable evidence on the side of the plaintiff. Looking to the documents produced by the plaintiff regarding number of the property old as well as new one. Therefore, the Trial Court comes to the conclusion that the plaintiff failed to prove the agreements Ex.P-1 to P-3 with acceptable evidence. Accordingly the suit was dismissed. When the matter taken up before the first Appellate Court, the first Appellate Court after re-appreciating the materials on record, it also comes to the conclusion that the dismissal of the suit is in accordance with law and no illegality has been committed by the Trial Court.
>
> 13 When it is definite case of the plaintiff that agreement of sale is attested by the witnesses and witnesses have been examined before the Trial Court. The scribe of the document is also examined before the Trial Court and their evidence is appreciated by the Trial Court, the question of sending the document for expert opinion does not arise at all. Getting opinion of the expert is when there are no means to prove the document, then in that case as a last resort, the Court has to refer the document for expert opinion and expert opinion it is opinion evidence. When there are direct witnesses to the documents i.e., attesting witnesses and

the scribe of the document. When their evidence is not acceptable and trustworthy, the contention of the appellant before this Court cannot be accepted that it is to be sent for expert's opinion. No grounds in this Regular Second Appeal. Perusing the entire materials placed on record, I am of the opinion that no substantial question of law involved in this appeal. There is no merit in this appeal. Accordingly the appeal is dismissed in the admission stage itself. Consequently, the application I.A. No.1/2015 is also dismissed."

Plaintiff miserably failed to prove due execution of the agreement (Ext. PW-1/A)

Question of law No.3 is answered accordingly.

The agreement dated 6.11.1992 (Ext. PW-1/A) is vague & void, therefore, not capable of being enforced. Plaintiff even otherwise has failed to prove its execution by the defendants in accordance with law. No interference in concurrent dismissal of plaintiff's suit by the learned Courts below, is called for. Hence, the appeal is dismissed. Pending application(s),if any, also stand disposed of accordingly.

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

Nasrin ...Petitioner.

Versus

State of H.P. ...Respondent.

Cr.M.P.(M) No.567 of 2021
Reserved on: 05.04.2021
Date of Decision: April 9, 2021

Petition under section 439 Cr.P.C for Regular bail in case FIR No. 34/2021 under section 363, 366 A, 370(4), 506, 120-B IPC- Victim aged 15 years in

class 9th, did not return in the evening after school- Father approached police with suspicion that someone had abducted his daughter after alluring and misleading her- Held-in facts and circumstances of case, case of petitioner can be considered differently than other accused involved in the case, some of them have been arrested ,rest are absconding, allegation against her are that co-accused Ibad, her husband is not submitting himself for investigation and she was playing active role for handling minor girl and has been resisting handing over girl to police ,main accused Nazim is her brother and she under dictate of her brother had been facilitating the commission of offence- She was in judicial custody- Considering entire facts and circumstances with respect to role of petitioner coupled with the fact the she is a mother of an infant child dependant upon her breast feeding- Petitioner is entitled to be enlarged on bail. Title: Nasrin vs. State of H.P. Page-99

For the Petitioner: Mr. Rajesh Kumar Parmar, Advocate.

For the Respondent: Mr.Raju Ram Rahi, Deputy Advocate General.

ASI Nasib Singh, I.O. Police Station Sadar, Shimla, present alongwith record.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J (Oral)

By way of this petition, petitioner is seeking regular bail under Section 439 Code of Criminal Procedure (in short 'Cr.P.C.'), in case FIR No.34 of 2021, dated 05.03.2021, registered in Police Station Sadar, Shimla, H.P., under Sections 363, 366A, 370(4), 506 and 120B of the Indian Penal Code (in short 'IPC').

2. Status report stands filed, wherein it is stated that on 05.03.2021 victim, aged about 15 years, who is studying in Class 9th, had left her home at 9.30 a.m. to attend her school i.e. Sanatan Dharam Senior Secondary School, Ganj Bazaar, Shimla, and when she did not return home in the evening, her father, on inquiry, had received information that

on that day students were not called in the school. With aforesaid details, father of the victim had approached Police Station Sadar, Shimla, with suspicion that someone had abducted her daughter after alluring and misleading her.

3. As per status report, on complaint of father of the victim, case under Section 363 IPC was registered and investigation was started. During investigation, location of mobile number of victim was found in Haryana leading to the clue to the police that victim was travelling towards Delhi. Whereupon, police party was sent to Delhi in search of victim and it was also found that victim was having too many talks on two mobile numbers (96398-21301 and 62382-27896), therefore, CDRs and location of those two numbers were also requisitioned.

4. Investigating Officer, on 06.03.2021, after reaching in Police Station Badarpur, Delhi, started investigation and found that last location of victim, on 05.03.2021 at about 8.19 p.m., was found at Panipat and thereafter her phone was found switched off. From CDRs of two mobile numbers, Investigating Officer had contacted on some mobile numbers, which were found in contact of these two mobile numbers and during this exercise, one mobile number 95606-42747 was found to be of one Jatin Malik, who, in response, informed the Investigating Officer that he is having a Maruti Car bearing registration No.DL9CAP-3819 and on 05.03.2021 he had gone to Ambala from Delhi to drop a passenger and at Ambala a girl had met him, who had disclosed that she was going to Delhi, whereupon, when he was taking that girl to Delhi alongwith him and had reached near Panipat, mobile phone of that girl had switched off and for that reason that girl had contacted someone through his (Jatin's) mobile and the person, with whom she had talked, had disclosed his name to him (Jatin) as Zuber and further that Zuber had told him that one boy will send him location from mobile number 96671-56859 and had asked him (Jatin) to drop the victim on that location and

thereafter on receiving location of Badarpur, Delhi from the aforesaid number, he had dropped victim at Badarpur NTPC Chowk at about 10.30 p.m. on 05.03.2021, wherefrom a boy had taken her.

5. During investigation, it was revealed that the boy, who had sent the location, was one Ibrahim residing at Badarpur in a room rented in a building known as 'Akash'. During search for Ibrahim, his room was found locked and it came in notice that he was hiding in some other house in the room of his friend, wherefrom he was apprehended and taken to Badarpur Police Station and shown to Jatin, and Jatin had identified him the same boy to whom he had handed over the girl on 05.03.2021.

6. During interrogation, Ibrahim had disclosed that on 05.03.2021 he had received calls from Zuber and Nazim @ Sameer, the boys belonging to his village, who were working with him earlier at Delhi, but presently Zuber was at Chennai, whereas, Nazim @ Sameer was in Kerala. He had further revealed that both of them had informed him that one 'X' named girl (victim) would come in some vehicle at Badarpur NTPC Gate and they had asked him to take her to his quarter and further that on request of these two persons he had taken victim from Badarpur NTPC Gate to his room in 'Akash' building and had kept her in his room on 05.03.2021 and 06.03.2021 and on 07.03.2021, he had taken the victim to Dhakia and as he was anticipating that police would be in his search, therefore, he was not sleeping in his room but was staying with his friend. Ibrahim had also disclosed that victim, at the time of investigation, was in Dhakia and his elder brother Istiyaak, who is serving at Delhi and living with him in the same room, had also gone to Village Sahaspur near Dhakia and on his message he would come to Badarpur alongwith victim. Ibrahim had also disclosed that Nazim @ Sameer was intending to marry victim and Nazim @ Sameer and Zuber had called victim to Delhi, but Zuber was at that time at Chennai and Nazim @ Sameer was in Kerala and, therefore, victim was housed with him.

7. On 08.03.2021 at about 09.30 a.m. Istiyaak brother of Ibrahim and Nasrin (petitioner), on message, had brought victim to Police Station Badarpur, Delhi, who was identified by her father and thereafter victim had identified the places where she was dropped from the car and also the room of Ibrahim.

8. On 10.03.2021, statement of victim was also recorded under Section 164 Cr.P.C. and considering the circumstances revealed, during investigation and from statement of victim, Sections 366A, 370(4), 506 and 120B IPC were also added in the case. As per record age of victim is 14 years 11 months.

9. During investigation in custody, Ibrahim had identified house where he had handed over victim to Nasrin and her husband Ibad. Nasrin and her husband were directed to join investigation in their area's Police Station at Dhidholi. On 13.03,2021 houses of Zuber and Nazim @ Sameer were searched where they were not found at home. In none of these houses any male was found, and Mehsar mother of Zuber and Jafree mother of Nazim @ Sameer had also denied any knowledge regarding whereabouts of their respective sons. Nasrin and her husband did not turn up to the Police Station and on inquiry it was found that they had locked their house and had fled. Nasrin did not return her home during day and night of 13.03.2021, whereupon Investigating Officer however announced that police party is going back to Himachal Pradesh, but, in fact, stayed at a distant place, whereupon, believing that Himachal Police had gone back, Nasrin came back to her house on 14.03.2021 at 9.30 a.m. and on receiving that information, police party reached her home and brought her to Police Station for interrogation and on the same day, at about 2.10 p.m., she was arrested by giving due information to Rahees, Pradhan of Dhakia Panchayat.

10. During investigation, Nasrin had disclosed that Ibrahim had brought the minor victim to her house on 07.03.2021, and, on the mobile of

Ibrahim, her brother Nazim @ Sameer had also talked with her and her husband, and he and her husband had kept minor in their home at the behest of Nazim @ Sameer, and despite having knowledge about age of victim, circumstances in which victim had reached there and religion of victim, they did not report the matter to the police and when during night they came to know about that staying of victim with them had come in the knowledge of police, Istiyaak brother of Ibrahim had come to their house to take victim to Delhi then, firstly they had resisted, but later on had agreed to send victim to Delhi.

11. During investigation, Nasrin had expressed her ignorance about mobile number and address of her brother Nazim @ Sameer and also mobile number of her husband and whereabouts of her husband. At present, Nasrin is in judicial custody.

12. Learned Deputy Advocate General has submitted that co-accused Ibad, who is husband of petitioner is not submitting himself to the Investigating Agency for interrogation and petitioner was actively playing role for hiding a minor girl (victim) and had been resisting handing over the girl to the police. Further that keeping in view the role of the petitioner and the fact that main accused Nazim @ Sameer is her brother and she under dictates of her brother had been facilitating the commission of offence, she does not deserve to be enlarged on bail as on her release there is every possibility of her fleeing from justice like her husband.

13. Learned counsel for the petitioner has submitted that petitioner is a woman having her family and a permanent home in Village Dhakia, District Amroha, U.P., and there is no possibility of her fleeing from justice and further that petitioner is also ready to furnish local surety for ensuring her presence during trial.

14. Learned counsel for the petitioner has also submitted that present case is not a case of conspiracy, but a simple story of love affair where

victim herself had left her house and reached Ambala, wherein petitioner had no role to play and even thereafter till handing over of victim to petitioner (Nasrin) by Ibrahim, and acceptance of the girl in her house by her after having talks with her brother Nazim @ Sameer on the mobile phone of Ibrahim itself indicates that she was not having knowledge about activities of her brother and intention of her brother or others involved in the case and her resistance not to hand over the girl to Istiyaak was also for having concern to the safety of the victim. It is also stated that even if prosecution case is admitted to be proved in all respects, there is no overt act on the part of the petitioner for commission of offence and when a minor girl had reached her house, petitioner was having no other option but to give shelter to the minor girl and further that petitioner is a woman of age of 40 years having five children and youngest child is of two years of age and is dependent on breasts feeding of the petitioner. Therefore, he has prayed for enlarging the petitioner on bail, particularly keeping in view the provisions of Section 437 of Cr.P.C.

15. No doubt, Section 437 Cr.P.C. deals with situation when accused is produced before the Magistrate and Section 439 Cr.P.C. devolves special power on the High Court and/or Court of Sessions regarding the bail and both Sections deal with different situations in different Courts, but it is also settled position that provisions contained in Sections 437 and 438 Cr.P.C. can also be taken into consideration at the time of considering bail under Section 439 Cr.P.C. In fact, Section 437 Cr.P.C. refrains the Court, other than the High Court or Court of Sessions, from releasing a person, accused or suspect of commission of any non-bailable offence, who is arrested or detained for without warrant, or appears, or is produced before such Court and there appears reasonable ground for believing that he is guilty of an offence punishable with death, or imprisonment for life. However, an exception has been carved out enabling such Court to release such a person on bail, in case, such person is under the age of sixteen years, or is a woman, or is sick, or

infirm, with further provision that no such person shall be released without giving an opportunity of hearing to the Public Prosecutor, which means that the persons under the age of sixteen years, or woman, or sick, or infirm are also not to be released in all cases, but after considering facts and circumstances brought in the notice of the Court by Public Prosecutor. Therefore, a woman accused cannot claim her entitlement for bail only for her womanhood, but discretion has been given to the Court to decide the bail application of a woman after considering facts and circumstances of the case, particularly nature and gravity of the offence and role of the woman in commission thereof.

16. In the given facts and circumstances of present case, case of the petitioner can be considered differently than the other accused involved in the case and some of them have been arrested and rest are absconding.

17. Considering entire facts and circumstances brought before me with respect to role of petitioner coupled with the fact that she is a mother of an infant child dependent upon her breasts feeding, I am of the opinion that at this stage, petitioner is entitled to be enlarged on bail.

18. Accordingly, petition is allowed and petitioner is ordered to be released on bail in case FIR No.34 of 2021 dated 05.03.2021, registered in Police Station Sadar, Shimla H.P., on her furnishing personal bond in the sum of `1,00,000/- with two sureties in the like amount, out of which one surety, as undertaken, shall be local surety, to the satisfaction of the trial Court, within two weeks from today, upon such further conditions as may be deemed fit and proper by the trial Court, including the conditions enumerated hereinafter, so as to ensure the presence of petitioner/accused at the time of trial and also subject to following conditions:-

(i) That the petitioner shall make herself available to the police or any other Investigating Agency or Court in the present case as and when required;

(ii) that the petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade her from disclosing such facts to Court or to any police officer or tamper with the evidence. She shall not, in any manner, try to overawe or influence or intimidate the prosecution witnesses;

(iii) that the petitioner shall not obstruct the smooth progress of the investigation/trial;

(iv) that the petitioner shall not commit the offence similar to the offence to which she is accused or suspected;

(v) that the petitioner shall not misuse her liberty in any manner;

(vi) that the petitioner shall not jump over the bail;

(vii) that in case petitioner indulge in repetition of similar offence(s) then, her bail shall be liable to be cancelled on taking appropriate steps by prosecution; and

(viii) that the petitioner shall not leave the territory of India without prior permission of the Court.

(ix) that the petitioner shall inform the Police/Court her contact number and shall keep on informing about change in address and contact number, if any, in future.

19. It will be open to the prosecution to apply for imposing and/or to the trial Court to impose any other condition on the petitioner as deemed necessary in the facts and circumstances of the case and in the interest of justice and thereupon, it will also be open to the trial Court to impose any other or further condition on the petitioner as it may deem necessary in the interest of justice.

20. In case the petitioner violates any condition imposed upon her, her bail shall be liable to be cancelled. In such eventuality, prosecution may approach the competent Court of law for cancellation of bail, in accordance with law.

21. Trial Court is directed to comply with the directions issued by the High Court, vide communication No.HHC.VIG./Misc. Instructions/93-IV.7139 dated 18.03.2013.

22. Observations made in this petition hereinbefore, shall not affect the merits of the case in any manner and are strictly confined for the disposal of the bail application.

23. Petition is disposed of in aforesaid terms.

24. Copy dasti.

25. Petitioner is permitted to produce a copy of this judgment, downloaded from the web-page of the High Court of Himachal Pradesh, before the authorities concerned, and the said authorities shall not insist for production of a certified copy.

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

Parveen Kumar ...Petitioner

Versus

State of H.P. ....Respondent

Cr.MP(M) No. 564 of 2021
Judgment Reserved on 6th April,2021
Date of Decision 09th April, 2021

Petition under section 438 Cr.P.C- Anticipatory bail- in case FIR 21/2021 u/s 15, 29, 27-A ND&PS Act- Allegations are when truck was intercepted by police on information, person driving the truck, after parking the truck, fled away towards yamuna river taking benefit of darkness and dense fog- On checking truck- 8 plastic bags were found suspected to contain poppy straw- Weight of poppy straw was 200.278 kg-As per owner of truck, he handed over key of truck to Mohammed Deen at the instance of petitioner- Petitioner evaded to join investigation- Petitioner also approached court of Ld. Sessions Judge for anticipatory bail under section 438 Cr.P.C- His petition was

dismissed- Held- considering the material placed before Hon'ble High Court- Nature, gravity and seriousness of offence, quantum of contraband recovered and involvement of number of persons in procuring and transporting huge quantum of contraband, investigation is in progress - custodial interrogation of petitioner is justified- No case made out to enlarge him on bail- petition dismissed.

Cases referred:
Bhadresh Bipinbhai Sheth vs. State of Gujarat and another, 2016(1) SCC 152;
Mulana Mohammed Amir Rashadi vs. State of Uttar Pradesh and another, 2012(2) SCC 382;
Sanjay Chandra vs.Central Bureau of Investigation, (2012)1 SCC 40;
Santosh vs. State of Maharashtra, reported in (2017)9 SCC 714;
Tofan Singh vs. State of Tamil Nadu AIR 2020 SC 5592;

For the Petitioner: Mr. Dheeraj K. Vashisht, Advocate.

For the Respondent: Mr. Sunny Dhatwalia, Assistant Advocate General.

Mr.Rajesh Pal, Additional SHO Police Station Paonta Sahib.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

Petitioner has approached this Court, under Section 438 Cr.P.C., for granting him anticipatory bail in case FIR No. 21 of 2021 dated 11.2.2021, registered under Sections 15, 29, 27-A of Narcotic Drugs and Psychotropic Substances Act (hereinafter in short 'NDPS Act') and Section 212 IPC in Police Station Paonta Sahib, District Sirmaur (H.P.).

2 Status report stands filed wherein it is brought on record that on 2.11.2021, at about 6 AM, on the basis of reliable information that truck No. HP-11-4991 moving towards Banjara Basti huge poppy-straw can be recovered, the said information was transmitted to Sub Divisional Police Officer as provided under Section 42 (2) of NDPS Act and police party had

rushed towards Banjara Basti where aforesaid truck was found coming towards Satiwala Chowk main road. However, on seeing the PCR van of police, person driving the truck, after parking the truck, had come out from driver side and had fled towards Yamuna river by taking benefit of darkness and dense fog and despite taking help of torch and mobile light, he could not be chased by police officials, and during checking of truck, 8 plastic bags were found in rear portion of truck and on opening of one bag, poppy-straw was found therein, which created suspicion that other 7 plastic bags might have been containing poppy-straw, whereupon house owners of houses, adjacent to the spot, were asked to join search and seizure process, but, by citing their difficulties, they refused to come on spot, whereupon Panchayat Pardhan Anjana and Up-Pardhan Satnam Singh were called on spot from their houses through PCR van and were asked to join search and seizure process, but, they also had refused to join as independent witnesses by referring their own restrictions. Thereafter, a Constable was sent to Toll Tax Barrier Bahral in search of independent witness wherefrom Toll Tax Barrier employee Arun Sharma had agreed to become an independent witness and thus, he was associated in search and seizure process. Thereafter, 8 plastic bags were unloaded from truck and each bag was opened and checked, wherein poppy-straw was found. On weighing with electronic scale available in police vehicle, in total 200.278 Kg poppy-straw was found in those bags. Thereafter, by sending a ruka, FIR was registered in Police Station and recovered contraband was seized and taken in possession by Investigating Officer and thereafter, SI Gian Singh along with police officials had gone to Khaira valley of Yamuna river in search of accused, then in Khaira valley also, he had found 6 plastic bags of poppy-straw and two spades and one belcha kept in pits of sand under cover of bushes. In these bags, in total 150.500 Kg poppy-straw was found, which was also taken in possession along with belcha and spades.

3 On 15.2.2021, Higher Police Officers had constituted a Special Investigation Team for investigating the case. During investigation, truck owner Ajmer Singh was interrogated, who had disclosed that on 10.2.2021 Parveen Kumar resident of Satiwala (petitioner), who was his neighbour, had approached him in the morning for his truck to shift the goods therein and he (Ajmer) had agreed for that and in the evening Parveen and Subhash had come to his house and asked him to bring the truck near Reliance Petrol Pump, Taruwala by saying that both of them would meet him there, whereupon, Ajmer had driven his truck from his house and Parveen and Subhash had followed him in his (Ajmer's) Alto car and thereafter, Parveen had telephonically informed Ajmer that Mohammad Deen @ Kala and Chaman @ Tinku will meet him behind the petrol pump and asked him (Ajmer) to hand over the key of truck to them and accordingly he (Ajmer) had handed over the key of truck to Mohammad Deen and Chaman @ Tinku and started coming back on foot towards Badripur and by that time, Parveen and Subhash, who had brought his car, handed over the car to him and thereafter he (Ajmer) went home.

4 It is stated in status report that since 12.2.2021, police kept on searching Mohammad Deen @ Kala, Chaman @ Tinku, Subuash and Parveen in their homes, but, they had absconded to avoid their arrest and thereafter, on 19.2.2021, Mohammad Deen @ Kala, Budh Ram and Ajmer could be traced after great difficulty and were associated in the investigation and during interrogation, Mohammad Deen had disclosed that poppy-straw was brought out of State in another truck with help of Parveen, Subhash and Chaman @ Tinku and thereafter, Mohammad Deen @ Kala, Ajmer Singh and Budh Ram were arrested on 19.2.2021 and their police remand was obtained on 20.2.2021.

5 As per status report, on 20.2.2021, Mohammad Deen had made a disclosure statement under Section 27 of Indian Evidence Act in the

presence of independent witness Gaurav Dhiman, Block Development Officer Paonta Sahib and ASI Ram Lal and in pursuant thereto, 4 bags of poppy-straw were recovered from Satiwala forest/Khudd wherein in total 101.530 Kg. poppy-straw was recovered.

6 The recovered contraband was sent for chemical analysis to the State FSL Jundga and it has been reported by State FSL that recovered material was poppy-straw.

7 As per status report, Budh Ram had used his tractor No. HP-17D-9357 for loading and unloading the poppy-straw under instructions of Parveen Kumar petitioner and car of Ajmer bearing No. HP-17E-9340 was used by Parveen Kumar and Subhash and another car of Ajmer HP-17F-4020 was also used by Mohammad Deen @ Kala and Mushatkeen to procure poppy-straw from Jharkhand and to load in truck No. HR-55A-4876 along with driver Deepak in the month of January, 2021 in the bags of rice. All these vehicles have been taken in possession by police. It is also stated that after taking into possession of aforesaid trucks by Finance Company in Banaras, Mohammad Deen and Mushatkeen had returned home, but, truck driver Deepak had stayed there and freight thereof was fixed by Mohammad Deen @ Kala and Ahsaan resident of village Dharmawala in District Dehradun for Rs. 1,50,000/- and out of that, Rs.80,000/- were received by Ahsaan from Mohammad Deen and, therefore, Ahsaan has also been arrested under Section 29 of NDPS Act on 23.2.2021, who after remaining in police custody for three days, has been sent to judicial custody since 26.2.2021.

8 According to status report, efforts for searching Parveen were made in his village and in his relations and on 15.2.2021, his wife Nigam was asked to inform her husband to join the investigation on 15.2.2021, whereupon, Parveen along with his wife and daughter had shifted to his In-laws house at Atalpur, Meerut (UP) and after receiving reliable information about his presence in his In-laws house, police party reached at Meerut on

2.3.2021 where it was found that his mother-in-law Anita and father-in-law Raj Kumar, instead of sending him to Police Station Paonta Sahib, had sent him in relations in Rajasthan.

9 As per status report, it was found that Raj Kumar and Anita Devi had harboured petitioner Parveen Kumar and thereafter had helped him to fled from his in-laws house and therefore, Raj Kumar was arrested on 16.3.2021 under Section 27-A of NDPS Act read with Section 212 IPC. Raj Kumar is alsoin judicial custody since 15th March, 2021.

10 After arrest of his father-in-law, petitioner had approached District and Sessions Judge (Special Judge), Nahan on 8.3.2021 under Section 438 Cr.P.C. for availing anticipatory bail, but, his petition was dismissed on 10.3.2021 and thereafter, he had filed present petition in this Court.

11 It is stated in status report that Mohammad Deen had brought 680 Kg. poppy-straw from Jharkhand wherefrom 452.308 Kg. has been recovered and remaining quantity of poppy-straw is yet to be recovered and after obtaining anticipatory bail, though Parveen has joined the investigation, but is not cooperating in investigation and has denied the acquaintance with arrested persons including Ajmer and has stated that he has not been keeping mobile phone since last one year, whereas, from CDR of mobiles, it has been found that he had been using mobile number 98053-03964 most of times and on 10.2.2021 also, he had talks with Ajmer Singh on mobile for eight times and in addition, Ajmer Singh had also rung him for six times and he was in regular contact with Ajmer and other accused persons through Whatsapp calls. During interrogation, arrested co-accused have already disclosed that Parveen was also having other 4-5 SIMS which were being used by him. It is also stated that earlier also, Parveen was found involved in commission of offence under Section 15 of NDPS Act in case FIR No. 150 of 2020 dated 29.9.2020 and in that case, he was found in possession of 3.762 Kg. poppy-

straw and he was enlarged on bail in that case on 31.10.2020 by District and Sessions Judge, Nahan. It is also submitted that co-accused Subhash, Deepak resident of Bijnour and Chaman Lal @ Tinku and Mushatkeen resident of Chhachhroli Haryana are still absconding.

12 Learned Deputy Advocate General has submitted that petitioner is member of a big racket involved in supplying the narcotic drug in the State and investigation is at the initial stage and there is credential evidence available on record with respect to involvement of petitioner as one of main accused in present case and despite availing benefit of anticipatory bail, he is not cooperating in investigation and his non-cooperation and falsehood has been proved from the call details record of mobile number being used by him.

13 Learned counsel for the petitioner submits that petitioner has nothing to do with present case and he is being implicated on the basis of suspicion and also on the basis of alleged disclosure statements of co-accused, which cannot be taken into consideration against him in view of pronouncements of Apex Court in ***Tofan Singh vs. State of Tamil Nadu*** reported in ***AIR 2020 SC 5592;*** and ***Sanjay Chandra vs.Central Bureau of Investigation,*** reported in ***(2012)1 SCC 40*** and further that though it is true that another case under Section 15 of NDPS Act was registered against petitioner in September, 2020, however, in view of judgment of the Supreme Court passed in ***Mulana Mohammed Amir Rashadi vs. State of Uttar Pradesh and another,*** reported in ***2012(2) SCC 382,*** past precedent of involvement of petitioner in commission of offence cannot be considered for accusing the petitioner in present case and for rejecting his bail on this count. He has further submitted that in view of decision rendered by the Supreme Court in ***Santosh vs. State of Maharashtra,*** reported in ***(2017)9 SCC 714***, refusal to confess by accused cannot be considered a non-cooperation by accused in investigation and thus, this ground cannot be taken for cancellation of bail. Lastly, it is submitted that for principles culled out in

judgment of Supreme Court in ***Bhadresh Bipinbhai Sheth vs. State of Gujarat and another,*** reported in ***2016(1) SCC 152,*** petitioner is entitled for confirmation of his anticipatory bail granted to him.

14 It is also canvassed that for the purpose of recovery of alleged remaining part of contraband, personal liberty of petitioner guaranteed under Article 21 of Constitution of India cannot be infringed.

15 It is well settled that interference by Court at the investigation stage, in normal course, is not warranted. However, Section 438 Cr.P.C. provides an exception to general principle, wherein power has been incorporated by Courts by reading it with Article 21 of Constitution of India, so as to keep arbitrary and unreasonable limitations on the personal liberty at bay. The essence of mandate of Article 21 of Constitution of India is a basic concept of Section 438 Cr.P.C.

16 Section 156 Cr.P.C. read with Section 157 Cr.PC empowers Police Officer to investigate and to arrest the offender during investigation in order to investigate the facts and circumstances of the case. Section 41 Cr.PC also empowers the Police Officer to arrest an offender, without an order from the Magistrate as provided under Sections 41(1)(b)(ii) and 41(1)(ba), in case Police Officer has reasons to believe on the basis of information that person has committed any offence referred in these Sections. Therefore, Police Officer/Investigating Officer is empowered to arrest the offender or suspect for proper investigation of offence as provided under Section 41 read with Section 157 Cr.P.C.

17 Article 21 of Constitution of India provides that no person shall be deprived of his life and personal liberty except according to procedure established by law. Arrest of an offender or suspect during investigation, as discussed supra, is duly prescribed in Code of Criminal Procedure, but at the same time, Code of Criminal Procedure also contains provisions for release of

offender or suspect on bail by Magistrate, Sessions Court and High Court which include grant of anticipatory bail under Section 438 Cr.PC.

18 Balance has to be maintained between right of personal liberty and right of Investigating Agency to investigate and to arrest an offender for the purpose of investigation.

19 Undisputedly, bail is rule and jail is exception. But, at the same time, it is also to be kept in mind that provisions of Cr.PC empower a Police Officer to arrest not only the offender but also suspect in the given facts and circumstances, in consonance with provisions related thereto. Though provisions for bail have been provided in the Cr.PC, however Courts are also empowered to reject the bail subjecting the accused or suspect not only to police custody but also to judicial custody, even after completion of investigation, even if accused or suspect is no more required for interrogation or investigation by the Investigating Agency. Therefore, grant or refusal of bail, including anticipatory bail, is to be considered by considering relevant factors, parameters and principles enumerated and propounded by the Courts in various pronouncements.

20 In present case, considering the material placed before me, nature, gravity and seriousness of offence, quantum of contraband recovered and involvement of a group of persons in procuring and transporting the huge quantity of contraband to the State of HP and keeping in view the initial stage of investigation and also for the reason that though petitioner has denied acquaintance with Ajmer and other accused, however, he has been found in their regular contact as evident from CDR of mobile number being used by him, I am of the considered view that no case is made out for enlarging the petitioner on bail by exercising power under Section 438 Cr.PC as prayer for custodial interrogation of petitioner has been found just and valid.

21 So far as principles propounded in pronouncements referred supra, cited by petitioner are concerned, there is no quarrel in this regard.

However, by taking into consideration the entire facts and circumstances of the present case as brought in the notice of Court, I find that these judgments are of no help to the petitioner.

Accordingly, petition is dismissed with direction to petitioner to surrender before police/Investigating Officer.

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

Ibad ....Petitioner

Versus

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

CRMPM No.716 of 2021
Date of Decision: April 9, 2021

Petition under section 438 Cr.P.C- Anticipatory bail- in case FIR 34/2021 under section 363, 366A, 370(4), 506, and 120-B IPC- Victim aged 15 years in class 9th, did not return in the evening after school- Father approached the police with suspicion that someone had abducted his daughter after alluring and misleading her- Held- Keeping in view nature, gravity and seriousness of offence- Manner in which girl had been managed to have travelled from Shimla to a remote village of U.P.in an organized manner and for finding or ruling out possibility of amplitude and magnitude of the conspiracy- Custodial interrogation of the petitioner is justified- Petition dismissed.

For the Petitioner : Mr. Rajesh Kumar Parmar, Advocate.

For the respondent : Mr. Raju Ram Rahi, Deputy Advocate General.

ASI Nasib Singh, Police Station Sadar, District Shimla, is present alongwith record.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

Notice.

2. Mr. Raju Ram Rahi, learned Deputy Advocate General, appears, waves and accepts service of notice on behalf of the respondent-State.

3. Learned Deputy Advocate General submits that, after notification of listing of present petition, he has called the Investigating Officer from Police Station Sadar, District Shimla, Himachal Pradesh and, under instructions, he submits that petitioner is a co-accused in case FIR No.34 of 2021, dated 5.3.2021, registered in Police Station Sadar, Shimla, H.P., under Sections 363, 366A, 370(4), 506 and 120B of the Indian Penal Code (in short 'IPC'), wherein his brother-in-law Nazim @ Sameer and wife Nasrin are also accused and his wife, after remaining in police and judicial custody, has been ordered to be enlarged on bail today (9.4.2021), vide order passed in CRMPM No.567 of 2021, and, till the passing of the said order, petitioner was absconding and present petition has been filed after enlargement of Nasrin on bail today. Whereas bail petition CRMPM No.620 of 2021, filed by Nazim @ Sameer, seeking anticipatory bail, has been rejected by this Court, for necessity of custodial interrogation.

4. ASI Nasib Singh, Investigating Officer, Police Station Sadar, Shimla, is present in person alongwith record and has filed Status Report, which is taken on record and placed on the file.

5. By way of this petition, petitioner is seeking anticipatory bail under Section 438 of the Code of Criminal Procedure (in short 'Cr.P.C.'), in the aforesaid case FIR.

6. In the Status Report, it is stated that on 5.3.2021 victim, aged about 15 years, who is studying in Class 9th, had left her home at 9.30 a.m. to attend her school i.e. Sanatan Dharam Senior Secondary School, Ganj Bazaar, Shimla, and when she did not return home in the evening, her father, on inquiry, had received information that on that day students were not called in the school. With aforesaid details, father of the victim had approached Police Station Sadar, Shimla, with suspicion that someone had abducted her daughter after alluring and misleading her.

7. It is further stated in Status Report that on complaint of father of the victim, case under Section 363 IPC was registered and investigation was started. During investigation, location of mobile number of victim was found in Haryana leading to the clue to the police that victim was travelling towards Delhi. Whereupon, police party was sent to Delhi in search of victim and it was also found that victim was having too many talks on two mobile numbers (96398-21301 and 62382-27896), therefore, CDRs and location of those two numbers were also requisitioned.

8. Investigating Officer, on 6.3.2021, after reaching in Police Station Badarpur, Delhi, started investigation and found that last location of victim, on 5.3.2021 at about 8.19 p.m., was found at Panipat and thereafter her phone was found switched off. From CDRs of two mobile numbers, Investigating Officer had contacted on some mobile numbers, which were found in contact of these two mobile numbers and during this exercise, one mobile number 95606-42747 was found to be of one Jatin Malik, who, in response, informed the Investigating Officer that he is having a Maruti Car bearing registration No.DL9CAP-3819 and on 5.3.2021 he had gone to Ambala from Delhi to drop a passenger and at Ambala a girl had met him, who had disclosed that she was going to Delhi, whereupon, when he was taking that girl to Delhi alongwith him and had reached near Panipat, mobile phone of that girl had switched off and for that reason that girl had contacted someone through his (Jatin's) mobile and the person, with whom she had talked, had disclosed his name to him (Jatin) as Zuber and further that Zuber had told him that one boy will send him location from mobile number 96671-56859 and had asked him (Jatin) to drop the victim on that location and thereafter on receiving location of Badarpur, Delhi from the aforesaid number, he had dropped victim at Badarpur NTPC Chowk at about 10.30 p.m. on 5.3.2021, wherefrom a boy had taken her.

9. During investigation, it was revealed that the boy, who had sent the location, was one Ibrahim residing at Badarpur in a room rented in a building known as 'Akash'. During search for Ibrahim, his room was found locked and it came in notice that he was hiding in some other house in the room of his friend, wherefrom he was apprehended and taken to Badarpur Police Station and shown to Jatin, and Jatin had identified him the same boy to whom he had handed over the girl on 5.3.2021.

10. During interrogation, Ibrahim had disclosed that on 5.3.2021 he had received calls from Zuber and Nazim @ Sameer, the boys belonging to his village, who were working with him earlier at Delhi, but presently Zuber was at Chennai, whereas, Nazim @ Sameer was in Kerala. He had further revealed that both of them had informed him that one 'X' named girl (victim) would come in some vehicle at Badarpur NTPC Gate and they had asked him to take her to his quarter and further that on request of these two persons he had taken victim from Badarpur NTPC Gate to his room in 'Akash' building and had kept her in his room on 5.3.2021 and 6.3.2021 and on 7.3.2021, he had taken the victim to Dhakia and as he was anticipating that police would be in his search, therefore, he was not sleeping in his room but was staying with his friend. Ibrahim had also disclosed that victim, at the time of investigation, was in Dhakia and his elder brother Istiyaak, who is serving at Delhi and living with him in the same room, had also gone to Village Sahaspur near Dhakia and on his message he would come to Badarpur alongwith victim. Ibrahim had also disclosed that Nazim @ Sameer was intending to marry victim and Nazim @ Sameer and Zuber had called victim to Delhi, but Zuber was at that time at Chennai and Nazim @ Sameer was in Kerala and, therefore, victim was housed with him.

11. On 8.3.2021 at about 9.30 a.m. Istiyaak brother of Ibrahim and Nasrin, on message, had brought victim to Police Station Badarpur, Delhi,

who was identified by her father and thereafter victim had identified the places where she was dropped from the car and also the room of Ibrahim.

12. On 10.3.2021, statement of victim was also recorded under Section 164 Cr.P.C. and considering the circumstances revealed, during investigation and from statement of victim, Sections 366A, 370(4), 506 and 120B IPC were also added in the case. As per record age of victim is 14 years 11 months.

13. During investigation, in custody, Ibrahim had identified the house where he had handed over victim to Nasrin and petitioner-Ibad. Nasrin and the petitioner were directed to join investigation in their area's Police Station at Dhidholi. On 13.3,2021 houses of Zuber and Nazim @ Sameer were searched where they were not found at home. In none of these houses any male was found, and Mehsar mother of Zuber and Jafree mother of Nazim @ Sameer had also denied any knowledge regarding whereabouts of their respective sons. Petitioner and Nasrin did not turn up to the Police Station and on inquiry it was found that they had locked their house and had fled. Nasrin did not return her home during day and night of 13.3.2021, whereupon Investigating Officer, however, announced that police party is going back to Himachal Pradesh, but, in fact, stayed at a distant place, whereupon, believing that Himachal Police had gone back, Nasrin came back to her house on 14.3.2021 at 9.30 a.m. and on receiving that information, police party reached her home and brought her to Police Station for interrogation and on the same day, at about 2.10 p.m., she was arrested by giving due information to Rahees, Pradhan of Dhakia Panchayat.

14. During investigation, co-accused Nasrin had disclosed that Ibrahim had brought the minor victim to her house on 7.3.2021, and, on the mobile of Ibrahim, her brother Nazim @ Sameer had also talked with her and the petitioner, and she and the petitioner had kept the minor in their home at the behest of Nazim @ Sameer, and despite having knowledge about age of

victim, circumstances in which victim had reached there and religion of victim, they did not report the matter to the police and when during night they came to know about that staying of victim with them had come in the knowledge of police, Istiyaak brother of Ibrahim had come to their house to take victim to Delhi then, firstly they had resisted, but lateron had agreed to send victim to Delhi.

15. During investigation, it has also come that Nazim @ Sameer had been in contact of victim since last five months, after sending her friend requests on FACEBOOK and thereafter he was in regular contact of the victim, and that the petitioner and his wife co-accused Nasrin had conspired with main accused Nazim @ Sameer and Zuber.

16. During investigation, Nasrin had expressed her ignorance about mobile number and address of her brother Nazim @ Sameer and also mobile number and whereabouts of the petitioner.

17. Learned Deputy Advocate General has submitted that the petitioner is not submitting himself to the Investigating Agency for interrogation and he was actively playing role for hiding a minor girl (victim) and had been resisting handing over the girl to the police. Further that keeping in view the role of the petitioner and the fact that main accused Nazim @ Sameer is his brother-in-law and petitioner had been facilitating the commission of offence, he does not deserve to be enlarged on anticipatory bail as on his release there is every possibility of his fleeing from justice.

18. Learned counsel for the petitioner has submitted that it is not a case of big conspiracy, but of simple story of love affair where victim herself had left her house and reached Ambala and petitioner had only, in order to ensure her safety, had been making arrangements for her arrival to Delhi in his house and at the time of leaving house by the victim, petitioner was in Kerala and it was not possible for him to kidnap victim or allure her to leave lawful guardianship of her parents. He has further submitted that there is no

overt act on the part of petitioner in leaving of the house by the victim, rather victim had voluntarily left her house and when she reached Ambala, petitioner had only helped her by providing shelter to her.

19. Section 156 Cr.P.C. empowers Police Officer to investigate in cognizable offences without order of the Magistrate and Section 157 prescribes procedure for investigation, which also provides that when an Officer Incharge of a Police Station has reason to suspect the commission of an offence, which he is empowered to investigate under Section 156, he, after sending a report to the Magistrate, shall proceed in person or shall depute one of his subordinate Officers as prescribed in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender.

20. Chapter V of the Cr.P.C. deals with provisions related to arrest of persons, wherein Section 41 also, inter alia, provides that any Police Officer may, without an order from Magistrate, and without a warrant, arrest any person against whom reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment which may be less than seven years or may extend to seven years, subject to condition that he has reason to believe, on the basis of such complaint, information, or suspicion, that such person has committed the said offence and also if the Police Officer is satisfied of either of the conditions provided under Section 41(1)(b)(ii), which also include that if such arrest is necessary “for proper investigation of the offence”. Whereas Section 41(1)(ba) empowers the Police Officer to make such arrest of a person against whom credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term which may extend to more than seven years or with death sentence and the Police Officer has reason to believe, on the basis of that information, that such person has committed the said offence, and for commission of such

offence no further condition is required to be satisfied by the Police Officer. Therefore, Police Officer/Investigating Officer is empowered to arrest the offender or the suspect for proper investigation of the offence as provided under Section 41 read with Section 157 Cr.P.C.

21. Article 21 of the Constitution of India provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Arrest of an offender during investigation, as discussed supra, is duly prescribed in Cr.P.C.

22. At the same time, Cr.P.C. also contains Chapter XXXIII, providing provision as to bail and bonds, which empowers the Magistrate, Sessions Court and High Court to grant bail to a person arrested by the Police/Investigating Officer in accordance with provisions contained in this Chapter. This Chapter also contains Section 438 empowering the Court to issue directions for grant of bail to a person apprehending his arrest.

23. Section 438 Cr.P.C. empowers the Court either to reject the application forthwith or issue an interim order for grant of Anticipatory Bail, at the first instance, after taking into consideration, inter alia, the factors stated in sub-section (1) of Section 438 Cr.P.C. and in case of issuance of an interim order for grant of Anticipatory Bail the application shall be finally heard by the Court after giving reasonable opportunity of being heard to the Police/ Prosecution. Section 438 Cr.P.C. prescribes certain factors which are to be considered at the time of passing interim order for grant of Anticipatory Bail amongst others, but no such factors have been prescribed for taking into consideration at the time of final hearing of the case. Undoubtedly, those factors which are necessary to be considered at the time of granting interim bail are also relevant for considering the bail application at final stage.

24. A balance has to be maintained between the right of personal liberty and the right of Investigating Agency to investigate and to arrest an offender for the purpose of investigation.

25.The Legislature, in order to protect right of the Investigating Agency and to avoid interference of the Court at the stage of investigation, has deliberately provided under Section 438 Cr.P.C. that only High Court and the Court of Session are empowered to issue direction that in the event of arrest, an offender or a suspect shall be released on bail. The Court has no power to issue direction to the Investigating Agency not to arrest an offender. A direction under Section 438 Cr.P.C. is issued by the Court, in anticipation of arrest, to release the offender after such arrest. It is an extraordinary provision empowering the Court to issue direction to protect an offender from detection. Therefore, this power should be exercised by the Court wherever necessary and not for those who are not entitled for such intervention of the Court at the stage of investigation, for nature and gravity of accusation, their antecedents or their conduct disentitling them from favour of Court for such protection.

26.Where right to investigate, and to arrest and detain an accused during investigation, is provided under Cr.P.C., there are provisions of Articles 21 and 22 of the Constitution of India, guaranteeing protection of life and personal liberty as well as against arrest and detention in certain cases. It is well settled that interference by the Court at the investigation stage, in normal course, is not warranted. However, as discussed supra, Section 438 Cr.P.C. is an exception to general principle and at the time of exercising power under Section 438 Cr.P.C., balance between right of Investigating Agency and life and liberty of a person has to be maintained by the Courts, in the light of Fundamental Rights guaranteed under Articles 21 and 22 of the Constitution of India, but also keeping in mind interference by the Court directing the Investigating Officer not to arrest an accused amounts to interference in the investigation.

27.Though bail is rule and jail is exception. However, at the same time, it is also true that even in absence of necessity of custodial interrogation also, an accused may not be entitled for anticipatory bail in all eventualities. Based on

other relevant factors, parameters and principles enumerated and propounded by Courts in various pronouncements, some of which have also been referred by learned counsel for CBI, anticipatory bail may be denied to an accused. Requirement of custodial interrogation is not only reason for rejecting bail application under Section 438 Cr.P.C.

28. Nature, gravity and seriousness of offence, extent of involvement of petitioners, manner of commission of offence, antecedents of petitioners, possibility of petitioners fleeing from justice and impact of granting or rejecting the bail on society as well as petitioner, are also amongst those several relevant factors which may compel the Court to reject or accept the bail application under Section 438 Cr.P.C. It is not possible to visualize all factors and enlist them as every case is to be decided in its peculiar facts and circumstances.

29. Wife of the petitioner, Nasrin, is also a co-accused in the present case. She was arrested and after remaining in police remand she remained in judicial custody and has been ordered to be enlarged on bail today morning (9.4.2021) at 10.00. Present petition was though prepared on 7.4.2021 but has been filed in the Registry today at around 11.00 a.m., after enlargement of the wife of petitioner on bail, meaning thereby that the petitioner was keeping an eye on the fate of the petition filed by his wife.

30. Considering entire facts and circumstances of the case placed before me and contention of learned Deputy Advocate General as well as learned counsel for the petitioner, and nature, gravity and seriousness of offence for the manner in which girl has been managed to be transported/travelled from Shimla to a remote village of Uttar Pradesh in an organized manner, and also for finding or ruling out possibility of amplitude and magnitude of the conspiracy, I find that prayer for custodial interrogation of the petitioner is justified and thus acceptable. Therefore, petition is dismissed with direction to the petitioner to surrender before Investigating Officer/police immediately.

Petition stands disposed of in the aforesaid terms

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

Prem Chand and others ....Petitioners.

Versus

State of Himachal Pradesh and others ...Respondents.

CWP No.931 of 2020
Reserved on: 02.03.2021.
Decided on : 08.04.2021

Writ of certiorari for quashing allotment of shops by respondent No. 3 to 5 in sports complex Hamirpur in favour of respondent No. 6 to 34 and for mandamus directing respondents to make allotment of shops in transparent manner- Held- Government largesse cannot be distributed in the mode and manner in which the same has been done in this case- Amongst the eligible candidates, some transparent criteria ought to have been adopted by the allotting agency so that process was above board and there was no element of arbitrariness in the same- As per attendance resister, petitioners were present in the meeting- Against the names of petitioners, shops were also allotted, petitioners Vijay Kumar , Virender, Suman and Ranjit appended their signature without protest- these petitioners had duly participated in the process without objection ,they do not have locus standi to file the petition- they also entered into agreement . They acquiesced to the process of allotment of shops- their petitions are dismissed.

For the petitioners : Mr. Jia Lal Bhardwaj, Advocate.

For the respondents :Mr. Ashok Sharma, Advocate General with M/s Sumesh Raj, Dinesh Thakur and Sanjeev Sood, Additional Advocate Generals with Ms. Divya Sood, Deputy Advocate General for respondents No. 1 to 4.

: Mr. Anil Kumar God, Advocate for respondent No. 5.

: Mr. Balwant Singh Thakur, Advocate for respondents No. 6 to 33.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this writ petition, the petitioners have prayed for the following substantive reliefs:-

> *"(i) That a writ in the nature of certiorari may kindly be issued for quashing the allotment of shops made on 01.02.2020 by respondents No. 3 to 5 in the Sports Complex, Hamirpur, H.P. in favour of respondents No. 6 to 34 and justice be done.*
> *(ii) That a writ in the nature of mandamus may kindly be issued directing respondents No. 1 & 2 to make allotment of shop in Sports Complex, Hamirpur, H.P. in a transparent manner and justice be done."*

2. The case of the petitioners is that respondent-Society constructed shops near Hamirpur bus stand and the same was named as Sports Complex. Petitioners and other persons, who were allotted shops/khokhas earlier in the main Bus Stand, Hamirpur, were issued notices for allotment of the shops in the said newly constructed Sports Complex in the month of December, 2019. According to the petitioners, in terms of the decision taken in the meeting of the Committee held under the Chairmanship of respondent No. 3 on 13.12.2019, shops were to be allotted to the beneficiaries and preference was to be given to 58 khoka holders having Khokas opposite to the bus stand. The last date to apply for allotment of

shops was 04.01.2020 and each applicant was to submit his/her application alongwith an affidavit to the effect that he/she will vacate the khokha after the allotment of shop in his/her favour in the Sports Complex. The petitioners were the allottees of shops and khokhas by respondent No. 5 in Ward No. 9, main Bus Stand, Hamirpur, which shops were allotted to them in the year 1984 onwards and they were paying rent with regard to the said shops as fixed by respondent No. 5 from time to time. As per the averments made in the petition, the shops allotted to the six petitioners were as under:-

a) Petitioner No. 1: Shop No. 36
b) Petitioner No. 2: Shop No. 37
c) Petitioner No. 3: Shop No. 47
d) Petitioner No. 4: Shop No. 19
e) Petitioner No. 5: Shop No. 40
f) Petitioner No. 6: Shop No. 15.

It was in lieu of vacation of said shops/khokhas allotted to the petitioners that they, alongwith other similarly situated persons, were given an offer for allotment of the newly constructed shops in the Sports Complex. Annexure P-1, dated 24.12.2019, was a notice issued to petitioner No. 1 to the effect that the shops of Sports Complex were lying vacant since a long time and in terms of the meeting of Committee dated 13.12.2019, the shops were to be allotted to the beneficiaries and preference was to be given to 58 khokha holders opposite to bus stand. In terms of this notice, all khokha holders, which included the petitioners, were called upon to file applications for the allotment of shops till 04.01.2020 alongwith an affidavit to the effect that they will vacate the khokhas following the allotment of the shops in Sports Complex. Similar notices were issued to all the petitioners. Petitioners applied for allotment of the shops in response to notice dated 24.12.2019 and they also furnished their affidavits that they will vacate their khokhas except petitioner No. 3, who applied under protest for the reason that against

vacation of shop allotted in his favour in the main bus stand, he had already filed a writ petition in the High Court of Himachal Pradesh, i.e CWP No. 3412 of 2019. The date fixed for receipt of the applications was extended from 04.01.2020 to 07.01.2020 and then to 10.01.2020. After scrutiny of the applications, all the petitioners as well as other persons who applied for allotment of shops in the Sports Complex, were issued letters on 28.01.2020 to remain present on 29.01.2020 at 11:45 a.m. at Hamir Bhawan before the Sub Committee for the purpose of allotment of the shops in question. A copy of one said communication issued by respondent No. 5 is appended with the petition as Annexure P-2. It is the case of the petitioners that they reached Hamir Bhawan, on 29.01.2020, at 11:45 a.m., however, nothing happened on the spot and petitioners and other persons were asked to shift as per their own willingness in the Sports Complex and the same was resisted by the petitioners. No shops were allotted by respondent No. 4 on said date, and the date of allotment of shops was postponed till 01.02.2020. It is further the case of the petitioners that on 01.02.2020, they were present at Hamir Bhawan and despite their objections qua the procedure adopted by respondents No. 4 and 5 with regard to allotment of shops, same were allotted by respondents No. 3 to 5 on the basis of first come first serve, i.e, first applicant was given the first choice to choose the first shop, though, this was not contemplated in communication dated 24.12.2019. Respondents No. 6 to 34 were allotted shops in this mode which was objected to by them vide written complaint dated 08.02.2020. Thereafter, respondent No. 4 issued a letter dated 15.02.2020 to petitioner No. 1 and also to other petitioners to the effect that they stood allotted shops in the meeting held on 01.02.2020 and despite direction given to them to execute the agreement, they had not done so. Respondent No. 4 gave an ultimatum to the petitioners that they should either sign the agreement by 5:00 p.m. on 17.02.2020, otherwise, shops allotted to them shall be cancelled. After the receipt of this communication Annexure P-

4, some of the petitioners signed the agreement but petitioners No. 1 and 2 did not execute the same.

3. The grievance of the petitioners is that the allotment of the shops as done by respondents No. 3 to 5 on the basis of first applicant being given first choice to choose the first shop, is arbitrary and not sustainable in law as the same was done by the respondents-authorities by adopting a procedure completely unknown to law and the same was also done with an oblique motive and was a result of colourable exercise of power by the authorities to allot the shops in favour of private respondents. It is further the case of the petitioners that the criteria which was so adopted by the authorities for allotment of the shops was to favour a few persons. It is in this background that the petitioners have filed this petition praying for the reliefs already enumerated hereinabove.

4. Response to the petition has been filed by respondents No. 1 to 4. The stand of respondents No. 1 to 4 is that the Sub Committee of the respondent-Society had convened a pre-allotment meeting on 29.01.2020 vide Annexure P-6, in which, all 37 eligible khokha holders, including the petitioners participated and they were informed that allotment of shops in Sports Complex would be done by applying the criteria of 'First Come First Serve", i.e the applicant who applied first would be given an option to choose the shop first and such allotment would be for a period of five years and `800/- per month will be charged as rent for each allotted shop. The Sub Committee of the society convened the final allotment meeting on 01.02.2020, in which, all 37 applicants, including the petitioners, whose names are reflected at serial numbers 25, 28, 29, 31, 32 and 36 of the attendance register Annexure R-8 participated. In the said meeting, allotment of the shops to all 37 eligible applicants was made, including the petitioners, by applying the criteria of first come first serve, starting from the applicant, who had applied prior in time vis-a-vis others. As petitioner No. 6 applied on

06.01.2020 and petitioners No. 1, 3, 4 and 5 applied on 07.01.2020 whereas petitioner No. 2 applied on 10.01.2020, consequently, after the allotment of the shops, petitioners No. 3, 4, 5 and 6 also executed agreement of allotment with the respondent-Society on 14.02.2020, vide Annexures R-9 to R-12, whereas petitioners No. 1 and 2 failed to execute the required agreement of allotment. In this background, notices were issued to said petitioners vide Annexures P-13 and P-14. It is further the stand of the respondents that as petitioners No. 1 and 2 did not execute the required agreement before the cut-off-date, therefore, their allotments stood cancelled. According to the respondents, a transparent and fair procedure was adopted for the allotment of the shops in question and the petitioners also participated in the pre-allotment process as also in the final allotment process without any demur. It stands denied by respondents that the allotment of the shops was done either in an arbitrary manner or same was a result of colourable exercise of power. According to them, allotment of the shops was done with consensus and in a fair manner, which was agreed upon by all, including the petitioners. It is also the stand of respondents No. 1 to 4 that petitioners No. 3 to 6 participated in the allotment process without raising any objections and they also signed the agreement of allotment of shops voluntarily, whereas petitioners No. 1 and 2 did not come forth for execution of the agreement within the stipulated time and even after the issuance of notice dated 15.02.2020, they failed to do so. On these bases, the claim of the petitioners have been denied by respondents No. 1 to 4.

5. The stand of the private respondents No. 6 to 33 is to the effect that they were running khokhas/shops opposite main bus stand, Hamirpur and on 01.12.2019, spot was demarcated in the presence of the petitioners, replying respondents as well as the officials of Public Works Department and Municipal Council and this demarcation demonstrated that the khokhas of the petitioners and the present respondents were on HPPWD land. Thereafter

for the benefit of khokha holders, respondent No. 3 gave an option to the khokha holders for shifting to the shops subject matter of this writ petition. It was already one of the condition that after the allotment of the shops, they will have to vacate the khokhas. As per the replying respondents, the terms of allotment of the khokhas were prepared by the society and the allottees, and it was agreed that the khokha holders shall be charged rent at the rate of `800/- per month for the shop. In the meeting, which took place between the stakeholders of Khokha holders, including the petitioners, all were apprised that shops were to be allotted on first come first serve basis or as per the settlement between the khokha holders. After detailed discussions, all eligible persons, which included the petitioners, requested the Sub-Committee to provide them with some time so that they could distribute the shops between themselves with consensus. Thereafter, it was decided that the khokha holders shall take the shops according to the serial number allotted to their applications and it was in this way that the shops were allotted. It has been denied in the reply that the shops were allotted in an arbitrary manner or that the mode adopted for allocation of the shops was arbitrary or with the intent of favouring someone.

6. Respondent No. 34 could not be served. Though an application has been filed for his substituted service, however no order is being passed on the same, in view of this judgment, as no adverse direction is being issued against the said respondent. Therefore, the petition is being decided without insisting upon the service of the said respondent.

7. In the rejoinder, which has been filed by the petitioners to the reply filed by respondents No. 1 to 4, it is averred that in the public notice dated 24.12.2019, it was nowhere stipulated that person, who files the application first, will be considered first for allotment of the shop and same was contrary to communication dated 24.12.2019. It is further mentioned in the rejoinder that the proposal of allotment of shops on the basis of

application number, i.e. to say that first applicant shall be having the first right to choose the shop was never agreed upon by the petitioners and petitioners No. 3 to 6 executed agreement under fear that in case they did not execute the agreement, then, their allotment may be cancelled. It is further mentioned in the rejoinder that the criteria actually adopted for the allotment of the shops was not disclosed to anyone and persons who were having political patronage etc. though were privy to it.

8. I have heard learned Counsel for the parties and also gone through the pleadings as well as record of the case.

9. At the very outset, this Court may observe that the government largesse cannot be distributed in the mode and manner in which the same has been done in this case. Amongst the eligible candidates, some transparent criteria ought to have been adopted by the allotting agency so that the process was above board and there was no element of arbitrariness in the same. It goes without saying that the procedure which has been adopted by the allotting agency *per se* cannot be approved by the Court and the allotment of shops in the present case should have been done in a manner which, as already observed hereinabove, was more transparent and more fair.

10. Having made said observations, now this Court has to see as to whether in the peculiar facts and circumstances of this case, the petitioners can be granted the reliefs, which have been prayed for by them. The grievance of the petitioners is with regard to the allotment of the shops by respondents No. 3 to 5 on first come first serve basis, i.e. the person who had applied for the shop first, was given an option to choose the shops in issue first in priority to others. It is not in dispute that communication dated 24.12.2019 vide which applications were invited from khokha holders to apply for the shops in question, did not envisage such criteria for allotment of shops. However, the fact of the matter still remains that this notice did not envisage any criteria whatsoever for allotment of the shops. In this background,

documents which have been appended with their reply by respondents No. 1 to 4 become important to infer as to whether process through which the shops were allotted was acquiescend by the petitioners or not. Annexure R-6 is the copy of the proceedings of the meeting held by the Sub-Committee constituted on 13.12.2019 in terms of the directions of Deputy Commissioner, Hamirpur-cum-Chairman of respondent No. 4-Society for the allotment of the shops in issue. These proceedings are dated 29th January, 2020. A perusal of the said proceedings demonstrates that a meeting of the stakeholders was held on 29.01.2020, in Hamir Bhawan, and in the said meeting, khokha holders, who were found eligible for the allotment of the shops after scrutiny, were present and they were apprised that the term of the contract will be for five years and `800 per month will be charged as rent for each of the allotted shop. As per said proceedings, the committee also stated that if any of the khokha holders wanted to exchange the allotted shops in between themselves, then the same could be allowed subject to the filing of affidavit by the khokha holder(s) concerned. It was also made clear to khokha holders that if they want to have the possession of the allotted shop, then, they had to move an application to the Committee so that an agreement can be entered into with said party. Proceedings further mention that it was also decided by the Sub Committee that if two khokha holders wanted to run shops together, they shall have to move an application to the Chairman seeking such permission which shall be subject to enhancement of rent by 25%. Khokha holders were also made clear that if they do not vacate the khokhas after entering the agreement, then, the allotment of the shop shall be cancelled and the Committee will be free to allot the shop to some other eligible persons. The khokha holders were also apprised that allotment of the shops was to be done on first come first serve basis. There were 107 shops lying vacant in the Sports Complex and the khokha holders, in the meeting, requested to start the allotment of shops from the ground floor, and all of them requested for allotment of shops in the

ground floor only and majority of eligible khokha holders also requested to start allotment process from shop No. G1. The Sub Committee took into consideration their requests and agreed to start allotment from ground floor as 41 shops were there in the ground floor and there were only 37 eligible khokha holders. The khokha holders requested that they wanted to have shops as per internal arrangement which may be arrived between them and prayed for grant of two days' time. They also stated that if no internal arrangement was worked out then they were ready and willing to take shops on first come first serve basis as per the receipt number of the application. Proceedings further record that two days were given to the khokha holders by the Sub Committee and khokha holders were directed to submit report of internal arrangement on the day fixed for the allotment of the shops. It was made clear that if they failed to reach on any consensus, then the shops were to be allotted as per the date of receipt of the applications.

11. There is also appended with the reply Annexure R-8, which is the relevant extract from Register for allotment of shops, subject matter of this petition-cum-attendance register dated 01.02.2020. A perusal thereof demonstrates that the petitioners were present in the meeting which was convened on the said date. Incidentally, this document reflects the details of shops which were allotted to the respective applicants on first come first serve basis. The names of the petitioners in this Annexure are at serial number 29, 36, 28, 31, 32 and 25 respectively. Against their names, shops allotted to them were also mentioned. This annexure further demonstrates that petitioners Vijay Kumari, Virender Malhotra, Sumna Devi and Ranjit Singh appended their signatures in acknowledgment thereof without protest. In this view of the matter, in the considered view of this Court, as said four petitioners had duly participated in the process without any objection, they do not have any locus-standi to file and maintain the present writ petition. Also, it is a matter of record that agreements were entered into by these four above

named petitioners with the respondent-Society qua the shops allotted to them vide Annexure R-8 and their contention in this petition that this was done out of fear that in case they did not enter the agreement, allotment in their favour may be cancelled, is not substantiated from any other material on record. Thus, as said petitioners acquiscned to the process of allotment of shops, therefore, the present writ petition is not maintainable on their behalf as the said petitioners cannot be permitted to blow hot and cold in the same breath and the same is accordingly dismissed qua them.

12. Coming to the remaining two petitioners, namely, Prem Chand and Dhani Ram, though, it is matter of record that they had not appended their signatures to Annexure R-8 in acknowledgment of them having been allotted the shops, yet it remains a fact that on account of their not entering into the agreement with the respondent-society, the shops which were allotted to them have been later on cancelled, as is the stand of respondents No. 1 to 4 in their reply. Incidentally, in the writ petition, no prayer has been made by said two petitioners for setting aside the cancellation of the shops allotted to them by the respondent-society. Though, this Court has, in principle, disapproved the mode and manner in which the shops in issue were allotted to the private respondents by the respondent-society, yet it remains a fact that the petitioners have not been able to demonstrate through the pleadings or from the documents appended therewith that the mode and manner in which the shops were allotted to some of the petitioners as well as to the private respondents was on account of a malafide intention or with the intent of conferring favour upon some of the allottees. The stand of the authorities as well as the private respondents is that, as agreed, the shops were allotted on the basis of receipt of the applications from the applicants. In other words, the first applicant was given the opportunity to opt for any shop and thereafter, each applicant on his turn got an opportunity to choose from the left out shops. During the course of arguments, the petitioners could not demonstrate

that the allotment of shops was not done by strictly following this criteria. In fact, the petitioners were also called upon to opt for the shops on the basis of number of submission of their application form with the society. All the allottees are petty shopkeepers who were earlier running khokhas which were found to be situated on HPPWD land and who now stand rehabilitated in the newly constructed shops on the condition of their willing to vacate the khokhas. It is reiterated that the petitioners have not been able to demonstrate that the allotment of shops was done with some ulterior motive of conferring undue benefit upon the private respondents. This demonstrates that the mode of allotment, which otherwise may not be strictly desirable while distributing government largesse, yet was bonafide and not an act of malafides on behalf of respondents No. 2 to 4. In these circumstances, this Court is of the view that the prayer of the petitioners of setting aside the allotment cannot be granted to them as the same will unsettle the private respondents who are occupying the shops and running their business from the same for some time now. This Court can also not loose sight of the fact that due to COVID-19 pandemic, otherwise also, commercial activities are at their nadir and in these peculiar circumstances, in case, allotment of shops is ordered to be set aside, it will undoubtedly create undue hardship to the private respondents, who are petty shopkeepers.

13. Accordingly, this writ petition is disposed of by directing that the cancellation of the shops of the petitioners, namely, Prem Chand and Dhani Ram by the authorities is quashed and the shops, which stand allotted to the said petitioners, be handed over to them in the event of their entering into agreement with the respondent-Society within a period of 30 days from today. In addition, in case, these two petitioners are interested in having any other shop other than allotted to them vide Annexure R-8, then, they shall be free to do so as per procedure out of the left out shops. As this Court is of the view that respondents-authorities have not performed their duty of allotment of the

shops in the manner which is expected from the State, it is ordered that as from the date of entering into the agreement qua the allotment of shops in favour of petitioners, currency of which in terms of standard contract shall be five years, petitioners Prem Chand and Dhani Ram shall not be liable to pay any rent to the respondent-Society initially for a period of 12 months.

With these observations, the writ petition stands disposed of. Pending miscellaneous application(s), if any, also stand disposed of accordingly. Interim orders, if any, stand vacated.

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

Bharti Sharma and Another. ...Petitioners.

Versus

Naresh Kumar and Another. ...Respondents.

Civil Revision No. 88 of 2019
Reserved on: 19.3.2021
Date of Decision: 8.4.2021

Petitioner assailed part of order passed by Civil Judge in an application under order 6 Rule 17 CPC filled by petitioner for amendment of plaint whereby application has been allowed partly by permitting the petitioner to plead that suit property is Joint Hindu family coparcenary ancestral property under Mitakshra law and rejecting second proposed amendment to add another property at Yamuna Nagar in the suit property on the ground of res-judicata as property in Haryana was subject matter of suit filed in competent court at Haryana but was got dismissed as withdrawn unconditionally on 11.7.2016 by the plaintiff. Held- Order dated 11.7.2016 suggests that suit was dismissed as withdrawn on the basis of statement of plaintiff and said statement nowhere suggests that plaintiff had prayed for dismissal of suit unconditionally as condition for withdrawing the suit was stated by plaintiff in her statement in unambiguous terms- The order dated 11.7.2016 was passed by Civil Court Yamuna nagar acting as Daily Lok Adalat- Lok Adalat has no authority to adjudicate the matter on merits. The word unconditionally in

order is beyond jurisdiction of Lok Adalat. The statement of plaintiff before Lok Adalat at Yamuna Nagar clearly establishes that suit was withdrawn on account of technical defect with intention to add the suit property of that suit in suit property of present suit, hence, by rejection of amendment proposing addition of property of Yamuna Nagar in suit property of present suit, the trial court has committed material irregularly- Hence, impugned order is modified and part of order rejecting proposed amendment to add property of Yamuna Nagar is set aside.

For the Petitioners: *Mr.Ajay Sharma, Senior Advocate with Mr.Amit Jamwal, Advocate.*

For the Respondents: *Mr.Yadupati Sood, Advocate.*

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

In instant petition, petitioners have assailed part of impugned order dated 22.5.2019 passed by learned Senior Civil Judge Court No. 1, Amb in an application filed on behalf of plaintiffs/petitioners, under Order 6 Rule 17 of the Code of Civil Procedure (for short "CPC") for amendment of plaint, whereby application has been allowed partly, by permitting the amendment by allowing plaintiffs to plead that suit property is Joint Hindu family coparcenary ancestral property under Mitakshra Hindu Law, but rejecting second proposed amendment to add another property situated at Yamunanagar, Haryana in the suit property in present suit, on the ground of resjudicata with observation that suit property situated in Haryana was subject matter of the suit which was filed in a competent Court in Haryana, but was got dismissed as withdrawn unconditionally on 11.7.2016 by plaintiffs on the alleged objection of defendants.

2. Plaintiffs, being aggrieved by rejection of proposed amendment, disallowing addition of property of Yamunanagar in the suit property, has assailed this part of the impugned order, passed by trial Court, on the ground

that suit with subject matter of property at Yamunanagar in Haryana, was withdrawn with specific statement that suit property of that suit shall be added in suit property of present suit pending at Amb.

3. The conclusion, that suit filed at Yamunanagar was withdrawn unconditionally, has been drawn by the trial Court on the basis of order dated 11.7.2016 announced in Daily Lok Adalat by Additional Civil Judge, Yamunanagar at Jagadhri, which reads as under:-

> *"Bharti Sharma Vs. Rahul Sharma*
> *Present: Plaintiff Bharti Sharma in person with Sh.Sunil Kumar, Advocate.*
> *Sh.Sourabh Kaushik, Advocate for the defendant.*
> *Suit received by way of assignment. It be checked and registered.*
> *File taken up today in Daily Lok Adalat. Today plaintiff Bharti Sharma has personally appear and suffered a statement thereby seeking to withdraw the present suit. She is identified by Sh. Ssunil Kumar, Advocate for the plaintiff. Statement recorded separately.*
> *Heard. In view of the above mentioned statement, the present suit is hereby dismissed as withdrawn unconditionally. File be consigned to record room after due compliance.*
> *Announced in Daily Lok Adalat.*
> *11.07.2016*
>
> *(Sunil Jindal)*
> *Additional Civil Judge,*
> *Yamuna Nagar at Jagadhri."*

4. English translation of statement of plaintiff No. 1, on the basis of which the suit was withdrawn, reads as under:-

> *"Stated that present suit is being withdrawn on technical ground. A suit related to the property of my husband, filed prior in time, is pending adjudication at Amb in District Una, H.P., therefore, does*

not want to continue present suit. Be consigned. The property of my husband, situated at Yamunanagar shall be challenged in case pending in Una."

5. Order 23 Rule 1(1) of CPC provides that a plaintiff, at any time after the institution of a suit, may against all or any of the defendant(s), abandon his suit or abandon a part of his claim. Rule 1(3) of order 23 of CPC provides that where there is some formal defect in the suit leading to its failure or there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of the suit or part of a claim, the Court may grant permission to withdraw to the plaintiff from such suit or such part of the claim with liberty to institute a fresh suit in respect of subject matter of such suit or such part of claim. Order 23 Rule 1(4) CPC provides that when any suit or part of claim has been abandoned under Sub Rule (1) or a suit or part of claim has been withdrawn without permission referred in sub Rule (3), plaintiff beside liability to pay cost as may be awarded by the Court, shall also be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.

6. As has also been canvassed on behalf of defendants, the trial Court, for mention of the fact in the order passed by Daily Lok Adalat on 11.7.2016 that the suit was dismissed as withdrawn unconditionally, has rejected the amendment proposed by the plaintiffs to add property of Yamunanagar in the suit property of present suit.

7. Decision of the trial Court and plea of defendants, in my considered view is erroneous for the reasons assigned herein after.

8. In order dated 11.7.2016 passed by Civil Court Yamunanagar acting as Daily Lok Adalat it is clearly stated that in view of statement of plaintiff recorded separately, suit was dismissed as withdrawn. Though, the said Court has added one word "unconditionally", giving an impression that in

the statement of plaintiff, she had withdrawn the suit unconditionally. Whereas, perusal of statement of plaintiff quoted supra, unambiguously establishes that the suit was proposed to be withdrawn on technical ground with clear further averment that case related to the property of husband of petitioner, filed prior in time, was pending in Amb, District Una, H.P. and therefore, property of her husband at Yamunanagar had to be challenged in the case pending at Una and, therefore, she did not want to continue the suit at Yamunanagar. Therefore, order, passed on the basis of statement of plaintiff reflecting dismissal of suit as withdrawn unconditionally, is factually incorrect.

9. Order dated 11.7.2016 itself suggests that the suit was dismissed as withdrawn on the basis of statement of plaintiff and the said statement nowhere suggests that plaintiff had prayed for dismissal of the suit unconditionally as reason i.e. condition for withdrawing the suit was stated by the plaintiff in her statement in unambiguous terms.

10. Lok Adalats are organized/established under the Legal Services Authority Act, 1987 (herein after to be referred as the "Act"). Section 19 of the Act provides organization of Lok Adalats and Section 19(5) provides that Lok Adalats shall have jurisdiction to determine and to arrive at a compromise or settlement between the parties to a dispute in respect of any suit pending before any Court for which the Lok Adalat is organized. As evident from order dated 11.7.2016, suit filed by plaintiffs at Yamunanagar was assigned to and accordingly taken up in Daily Lok Adalat. Therefore, Additional Civil Judge, Yamunanagar was acting as Lok Adalat and the case pending in Civil Court was assigned to it, therefore, Lok Adalat was having jurisdiction to take up the matter.

11. Question arises as to whether Lok Adalat can pass an order beyond scope of compromise or contrary to the settlement arrived at between the parties to a dispute or beyond the statement of a party, nullifying the

portion of the statement, whereby a party asserts his/her right or expresses reason, cause or condition for taking a decision before Lok Adalat, as has been specifically stated by petitioner that suit was being withdrawn to add the suit property in the suit property in another suit filed prior in time.

12. Exercising the powers conferred under Section 29 of the Act, Central Authority has formed the National Legal Services Authority (Lok Adalats) Regulations, 2009. Regulations 9, 13(6), 16(3), 16(4), 17(1), 17(5) and 19 would be relevant to be referred for adjudication of issues involved in present case, which read as under:-

> *"9.* ***Jurisdiction of Lok Adalats****.---Lok Adalats shall have the power only to help the parties to arrive at a compromise or settlement between the parties to a dispute and, while so doing, it shall not issue any direction of order in respect of such dispute between the parties.*
>
> *13.* ***Procedure of Lok Adalats****.*
>
> *(1) … … ….*
>
> *… … ….*
>
> *(6) The Lok Adalat shall not determine a reference, at its own instance, but shall determine only on the basis of a compromise or settlement between the parties by making an award in terms of the compromise or settlement arrived at:*
>
> *Provided further that the award of the Lok Adalat is neither a verdict nor an option arrived at by any decision making process.*
>
> *16.* ***Communication between Lok Adalat and parties****.*
>
> *(1) … … …*
>
> *… … …*
>
> *(3) When it appears to the Lok Adalat that there exists elements of a settlement which may be acceptable to the parties, the terms of a possible settlement may be formulated by the Lok Adalat and given to the parties for their observations and modifications, if any, suggested by the parties can be taken into consideration and terms of a possible settlement may be re-formulated by the Lok Adalat.*

(4) If the parties reach a compromise or settlement of the dispute, the Lok Adalat may draw up or assist the parties in drawing up the terms of such compromise or settlement.

17. ***Award.—*** *(1) Drawing up of the award is merely an administrative act by incorporating the terms of settlement or compromise agreed by the parties under the guidance and assistance from Lok Adalat.*

(2) … … …

… … …

(5) Member of the Lok Adalat shall ensure that the parties affix their signatures only after fully understanding the terms of settlement arrived at and recorded. The members of the Lok Adalat shall also satisfy themselves about the following before affixing their signatures:-

(a) that the terms of settlement are not unreasonable or illegal or one-sided; and

(b) that the parties have entered into the settlement voluntarily and not on account of any threat, coercion or undue influence.

19. ***Failure of Lok Adalat proceedings:****--If a pre-litigation matter is not settled in the Lok Adalat, the parties may be advised to resort to other Alternative Dispute Resolution (ADR) techniques or to approach a court of law and in appropriate-cases they may be advised about the availability of legal aid".*

13. Regulation 17(5) provides that member of Lok Adalat before signing the award shall also satisfy themselves that terms of settlement are not unreasonable or illegal or one-sided and the parties have entered into settlement voluntarily and not on account of threat, coercion or undue influence.

14. In present case as apparent from contents of impugned order of the trial Court an objection was taken by defendants with respect to maintainability of suit filed at Yamunanagar for pendency of prior suit between same parties at Amb in District Una, whereupon plaintiffs had

withdrawn the suit at Yamunanagar by making statement supra with intention to add the property of Yamunanagar in the suit property of suit pending at Amb. From presence of parties marked in Lok Adalat, it is apparent that statement of plaintiff was recorded in presence of counsel for defendants and in terms of the statement, suit was permitted to be withdrawn. Lok Adalat has a right to determine and to arrive at compromise or settlement between the parties, however, Lok Adalat has no authority to adjudicate the matter on merits. In case, there is no settlement or compromise, Lok Adalat is supposed to refer the Civil Suit back to the Civil Court. Similarly in case Lok Adalat concludes that, for just, legal and valid reasons, order cannot be passed as proposed by the parties or a party, the Lok Adalat has no jurisdiction to pass an order which is beyond the scope of proposal, without consent of the party(ies) and in such eventuality Lok Adalat shall have no option except to refer the matter to the regular Court or direct the parties to resort to legal remedy/recourse available to the party(ies).

15. As evident from Regulation 17 drawing of award is merely an administrative act, whereby terms of settlement or compromise agreed by parties are to be incorporated in the award. In present case petitioners, in Lok Adalat, had agreed for withdrawal of the suit with assertion that suit property at Yamunanagar shall be added in the suit property of the suit pending at Amb. The defendants remained silent, which indicates that they had not opposed the proposal of plaintiffs and, therefore, the terms of settlement before Lok Adalat was that suit was to be withdrawn with liberty to add suit property of that suit in present suit. The addition of word “unconditionally” is not only superfluous, but beyond jurisdiction of Lok Adalat. The terms of settlement between the parties before Lok Adalat are to be construed by reading statement of plaintiff and order passed by Lok Adalat is to be interpreted as such.

16. As discussed supra, as a matter of fact, order (Award) of Lok Adalat has to reflect the settlement between the parties, but not any condition or opinion which is foreign to the statement/settlement between the parties. Therefore, the word 'unconditionally' mentioned in order passed by Lok Adalat has to be ignored and right of the plaintiffs to incorporate/add the suit property of Yamunanagar in the suit property of present suit is to be determined accordingly. As already discussed, from the statement of plaintiff made before Lok Adalat at Yamunanagar does not suggests that suit was withdrawn unconditionally, rather it clearly establishes that suit was withdrawn on account of technical defect with intention/permission to add the suit property of that suit in the suit property of present suit and plaintiffs had never abandoned the suit with respect to the property at Yamunanagar or a part thereof.

17. In normal course, plaintiffs should have been relegated to the Court which has passed the order, i.e. Civil Court, Yamunanagar, for rectifying the mistake or correction of the order, however, in present case it may not be necessary for the reason that the order has not been passed by regular Civil Court, but in Daily Lok Adalat and Lok Adalat has no jurisdiction to pass such order which is beyond the scope of statement of parties or terms of settlement. Otherwise also, at this stage relegating the parties to Civil Court Yamunanagar (Haryana) will cause unnecessary and unwarranted multiplicity of litigation.

18. During arguments, faced with aforesaid legal position, learned counsel for the defendants has also communicated no objection for allowing the amendment as proposed by plaintiffs with respect to addition of property at Yamunanagar in the suit property of present suit.

19. In view of aforesaid discussion, I am of the considered opinion that rejection of amendment proposing addition of property of Yamunanagar in suit property of present suit, the trial Court has committed material irregularity and illegality and, therefore, part of impugned order dated

22.5.2019, whereby proposal of amendment has been rejected, is set aside, but maintaining the portion of that order whereby amendment proposed to plead suit property as joint Hindu Family Coparcenary Ancestral Property under Mitakshra Hindu Law, has been permitted.

20. Resultantly, plaintiffs are permitted to carry out amendment proposed by them and the order dated 22.5.2019 stands modified to that extent.

21. Amended plaint, if not already filed, be filed in the trial Court on first date of appearance. The same shall be taken on record by the trial Court and thereafter trial Court shall proceed further in accordance with law.

22. Parties are directed to appear before the trial court on **3rd May, 2021**. Copy of order be transmitted to trial court. No order as to cost.

Petition stands disposed of in aforesaid terms.

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

Mohinder Singh. ...Applicant.

Versus

State of Himachal Pradesh & Another. ...Respondents.

C.M.P. (M) No. 768 of 2020
Date of decision: 5.4.2021

The application for condonation of delay in filing the appeal- Delay of 1 year 10 months and 27 days- Reason disclosed for not filing appeal for almost 2 years is that during white wash in house of applicant in March 2018, copy of judgment was misplaced and not traceable. It is only on 15.3.2020 copy was found along with other papers in another almirah of house- Held- The conduct of the applicant indicates that he was not interested in contesting the case for 2 years because when copy was misplaced in March 2018 the applicant had to make an endeavor to obtain another copy but there is nothing on record to show such effort- Rather applicant kept on sleeping till copy was traced in

March 2020- The applicant had not taken any over act to assail impugned judgment within reasonable period- The application dismissed.

For the Applicants: *Mr.Y.P.S. Dhaulta, Advocate.*

For the Respondents: *Mr.Gaurav Sharma, Deputy Advocate General.*

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge (oral)

This application has been filed for condonation of delay in filing the appeal.

2. The impugned judgment was passed on 15.1.2018, whereby judgment dated 27.10.2016 passed by trial Court, dismissing the suit of the applicant filed for declaration and alternatively for permanent prohibitory injunction qua suit property, was affirmed by learned District Judge, Solan, in Civil Appeal preferred by the applicant. Present appeal has been filed on 9.10.2020.

3. Taking into consideration order passed by the Supreme Court in Suo Motu Writ Petition (Civil) No. 3 of 2020, after excluding the time from 15.3.2020 till filing of the appeal, i.e. 9.10.2020, it has been found that appeal is barred by 1 year 10 months and 27 days.

4. It is stated in the application that copy of impugned judgment was received on 6.3.2018. It is evident from the stamp of Copying Agency that certified copy of impugned judgment was applied on 24.1.2018 and it was complete for delivery on 23.2.2018. However, it has been received in March, 2020. Be that as it may, it is a fact that present application has been preferred on 9.10.2020. Reasons disclosed, for not filing appeal for almost 2 years, is that during white wash in the house of applicant in March, 2018, copy of judgment was misplaced and it was not traceable and it is only on 15.3.2020 copy was found amongst other papers in another Almirah of the

house and thereafter applicant had immediately consulted the counsel representing him in District Court, Solan, who has advised him to file appeal by stating the aforesaid facts for condonation of delay.

5. Possibility of misplacing the copy of impugned judgment cannot be ruled outrightly. However, conduct of the applicant indicates that he was not interested in contesting the case for almost 2 years because when copy was misplaced in the month of March, 2018 and it was not available with him, then he had to make an endevour to obtain another copy but there is nothing on record to point out any reason about any such attempt made by applicant or for not making such effort by applicant to obtain another copy of the judgment by contacting the Advocate representing him before District Judge, Solan, so as to assail the said judgment, rather, as claimed, applicant kept on sleeping till the copy was traced in the month of March, 2020, meaning thereby, had it not been traced in March, 2020, appeal would not have been filed even till date. The applicant has not taken any overt act to assail the impugned judgment within reasonable period.

6. In the aforesaid circumstances, I find that there is no reasonable ground or sufficient cause which prevented the applicant from filing the appeal within time. Therefore, the application for condonation of delay for want of sufficient cause is dismissed.

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

Sher Singh. ...Petitioner.

Versus

State of Himachal Pradesh. ...Respondent.

Cr.M.P. (M) No. 633 of 2021
Date of decision: 30.3.2021

Petition under section 438 Cr.P.C- Anticipatory bail- Petitioner has been declared as proclaimed offender- Held- Section 438 Cr.P.C entitles any person

who has reason to believe that he may be arrested on accusation of having committed a non-bailable offence to apply to High Court or court of Session for direction that in event of such arrest he shall be released on bail- In the present case- Petitioner is not apprehending his arrest for commission of non-bailable offence rather apprehending his arrest for declaring him as proclaimed offender by the trial court for not attending the court in a complaint u/s 138 N. I Act, after completing procedure under section 138 N. I Act wherein offence is bailable – The petition is not maintainable- Petition dismissed as withdrawn.

For the Petitioner: *Mr.Kulwant Singh Gill, Advocate.*

For the Respondent: *Mr.Raju Ram Rahi, Deputy Advocate General.*

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge (oral)

Petitioner has been declared as proclaimed offender. He has filed this petition under Section 438 Cr.P.C. for grant of anticipatory bail.

2. Section 438 Cr.P.C. entitles any person, who has reason to believe that he may be arrested on an accusation of having committed a non-bailable offence to apply to the High Court or the Court of Sessions for a direction under this section and that Court may, if it thinks fit, direct that in the event of such arrest, he shall be released on bail.

3. Petitioner herein is not apprehending his arrest for commission of non-bailable offence, rather apprehending his arrest for declaring him as proclaimed offender by the trial Court for not attending the Court in a complaint filed under Section 138 of Negotiable Instruments Act, after completing procedure prescribed under Section 138 of Negotiable Instruments Act, wherein offence is bailable. Therefore, present petiton is not maitnainiable.

4. Faced with aforesaid situation, learned counsel for the petitioner seeks liberty to file appropriate petition for redressal of grievances of petitioner and, therefore, he seeks permission to withdrawn present petition. Accepting his prayer, petition is dismissed as withdrawn with liberty as prayed for.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Satnam ...Petitioner.

Versus

State of H.P. and others ...Respondents.

CWP No. 1121 of 2021
Decided on: 05.04.2021

The petition seeking writ of mandamus directing the respondents to release D.C. R.G and to pay compensation for unnecessary harassment- the petitioner retired as Range Forest Officer in Shri Naina Devi Ji Forest division- Certain retiral benefits were withheld- Held- Pension is scour for post retiral period- Not a bounty payable at will- Also a post retrial entitlement to maintain dignity of employee- On the date of retirement there was neither a departmental enquiry nor any criminal case pending against him- Even FIR No. 1/2018 was registered after his retirement –wherein petitioner has not even been arraigned as an accused- action of respondents in not paying the entire retrial dues is not justified- Petition allowed.

Cases referred:

Devaki Nandan Prasad vs. State of Bihar and others AIR 1983 SC 1134;
Hira Lal vs. State of Bihar and others (2020) 4 SCC 346;
Ram Pal Singh vs. Union of India and others AIR 1984 SC 504;
State of Kerala and others vs. M. Padmanabhan Nair (1985) 1 SCC 429;
State of Uttar Pradesh and others vs. Dhirendra Pal Singh (2017) 1 SCC 49;
Y.K. Singla vs. Punjab National Bank and others, (2013) 3 SCC 472;

For the Petitioner: Mr. J. L. Bhardwaj, Advocate.

For the Respondents: Mr. Ashok Sharma, Advocate General, with Mr. Vikas Rathore, Mr. Vinod Thakur, Mr. Shiv Pal Manhans, Addl.A.Gs., Mr. J.S. Guleria and Mr. Bhupinder Thakur, Dy. A.Gs.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, J.(Oral)

Pension is succor for post retirement period. It is not a bounty payable at will, but is a social welfare measure, as also a post retirement entitlement to maintain the dignity of an employee. This is what the Courts in India including the Hon'ble Supreme Court have repeatedly held.

2. The instant case is a glaring example where the respondents have flagrantly and in most brazen manner denied the petitioner part of his retiral benefits, constraining him to file the instant petition for the grant of following substantive reliefs:

> *(i) That the writ in the nature of mandamus may kindly be issued directing the respondents to release the amount of Death-cum-retirement gratuity amounting to Rs.9,47,117/-, leave encashment of 300 days, TA bills of 2016-17 and medical bills amounting to Rs.78059/- submitted by the petitioner alongwith interest @ 12% per annum on the amount of Death-cum-retirement gratuity and leave encashment w.e.f. 01.11.2017 till its realisation and justice be done.*
>
> *(ii) That the respondents may kindly be directed to pay the compensation to the petitioner to the tune of Rs.1,00,000/- for unnecessarily harassing him."*

3. The petitioner was appointed as Forest Guard on 27.02.1981 and thereafter in the year 2005, promoted to the post of Deputy Ranger and then in the year 2015, the petitioner was promoted as Range Officer and

consequent upon his promotion was ordered to be transferred and posted as Range Forest Officer, Naina Devi Ji, Forest Division Bilaspur in the year 2016 i.e. on 17.03.2016 and ultimately retired on superannuation from the said Range Zone on 31.10.2017.

4. It is not in dispute that certain retiral benefits have been withheld by the respondents and explanation for not releasing these benefits is contained in para-3 of the preliminary submissions of the reply filed by respondents No.1 to 4, which inter alia reads as under:

> *"**3**. That during tenure of petitioner as RFO Naina Devi Ji Range, the felling of private Khair trees during the year 2015-16 under approved ten year felling programme (Annexure R-III) and under extension permissions during the year 2016-17 was going on in Kot, Saloa and Badoh blocks of Naina Devi Ji range. The respondent department as well as State Anti Corruption Bureau has received complaints regarding illicit felling of Khair trees from Govt. forests, in Naina Devi Ji range. Keeping in view of illicit felling in Naina Devi Ji range and ongoing investigation by State Vigilance & Anti Corruption Bureau, the DCRG and leave encashment of the petitioner is withheld to meet with the Govt. loss if found due to negligence/conspiracy of the petitioner by the competent court of law. Since petitioner is suspect in said illicit felling case which has also been communicated by Deputy Superintendent of Police, State Vigilance & Anti Corruption Bureau, Bilaspur vide his letter No. 568 dated 25.3.2021 (Annexure R-IV). The State Vigilance and Anti Corruption Bureau has carried out detailed investigation into the complaints and found illicit felling of 4743 trees from the Govt. land of Saloa Block of Naina Devi Range with criminal conspiracy of field staff of Naina Devi Range. Further in this regard Station House Officer, State Vigilance & Anti Corruption Bureau, Police Station, Bilaspur had registered FIR No. 0001/2018 dated 25.2.2018 under Section 32, 33 of Indian Forest Act, 1927, Section 120B, 420 IPC , 1860 and under Section 13(2), 13(1) (d) of Prevention of Corruption Act, 1988 and has also interrogated petitioner many times along with others. Copy of FIR is annexed as Annexure R-V. That matter with regard to payment of gratuity to petitioner was examined in*

the office of Deputy Controller (F&A) o/o PCCF (HoFF) HP where as per Annexure R-VI who opined that "No gratuity is paid to the retired Govt. servant until the conclusion of Departmental/judicial proceedings against him unless the department proceedings are instituted under rule 16 of CCS (CCA) Rules, 1965 for imposing minor penalties specified in clause I, ii & iv of Rule 11 of said rules i.e. if no recovery of Govt. money is expected to fall due towards the retiree. Therefore, the action needs to be taken keeping in view the rule under which the enquiry is being held which has not been indicated in the communication please." Since the matter is serious in nature as involving illicit felling of 4743 of Khair trees from Govt. land thus causing huge financial loss to the Govt. alongwith making damage to environment and forest. Hence gratuity was not payable to the petitioner on this count. Further as per Rule 69 (1) (c) of CCS (CCA) Pension Rules, 1972 which reads as under:-

> *"No gratuity shall be paid to the Government servant until the conclusion of the departmental or judicial proceedings and issue of final orders thereon".*

Further as per CCS(CCA) Leave Rules, rule 39(3) clearly specifies with regard to withholding cash equivalent to earned leave as under:

> *"39(3). The authority competent to grant leave may withhold whole or part of cash equivalent of earned leave in the case of a Government servant who retires from service on attaining the age of retirement while under suspension or while disciplinary or criminal proceedings are pending against him, if in the view of such authority there is a possibility of some money becoming recoverable from him on conclusion of the proceedings against him. On conclusion of the proceedings, he will become eligible to the amount so withheld after adjustment of Government dues if any."*

Since the matter is pending and judicial proceedings are to be completed and petitioner being one of the suspect and FIR in this regard has already been filed by Vigilance Department and since the matter is involving financial implication as huge loss has been

done to the Govt. and petitioner being one of suspect as being made by the investigating /prosecuting agency and also as per Annexure R-IV some documentary evidences are against the petitioner and hence looking into all such aspects DCRG and leave encashment of the petitioner has been rightly been withheld and if on completion of inquiry/judicial proceedings petitioner is discharged/acquitted his remaining dues as submitted above shall be released to the petitioner."

5. Certain retiral benefits have been released to the petitioner and details of some of which are contained in para-3 of the reply, the relevant portion whereof reads as under:

"3……In fact, after the retirement of petitioner, pension of Rs.12110/- per month and commuted value of pension amounting to Rs.4,86,590/- has been paid to petitioner vide PPO No. 1117163675 dated 28.9.2017 (Annexure R-VII & VIII). On the request of petitioner vide application dated 16.11.2017 (Annexure R-IX), the petitioner has been allowed by respondent No.4 vide office order No. 179/2017-18 dated 25.11.2017 (Annexure R-X) to retain his GPF accumulation in GPF account until unless his request for final payment is not received. Thereafter, petitioner has applied for advance to the tune of Rs.5 lakh which has been paid to him from his GPF account by the respondent No.4 vide his office order No. 256/2020 dated 4.12.2020 (Annexure R-XI). Further, on receipt of medical bills from petitioner, the payment of medical bills amounting to Rs. 45287/- has been made to petitioner by respondent No.4 vide bill No. 100720, 100721 both dated 16.3.2021 & 100765 dated 18.3.2021 (Annexure R-XII & XIII) and there is no travelling allowance bill of petitioner is pending with respondent department…."

6. It would clearly be evident from the reply filed by the respondents that as on the date of retirement i.e. 31.10.2017, there was neither a departmental inquiry nor any criminal case pending against the petitioner. Even the FIR No. 0001/2018 that was registered was after the retirement of the petitioner on 25.02.2018 wherein again the petitioner has not even been arraigned as an accused.

7. Now, in such circumstances, the moot question arises as to whether the respondents could have at all withheld the retiral benefits.

8. Chapter VIII of the Central Civil Services (Pension) Rules, 1972 (hereinafter referred to as "the Rules") deals with the determination and authorisation of the amounts of pension and gratuity. Rules 56 to 74 are comprised in this chapter. Briefly speaking, the rules, inter alia, contemplate the following steps to be taken in the sequence of time: (1) the preparation of a list every six months, that is, on the 1st January and the 1st July of each year, of all government servants who are due to retire within the next 24 to 30 months of that date and the supply of a copy of every such list to the Accounts Officer concerned not later than the 31st January or the 31st July, as the case may be, of that year, (2) the preparation of pension papers to commence two years before the date on which a government servant is due to retire on superannuation, or on the date on which he proceeds on leave preparatory to retirement whichever is earlier; such preparatory work to consist of three consecutive stages, namely, verification of service record, making good of omissions in the service book and obtaining of requisite particulars from the retiring government servant; the last of the above mentioned stages to be completed eight months prior to the date of retirement, (3) the completion of the pension and gratuity papers and the forwarding thereof to the Accounts Officer concerned not later than six months before the date of retirement; (4) the ascertainment and assessment of the government dues and furnishing of particulars thereof to the Accounts Officer at least two months before the date of retirement; (5) the assessment of the amount of pension and gratuity and the issue of the pension payment order by the Accounts Officer not later than one month in advance of the date of retirement, and (6) the determination by the Head of Office of provisional pension and death-cum-retirement gratuity without delay, in cases where the government servant is likely to retire before his pension and gratuity or both can be finally assessed and settled in accordance with law; the payment of such provisional pension and gratuity not to continue beyond the period of six months from the date of retirement by which time the final amount of pension must be determined.

9. These various time bound stages in the process of determination of pensionary benefits as laid down in the Rules reflect the policy of the State to ensure the payment of such benefits to a retiring government servant on and from the date of his retirement. These Rules, which confer rights and prescribe duties, constitute the conditions of service of government servants.

They fall within the realm of public law governing the relationship between the employer and employees in the field of public employment. The implementation and enforcement of those statutory conditions is the duty of every Head of Department/Accounts Officer and, indeed, of all those concerned at different stages and levels of the process of determination of the pensionary benefits. They must not forget that by the passage of time they too would be claiming those benefits and that any infringement of those conditions on their part may conceivably recoil on them in course of time.

10. As observed above, the petitioner on the date of his retirement did not have a criminal case or any departmental inquiry contemplated or pending against him. Therefore, in the given circumstances, there was no reasonable basis or ground available with the respondents for withholding the retiral benefits of the petitioner and the same is, therefore, contrary to law.

11. It is more than settled that once an employee retires from service on attaining the age of superannuation, there is no authority vested with the employer (like the respondents in the instant case) for initiating disciplinary proceedings even for the purpose of reduction in the retiral benefits payable to the employee. This has so been held by this Court in CWPOA No. 138 of 2019 titled ***Lokinder Dutt Sharma vs. Board of Directors H.P. Horticulture Produce Marketing and Processing Corporation Ltd. and another***, decided on 18.03.2020.

12. The pension and gratuity, as stated above, are not mere bounties, or given out of generosity of employer, but these are benefits earned by the employee by virtue of his long, continuous faithful service.

13. This aspect of the matter has recently been considered in detail by the Hon'ble Supreme Court in ***Hira Lal vs. State of Bihar and others (2020) 4 SCC 346***, wherein it was observed as under:

> "22. *It is well settled that the right to pension cannot be taken away by a mere executive fiat or administrative instruction. Pension and gratuity are not mere bounties, or given out of generosity by the employer. An employee earns these benefits by virtue of his long, continuous, faithful and un-blemished service. The right to receive pension of a public servant has been held to be covered under the*

"right to property" under Article 31(1) of the Constitution by a Constitution bench of this Court in Deokinandan Prasad v. State of Bihar, *((1971) 2 SCC 330*, which ruled that: (Deokinandan Prasad case, SCC pp. 343-44, paras 30-31 & 33)

> **"** *30. The question whether the pension granted to a public servant is property attracting Article 31(1) came up for consideration before the Punjab High Court in Bhagwant Singh v. Union of India [AIR 1962 Punj 503] . It was held that such a right constitutes "property" and any interference will be a breach of Article 31(1) of the Constitution. It was further held that the State cannot by an executive order curtail or abolish altogether the right of the public servant to receive pension. This decision was given by a learned Single Judge. This decision was taken up in letters patent appeal by the Union of India. Letters Patent Bench in its decision in Union of India v. Bhagwant Singh [ILR 1965 Punj 1] approved the decision of the learned Single Judge. The Letters Patent Bench held that the pension granted to a public servant on his retirement is "property" within the meaning of Article 31(1) of the Constitution and he could be deprived of the same only by an authority of law and that pension does not cease to be property on the mere denial or cancellation of it. It was further held that the character of pension as "property" cannot possibly undergo such mutation at the whim of a particular person or authority.*
>
> 31. The matter again came up before a Full Bench of the Punjab and Haryana High Court in K.R. Erry v. State of Punjab [ILR 1967 Punj & Har 278] . The High Court had to consider the nature of the right of an officer to get pension. The majority quoted with approval the principles laid down in the two earlier decisions of the same High Court, referred to above, and held that the pension is not to be treated as a bounty payable on the sweet will and pleasure of the Government and that the right to superannuation pension including its amount is a valuable right vesting in a government servant. It was further held by the majority that even though an opportunity had already been afforded to the officer on an earlier occasion for showing cause against the imposition of penalty for lapse or misconduct on his part and he has been found guilty, nevertheless, when a cut is sought to be imposed in the quantum of

pension payable to an officer on the basis of misconduct already proved against him, a further opportunity to show-cause in that regard must be given to the officer. This view regarding the giving of further opportunity was expressed by the learned Judges on the basis of the relevant Punjab Civil Service Rules. But the learned Chief Justice in his dissenting judgment was not prepared to agree with the majority that under such circumstances a further opportunity should be given to an officer when a reduction in the amount of pension payable is made by the State. It is not necessary for us in the case on hand to consider the question whether before taking action by way of reducing or denying the pension on the basis of disciplinary action already taken, a further notice to show-cause should be given to an officer. That question does not arise for consideration before us. Nor are we concerned with the further question regarding the procedure, if any, to be adopted by the authorities before reducing or withholding the pension for the first time after the retirement of an officer. Hence we express no opinion regarding the views expressed by the majority and the minority Judges in the above Punjab High Court decision on this aspect. But we agree with the view of the majority when it has approved its earlier decision that pension is not a bounty payable on the sweet will and pleasure of the Government and that, on the other hand, the right to pension is a valuable right vesting in a government servant.

** ** **

33. Having due regard to the above decisions, we are of the opinion that the right of the petitioner to receive pension is property under Article 31(1) and by a mere executive order the State had no power to withhold the same. Similarly, the said claim is also property under Article 19(1)(f) and it is not saved by sub-article (5) of Article 19. Therefore, it follows that the order, dated June 12, 1968, denying the petitioner right to receive pension affects the fundamental right of the petitioner under Articles 19(1)(f) and 31(1) of the Constitution, and as such the writ petition under Article 32 is maintainable..." [emphasis supplied]

23. The aforesaid judgment was followed in D.S. Nakara and Ors. v. Union of India, (1983) 1 SCC 305, by another Constitution bench of this Court, which held that: (SCC pp. 320

& 323-24, paras 20. 29 and 31)

"20. The antiquated notion of pension being a bounty, a gratuitous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in Deoki Nandan Prasad v. State of Bihar and Ors7.: wherein this Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a Government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon any one's discretion. It is only for the purpose of quantifying the amount having regard to service and other allied maters that it may be necessary for the authority to pass an order to that effect but the right to receive pension flows to the officer not because of any such order but by virtue of the rules. This view was reaffirmed in State of Punjab and Anr. v. Iqbal Singh.(1976) 2 SCC 1.

*** *** ***

29. Summing up it can be said with confidence that pension is not only compensation for loyal service rendered in the past, but pension also has a broader significance, in that it is a measure of socio-economic justice which inheres economic security in the fall of life when physical and mental prowess is ebbing corresponding to aging process and, therefore, one is required to fall back on savings. One such saving in kind is when you give your best in the hey-day of life to your employer, in days of invalidity, economic security by way of periodical payment is assured. The term has been judicially defined as a stated allowance or stipend made in consideration of past service or a surrender of rights or emoluments to one retired from service. Thus the pension payable to a government employee is earned by rendering long and efficient service and therefore can be said to be a deferred portion of the compensation or for service rendered. In one sentence one can say that the most practical raison d'etre for pension is the inability to provide for oneself due to old age. One may live and avoid unemployment but not senility and penury if there is nothing to fall back upon.

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> 31. From the discussion three things emerge: (i) that pension is neither a bounty nor a matter of grace depending upon the sweet will of the employer and that it creates a vested right subject to 1972 Rules which are statutory in character because they are enacted in exercise of powers conferred by the proviso to Article 309 and clause (5) of Article 148 of the Constitution; (ii) that the pension is not an ex gratia payment but it is a payment for the past service rendered; and (iii) it is a social welfare measure rendering socio-economic justice to those who in the hey-day of their life ceaselessly toiled for the employer on an assurance that in their old age they would not be left in lurch..” [emphasis supplied]
>
> 24. The right to receive pension has been held to be a right to property protected under Article 300A of the Constitution even after the repeal of Article 31(1) by the Constitution (Forty-Fourth Amendment) Act, 1978 w.e.f. 20.06.1979, as held in State of West Bengal v. Haresh C. Banerjee and Ors.(2006) 7 SCC 651).”

14. In view of the aforesaid exposition of law, the action of the respondents in not paying the entire retiral dues to the petitioner is not only unjustified, but is clearly illegal.

15. As already noticed above, there are various time bound stages in the process of determining the pensionary benefits as laid down in the Rules and in case these are not adhered to and result in denial or delay in processing the pensionary claims, then the Courts are required to intervene and impart justice to the parties by awarding interest and may also where the facts otherwise justify, levy costs. (See: *Devaki Nandan Prasad* vs. *State of Bihar and others AIR 1983 SC 1134, Ram Pal Singh* vs. *Union of India and others AIR 1984 SC 504, State of Kerala and others* vs. *M. Padmanabhan Nair (1985) 1 SCC 429*, *Y.K. Singla* vs. *Punjab National Bank and others, (2013) 3 SCC 472* and *State of Uttar Pradesh and others* vs. *Dhirendra Pal Singh (2017) 1 SCC 49*).

16. In view of the aforesaid discussion, the present petition is

allowed and the respondents at the first instance are directed to pay the entire retiral benefits to the petitioner alongwith 9% interest within a period of 30 days from today. Further, the respondents shall conduct an inquiry and fasten responsibility on the officer/official, whether serving or retired, responsible for the delay in finalising and thereafter not releasing the pensionary benefits in favour of the petitioner, so that the amount to be remitted to the petitioner towards interest by the respondents can be recovered from the salary /pensionary benefits of the erring officer/official, who is responsible for delaying the retiral benefits, as the case may be. This exercise be completed within a period of six months from today.

17. The instant petition is disposed of in the aforesaid terms, so also the pending application(s), if any.

18. For compliance, list on 18.10.2021.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Vijay Gupta .....Petitioner.

Versus

State of H.P. and others ..Respondents.

CWP No. 7487 of 2014.
Reserved on: 26.03.2021
Date of decision: 09.04.2021

The petition for writ of Certiorari- Mandamus- Aggrieved by the suspension of his accreditation – The accreditation of the petitioner has been cancelled only on the ground that there are certain FIRs pending against him- Held- The rule 14 (1)- relates to a correspondent, who is liable to be disaccredited / derecognized where as in present case- The accreditation of the petitioner has simply been suspended till the final outcome of the criminal case in exercise of power under sub rule (2) of rule 4- The owner or editor of newspaper like the petitioner shoulder greater responsibility and in case his own conduct is under scanner then obviously, his accreditation has to be suspended- Petition

dismissed direction issued to review and revise accreditation granted- amendments in rules providing for time bound granting/ refusing accreditation and mandatory recording of reasons for rejection.

Cases referred:

Surya Prakash Khatri vs. Smt. Madhu Trehan, 1992 (2001) DLT 665;

For the Petitioner : Mr. Ashok Kumar Thakur, Advocate.

For the Respondents : Mr. Ashok Sharma, Advocate General, with Mr. Vinod Thakur, Addl. A.G. and Mr. Bhupinder Thakur, Dy. A.G.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Aggrieved by the suspension of his accreditation as a Journalist, the petitioner has filed the instant petition for the grant of following substantive reliefs:

> *"I. That a writ of certiorari may be issued thereby directing the respondents to quash and set-aside the order passed by the State Level Accreditation Committee on 2nd August, 2014.*
> *(II) That a writ of mandamus may very kindly be issued thereby directing the respondents to renew the accreditation of the petitioner immediately, which is pending since December, 2012.*
> *(III) That a writ of mandamus may further be issued thereby directing the respondents to start allocation publication of government related notices, tenders, classified advertisements in the news weekly of the petitioner, as is being given to other news agencies or dailies etc.*
> *(IV) That the respondents may be issued a direction thereby directing them not to cancel the accreditation of the petitioner."*

2. It is averred that the petitioner is the Editor of the Hindi Weekly namely 'Him Ujala' circulated in Himachal Pradesh, Delhi, Uttrakhand, Utter Pradesh and Haryana having around 6,000/- copies circulation per week.

The petitioner is working in the field of journalism for the past more than 13 years and has served the interest of the general public by bringing out the true and correct news items. The petitioner news weekly has been given award in the field of journalism by the Government of Himachal Pradesh i.e. '*Laghu Patrikarita ke Kshetra me Nirantar Parkashan Hetu',* yet the accreditation of the petitioner has been cancelled only on the ground that there are certain FIRs pending against him.

3. It is further averred that the impugned action on the part of the respondent-State in stopping publication of the tenders and classified ads of the government and further not renewing the accreditation of the petitioner, is a direct attack on the freedom of press, inasmuch as, on one hand, the petitioner's news weekly is being financially crippled as the publication of the government tenders, notices and classified ads is a major source of income of the petitioner so as to enable him to run the news weekly and on the other hand the respondents by not renewing the accreditation, is depriving the petitioner the facilities which are usually available to the correspondents and journalists of the State. It is further averred that the freedom of press is one of the pillars of democrary and it is imperative to ensure that there is no attack on the freedom of press and, therefore, also the action of the respondents-State is illegal.

4. Lastly, it is averred that the petitioner has been targeted because he had been publishing news items regarding corruption and irregularities committed by the political leaders, who had amassed huge wealth.

5. The respondents have filed their reply wherein it is averred that the petitioner's accreditation and suspension was placed before the Press Accreditation Committee, which is the final authority as per Rule 4 of H.P. Press Correspondents Accreditation and Recognition Rules, 2002 (for short 'the Rules') held on 15.07.2014, who after scrutiny of the record decided to

keep under suspension the accreditation of the petitioner till the final outcome of the criminal cases pending against him in various Courts.

6. It is further averred that the petitioner was given District Level Accreditation by the respondent-department for 'Him Ujala Weekly' which was valid upto 31.12.2012. The Director, Information and Public Relations (respondent No.2) received a complaint dated 06.03.2013 from one Rajinder Thakur, resident of Room No. 10, Ward No.11, Dashmesh Complex, Paonta Sahib, District Sirmaur wherein it was stated that FIR had been registered against the petitioner.

7. The factual position was accordingly ascertained from the Superintendent of Police, District Sirmaur, through District Public Relations Officer and it was confirmed that the above criminal case by way of FIR No. 397/2012 dated 14.10.2012 was registered against the petitioner under Sections 451, 323, 504/34 IPC and Section 30 of the Indian Arms Act.

8. On receipt of the complaint, the matter was examined and respondent No.2 in view of the allegation of grave misconduct on the part of the petitioner, suspended his accreditation under Rule 14 of the Rules and the same were not renewed.

9. It is further averred that the respondents had also received complaint inter alia alleging that the petitioner has submitted a fake certificate Annexure R-2/4 that he is a temporary resident of House No.11, Dashmesh Complex, Bye Pass, Paonta Sahib District Sirmaur, H.P. for the last 15 years, whereas, this building did not exist then and was constructed in the year 2000 as per report dated 02.02.2013 issued by the Councillor, Nagar Palika, Paonta Sahib. The complainant had also endorsed a letter dated 13.02.2013 issued by the PIO-cum-Tehsildar, Paonta Sahib that no certificate had been issued by his office certifying that the petitioner is a temporary resident of the aforesaid address.

10. In another complaint dated 10.04.2014, it was reported that FIR had been registered against the petitioner regarding producing a fake certificate. In respect of this complaint, the following information was sought from the office of the Deputy Commissioner, Sirmaur vide letter dated 06.05.2014:

> *1) Whether Sh. Vijay Gupta, Editor, Him Ujala, Weekly newspaper, Paonta Sahib, District Sirmaur, is a permanent resident of Himachal Pradesh.*
>
> *2) Whether the certificate stated to be issued by the Executive Magistrate, Paonta Sahib, District Sirmaur on dated 19.02.2008 is fake as alleged by the complainant.*

The Deputy Commissioner, Sirmaur vide his letter No. Reader-ADC/2014 dated 02.07.2014 informed as under:

> *1. Sh. Vijay Gupta S/o Sh. Sanjeet Kumar, R/o Room No. 14, Ward No.11, Dashmesh Complex, Paonta Sahib is not a permanent resident of Himachal Pradesh, but he has been living at Paonta Sahib for the last few years.*
> *2. The Tehsildar Paonta Sahib has not issued certificate on 19.02.2008 in favour of Sh. Vijay Gupta as per his office record.*

The Deputy Commissioner had further informed that the Station House Officer, Paonta Sahib has reported that FIR No. 84/2014 dated 01.03.2014 has been lodged against the petitioner under Sections 420, 465, 468 and 471 IPC on the complaint of Sh. Rajinder Thakur.

11. It was also reported that the matter pertain to various allegations, including the allegation of fake certificate levelled by Sh. Rajinder Thakur against the petitioner and the same are under investigation by the police and at this stage it cannot be ascertained as to whether the certificate is fake or genuine.

12. Lastly, it is averred that accreditation or recognition is not a matter of right and the same can always be suspended under the relevant Rules.

13. Even though the petitioner has filed rejoinder, however, the factual matrix as set-out in the reply, have not been controverted and only the provisions of the Rules have been reproduced.

14. I have heard learned counsel for the parties and have gone through the material available on record.

15. Mr. Ashok Kumar Thakur, learned counsel for the petitioner has vehemently argued that the action of the respondents is arbitrary, illegal as the petitioner has been deprived of the bread and butter without following the process of law, more particularly, the provisions of Rule 14 (1) of the Rules, which read as under:-

"14. Disaccreditation or Derecognition of Correspondent:

(1) A correspondent shall be liable to be disaccreditated/derecognized if:

- *(a) He commits any offence under the Press and Registrations Act, or*
- *(b) He uses information received and facilitates acccorded to him for a non-journalistic or illegal purposes or*
- *(c) In the course of his duties as correspondent, he behaves in an undignified or unprofessional manner or commits an offence involving moral turpitude or*
- *(d) He engages himself in work other than journalistic such as soliciting business or advertisements for a newspaper or news agency, or*
- *(e) he is convicted by a court of law for defamation or any other criminal offence arising out of his writings/coverage.*

(2) The power to disaccreditate or derecognize correspondent will vest in the Press Accreditation Committee which shall not exercise this power except after giving to the

correspondent concerned a show cause notice and also an opportunity of being heard.

Provided that the order of Director shall be competent in the case of an emergency and a grave misconduct on the part of a correspondent to suspend his accreditation or recognition pending the completion of proceedings before the Press Accreditation Committee.

Provided that the order of dis accreditation or derecognition shall contain reasons therefore.

(3) A correspondent aggrieved by an order passed by the Press Accreditation Committee under this rule may prefer a review petition before the Accreditation Committee within 15 days of the passing of the order or after communication of the order to him/her, if it is passed in his/her absence."

16. To say the least, the submissions made by Mr. Ashok Kumar Thakur, learned counsel for the petitioner is totally fallacious and reliance placed on Rule 14 (1) is totally misplaced as the same relates to a correspondent, who is liable to be disaccreditated/derecognized. Whereas, in the instant case, the accreditation of the petitioner has simply been suspended till the final outcome of the criminal case in exercise of sub rule (2) of 14, which reads as under:

"*(2) The power to disaccreditate or derecognize correspondent will vest in the Press Accreditation Committee which shall not exercise this power except after giving to the correspondent concerned a show cause notice and also an opportunity of being heard.*

Provided that the order of Director shall be competent in the case of an emergency and a grave misconduct on the part of a correspondent to suspend his accreditation or recognition pending the completion of proceedings before the Press Accreditation Committee.

Provided that the order of dis accreditation or derecognition shall contain reasons therefore."

17. In this view of the matter, obviously no fault can be attributed to the action of the respondents.

18. The media has often been called the handmaiden of justice, the watchdog of society and the judiciary, the dispenser of justice and the catalyst for social reforms. Hence, it is the utmost responsibility of all the media houses, news channels, journalists and press to ensure that their conduct is above-board and they discharge their duties in a responsible manner.

19. A Full Bench of the Delhi High Court in ***Surya Prakash Khatri*** vs. ***Smt. Madhu Trehan, 1992 (2001) DLT 665,*** observed that the power of the Press is almost like nuclear power – it can create and it can destroy. Keeping this in mind, it is imperative that the owner/editor of a newspaper like the petitioner shoulder greater responsibility and in case his own conduct is under scanner, then obviously, his accreditation has to be suspended.

20. The Press in India, more particularly, in Himachal Pradesh, has played pivotal role at various challenging and testing times. Investigative journalism undertaken by it has unearthed important instances, which otherwise would have gone unnoticed.

21. However, as is common with any other institution, certain disturbing tendencies have crept into this institution also. There cannot be

any doubt that such a glorious institution would have the resilience to overcome the shortcomings, before the latter exhibit and unfold their malignancy. Therefore, it is imperative that people with absolute integrity and dedication for the cause hold reins of the chariot of journalism and in case their own conduct is under scanner, then the same reins are to be withdrawn till so long the journalist is not cleared of all the charges. Disorderly conduct by a journalist besides causing irreparable damage to the institution will also cause huge irreparable loss to the journalism.

22. As observed above, like the other institutions, even the institution of journalism is crumbling. The primary function of the press to provide comprehensive and objective information of all aspects of the country's political, social, economic and cultural life. It has an educative and mobilizing role to play. It plays an important role in moulding public opinion and can be an instrument of social change. But because of mushroom growth of journalist and because of the cut-throat competition amongst the journalists themselves, their standards are declining leading to the decline of the institution of journalism itself. This is further compounded by the accreditation offered by the State Government to so called "journalists", who in the real sense are not journalists but only enjoy the facilities accorded and available to accredited journalists.

23. It is, therefore, high time that the respondents review and revise the list of accreditation so as to ensure that only genuine and credible correspondents etc. are accorded accreditation.

24. The Rules of accreditation have though been framed, but the same are not being scrupulously followed like:

i). Even though norms have been laid down for granting Accreditation to journalists based on the circulation of the particular publication/ newspaper in Himachal Pradesh. There are instances where state level accreditation has been granted

to Correspondents of newspapers whose publication is negligible in Himachal and in some cases are not even sold in Himachal. Yet in some cases where circulation has been given to reporters of newspapers which hardly have any circulation in H.P., even though they have a sizeable presence elsewhere in the Country. It has to be ensured that accreditation is granted at the state level based on the publication's circulation in Himachal Pradesh and not merely on the basis of the appointment letter of the Editor of the concerned paper.

ii) Even though the instant Rules 2002 stood substituted yet the Rules as applicable today do not contain a time frame to consider a journalist's request for accreditation or renewal. This cannot be left to the whims and fancy and caprices of the Government. Therefore, the Rules need to be suitably amended by clearly setting out therein the time frame which the accreditation has been granted or refused and provisions have to be made for citing of the reasons in case of the rejection of the request for accreditation.

iii) Even though the Rules do contemplate that only one Journalists from one publication/newspaper would have given accreditation (state or district level) yet it is noticed that more than one person of one organisation has been given accreditation and the Rules are openly flouted. This practice deprives many deserving Journalists to get accreditation.

iv) Even though there is a clear bar for retaining official accommodation in case of Journalists alike Government servants having their own house/flats in Shimla. However, it is noticed that many of the Journalists, who have own houses/flats and some have constructed the flats over the

subsidised land in the Journalists Housing Society near "Asia The Dawn" near Sankat Mochan temple are still retaining the Government accommodation and such tendency needs to be curbed forthwith and such possession is required to be handed over to the Government immediately.

25. In the given facts and circumstances of the case while dismissing this petition, this Court deems it imperative to pass the following directions:

(i) Respondent No.1 is directed to review and revise the accreditation granted to different categories strictly in accordance with the Rules of 2016 as amended from time to time and thereafter grant fresh accreditation strictly in accordance with these rules.

(ii) Amendment be carried out in Rules 2016 making a time bound provision for granting/ refusing accreditation and in case of rejection a provision be made making it mandatory for recording reasons for such rejection. It must be ensured that only one journalist from one publication/newspaper be granted accreditation (State or District level) in accordance with the rules.

26. The instant petition is disposed of on the aforesaid terms, so also the pending application(s), if any.

27. Needful be done within three months.

List for compliance on **09.07.2021.**

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

Rajiv Kant and others ...Petitioners

Versus

Govind Singh Pathania ...Respondent

CMPMO No. 421 of 2018
Judgment reserved on : 09.04.2021
Date of decision : 20.04.2021

The petition under article 227 constitution of India filed by defendant against the order turning down application under order.7 rule 11 CPC for rejection of plaint moved at the stage of arguments- Civil suit for declaration that he was owner of suit land -for decree of permanent prohibitory injunction, possession, for recovery of rent and damages, plaintiff is depicted as plaintiff son of Harnam Singh Pathania defendant contends that plaintiff is son of Anant Singh Pathania who never gave plaintiff in adoption to Harnam Singh- The plaint was amended by incorporating the word 'adopted Son' vide order dated 27.6.2017- Order was not assailed by defendant, at the stage of arguments, defendant moved application under order 7 rule 11 CPC for rejection of plaint on the ground that suit was filed by plaintiff being adopted son of Harnam Singh where in judgment in other civil suit it was held that plaintiff was not adopted son of Harnam Singh- therefore entire edifice of present suit goes- Held- Application was not filed by defendant at the first available opportunity- The plaintiff was allowed to amend plaint by incorporating word 'adopted' – order was accepted by defendant- the moving of application at the fag end of the trial was nothing but a ploy to drag the proceedings- The ground raised in application does not fall within purview of order 7 rule 11 CPC- Ld. trial court committed no error in dismissing application under order 7 rule 11 CPC- Petition dismissed.

Cases referred:

Church of Christ Charitable Trust and Educational Charitable Society Vs. Ponniamman Educational Trust, 2012 (8) SCC 706;
Dahiben Vs. Arvindbhai Kalyanji Bhanusali (Gajra), 2020 (7) SCC 366;
Madanuri Sri Rama Chandra Murthy Vs. Syed Jalal, 2017 (13) SCC 174;
R.K. Roja Vs. U.S. Rayudu and another, 2016 (14) SCC 275;
Saleem Bhai and others Vs. State of Maharashtra, 2003 (1) SCC 557;
Saleem Bhai Vs. State of Maharashtra, 2003 (1) SCC 557;
Shakti Bhog Food Industries Ltd. Vs. Central Bank of India and another, AIR 2020 SC 2721;

Shakti Bhog Food Industries Ltd. Vs. Central Bank of India and another, AIR 2020 SC 2721;
Sopan Sukhdeo Sable and others Vs. Assistant Charity Commissioner and others, 2004 (3) SCC 137;
Sopan Sukhdeo Sable Vs. Assistant Charity Commissioner, 2004 (3) SCC 137;
Sultan Saleh Bin Omer Vs. Vijaya- chand Sirimal, AIR 1966 AP 295;

For the Petitioners: Mr.K.S. Banyal, Senior Advocate, with Mr. Vijender Katoch, Advocate

For the Respondent: Mr. Ajay Sharma, Senior Advocate, with Mr. Rakesh Chaudhary, Advocate

The following judgment of the Court was delivered:

Jyotsna Rewal Dua,J.

An application for rejection of plaint moved at the stage of arguments by the defendants under Order 7 Rule 11 of the Code of Civil Procedure (in short O7 R11 CPC) has been turned down by the learned trial Court. Aggrieved, the defendants have filed instant petition.

2. Facts

2(i) A civil suit bearing No. 100/2004 was filed by the respondent for declaration to the effect that he was owner of the suit land. Various other reliefs were also prayed including permanent injunction for restraining the defendants from proclaiming any right, title or interest over the suit land. Further relief of possession by way of demolition of structure of petrol pump over the suit land was also prayed. Another prayer for recovery of rent and damages was also

made. The cause title of the plaint reflected the plaintiff as son of Shri Harnam Singh Pathania.

2(ii) Written statement on behalf of the defendants was filed in the year 2004 itself, contesting the suit on various grounds available to them. It was also pleaded in the written statement that the plaintiff is son of General Anant Singh Pathania, who never gave the plaintiff in adoption to Shri Harnam Singh Pathania. Latter had no right to adopt the plaintiff as his son. The adoption of plaintiff by Harnam Singh was asserted to be contrary to the provisions of Hindu Adoption and Maintenance Act.

2(iii) The plaint was amended on 27.06.2007 by incorporating the word 'adopted son' in the plaint. Pursuant to the amendment, the plaintiff projected himself as an adopted son of Shri Harnam Singh Pathania. The order dated 27.06.2007 was not assailed by the defendants.

2(iv) After closure of the evidence led by the parties, the matter was fixed for arguments. At that stage, on 12.09.2018, the defendants moved an application under O7 R11 (a) and (d) CPC for rejection of plaint on the ground that plaintiff had filed the suit as an adopted son of Shri Harnam Singh Pathania, whereas in a judgment dated 27.11.2002 delivered in another civil suit No. 265 of 1997, learned Sub Judge 1st Class (Court No.1), Nurpur, District Kangra, H.P. had held that the plaintiff was not the adopted son of Shri Harnam Singh Pathania. Relying upon this judgment, it was contended by the defendants that the deed of adoption was signed only by Shri Harnam Singh Pathania and not by the plaintiff's natural father-General Anant Singh Pathania. Therefore, adoption deed cannot prove that the plaintiff was legally adopted by late Shri Harnam Singh Pathania. It was also contended that the present suit was filed by the plaintiff asserting his

ownership over the suit land in the capacity of being an adopted son of Shri Harnam Singh Pathania. Since the plaintiff has been held to be not a legally adopted son of Shri Harnam Singh Pathania vide judgment dated 27.11.2002, therefore, the entire edifice of the present civil suit goes.

2(v) The plaintiff contested this application and submitted that matter in respect of his adoption stood already adjudicated by this Court in CMPMO Nos. 2, 3 and 6 of 2007 as well as by certain other orders, referred to in the reply. It was also submitted that amendment of the plaint was allowed by the learned trial Court on 27.06.2007, whereby the word 'adopted' was allowed to be incorporated in the plaint. No written statement was filed to the amended plaint by the defendants, rather a statement was made that earlier written statement on record be read as written statement to the amended plaint. It was asserted that plaintiff was given in adoption by his natural father General Anant Singh to Shri Harnam Singh Pathania (real brother of General Anant Singh) and that plaintiff was absolute owner of suit property being an adopted son of late Shri Harnam Singh. Mutation No.69 dated 01.06.1990 had already been attested in this regard in plaintiff's favour. It was also pleaded that Civil Suit No. 265 of 1997 was withdrawn with permission of appellate Court, therefore, reliance upon the judgment passed by the learned trial Court in that suit was of no use. The application moved by the defendants for rejection of the plaint at such a belated stage of the suit was nothing but a ploy to linger on the proceedings.

2(vi) After hearing the parties, learned trial Court dismissed the application under O7 R11 CPC on 28.09.2018. This order has been assailed by the defendants in the instant petition, preferred under Article 227 of the Constitution of India.

3. Contentions

3(i) Learned Senior Counsel for the petitioners-defendants submitted that the learned trial Court committed material illegality and irregularity in dismissing the application. Plaintiff was not the legally adopted son of Shri Harnam Singh Pathania. Therefore, he could not have filed the suit as Harnam Singh's adopted son. Dissected from Shri Harnam Singh Pathania, the plaintiff neither had any right to sue the defendants regarding the suit land nor any cause of action whatsoever. Therefore, provisions of O7 R11 (a) CPC were attracted and plaint was accordingly liable to be rejected.

3(ii) Learned Senior Counsel for the respondent contended that the application for rejection of plaint was justly dismissed by the learned trial Court. The application was moved at the stage of argument, hence was not even maintainable at that stage. No cogent explanation for delay in moving the application was offered. No specific issue in respect of adoption of the plaintiff was framed in the civil suit. Defendants neither agitated nor contested the issues framed in the suit. It was also submitted that the judgment dated 27.11.2002 heavily relied upon by defendants, holding plaintiff's adoption as invalid, had been set aside by the learned first appellate Court on 18.06.2005. The application under O7 R11 CPC primarily based upon the judgment dated 27.11.2002, therefore, was bound to be rejected and was accordingly rejected.

4. Observations

Broad aspects under which the matter needs consideration are :-

a) Merits of application moved under O7 R11 CPC

b) Maintainability of application under O7 R11 CPC viz-a-viz facts and stage of the suit.

Merits of application moved under O7 R11 CPC

4(i) Primary contention of the petitioners-defendants is that the plaintiff had no cause of action. His right to sue in the plaint is on the basis of being an adopted son of Shri Harnam Singh Pathania, whereas a judgment dated 27.11.2002 delivered in Civil Suit No. 265 of 1997 has held that plaintiff was unable to prove his valid adoption by Shri Harnam Singh Pathania. Plaintiff had no separate and different title in his own name to seek the relief claimed in the plaint. Therefore, plaint was liable to be rejected.

At this stage, it will be appropriate to extract the provisions of O7 R11 CPC, whereunder plaint is liable to be rejected in following cases :-

"11. Rejection of plaint. *- The plaint shall be rejected in the following cases:-*

(a) where it does not disclose a cause of action;

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law :

(e)where it is not filed in duplicate;

(f) where the plaintiff fails to comply with the provisions of rule 9:

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature form correcting the valuation or supplying the requisite stamp-paper , as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff."

Where the plaint does not disclose a cause of action, the relief claimed is undervalued and not corrected within the time allowed by the court, insufficiently stamped and not rectified within the time fixed by the Court, barred by any law, failed to enclose the required copies and the plaintiff fails to comply with the provisions of Rule 9, the Court has no other option except to reject the same. {Ref. **2012 (8) SCC 706** titled **Church of Christ Charitable Trust and Educational Charitable Society** Vs. **Ponniamman Educational Trust**}**.**

It is also well settled that for the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order 7 CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage.{ **Ref. 2003 (1) SCC 557** titled **Saleem Bhai** Vs. **State of Maharashtra**}**.**

The above principles were reiterated in **2017 (13) SCC 174** titled **Madanuri Sri Rama Chandra Murthy** Vs. **Syed Jalal.** Para 7 of the judgment reads thus :-

"7. The plaint can be rejected under Order 7 Rule 11 if conditions enumerated in the said provision are fulfilled. It is needless to observe that the power under Order 7Rule 11, CPC can be exercised by the Court at any stage of the suit. The relevant facts which need to be looked into for deciding the

application are the averments of the plaint only. If on an entire and meaningful reading of the plaint, it is found that the suit is manifestly vexatious and meritless in the sense of not disclosing any right to sue, the court should exercise power under Order 7 Rule 11, CPC. Since the power conferred on the Court to terminate civil action at the threshold is drastic, the conditions enumerated under Order 7 Rule 11 of CPC to the exercise of power of rejection of plaint have to be strictly adhered to. The averments of the plaint have to be read as a whole to find out whether the averments disclose a cause of action or whether the suit is barred by any law. It is needless to observe that the question as to whether the suit is barred by any law, would always depend upon the facts and circumstances of each case. The averments in the written statement as well as the contentions of the defendant are wholly immaterial while considering the prayer of the defendant for rejection of the plaint. Even when, the allegations made in the plaint are taken to be correct as a whole on their face value, if they show that the suit is barred by any law, or do not disclose cause of action, the application for rejection of plaint can be entertained and the power under Order 7 Rule 11 of CPC can be exercised. If clever drafting of the plaint has created the illusion of a cause of action, the court will nip it in the bud at the earliest so that bogus litigation will end at the earlier stage."

The above judgments alongwith various other precedents in timeline were relied upon by the apex Court in **AIR 2020 SC 2721**, titled **Shakti Bhog Food Industries Ltd.** Vs. **Central Bank of India and another.** It would also be appropriate to refer to **2004 (3) SCC 137**, titled **Sopan Sukhdeo Sable and others** Vs. **Assistant Charity Commissioner and others**, wherein it was held that application for rejection of plaint should not be considered on the basis of allegations made by the defendant in his written statement or on the basis of allegations in the application for rejection of the plaint.

4(ii) Against the backdrop of above legal position, relevant facts may be noticed. The admitted factual position is that the suit was filed

by the respondent for declaration as well as possession alongwith consequential relief of injunction. Various other reliefs were also prayed. This suit was instituted by the plaintiff projecting himself as son of Shri Harnam Singh Pathania. Written statement to this civil suit was filed in the year 2004 wherein inter-alia some pleas about the adoption of the plaintiff by Harnam Singh being illegal, invalid and contrary to the provisions of the Hindu Adoption and Maintenance Act were raised.

4(iii) Amendment to the plaint was allowed by the learned trial Court on 27.06.2007 whereby the word 'adopted' was allowed to be incorporated in the plaint. The order amending the plaint was not challenged by the defendants. During hearing of the case, it was stated by learned counsel for the defendants-petitioners at the Bar that no separate written statement to the amended plaint was filed. Learned counsel for the plaintiff-respondent stated that no issue with respect to adoption of the plaintiff had been framed.

4(iv) Civil Suit No. 265 of 1997 was filed by the plaintiff/present respondent. The suit claimed reliefs against the State, impleaded as defendant therein. This suit was dismissed on 27.11.2002. A finding was given in the judgment that plaintiff had not been able to prove his lawful adoption by Shri Harnam Singh Pathania. On the strength of this judgment, the defendants in the instant case, moved the application under O7 R11 CPC. However, the fact remains that the judgment dated 27.11.2002 delivered in C.S. No. 265 of 1997 was assailed by the plaintiff before the learned District Judge, Kangra at Dharamshala in Civil Appeal No. 8-N/2003. Vide order dated 18.06.2005 passed with the consent of the parties, the plaintiff was permitted to withdraw the civil suit with permission to file afresh on the same cause of action. Accordingly, the civil appeal preferred by him was

also dismissed as withdrawn. Once the civil suit was dismissed as withdrawn, the judgment rendered by the learned trial Court in the suit lost its efficacy. The judgment of learned trial Court was the foundation over which, the application under O7 R11 CPC was moved by the defendants. Thus, no benefit, as was being sought to be gained from the judgment, could actually be derived by the defendants in their application moved under O7 R11 CPC.

4(v) It is also significant to note that for rejecting the plaint, the defendants had put forward their contention in the application moved under O7 R11 CPC/written statement about illegality in plaintiff's adoption. Their allegation is that plaintiff was not legally adopted son of late Shri Harnam Singh Pathania, therefore, plaint filed by him in that capacity had to be rejected. However, for considering the application under O7 R11 CPC, it is only the plaint alone, which it is to be looked into and not the written statement or the contentions raised in the application. Whether the plaintiff has cause of action and right to seek the reliefs claimed in the plaint has to be established by him by resorting to the pleadings, proofs and evidence adduced during trial. It is settled legal position that cause of action is a bundle of material facts which are necessary for the plaintiff to prove in order to entitle him to the reliefs claimed in the suit. In the facts of the case, solely on the basis of judgment dated 27.11.2002, rendered in C.S. No. 263 of 1997 (which has been permitted to be withdrawn by the first appellate Court vide order dated 18.06.2005), it cannot be said, at this stage, that plaintiff has no cause of action or right to sue with respect to the suit land viz-a-viz the reliefs prayed for in his capacity as an adopted son of Shri Harnam Singh Pathania. Fully aware of the factual position, the issues were framed, the parties led evidence and ventured into the trial. Learned trial Court is yet to hear the arguments. The application

does not come within the purview of situations contemplated under O7 R11 CPC.

Stage at which application under O7 R11 CPC was moved and its effect:

4(vi) There is no dispute to the well settled principle that the powers under O7 R11 CPC can be exercised at any stage of the suit before registering the plaint or after issuing summons to the defendants at any time before conclusion of the trial {**Refer 2003 (1) SCC 557**, titled **Saleem Bhai and others** Vs. **State of Maharashtra ; 2004 (3) SCC 137**, titled **Sopan Sukhdeo Sable** Vs. **Assistant Charity Commissioner**}. It would also be appropriate to refer to a recent judgment of Hon'ble Supreme Court in this regard, reported in **AIR 2020 SC 2721,** titled **Shakti Bhog Food Industries Ltd.** Vs. **Central Bank of India and another**, wherein various precedents in the timeline explaining O7 R11 CPC were considered reiterating that in order to consider O7 R11 CPC, the Court has to look into the averments in the plaint and the same can be exercised by the trial Court at any stage of the suit. The averments in the written statement are immaterial and it is the duty of the Court to scrutinize the averments/pleas in the plaint. In other words, what needs to be looked into for deciding such an application are the averments in the plaint. Paras 5 and 6 from **2016 (14) SCC 275**, titled **R.K. Roja** Vs. **U.S. Rayudu and another**, are also relevant in respect of stage of filing application under O7 R11 CPC which read as under :-

> **"5.** *Once an application is filed under Order VII Rule 11 of the CPC, the court has to dispose of the same before proceeding with the trial. There is no point or sense in proceeding with the trial of the case, in case the plaint (Election Petition in the present case) is only to be rejected at the threshold. Therefore, the defendant is entitled to file the application for*

rejection before filing his written statement. In case, the application is rejected, the defendant is entitled to file his written statement thereafter (See Saleem Bhai and others v. State of Maharashtra and others). But once an application for rejection is filed, the court has to dispose of the same before proceeding with the trial court. To quote relevant portion from paragraph-20 of Sopan Sukhdeo Sable case (supra):

> *"20. … Rule 11 of Order 7 lays down an independent remedy made available to the defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the objections can be raised, and also does not say in express terms about the filing of a written statement. Instead, the word "shall" is used, clearly implying thereby that it casts a duty on the court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the defendant.…"*

6. *In Saleem Bhai case (supra), this Court has also held that … "A direction to file the written statement without deciding the application under Order VII Rule 11 cannot but be a procedural irregularity touching the exercise of jurisdiction of the trial court." However, we may hasten to add that the liberty to file an application for rejection under Order VII Rule 11 of the CPC cannot be made as a ruse for retrieving the lost opportunity to file the written statement.."*

4(vii) Learned Senior Counsel for the petitioners submitted that the application for rejection of plaint could be moved at any stage before conclusion of the trial. In the instant case, the suit was fixed for arguments when application under O7 R11 CPC was moved. The

application was, therefore, maintainable at that stage. Trial of the suit comes to an end only with delivering of judgment or when the suit is posted for judgment where it is reserved. Reliance in this regard was placed upon following paras of **AIR 1966 AP 295**, titled **Sultan Saleh Bin Omer** Vs. **Vijaya- chand Sirimal :-**

> ***"****17. A combined reading of all these provisions makes it abundantly clear that the Code has not provided for hearing of arguments as a distinct stage in the trial of the suit. On the other, hand, according to Order 15, Rule 3, the hearing of the suit includes both production of evidence, as well as argument. It is in the option of the parties to argue their case after the evidence in the suit is closed, and it is for them to decide whether they will exercise their privilege or not. In other words, once the trial of the suit is taken up and the examination of the witnesses has commenced, the hearing of the suit is said to begin; and that hearing comes to an end only with the delivery of the judgment, or when the suit is posted for judgment where it is reserved. In eases, therefore, where the suit has not been posted for judgment, but is posted for hearing arguments of one side or the other, it should be remembered that the hearing of the suit is not concluded, though the recording of evidence might have been finalised by both the parties. In such cases, either party is not precluded from making a request for examination of additional witnesses, or making documents, merely on the ground that the trial is closed and the matter is posted for arguments, whether the request should be granted or not, is however a matter to be decided on its merits, bearing in mind the fact that it is belated.*
>
> *19. I, therefore, hold that from the commencement of the recording of evidence till the suit if posted for judgment, if it is not delivered soon after the hearing constitutes 'hearing of the suit', though in the course of the hearing judge may note the purpose for which the suit is adjourned to a particular date, viz., for examining witness on behalf of the plaintiff or the defendant, or for hearing argument on a particular aspect of the case, or arguments at the*

conclusion of the evidence. In this view, I cannot accept the contention of Sri Suryaprakasam that the trial Court had acted illegally in exercising its jurisdiction in re-opening the suit already closed, for, there was no need for any re-opening, when the hearing is not concluded."

4(vii) The remedy under O7 R11 CPC is an independent and special remedy, wherein the Court is empowered to summarily dismiss a suit at the threshold, without proceeding to record evidence, and conducting a trial, on the basis of the evidence adduced, if it is satisfied that the action should be terminated on any of the grounds contained in this provision. {**Ref. 2020 (7) SCC 366,** titled **Dahiben** Vs. **Arvindbhai Kalyanji Bhanusali (Gajra)**}**.** In the instant case, application under O7 R11 CPC was not moved by the defendants at the first available opportunity. The defendants had vaguely taken a stand with respect to the adoption of plaintiff being illegal in their written statement filed in the year 2004. The plaintiff was allowed to amend the plaint by the learned trial Court on 27.06.2007 by incorporating the word 'adopted' son of Shri Harnam Singh Pathania. The order dated 27.06.2007 was accepted by the defendants. No separate written statement to the amended plaint was filed. Issues were framed. The parties being fully aware of their respective cases, the pleadings and the points involved therein led evidence. On 12.09.2018, when the case was fixed for arguments, the defendants moved the application under O7 R11 CPC. This application was moved after a gap of 14 years from the date of filing of the plaint and 11 years after the amendment of the plaint. Written statement to the original plaint stood filed 11 years ago in the year 2004. It is not that alleged illegality in the adoption of the plaintiff came to the notice of defendants for the first time in September, 2018. Some averments in this regard were already made in the written statement filed in the year 2004. There is not a whisper in the application about the reasons for delay in moving such an application. No doubt, the application under O7 R11 CPC can be moved at any stage before

conclusion of the trial, however, in the facts and circumstances of the case, moving of such application for rejection of the plaint at the fag end of the trial was nothing but a ploy to drag the proceedings.

5. The sum total of above discussion is that neither the grounds raised in the application fall within the purview of any of the situations covered under O7 R11 CPC nor the application in the facts of the case was filed within a reasonable time in accordance with the provisions. Therefore, the learned trial Court committed no error in dismissing the application under Order 7 Rule 11 of the Code of Civil Procedure moved by the defendants 11 years after filing of written statement and at the stage of hearing of arguments. Finding no merit in the instant petition, the same is accordingly dismissed. Parties, through their learned counsels, are directed to appear before the learned trial Court on 12.05.2021. It is clarified that the observations made above are only for adjudicating the instant petition and will have no bearing on the merits of the matter.

The petition stands disposed of in the aforesaid terms, so also the pending applications, if any.

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

Ranvir Singh Chauhan ...Petitioner.

Versus

State of Himachal Pradesh & others ..Respondents.

CWPOA No. 4596 of 2019
Date of Decision: April 19, 2021.

The petition seeking regularization of service by petitioner immediately on completion of 8 years service on daily wages as clerk in Nagar Panchayat Narkanda w.e.f 2.5.2002 whereas he was regularized vide order dated

18.8.2007 with prospective effect after applying regularization policy of Government dated 9.6.2006- Petitioner working against vacant post and appointed as a daily wage clerk in 1994- The claim of petitioner is that in furtherance of the order passed by court to consider the case of Kushal and Bittu in other writ petition the respondents have regularized them immediately on completion of 8 years of their service.-Held, it is not in dispute that petitioner as well as petitioners in other writ petition were serving with Urban Local bodies on daily wage basis and were regularized from prospective date in application of policy dated 9.6.2006 therefore in principle, everything is identical in nature therefore omission and commission on part of respondents not treating the petitioner in similar fashion in which others were considered is discrimination and violation of Article 14. Petition disposed of with direction to consider the case of petitioner for regularization after completion of 8 years of service in terms of earlier judgment.

For the Petitioner: Mr.I.D. Bali, Senior Advocate, alongwith Mr.Virender Bali, Advocate.

For the Respondents: Mr.Gaurav Sharma, Deputy Advocate General, for respondents No.1 and 2.

Mr.Praveen Chauhan, Advocate, vice Mr.Vishal Panwar, Advocate, for respondent No.3, through Video Conferencing.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J (oral)

By way of the instant petition, petitioner has approached the Court seeking regularization of his services immediately on completion of eight years of daily wage service as a Clerk in Nagar Panchayat Narkanda w.e.f. 02.05.2002. Whereas, respondents have regularized him vide order dated 18.08.2007 (Annexure P-3) with prospective effect of the said order after applying regularization Policy of the Government dated 09.06.2006.

2. As evident from order dated 18.08.2007 (Annexure P-3) as indicated in remarks column, petitioner has been working against vacant post. Petitioner was appointed as a daily wage Clerk in May 1994 in Nagar Panchayat Narkanda and he has been serving against vacant post and has completed eight years of service on the date of issuance of regularization Policy dated 09.06.2006 which has also been made applicable to the daily wagers of Urban Local Bodies vide letter dated 11.04.2007, who have completed eight years on the date of issuance of regularization Policy, were to be regularized against the said vacant posts.

3. It is case of the respondents that the Policy has to be made applicable with prospective effect and, therefore, petitioner has been rightly regularized w.e.f. 18.08.2007 that is the date of order of his regularization passed after application of regularization Policy to the Urban Local Bodies.

4. It is claim of the petitioner that omission and commission on the part of the respondents are discriminatory in nature as the respondent-Department has regularized similarly situated persons immediately on completion of eight years of service in cases of other persons serving in Nagar Panchayat (now Nagar Parishad) Rohru. Petitioner in para-12 (d) of the petition has categorically stated that in furtherance of the order passed by the Court to consider the case of the petitioners in CWP(T) No.1728 of 2008, titled as *Kushal Chand and another vs. State of Himachal Pradesh* and CWP(T) No.1735 of 2008, titled as *Bablu and another vs. State of Himachal Pradesh,* respondents have regularized services of those petitioners immediately on completion of eight years of their services. Copies of judgments have also been placed on record as Annexures P-6 and P-7.

5. Perusal of judgment passed in CWP(T) No.1728 of 2008 (supra) indicates that respondents No.1 and 2 were directed to consider cases of the petitioners therein for regularization immediately after completion of eight years of service instead of prospective date of regularization in those cases

with all consequential benefits within a period of ten weeks from the date of passing of the order and CWP(T) No. 1735 of 2008 (supra) was also decided in the same terms on the basis of judgment passed in CWP(T) No.1728 of 2008.

6. In response to the aforesaid plea of the petitioner, in reply, it is stated that judgments in those cases were judgments in *rem* and not in *personam* with further averments that however, services of petitioners in those writ petitions, were regularized from back date in pursuance to the judgments of the Court duly examined by the Department of Law to the Government of Himachal Pradesh.

7. It is not in dispute that petitioner as well as petitioners in above referred writ petitions, were serving with Urban Local Bodies on daily wage basis and were regularized from prospective date in application of the Policy dated 09.06.2006 and services of all of them are under control of respondents No.1 and 2. Therefore, in principle, except the post and Urban Local Body of the petitioner herein, and the petitioners in above referred writ petitions, everything is identical in nature. Therefore, omission and commission on the part of the respondents, not treating the petitioner in similar fashion in which petitioners in CWP(T) No.1728 of 2008 and CWP(T) No.1735 of 2008 (supra) were considered, is discriminatory and, thus, violative of Article 14 of the Constitution of India.

8. Being a case identical in facts to the cases of judgments in CWP(T) No.1728 of 2008 and CWP(T) No.1735 of 2008 (supra), judgments passed in those cases shall also be applicable in present case *mutatis mutandi,* for all intent and purposes.

9. In view of above, present petition is disposed of with direction to the respondents to consider the case of the petitioner for regularization immediately after completion of eight years service for the post of Clerk instead of 18.08.2007, with all consequential benefits on or before 30.06.2021

strictly in consonance with principles laid down in judgments passed in CWP(T) No.1728 of 2008 and CWP(T) No.1735 of 2008 (supra).

Pending application(s), if any, also stand disposed of.

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

Sh. Parveen Kumar & ors. .....Petitioners.

Versus

Sh. Choudary Ram & ors. .....Respondents**.**

CMPMO No. 341 of 2014
Reserved on: 19.4.2021
Decided on: 22.04.2021

The petition under Article 227 of Constitution of India against the order passed by executing court where by objection preferred by judgment debtor to the execution petition filed by DH have been partly allowed and instead of actual possession, only symbolic possession of suit Land has been ordered to be delivered to the decree holder- An exparte decree for vacant possession of suit land was passed- In execution- The J.D stated that JD No.1 had purchased 1/6th share in suit land and JD Bhole Ram also purchased separate share in the suit land – Held- in instant case, JD's/ objectors have proved on record that they had become co-sharers of suit land subsequent to passing of the decree sought to be executed. The suit land is now jointly owned by them along with various co-sharers – In such situation their possession over the suit land cannot be treated as illegal and therefore cannot be ousted from such possession. The JDs and objectors have purchased share in suit land from other co-sharers. Their possession of the suit land is now in capacity different from the one in which they had suffered the decree for possession- in such circumstances ld. trial court was justified in not issuing the warrant of actual possession in favour of decree holder. Petition lacks merit and dismissed.

Cases referred:

Arun Lal and others versus Union of India and others, (2010) 14 SCC 384;
Jagdish Dutt and another v. Dharam Pal and others, AIR 1999 Supreme Court 1694;

For the petitioners : Mr. Anuj Gupta,Advocate.

For the respondent s : Mr. Ajay Sharma, Senior Advocate
with Ms. Aanandita Sharma,
Advocate, for respondents No. 1 to 4.

Nemo for respondents No. 5 to 9.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge

The objections preferred by the judgment debtors to the execution petition filed by the decree holders have been partly allowed by the learned Executing Court vide order dated 29.8.2014, which is impugned herein by the decree holders. In terms of this order, instead of actual possession, only symbolic possession of the suit land has been ordered to be delivered to the decree holders.

2(i) A civil suit was instituted by S/Shri Rania and Chuni Lal, both sons of Shri Litru on 29.12.1995. The defendants in the suit were S/Shri Dulo and Chhunku, both sons of Shri Mangtu. The plaintiffs asserted themselves to be owners alongwith other co-sharers of the suit land comprised in Khata No. 39 min, Khatauni No. 81, Khasra No. 78, measuring 0-00-55 HM, situated in village Tutwan, Sub Tehsil Fatehpur, District Kangra, on the basis of jamabandi for the year 1989-90. The allegations in the plaint were that the defendants were neither the owners nor the tenants over the suit land. Yet they had forcibly taken over the possession of the suit land in May 1989 in an illegal and unlawful manner. Therefore, decree for vacant possession of the suit land was prayed for. Learned trial Court on 22.8.1998, decreed the suit of the plaintiffs exparte against the defendants for vacant possession of suit land. The operative part of the judgment reads as under:

> *".....Since the plaintiffs alongwith other cosharers are the owners of the suit land and the defendants have no right, title or interest over the suit land, and thus, the suit of the plaintiffs is hereby decreed against the defendants for vacant possession of the land comprised in Khata No. 39 min, Khatauni No. 81, Khasra No. 78, measuring 0-00-55 HM, situated in village Tutwan,Sub Tehsil Fatehpur, Distt. Kangra, H.P. as per jamabandi for the year 1989-90."*

2(ii) On 12.8.2006, the legal heirs of original plaintiff No. 1 and Shri Chuni Lal-original plaintiff No. 2 (petitioners herein) filed an execution petition under Order 21 Rule 11 of Code of Civil Procedure for executing the aforesaid decree dated 22.8.1998. The execution was preferred against the legal heirs of original defendants. The prayer in the execution petition was for putting the plaintiffs/decree holders (present petitioners) into actual possession of the suit land after demarcation of boundaries.

2(iii) On 12.1.2007 objections on behalf of judgment debtors were preferred pleading therein that the decree had become inexecutable for the reasons:-

a) The original judgment debtor No. 1 Dulo had purchased 1/16th share in the suit land on 27.5.1999.

b) Judgment debtor Bhola Ram son of Shri Dulo had also purchased a separate share in the suit land.

c) After purchase of shares in the suit land, the judgment debtors had become joint owners in possession with the decree holders. The share of the judgment debtors/joint owners is not specified on a particular portion of land in question. Therefore, till the time the land is partitioned, every inch of it has to be construed as joint between the parties-joint owners.

d) The decree holders (present petitioners) in such circumstances are not entitled for actual possession of the suit land.

The reply to the objections had been filed on behalf of the decree holders/present petitioners denying the purchase of suit land by the judgment debtors. It was also submitted that even after the purchase of a portion of the suit land by the judgment debtors, the decree could still be executed.

2(iv) Issues were framed in the objection petition on 28.12.2007. The parties led evidence in support of their respective contentions After considering the pleadings and the evidence adduced by the parties, the learned trial court held that the original defendant No. 1 Shri Dulo (father of judgment debtors/respondents No. 1 to 3) had purchased the suit land on 27.5.1999 to the extent of 1/16th share and judgment debtor Bhola Ram had also purchased separate share in the suit land. Therefore, the judgment debtors had become co-sharers of the suit land. On becoming co-sharers of the suit land, the judgment debtors cannot be ousted from their possession of the suit land and for this reason actual possession of the suit land was not ordered to be delivered to the decree holders. Instead of warrant of actual possession, warrant of symbolic possession was ordered to be issued in favour of the decree holders.

Aggrieved against this order passed by the learned executing court on 29.8.2014, the decree holders have preferred instant petition under Article 227 of the Constitution of India.

3. Heard learned counsel for the parties and gone through the record.

4. Learned counsel for the petitioners/decree holders submitted that learned Executing Court erred in not delivering actual possession of the suit land in favour of the decree holders. Learned counsel contended that there was no document on record to show that the judgment debtors had purchased any portion of land in the suit land. He further submitted that in any case even if it is to be presumed that the part of suit land was sold to the

judgment debtors-original defendants, then also it was sold much after passing of the judgment and decree sought to be executed. The intention of the judgment debtors and their predecessors was only to deprive the decree holders from getting the possession of the suit land. In such circumstances, the objections filed by the judgment debtors were not legally maintainable and were liable to be rejected as the executing court could not have gone behind the decree. Learned counsel for the appearing respondents/judgment debtors supported the impugned order.

4. On going through the record, the impugned order cannot be said to be suffering from any infirmity. Following aspects become material in this regard:-

4(i) The objections preferred on behalf of the judgment debtors were in respect to the inexecutability of the decree dated 22.8.1998 vide which the plaintiffs were held to be the owners of the suit land alongwith other co-sharers. It was held in the judgment and decree that the defendants/judgment debtors without any rights or authority had forcibly taken the possession of the suit land in May 1989. Accordingly, the suit filed by the plaintiffs was decreed against the defendants for vacant possession of the suit land comprised Khata in No. 39 min, Khatauni No. 81, Khasra No. 78, measuring 0-00-55 HM situated in village Tutwan, Sub Tehsil Fatehpur, District Kangra as per jamabandi for the year 1989-90.

4(ii) In response to the execution petition filed in the year 2006, the judgment debtors by submitting that subsequent to the decree they had purchased shares in the suit land, objected to the executability of the decree. During evidence, they placed on record jamabdndi for the year 1999-2000 (Ex. R-2) and jamabandi for the year 2004-2005 (Ex. R-1) wherein it was recorded that original defendant No. 1-Dulo (father of judgment debtors/respondents No. 1 to 3) had purchased 30 out of 480 shares in the suit land and judgment debtor Bhola Ram had also purchased 45 out of 480 shares in the suit land.

Sale deeds though have not been placed on record, however, the decree holders have not denied the revenue documents placed on record by the defendants/judgment debtors. In fact, no evidence in this regard whatsoever has been led by the plaintiffs/decree holders to rebut the revenue record reflecting purchase of shares in the suit land by the objectors/judgment debtors. Thus, from the perusal of the evidence adduced by the parties in the objection petition, it is evident that subsequent to the passing of the decree, the defendants/judgment debtors have purchased shares in the suit land from the other cosharers and, therefore, have themselves become co-shares over the suit land.

4(iii) There is no dispute qua the settled legal position that the executing court cannot go behind the decree and has to execute it as its stands. However, in terms of Section 47 of Code of Civil Procedure the executing court is required to look into the questions relating to the execution, discharge or satisfaction of the decree. Such questions are to be adjudicated by the executing court and not by a separate suit. Section 47 reads as under:

> *"47. Questions to be determined by the Court executing decree.—(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.*
>
> *(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court. [Explanation 1.—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit. Explanation II—(a) For the purposes of this section, a*

purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.]"

4(iv) ***(2010) 14 SCC 384,*** title ***Arun Lal and others*** versus ***Union of India and others*** was a case where decree for recovery of possession by ejectment of defendants from a bungalow was passed with a direction to remove barracks constructed on part of compound. Union of India, in terms of a resumption notice, took over possession of land appurtenant to the bungalow. The notice was not challenged. In execution proceedings, respondents filed objections under Section 47 CPC that decree was rendered inexecutable to the extent of land resumed under the resumption notice. The apex court upheld High Court's verdict that possession of said land could not be taken away from Union of India for delivering to the decree-holders, since after resumption of property and taking possession, Union of India in exercise of its rights as paramount title-holder, was no longer holding the same as a tenant so as to be answerable to petitioners as its landlords. Relevant para from the judgment is extracted hereinafter:-

"15. It is common ground that the land appurtenant to the bungalow had been utilised by the Union of India for construction of barracks. The entire extent of 2.792 acres of of land including the one under the barracks could, therefore, be taken over pursuant to the resumption order which was never assailed and had thereby attained finality. Such being the position, the High

> *Court was right in holding that possession of the above extent of land could not be taken away from the Union of India for delivery to the decree-holders. That is because after the resumption of the property and the taking over of the possession by the Union of India in exercise of its rights as the paramount title holder, it was no longer holding the same as a tenant so as to be answerable to the petitioners as its landlords. The Union of India was on the contrary holding the resumed property in its own right and in a capacity that was different from the one in which it had suffered the decree for eviction. This was a significant change in the circumstances in which the decree was passed rendering it inexecutable."*

Jagdish Dutt and another v. ***Dharam Pal and others,*** reported in ***AIR 1999 Supreme Court 1694,*** was a case where a decree for actual possession of immovable property was passed. One of the coparceners assigned/transferred his interest in the decree in favour of the judgment debtors. It was held that the decree in such situation would get extinguished to the extent of the interest so transferred and further that execution petition would lie only to the extent of remaining part of the decree. It was also observed that where the interest of coparceners is undefined, indeterminate and cannot be specifically stated to be in respect of any one portion of the property, then a decree for actual possession of immovable property cannot be given effect to before ascertaining the rights of the parties by an appropriate decree in a partition suit. The relevant para of the judgment reads as under:

> "7. *When a decree is passed in favour of a joint family the same has to be treated as a decree in favour of ail the members of the joint family in which event it becomes a joint decree. Where a joint decree for actual possession of immovable property is passed and one of the coparceners assigns or transfers his interest in the subject matter of the decree in favour of the judgment debtor, the*

> *decree gets extinguished to the extent of the interest so assigned and execution could lie only to the extent of remaining part of the decree. In case where the interest of the coparceners is undefined, indeterminate and cannot be specifically stated to be in respect of any one portion of the property, a decree cannot be given effect to before ascertaining the rights of the parties by an appropriate decree in a partition suit. It is no doubt true that the purchaser of the undivided interest of a coparcener in an immovable property cannot claim to be in joint possession of that property with all the other coparceners. However, in case where he is already in possession of the property, unless the rights are appropriately ascertained, he cannot be deprived of the possession thereof for a joint decree holder can seek for execution of a decree in the whole and not in part of the property. A joint decree can be executed as a whole since it is not divisible and it can be executed in part only where the share of the decree holders are defined or those shares can be predicted or the share is not in dispute. Otherwise the executing court cannot find out the shares of the decree holders and dispute between joint decree holders is foreign to the provisions of Section 47, CPC. Order XXI, Rule 15, CPC enables a joint decree holder to execute a decree in its entirety but if whole of the decree cannot be executed, this provision cannot be of any avail. In that event also, the decree holder will have to work out his rights in an appropriate suit for partition and obtain necessary relief thereto. Various decisions cited by either side to which we have referred to do not detract us from the principle stated by us as aforesaid. Therefore, a detailed reference to them is not required."*

The ratio of aforesaid judgments squarely applies to the facts of the case. In the instant case, the judgment debtors/objectors have proved on record that they had become co-sharers of the suit land subsequent to passing of the decree sought to be executed. The suit land is now jointly owned by

them alongwith various cosharers. In such situation, their possession over the suit land cannot be treated as illegal and, therefore, they cannot be ousted from such possession. The judgment debtors/objectors have purchased shares in the suit land from the other co-sharers. Their possession of the suit land is now in a capacity different from the one in which they had suffered the decree for possession. In such circumstances, learned trial court was justified in not issuing the warrant of actual possession in favour of decree holders/petitioners. For the foregoing reasons, the petition lacks merit and is accordingly dismissed.

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

Sh. Parveen Kumar & ors. .....Petitioners.

Versus

Smt. Fikki & ors. .....Respondents.

CMPMO No. 342 of 2014
Reserved on: 19.4.2021
Decided on: 22.04.2021

The challenge to order vide which the objections preferred by the J.D to execution petition filed by Decree holder were partly allowed by executing court where by instead of actual possession, only symbolic possession of suit land has been ordered to be delivered to decree holders- The suit is decreed for vacant possession of suit land- in execution, J.D took objection that decree is in executable as J.D had purchased share in suit land- Held- J.D had proved on record that they had become co-owners of the suit land subsequent to passing of decree sought to be executed. The suit land is jointly owned by them alongwith various co-owners- in such situation, their possession over the suit land can not be treated as illegal and therefore they cannot be ousted from possession. Their possession is now in different capacity from one in which they had suffered decree for possession. Hence, the executing court was justified in not issuing the warrant of actual possession in favour of DH. The petition dismissed.

Cases referred:

Arun Lal and others vs Union of India and others, (2010) 14 SCC 384;
Jagdish Dutt and another v. Dharam Pal and others, AIR 1999 Supreme Court 1694;

For the petitioners : Mr. Anuj Gupta,Advocate.

For the respondent s : Respondents No. 1 to 5 exparte.

Name of respondent No. 6 deleted.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge

The objections preferred by the judgment debtors to the execution petition filed by the decree holders have been partly allowed by the learned Executing Court vide order dated 29.8.2014, which is impugned herein by the decree holders. In terms of this order, instead of actual possession, only symbolic possession of the suit land has been ordered to be delivered to the decree holders.

2(i) A civil suit was instituted by S/Shri Rania and Chuni Lal, both sons of Shri Litru on 29.12.1995. The plaintiffs asserted themselves to be owners alongwith other co-sharers of the suit land comprised in Khata No. 39 min, Khatauni No. 83, Khasra No. 77, measuring 0-00-43 HM, situated in village Tutwan, Sub Tehsil Fatehpur, District Kangra, on the basis of jamabandi for the year 1989-90. The allegations in the plaint were that the defendants were neither the owners nor the tenants over the suit land. Yet they had forcibly taken over the possession of the suit land in January 1988 an illegal and unlawful manner. Therefore, decree for vacant possession of the suit land was prayed for. Learned trial Court on 2.11.1998, decreed the suit of the plaintiffs against the defendants for vacant possession of suit land. The operative part of the judgment reads as under:

> ".....suit of the plaintiffs is hereby decreed against the defendants for vacant possession of the land comprised in Khata No. 39 min, Khatauni No. 83, Khasra No. 77, measuring 0-00-53 HM, situated in village Tutwan,Sub Tehsil Fatehpur, Distt. Kangra, H.P. as per jamabandi for the year 1989-90."

2(ii) On 11.8.2006, the legal heirs of original plaintiff No. 1 and Shri Chuni Lal-original plaintiff No. 2 (petitioners herein) filed an execution petition under Order 21 Rule 11 of Code of Civil Procedure for executing the aforesaid decree dated 2.11.1998. The execution was preferred inter-alia against the legal heirs of Dulo, Chunku as well as against legal heirs of Dhannu (original defendants). The prayer in the execution petition was for putting the plaintiffs/decree holders (present petitioners) into actual possession of the suit land after demarcation of boundaries.

2(iii) On 12.1.2007 objections on behalf of judgment debtors were preferred pleading therein that the decree had become inexecutable for the reasons:-

a) The legal heirs of Dulo [judgment debtors 1(a) to 1(d)] had purchased 1/16th share in the suit land on 27.5.1999.

b) Judgment debtor Bhola Ram son of Shri Dulo had also purchased a separate share in the suit land.

c) After purchase of shares in the suit land, the judgment debtors had become joint owners in possession with the decree holders. The share of the judgment debtors/joint owners is not specified on a particular portion of land in question. Therefore, till the time the land is partitioned, every inch of it has to be construed as joint between the parties-joint owners.

d) The decree holders (present petitioners) in such circumstances are not entitled for actual possession of the suit land.

The reply to the objections was filed by the decree holders/present petitioners denying the purchase of suit land by the judgment debtors. It was also submitted that even after the purchase of a portion of the suit land by the judgment debtors, the decree could still be executed.

2(iv) Issues were framed in the objection petition on 28.12.2007. The parties led evidence in support of their respective contentions. After considering the pleadings and the evidence adduced by the parties, the learned executing court held that the Dulo had purchased the suit land on 27.5.1999 to the extent of 1/16th share and Bhola Ram had also purchased separate share in the suit land. Therefore, the judgment debtors had become co-sharers of the suit land. On becoming co-sharers of the suit land, the judgment debtors cannot be ousted from their possession of the suit land and for this reason, actual possession of the suit land was not ordered to be delivered to the decree holders. Instead of warrant of actual possession, warrant of symbolic possession was ordered to be issued in favour of the decree holders.

Aggrieved against this order passed by the learned executing court on 29.8.2014, the decree holders have preferred instant petition under Article 227 of the Constitution of India.

3. Heard learned counsel for the petitioners and gone through the record.

4. Learned counsel for the petitioners/decree holders submitted that learned Executing Court erred in not delivering actual possession of the suit land in favour of the decree holders. Learned counsel contended that there was no document on record to show that the judgment debtors had purchased any portion of land in the suit land. He further submitted that in any case even if it is to be presumed that the part of suit land was sold to the judgment debtors, then also it was sold much after passing of the judgment

and decree sought to be executed. The intention of the judgment debtors was only to deprive the decree holders from getting the possession of the suit land. In such circumstances, the objections filed by the judgment debtors were not legally maintainable and were liable to be rejected as the executing court could not have gone behind the decree.

4. On going through the record, impugned order cannot be said to be suffering from any infirmity. Following aspects become material in this regard:-

4(i) The objections preferred on behalf of the judgment debtors were in respect to the inexecutability of the decree dated 2.11.1998 vide which the plaintiffs were held to be the owners of the suit land alongwith other co-sharers. It was held in the judgment and decree that the defendants without any rights or authority had forcibly taken the possession of the suit land from the plaintiffs. Accordingly, the suit filed by the plaintiffs was decreed against the defendants for vacant possession of the suit land comprised Khata in No. 39 min, Khatauni No. 83, Khasra No. 77, measuring 0-00-43HM situated in village Tutwan, Sub Tehsil Fatehpur, District Kangra as per jamabandi for the year 1989-90.

4(ii) Petitioners preferred execution petition inter-alia impleading legal heirs of Dulo as judgment debtors. In response to the execution petition filed in the year 2006, the judgment debtors by submitting that they had purchased shares in the suit land from other cosharers, objected to the executability of the decree. During evidence they placed on record jamabandi for the year 1999-2000 (Ex. R-2) and jamabandi for the year 2004-2005 (Ex. R-1) wherein it was recorded that Dulo (father of judgment debtors 1(a) to 1(d) had purchased 30 out of 480 shares in the suit land and the judgment debtor Bhola Ram had also purchased 45 out of 480 shares in the suit land. Sale deeds though have not been placed on record, however, the decree holders have not denied the revenue documents placed on record by the judgment

debtors. In fact, no evidence in this regard whatsoever has been led by the plaintiffs/decree holders to rebut the revenue record reflecting purchase of shares in the suit land by the objectors/judgment debtors. Thus, from the perusal of the evidence adduced by the parties in the objection petition, it is evident that subsequent to the passing of the decree, the objectors have purchased shares in the suit land from other cosharers and, therefore, have themselves become co-shares over the suit land.

4(iii) There is no dispute qua the settled legal position that the executing court cannot go behind the decree and has to execute it as its stands. However, in terms of Section 47 of Code of Civil Procedure, the executing court is required to look into the questions relating to the execution, discharge or satisfaction of the decree. Such questions are to be adjudicated by the executing court and not by a separate suit. Section 47 reads as under:

> *"47. Questions to be determined by the Court executing decree.—(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.*
>
> *(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court. [Explanation 1.—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit. Explanation II—(a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and*

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.]"

4(iv) ***(2010) 14 SCC 384,*** title ***Arun Lal and others*** versus ***Union of India and others*** was a case where decree for recovery of possession by ejectment of defendants from a bungalow was passed with a direction to remove barracks constructed on part of compound. Union of India, in terms of a resumption notice, took over possession of land appurtenant to the bungalow. The notice was not challenged. In execution proceedings, respondents filed objections under Section 47 CPC that decree was rendered inexecutable to the extent of land resumed under the resumption notice. The apex court upheld High Court's verdict that possession of said land could not be taken away from Union of India for delivering to the decree-holders, since after resumption of property and taking possession, Union of India in exercise of its rights as paramount title-holder, was no longer holding the same as a tenant so as to be answerable to petitioners as its landlords. Relevant para from the judgment is extracted hereinafter:-

"15. It is common ground that the land appurtenant to the bungalow had been utilised by the Union of India for construction of barracks. The entire extent of 2.792 acres of of land including the one under the barracks could, therefore, be taken over pursuant to the resumption order which was never assailed and had thereby attained finality. Such being the position, the High Court was right in holding that possession of the above extent of land could not be taken away from the Union of

> *India for delivery to the decree-holders. That is because after the resumption of the property and the taking over of the possession by the Union of India in exercise of its rights as the paramount title holder, it was no longer holding the same as a tenant so as to be answerable to the petitioners as its landlords. The Union of India was on the contrary holding the resumed property in its own right and in a capacity that was different from the one in which it had suffered the decree for eviction. This was a significant change in the circumstances in which the decree was passed rendering it inexecutable."*

Jagdish Dutt and another v. ***Dharam Pal and others,*** reported in ***AIR 1999 Supreme Court 1694,*** was a case where a decree for actual possession of immovable property was passed. One of the coparceners assigned/transferred his interest in the decree in favour of the judgment debtors. It was held that the decree in such situation would get extinguished to the extent of the interest so transferred and further that execution petition would lie only to the extent of remaining part of the decree. It was also observed that where the interest of coparceners is undefined, indeterminate and cannot be specifically stated to be in respect of any one portion of the property, then a decree for actual possession of immovable property cannot be given effect to before ascertaining the rights of the parties by an appropriate decree in a partition suit. The relevant para of the judgment reads as under:

> "7. *When a decree is passed in favour of a joint family the same has to be treated as a decree in favour of ail the members of the joint family in which event it becomes a joint decree. Where a joint decree for actual possession of immovable property is passed and one of the*

coparceners assigns or transfers his interest in the subject matter of the decree in favour of the judgment debtor, the decree gets extinguished to the extent of the interest so assigned and execution could lie only to the extent of remaining part of the decree. In case where the interest of the coparceners is undefined, indeterminate and cannot be specifically stated to be in respect of any one portion of the property, a decree cannot be given effect to before ascertaining the rights of the parties by an appropriate decree in a partition suit. It is no doubt true that the purchaser of the undivided interest of a coparcener in an immovable property cannot claim to be in joint possession of that property with all the other coparceners. However, in case where he is already in possession of the property, unless the rights are appropriately ascertained, he cannot be deprived of the possession thereof for a joint decree holder can seek for execution of a decree in the whole and not in part of the property. A joint decree can be executed as a whole since it is not divisible and it can be executed in part only where the share of the decree holders are defined or those shares can be predicted or the share is not in dispute. Otherwise the executing court cannot find out the shares of the decree holders and dispute between joint decree holders is foreign to the provisions of Section 47, CPC. Order XXI, Rule 15, CPC enables a joint decree holder to execute a decree in its entirety but if whole of the decree cannot be executed, this provision cannot be of any avail. In that event also, the decree holder will have to work out his rights in an appropriate suit for partition and

obtain necessary relief thereto. Various decisions cited by either side to which we have referred to do not detract us from the principle stated by us as aforesaid. Therefore, a detailed reference to them is not required."

The ratio of aforesaid judgments squarely applies to the facts of the case. In the instant case, the judgment debtors/objectors have proved on record that they had become co-sharers of the suit land subsequent to passing of the decree sought to be executed. The suit land is now jointly owned by them alongwith various cosharers. In such situation, their possession over the suit land cannot be treated as illegal and, therefore, they cannot be ousted from such possession. The judgment debtors/objectors have purchased shares in the suit land from the other co-sharers. Their possession of the suit land is now in a capacity different from the one in which they had suffered the decree for possession. In such circumstances, learned trial court was justified in not issuing the warrant of actual possession in favour of decree holders/petitioners. For the foregoing reasons, the petition lacks merit and is accordingly dismissed.

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

Davinder Kumar ....Petitioner.

Vs.

State of H.P. and others .....Respondents.

CWP No. 981 of 2019
Date of Decision: 05.04.2021

The petitioner, a registered Forest contractor- Intending to purchase dry Khair trees from different land owners from their malkiti land and approached,

bargained with land owners qua dry Khair trees standing on their land- The applications were submitted by land owners as per procedure through petitioner- The area in question was having status of "Khudro Drakhtan Malkiyat Sarkar" – As per notification dated 11.3.1999 ownership of standing trees on such lands stood vested in owners and entries to this effect were made in revenue papers. As per respondents ,the land having status of" Khudro Darkhtan Malkiyat Sarkar" comes under the definition of Forest and as per guidelines of Hon'ble Apex Court in J.N Godaverman vs union of India, Forest Conservation Act comes into play, separate plan stood prepared, submitted to government- without permission, felling of trees could not be permitted- Held- Before issuance of notification- Forest produce/ trees standing on private land with entry "Khudro Drakhtan malkiyat Sarkar" was considered belonging to government, after issuance of notification land owners became owner of forest produce standing in their land- this right conferred upon the land owners cannot be arbitrarily denied to them by state government by not acting upon the notification dated 11.3.199 till the same is legally in force and respondents are directed to process the case of landowners submitted by petitioner on the strength of notification- The communication addressed by principal CF (HOFF) cannot supersede a duly issued notification of government of H.P.

For the petitioner: Mr. Ajay Sharma, Senior Advocate, with M/s Anandita Sharma & Rakesh Chaudhary, Advocates.

For the respondents: M/s Dinesh Thakur & Sanjeev Sood, Additional Advocate Generals, with M/s Kamal Kant Chandel & Divya Sood, Deputy Advocate Generals, for respondents No. 1 to 4.

Mr. Lokender Paul Thakur, Senior Panel Counsel, for respondent No. 5.

Dr. Hemant Gupta, IFS, Additional Principal Chief Conservator of Forests, Shimla, is present in person.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this writ petition, the petitioner has primarily prayed for the following reliefs:

> *"(a) That impugned letter dated 30.03.2019, Annexure P-2, issued by respondent No. 2 may very kindly be quashed and set aside with directions to the respondents to consider and grant necessary approval as is sought by respondents No. 3 and 4 immediately forthwith without any further delay;*
>
> *(b) That in the alternative, the respondents may very kindly be directed to adhere to the action taken in sequel to the directions issued by this Hon'ble Court in cases of Shri Anant Ram and Shri Sukhdev Singh, supra, and letter dated 04.01.2013 with respect to Nurpur Forest Division as it is with respect to the case of the petitioner; and*
>
> *(c) That still yet in the alternative, the respondents may very kindly be directed to take action as is deemed fit with respect to putting the matter in any working plan, exclude the same from working plan or prepare the separate management plan and get the necessary approval in a time bound manner as is deemed fit by this Hon'ble Court, but petitioner prays that for the purpose, not more than three months may be allowed to the respondents as contrary to this, period of felling of dry khair trees even in this year will lapse."*

2. The case of the petitioner is that he is a registered Forest Contractor and he intended to purchase dry *Khair* trees from different owners from their *Malkiti* lands. For the said purpose, he approached the land owners in Tikka Ghamirpur, Mauza Nandpur and bargained with them qua dry *Khair* trees

standing on their lands. Applications were submitted by the land owners as per procedure through the petitioner to respondent No. 4 and petitioner acquired knowledge that procedure prescribed for grant of felling permission was adhered to by calling for the reports from the Range Officer as also Revenue Agencies. According to the petitioner, reports were submitted by the Authorities concerned with respect to the land of the land owners and Forest Officials reported the matter to respondent No. 4 that there were trees standing on the personal lands of the inhabitants of the village, which were dry and permission qua felling of the same be granted. Notice was taken of this fact also that the area in question was earlier having the status of *"Khudrao Drakhtan Malkiyat Sarkar".* According to the petitioner, vide Notification dated 11.03.1999 (Annexure P-1), ownership of trees standing on such lands stood vested in the owners and entries to this effect were also recorded in the revenue papers. Reports were also submitted by the field staff of the Forest and Revenue Departments to the effect that lands in question were not part of any forest land as per the Working Plan of Dehra Forest Division. As no felling permission was coming forth from respondent No. 4, inquiries in this regard were made by the petitioner and he was informed that respondent No. 3 had forwarded the case to respondent No. 2, requesting for necessary guidelines, who in turn, vide letter dated 30.03.2019, addressed to respondent No. 3, on the subject *"Felling of Khair Trees from Private Lands during the Year 2018-19-Case of Shri Davinder Kumar S/o Shri Radha Krishan, VPO Behdala, Tehsil & Distt. Una, H.P."* observed that a comprehensive Management Plan was required to be prepared and got approved from the competent authority for felling of trees from the private land having entry of *"Khudrao Drakhtan Malkiyat Sarkar"* and as no such comprehensive Management Plan for felling of trees from the private land having said entry, had been prepared and got approved from the Government, therefore, action be taken in this regard. It is the case of the petitioner that the contents of this letter are contradictory in view of the fact that earlier there was no embargo in respect

of felling of dry *Khair* trees and for said purpose, no Working/Management Plan was required. This embargo was now being created by ignoring the contents of Annexure P-1. According to the petitioner, the provisions of the Forest Conservation Act, 1980 cannot be made applicable to dry trees, because if said trees are not permitted to be removed, then they will die and cause loss not only to the private land owners but also to the State exchequer. According to the petitioner, earlier two Writ Petitions were filed in this regard, i.e., CWP No. 11034 of 2011 and CWP No. 1191 of 2011. On account of the directions which were passed in these writ petitions by the Court, the Authority concerned issued a Communication dated 04.01.2013, which was also not being adhered to by the respondent-State. In this backdrop, the petition has been filed by the petitioner praying for the reliefs already enumerated hereinabove.

3. Reply to the petition has been filed by respondents No. 1 to 4 as well as respondent No. 5. The stand of respondents No. 1 to 4 is that petitioner had applied for issuance of order for marking and demarcation of dry *Khair* trees standing on the private land of land owners of Tikka Ghamirpur, Mauza Nandpur, Tehsil Dehra, District Kangra, H.P. vide application dated 21.01.2019. Range Officer, Nagrota Surian was asked to confirm the availability of dry *Khair* trees in Tikka Ghamirpur, who vide letter dated 23.01.2019, reported that there were 189 dry *Khair* trees standing on the private land in the said Tikka. Thereafter scrutiny of papers submitted by the petitioner was undertaken and respondent No. 4 issued an order calling upon Sub-Divisional Officer, Dehra to get the demarcation and marking of dry *Khair* trees done. 60 dry *Khair* trees were enumerated/marked for felling as per list duly verified by the concerned signatories in terms of Annexure R-3 appended with the reply of respondent No. 4. As grant of permission for felling more than 49 trees was within the competence of respondent No. 3, hence, case was moved to the office of respondent No. 3 through proper channel, who referred the matter alongwith all relevant papers to respondent No. 2 vide Annexure R-5, dated 22.03.2019.

Said respondent vide letter dated 30.03.2019 (Annexure R-6) called upon respondent No. 3 to prepare a comprehensive Management Plan for felling of trees from the private land having entry of *"Khudrao Drakhtan Malkiyat Sarkar"* and get it approved from the Government. Plan was prepared by respondent No. 4 and submitted to respondent No. 3 vide letter dated 12.02.2019 (Annexure R-7) for approval, but the same was returned back by respondent No. 2 vide letter dated 18.03.2019 with the direction to prepare the same for remaining 10 years felling programme from 2019-20 onwards on the prescribed proforma and submit the same to the office of respondent No. 2. This was submitted vide Annexure R-9, dated 21.05.2019. As per respondents No. 1 to 4, issuance of Notification dated 11.03.1999 was not in dispute, but Additional Principal Chief Conservator of Forests (Central) Northern Regional Office, Dakshin Marg, Sector 31-A, Chandigarh vide Communication dated 04.01.2013 (Annexure R-13) had clarified that the land having the status of *"Khudrao Drakhtan Malkiyat Sarkar"* comes under the definition of "*Forest*" as per order dated 12.12.1996, passed by the Hon'ble Supreme Court in ***T.N. Godavarman Thirumulkpad*** Vs. ***Union of India and Ors.*** Writ Petition (Civil) No. 202 of 1995, hence, Forest Conservation Act, 1980 automatically comes into operation and accordingly, separate Management Plan for the areas in issue having previously the status of *"Khudrao Drakhtan Malkiyat Sarkar"* stood prepared and submitted to the higher authorities for obtaining the approval of the State Government. As per the said respondents, the Management Plan was under process of getting approval from the Government of Himachal Pradesh and unless the same was approved, permission for felling of trees from the land having the status of *"Khudrao Drakhtan Malkiyat Sarkar"* could not be done.

4. The stand of respondent No. 5 is to the effect that the land in issue falls within the definition of "*Forest*", as held by Hon'ble Supreme Court vide order dated 12.12.1996, passed in Writ Petition (Civil) No. 202 of 1995, which entailed the enforceability of provisions of the Forest Conservation Act,

1980. As per the said respondent, the Government of Himachal Pradesh, however, was at liberty to ensure its Management Plan as per the provisions of existing Working Plan or exclude this type of land from the Working Plan and prepare a separate Management Plan with appropriate prescriptions and get the same approved from the competent authority. It is further the stand of said respondent that Integrated Regional Office, Dehradun of the replying respondent has received a Management Plan from the office of PCCF (HoFF), H.P. on 02.09.2020 for approval of competent authority, but after scrutiny of the same, it was found that the Plan needed to be revised in view of National Working Plan Code 2014 and PCCF (HoFF), Himachal Pradesh vide letter dated 15.09.2020 was accordingly informed to submit a revised plan.

5. I have heard learned counsel for the parties and also gone through the pleadings as well as the record, which was submitted by the learned Additional Advocate General, in compliance to various orders which were passed by this Court during the course of hearing of this petition.

6. During the course of arguments, on the basis of instructions so imparted by the Officers of the Forest Department, who were present in the Court, learned Additional Advocate General informed the Court that the case of the petitioner was not being processed by the Authorities in view of Communication dated 30.03.2019 (Annexure P-2). The Court had put a pointed query to the State as to whether the operation of Notification dated 11.03.1999 was ever rescinded by the Authority concerned by way of issuance of a fresh Notification or its operation was put in abeyance by way of issuance of a Notification. The Court was informed that neither the operation of Notification dated 11.03.1999 was ever put in abeyance nor the same stands rescinded.

7. In the considered view of the Court, as Notification dated 11.03.1999, issued by the Financial Commissioner-cum-Secretary (Revenue), Government of Himachal Pradesh holds the field and is in force, therefore, cases of land owners submitted by the petitioner have to be scrutinized by the

Government in view of the contents of said Notification. Simply because there is a Communication, dated 30.03.2019 (Annexure P-2), addressed by Principal CCF(HoFF), H.P., Shimla, which is contrary to Annexure P-1, the scrutiny of the cases of land owners submitted through the petitioner cannot be stalled in the light of contents thereof, as this Communication cannot supersede a duly issued Notification of the Government of Himachal Pradesh.

8. The stand of the State put forth during the course of arguments that in principle, the Department was not implementing Notification dated 11.03.1999 in view of the contents of Annexures P-2 and P-3, cannot be accepted for the reason that once the field in issue was governed by Notification dated 11.03.1999, the benefit thereof could not be denied to the persons concerned until and unless either the Notification in issue stood rescinded by way of issuance of a Notification or its operation was put in abeyance, that also by way of issuance of a Notification. At this stage, it is necessary to quote the contents of Notification dated 11.03.1999, which read as under:

> *"NOTIFICATION*
>
> *Whereas it appears to the Governor of Himachal Pradesh that existing record-of-rights with respect to Private Lands in the State of Himachal Pradesh requires special revision by deleting the entry "Khudrao Drakhtan Malkiyat Sarkar" appearing in Khanna Kafiat (Remarks Column) of Jamabandi.*
>
> *Now therefore, in supersession of all previous notifications, if any, issued in this behalf, in exercise of the powers conferred by Sub-Section (1) of Section 33 of the Himachal Pradesh Land Revenue Act, 1953 (Act No. 6 of 1954), the Governor of Himachal Pradesh is pleased to direct the special revision of record of rights by deleting the entry "Khudrao Drakhtan Malkiyat Sarkar" appearing in Khanna Kafiat (Remarks Column) of Jamabandies*

with respect to Private Lands in the State of Himachal Pradesh.

Governor of Himachal Pradesh is further pleased to direct that notwithstanding the deletion of the entry "Khudrao Drakhtan Malkiyat Sarkar" forthwith, the felling of trees shall continue to be regulated under the prevailing Forest Laws."

9. Before issuance of this Notification, forest produce/trees standing on the private lands, in which the entry in Record of Rights was *"Khudrao Drakhtan Malkiyat Sarkar",* were considered to be belonging to the Government, however, after issuance of this Notification, the land owners became the owners of the forest produce/trees standing on their lands. This right conferred upon the land owners cannot be arbitrarily denied to them by the State Government by not acting upon the Notification dated 11.03.1999 till the time, the same is legally in force.

10. Accordingly, without making any further observation, this writ petition is partly allowed by directing the respondents to process the cases of the land owners submitted by the petitioner, subject matter of this writ petition, on the strength of the contents of Notification dated 11.03.1999. The effect of various orders passed by Hon'ble Supreme Court in T.N. Godavarman Thirumulkpad's case *(supra),* but obvious, will be taken into consideration by the Authority concerned, however, in light of the contents of Notification dated 11.03.1999. This be done within a period of 90 days from today. However, this Court is not making any observation with regard to the outcome of the application(s) so submitted by the petitioner of the land owners, on the basis of the contents of Notification dated 11.03.1999 and the Authority concerned shall pass appropriate orders on the application(s) of the land owners, in view of the law of the land as well as other Notifications etc. governing the field.

11. Before parting with the judgment, this Court wants to make one observation that in facts, akin to the present case, cause of action to file the petition, if any, accrues in favour of the land owners and not the intended purchaser of forest produce. Of course, in case the land owners so choose, they can file the petition through their Attorney, be it General or Special, however, the petitioners have to be land owners, in any case. With this observation, the petition stands disposed of, in above terms, so also pending miscellaneous applications, if any.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Meena .....Petitioner.

Versus

Mohit Kumar Gupta and another .....Respondents.

CMPMO No.105 of 2021.
Date of decision: 24.04.2021.

The plaintiff had obtained an exparte ad-interim order dated 17.3.2021 in her favour despite a caveat petition having been filed by respondents/ defendant on 9.3.2021 prior to passing of such order –Held in such circumstances first appellate court before whom the appeal was filed by respondent committed no irregularity much less illegality in vacating the exparte ad interim order that has been passed in favour of petitioner.

Cases referred:

C. Seethaiah vs. Government of Andra Pradesh and others, AIR 1983 Andra Pradesh 443;

G.C. Siddalingappa vs. Veeranna, AIR 1981 Karnataka 242;

M. Krishnappa Chetty and another vs. P.E. Chandrasekaran @ Chandran, 1993 1 MLJ 18;

M/S Contemporary Target Pvt. Ltd. and others vs. M/S M.B. Enterprises and others, AIR 1994 Gauhati 7;

For the Petitioner : Mr. Romesh Verma, Advocate.

For the Respondents: Nemo

(Through Video Conferencing)

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

Heard. It appears that the plaintiff had obtained an ex-parte ad-interim order dated 17.03.2021 in her favour despite a caveat petition having been filed by the respondent/defendant on 09.03.2021 prior to passing of such order.

2. In ***G.C. Siddalingappa vs. Veeranna, AIR 1981 Karnataka 242,*** it was held as under:-

> "Section 148-A (3) of Civil Procedure Code is a condition precedent for serving an application on caveator before passing interim order etc."

3. In ***C. Seethaiah*** *vs.* ***Government of Andra Pradesh and others, AIR 1983 Andra Pradesh 443***, it was held that:-

> "also, when a caveat is lodged it becomes not only th duty of the Court but also of the petitioner and his counsel to bring to the notice of the Court that caveat has been lodged and the matter may not be heard exparte etc."

4. In ***M. Krishnappa Chetty and another*** *vs.* ***P.E. Chandrasekaran @ Chandran, 1993 1 MLJ 18,*** it was observed as follows:-

> "The proper procedure to be adopted in all cases where caveat has been filed is for the plaintiff/ petitioner to serve copies of the plaint and application on the caveator's counsel or the caveator before filing them in court. He must inform the caveator or his counsel as the case may be, the date on which he will move the application before court. He must also file acknowledgments of the receipt of copies obtained from the caveator's counsel or the

> caveator as the case may be, in court along with the application. On receiving such papers the office of the Court shall, while fixing the date for the first hearing of the application prepare a note and bring it to the notice of the presiding officer concerned that caveat has been entered and the caveator's counsel or the caveator has been served with copies of plaint and the application. Then the presiding officer shall direct the office of the court to issue notice to the caveator's counsel or the caveator, as the case may be, specifying the date on which the matter will be heard in the first instance. The court shall inform the petitioner's counsel also of the said date and on that date both sides shall be heard before any interim order is passed. This procedure shall strictly be followed by all the subordinate courts. There shall be no lapse in following this procedure.

5. The Gauhati High Court in ***M/S Contemporary Target Pvt. Ltd. and others*** *vs.* ***M/S M.B. Enterprises and others, AIR 1994 Gauhati 7*** in paragraphs 18 and 19 held that the purpose and intend of introducing the new provision for a caveat by authorising a party to intimate to the Court of his intention to have notice of an intended application by the adverse party so that ex parte order on an application may not be obtained by an adverse party without such notice. Therefore, he sought to quash the impugned order passed by the Trial Court allowing the writ petition.

6. Obviously, in such circumstances, the learned first appellate Court before whom the appeal was filed by the respondent committed no irregularity much less illegality in vacating the ex-parte ad-interim order that had been passed in favour of the petitioner.

7. Record reveals that the learned first appellate Court had passed the order on 08.04.2021 and directed the parties to appear before the learned trial Court on 09.04.2021, but the certified copy of the order was made available to the petitioner only on 20.04.2021.

8. It is stated by learned counsel for the petitioner that this order was not even got uploaded on the official website by the learned first appellate Court. Let the learned first appellate Court explain its position regarding this aspect of the matter.

9. As observed above, the learned first appellate Court was absolutely right in setting aside the ex-parte ad-interim order passed by the learned trial Court on 17.03.2021, but then it was also required to ensure that the order so passed directing the parties to appear before the learned trial Court on the next date of hearing i.e. 09.04.2021 was made available to the parties.

10. Construction, if any, raised during the pendency of the litigation is always a serious matter where everyday counts and it may be extremely difficult to balance the equities at later stage.

11. Therefore, in the given circumstances, this Court directs the learned trial Court to list the matter forthwith on 26.04.2021 when it would proceed to hand over notices for effecting service upon the respondents/defendants directly under Order 5 Rule 9-A CPC and then proceed to fix the matter for consideration on 30.04.2021 when arguments on the application for ad-interim relief shall be heard by the Court afresh.

12. The petition stands disposed of in the aforesaid terms, so also the pending application, if any.

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BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Municipal Corporation, Shimla ...Petitioner

Versus

Mathu Ram and others ..Respondents

C.R. No. 19 of 2020.
Date of decision: 22.04.2021

The petitioner sought deletion of its name from array of defendants but same was rejected vide order dated 25.10.2019- Hence revision petition- The petitioner sought deletion of its name on the ground that present mater pertains to forest department and entire record stands transferred to it in view of fact that state government has withdrawn control of forest from purview of M.C.Shimla- Held, There can be no doubt that the plaintiff is the dominus litus and would certainly have a right to implead anyone against whom he or she has a cause of action or any one against whom he or she seeks a relief but the party who is so impleaded, should satisfy at least any one of two tests viz- that of being a necessary or proper party –Held- the state government vide notification dated 15.10.2013 resumed the control of forest from petitioner and now same is under the control of Forest department - the suit was filed in the year 2018- control of the forests was of forest department and not of the petitioner i.e, Municipal corporation- Therefore M. C could not have been impleaded as party only because at some stage the forest was vested with it – Hence, petition is allowed and M .C. is ordered to be deleted from array defendants.

For the Petitioner : Mr. Naresh K. Gupta, Advocate.

For the Respondents : None for respondent No.1.
Mr. Ashok Sharma, Advocate General,
with Mr. Vinod Thakur, Addl. A.G. and
Mr. Bhupinder Thakur, Dy. A.G., for
respondents No.2 and 3.

Through Video Conferencing.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

The petitioner sought deletion of its name from array of defendants, but the same was rejected vide impugned order dated 25.10.2019, constraining it to file the instant revision petition.

2. Respondent No.1 Mathu Ram filed a suit for injunction against the petitioner and other defendants being Divisional Manager Forest, Forest Working Division, Shimla and Divisional Forest Officer, Shimla Forest Division (Urban), Khalini, Shimla, before the trial Court.

3. After being served, the petitioner filed an application under Order 1 Rule 10 CPC for deletion of its name from the array of the defendants on the ground that the present matter pertains to Forest Department and the entire record in this regard stands transferred to it in view of the fact that the State Government has withdrawn the control of forest from the purview of Municipal Corporation, Shimla.

4. The learned trial Court dismissed the application by according the following reasons as contained in paras 6 and 7, which read as under:

> *"6. Heard. Perusal of the record shows that the applicant has been impleaded as defendant No.1 in the present case. The perusal of prayer clause of the plaint shows that a relief of mandatory injunction and compensation and damages has been sought against all the defendants. Moreover, perusal of plaint shows that specific averments have been made against defendant No.1. As such, it would not be appropriate to end litigation against defendant No.1 at the threshold and the matter shall be decided on merits.*
>
> *7. The applicant is a necessary party in the present suit as per the pleadings of plaintiff. Therefore, Court is of the considered view that at this stage the applicant shall not be deleted from the arrayed parties and the matter shall be decided on merits against all the defendants. As such, application is dismissed. Put up with main case file."*

5. Even though respondent No.1//plaintiff has been served, however, there is no appearance on his behalf.

6. I have heard learned counsel for the petitioner/defendant No.1 and have gone through the material placed on record.

7. There can be no doubt that the plaintiff is the *dominus litus* and would certainly have a right to implead anyone against whom he or she has a cause of action or anyone against whom he or she seeks a relief. But the party, who is so impleaded, should satisfy atleast anyone of the two tests viz., that of being a necessary or atleast a proper party.

8. The test to be applied for determining the right of a party to implead another, in a pending suit or other proceeding, may be crystallized into the following broad categories:-

a) If without his presence no effective and complete adjudication could be made;

b) If his presence is necessary for a complete and effectual adjudication of the dispute though no relief is claimed against him;

c) If there is a cause of action against him;

d) If the relief sought in the suit or other proceedings is likely to be made binding on him;

e) If the ultimate outcome of the proceedings is likely to affect him adversely;

f) If his role is really that of a "necessary witness" but is sought to be camouflaged as a "necessary party";

The above tests are not exhaustive and at times, even if a person falls under anyone of the above categories, the Court may still refuse to implead him.

9. Equally settled is the proposition that the plaintiff being dominus litus can always contend that he cannot be compelled to implead a party not of his choice. But then, it is also true that the plaintiff cannot compel a party, who is neither a necessary or proper party to defend the litigation. The right of the plaintiff to be dominus litus is always subservient to the power vested with the Court to implead and delete anyone, who is considered to be a necessary or proper party or not necessary or proper, as the case may be, to do complete justice in the matter.

10. Adverting to the facts of the present case, it would be noticed that the specific defence of the petitioner is that initially the forest was falling under the Municipal Corporation, who was vested with it, however, subsequently, the State Government vide notification dated 15.10.2013 resumed the control of forests from the petitioner and the same are now under the control of the Forest Department.

11. The suit was filed in the year 2018 when admittedly the control of the forests was that of the Forest Department and not the petitioner i.e. Municipal Corporation. Therefore, in the given circumstances, the plaintiff/respondent No.1 could not have impleaded the petitioner as a party only because at some stage the forest was vested with it. Even otherwise at all any act was committed by the petitioner when the forests were under its control, the same was an official act for which no personal liability can be enforced or fastened and even no such relief is otherwise claimed by the plaintiff.

12. In view of the above discussion, I find merit in the instant petition and the same is accordingly allowed. The application filed by the petitioner for deletion is allowed and its name is ordered to be deleted from the

array of the defendants before the learned trial Court. Interim order passed by this Court on 24.02.2020 is vacated. Pending application(s), if any, also stands disposed of.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Hem Raj .....Petitioner.

Versus

State of Himachal Pradesh and others

.....Respondents.

CWPOA No.4275 of 2020.
Reserved on : 22.04.2021.
Date of decision: 24.04.2021.

The petitioner- engaged as daily waged 'beldar' in IPH department in the year 1991 and thereafter completed 240 days of service in each calendar year w.e.f 01.01.1992- The service of petitioner was initially regularized vide order dated 4.1.2007 and subsequently w.e.f. 1.1.2002- The petitioner is aggrieved that as on the date of consideration of his case, the policy of regularization contemplated completion of 8 years service as daily waged as against 10 years when formal policy was formulated, therefore his services were required to be regularized on completion of 8 years service, hence petition for direction to respondents accordingly held- When the benefits have been given to similarly situated employees, the petitioner cannot be discriminated against - it is not in dispute that petitioner had completed 240 days of his service in each calendar year with effect from 1.1.1992 and therefore his services in terms of policy prevalent on the date of consideration were required to be regularized from 2000 as per policy clearly provided for regularization of services of daily waged workman who had continuously worked for 8 years- Petition allowed.

Cases referred:

Mool Raj Upadhyaya vs. State of H.P. and others, 1994 Supp (2) SCC 316;
Siraj Ahmad vs. State of Uttar Pradesh and another', 2019 (17) Scale 626;

For the Petitioner : Mr. C.N.Singh, Advocate.

For the Respondents: Mr. Ashok Sharma, Advocate General with Mr. Vinod Thakur, Mr. Shiv Pal Manhans, Additional Advocate Generals and Mr. Bhupinder Thakur, Deputy Advocate General.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The instant petition has been filed for the grant of following reliefs:-

> "i) That the respondent department may kindly be directed to grant work charge status/Regularization (In terms of Jai Singh as well as Chuni Lal Case) to the applicant w.e.f. 1.1.2000 with all consequential benefits and arrear may kindly be ordered to be released in favour of applicant in a time bound manner along with 12% interest per annum.
> ii) That the respondents department may kindly be directed to re-fix the pay of the applicant w.e.f. 1.1.2000 and arrear be released in favour of the applicant in time bound manner along with 12% interest."

2. The undisputed facts are that the petitioner was engaged as daily waged 'beldar' in the Irrigation and Public Health Department in the year 1991 and thereafter completed 240 days of service in each calendar year with effect from 01.01.1992.

3. The services of the petitioner were initially regularized vide order dated 04.01.2007 and subsequently with effect from 01.01.2002.

4. Now, the grievance of the petitioner is that as on the date of consideration of the case of the petitioner, the policy of regularization

contemplated completion of 8 years of daily waged service as against the period of 10 years when a formal policy was formulated and, therefore, his services were required to be regularized immediately on completion of 8 years service and not 10 years, as has been done by the respondents.

5. The claim of the petitioner has been opposed by the respondents on the ground that this Court in ***CWP No. 778 of 2006*** titled ***'Gauri Dutt*** *vs.* ***State of H.P.'*** decided on 29.12.2007, has categorically held that a workman is entitled to work charge status after completion of 10 years of service.

6. I have heard the learned counsel for the parties and have gone through the records of the case.

7. It would be noticed from the reply filed by the respondents themselves that initially a period of 10 years of daily waged service was envisaged and provided for granting work charge status/regularization in terms of the policy of the Government as affirmed with certain modifications in ***Mool Raj Upadhyaya*** *vs.* ***State of H.P. and others,*** **1994 Supp (2) SCC 316.**

8. However, thereafter the Government itself relaxed the policy and issued a policy for such daily waged workers, who had worked continuously for 9 years with minimum of 240 days in each calendar year on 01.04.1998. The Government further liberalized the policy for regularization of services of daily waged workers, who continuously worked for 8 years as on 31.03.1999 with 240 days in each calendar year. This is so stated and acknowledged by the respondents in para-2 of the reply which reads as under:-

> "2.....It is submitted that the Hon'ble Apex Court rendered its judgment in Mool Raj Upadhayaya's case, wherein it held that the daily waged workers who have worked continuously for 10 or more years with minimum of 240 days in each calendar year as on 31.12.1993, they shall be granted work charge status immediately w.e.f. 01.01.1994. It further held that where a

> daily waged worker has not completed 10 years of continuous service as on 31-12-1993 shall be granted work charge status as and when they complete 10 years of continuous service with minimum of 240 days in each calendar year. Subsequently, the Govt. relaxed the policy and framed and issued a policy for such daily waged workers who have worked continuously for 9 years with minimum of 240 days in each calendar year as on 01.04.1998. The Govt. later on further liberalized the policy for regularization of services of daily waged workers who worked continuously for 8 years as on 31.03.1999 with 240 days in each calendar year. This policy provided for regularization of daily waged workers from prospective effect i.e. w.e.f. the date of issuance of regularization order after completing all the codal formalities....."

9. It is not in dispute that the petitioner had completed 240 days of his service in each calendar year with effect from 01.01.1992 and had completed his 240 days in each calendar year with effect from 1992 and, therefore, his services in terms of policy prevalent on the date of consideration were required to be regularized from 2000 as the policy clearly provided for regularization of services of daily waged workers, who had continuously worked for 8 years and, therefore, the respondents could not have illegally and arbitrarily regularized the services of the petitioner with effect from 01.01.2002 instead of 01.01.2000 when the petitioner had completed 8 years of regular daily waged service.

10. To be fair to the respondents, it is vehemently argued by the learned Advocate General that the instant petition is clearly time barred and is, therefore, liable to be dismissed on this ground alone.

11. In support of such contention, the learned Advocate General has placed strong reliance on the judgments rendered by this Court in ***LPA No. 91/2011***, titled ***'State of H.P. and others*** *vs.* ***Babu Ram'*** decided on 17.05.2016, ***CWP No. 1423/2016*** titled ***Raj Kumar*** *vs.* ***Bharat Sanchar***

Nigam Limited and others', decided on 06.03.2017, ***CWP No. 3277/2019*** titled '***Bansi Ram Thakur*** *vs.* ***State of H.P. and others,*** decided on 26.11.2019 and ***CWP No. 5493/2014,*** titled '***Surender Kumar*** *vs.* ***Union of India and others'***, decided on 15.03.2016.

12. However, I find this objection to be not at all sustainable because it has to be borne in mind that the petitioner is a Class-IV worker ('beldar') and it was a duty cast on the respondents to consider the case of the petitioner for conferment of work charge status on completion of required number of years as per the policy. Therefore, the petitioner can only be denied the interest on the eligible benefits and not the benefits as such, which accrued on him as per the policy and under which policy, the department was bound to confer the status, subject to the workman satisfying the required conditions.

13. In coming to this conclusion, this Court draws support from the judgment rendered by the learned Division Bench of this Court in ***CWP No. 2735/2010***, titled ***'Rakesh Kumar*** *vs.* ***State of H.P. and others***, decided on 28.07.2010, wherein it has been held as under:-

> "6. The simple question is whether the delay defeats justice? In analyzing the above issue, it has to be borne in mind that the petitioners are only class-IV workers (Beldars). The schemes announced by the Government clearly provided that the department concerned should consider the workmen concerned for bringing them on the work-charged category. So, there is an obligation cast on the department to consider the cases of the daily waged workmen for conferment of the work-charged status, being on a work-charged establishment, on completion of the required number of years in terms of the policy. At the best, the petitioners can only be denied the interest on the eligible benefits and not the benefits as such, which accrued on them as per the policy and under which policy, the department was bound to confer the status, subject to the workmen satisfying the required conditions."

14. The aforesaid judgment rendered by the learned Division Bench of this Court is otherwise binding on this Court and it is more than settled that judicial propriety demands that a binding decision to which an attention has been drawn should neither be ignored nor be overlooked.

15. Moreover, I find that none of the aforesaid judgments deals with the dispute of the instant kind. ***Babu Ram's case (supra)*** pertained to the claim of seniority to the post of Foreman (Electrical) with effect from 1998 while the Original Application was filed in the year 2008.

16. In ***Raj Kumar's case (supra)***, the petitioner was held to be a fence-sitter as it was after various judgments rendered by the Hon'ble Supreme Court that the petitioner therein had approached the Central Administrative Tribunal after 10 years that too after noticing that the benefits have been granted to the similarly situated persons, as is recorded in para-2 of the judgment.

17. In ***Bansi Ram Thakur's case (supra)***, the dispute had been raised after 21 years of his retirement.

18. In ***Surender Kumar's case (supra)***, the petitioner therein had approached the Tribunal for appointment on compassionate ground. His claim had been rejected on 05.02.2008 while the petitioner had approached the Tribunal belatedly and in this way more than 14 years had passed since the sole bread earner employee had died.

19. Whereas, the judgment rendered by the learned Division Bench in ***Rakesh Kumar's case (supra)*** clearly deals with the claims of daily waged workers seeking work charge status/regularization and it is in this background that not only closure of homes, but deals with the identical situation regarding conferment of work charge status and the question of delay and laches has been expressly considered in that case in para-6 which has been extracted above.

20. It needs to be observed that where the Court is dealing with one of fundamental rights of poor workman, its role is that of a sentinel for protection of fundamental rights of the weak and down-trodden and cannot, therefore, easily allow itself to be persuaded to refuse the reliefs solely on jejune ground of delay and laches or the like. The right seeking of benefits of regularization of service is a right akin to a fundamental right guaranteed to the workman. Therefore, the plea of delay should not come in the way of granting relief to the workman, more particularly, when the Court is of the opinion that it is the inaction of the respondents that has formed basis of such delay.

21. This issue otherwise is no longer *res integra* in view of the similar reiteration of law made in the judgments rendered by this Court in ***CWP No. 2415/2012,*** titled '***Mathu Ram*** *vs.* ***Municipal Corporation and others'***, decided on 31.07.2014, ***CWP No. 7140/2012*** titled '***Gian Singh*** vs. ***State of H.P. and others'*** decided on 24.09.2014,(affirmed right up to the Hon'ble Supreme Court), ***CWPOA No.1245/2019*** titled ***'Tilak Chand*** *vs.****State of H.P. and others'***, decided on 27.02.2020, ***CWPOA No. 5566/2019*** titled ***'Smt. Reema Devi*** *vs.* ***State of H.P. and others'*** decided on 03.09.2020 and ***CWPOA No. 5660/2019*** titled '***Ghanshyam Thakur*** *vs.* ***State of Himachal Pradesh and others',*** decided o 09.11.2020.

22. Now, when the benefits have been given to the similarly situated employees, the petitioner cannot be discriminated against or else it will be a case of invidious discrimination.

23. Reference in this regard can conveniently be made to a fairly recent judgment of the Hon'ble Supreme Court rendered by Hon'ble Three Judges' Bench in '***Siraj Ahmad*** *vs.* ***State of Uttar Pradesh and another', 2019 (17) Scale 626****,* wherein it was observed as under:-

> "23. We further fail to appreciate as to how the same High Court could have considered the case of two employees differently

when they were similarly circumstanced. It is not in dispute that the present appellant as well as Rajendra Prasad Dwivedi were selected through the same selection process though their orders of appointment differs. It will be appropriate to refer to the observation made by the Allahabad High Court in Writ Petition No. 3421 of 1996 in the case of Rajendra Prasad Dwivedi vs. State of U.P. which reads thus:

> **"Upon perusal of the Government Orders dated 26th of August, 1992 as well as 11th of March, 1994, I find force in the submission of the petitioner, therefore, I am of the view that as soon as the petitioner obtained the qualification of AMIE in 1993, he became eligible for promotion to the post of Assistant Engineer. Though only gaining the qualification does not create right of promotion, but I am of the view that if thereafter any promotion has been given to others particularly junior to the petitioner, the petitioner is liable to be considered for promotion from the said date alongwith consequential benefits.**
>
> **In light of the law laid down by the Hon'ble Supreme Court, in the case referred to herein above, I hereby also observe that the fact that the petitioner was not confirmed in the service, shall not come in the way of the petitioner's promotion as an impediment and the petitioners services even on ad hoc basis on the post of Junior Engineer shall be taken into consideration for the purpose of promotion to the higher post. Accordingly a direction is issued to the respondents to consider the petitioner's case for promotion to the higher post from the date of promotion of his junior within two months, after receipt of a certified copy of this order"**
>
> **(emphasis supplied)**

24. The above judgment of the learned Single Judge dated 09.11.2011 was carried in appeal before the division bench of the said court. The division bench of the Allahabad High Court

in Special Appeal No. 75 of 2012 in State of U.P. Vs. R. P. Dwivedi in its Order dated 13.02.2014 observed thus:

> **"On due consideration of rival submissions, we find considerable force in the arguments of respondent. The condition of length of ten years' service was relaxed. The respondent, though appointed on ad hoc basis as Junior Engineer on 24.02.1987, had obtained the degree of AMIE on 10.10.1993 before Sri Sunil Dutt Sharma and Sri Sajid Hasan who passed the examination in 1994. As the vacancies were available and the private respondent was qualified to be considered for promotion in 1993, he should have been considered even prior to the aforesaid persons. ...."**
>
> **(emphasis supplied)**

25. The State had also carried the said matter by way of Special Leave Petition Civil (CC) No. 1383031 of 2014 before this court. The SLP also came to be dismissed on 12.01.2015. The state thereafter preferred a Review Petition, seeking review of the Judgment of division bench in the case of State of U.P. vs. Rajendra Prasad Dwivedi by way of Review Petition No. 188 of 2015. The said Review Petition is also dismissed.

26. The only ground on which the High Court has refused to consider the case of the appellant is that in the case of Rajendra Prasad Dwivedi, the court had not considered the issue with regard to nonconcurrence of the U.P. Public Service Commission. At the cost of repetition as discussed herein above the appointment of the appellant at the most can be considered as irregular and not illegal.

27. It is to be noted that the appellant has obtained the Bachelor of Science (Engineering) degree in the year 1987 and though Rajendra Prasad Dwivedi had obtained the A.M.I.E. in 1993, taking into consideration that Sunil Dutt Sharma and

Sajid Hasan had obtained the degree of A.M.I.E. in 1994, the said Rajendra Prasad Dwivedi was held to be entitled for promotion on 18.01.1995 i.e. the date on which the said Sajid Hasan and Sunil Dutt Sharma were promoted as Assistant Engineer from Junior Engineer. We fail to appreciate the approach of the High Court in denying the promotion to the appellant when all the other three i.e. namely Rajendra Prasad Dwivedi, Sajid Hasan and Sunil Dutt Sharma were appointed in the year 1987 through the same selection process and though Rajendra Prasad Dwivedi had obtained the degree in 1993 and Sajid Hasan and Sunil Dutt Sharma had obtained the same in 1994 whereas the appellant had obtained the said degree in 1987."

24. Lastly and more importantly, the respondents-State has itself issued a notification dated 07.01.2020 to the Engineer-in-Chief, I&PH wherein after considering the judgment rendered by this Court in ***Rakesh Kumar's case (supra)***, it has been observed as under:-

"From: The Secretary(IPH) to the
Government of Himachal Pradesh.

To

The Engineer-in-Chief,
I&PH Department,
Jal Shakti Bhawan, Tutikandi,
Shimla-171005.

Dated Shimla-171002, the 7th Jan. 2020.

Subject: O.A. No. 1077/2017-Titled All Himachal Pradesh, HPPWD-IPH & Contract Workers Union Vs. State of H.P.

Sir,

I am directed to refer to your letter No. IPH-SE-III-D/W-Court Case-Rakesh Kumar -Vo1. VII/2018-5191 dated 5.11.2019 on the subject cited above and to say that the matter was taken up with the Finance Department who have advised as under:-

> Examined in consultation with F.D. (Pension). The proposal of the IPH Department to confer work charged status to 816 daily waged persons, based on High Court decision in CWP No. 2735 of 2010, titled -"Rakesh Kumar & Ors. Vs. State of H.P. & Others." Is contract to the order dated 9.07.2019 passed by the erstwhile HPAT in O.A. No., 1077 of 2017 titled as "All Himachal PWD-IPH-Contractual workers Union vs. State of H.P. & Others" because if the IPH Department considers to confer work charged status to 816 daily waged persons based on "Rakesh Kumar's case, the order dated 9.07.2019 of erstwhile HPAT delivered in O.A. No. 1077 of 2017 shall remain un-attended and possibility of filing contempt petition(s) by any of the applicant(s) in said O.As cannot be overruled. Therefore, IPH Department is required to contest the order dated 9.07.2019 of erstwhile HPAT in higher appellate Court on the grounds that regularization of all 816 daily wagers on completion of 08 years daily waged service is not possible being contrary to "Regularization Policy" of the State Government, which specifically provides that regularization shall be from prospective effect and it will be against the available vacant post. However, I&PH Department may consider to agree before the higher appellate court to confer work charge status to all class III daily waged persons on completion of 08 years daily waged service (with minimum 240 days in

each calender year prior to 31.05.2006 i.e. conversion of work charged staff Class III into regular establishment of I&PH Department based on Rakesh Kumar's case subject to the condition that financial benefits to the Applicants/Petitioners who have filed OAs/Writ petitions in the HPAT/High Court shall be restricted to 03 years prior to the date of filing of such OAs/Writ petitions in the Courts in terms of F.D.'s letter N.Fin-(PR)-B(7)-16/98-III (Agriculture) dated 15.12.2011 and Non-applicants/Non-petitioners i.e. who have not filed any O.A./Writ petition, shall be granted financial benefits on notional basis, as has been done in the case of Class IV employees of I&PH Department.

In addition, it may, however, be ensured specifically that this sanction of F.D. for conferment of work charged status in the said Department shall be last concurrence of F.D. and no such case would be entertained by F.D. in future.

You are, therefore, requested to take further action in the matter as per the advice of Finance Department, under intimation to this Department."

25. In view of the foregoing discussion and for the reasons stated above, I find merit in this petition and the same is accordingly allowed. The respondents are directed to grant work charge status to the petitioner with effect from 01.01.2000 with all consequential benefits including seniority etc. However, the actual monetary benefits shall be limited to a period of three years prior to the date of filing of the petition i.e. 20.04.2018. Pending application, if any, also stands disposed of.

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

State of Himachal Pradesh ...Appellant.

Versus

Shankar Singh ..Respondent.

Cr. Appeal No. 343 of 2009
Reserved on: 19.04.2021
Date of Decision: April 27, 2021

Appeal against acquittal for commission of offences under section 279 IPC and section 185 MV Act- Held, The prosecution has withheld the scientific report regarding content of alcohol in blood & urine of accused- more than one reason appearing as cause of accident (1) accused was driving vehicle under influence of alcohol in rash and negligent manner (2) accident had happened due to existence of pit on the spot and vehicle went in pit for piercing light of vehicle coming from opposite side (3) accident took place for failure of foot brake – It Cannot be said with certainly that accident had taken place only for reason alleged by prosecution- benefit of doubt is to be extended to accused- Appeal dismissed.

For the Appellant: Mr. Raju Ram Rahi, Deputy Advocate General.

For the Respondent: Mr.Shorya Sharma, Legal Aid Counsel.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

Instant appeal has been preferred by the State of Himachal Pradesh against judgment dated 07.11.2008, passed by learned Judicial Magistrate 1st Class, Court No.3, Shimla, H.P., in Cr. Case No.2/2 of 2007, titled as *State vs. Shankar Singh,* whereby respondent-accused has been

acquitted of notice of accusation under Section 279 of the Indian Penal Code (in short 'IPC') and Section 185 of the Motor Vehicles Act, 1988 (hereinafter referred to as 'M.V. Act'), in case FIR No. 233 of 2006, dated 25.11.2006, registered in Police Station West Shimla.

2. Prosecution case in nutshell is that on 25.11.2006, at about 7.30 p.m. respondent-accused had caused accident by driving truck Mazda bearing registration No.HP-63-1120 in rash and negligent manner, on the public way, near Victory Tunnel and had hit the railing and pedestrian path. It is further case of the prosecution that at that time respondent-accused was under influence of alcohol.

3. As per prosecution case, respondent-accused was apprehended on the spot by PW-3 Ankur Kanwar and PW.4 Paras and was handed over to the police in presence of number of persons, who had gathered on the spot.

4. On the basis of statement of PW.3 Ankur Kanwar, recorded under Section 154 of the Criminal Procedure Code (in short Cr.P.C.), FIR was registered and investigation was carried out. After completion of investigation, finding *prima facie* complicity of respondent-accused in commission of offences under Section 279 IPC and 185 of M.V. Act, challan was presented in the Court.

5. To prove its case, prosecution has examined ten witnesses. After recording statement of respondent-accused under Section 313 Cr.P.C., one witness in defence was also examined by respondent-accused.

6. Defence of the respondent-accused is that he was not driving the vehicle in rash and negligent manner, but driver of another vehicle coming from opposite side, with high speed, did not use dipper causing obstruction to vision of the respondent-accused and, thus, he had driven his vehicle towards the railing, where there was pit and one tyre of vehicle being driven by respondent-accused went in the pit causing the accident in which there was no rashness and/or negligence on the part of the respondent-accused.

7. In prosecution case, PW.1 is Dr.Amita Bhatnagar, who had medically examined the respondent-accused immediately after the accident. PW.3 Ankur Kanwar and PW.4 Paras are complainant and eye witnesses to the accident. Whereas, PW.2 Sanjay Thakur is owner of the vehicle, and he, as per prosecution evidence particularly as per statements of PW.3 Ankur Kanwar and PW.4 Paras, had also reached on the spot immediately after the accident. PW.5 Joginder Singh is serving as a Head Constable, Mechanic in Police Department, who had inspected the vehicle immediately after the accident. PW.10 Nikka Ram is Investigating Officer. Other witnesses are formal in nature, who had performed their role in completion of investigation.

8. To prove allegation that respondent-accused was driving vehicle under influence of alcohol, prosecution has relied upon medical evidence as well as evidence of PW.1 Dr.Amita Bhatnagar. So far as medical evidence is concerned, though it is claimed that blood and urine samples of respondent-accused were taken, however, report of State Forensic Science Laboratory (SFSL) has not seen light of the day, as it has not been referred and exhibited in statements of either witness, rather PW.1 Dr.Amita Bhatnagar has admitted that no such report is available on record. Dr. Amita Bhatnagar has stated that respondent-accused was brought to her with alleged history of alcoholic consumption, who, at the time of examination, was conscious, cooperative and well oriented in time and place. Though, she has also stated that alcoholic smell was present, however, with further statement in cross-examination that when patient was brought to her he was conscious and well behaved.

9. PW.2 Sanjay Thakur in his cross-examination has admitted that vehicle involved in the accident was loaded with sand and its one tyre had gone into a pit, existing on the road, because of collapse of retaining wall. His statement found corroboration in the statement of DW.1 Kishan Lal. PW.3 Ankur Kanwar and PW.4 Paras, though, have stated that respondent-accused was driving the vehicle in rash and negligent manner, but at the same time,

they have also admitted that there is a shop of Hardware near Victory Tunnel in front whereof, construction material used to be loaded and unloaded. PW.2 Sanjay Thakur in his cross-examination has specifically stated that there was construction material lying on the road in front of the shop of Devi Ram.

10. PW.5 Joginder Kumar, Head Constable Mechanic in Police Department, has admitted in cross-examination that at the time of inspection of vehicle, he had found that brakes of the vehicle were not working with further admission that in case of failure of foot brake vehicle would not stop.

11. Now, from the evidence on record, three versions have emerged. One, that respondent-accused was driving the vehicle under influence of alcohol in rash and negligent manner leading to the accident in question. Second, that accident had been caused for existence of a pit on the spot caused due to collapse of retaining wall a vehicle went in pit for piercing light of vehicle coming from opposite side. Third, that accident had taken place for failure of foot brake. So far as influence of alcohol is concerned, prosecution has withheld scientific evidence which would have established quantum of presence of alcohol in urine and blood of the respondent-accused, because though PW.1 Dr.Amita Bhatnagar has stated that there was smell of alcohol from the respondent-accused, but at the same time she has also stated that he was conscious, well behaved, cooperative and well oriented in time and place at the time of his medical examination. It is also relevant to notice that accident had taken place at 7.30 p.m. and respondent-accused was examined at 9.00 p.m. on the very same day.

12. In view of aforesaid facts and circumstances, for more than one reasons appearing as cause of accident, two of which could not be attributed to respondent-accused, it cannot be said with certainty that accident had taken place only for the reason as alleged by prosecution. Thus, benefit of doubt is to be extended to the respondent-accused. Therefore, I do not find any reason to

interfere with the judgment passed by the trial Court acquitting the respondent-accused of the notice of accusation put to him.

13. Hence, the appeal, being devoid of merit, is dismissed and disposed of accordingly. Pending application(s), if any, also stand disposed of. Record be sent back forthwith.

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

Shiv Dai and others .....Petitioners

Versus

Rai Singh and another

.....Respondents

CMPMO No.294 of 2018
Decided on: 30th April, 2021

The petition under Article 227 constitution of India, 1950, challenging the order dated 15.6.2018 whereby application moved by defendant/ respondent No. 1 under section 65 Indian evidence Act, was allowed and photocopies of original will dated 7.11.1987 were permitted to be placed on record- Defendant No.1 moved application under section 65 I.E Act for taking on record copy of original will on the ground that he after attestation of mutation handed over the will to defendant No.2 Now, defendant No.2 ,hand in gloves with plaintiff, has not produced the will despite repeated requests- in reply to application under order 12 rule 8 CPC, defendant No.2 refused that original will was handed over to him. Held- it is pleaded by defendant No.1 that on the basis of original will dated 7.11.1987, mutation was attested on 15.3.1988- The entire defence of defendant No.1 is based on will- his application under order 12 rule 8 read with section 15 CPC requesting defendant No.2 to produce the will was disposed in view of stand of defendant No.2 denying its possession- Defendants are yet to lead their evidence- defendant No.1 had made a case for leading secondary evidence- Petition dismissed.

Cases referred:

Ashok Dulichand v. Madahavlal Dube (1975) 4 SCC 664;

Dhanpat Vs. Sheo Ram (Deceased) through Legal Representatives and others, (2020) 16 SCC 209;
H. Siddiqui Vs. A. Ramalingam, (2011) 4 SCC 240;
J. Yashoda Vs. K. Shobha Rani, (2007) 5 SCC, 730;
Jagmail Singh and another Vs Karamjit Singh and others, 2020) 5 SCC 178;
M. Chandra Vs. M. Thangamuthu, (2010) 9 SCC 712;
Rakesh Mohindra v. Anita Beri (2016) 16 SCC 483;
U. Sree Vs. U. Srinivas, (2013) 2 SCC 114;

For the Petitioners: Ms. Anjali Soni Verma, Advocate.
For the Respondents: Mr. Sanjay Prasher, Advocate, for respondent No.1.
Ms. Sharmila Patial, Advocate, for respondent No.2.
(Through Video Conference)

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge *(Oral)*

The petitioners/plaintiffs have laid challenge to the order dated 15.06.2018 passed by the learned Trial Court, whereby the application moved by respondent No.1/ Defendant No.1 under Section 65 of the Indian Evidence Act was allowed and the photocopy of original will dated 07.11.1987 was permitted to be placed on record. Aggrieved, the petitioners have preferred instant petition under Article 227 of the Constitution of India.

2. Bare minimum facts required to be noticed for adjudication of this petition are:-

2(i). Suit was filed by the petitioners for declaration to the effect that they are joint owners in possession with the defendants to the extent of specified shares over the suit land and further that mutation No.54, dated 15.03.1988,

with respect to estate of late Sh. Sudama Ram, sanctioned and attested in favour of the defendants, was illegal, null and void. Consequential relief of permanent injunction was also prayed for.

2(ii). Defendant No.1 (respondent No.1 herein) resisted the suit, inter alia, putting forth the claim that father of the plaintiffs and defendants had executed a will on 07.11.1987 in favour of the defendants. The mutation of the property of the deceased was accordingly sanctioned and attested in favour of the defendants in equal shares. The original will was shown to the revenue officers at the time of sanctioning of the mutation. It was further set out that mutation No.54, dated 15.03.1988, was sanctioned and attested in presence of the plaintiffs, who never objected to the same being based on genuine will. Copy of the will dated 07.11.1987 was enclosed with the written statement.

2(iii). On 11.05.2017, defendant No.1 moved an Application under Section 65 of the Indian Evidence Act for taking on record the photocopy of the original will dated 07.11.1987 as secondary evidence. The application was moved on the premise that after the attestation of mutation No.54 on the basis of the original will by the revenue officers, the same was handed over by defendant No.1 todefendant No.2. Defendant No.2 is now hand in gloves with the plaintiffs and despite repeated requests of defendant No.1, has not produced the original will. It was further stated that an application under Order 12 Rule 8 read with Section 151 of the Code of Civil Procedure (CPC) was also moved on 08.06.2016 by defendant No.1 in this regard. Notice of the application was also given to

defendant No.2, who in his reply to the application, refused that the original will was handed over to him. Accordingly, the learned Court below disposed of this application on 09.05.2017 and fixed the case for defendants' evidence. It was further the submission of defendant No.1 that since his entire defence is based upon the will dated 07.11.1987, therefore, the same is required to be placed on record to prove its execution. In light of these submissions, prayer was made
to lead secondary evidence in respect of photocopy of the original will dated 07.11.1987.

2(iv). The application was opposed by the petitioners. It was denied that during his lifetime, father of the parties executed the will dated 07.11.1987. Petitioners submitted that defendant No.1 had intentionally withheld the document to save himself from the criminal proceedings as the same was a forged document. Another contention raised was that in the written statement, defendant No.1 had not stated about handing over the original will to defendant No.2.

2(v). Upon hearing the parties, learned Trial Court vide order dated 15.06.2018, allowed the application, thereby permitting defendant No.1 to lead secondary evidence in respect of original will dated 07.11.1987.

It is in the above background that the instant petition has been filed by the petitioners.

3. After hearing learned counsel for the parties and perusing the record available on the file, in my considered view, the impugned order suffers from no infirmity for the following reasons:-

3(i). Defendant No.1 (respondent No.1 herein) had based his entire defence on the will dated 07.11.1987 allegedly executed by father of the parties. He had taken a plea in the written statement that mutation No.54 was sanctioned and attested in favour of the defendants on 15.03.1988 on production of original will.

3(ii). It is also an admitted fact that an application under Order 12 Rule 8 read with Section 151 CPC was moved by respondent No.1 on 08.06.2016, calling upon defendant No.2 to produce the original will. In his reply filed on 09.05.2017, defendant No.2 refused that the original will was handed over to him by defendant No.1. Considering this reply, the application was disposed of on 09.05.2017. From the documents on record, the inclination of defendant No.2 towards the case of the petitioners is apparent.

3(iii)(a). It will also be apposite to refer to Section 65 of the Indian Evidence Act at this stage:-

> *"65. Cases in which secondary evidence relating to documents may be given.- Secondary evidence may be given of the existence, condition, or contents of a documents in the following cases:-*
>
> *(a) when the original is shown or appears to be in the possession or power-*
> *of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or*
> *of any person legally bound to produce it,*
> *and when, after the notice mentioned in section 66, such person does not produce it;*
>
> *(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his*

representative in interest;

(c) *when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;*

(d) *when the original is of such a nature as not to be easily movable;*

(e) *when the original is a public document within the meaning of section 74;*

(f) *when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in [India] to be given in evidence;*

(g) *when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.*

In cases (a), (c) and (d), any secondary evidence of the contents of the document is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents."

3(iii)(b). Relying upon the judgments rendered by the Hon'ble Supreme Court in cases of ***Yashoda Vs. K. J. Shobha Rani, (2007) 5 SCC, 730, Chandra Vs. M. M. Thangamuthu, (2010) 9 SCC 712, Siddiqui Vs. A. H. Ramalingam, (2011) 4 SCC 240U. Sree Vs. U.*** and

Srinivas, (2013) 2 SCC 114, it can be concluded that secondary evidence in respect of an ordinary document can be allowed in case following requirements inter-alia amongst others are met :-

(i) For leading secondary evidence, non production of the document in question has to be properly accounted for by giving cogent reasons inspiring confidence.

ii) The party should be genuinely unable to produce the original of the document and it should satisfy the Court that it has done whatever was required at its end. It cannot for any other reason, not arising from its own default or neglect produce it.

iii) Party has proved before the Court that document was not in his possession and control, further that he has done, what could be done to procure the production of it.

iv) The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the original."

3(iii)(c). ***(2020) 5 SCC 178,*** titled ***Jagmail Singh and another Versus Karamjit Singh and others***, was a case where the appellants had filed a suit for declaration that they are owners of the land and that mutations attested in favour of the respondents were null and void having been sanctioned on the basis of a forged will. During pendency of the suit, an application under Sections 65/66 of the Evidence Act was moved seeking permission to prove copy of the will by way of secondary evidence. The Trial Court allowed the application, however, in revision, this order was set aside by the High Court.

Thereafter, another application under Sections 65/66 of the Act was moved before the learned Trial Court for issuance of notice to the revenue officers for production of original will on the ground that the
original will was handed over to the revenue officials for sanctioning the mutation. In this background, the Hon'ble Apex Court held that in terms of Section 67 of the Indian Evidence Act, the secondary evidence may be given with regard to existence, condition or the contents of a document when the original is shown or appears to be in possession or power against whom the document is sought to be produced, or of any person out of reach of, or not subject to, the process of the court, or of any person legally bound to produce it, and when, after notice mentioned in Section 66 such person does not produce it. Settled legal position was reiterated that for secondary evidence to be admitted foundational evidence has to be given being the reasons as to why the original evidence has not been furnished. Further relying upon ***Ashok Dulichand v. Madahavlal Dube [(1975) 4 SCC 664] and Rakesh Mohindra v. Anita Beri [(2016) 16 SCC 483]***, it was held as under:-

> *"14. It is trite that under the Evidence Act, 1872 facts have to be established by primary evidence and secondary evidence is only an exception to the rule for which foundational facts have to be established to account for the existence of the primary evidence. In the case of H. Siddiqui v. A. Ramalingam, this Court reiterated that where original documents are not produced without a plausible reason and factual foundation for laying secondary evidence not*

established it is not permissible for the court to allow a party to adduce secondary evidence.

16. In view of the aforesaid factual situation prevailing in the case at hand, it is clear that the factual foundation to establish the right to give secondary evidence was laid down by the appellants and thus the High Court ought to have given them an opportunity to lead secondary evidence. The High Court committed grave error of law without properly evaluating the evidence and holding that the pre-requisite condition i.e., existence of Will remained unestablished on record and thereby denied an opportunity to the appellants to produce secondary evidence."

3(iii)(d). In ***(2020) 16 SCC 209***, titled ***Dhanpat Versus Sheo Ram (Deceased) through Legal Representatives and others***, it was held that there is no requirement that an application is required to be filed in terms of Section 65(c) of the Evidence Act before the secondary evidence is led. A party to the lis may choose to file an application which is required to be considered by the trial court but if any party to the suit has laid foundation of leading of secondary evidence, either in the plaint or in evidence, the secondary evidence cannot be ousted for consideration only because an application for permission to lead secondary evidence was not filed. Relevant paras of the judgment areas under:-

"18. In another judgment reported as Aher Rama Gova v. State of Gujarat, the secondary evidence of dying declaration recorded by a Magistrate was produced in evidence. This Court found that though the original dying declaration was not produced but from the evidence, it is clear that the original was

lost and was not available. The Magistrate himself deposed on oath that he had given the original dying declaration to the Head Constable whereas the Head Constable deposed that he had made a copy of the same and given it back to the Magistrate. Therefore, the Court found that the original dying declaration was not available and the prosecution was entitled to give secondary evidence which consisted of the statement of the Magistrate as also of the Head Constable who had made a copy from the original. Thus, the secondary evidence of dying
declaration was admitted in evidence, though no application to lead secondary evidence was filed.

19. *Even though, the aforesaid judgment is in respect of the loss of a sale deed, the said principle would be applicable in respect of a Will as well, subject to the proof of the Will in terms of Section 68 of the Evidence Act. In the present case as well, the Will was in possession of the beneficiary and was stated to be lost. The Will is dated 30th April, 1980 whereas the testator died on 15th January, 1982. There is no cross- examination of any of the witnesses of the defendants in respect of loss of original Will. Section 65 of the Evidence Act permits secondary evidence of existence, condition, or contents of a document including the cases where the original has been destroyed or lost. The plaintiff had admitted the execution of the Will though it was alleged to be the result of fraud and misrepresentation. The execution of the Will was not disputed by the plaintiff but only proof of the Will was the subject matter in the suit. Therefore, once the evidence of the defendants is that the original Will was lost and the certified copy is produced, the defendants have made out sufficient ground for leading of secondary evidence.*

22. There is no requirement that an application is required to be filed in terms of Section 65(c) of the Evidence Act before the secondary evidence is led. A party to the lis may choose to file an application which is required to be considered by the trial court but if any party to the suit has laid foundation of leading of secondary evidence, either in the plaint or in evidence, the secondary evidence cannot be ousted for consideration only because an application for permission to lead secondary evidence was not filed."

4. In light of above legal position, it may be noticed that here it is the pleaded case of respondent No.1 that on the basis of original will dated 07.11.1987, mutation No.54 was attested on 15.03.1988. Respondent No.1 is only praying for leading of secondary evidence in respect of photocopy of the original will, which is to be procured from public office. The entire defence set up by defendant No.1 in the written statement is, inter alia, based upon the will dated 07.11.1987. His application moved under Order 12
Rule 8 read with Section 151 CPC, requesting defendant No.2 to produce the original will, stood disposed of in view of the stand of defendant No.2 denying its possession. On the date of passing of the impugned order on 15.06.2018, the defendants were yet to lead their evidence. Respondent No.1 had made out a case for leading secondary evidence. The permission was granted by the learned Trial Court in the facts and circumstances of the case only to lead secondary evidence by placing on record the photocopy of original will dated 07.11.1987. Its relevancy, admissibility and effect can be seen only at the time of arguments. During hearing of the case, learned counsel for the

parties jointly submitted that evidence has since been led by the defendants and the matter is now fixed for arguments before the learned Court below.

For all the aforesaid reasons, the present petition lacks merit and is accordingly dismissed alongwith pending miscellaneous application(s), if any.

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

Sh. Puran Chand ....Petitioner.

Vs.

State of Himachal Pradesh and others .....Respondents.

CWPOA No. 443 of 2019
Reserved on: 09.03.2021
Date of Decision: 29.04.2021

The petitioner initially appointed as inspector Grade-II in Food and Supplies department on 26.8.1988- Respondent No. 3 & 4 were junior to him in seniority list of inspectors Grade-II circulated in 1996- Respondent 3&4 belong to reserved category and promoted to post of inspector Grade-1 on 26.6.1997 & 24.01.2007 by way of promotion- against posts reserved in their category- The petitioner was promoted as inspector Grade-1 on 9.2.2007- seniority list circulated in july 2007 shows respondent No.3 & 4 above the petitioner though they were junior to petitioner in feeder category- Held- It is not in dispute that petitioner was senior to private respondents in the feeder category of inspector grade-II- It is also not in dispute that private respondents were promoted to the post of inspector Grade-I before petitioner on account of roaster point available in promotional category of reserved category however after the petitioner stood promoted to the post of inspector Grade-I he was entitled to regain his seniority over and above the private respondents in the seniority list of inspector Grade-I as per "catch up principle" by not doing so respondent department has committed an illegality and to this extent, seniority list is not sustainable in law- Petition disposed of with direction to

respondent department to reflect the petitioner over and above private respondents in the seniority list of inspector Grade-I.

Cases referred:

Ajit Singh and others (II) Vs. State of Punjab and others,(1999) 7 SC Cases 209;
H.P. Samanaya Varg Karamchari Kalayan Mahasangh Vs. State of Himachal Pradesh and others, 2009 (3) Shim. L.C. 473;
M. Nagraj and others Vs. Union of India and others, (2006) 8 SC Cases 212;

For the petitioner:	Mr. Ramesh Kaundal, Advocate.
For the respondents:	M/s Sumesh Raj, Dinesh Thakur & Sanjeev Sood, Additional Advocate Generals, with M/s Kamal Kant Chandel & Divya Sood, Deputy Advocate Generals, for respondents No. 1 and 2.
	Mr. Bimal Gupta, Senior Advocate, with Ms. Swati Verma, Advocate, for respondent No. 3.
	Respondent No. 4 *ex parte.*
	Mr. P.D. Nanda, Advocate, for respondent No. 5. (Through Video Conferencing)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this petition, the petitioner has, *inter alia,* prayed for the following reliefs:

> *"(i) That this Hon'ble Court may kindly be pleased to quash the impugned seniority list Annexure P/4.*

(ii) That the respondents No. 1 and 2 may kindly be directed to re-cast the seniority list strictly in accordance with the instructions of the Government assigning appropriate place above the respondents No. 3 to 5 to the petitioner.

(iii) That the respondents No. 1 & 2 may kindly be directed not to hold the meeting of Departmental Promotion Committee for the post of Food & Supplies Officers till the seniority list of the Inspectors Grade-I is re-cast as prayed for."

2. On 09.03.2021, this Court had passed the following order:

"Heard.

After hearing learned counsel for the petitioner, as this Court has observed that there is mis-joinder of causes, learned counsel for the petitioner submits that this petition be treated as a petition against respondents No. 1 to 4 and the petitioner may be permitted to withdraw this petition against respondent No. 5, with liberty to agitate the cause against respondent No. 5 afresh. The petition is permitted to be withdrawn qua respondent No. 5, with liberty as prayed for.

Arguments heard. Judgment reserved.

Mr. Bimal Gupta, learned Senior Counsel appearing for respondent No. 3 has also submitted that the petitioner otherwise also stands promoted to the post of District Controller, F, CS & CA vide Notification dated 03.06.2020. This fact is taken on record."

In view of the said order, the present petition is being treated only against respondents No. 1 to 4.

3. Brief facts necessary for adjudication of the present petition are as under:-

The case of the petitioner is that he was initially appointed as Inspector Grade-II on 26.08.1988 in the Food & Supplies Department. Respondents No. 3 and 4 were juniors to him in the Seniority List of Inspectors Grade-II, which was circulated vide letter dated 29.01.1996 (Annexure P/1). In the said Seniority List, the name of the petitioner was figuring at Sr. No. 67, whereas names of respondents No. 3 and 4 were reflected at Sr. Nos. 68 and 71, respectively. Said respondents belong to reserved category and were promoted to the posts of Inspector Grade-I on 26.06.1997 and 24.01.2007 by way of promotion against the posts reserved for their respective categories. The petitioner in his own seniority was promoted to the post of Inspector Grade-I on 09.02.2007. Respondent-Department issued a Tentative Seniority List of Inspectors Grade-I, as it stood on 01.07.2007, vide letter dated 12.07.2007 (Annexure P/2). In this Seniority List, respondents No. 3 and 4, who otherwise were juniors to the petitioner in the feeder category of Inspector Grade-II, were reflected above him. The name of petitioner in the said Seniority List was reflected at Sr. No. 51, whereas, the names of respondents No. 3 and 4 were reflected at Sr. Nos. 42 and 49, respectively.

4. Feeling aggrieved, the petitioner filed a representation dated 07.08.2007 (Annexure P/3), yet Final Seniority List of Inspectors Grade-I was finalized by the Department without considering the representation of the petitioner.

5. The grievance of the petitioner is that as the private respondents were not promoted to the posts of Inspector Grade-I as per their own seniority in the feeder category of Inspector Grade-II, but were promoted as such by virtue of reservation, therefore, when the petitioner who otherwise was senior to them, was promoted to the post of Inspector Grade-I in his own seniority, he was entitled to be placed over and above the said private respondents in the Seniority List of Inspectors Grade-I and the act of the respondent-Department of not doing so, is bad in law. It is in these

circumstances that the petition stood filed with the prayers already enumerated hereinabove.

6. The petition has been resisted by the Department, *inter alia,* on the ground that the private respondents were promoted against the posts of Inspector Grade-I on 26.06.1997 and 24.01.2007 against the roster point of reserved categories, whereas the petitioner was promoted to the said post on 09.02.2007, therefore, the private respondents were rightly placed above the petitioner in the Seniority List of Inspectors Grade-1 in terms of the relevant Recruitment and Promotion Rules as well as the Government instructions prevalent at that time. It is further the stand of the Department that the representation of the petitioner stood rejected, as is evident from the Final Seniority List, wherein, it is mentioned that the same was issued after consideration of representation received from Inspectors Grade-II, in terms of the relevant Government Instructions prevalent at that time.

7. The stand of the private respondents is also to the same effect.

8. By way of rejoinder which has been filed to the said replies, the petitioner contended that Instructions dated 07.09.2007 issued after 85th Constitutional Amendment by the Government of Himachal Pradesh, providing for accelerated seniority to the reserved category candidates were quashed by this Court, as is evident from judgment dated 18th September, 2009, passed by this Court in ***H.P. Samanaya Varg Karamchari Kalayan Mahasangh*** Vs. ***State of Himachal Pradesh and others,*** 2009 (3) Shim. L.C. 473, as the same were not in conformity with the decision of the Hon'ble Supreme Court in ***M. Nagraj and others*** Vs. ***Union of India and others***, (2006) 8 Supreme Court Cases 212. Special Leave to Appeal (Civil) No. 30143/2009 filed before the Hon'ble Supreme Court assailing the judgment of this Court was disposed of when the State Government itself filed an affidavit before the Hon'ble Supreme Court withdrawing its Instructions dated 07.09.2007. In this background, the

petitioner has urged that the act of the respondents reflecting the private respondents over and above the petitioner in the Seniority List of Inspectors Grade-I is bad in law and is liable to be held as such.

9. During the pendency of this petition, the petitioner was promoted to the post of District Controller, Food, Civil Supplies & Consumer Affairs vide Notification dated 3rd June, 2020.

10. I have heard learned counsel for the parties and have also gone through the pleadings.

11. The law as it existed before the 85th Amendment to the Constitution of India came into force, was to the effect that promotions on the basis of reservation did not confer seniority upon the incumbent who was so promoted against the reserved post. The only exception, as carved out by the Hon'ble Supreme Court in ***Ajit Singh and others (II)*** Vs. ***State of Punjab and others,***(1999) 7 Supreme Court Cases 209 was that in case a person promoted against a post of reserved category was conferred another, say second promotion, whereas general category candidate though senior to him, was not yet offered even one promotion, then the general category candidate was not having any right to catch up with the reserved category candidate and claim seniority, otherwise the general category candidate was to re-gain his seniority over and above a junior employee of the feeder category, who was promoted earlier against the post belonging to reserved category.

12. By virtue of the 85th Amendment, Article 16(4) was introduced in the Constitution of India, which provided that nothing in Article 16 shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

13. It is not in dispute that for implementation of the 85th Amendment, instructions were issued by the Department of Personnel (AP-III),

Government of Himachal Pradesh on 07.09.2007 on the subject *"Implementation of Constitution (85th Amendment) Act, 2001 and assignment of Seniority to SC/ST Government servants on promotion by virtue of rule of reservation/roster".* It is also not in dispute that this Notification was challenged by the Himachal Pradesh Samanaya Varg Karamchari Kalyan Mahasangh before the erstwhile learned Himachal Pradesh Administrative Tribunal by way of OA No. 19/2008, which Original Application, after abolition of the Tribunal, was transferred to this Court and re-registered as CWP-T No. 2628 of 2008. Vide judgment dated 18.09.2009, this Court quashed the Instructions dated 07.09.2007. This was assailed by the Himachal Pradesh Scheduled Tribes Employees Federation & Another before the Hon'ble Supreme Court by way of SLP (Civil) No. 30143 of 2009. During the pendency of SLP, vide Notification dated 16.11.2009 (Annexure P/9), instructions dated 07.09.2007 were withdrawn by the Government of Himachal Pradesh. As a consequence thereof, the SLP was disposed of by the Hon'ble Supreme Court vide order dated 26.04.2010 (Annexure P/10) in the following terms:

> *"The State of Himachal Pradesh has issued a Circular on 07.09.2007 as regards the promotion of Scs/Sts in the State service. The said circular was challenged by the respondent No. 1 and the circular was quashed by the High Court by the impugned judgment. Learned counsel appearing for the State submits that the circular issued on 07.09.2007 has since been withdrawn as the State intends to collect more details with regard to representation of SCs/STs and to pass appropriate orders within reasonable time i.e. approximately withn three months after collecting necessary details and datas. The petitioner would at liberty to take appropriate steps, if any adverse order is passed. This Special Leave Petition and the Contempt Petition are thus disposed of finally."*

14. In this background, the reflection of the private respondents over and above the petitioner in the Seniority List of Inspectors Grade-I by the respondents is not sustainable in law. It is not in dispute that the petitioner was

senior to the private respondents in the feeder category of Inspectors Grade-II. It is also not in dispute that the private respondents were promoted to the posts of Inspector Grade-I before the petitioner on account of roster point available in the promotional category of their respective reserved categories. However, after the petitioner stood promoted to the post of Inspector Grade-I, he was entitled to re-gain his seniority over and above the private respondents in the Seniority List of Inspectors Grade-I, as per the *"catch up principle"*. By not doing so and by reflecting the private respondents over and above the petitioner in the Seniority List of Inspectors Grade-I, the respondent-Department has, indeed, committed an illegality and to this extent, the impugned Seniority List is not sustainable in law.

15. Accordingly, Final Seniority List of Inspectors Grade-I (Annexure P/4), as it stood on 01.07.2007, in which the private respondents are reflected over and above the petitioner, is quashed to this limited extent, with a direction to the respondent-Department to reflect the petitioner over and above the private respondents in the Seniority List of Inspectors Grade-1. Though now the petitioner has been promoted to the post of District Controller, Food, Civil Supplies & Consumer Affairs vide Notification dated 3rd June, 2020 during the pendency of this petition, however, it is directed that as a consequence of the revision of the Seniority List of Inspectors Grade-1, in which the petitioner is to be reflected over and above the private respondents, in case he becomes entitled for promotion to the post of District Controller, Food, Civil Supplies & Consumer Affairs, as per the relevant Recruitment and Promotion Rules earlier than the date on which he was actually promoted to the said post, then the respondent-Department shall hold a review DPC and confer notional promotion to him, if otherwise eligible, without disturbing the incumbents, who might have been promoted earlier. In case the petitioner, indeed gets promotion to the post of District Controller, Food, Civil Supplies & Consumer Affairs from an earlier date, then the benefits accruable to him shall be deemed to be notional up to his

promotion to the post of District Controller, Food, Civil Supplies & Consumer Affairs vide Notification dated 3rd June, 2020, whereafter, actual benefits, for all intents and purposes and with all consequentialities shall be conferred upon the petitioner.

Petition stands disposed of in above terms, so also pending miscellaneous applications, if any.

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

Sh. Vinay Kumar Bharti and others ....Petitioners.

Vs.

Dr. Y. S. Parmar, University and others .....Respondents.

CWPOA No. 3309 of 2019
Date of Decision: 29.04.2021

The petition for direction to state government to convey its approval to decision dated 30.3.2011 and notification dated 19/21.4.2011 taken by Board of management of University upgrading the posts of personal staff of university- Held- the reason and rational as to why Secretary (Finance) is an ex-officio member of Board of management of university is that whenever any decision is taken by the B.O.M in terms of power so conferred upon it under the statues the Financial aspect of the matter can also be taken in to consideration – He is not a ceremonial representative to be therein B.OM. The only inference which can be drawn from the fact that in 85th meeting B.O.M, had approved its proceeding of 84th meeting in which Deputy Secretary Finance in his capacity as representative of Principle Secretary Finance was present is that before B.O.M gave its approval the financial aspect was discussed and approved. The rejection of proposal of up-gradation of posts from feeder cadre of personal staff on the ground that Finance department had expressed its inability to concur is not just in law-the authority conferred upon the state government qua creation of posts, have to be exercised by government judiciously with due application of mind, which has not been done in present case Finance department is one department of state government and it is not the state government- the state government could

take call and not finance department. The view of finance department could have been one of reason but not the sole reason. The petition is allowed to the extent that government shall reconsider proposal and take into consideration proceedings of B.O.M sympathetically.

For the petitioners: Ms. Shradha Karol, Advocate.

For the respondents: Mr. Avinash Jaryal, Advocate, for respondent No. 1.

M/s Sumesh Raj, Dinesh Thakur & Sanjeev Sood, Additional Advocate Generals, with M/s Kamal Kant Chandel & Divya Sood, Deputy Advocate Generals, for respondents No. 2 and 3.
(Through Video Conferencing)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition, the petitioners have prayed for the following reliefs:

> *"(i) That respondent State Government may be directed to give/convey its approval to the decision dated 30.03.2011 and the Notification dated 19/21.04.2011 (Annexures P-11 & P-12) taken by the Board of Management of respondent University upgrading the posts of Personal Staff of the University while issuing writ in the nature of mandamus.*
> *(ii) That the respondent University may be directed to consider and promote/upgrade the petitioners to the posts of Senior Scale Stenographers, Personal Assistants, Private Secretaries, Senior Private Secretaries and Special Private Secretary by giving them the benefit of eligibility consideration for such promotions w.e.f. 21.04.2011 when the notification*

dated 19/21.04.2011 (Annexure P-12) upgrading the posts of personal staff was issued, with all consequential benefits while issuing writ in the nature of mandamus.

(iii) That the impugned order of rejection dated 25.02.2012 (Annexure P-16) may kindly be quashed and set aside while issuing writ in the nature of Certiorari.

(iv) That Section 39-A (Annexure P-26) of the H.P. Universities of Agriculture, Horticulture and Forestry Act, 1986 may be quashed and set aside being arbitrary, unconstitutional, unreasonable and superfluous affecting the autonomy of the respondent University, on the analogy of H.P. University while issuing writ in the nature of Certiorari.

(v) That the respondents may be directed to produce the records of the case for perusal of this Hon'ble Court.

(vi) Any other order or direction, which this Court may deem just and proper in the facts and circumstances of the case may also be passed in favour of the petitioner and against the respondent and justice be done."

2. When this case was taken up for consideration on 20.04.2021, the following order was passed:

"When this case was taken up for consideration, learned counsel for the petitioners submitted that the petitioners are praying for grant of reliefs No. (i) to (iii) as well as (v) and (vi) and are giving up relief No. (iv) in CWPOA No. 3309 of 2019. Her statement is taken on record.

Heard in part. For continuation, list on 22nd April, 2021. Learned counsel for the respondent-University to bring the original/photo copies of the proceedings of 74th& 79th meeting of the Board of Management on the next date of hearing."

Accordingly, the case has been heard today on reliefs No. (i) to (iii) as well as (v) and (vi).

3. Brief facts necessary for adjudication of the present petition are as under:-

The case of the petitioners is that petitioners No. 1 to 6 were appointed as Junior Scale Stenographers in the respondent-University in between the years 1989 to 1994 and at the time of filing of the petition, they were continuing to serve as such. Similarly, petitioners No. 7 to 18 were initially appointed as Junior Scale Stenographers in the year 1988 and thereafter, they were promoted as Senior Scale Stenographers on different dates and they were serving as such at the time of filing of the petition. Petitioners No. 19 to 23 were initially appointed as Junior Scale Stenographers on different dates in between years 1986 to 1988 and thereafter, they were promoted as Senior Scale Stenographers in between the years 1995-1996. They were further promoted as Personal Assistants on different dates mentioned in the writ petition and they were serving as such at the time of filing of the petition. Petitioner No. 24 was initially appointed as a Senior Scale Stenographer in the year 1986 and thereafter, he was promoted to the post of Personal Assistant in the year 1998. He was serving as such at the time of filing of the petition. Petitioner No. 25 initially joined as a Senior Scale Stenographer on 07.05.1986. He was promoted as Personal Assistant on 17.07.1995 and thereafter as Private Secretary on 06.09.2006. He was working as such at the time of filing of the petition. Petitioners No. 26 and 27 were initially appointed as Junior Scale Stenographers in between the years 1985-1986 and there were promoted as Senior Scale Stenographers subsequently. They were further promoted as Personal Assistants and thereafter as Private Secretaries. They were serving as such at the time of filing of the petition. Petitioner No. 28 was initially appointed as Junior Scale Stenographer in the year 1982. He was promoted initially as a Senior Scale

Stenographer and then to the post of Personal Assistant and thereafter to the post of Private Secretary. At the time of filing of the petition, he stood promoted to the post of Senior Private Secretary. Petitioner No. 29 initially joined as Senior Scale Stenographer in the year 1986. He was promoted against the post of Personal Assistant w.e.f. 17.07.1995 and thereafter to the post of Private Secretary w.e.f. 12.11.2008. He superannuated from service on 31.10.2013.

4. According to the petitioners, the respondent-University came into existence on 01.12.1985. After its establishment, the respondent-University vide Notification dated 21.11.1987, notified the Recruitment and Promotion Rules of Non-Teaching Ministerial and Administrative Staff, which were subsequently amended on 11.03.1988, whereby, the category of Personal Staff was made eligible for promotion in the Ministerial Cadre posts consisting of Superintendent Grade-II and Superintendent Grade-I, respectively. Vide Notification dated 19.04.1995 (Annexure P-3), the respondent-University approved the Recruitment and Promotion Rules for the cadre of Stenographers. This was followed by issuance of Annexure P-4, i.e., Notification dated 24.09.1998, vide which, the Recruitment and Promotion Rules earlier notified vide Notification dated 11.03.1988 were repealed and modified to the extent as mentioned in the said Notification. According to the petitioners, in terms of 1988 Rules, category of Personal Staff post holders, i.e., the posts which were being manned by the petitioners were eligible for promotion against the Ministerial Cadre posts of Superintendent Grade-II and Superintendent Grade-I, yet as a result of repealing of the said Rules in the year 1998, this benefit stood denied to the Personal Staff.

5. In order to remove the prolonged and unabated stagnation, which was now being faced by the category of Personal Staff, the respondent-University constituted a Committee in the year 2005 to look into the demands of the said staff for providing them promotional avenues. Vide Notification dated 02.04.2008 (Annexure P-6), the Board of Management of the respondent-

University, in terms of the proceedings of its meeting held on 01.03.2008, constituted a Sub-committee to review the staffing pattern of Personal Staff of the respondent-University. This Committee consisted of Principal Chief Conservator of Forests, Himachal Pradesh, who was to be the Chairman, Chief Engineer, HP PWD (Retd.) as well as Comptroller and Registrar of the respondent-University, who were to be the Members and Member Secretary of the said Sub-committee, respectively. In the proceedings of the meeting of said Sub-Committee held on 09.03.2009 (Annexure P-7), the Committee recommended that there should be at least two promotions in personal career of an employee irrespective of the level of recruitment, as was existing for all other Government jobs. The Committee further recommended the adoption of Personal Staff Pattern of the Himachal Pradesh University by the respondent-University.

6. To cut the controversy short, the proceedings of 79th meeting of the Board of Management of the respondent-University held on 20.07.2009 demonstrates that vide Item No. 7, the following was decided:

> *"Item No. 7: The matter regarding placing the recommendations of a sub-committee constituted by the Board of Management for the adoption of staffing pattern of personal staff of Himachal Pradesh University to the personal staff of this University.*

7. It is clarified at this stage that the proceedings of the meetings of the Board of Management of the respondent-University were placed on record of this petition on the previous date by learned counsel representing the parties.

8. In the 84th meeting of the Board of Management of the respondent-University held on 30.01.2011, vide Item No. 10, the Board of

Management approved the cadre strength as well as the up-gradation of posts from the feeder cadre(s) of Personal Staff, as recommended by the Sub-committee. This was followed by 85th meeting of the Board of Management held on 30th June, 2011, in which, vide Item No. 1, the Board of Management confirmed the proceedings of its 84th meeting held on 30th March, 2011.

9. Incidentally, a perusal of the 85th meeting of the Board of Management demonstrates that in this meeting besides others, was attended by the Principal Secretary (Horticulture) to the Government of Himachal Pradesh as well as Deputy Secretary (Finance) in his capacity as a representative of the Principal Secretary (Finance) to the Government of Himachal Pradesh. It is pertinent to mention at this stage that Principal Secretary (Finance) happens to be an Ex-officio Member of the Board of Management of the respondent-University in terms of the provisions of the Himachal Pradesh Universities of Agriculture, Horticulture and Forestry Act, 1986 (hereinafter referred to as 'the 1986 Act'). At this stage, it is also relevant to refer to Section 39A of the 1986 Act, which reads as under:

> *"**39A. Creation of posts etc.** -No post, position and assignment created by the University shall have any effect unless approved by the State Government."*

It appears that in terms of the provisions of Section 39A of the Act, the recommendations of the Board of Management of the respondent-University were forwarded to the State Government. However, the same stood rejected by the State Government vide Notification dated 25th February, 2012 (Annexure P-16) in the following terms:

> *"I am directed to refer to your letter No. UHF. Regr/ GA/ 5-1(84)/ 2011/ -24180 dated 13.01.2012 on the subject cited above and to say that the matter was taken up with the Fin. Deptt. who have expressed its inability to concur in the proposal."*

It is in this background that the present petition has been filed by the petitioners for the reliefs already mentioned hereinabove.

10. Learned counsel for the petitioners has argued that rejection of the recommendations of the Committee of the Board of Management of the respondent-University by the respondent-State vide Annexure P-16 is not sustainable in the eyes of law, because a perusal of the same demonstrates that the recommendations have been rejected on the sole ground that the Finance Department has expressed its inability to concur with the proposal, whereas, an extremely important aspect of the matter has been ignored by the respondent-State that the representative of the Finance Department of the Government was part of the meeting which had approved the recommendations of the Board of Management with regard to the up-gradation of posts from the feeder cadre(s) of personal staff. Learned counsel thus submitted that rejection of the recommendations is arbitrary and, therefore, not sustainable in law. She has further argued that the recommendations otherwise were well reasoned and the same were based upon the Policy, which was not only being followed by the Himachal Pradesh University with regard to the Personal Staff, but also a Policy which was being followed by the Government to ensure that at least two promotional avenues should be available to an employee. Learned counsel thus prayed that the petition be allowed, as prayed for by quashing Annexure P-16 and directing the respondents to give effect to the recommendations of the respondent-University, with all consequential benefits.

11. The petition is opposed by the State, *inter alia,* on the ground that the claim of the petitioners for up-gradation of posts from the feeder cadre of Personal Staff was examined in consultation with the Finance Department and the said Department expressed its inability to concur with the proposal. Further, up-gradation of posts cannot be claimed as a matter of right and further to take care of stagnation, a new Assured Career Progression Scheme was introduced by the Government for grant of different financial benefits to the employees in the State, hence the writ petition deserved dismissal.

12. Learned Additional Advocate General, on the strength of the reply, while supporting the stand of the Finance Department, has submitted that except few petitioners, others were not stagnating on the same post on which they joined the respondent-University in terms of the Recruitment and Promotion Rules. He further submitted that the power conferred upon the State under Section 39A of 1986 Act was *bonafidely* exercised by the State and as the Finance Department only after taking into consideration all the *pros* and *cons* of the recommendations made by the respondent-University, did not concur with the same and further as there is no stagnation vis-a-vis the petitioners who are now getting the benefits of Assured Career Progression Scheme, the petition deserved dismissal. Further, while drawing the attention of the Court to Annexure P-20, he submitted that the recommendations of the respondent-University were not practical keeping in view the reduction of staff of feeder entry category of Junior Scale Stenographer from 18 to 4, whereas simultaneously the number of posts of Senior Scale Stenographer stood increased from 13 to 16.

13. Learned counsel for the respondent-University has submitted that the recommendations which were made by the Board of Management of the respondent-University is a matter of record, but because the State Government has chosen not to approve the same, therefore, the respondent-University is not in a position to accept the request of the petitioners.

14. I have heard learned counsel for the parties and also gone through the record of the case as well as the minutes of the meetings of the Board of Management of the respondent-University placed on record by learned counsel for the parties on the previous date.

15. The University before this Court is a statutory University. It has come into existence by virtue of provisions of The Himachal Pradesh Universities of Agriculture, Horticulture and Forestry Act, 1986. The Board of

Management of the said University stands constituted under Section 12 of the Act, meaning thereby that the said Board of Management has a statutory force behind it. A perusal of Section 12 of the Act demonstrates that the Board of Management, *inter alia,* shall be consisting of the following in respect of respondent-University:

> *"**Ex-officio Members**:-*
>
> *(i) Vice-Chancellor;*
> *(ii) Vice-Chancellor of Himachal Pradesh Krishi Vishva Vidyalaya;*
> *(iii) Agriculture Production Commissioner to the Government;*
> *(iv) Secretary (Horticulture) to the Government;*
> *(v) **Secretary (Finance) to the Government**;*
> *(vi) Secretary (Forests) to the Government;*
> *(vii) Heads of Government Departments of Horticulture, Forrest and Agriculture;*
>
> ***Other Members:***
>
> *(viii) one officer to be nominated by the Chancellor from amongst the Deans/ Directors of the University;*
> *(ix) two eminent scientists, one in horticulture and the other in forestry, to be nominated by the Chancellor;*
> *(x) two progressive orchardists or farmers to be nominated by the Chancellor;*
> *(xi) one progressive orchardist/farmer from the tribal areas of the State, to be nominated by the Chancellor;*
> *(xii) one outstanding woman social worker, preferably having background of rural advancement to be nominated by the Chancellor;*
> *(xiii) one distinguished engineer to be nominated by the Chancellor;*
> *(xiv) one representative of the Indian Council for Agricultural Research, New Delhi; and*

(xv) one representative of the Indian Council of Forestry Research and Education, Dehradun……"

Thus, Secretary (Finance) happens to be an *Ex-officio* Member of the Board of Management of the respondent-University.

16. A perusal of the proceedings of the Board of Management placed on record demonstrates that in the 74th meeting of the Board of Management held on 1st March, 2008, vide Item No. 13, the following was decided:

> *"Item No. 13: The matter regarding constitution of a sub-committee to review the staffing pattern of Personal Staff of this University.*
>
> *After a threadbare discussion on the issue, the Board of Management constituted a sub-committee consisting of Dr. Pankaj Khullar PCCF as Chairman and Er. G.R. Kaundal, Chief Engineer HP PWD (Retd.) & the Comptroller as its members. The Registrar will be the Member-Secretary of this sub-Committee. In the meantime, it was decided by the Board that the staffing position of the Personal staff may be obtained from the other Departments/Universities for placing it before the Sub-Committee."*

This was followed by the 79th Meeting of the Board of Management, in which, under Item No. 7, the following was decided:

> *"Item No. 7: The matter regarding placing the recommendations of a sub-committee constituted by the Board of Management for the adoption of staffing pattern of*

personal staff of Himachal Pradesh University to the personal staff of this University.

After a threadbare discussion on the issue, the Board of Management accepted/approved the recommendations of the sub-committee constituted by it under item No. 13 of the proceedings of the 74th meeting held on 1.3.2008 for the adoption of staffing pattern of personal staff of Himachal Pradesh University in respect of personal staff of this University."

Thereafter, vide 84th meeting of the Board of Management, under Item No. 10, the following was decided:

"Item No. 10: Matter regarding adoption of staffing pattern of Personal Staff of HP University in respect of personal staff of Dr. Y.S. Parmar University of Horticulture and Forestry, Nauni, Solan.

The Board of Management, pursuant to the decision taken by its 74th meeting held on 1.3.2008, approved the cadre strength as well as upgradation of posts from the feeder cadre(s) of personal staff, as recommended by the Committee so constituted for the purpose."

17. Thus, in its 84th meeting, the Board of Management, pursuant to the decision taken vide 74th meeting held on 1st March, 2008, approved the cadre strength as well as up-gradation of posts from the feeder cadre of personal staff, as recommended by the Committee constituted for the said purpose. Now, when the proceedings of 84th meeting of the Board of Management were placed before the 85th meeting of the said Board of Management held on 30th June, 2011, in which, besides other representatives, Deputy Secretary (Finance) was also present, the Board of Management, *inter*

alia, vide Item No. 1, confirmed the proceedings of its 84th meeting held on 30th March, 2011, vide which, in terms of Item No. 10, the said Board has approved the cadre strength as well as up-gradation of posts from the feeder cadre(s) of personal staff, as recommended by the Committee so constituted for the said purpose.

18. In the considered view of the Court, the reason and rational as to why Secretary (Finance) to the Government of Himachal Pradesh is an *Ex-officio* Member of the Board of Management of the respondent-University is that whenever any decision is taken by the Board of Management, in terms of the power so conferred upon it under the Statute, then the financial aspects of the matter can also be taken into consideration and discussed. There is a purpose behind the Principal Secretary (Finance) being Member of the Board of Management and he is not a ceremonial representative to be there in the Board of Management. The only inference which can be drawn from the fact that in its 85th meeting, the Board of Management approved its proceedings of 84th meeting, in which, the Deputy Secretary(Finance), in his capacity as a representative of Principal Secretary (Finance) was also present, is that before the Board of Management approved the proceedings of its 84th meeting, the financial aspects of the Items discussed and approved in the 84th meeting, were also taken into consideration. In this peculiar background, in my considered view, the rejection of the proposal of up-gradation of posts from the feeder cadre of Personal Staff by the respondents vide communication dated 25th February, 2012 (Annexure P-16) only on the ground that the Finance Department had expressed its inability to concur with the proposal is not sustainable in law. The Court is holding so for the reason that when the representative of the Finance Department was the Member of the 85th meeting of the Board of Management of the respondent-University held on 30th June, 2011, vide which, the Board of Management approved its earlier minutes of 84th meeting, then it is to be deemed that the Finance Department was having no issues with regard to the

proposal of up-gradation of the posts from the feeder cadre of Personal Staff. If there were any reservations which the Finance Department was having with regard to the said recommendations, then the stage to express those reservations was in the course of meetings of the Board of Management held from time to time, including the 85th meeting of the Board of Management held on 30th June, 2011. The Finance Department cannot be permitted to take two different stands with regard to the same issue. Besides this, the Court is of the view that the authority conferred upon the State Government under Section 39A of the Act with regard to grant of approval qua creation of posts etc. has to be exercised by the State Government judiciously with due application of mind, which has not been done in the present case. The State Government has rejected the proposal simply on the ground that the Finance Department has expressed its inability to concur with the proposal. In the considered view of the Court, the Finance Department is just one of the Department of the State Government and it is not the State Government. Section 39A envisages that "the State Government could take the call and not the Finance Department". The view of the Finance Department could have been one of the reasons as to why the State Government was not concurring with the proposal in issue, but the same could not have been the sole reason to take the decision.

19. In view of what has been discussed above, as this Court does not agrees with the stand of the State, as has been taken vide Annexure P-16, dated 25th February, 2012 while rejecting the proposal with regard to up-gradation of posts from the feeder cadre of Personal Staff, simply on the ground that the Finance Department had expressed its inability to concur with the proposal, said communication is quashed and set aside. Consequently, the petition is allowed to the extent that the respondent-State is directed to re-consider the proposal with regard to up-gradation of posts from the feeder cadre of Personal Staff afresh, in terms of the provisions of Section 39A of the Act. Decision with regard to the said proposal shall be taken by the State

Government on or before 31st May, 2021. While taking the decision, the State Government shall take into consideration the proceedings of 84th meeting of the Board of Management of the respondent Board, which subsequently were approved in the 85th meeting of the Board of Management of the respondent-University, in which, the Deputy Secretary (Finance), Government of Himachal Pradesh was present, in his capacity as representative of the Principal Secretary (Finance), Government of Himachal Pradesh. The Court further impresses upon the State Government to take a sympathetic view with regard to the recommendations of the Board of Management of the respondent-University and in the event of it concurring with the same, confer benefits to all the petitioners. Miscellaneous applications, if any, stand disposed of.

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

State of HP ...Appellant

Versus

Balkar Singh @ Suram Singh ....Respondent

Criminal Appeal No. 143 of 2007
Judgment Reserved on 28th April,2021
Date of Decision 30th April, 2021

Appeal against acquittal in criminal case state of H.P vs. Balkar Singh under section 279, 338, 304-A IPC- allegations are respondent while driving Maruti Van in rash and negligent manner had hit Chiru Ram, dragged him to 60 to 70 feet causing his death on the spot- Held,- For the material placed on record by way evidence including statements of eye witnesses and site map it cannot be said with certainty that respondent was driving the vehicle at the time of accident as there is nothing on record to establish that Suresh and Balkar was and is one and same person -none of witnesses has stated so- no document has been placed on record to establish this fact even I.O is silent. The only material on record is that in challan, name of accused has been mentioned as Balkar @ Suresh which is not sufficient to prove that Suresh alleged to be

driver in the statement of witnesses is Balkar. State has failed to establish foundation of case by leading cogent and convincing evidence- no illegality in judgment of trial court – Appeal dismissed.

For the Appellant: Mr. Desh Raj Thakur, Additional Advocate General through Video Conferencing.

For the Respondent: Mr. Manoj Thakur, Advocate, through Video Conferencing.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

State of Himachal Pradesh has approached this Court against acquittal of respondent vide judgment dated 1.12.2006 passed by Sub Divisional Judicial Magistrate, Jawali, in Criminal Case No. 101-II/2002, titled State of HP vs. Balkar Singh @ Suram Singh, in case FIR No. 21 of 2002, dated 22.1.2002, registered in Police Station Jawali, under Sections 279, 338 and 304-A of Indian Penal Code (in short 'IPC').

2 Prosecution case, in brief, is that on 22.1.2002 at about 9 AM, respondent/accused, while driving Maruti Van No. PAC-3468 in rash and negligent manner in village Barot, had hit Chiru Ram and dragged him for 60 to 70 feet causing his death on the spot.

3 On the basis of statement of PW3 Baldev Singh recorded under Section 154 Cr.P.C. (Ext.PW2/A), FIR was registered by police and investigation was carried out. In his statement, PW3 Baldev Singh had stated that Chiru Ram was walking on his own side on the side of road and van coming from Fatehpur side, on wrong side, with high speed had hit and dragged Chiru Ram between both front tyres for a distance of 60 to 70 feet causing death of Chiru Ram and the said van was being driven by Suram Singh son of Gorkhu Ram resident of Bankehar and the said incident was also witnessed by Karnail Singh (not examined) and Bhawani Singh (PW1-A), who were basking in the sun near the tree of Pipal. It is claimed by Baldev Singh

that accident had taken place for rash, negligent and wrong side driving of driver of van No. PAC-3468.

4 On completion of investigation, finding prima-facie complicity of respondent/accused in commission of alleged offences, a challan was presented against him in the Court.

5 After putting Notice of Accusation to respondent/accused, prosecution has examined 8 witnesses to prove its case, whereas, after recording the statement of respondent/accused under Section 313 Cr.P.C., no evidence was led by respondent/accused in defence.

6 Accident in question has not been disputed. But, identification of driver, driving the vehicle at the time of accident and the manner in which accident had occurred have been disputed. Claim in defence is that respondent/accused was not driving the vehicle and Chiru Ram was crossing the road without noticing the van and had come in front of vehicle on the middle of road and vehicle could not be stopped for failure of brakes.

7 PW1 Dr. R.K. Mehta has proved the factum of death of Chiru Ram and cause of death with further qualification that injuries causing the death of Chiru Ram can be caused in a motor vehicle accident. He has also proved postmortem report Ext.PW1/A on record, which has not been disputed.

8 PW2 Baldev Singh, complainant as well as eye witness, and PW1A Bhawani Singh, eye witness, have supported the prosecution case in examination-in-chief in general and had also deposed about witnessing the incident and investigation carried out by Investigating Officer on spot including taking of photographs of spot and dead body, preparation of site map and also recording of their statements by police. In cross examination, both of them have not denied the suggestion put by defence counsel that Chiru Ram along with another person was crossing the road, rather, it is stated by them that they did not know about this fact and further that another person, who was crossing the road along with Chiru Ram, had tried to pull

Chiru Ram and during that effort, shawl of Chiru Ram had come in the hands of that another person. PW2 Baldev Singh has stated it to be correct that thereafter van had hit Chiru Ram with further qualification that he did not know what had happened prior to that. Whereas PW1A Bhawani Singh has stated that he did not know who was crossing the road along with Chiru Ram at the time of occurrence of accident as he used to wear spectacles but on that day, he was not having the same. In statement recorded under Section 161 Cr.P.C., PW1A Bhawani Singh had stated number of vehicle and he had explained in his cross-examination that he was knowing the number of van, but, how and why he has not clarified, rather, he has also stated that he did not know who was owner of van and whereto van belonged. PW1A has also stated that name of driver as Suram Singh was stated by him to police, but, he was not knowing Suram Singh and public had informed him the name of driver, but, he was not knowing the native village of Suram Singh and he did not remember from whom he had inquired about name of Suram Singh. According to him, police had not got identified Suram Singh from him, however, he had seen the driver. He has admitted that he had also come to the Court on previous date for his evidence in this case and he had seen the respondent/accused only on that day and before that he had seen him in Barot. In examination-in-chief, he has stated that van had stopped after striking with stone, but, in cross-examination he has denied not only the said fact but also making of such statement at any point of time. In examination-in-chief, he has stated that front glass of van had broken in accident.

9 According to PW2 Baldev Singh, vehicle had hit Chiru Ram and he (Chiru Ram) was dragged in between the tyres and thereafter, a stone had come under the tyre of vehicle, whereupon Chiru Ram was left behind and vehicle had stopped at a distance of 10-50 feet and Chiru Ram had died on the spot. In cross-examination, he has stated that they had inquired the name of driver from the boys. According to him and Bhawani Singh, driver remained

on spot, but, later on they did not know where he had gone. According to Bhawani Singh, two persons were sitting in van, whereas, according to Baldev Singh, three persons were sitting on front seat. According to him there were no skid marks on the spot on the road and he has stated that it might be possible that in site plan police might have shown skid marks on spot, but according to him, it was incorrect. He has admitted that he had seen the accused for the first time in the Court, but, had again stated that he had also seen him earlier, but, he was not knowing about his village and caste. PW2 Baldev Singh and PW1A Bhawani Singh, are real brothers. The third witness Karnail Singh has not been examined. These witnesses are real brothers and they have admitted that Chiru Ram was their co-villager and customer also. Baldev Singh has admitted, even to the extent, that he has deposed in Court according to statement read over to him by police.

10 PW3 Uttam Singh is a formal witness who has proved the seizure of Van No. PAC-3468 vide memo Ext.PW3/A, but, in his cross examination, he has expressed his ignorance about owner or driver of vehicle. According to him, van, parked on the spot along with key, was taken in possession by police.

11 PW4 Rajinder Kumar is a mechanic, who had inspected the vehicle on request of Investigating Agency. He has proved his mechanical report Ext.PW4/A on record. In report, he has stated, and also admitted in cross examination, that brake system of vehicle was poor. He has admitted in cross examination that with such poor brake system, despite being driven at low speed, the vehicle would not be stopped easily.

12 PW5 Ravinder Singh is a photographer, who had taken photographs of the spot on the day of accident. In his cross examination, he has admitted that deceased had collided with vehicle on the middle of road and pieces of broken glass were lying on middle of road. This admission is duly corroborated by facts recorded by Investigating Officer in site map

Ext.PW8/A, wherein, at spot 'H' at the middle of road, pieces of broken glass of van have been depicted. It is the case of prosecution that at the time of hitting Chiru Ram from front side of vehicle, front glass of van was broken.

13 According to PW1A Bhawani Singh and PW2 Baldev Singh, accident had taken place on side of road, whereas, according to site map as well as statement of PW5 Ravinder Singh, accident had taken place in the middle of road. Investigating Officer has shown skid marks on side of road, but, away from the place where broken pieces of glass of van have been reflected in site map, where PW2 Baldev Singh has deposed that there were no skid marks on the spot, which creates doubt about the claim of prosecution with respect to existence of skid marks on spot. It may be possible that those skid marks might be of a different vehicle, because, it is not possible that front glass of the vehicle is broken in middle of road, but, tyres of the said vehicle were on the side of road. Therefore, the manner in which accident had taken place has not been clearly established on record. Even PW1A Bhawani Singh and PW2 Baldev Singh have expressed their ignorance to the suggestion put by defence that accident had taken place on middle of road when Chiru Ram was crossing the road along with another person.

14 PW4 Rajinder Kumar and PW5 Ravinder Singh had further fortified the version of defence that accident did not take place as alleged by PW1A and PW2, but, for different reason including the poor brake system of vehicle.

15 There is also confusion to witnesses with respect to name and identity of driver. Everywhere, in their statements, PW1A Bhawani Singh and PW2 Baldev Singh have stated that name of driver was Suram Singh, whereas according to prosecution case, Balkar Singh was driving the vehicle, though, PW8 ASI Kulvinder Singh, the Investigating Officer, has tried to establish identity of the respondent/accused by saying that accused was got identified from Baldev Singh and Bhawani Singh on spot, but, the said fact has been

denied by these witnesses in their statements recorded in Court. PW8, Investigating Officer, has also stated that owner and driver of vehicle was one and the same person and vehicle was released to driver, whereas, as a matter of fact, vehicle was released to Buta Singh the registered owner of vehicle through one Rakesh Kumar and respondent/accused is not owner of vehicle. It is admitted by Investigating Officer that brake system of vehicle was found poor on mechanical inspection of it and he has also admitted that at the time of accident, deceased Chiru Ram was crossing the road, which is contrary to statements of PW1A Bhawani Singh and PW2 Baldev Singh.

16 PW6 Bagicha Singh is also witness to seizure of documents of vehicle, whereas, PW7 SI Gurbaksh Singh is SHO, who had prepared challan and presented it in Court.

17 PW6 Bagicha Singh has been examined to establish that the documents of vehicle were handed over to police by Balkar Singh, but, in cross examination he has categorically stated that in his presence no document was produced by Balkar Singh to police and memo Ext.PW6/A prepared by police was not read over to him.

18 As discussed supra, for the material placed on record by way of evidence, including statements of eye witnesses and site map Ext.PW8/A, it cannot be said with certainty that accident had taken place in the manner as claimed by prosecution and it cannot be said with certainty that respondent/accused was driving the vehicle at the time of accident.

19 There is nothing on record to establish that Suram Singh and Balkar Singh was and is one and same person. None of the witnesses has stated so in their oral depositions and no document has been placed on record to establish this fact. Even the Investigating Officer, PW8 is silent in this regard. The only material on record, in this regard, is that in challan name of accused has been mentioned as Balkar Singh @ Suram Singh, which is not

sufficient to prove that Suram Singh, alleged to be the driver in the statements of witnesses, is Balkar Singh.

20 From aforesaid discussion, it is apparent that State has failed to establish the foundation of case by leading cogent, reliable, trustworthy and confidence inspiring evidence and prove its case against respondent/accused beyond reasonable doubt. As such, I do not find any illegality, irregularity or perversity in the judgment passed by trial Court. Therefore, respondent/accused is entitled for benefit of doubt more particularly for the reason that respondent/accused is having the advantage of being acquitted by trial Court fortifying the presumption of his innocence.

In view of above, appeal is dismissed being devoid of any merit. Bail/surety bonds furnished by respondent and his surety are discharged. Record be sent back to the concerned Court.

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

Ashish Kumar ...Petitioner

Versus

State of H.P. & others ....Respondents

Cr.MMO No. 144 of 2021
Date of Decision 27th April, 2021

The petition under section 482 Cr. P.C for quashing FIR No. 37/2018 dated 9.5.2018 under section 363, 366, 376, 506 IPC and section 4 &6 POCSO Act-Held- at the time of eloping with petitioner, respondent No.2 was 17 years and 10 months old therefore for her minority criminal case as registered has been made out and after two months, for attaining the age of discretion by respondent No.2 in the same circumstances, no case would have been made out –not only respondent No.2 but her grandmother has also found petitioner as suitable match for respondent No.2 after knowing about love affair and has organized their marriage -the couple is living happily under one roof with their

two years small kid in view of above circumstances this is fit case to exercise power under section 482 Cr.P.C. If the criminal proceedings are allowed to continue, the same will adversely affect married life- Petition allowed- FIR quashed.

Cases referred:

Gian Singh Vs. State of Punjab and Ors. (2012) 10 SCC 303;
Parbatbhai Aahir alias Parbathbhai Bhimsinghbhai Karmur and others vs. State of Gujarat and another, (2017)9 SCC 641;
Narinder Singh and others vs. State of Punjab and others (2014)6 SCC 466;
State of Madhya Pradesh vs. Laxmi Narayan and others (2019)5 SCC 688;
Madan Mohan Abbot vs. State of Punjab, (2008)4 SCC 582;
Rahul Thakur vs. State of HP, 2020(2) Shim.LC 629;

For the Petitioner: Mr. Vijender Katoch, Advocate, through Video Conferencing.

For the Respondents: Mr. Desh Raj Thakur, Additional Advocate General, for respondent No.1 through Video Conferencing.

Mr. A.K. Sharma, Advocate for respondents No. 2 and 3.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

This petition has been preferred under Section 482 Cr.P.C. for quashing of FIR No. 37 of 2018, dated 9.5.2018, registered under Sections 363, 366, 376 and 506 of Indian Penal Code (hereinafter in short 'IPC') and Sections 4 and 6 of Prevention of Children from Sexual Offences Act (in short 'POCSO Act') at Police Station Panchrukhi, District Kangra HP and quashing of proceedings initiated in pursuant thereto pending in the concerned Court.

2 Respondent No.2 Shabnam as well as respondent No.3/complainant Champa Devi, duly identified by their counsel Mr.A.K. Sharma, Advocate, are present through Video Conferencing.

3 Respondent No.2-Shabnam, vide separate statement, placed on record, has stated that petitioner Ashish Kumar is her husband, who is an accused in FIR lodged by her grandmother, respondent No.3. She has further stated that she and Ashish Kumar were knowing each other and were having love affairs with intention to marry, however, they were suspecting that her grandmother would marry her somewhere else and, therefore, she had gone along with Ashish Kumar in his relations without telling any member of her family, whereupon, her grandmother thought that she was missing or some wrong had happened with her, and therefore, she lodged an FIR in Police Station Panchrukhi on 9.5.2018, whereupon, police had conducted the investigation and she was found in house of relations of Ashish Kumar and at that time, she was two months short for completing her age of discretion and, therefore, a criminal case was made out against Ashish Kumar and he was arrested and later on, was enlarged on bail. She has also stated that after some time, succumbing to their wishes, her grandmother agreed to marry them and she arranged their marriage on 3rd February, 2019 which has been registered in the Panchayat also and after marriage, she and Ashish Kumar are residing happily with her in-laws and they have also been blessed with one son Harshit, who was born on 15th July, 2019 and further stated that now she is residing happily with her husband under one roof and, therefore, she does not intend to continue the criminal proceedings against her husband which would be destructing not only her life but also the life of their son and her grandmother has also realized the mistake committed by her on account of misunderstanding and therefore, she is also agree to withdraw the FIR for compounding the case for betterment of her life and in the interest of her entire family including her husband and son and she (grandmother) has also come with her to Shimla. She has stated that compromise is out of her free will, consent and also without any kind of threat, coercion or pressure etc.

4 Respondent No.3/complainant Champa Devi has also stated in her statement that she is grandmother of Shabnam, whose father had expired 10 years ago and her mother had left the house and only she is looking after Shabnam as well as her younger brother. She has stated that in the year 2018, Shabnam had eloped with Ashish Kumar with intention to solemnize marriage, but she was not knowing about her love affairs and therefore, she had lodged the FIR, but, later on she came to know about reality and therefore, their marriage was solemnized with her consent and endorsed the statement made by Shabnam to be true and correct. She has further stated that she has deposed in the Court out of her free will, consent and also without any kind of threat, coercion or pressure etc.

5 Petitioner Ashish Kumar, vide separate statement, has endorsed the statements of Shabnam (respondent No.2) as well as complainant (respondent No.3) to be true and correct and has further stated that he undertakes to keep his family including his wife and child/children with care, love and affection. He has further stated that he has made the statement and compromised the matter out of his free will, consent and also without any kind of threat, coercion or pressure etc.

6. Quashing of FIR in present petition has been prayed on the basis of compromise deed arrived at between the parties, which is placed on record and duly signed by parties. All of them have endorsed the compromise. Copies of date of birth certificate of child of petitioner and respondent No.2 and marriage certificates issued by temple as well as Gram Panchayats have also been placed on record.

7 In reply, filed on behalf of respondent/State, the quashing of FIR has been opposed on the ground that petitioner has committed the offences by taking away a minor girl out of the custody of lawful guardianship and therefore, the consent of minor to quash the FIR is immaterial. It is further averred that if present petition is allowed the whole practice and investigation

conducted by police will become futile and it will be sheer abuse of process of law.

8 Three Judges Bench of the Apex Court in ***Gian Singh Vs. State of Punjab and Ors.*** reported in ***(2012) 10 SCC 303***, explaining that High Court has inherent power under Section 482 of the Code of Criminal Procedure with no statutory limitation including Section 320 Cr.PC, has held that these powers are to be exercised to secure the ends of justice or to prevent abuse of process of any Court and these powers can be exercised to quash criminal proceedings or complaint or FIR in appropriate cases where offender and victim have settled their dispute and for that purpose no definite category of offence can be prescribed. However, it is also observed that Courts must have due regard to nature and gravity of the crime and criminal proceedings in heinous and serious offences or offence like murder, rape and dacoity etc. should not be quashed despite victim or victim family have settled the dispute with offender. Jurisdiction vested in High Court under Section 482 Cr.PC is held to be exercisable for quashing criminal proceedings in cases having overwhelming and predominatingly civil flavour particularly offences arising from commercial, financial, mercantile, civil partnership, or such like transactions, or even offences arising out of matrimony relating to dowry etc., family disputes or other such disputes where wrong is basically private or personal nature where parties mutually resolve their dispute amicably. It was also held that no category or cases for this purpose could be prescribed and each case has to be dealt with on its own merit but it is also clarified that this power does not extend to crimes against society.

9 The Apex Court in ***Parbatbhai Aahir alias Parbathbhai Bhimsinghbhai Karmur and others vs. State of Gujarat and another, (2017)9 SCC 641*** summarizing the broad principles regarding inherent powers of the High Court under Section 482 Cr.P.C. has recognized that these powers are not inhibited by provisions of Section 320 Cr.P.C.

10 The Apex Court in case ***Narinder Singh and others vs. State of Punjab and others*** reported in ***(2014)6 SCC 466*** and also in ***State of Madhya Pradesh vs. Laxmi Narayan and others (2019)5 SCC 688*** has summed up and laid down principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercise its power under Section 482 of the Code while accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with criminal proceedings.

11 No doubt Sections 363, 366 and 376 IPC and Sections 4 and 6 of POCSO Act are not compoundable even with the permission of Court. However, as explained by Hon'ble Supreme Court in **Gian Singh's, Narinder Singh's, *Parbatbhai Aahir's* and Laxmi Narayan's cases supra,** power of High Court under Section 482 Cr.PC is not inhibited by the provisions of Section 320 CrPC and FIR as well as criminal proceedings can be quashed by exercising inherent powers under Section 482 CrPC, if warranted in given facts and circumstances of the case for ends of justice or to prevent abuse of the process of any Court, even in those cases which are not compoundable where parties have settled the matter between themselves.

12. In ***Madan Mohan Abbot vs. State of Punjab, (2008)4 SCC 582*** the Hon'ble Supreme Court emphasized and advised that in the matter of compromise in criminal proceedings, keeping in view of nature of this case, to save the time of the Court for utilizing to decide more effective and meaningful litigation, a commonsense approach, based on ground realities and bereft of the technicalities of law, should be applied.

13. Observations with respect to individual, family and societal interest, made by this Court in case ***Rahul Thakur vs. State of HP,*** reported in ***2020(2) Shim.LC 629,*** are also relevant in present case which are as under:-

"13. Observation of a Coordinate Bench of this Court in similar case decided on 12.01.2017 in Cr.MMO No. 385 of 2016, titled as *Chander Vir Kaundal vs. State of H.P.,* would also be relevant, where it is recorded that looking at the case from another angle, since the petitioner has solemnized marriage with respondent, obviously, there is no possibility of her supporting the charge in case the petitioner is put to trial. Therefore, in such circumstances, the continuation of criminal proceedings would only cause untoward torture or harassment apart from creating undue social and psychological pressure upon the private parties and it will be an extremely sad story in case complainant is called in the witness box to depose against the accused, who is none other than her husband.

14 In present case also, deposition of victim in the Court in consonance with prosecution case would lead to landing her husband and parents in jail and pushing her in pitch dark and unnecessary trouble.

15 Learned counsel for the accused-petitioner has also referred to judgments passed by the Coordinate Benches in Cr.MMO No. 301 of 2018, decided on 24.04.2019, titled as *Asha Devi & others vs. State of Himachal Pradesh & another;* Cr.MMO No. 399 of 2018, decided on 18.09.2018, titled as *Kajal & another vs. State of Himachal Pradesh & another;* Cr.MMO No. 244 of 2019, decided on 07.05.2019 titled as *X vs. State of H.P. & others, Criminal Miscellaneous (Main) No. 139 of 2018, decided on 26.5.2018, titled Sahil Chaudhary vs. State of H.P. and another, Cr.MMO No. 464 of 2018 decided on 9.8.2019 titled as Shri Devi vs. State of H.P. and another, Cr.MMO No. 377 of 2019 decided on 27.8.2019 titled as Shishpal vs. State of H.P. and another and Cr.MMO No. 41 of 2019 decided on 24.9.2019 titled as Ravi Goyal and another vs. State of H.P. and others* wherein FIRs registered under Section 376 IPC and in some cases under Section 376 IPC read with provisions of POCSO Act have also been quashed in similar circumstances where victims and accused had married to each other.

16. The ratio of law laid down by the Apex Court on the issue of permitting quashing of FIR in such cases, the Courts must

consider the interest of public at large and the offence offending the Society at large should not be permitted to be compromised and quashing of FIR or criminal proceedings on the basis of such compromise should not be permitted. Present case is somewhat different from general category, as in present case, it is not on the basis of compromise that quashing of FIR has been sought for, but it is a case where interest of victim is also involved and welfare of victim appears to be in closing criminal proceedings as she has proclaimed herself to be wife of accused and the case has been registered against petitioner-accused, only for the reason that at that time victim below 18 years of age and further, it is not a case where it can be said that victim was abducted forcefully and ravished mercilessly and was used as an instrument of enjoyment and thrown out after the use but it is a case where sexual intercourse was consensual for misrepresentation on the part of victim and now victim is living in her matrimonial house happily. Now in the facts and circumstances of the case, this case cannot be termed as a case subjecting the victim-complainant forcibly to illicit sexual intercourse. Further, it is a peculiar kind of case where there is a conflict between interest of victim and societal interest. Interest of victim is not purely private in nature as rehabilitation and survival of victim is another issue which involves public interest because to ensure rehabilitation and provide resources for survival of victim is also responsibility of society. Considering entire facts and circumstances of the case, in my opinion, balance lies in favour of the prayer of the victim.

17 Family is a primary unit of society, which gives protection to all family members. Therefore, there is always endeavour to save the family. By saving a family, we definitely save the fabric of society and thus any endeavour to save the family is also interest of society. Therefore, in present case, there is conflict of interest not only between victim and societal interest but also amongst divergent societal interest i.e. to continue proceedings for commission of an offence having adverse impact on the society and to save the family in larger interest of society."

14. At the time of eloping with petitioner, respondent No.2 was 17 years and 10 months old and, therefore, for minority of respondent No.2, criminal case, as registered, has been made out. Otherwise, two months later, for attaining the age of discretion by respondent No.2, in the same circumstances, no case would have made out, as can be easily gathered from the statement of respondent No.2 recorded, on oath, in this Court. Not only respondent No.2 but her grandmother has also found the petitioner as a suitable match for respondent No.2, after knowing about the love-affair of petitioner and respondent No.2 and, thus, has organized their marriage willingly and has come alongwith the couple today to attend the Court and has endorsed the statements of petitioner and respondent No.2 for withdrawing the FIR and closing the criminal proceedings arising thereto. The couple is living happily under one roof with their two years old small kid. Therefore, issue involved in present case is identical to the issue in ***Rahul Thakur's*** case, referred supra, and, thus, observations made therein with respect to individual, family and societal interests are also relevant to the present case.

15. Keeping in view the facts and circumstances of the present case, I find that it is a fit case to exercise power under Section 482 Cr.P.C. and further even otherwise, in view of statement of the complainant, if criminal proceedings are allowed to continue, the same will adversely affect the married life of her granddaughter and she will be a victim of a case, which has been registered by her for protecting her granddaughter's interest.

16 Considering facts and circumstances of the case in entirety, I am of the opinion that present petition deserves to be allowed for ends of justice and the same is allowed accordingly and FIR No. 37 of 2018, dated 9.05.2018, registered against the petitioner/accused at P.S. Panchrukhi, District Kangra H.P. is quashed. Consequent to quashing of said FIR, criminal proceedings pending in the concerned Court are also quashed.

Petition stands disposed of in above terms, so also pending application, if any.

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

Kuldeep Kumar ...Petitioner

Versus

State of H.P. ....Respondent

Cr.MP(M) No. 441 of 2021
Judgment reserved on 7th Apri, 2021
Date of Decision April, 2021

The petition for bail in case of FIR No. 114/2020 under section 21 NDPS Act(3rd Successive bail application) for recovery of 7 grams of heroin/Chitta allegedly thrown by him in bushes on noticing the police party- Held- No doubt criminal history of accused and his family is an important factor for deciding his bail application but at the same time, the punishment likely to be imposed upon accused on culmination of trial is also an important factor viz-a-viz the period of detention during trial. Considering the conflicting interests of individual and society and also quantum of contraband recovered from the petitioner and possible quantum of sentence which may be imposed upon the petitioner on his conviction – Petitioner is ordered to be released on bail- Petition allowed.

For the Petitioner: Mr. Rajesh Mandhotra, Advocate.

For the Respondent: Mr. Sunny Dhatwalia, Assistant Advocate General.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

Present petition is third successive bail application preferred by petitioner for enlarging him on bail, who has been arrested on 22.9.2020 in case FIR No. 114 of 2020 registered in Police Station Damtal, District Kangra under Section 21 of Narcotic Drugs and Psychotropic Substances Act, 1985 (in

short 'NDPS Act') for recovery of 7 grams heroin/chitta allegedly thrown by him in bushes on noticing the policy party.

2. First bail application No. 280-D/XXII/2020, titled Kuldeep Kumar vs. State of Himachal Pradesh, preferred by him before learned Special Judge-II, Kangra at Dharamshala, District Kangra HP, was rejected on 16.10.2020.

2 Later on, petitioner had approached this Court by filing Cr.MP(M) No. 2018 of 2020 which was dismissed on 5th January, 2021 mainly on the ground that enlarging the petitioner on bail at that time would have adverse impact on society.

3 Status report stands filed, wherein, besides giving details of circumstances in which the petitioner has been arrested for having been found in possession of 7 grams heroin/Chitta, details of number of cases registered/pending against his father since 2000 till 2020 and his mother since 2016 till 2020 under the NDPS Act and Excise Act have also been narrated in report. It is also stated that petitioner himself was also found involved in case under NDPS Act in the year 2019 and in that regard, an FIR has also been registered against him in Police Station Sadar Pathankot, Punjab.

4 Learned counsel for petitioner has submitted that petitioner, for involvement of his father and mother in various cases, cannot be punished by denying the bail in present case and petitioner is behind the bars since last about 7 months for alleged recovery of 7 grams of heroin which is slightly more than small quantity of 5 grams, whereas, commercial quantity of heroin is 250 grams. He further submits that for having been found small quantity of contraband, Section 21(a) provides maximum sentence for one year or fine and he further submits that no doubt, as per Section 21(b) maximum sentence provides for having been found in possession of intermediate quantity is 10 years with fine up to Rs. 1 lac. However, in the present case,

recovered contraband is only 2 grams higher than small quantity and 243 grams lesser than commercial quantity. Therefore, even if prosecution case is admitted to be true in its totality, then also proportionate sentence for having been found 7 grams heroin would be near about one year or so and at present without trial, petitioner would be completing 7 months on 22nd of April, 2021 and therefore, keeping in view the proportionality of sentence, which may be imposed upon the petitioner, and period for which he is behind the bars, petitioner deserves to be enlarged on bail.

5 No doubt, criminal history of accused and his family is an important factor for deciding his bail application. But at the same time, the punishment likely to be imposed upon accused on culmination of trial is also an important factor viz-a-viz the period of detention during trial.

6 Earlier bail application was rejected by this Court on 5th January, 2021 i.e. about four months ago. At that time, petitioner had been under detention for about a period of 3½ months and for material placed before the Court, it was considered that enlargement of petitioner on bail at that time would have an adverse impact on society and as of now, petitioner is under detention since the last about seven months.

7 Considering the conflicting interest of individual and society and also the quantum of contraband recovered from the petitioner and possible quantum of sentence, which may be imposed upon the petitioner on his conviction, I am of the view that at this stage, petitioner may be enlarged on bail and accordingly, he is ordered to be released on bail, subject to his furnishing personal bond in the sum of Rs.50,000/- with one surety in the like amount to the satisfaction of concerned trial Court within two weeks from today, subject to the following conditions:-

(i) That the petitioner shall make himself available during the investigation as well as trial on each and every date as and when required;

(ii) That the petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade her from disclosing such facts to Court or to any police officer or tamper with the evidence. He shall not, in any manner, try to overawe or influence or intimidate the prosecution witnesses;

(iii) That the petitioner shall not obstruct the smooth progress of the investigation as well as trial;

(iv) That the petitioner shall not jump over the bail and shall inform, in writing, regarding change of address, land line number and/or mobile number, if any, in advance, to concerned Police Station;

(v) That the petitioner shall not commit the offence similar to the offence to which he is accused or suspected or the commission of which he is suspected;

(vi) In the event of repetition of commission of offence, bail granted in present case shall be liable to be cancelled on taking appropriate steps by prosecution/police;

(vii) That the petitioner shall not leave India without prior permission of Court;

(viii) That petitioner shall not misuse his liberty in any manner.

8. It will be open to the prosecution to apply for imposing any such other or further condition on the petitioner as deemed necessary in the facts and circumstances of the case and in the interest of justice. It will also be open to the trial Court/Magistrate to impose any other or further condition on the petitioner as it may deem necessary in the interest of justice.

9. In case the petitioner violates any condition imposed upon him, his bail shall be liable to be cancelled. In such eventuality, prosecution may

approach the competent Court of law for cancellation of bail in accordance with law.

10. Learned trial Court is directed to comply with the directions issued by the High Court, vide communication No. HHC/VIG/Misc.Instructions/93-IV.7139 dated 18.3.2013.

11 Any observation made in this order shall not affect the merits of case in any manner and will strictly confine for the disposal of this bail application filed under Section 439 of Code of Criminal Procedure 1973.

12. The petitioner is permitted to produce copy of order downloaded from the High Court website and the trial Court shall not insist for certified copy of the order, however, they may verify the order from the High Court website or otherwise.

Petition stands disposed of.

Dasti copy on usual terms.

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

Saurabh Behal .....Petitioner.

Versus

State of Himachal Pradesh .....Respondent.

Cr.MP(M) No. 594 of 2021
Date of decision: April 29, 2021.

The petitioner after being declared as a proclaimed offender on 12.9.2019 was arrested on 11.3.2021 in complaint before Ld Special Judge in case arising out of FIR lodged under section 22 (3) 27 (c) 28(A), 36 AC of Drugs and Cosmetics Act- The petition for grant of regular bail- Held- The petitioner was enlarged on bail by ld Sessions Judge on 13.9.2011. The complaint filed by Drug Inspector was registered in court of ld Special Judge on 20.2.2014- It comes to notice of trial court that petitioner and his father was not residing on address given in complaint- Correct addresses were not furnished by Drug inspector- in mechanical manner, bailable warrants and thereafter, non-

bailable warrants were ordered to be executed on same address. Since address was wrong, warrants were also received unexecuted for want of correct address -despite this proceedings under section 82 Cr.P.C were instituted with observation that petitioner is deliberately evading service which is not justified- Thus petitioner has made out a case for enlargement on bail on furnishing bonds subject to conditions- Petition stands disposed of.

Cases referred:

Devendra Singh Negi alisa Debu v. State of U.P. and another 1994 CRI. L. J. 1783;

Rohit Kumar v. State of NCT Delhi & Anr. 2008 Cr. L.J 3561;

For the petitioner : Mr. N.S. Chandel, Senior Advocate with Mr. Vinod Chauhan, Advocate.

For the respondent : Mr. Anil Jaswal, Addl. AG with Mr. Manoj Bagga, Asstt. AG.

(Through Video Conferencing).

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, *Judge (Oral)*

After being declared as a proclaimed offender on 12.9.2019, the petitioner was arrested on 11.3.2021 in complaint No. 6-N/7 of 2014 pending before the learned Special Judge-II, District Sirmour at Nahan arising out of FIR No. 220/1011, dated 15.7.2011 lodged under Sections 22(3), 27C, 28A, 36AC of the Drugs and Cosmetics Act, 1990 registered at Police Station, Paonta Sahib, District Sirmour. Prayer in the instant petition is for enlargement on regular bail.

2. The prosecution case is that :-

2(i) One Shri Atul Kumar Gupta had sublet the premises of M/s Himalyan Laboratories, village Surajpur Paonta Sahib, District Sirmour on rent to M/s Soliance Pharma Products through its proprietor Saurabh Behal (Bail petitioner) for running the business of drugs.

2(ii) The bail petitioner was involved in manufacturing of spurious, misbranded and sub-standard quality drugs meant for sale to public with manufacturing addresses of M/s Soliance Pharma Products, Village Surajpur, Tehsil Paonta Saghib, M/S M.Sea Pharmaceuticals, Village Surajpur, Tehsil Paonta Sahib and M/s NLP Organics Pvt. Limited, A-590B, RIICO Industrial Area, Bhiwadi, at M/s Himalyan Laboratories, village Surajpur, Tehsil Paonta Sahib.

2(iii) M/S Lincoln Pharmaceuticals Limited filed a complaint against M/s Soliance Pharma Products in respect of supply of alleged spurious and illegal drugs. During investigation, it was found that the licences on Forms-25A and 28A were not issued to the M/s Soliance Pharma Products. As a result of investigation, it was concluded that the bail petitioner being sole proprietor of M/s Soliance Pharma had unauthorisidely manufactured illegal and spurious drugs and sold the same to M/s Lincoln Pharmaceuticals Limited by using forged licences.

2(iv) On the above basis, FIR No. 220 of 2011 dated 15.7.2011 was registered under Sections 22(3), 27(c), 28 A and 36AC of the Drugs and Cosmetics Act, 1940 at Police Station, Paonta Sahib. Petitioner was granted bail in this FIR on 13.9.2011 under Section 438 Cr.P.C. by learned Sessions Judge, District Sirmour.

2(v) Since in terms of the applicable Act, the police had no jurisdiction, therefore, the FIR was sent to the concerned Drugs Inspector for instituting the complaint. Accordingly complaint No. 6-N/7 of 2014 under Sections 18(a)(i) readwith Sections 17, 17-B, 18(a)(vi), 18-B, 18(c) and 22(3) punishable under Section 27(c), 27(d), 28-A, 27(b)(ii) and 22(3) of the Drugs and Cosmetics Act, 1940 was instituted by the Health and Family Welfare Department, District Sirmour before the learned Special Judge-II, District Sirmour at Nahan on 3.1.2014. Three persons were made accused in this complaint i.e. Shri Atul Kumar Gupta (accused No. 1), the bail petitioner

(accused No. 2) and Shri Anil Behal (father of the bail petitioner)(accused No. 3).

Petitioner was declared a proclaimed offender vide order dated 12.9.2019 passed in this complaint. He was arrested on 11.3.2021 from Gurgaon (Haryana). Ever since then he is in custody. By means of instant petition preferred under Section 439 of Code of Criminal Procedure, he has prayed for his enlargement on regular bail.

3. Heard learned counsel for the parties and also gone through the status reports as well as documents placed on record by the petitioner. Relevant facts, as they come out from cumulative reading of the documents are that :-

3(i) Admittedly, the petitioner was granted anticipatory bail under Section 438 Cr.P.C. on 13.9.2011 by the learned Sessions Judge, District Sirmour in FIR No. 220/2011.

3(ii) A complaint arising out of FIR No. 220/2011 was instituted by the Drugs Inspector, Nahan, District Sirmour on 3.1.2014 in the court of learned Special Judge-II, Sirmour at Nahan, which was registered on 20.2.2014 as 6-N/7 of 2014. Following position gives the gist of various orders passed in this complaint from time to time leading to petitioner being declared as proclaimed offender and his subsequent arrest on 11.3.2021:-

3(ii)(a) Order dated 25.11.2016 shows that learned trial Court had noticed the fact that correct address of the bail petitioner and his father was not filed. Accordingly, time was granted to the Drugs Inspector for furnishing the correct address of the petitioner. Further orders passed on 22.2.2017, 25.4.2017 and 1.7.2017 are all to the similar effect.

3(ii)(b) On 13.9.2017, bailable warrants were ordered to be issued against the petitioner on filing of his correct address by the Drugs Inspector. On similar lines, orders was passed on 13.11.2017, 5.3.2018, 7.5.2018, 9.7.2018 and 6.9.2018.

3(ii)(c) On 3.12.2018 after recording that the bail petitioner was not present, the learned trial Court issued non-bailable warrant against him.

3(ii)(d) Order dated 8.1.2019 states that non-bailable warrant ordered to be issued against the petitioner could not be sent for want of his correct address. Petitioner and his father (accused No. 3) were called again through non-bailable warrants to be executed through Superintendent of Police, CID, Nahan. The order passed on the next date i.e. 5.3.2019, records that the non-bailable warrants issued through CID were received back unexecuted for want of time. Therefore, fresh non-bailable warrants were ordered to be issued against the petitioner and his father through CID, Bharari. On 10.4.2019, it was noticed that non-bailable warrants issued to the petitioner and his father were received unserved for want of their correct address. Again, petitioner was called through issuance of fresh non-bailable warrant.

3(ii)(e) On 10.5.2019, the learned trial Court observed that non-bailable warrants issued against the petitioner and his father were received back unexecuted with the report that the accused persons had left the house about 8-9 years back. Despite noticing it, the learned trial Court expressed its satisfaction that there were reasons to believe that the petitioner and his father (accused No. 3) had absconded and concealed themselves. Therefore, proclamation was issued under Section 82 of Code of Criminal Procedure. The copy of the proclamation was ordered to be delivered to the Station House Officer, Police Station, Karol Bagh, New Delhi for further requisite action.

On 12.9.2019, the petitioner and his father were declared proclaimed offenders. The order reads as under:

> *"Serving Constable HHC Sunil Kumar No. 166 present who had gone to execute the proclamation against accused No. 2 Saurab Bhell and accused No. 3 Anil Bhell along with HHC Madan Singh No. 163. His statement is separately recorded. As per his statement, he and HHC Madan Singh affixed a copy of proclamation as per*

> *directions of this Court and despite of that accused No. 2 & 3 could not be traced. His report is Ext. PX under red circle-A his signature is there. Perusal of the report made by HHC Sunil Kumar Ext.PX, I am satisfied that accused No. 2 Saurab Bhell and accused No. 3 Anil Bhell are evading the service of this Court intentionally and, therefore, they are declared as proclaimed offenders. A copy of this order be sent to S.P. Nahan to enter the name of the accused No. 2 & 3 in the Register of the proclaimed offenders and a copy of this order be also sent to SHO Police Station, Karol Bagh, New Delhi in whose jurisdiction accused persons are residing for taking necessary action. Now this case be listed for consideration on charge against accused No. 1 on 4.11.2019."*

The petitioner was finally arrested by the police on 11.3.2021 and produced before the learned trial court on 12.3.2021. It is in this background that the present petition has been preferred for grant of regular bail.

4. Learned Senior counsel for the petitioner contended that the petitioner was enlarged on bail by the learned Sessions Judge, District Sirmour on 13.9.2011. Therefore even assuming for the sake of arguments that the petitioner had absconded or chosen to conceal himself to avoid the execution of the warrant then also the procedure as contemplated under Section 446 of Code of Criminal Procedure was required to be followed first and not under Section 82 Cr.P.C. Learned senior counsel further contended that the order sheets of the complaint case, placed on record by the petitioner, make it amply clear that there was no deliberate move on part of the petitioner to evade service. Rather fault lay with the Drugs Inspector who despite repeated opportunities could not furnish petitioner's correct address. Petitioner was neither served with the complaint case nor was he aware about the pendency of the same. It had been 8-9 years since the petitioner left the

premises described as his address in the complaint instituted by the Drugs Inspector. Therefore, petitioner deserves to be enlarged on bail.

5(i) Section 446 of Code of Criminal Procedure describes the procedure to be followed when bond gets forfeited. The Section reads as under :

> "*446. Procedure when bond has been forfeited.—(1) Where a bond under this Code is for appearance, or for production of property, before a Court and it is proved to the satisfaction of that Court, or of any Court to which the case has subsequently been transferred, that the bond has been forfeited,*
> *or where, in respect of any other bond under this Code, it is proved to the satisfaction of the Court by which the bond was taken, or of any Court to which the case has subsequently been transferred, or of the Court of any Magistrate of the first class, that the bond has been forfeited,*
> *the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof or to show cause why it should not be paid.*
> *Explanation.—A condition in a bond for appearance, or for production of property, before a Court shall be construed as including a condition for appearance, or as the case may be, for production of property, before any Court to which the case may subsequently be transferred.*
> *(2) If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same as if such penalty were a fine imposed by it under this Code:*
> *[Provided that where such penalty is not paid and cannot be recovered in the manner aforesaid, the person so bound as surety shall be liable, by order of the Court ordering the recovery of the penalty, to imprisonment in civil jail for a term which may extend to six months.]*

(3) The Court may, 2 [after recording its reasons for doing so], remit any portion of the penalty mentioned and enforce payment in part only.
(4) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond.
(5) Where any person who has furnished security under section 106 or section 117 or section 360 is convicted of an offence the commission of which constitutes a breach of the conditions of his bond, or of a bond executed in lieu of his bond under section 448, a certified copy of the judgment of the Court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety or sureties, and, if such certified copy is so used, the Court shall presume that such offence was committed by him unless the contrary is proved."

In the instant case, petitioner was granted bail on 13.9.2011. The bail was granted in relation to FIR No. 220/2011, which led to registration to complaint No. 6-N/7 of 2014 in the court of learned Special Judge-II, District Sirmour. The procedure prescribed under section 446 Cr.P.C. was not followed by the learned trial court.

5(ii) Proclamation was issued against the petitioner under Section 82 Cr.P.C. It will be apposite to extract relevant portion of the Section hereinafter:

"82. Proclamation for person absconding.—(1) If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.
(2) The proclamation shall be published as follows:—
……."

A bare perusal of the extracted Section makes it evident that the proclamation can be issued where the person against whom the warrant has been issued has absconded or is concealing himself to avoid the execution of the warrant.

In ***2008 Criminal Law Journal 3561***, titled ***Rohit Kumar*** v. ***State of NCT Delhi & Anr.***, it has been held that before declaring a person as proclaimed offender the court concerned must be satisfied that the person has absconded or has concealed himself. Relevant para from the judgment is as under:

> *"18. The expression 'reason to believe' occurring in Section 82 Cr.P.C. suggests that the Court must be subjectively satisfied that the person has absconded or has concealed himself on the materials before him. The term 'absconded' is not to be understood as implying necessarily that a person leaves the place in which he is. Its etymological and its ordinary sense is to hide oneself. Further, under* Section 82 *Cr.P.C. the Court issuing proclamation must record its satisfaction that accused had 'absconded' or 'concealed himself.'*
>
> *18A. The three Clauses (a), (b), and (c) of Sub-section (2) (i) of Section 82 Cr.P.C. are conjuctive and not disjunctive. The factum of valid publication depends on the satisfaction of each of these clauses. Clause (ii) of Sub-section (2) is optional; it is not an alternative to Clause (1). The latter clause is mandatory."*

Further in ***1994 CRI. L. J. 1783***, titled ***Devendra Singh Negi alisa Debu*** v. ***State of U.P. and another***, it was held that every person who is not immediately available cannot be characterized as an absconder. The court has to record its satisfaction the accused 'has absconded or is concealing himself' so warrant cannot be executed. Para-14 of the judgment reads as under:

> *"14. The words, "has absconded or is concealing himself so that such warrant cannot be executed" in Section 82 of the Code are significant. Every person who is not immediately available cannot be characterised as an absconder. The Court has to record its satisfaction that the accused has absconded or is concealing in order to avoid execution of the warrant. The provisions of Section 82 are mandatory and are to be construed strictly. Section 82 requires that the court must, in the first instance, issue a warrant and it must put down its reasons for believing that the accused is absconding or concealing himself. My view expressed above is supported by a Division Bench case of Dip Narain Singh v. State of Bihar, 1981 Cri LJ 1672 (Patna). Thus, in every case where the warrant is not executed, resort cannot be had to Section 82 and it may be necessary to examine the officer concerned who had gone to execute the warrant and to the measures adopted by him to serve the same."*

5(iii) In the instant case, subsequent to the registration of the FIR, the premises of petitioner's proprietary firm i.e. M/s Soliance Pharma Products, Paonta Sahib, District Sirmour were sealed by the police. In the complaint filed by the Drugs Inspector before the learned Special Judge, District Sirmour, the address of the petitioner and his father was reflected as :

> *'210 D.R. Chambers, 12/56, D.B. Gupta Road, Karol Bagh, New Delhi, Proprietor in M/s Soliance Pharma Products, Village Surajpur, Tehsil Paonta Sahib, Disttt. Sirmour, H.P.'*

The address of Karol Bagh, New Delhi given in the complaint was not the correct address of the petitioner and his father. This contention of the petitioner is supported by the reports of process serving agency of the learned trial Court. In terms of these reports, the petitioner and his father had left the premises at Karol Bagh about 8 to 9 years ago. Therefore, there

was no point in sending summons/bailable warrants/non bailable warrants to the petitioner repeatedly on an address at which they did not reside. It is not the case of the respondent that the petitioner was aware about pendency of the complaint before the learned Special Judge, District Sirmour. Since the address in the complaint was not correct, therefore, service could not be effected upon him and warrants could not be executed. Learned trial Court has also repeatedly observed in its orders that address of the petitioner and his father supplied by the respondent was not correct. Repeated directions were issued to the respondent to supply correct address of accused No. 2 and 3 i.e. of petitioner and his father. Respondent however failed to do so. Despite the fact that correct address of the petitioner was not supplied, learned trial court proceeded to issue bailable warrants and thereafter non-bailable warrants against the petitioner and his father. Accused No. 3-father of the petitioner died in March 2019. It is in this manner when the bailable and non-bailable warrants remained unexecuted that the proceedings under Section 82 Cr.P.C. were resorted to and the petitioner was eventually declared a proclaimed offender on 12.9.2019 and subsequently, arrested on that count on 11.3.2021. Submission of learned senior counsel carry force that the petitioner was not aware about the complaint pending before the learned Special Judge and that had the respondent had taken steps for furnishing petitioner's correct address, then there would have been no occasion for him to remain absent from these proceedings or to avoid execution of warrants issued against him.

Learned senior counsel for the petitioner has also placed on record and referred to the some orders passed in a related proceeding arising out of the same acts in question (as are involved in the instant FIR & complaint), pending before the learned Special Designated court at Ambala (Haryana) and submitted that the petitioner is regularly attending these proceedings. It was also stated that Mr. Atul Gupta (accused No. 1) was also

an accused in these proceedings going on at Ambala before the learned Special Designated court, however, he also did not inform the petitioner about pendency of the complaint before learned Special Judge District Sirmour at Nahan. Petitioner would have attended the complaint proceedings at Nahan also, had he known about its pendency.

Considering the above facts, it cannot be said that there was any willful, deliberate or intentional effort on part of the petitioner to avoid his presence before the learned Special Judge or to avoid execution of warrants.

5(iv) In light of the settled legal position coupled with the facts of the case, it is crystal clear that the petitioner was enlarged on bail on 13.9.2011 by the learned Sessions Judge, district Sirmour. The complaint filed by the Drugs Inspector was registered in the court of learned Special Judge on 20.2.2014. In this complaint, the address of the petitioner and his father was reflected as *'210 D.R. Chambers, 12/56, D.B. Gupta Road, Karol Bagh, New Delhi'*. It had come to the notice of learned trial Court, as is apparent from the perusal of various orders passed by it, that the petitioner and his father were not residing at the address given in the complaint. It is for this reason that repeated opportunities were granted to the Drugs Inspector for furnishing correct addresses of accused No. 2(petitioner) and accused No. 3 (petitioner's father-now expired). However, the correct addresses were not furnished by the Drugs Inspector. In a mechanical manner, the bailable warrants and thereafter non bailable warrants were ordered to be executed against the petitioner and his father on the same address. Since the address given was wrong, therefore, these warrants could not be executed and were always returned back unexecuted for want of correct address. Surprisingly, despite this, the proceeding under Section 82 Cr.P.C. was initiated after recording the satisfaction that the petitioner and his father were deliberately evading the service and execution of warrants. This observation was not justified on the face of the various orders passed by the learned court. It was also lost sight

of the fact that the petitioner had been earlier granted bail by the learned Sessions Judge on 13.9.2011 and he had furnished the surety bond in lieu of that.

Therefore, in my opinion, the petitioner has made out a case for enlargement on bail. Accordingly, instant petition is allowed. Petitioner is ordered to be released on bail on his furnishing personal bond in the sum of Rs.75,000/- with one local surety in the like amount to the satisfaction of learned Special Judge-II, Sirmour district at Nahan having jurisdiction over the concerned Police Station, subject to the following conditions:

(i) Petitioner is directed to join the investigation of the case as and when called for by the Investigating Officer in accordance with law. He shall fully cooperate the Investigating Officer and will appear before him in the concerned police station as and when called in accordance with law;

(ii) Petitioner shall not tamper with the evidence or hamper the investigation in any manner whatsoever:

(iii) Petitioner will not leave India without prior permission of the Court.

(iv) Petitioner shall not make any inducement, threat or promise, directly or indirectly, to the investigating officer or any person acquainted with the facts of the case to dissuade him/her from disclosing such facts to the Court or any Police Officer;

(v) Petitioner shall attend the trial on every hearing, unless exempted in accordance with law.

(vi) Petitioner shall inform the Station House Officer of the concerned police station about his place of residence during bail and trial. Any change in the same shall also be communicated within two weeks thereafter. Petitioner shall furnish details of his Aadhar Card, Telephone Number, E-mail, PAN Card, Bank Account Number, if any.

In case of violation of any of the terms & conditions of the bail, respondent-State shall be at liberty to move appropriate application for cancellation of the bail. It is made clear that observations made above are only for the purpose of adjudication of instant bail petition and shall not be construed as an opinion on the merits of the matter. Learned trial Court shall decide the matter without being influenced by above observations.

With the aforesaid observations, the present petition stands disposed of, so also the pending miscellaneous applications, if any.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Gitam Ram and another …Petitioners.

Versus

State of H.P. and another …Respondents.

CWP No. 2663 of 2021
Decided on: 28.04.2021

The petition for quashing FIR No. 2/2020 dated 18.1.2020 lodged against the petitioners under section 420, 406 & 120-B IPC on the ground that once the proceedings under section 138 N. I Act are initiated and pending against the petitioners, therefore in no event FIR for same offence i.e dishonor of cheque could have been registered against the petitioners- Held- The mere fact that in addition to complaint under section 138 N. I. Act criminal cases have now been filed against the petitioners cannot itself be a ground for quashing FIR as the remedy under section 138 NI Act is in addition to the remedy available to a complainant under the provision of IPC or before the Civil Court- Petition dismissed. Title: Gitam Ram and another vs. State of H.P. and another **(D.B.)** Page-309

Cases referred:

Dashrath Rupsingh Rathod vs. State of Maharashtra and another (2014) 9 SCC 129;

For the Petitioners: Mr. Rajeshwar Thakur, Advocate.

For the Respondents: Mr. Ashok Sharma, Advocate General, with Mr. Rajinder Dogra, Sr. Addl. A.G., Mr. Vinod Thakur, Addl. A.G. and Mr. J.S. Guleria, Dy. A.G.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Justice Tarlok Singh Chauhan, J.(Oral)

CWP No. 2663 of 2021

Notice. Mr. J. S. Guleria, learned Deputy Advocate General appears and waives service of notice on behalf of the respondents.

2. With the consent of the parties, the instant petition is taken up for final hearing.

3. This petition has been filed by the petitioners for the grant of following substantive relief:

> *"It is, therefore, most respectfully prayed that this petition may kindly be allowed and FIR No. 2/2020, dated 18.01.2020, lodged against the petitioners under Sections 420, 406 and 120-B of the Indian Penal Code in Police Station of Additional S.P. CID, Bharari, Shimla-9, may kindly be quashed and set-aside and for this act of kindness your humble petitioners as in duty bound shall ever pray."*

4. It is vehemently argued by Mr. Rajeshwar Thakur, learned counsel for the petitioners that once the proceedings under Section 138 of the Negotiable Instruments Act (for short NI Act) are initiated and are already pending against the petitioners, therefore, in no event, could the respondents

have registered a case for the same offence i.e. dishonour of cheque, against the petitioners under Sections 420, 406 and 120-B of IPC.

5. On the other hand, Mr. Ashok Sharma, learned Advocate General would argue that the petitioners are habitual offenders inasmuch as there are other criminal cases registered against the petitioners.

6. In addition to this, petitioner No.2 is otherwise fugitive, who despite the rejection of his bail application on the ground of non-participation in the investigation vide order dated 09.12.2020 vide Cr.MP(M) No. 207 of 2020 titled Najesh Chand vs. State of H.P. has till date not joined the investigation. As regards petitioner No.1, his bail application is stated to be pending consideration for today.

7. We have heard learned counsel for the parties and have gone through the material placed on record.

8. At the outset, it needs to be observed that even though the petitioners are seeking quashing of FIR, but for some strange reasons, the petitioners have not even annexed a copy thereof and, therefore, on this score alone, the petition is liable to be dismissed.

9. That apart, the mere fact that in addition to the complaint under Section 138 of the NI Act, criminal cases have now been filed against the petitioners, as aforesaid, cannot itself be a ground for quashing the FIR as the remedy under Section 138 of the NI Act is in addition to the remedy available to a complainant under the provisions of the IPC or for that matter before the Civil Court.

10. In drawing such a conclusion, we are duly supported by the decision rendered by three Judges of the Hon'ble Supreme Court in ***Dashrath Rupsingh Rathod*** vs**. *State of Maharashtra and another (2014) 9 SCC 129,*** more particularly, the findings recorded in para 20 of the judgment, which reads as under:

"20. We feel compelled to reiterate our empathy with a payee who has been duped or deluded by a swindler into accepting a cheque as consideration for delivery of any of his property; or because of the receipt of a cheque has induced the payee to omit to do anything resulting in some damage to the payee. The relief introduced by Section 138 of the NI Act is in addition to the contemplations in IPC. It is still open to such a payee recipient of a dishonoured cheque to lodge a first information report with the police or file a complaint directly before the Magistrate concerned. If the payee succeeds in establishing that the inducement for accepting a cheque which subsequently bounced had occurred where he resides or ordinarily transacts business, he will not have to suffer the travails of journeying to the place where the cheque has been dishonoured. All remedies under IPC and CrPC are available to such a payee if he chooses to pursue this course of action, rather than a complaint under Section 138 of the NI Act. And of course, he can always file a suit for recovery wherever the cause of action arises dependent on his choosing."

11. In view of the aforesaid discussion, we find no merit in the instant petition and the same is accordingly dismissed, so also the pending application(s), if any.

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

Sadiq Mohd. ....appellant

Versus

Land Acquisition ... respondents.

FAO No. 109/2020
Decided on: 27.4.2021

The appeal against the order vide which Ld ADJ had dismissed the application under order 39 Rule 1 & 2 IPC for restraining LAO (NHAI) from releasing entire compensation amount in lieu of acquired structure in favour of respondent NO.2 – Held- if any dispute as to the apportionment of the amount or to any person to whom the same is payable, the competent

authority shall refer the dispute to the decision of Principal Civil Court of original jurisdiction- suit filed by petitioners on their own was not maintainable in view of section 3 (H) (4) National Highways Act – The suit filed by appellant was not maintainable under section 3 (H) (4) of National Highways Act & dismissed- Direction issued to respondent No 1 to decide the objections preferred by the appellant in respect of his entitlement to receive half share in compensation amount determined in the award towards acquisition of structure with in four weeks. till the decision, the amount of compensation in question determined under the structure, award shall not be released.

Cases referred:

Gian Dass and others Vs. Daulat Ram and others, HLJ 2017 (HP) 1565;

For the appellant: Mr. Jagan Nath, Advocate.

For respondents: Mr. Anil Jaswal, Additional Advocate General with Mr. Manoj Bagga, AssistantAdvocate General, for respondent No.1.

Mr. Subash Chander, Advocate,forrespondent No.2.

(Through video conferencing)

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J *(oral)*

An application filed by the plaintiff under Order 39 Rule 1 and 2 of the Code of Civil Procedure seeking to restrain respondent No.1/Land Acquisition Officer (NHAI) from releasing entire compensation amount in lieu of acquired structure in favour of respondent No.2 has been dismissed by learned Additional District Judge Sundarnagar, District Mandi, H.P. Aggrieved, instant appeal has been preferred by the plaintiff.

2(i) Respondent No.1 acquired land comprised in Khasra No. 457 measuring 00-09-10 bighas, situated in Mohal Thala, Tehsil Sundernagar, District Mandi, H.P., for Four Laning of the National Highway. Award in lieu of acquisition of this land was passed by respondent No.1 on 2.5.2016. Appellant and respondent No.2, were held entitled to the awarded amount in equal shares. Both of them have admittedly received their shares in the awarded amount.

2(ii) The award for the acquisition of structure standing over the land was separately announced on 27.1.2017. Rs. 59,04,719/- was determined as compensation payable for the house/structure standing over the land. Respondent No.1 proceeded to pay the compensation in lieu of structure in favour of respondent No.2 in view of his alleged possession of the acquired structure. This was objected by appellant on the ground that he and respondent No.2 had jointly purchased the land and the structure, therefore, both of them are entitled to half share each in the compensation amount awarded not only for the acquired land butfor the acquired structure as well.

2(iii) The plaintiff/appellant filed a civil suit for Permanent Prohibitory and Mandatory Injunction under Sections 37, 38 and 39 of the Specific Relief Act before the learned District Judge Mandi on 26.05.2018. Relief clause of the plaint runs as under:-

> *"It is, therefore respectfully prayed that a decree for permanent prohibitory injunction be also passed against the defendant No.1 not to release the whole amount of compensation pertaining to house in favour of defendant No.2 in any manner whatsoever, that a decree of mandatory injunction may also be passed in favour of the plaintiff and against the defendants by directing them to pay the 50% of the total compensation amount alongwith the interest to the plaintiff without and demur or any other relief which this Ld. Court deems fit under the*

circumstances of the case may also be granted in favour of the plaintiff and against the defendants in the interest of justice."

Alongwith the plaint, an application under Order 39 Rule 1 & 2 read with Section 151 of the Code of Civil Procedure was also filed praying to restrain respondent No.1 from releasing the entire compensation of the structure in favour of respondent No.2 till the final disposal of the suit.

2(iv) Respondent No.2 in his reply to the application under Order 39 Rule 1 & 2 disputed the entitlement of the appellant for receiving the compensation amount, be it for land or for structure. His case was that the land and the house standing on it were in exclusive ownership and possession of respondent No.2. It was further pleaded that the appellant had given up his share over the land and structure in question in favour of respondent No.2 in lieu of share of respondent No.2 in another land and structure situated in Sundernagar, District Mandi.

Respondent No.1 in its separate reply filed to the application admitted that a dispute had arisen between the appellant and respondent No.2 with respect to release of the compensation amount in lieu of acquisition of the structure standing over the land. The stand taken by respondent No.1 was that in view of the objections raised by the appellant before respondent No.1 as well as considering the pendency of the civil suit filed by the appellant, the compensation amount determined in the award for the structure, had not been released and was withheld. Respondent No.1 further submitted that compensation amount would be disbursed as per the order of the Court. Relevant portions from the reply of respondent No.1 read as under:-

"(a) As regards the amount of compensation of the house which was assessed to Rs.59.04.719/- vide Award No.32/1 dated 27.01.2017 has been announced. The Plaintiff/Applicant objected the payment of whole of the compensation amount to

defendant/respondent No.2 and he had presented the copy of sale deed and mutations as referred in para No.2 of the plaint.

(b) Keeping in view his objection and pending civil suit regarding payment of the compensation of the house, the payment has been with hold to avoid further litigation. The amount of compensation will be paid as per decision to this Hon'ble Court.

(c) However, it is submitted that on the objection of the plaintiff/Applicant the payment of compensation of house has been with hold by the replying Defendant.

(d) The contents of para No.6 are admitted to the extent that compensation with regard to structure is yet to be released. Rest of the contents of para are denied being wrong. It is specifically denied that replying Defendant/respondent is going to release the amount of compensation pertaining to house in favour of Defendant/Respondent No.2. Further it is submitted that payment of compensation has been with hold, which would be released as per decision of the Ld. Court. Rest of the contents of para are denied being wrong.

(e) That content of this para are admitted to extent that plaintiff requested to release the ½ share in his favour. Rest of the content of this para is denied being wrong. However, it is submitted that compensation amount would be dispersed as per orders of Hon'ble Court.

(f) However, it is already submitted that compensation amount is with held and would only be dispersed as per directions of the Honorable court, therefore, question of irreparable loss to applicant does not arise."

2(v) Learned Trial Court dismissed the application vide order dated 13.3.2020 holding that:- **(a)** Once the award has been announced by the competent authority and the apportionment had been suggested by it then the Civil Court certainly cannot sit as an appellate Court to examine the legality of the same in a simple suit for injunction. **(b)** Once the award has been announced by the competent authority after making all the inquiries, the presumption attached to the revenue

entries stands rebutted and the award has to prevail over it. In case a person is aggrieved by the award and the manner of apportionment of the compensation amount then he has to file a suit for declaration of his status and entitlement. Relief of injunction can be prayed as a consequential relief and not as a primary relief. In the instant case the petitioner had not set up any claim for declaration, therefore, suit in present form was not maintainable, so long as declaratory relief was not claimed. **(c)** under the provisions of Section 3H(4) of the National Highway Act, 1956, it is for the competent authority to refer a dispute in respect of apportionment of the amount to the principal Civil Court of original jurisdiction. Filing of the civil suit by the aggrieved persons is not an appropriate remedy. **(d)** In the instant case, question raised pertained to the apportionment of money. No immovable property was subject matter of the litigation. Since loss of money can be adequately compensated, therefore ingredients for grant of temporary injunction were missing in the case. For the aforesaid reasons, application filed by the petitioner under Order 39 Rule 1 and 2 was dismissed. This order has been assailed by means of instant appeal.

3. I have heard learned counsel for the parties and gonethrough the documents appended with the appeal.

4(i) Section 3H(4) of the National Highways Act reads as under:-

> *"(4) If any dispute arises as to the apportionment of the amount or any part thereof or to any person to whom the same or any part thereof is payable, the competent authority shall refer the dispute to the decision of the Principal Civil Court of original jurisdiction within the limits of whose jurisdiction the land is situated."*

4(ii) The land in question has been acquired by respondent No.1 for Four Laning of the National Highway. Compensation amount determined for acquisition of the land has been released in equal shares in favour of appellant and respondent No.2. Release of half of compensation amount in favour of the appellant towards acquisition of land has not been objected by respondent No.2 despite his stand that the appellant was not entitled to the compensation in lieu of acquisition of land and structure existing over the land in question.

4(iii) There is no dispute between the parties that revenue documents as they stand today reflect the appellant and respondent No.2 as co-owners in possession with equal shares over the land/house in question.

4(iv) The appellant has claimed ½ share in the structure award passed by respondent No.1 on 27.1.2017. Respondent No.1 though was proceeding to release entire compensation announced under the structure award, in favour of respondent No.2 in view of his alleged exclusive possession of the structure, however, at present, admittedly,in view of the objections preferred by the appellant, the release of the award amount in lieu of the acquired structure has been withheld by respondent No.1 pending decision of the Civil Court. During hearing of the case, learned Additional Advocate General submitted that objections of the appellant against the release of the compensation amount awarded in lieu of acquisition of structure were received by respondent No.1, however, the same were not decided and further that compensation amount determined in the award towards acquired structure has not been released in favour of either of private parties till date.

4(v) In latest ***HLJ 2017 (HP) 1565*** titled ***Gian Dass and others Vs. Daulat Ram and others***, a coordinate Bench of this Court after noticing provisions of Section 3H(4) of the National Highways Act,

has held that if any dispute as to the apportionment of the amount or any part thereof or to any person to whom the same or any part thereof is payable, then the competent authority shall refer the dispute to the decision of the Principal Civil Court of original jurisdiction within the limits of whose jurisdiction the land is situated. It was further held that the suit filed by the petitioners therein on their own was not maintainable in view of the provisions of Section 3H(4) of National Highways Act 1956. In the instant case also the civil suit was instituted by the appellant on his own before the Court of learned Additional District Judge. The suit was not maintainable under the provisions of Section 3H(4) of the National Highways Act, hence the same is dismissed as such. However in the facts and circumstances of the case, where admittedly, the objections preferred by the appellant in respect of his entitlement to receive half share in the compensation amount determined in the award towards acquisition of structure standing over the land in question, are admittedly pending before respondent No.1, then, there shall be a direction to respondent No.1 to decide these objections in terms of provisions of Section 3H of the National Highways Act and in accordance with law within a period of four weeks from today. Till such decision, the amount of compensation in question determined under the structure award shall not be released by respondent No.1 either in favour of the appellant or respondent No.2. It goes without saying that respondent No.1/competent authority shall decide the objections without being influenced by any observations made above.

With these observations and directions, the instant appeal stands disposed of, so also the pending application(s), if any.

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

1. ***Cr.M.P. Nos. 1183 of 2018, 413 of 2019, 686 of 2020, 1696 of 2020 in Cr.MMO No. 191 of 2016***

Smt. Sangita Sharma & Another. ...Petitioners.

Versus

Sh. Rohit Kalia. ...Respondent.

2. ***COPC No. 81 of 2019***

Sh. Rohit Kaila. ...Petitioner

Versus

Smt.Sangita Sharma. ...Respondent

Cr.M.P. Nos. 1183 of 2018, 413 of 2019, 686 of 2020, 1696 of 2020 in Cr.MMO No. 191 of 2016 along with COPC No. 81 of 2019
Reserved on: 26.2.2021
Date of decision: 24.5.2021

Marriage of parties solemnized on 25.4.2012- couple was blessed with Son on 28.10.2014- for bitterness in relations for so many reasons, Parties had initiated various proceedings under various enactments against each other also involving other family members - In Mediation- Parties agreed not to pursue proceedings in Cr M O No 191 of 2016 and other pending matters between them- With further undertaking in H.M. Petition before ld district judge decree for divorce with mutual consent will be passed on basis of settlement arrived at between the parties and other proceedings shall be withdrawn and custody of son will remain with mother and father to deposit Rs. 3.50 lacs in the name of son- Name of son be rectified in Aadhar Card as Yuven Kalia @ Advik Sharma- Husband filed Cr, M .P with averments that wife has not taken steps for correcting name in Aadhar Card as compromised and mother is not allowing him visiting rights for non deposit of amount- Pending application father deposited amount in registry of Hon'ble HC – Cr.M.P filed by father of weekend Custody of Child and to know location of Child- Another CMPP to permit the father to have electronic contact with son

during lockdown in 2020- Contempt petition was also filed that of father was not allowed visiting rights as agreed between parties- Considering the entire facts and circumstance Child Access and Custody guidelines and parenting plan, observation of hon'ble supreme court All the applications and contempt petitions are disposed of making provision of visiting rights - Mother shall not conceal whereabouts of minor -contempt petition is closed to maintain and continue peaceful and harmonious working arrangement between them.

For the Petitioners: *Mr.Y.P. Sood, Advocate, in Cr.MMO No. 191 of 2016, for non-applicants in Cr.M.P. No. 686 of 2020 and Cr.M.P. No. 1696 of 2020 and for the respondent in COPC No. 81 of 2019.*

For the Respondent: *Mr.J.L. Bhardwaj, Advocate, for the respondent in Cr.MMO No. 191 of 2016, for applicant in Cr.MP No. 686 of 2020 and Cr.MP No. 1696 of 2020 and for the petitioner in COPC No. 81 of 2019.*

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Contesting parties herein are husband and wife, who are parents of one son and hereinafter, for convenience, they shall be referred as husband and wife or father and mother as the reference may be.

2. Undisputed facts in present case are that marriage between Rohit Kalia (husband) and Sangita Sharma (wife) was solemnized on 25.4.2012 in accordance with Hindu rites and rituals. Marital life of couple was neither healthy nor happy, however out of wedlock, couple was blessed with son 'Yuvan Kalias alias Aadvik Sharma' on 28.10.2014, who, as such, now is about 6 and ½ years old.

3. For bitterness in relations for so many reasons, husband and wife had initiated various proceedings under various enactments against each other but involving other family members also.

4. Wife had preferred complaint under Section 12 of Protection of Women from Domestic Violence Act, complaint converted into FIR No. 284 of 2015 under Sections 406, 498-A IPC, registered in Police Station, Haroli, petition for maintenance under Section 125 Cr.P.C. and a petition for divorce under Section 13(1) (ia) and 13 (1) (ib) of Hindu Marriage Act for dissolution of marriage in Courts at Una. Whereas husband had also initiated a civil suit against wife and a petition under Section 9 of Hindu Marriage Act for restitution of conjugal rights in Civil Court, Chandigarh and also a petition under Guardian and Wards Act, 1890 at Una for custody of child and a Contempt Petition No. 332 of 2017, titled Rohit Kalia Vs. Sangita Sharma in this High Court.

5. In petition filed under Section 125 Cr.P.C., learned Judicial Magistrate had awarded interim maintenance to wife and child amounting to `10,000/- each, which was reduced by learned Sessions Judge in Cr. Revision No. 62 of 2015, preferred by husband. Against reduction of interim maintenance, wife had approached this Court by way of Cr.MMO No. 191 of 2016.

6. Pending adjudication Cr.MMO No. 191 of 2016, matter was referred for mediation, and during mediation proceedings husband and wife had agreed not to pursue the issue involved in Cr.MMO No. 191 of 2016 and also other matters pending intra them and it was agreed to close all the matters pending in various Courts against each other with further understanding that in HMA No. 166 of 2017 pending in the Court of District Judge, Una, titled Sangita Sharma Vs. Rohit Kalia decree for mutual divorce will be passed between the parties by this High Court on the basis of settlement arrived at and all other matters referred supra and also appeals, revisions, applications etc. arising thereto shall be deemed to have been withdrawn without any further consequence and adjudication as a result of

compromise and parties were granted liberty to place on record the compromise in various Courts.

7. With reference to custody of minor child (son) of parties, it has been agreed that his custody will continue to remain with wife Sangita Sharma (mother of child), who has voluntarily, out of her own will, has agreed and undertaken to bear all legal obligation for maintenance, upbringing and ensuring the welfare of minor till he attains the age of majority without claiming any financial and other contribution of any kind from the husband (father of son) or his parents or any other relatives, except as agreed in terms of settlement. As per settlement husband (father) has undertaken to deposit an amount of `3,50,000/- in the name of minor child identifying him as Yuvan Kalia alias Aadvik Sharma, by way of Fixed Deposit Receipt which shall not be withdrawn/encashed till the minor son attains the age of majority, i.e. 18 years. However, the periodical interest earned from the said FDR will be released to wife (mother) Ms.Sangita Sharma for utilization thereof exclusively on the welfare and upbringing of child and on attaining age of majority, son will be entitled to encash and withdraw the amount from the concerned bank with entitlement to use and utilize the same at his own discretion.

8. Clauses 9 and 10 of terms and conditions of settlement deal with visitation rights of non-custodial parent and in clause 9 it has been agreed that father of child will have visitation rights to meet his minor child on second and fourth Saturdays and Sundays of every month at 2:30 P.M. on Saturdays and 11:00 A.M. on Sundays for a duration of 2½ hours and the husband will be at liberty to exercise such rights singly or jointly with his parents, but in absence and to the exclusion of mother Sangita Sharma, her parents and all her relatives for a duration of 1 hour and the child, if taken to any other place during said 1 hour, shall have to be handed over back safely to the custody of mother and/or her parents, whosoever brings the child to the appointed location mentioned in this clause.

9. In clause 10 of settlement, it has been re-iterated and accepted between the parties that right of visitation 4 times in a month, as above, is the absolute right created, which will not be altered for any reason, however, parties have been given liberty to approach the High Court of Himachal Pradesh for variation, alteration or modification of terms and conditions, mechanism and mode of exercising the right of visitation, including custody on account of legal disability of mother.

10. Besides above, it was also agreed that child/son of parties shall be known and identified by the name of 'Yuvan Kalia alias Aadvik Sharma' by recording it accordingly whereever so required as father has named him as 'Yuvan Kalia', whereas mother has named him as 'Aadvik Sharma'.

11. Cr.MMO No. 191 of 2016 has been disposed of in terms of settlement arrived at between the parties and the petition filed by wife being HMA No. 166 of 2017 has been ordered by the co-ordinate Bench of this Court vide order dated 30.8.2018, to be called to this Court for passing appropriate order therein, in terms of settlement arrived at between the parties.

12. In the meanwhile, after disposal of Cr.MMO No. 191 of 2016, husband, on 18.8.2018, has preferred Cr.M.P. No. 1183 of 2018 with averments that wife has not taken steps for correcting the name of child in Aadhar Card to reflect it as 'Yuvan Kalia alias Aadvik Sharma' and she is not handing over documents with corrected name, to the father of child, enabling him to deposit the amount in terms of settlement against complete correct name of the child, as agreed between the parties and also that mother of child is not permitting the father of child to exercise his right of visitation for non deposit of amount in Fixed Deposit Receipt as per terms of the settlement.

13. Pending adjudication this application, father has deposited `3,50,000/- in the Registry of this Court, which has been invested by the Registry in terms of settlement as recorded in order dated 16.11.2018 passed in Cr.M.P. No. 1183 of 2018, referred supra. On 4.1.2019, co-ordinate Bench

of this court had again directed to call for record of HMA Petition No. 166 of 2017 from the court of learned District Judge, Una for listing the same before appropriate Bench for passing appropriate orders in terms of settlement.

14. For tone and tenor of the order passed by co-ordinate Bench of this Court and also for terms and conditions of the settlement, petition HMA No. 166 of 2017, titled Sangita Sharma Vs. Rohit Kalia was to be transferred to High Court for passing appropriate order for dissolution of marriage of parties with mutual consent. Instead thereof record has been requisitioned and petition is alive and pending in the Court of learned District Judge, Una. Be that as it may, in terms of settlement arrived at between the parties and subsequent orders passed by co-ordinate bench of this Court, petition HMA No. 166 of 2017 is to be disposed of by passing a decree of dissolution of marriage between parties as agreed. Original side jurisdiction to decide such petition is with learned District Judge. Therefore, learned District Judge has to decide the HMA No. 166 of 2017 by treating it as a petition for mutual divorce as agreed by parties in amicable settlement.

15. With respect to updating the name of child in the Aadhar Card as 'Yuvan Kalia alias Aadvik Sharma', it has been pleaded on behalf of mother that despite making all out efforts by her, the concerned authority i.e. Aadhar Sampark Kendra, Unique Identification Authority of India (UIDAI), did not carry out correction on the ground that in the Date of Birth Certificate UID No. of son has already been mentioned and in the said certificate name of the son has been recorded as 'Yuvan Kalia alias Aadvik Sharma' and therefore, it is sufficient to establish that name of Aadvik Sharma is Yuvan Kalia alias Aadvik Sharma in the record and the same can be used for any other purpose. Husband has also placed on record certain documents claiming that correction in the name of a person in Aadhar Card is permissible two times as notified by the Government of India, Ministry of Electronics and IT Unique Identification Authority of India (Enrolment & Update Division) vide Office

Memoranda dated 24.9.2018, 7.2.2019 and 1.4.2019. Leaving rival claims of parties apart, to resolve the issue, wife (mother of the child) is directed to handover the original Aadhar Card, date of birth certificate and other relevant documents like bank passbook etc. to father of the child as directed herein after in this order.

16. An application Cr.M.P. No. 413 of 2019 has been filed in March, 2019 by father for weekend custody of child, right to attend Parent Teacher Meet, correction of name in Aadhar Card and right to know the location of child and his school in terms of Child Access & Custody Guidelines and Parenting Plan, which has been duly approved by this High Court.

17. Cr.M.P. No. 686 of 2020 has been filed in May, 2020 by father seeking direction to mother of the child, permitting the father to have electronic contact with minor child on his mobile as well as E-mail ID, during the period of complete lockdown in the year 2020. After lifting of restrictions of lockdown, father had again approached this Court by filing Cr.MP No. 1696 of 2020 seeking direction to mother to permit the father to meet his child as per visiting rights as agreed between the parties which is reflected in order dated 21.4.2018.

18. Contempt Petition No. 81 of 2019 has also been filed by father on the ground that in the month of April, 2019, father was not allowed to exercise his visitation rights to meet the minor child as agreed between the parties and thus mother is liable to be punished for contempt of Court for willful and intentional disobedience of undertaking given by her to the Court.

19. In response to the applications and Contempt Petition, the stand of mother is that she has utmost respect for the judicial system and cannot even think to disobey the order passed by the Court and she is regularly following directions of the Court, including the terms of settlement and regularly performing her part of performance and to substantiate her claim, she has also placed on record certain photographs.

20. Father has also placed on record certain photographs and has contended that photographs placed on record by mother are old one pertaining to period of November, 2018 and May, 2019 and has claimed that from the photographs placed on record by him, it is evident that mother is not allowing free access of the child to the father.

21. Learned counsel for the mother has also contended that prayers made with respect to visitation rights, beyond the scope of settlement, are not maintainable and father can exercise visitation rights in accordance with clause 9 of terms and conditions of settlement and not beyond that. Whereas, learned counsel for the father has submitted that as per clause 10 of settlement, parties have been given liberty to approach the High Court for variation, alteration or modification thereof.

22. No doubt clause 9 of settlement provides the terms in which visitation rights are to be exercised by the father and clause 10, in the beginning, provides that right of visitation for four times in a month as above is the absolute right granted, which will not be altered for any reason. But at the same time clause 10 also permits the parties to approach the Court for variation, alteration or modification of terms mechanism and mode of exercise the right of visitation including custody on account of legal disability of mother. On combined reading of terms and conditions contained in clauses 9 and 10, it can be undoubtedly inferred that right of visitation for four times in a month will not be altered for any reason, but the mode and manner in which the said right is to be exercised can be varied, altered or modified. Therefore, in my opinion the terms and conditions to exercise visitation rights contained in clause 9 can be varied, altered and modified, but frequency of visitation cannot be less than four times in a month as it has been termed as an absolute right granted in favour of father and both parties have right to approach the Court for variation, alteration or modification of terms, as provided in clause 10 of the settlement.

23. In Child Access and Custody Guidelines and Parenting Plan, drafted by Child Rights Foundation NGO, approved by this High Court in the year 2014 and communicated to all District and Sessions Judges to enforce these recommendations in their respective divisions, in Section 31, it has been observed as under:-

> *"OVER NIGHT ACCESS: Court's are under obligation to consider the child spending equal time, or substantial and significant time, with each parent. In making a parenting order the court 'must consider' making orders that the child spend equal time, or if not equal then substantial and significant time, with each parent. 'Substantial and significant time' is defined to mean, essentially, weekdays and overnight weekends and holidays, times that allow the parent to be involved in the child's daily routine as well as occasions and events that are of particular significance to the child or the parent child to maintain or consolidate a secure attachment with a parent whose behavior is oriented only to 'visiting' rather than 'care-giving'.*
>
> - *Children have the right to know and be cared for by both their parents, regardless of whether their parents are married, separated, divorced, have never married or have never lived together; and*
> - *Children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other immediate family members & relatives); and*
> - *Children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).*
>
> *Over Night Access at home of the non-custodial parent should be encouraged at an early stage so that the children have a close and continuing relationship and get the love, affection of not only parents but also of grandparents and other immediate family members like uncle, aunties, cousins etc. The healthy emotional development of children depends upon their early*

experience of a continuous, emotionally available care-giving relationship, through which they are able to form an organized attachment, and to develop their human capacities for thought and relationships essentially.

Children have their right to childhood of hopeful existence free of exploitations, neglect. Children need constant support system as well as love, hope and encouragement, all these things and more are required in order to experience childhood to the fullest and to eventually develop into a healthy, capable adult for the full and hormonal development of his or her personality children should grow up in a family environment in an atmosphere of happiness, love and understanding which is very important for their overall growth and well being. The children should be fully prepared to live life in society, in the spirit, dignity tolerance, freedom, equality and solidarity. However, young children are subjected to exploitation especially in a broken marriage where the court has to intervene to protect the rights of the child. Children have to be ensured that their right to parental access, right to quality of life, right to be cared for, and right to freedom of expression is not compromised and children get love and affection from both parents and grandparents and immediate family members. They should have a sense of belonging to a healthy family environment maintaining their heritage so that the genealogy of the child is not lost after attaining adulthood and they are able to be linked with their ancestors. Overnight access should, therefore, be encouraged at an early stage."

24. Section 30 of these Guidelines also provides that excess schedule for access for the child of parent can vary as per convenience of the parties by presenting a petition before the Court. Chapter 3 provides local guidelines with respect to parties residing within 200 driving kilometers of each other, part D whereof contains provision with respect to final visitation regarding children of 36 months and older. It provides that non-custodial

parent shall be entitled for weekend visitation on every weekend, weekday visitation, right of to spend at least four hours on the holiday or festival day and festivals weekend overnight access, right to spend 50% of each vacation during long vacations like Diwali, Christmas, summer, winter etc. Chapter 4 of Guidelines contains Non-Local Guidelines with respect to parties, not residing within 200 driving kilometers of each other. It also provides at least one weekend vacation on every week, right to spend holidays, celebrate religious holiday, right to spend 50% of long vacation such as Diwali, Christmas and summer and winter. Paramount consideration in all eventualities must be welfare of the child.

25. In present case family of father is situated at Chandigarh whereas mother is residing in district Una, which are at a distance of about 120 kilometers from each other. However father is not serving at Chandigarh, but somewhere else and as such present case is not totally covered either by guidelines framed for parties either residing within 200 driving kilometres or beyond 200 driving kilometers and, therefore, by maintaining balance, best suitable visiting rights, keeping in view the welfare and interest of child and also convenience of parties, are to be granted to non custodial parent (father) by considering rival contention of parties with respect to terms and conditions of visiting rights sought to be altered, modified or varied.

26. As stated in the Guidelines quoted supra, the Supreme Court, in a case titled ***Anuj Chaturvedi vs. Jyoti, Special Leave Petition (C) No(s) 6303/2017,*** decided on 4.1.2019 has also observed that visiting rights are to be fixed in such a manner that child gets to know and love his father. The order reads as under:-

> "*We are not inclined to interfere in the order granting custody of the child to the mother. The special leave petition is dismissed according.*
>
> *However, we give liberty to the petitioner to approach the Family Court for enactment of his visitation rights and we*

direct the Family Court to ensure that visitation rights are fixed in such a manner that the child gets to know and love his father. A child has a right to the affection of both his parents and the Family Court shall ensure that visitation rights are granted in such a manner. The Family Court may also make suitable arrangements for visitation/interim custody during vacation periods. Obviously the Family Court has to keep the interest of the child at the foremost.

Pending application(s), if any, stands disposed of."

27. The Supreme Court, in another case titled ***Tanuj Dhawan Vs. Court in its own Motion, Writ Petition (Civil) Diary No. 11058 of 2020*** decided on 30.4.2020, has suggested that where because of lockdown children are unable to interact with their parents, despite existence of visiting rights for the said purpose, electronic contact, instead of physical visits, can be substituted in such times. It has further been observed that in absence of mutually acceptable arrangement in this behalf, aggrieved party can approach the family Court.

28. Considering the entire facts and circumstances, Child Access and Custody Guidelines and Parenting Plan, observations of the Supreme Court and material placed before me, all these applications along with Contempt Petition are disposed of in following terms:-

(i) Rohit Kalia (father of minor child, noncustodial parent) shall have visiting rights to meet minor child at Municipal Park, Una or any other mutually agreed place on every second and fourth Saturday at 2:30 P.M. and second and fourth Sunday at 11:00 A.M. for a duration of 2½ hours, every month.

(ii) Rohit Kalia (father of child) shall also have overnight weekend custodial visitation right w.e.f. 2:00 P.M. on fourth Saturday till 4:00 P.M. of fourth Sunday of every alternative month, i.e. once in two months. Frequency of weekend custodial/overnight visitation right may be rescheduled in future

by Family Court/District Court, depending upon prevailing circumstances including age of the child.

(iii) Rohit Kalia and his parents, jointly or singly, shall have right to exercise the right of visitation in aforesaid terms and out of total duration of 2½ hours they shall have exclusive visitation right for one hour in absence of and to the exclusion of mother as well as her parents and all other relatives, during each weekend visitation, but, for entire overnight weekend visitation.

(iv) Custody of child shall be handed over by mother Sangita Sharma or her parents to father Rohit Kalia on the date and time fixed aforesaid in presence of Coordinator of Mediation Center or Para Legal Volunteer, District Court Una, at Municipal Park, Una or any other mutually acceptable place duly notified to the Coordinator/Para Legal Volunteer well in advance at least 2 days before.

(v) On expiry of time of visitation period, father Rohit Kalia shall ensure safe handing over of custody of child to his mother or her parents, whosoever brings the child to the appointed location in the same manner.

(vi) Mother of child (custodial parent) shall not conceal the whereabouts of the child from father. Similarly father during overnight visitation period shall not conceal whereabouts of the place where child would be taken. Child shall be made available for telephonic conversation by the parent in custody to other parent.

(vii) On change of place of residence, school, telephone number, on which communication of non-custodial parent with the child is being made, mother of the child shall notify the same to the father of the child telephonically/ through message within 24 hours and in writing within 72 hours of the change.

(viii) Father is also permitted to participate in Parents Teachers meetings and mother of the child shall notify the date thereof immediately

after receiving information from the school in this regard, so as to enable father to attend the Meeting, if possible to him.

(ix) Father shall be permitted to have telephonic communication with the child at least on every Tuesday, Friday and Sunday between 8:00 P.M. to 9:00 P.M. or any other time mutually agreed between the parents, except the Sundays on which right of visitation is exercised physically. In case child desires to have communication daily, then every day he shall be permitted to have such communication with his father at least for 3 to 5 minutes.

(x) In case during period of lockdown, curfew or other similar kind of restrictions imposed by the Government on account of prevailing Covid-19 pandemic or otherwise for any other reason, exercise of visitation rights is not possible physically then on the appointed days i.e. Second and Fourth Saturdays and Sundays, father shall have right to have telephonic communication for a longer period not less than 20 minutes in lieu of physical/overnight weekend visitation right. This communication shall be in addition to the routine telephonic communication.

(xi) Parents, though separated, but have to communicate with each other for welfare and development of balanced personality of child and, therefore, Contempt Petition COPC No. 81 of 2019 is also closed to maintain and continue peaceful and harmonious working arrangement between them, without adjudicating it on merits.

(xii) In case exercise of visitation right is to be suspended or cancelled on the appointed day, then party seeking such cancellation/suspension shall inform/notify other party about it at least 24 hours before it with reason for doing so and in case such suspension or cancellation is at the behest of mother then such visitation right shall be substituted for any subsequent Saturday and Sunday. Any visitation, cancelled by non-custodial father, shall be forfeited, unless parties agree to

substitute such visitation. For emergent reason surfacing within 24 hours before time of visitation right, condition of informing before 24 hours shall not apply.

(xiii) Wife (mother of the child) is directed to handover the original Aadhar Card, date of birth certificate and other relevant documents like bank passbook etc. to father of the child on a date(s) fixed with consultation of concerned authority, enabling father to take necessary steps for correction of name of child by updating it in Aadhar Card, and also to hand over the custody of child to husband (father of child) on date fixed for it, duly communicated to the mother at least two days in advance, and if necessary on subsequent dates also, enabling the father to take necessary steps for reflecting full name of child in Aadhar Card as agreed and in terms of order passed by this Court. Original relevant documents and child shall be handed over by mother to the father and vice versa also in presence of Coordinator of Mediation Center or Para Legal Volunteer in District Courts Una, like earlier arrangement made at the time of handing over the child during exercise of visitation right. For such arrangement parties are directed to notify the date(s) to Coordinator of Mediation Center/Learned District Judge well in advance at least 2 days before.

(xiv) Concerned competent authority/Incharge of Aadhar Sampark Kendra (UIDAI) is directed to carry out necessary correction in the name of child in Aadhar Card for reflecting it as 'Yuvan Kalia alias Aadvik Sharma', as agreed by the parents of child in settlement arrived at before the Court, which has also been accepted and ordered by the Court. In case of any difficulty, parties, i.e. father and mother, shall be at liberty to approach the Court again in this regard.

(xv) As agreed, in terms of settlement, for dissolution of marriage of Rohit Kalia and Sangita Sharma, petition filed by the wife, bearing HMA No. 166 of 2017, pending in the Court of District Judge, Una, Himachal Pradesh,

shall be considered a petition for dissolution of marriage with mutual consent and an appropriate decree is to be passed accordingly. Jurisdiction to pass such decree is with District Judge, Una. Therefore, record of HMA No. 166 of 2017 is ordered to be sent back to the said Court for passing appropriate decree on the basis of mutual consent for dissolution of marriage, on the date fixed for presence of parties before learned District Judge, Una, as the parties have already agreed for that.

(xvi) Parties are directed to appear in the Court of learned District Judge, Una, either personally or through counsel, on 30th June, 2021, by putting physical or virtual appearance, as possible and permissible on account of Pandemic Covid-19, for passing final judgment and decree for dissolution of marriage on the basis of mutual consent.

(xvii) Further, no fresh notice shall be issued by the learned District Judge for presence of parties on failure to appear by either party, but the petition shall be taken up and disposed of by the learned District Judge, by passing appropriate order and decree for dissolution of marriage on the basis of consent expressed by the parties before learned Mediator as well as in their statements recorded on oath, in the Court. Certified copies of statements as well as terms of settlement have already been produced by the wife before learned District Judge, which are lying in the record of HMA No. 166 of 2017.

(xviii) For violation of aforesaid directions, besides facing proceedings for Contempt of Court, party in default may also lose respective right over the custody or visitation right to the child, as the case may be.

(xix). Remaining conditions of terms of settlement shall remain as already agreed.

(xx) For any practical difficulty in complying with the aforesaid directions parties are at liberty to approach the Family Court/District Court, as the case may be.

29. Parties are also at liberty to approach the Family Court/District Court, as the case may be, to alter, vary or modify the aforesaid terms and conditions, mechanism and manner of exercise of visitation right for plausible reasons existing on date and in such eventuality without being influenced by the terms and conditions settled by this Court, Family Court/District Court shall exercise its jurisdiction to adjudicate the issue before it on its own merit under the Guardians and Wards Act, 1890 or any other law dealing with issue including visitation right but keeping in view the interest of the child at the foremost.

The applications as well as Contempt Petition stand disposed of in the aforesaid terms.

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

Leela Devi. ...Petitioner.

Versus

H.P. State Electricity Board Ltd. & Others. ...Respondents.

CWP No. 1149 of 2021
Reserved on: 19.4.2021
Date of decision: 4.5.2021

Petition for denial of electricity connection despite deposit of amount of charges and security demanded by respondents, after completion of necessary codal formalities to the premises occupied by the petitioner- Petitioner is not recorded owner of land beneath her house- She claims herself entitled for electricity connection for fundamental right under Article 21 of Constitution of India- Held- From the provisions of electricity Act, 2003 & The Indian Telegraph Act read with works of licensee rules – It is clear that distribution licensee through respondents is empowered to carry out necessary work over and / or under the land of any person in consonance with Act – It is duty of distribution licensee to provide connection to every eligible applicant by taking necessary steps, in the present case finding petitioner entitled for connection, a demand notice has been issued and petitioner has deposited

the amount- It appears that influenced by extraneous considerations electricity connection to petitioner has not been provided- in present case petitioner is being deprived from her basic amenity which is integral part of right of life within meaning of Article 21 of constitution of India. The plea of respondent that for want of ownership of land where upon her house is situated the connection cannot be released to her is not sustainable in view of definition of applicant as provided in HPERC which defines applicant means owner or occupier of the premises.

For the Petitioner: *Mr.Kush Sharma, Advocate.*

For the Respondents: *Mr.Vikrant Thakur, Advocate, through Video Conferencing.*

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Petitioner has approached this Court for denial of electricity connection by respondents to her, despite deposit of amount of charges and security, amounting to `10,008/- vide receipt No. 10201033127, dated 6.7.2019, demanded by respondents after completion of necessary codal formalities, to the premises occupied by her on Khasra Nos. 1043 and 1044, situated in Village Shiliri (Mohal Mehli), Tehsil Shimla Rural, District Shimla, H.P.

2. Admittedly, petitioner is not recorded owner of the land whereupon her house is constructed. Her claim is that irrespective of ownership of land beneath her house, for fundamental right under Article 21 of Constitution of India, she is entitled for electricity connection.

3. Petitioner, for establishing her entitlement for electricity connection, has referred provisions of Electricity Act, 2003 and Himachal Pradesh Electricity Regulatory Commission (Licensee's Duty for Supply of Electricity on Request) Regulation, 2004, (for short the "Electricity Act" and

"HPERC"), wherein it is provided that applicant means the 'owner or occupier of any premises', who makes an application to the distribution licensee for supply of electricity. Petitioner has also relied upon judgment passed by Division Bench of this Court dated 22.10.2018 in *CWP No. 2454 of 2018, titled as Madan Lal Vs. State of H.P. and others*, wherein electricity and water connection was directed to be released to the applicant/petitioner therein, despite the fact that applicant/petitioner was encroacher, facing proceedings under Section 163 of H.P. Land Revenue Act for eviction.

4. Petition has been opposed by respondents on the ground that petitioner has alternative appropriate remedy for redressal of her grievance as jurisdiction to entertain such compliant is vested with the Himachal Pradesh Electricity Regulatory Commission (in short HPERC) under HPERC (Licensee's Duty for Supply of Electricity on Request) Regulations, 2004, (in short HPE RC Regulations) framed under the Electricity Act, 2003 and on merits it is stated that petitioner has not been found to be owner of the land beneath the structure and, therefore, she is not entitled for electricity connection.

5. It is claimed by respondent that judgment in Madan Lal's case supra (CWP No. 2454 of 2018) is not applicable in present case, as no issue of title is pending adjudication before any authority and it is *ex facie* clear that structure of petitioner is on Government land as per jamabandi.

6. It is further stand of respondents that Service Connection Order (SCO) was issued by the respondents as per Supply Code, 2009 (amended provision), but the moment, when the connection was to be released from the service main of the respondents, the neighbours of the petitioner resisted against laying of the service wire to the house of the petitioner and had filed representation before respondents that meter should not be installed with refusal to allow laying service wire through their private lands with further threat that respondents shall have to face consequences on releasing of electricity connection to the petitioner.

6. In Regulation 2 of HPERC Regulation, definition of applicant has been provided as under:-

"2. Definitions—In these regulations, unless the context otherwise requires,-

(a) … … …

(b) … … …

(c) "applicant" means the owner or occupier of any premises who makes an application for the distribution licensee for supply of electricity."

7. Regulation 3 of HPERC Regulation explains the duty of licensee to supply on request. Relevant portion thereof reads as under:-

"*3. Duty of licensee to supply on request –(1) On the receipt of an application from the owner of occupier of the premises, every distribution licensee shall, within the time frame specified hereunder, issue, by a registered post/speed post, a demand notice to the applicant, clearly indicating--*

(a) all deficiencies to be made good and the codal formalities to be completed by the applicant;

(b) necessity to furnish the test report from the approved Wiring Contractor;

(c) the exact amount of charges and security to be deposited by the applicant:-

Type of service connection required.	***Period from date of receipt of application within which demand notice should be issued.***
Low Tension (LT) supply	*(10) days*
11KV supply	*(15) days*
22KV supply	*(15) days*
33KV supply	*(30) days*
Extra High Tension (EHT) supply	*(60) days*

(2) Every distribution licensee shall, upon the applicant making good the deficiencies and completion of codal formalities and

payment of charges and security, as indicated in the demand notice under sub-regulation (1), give supply of electricity to the premises within the time specified in sub-regulation (3).”

… *…* *…*

8. Section 43 of Electricity Act, 2003 is also relevant for adjudication of point in issue, which reads as under:-

“(1) Save as otherwise provided in this Act, every distribution licensee, shall, on an application by the owner or occupier of any premises, give supply of electricity to such premises, within one month after receipt of the application requiring such supply:

Provided that where such supply requires extension of distribution mains, or commissioning of new sub-stations, the distribution licensee shall supply the electricity to such premises immediately after such extension or commissioning or within such period as may be specified by the Appropriate Commission.

Provided further that in case of a village or hamlet or area wherein no provision for supply of electricity exists, the Appropriate Commission may extend the said period as it may consider necessary for electrification of such village or hamlet or area.

(2) It shall be the duty of every distribution licensee to provide, if required, electric plant or electric line for giving electric supply to the premises specified in sub-section (1):

Provided that no person shall be entitled to demand, or to continue to receive, from a licensee a supply of electricity for any premises having a separate supply unless he has agreed with the licensee to pay to him such price as determined by the Appropriate Commission.

(3) If a distribution licensee fails to supply the electricity within the period specified in sub-section (1), he shall be liable to a penalty which may extend to one thousand rupees for each day of default.”

9. The plea of respondents, that for want of ownership of land whereupon premises/house of petitioner is situated, the connection cannot be

released to her, is not sustainable in view of definition of applicant as provided in HPERC Regulations, wherein it is clearly defined that applicant means "owner or occupier of any premises", who makes an application to the distribution licensee for supply of electricity and Regulation 3 of HPERC as well as Section 43 of the Electricity Act cast a duty upon the distribution licensee to supply the electricity on application by owner or occupier of premises after completion of all necessary formalities. As evident from the relevant provisions referred supra, it is not necessary that for applying to a electricity connection, applicant should be owner, as in the Act and Regulations even an occupier of the premises has also been considered a competent applicant for having electricity connection in the premises occupied by him/her. In present case, it is undisputed that petitioner is occupier of the premises, to which she is seeking electricity connection as it is stand of respondents that Service Connection Order to the premises possessed by petitioner was issued, but not executed for objections of neighbours, which is not a valid ground for not providing electricity connection to the petitioner.

10. Regulation 3 of HPERC Regulations provides that after making good all deficiencies and on completion of codal formalities by the applicant, distribution licensee shall issue a demand notice to the applicant indicating the exact amount of charges and security to be deposited by the applicant. In present case that stage is over and on demand raised by respondents, petitioner has deposited `10,008/- on 6th July, 2019. After deposit of amount, within stipulated time as prescribed in Regulations referred supra, respondents were bound to release the electricity connection by taking all necessary steps for which distributor licensee is entitled and empowered, but the respondents have taken plea that for objection raised by neighbours of petitioner connection could not be provided. To support that plea, copy of representation purported to be made by villagers, has been placed on record as Annexure R-2, but this representation is not only undated, but also

unsigned and complete particulars of villagers, whose names have been typed thereon, have also not been mentioned.

11. Section 164 of The Electricity Act, 2003, empowers any public officer, licensee or any person engaged in the business of supplying electricity under this Act, for placing electric lines for transmission of electricity, to exercise any of the powers which the Telegraph Authority possesses under the Indian Telegraph Act, 1985 with respect to placing of telegraph lines and posts for the purpose of a telegraph established or maintained, by the Government or to be so established or maintained, however, these powers are subject to condition and restriction, if any, imposed by the appropriate Government.

12. Part III of The Indian Telegraph Act, 1885 provides power of Telegraph Authority to place telegraph lines and posts, wherein Section 10 empowers Telegraph Authority, from time to time, to place and maintain a telegraph line under, over, along, or across, and posts in or upon, any immovable property subject to procedure prescribed in the said Section.

13. Apart from aforesaid provisions of the Electricity Act and Indian Telegraph Act, 1985, Central Government has framed and notified 'Works of Licensees Rules, 2006', wherein under Rule 3(1), a licensee has been empowered to carry out works, lay down or place any electric supply line or other works in, through, or against, any building, or on, over or under any land whereon, whereover or whereunder any electric supply-line or works has not already been lawfully laid down or placed by such licensee, with the prior consent of the owner or occupier of any building or land, and where owner or occupier of the building or land raises objection in respect of works to be carried out under this Rule, licensee shall obtain permission in writing from District Magistrate or Commissioner of Police or any other Officer authorized by the State Government in this behalf for carrying out the works and carrying of the aforesaid works and grant of permission by the concerned Authority shall be subject to further procedure provided under these Rules. Further

Rule 3(4) provides that nothing contained under this rule shall affect the powers conferred upon any licensee under Section 164 of the Electricity Act.

14. From the aforesaid provisions of the Electricity Act, 2003 and The Indian Telegraph Act, 1885, read with Works of Licensees Rules, 2006, it is evidently clear that distribution licensee through respondents is empowered to carry out necessary works over and/or under the land of any person in consonance with provisions of the Act and Rules referred herein above, for providing electricity connection to an applicant or occupier of the premises.

It is duty of distribution licensee to provide connection to every eligible applicant by taking necessary steps for which respondents are empowered. In present case finding petitioner entitled for connection, a demand notice has been issued and in sequel thereto, petitioner has deposited the amount in July, 2019, but it appears that influenced by extraneous considerations, electricity connection to the petitioner has not been provided. Otherwise also, a person enjoying benefit of electricity connection from a line laid on Government or private land belonging to others, cannot be permitted to create hindrance to the electricity connection, to be provided to his neighbour, by raising objection for laying of electricity line or service wire through his building or land without any justifiable reason. Electricity connection of such person deserves to be discontinued.

15. So far as plea of respondents with respect to alternative remedy is concerned, there is no statutory or other bar to the High Court to entertain Writ Petition under Article 226 of Constitution of India in a matter like present one, particularly when matter relates to violation of fundamental rights to life within the meaning of Article 21 of Constitution of India, as also observed by a Division Bench of this Court in CWP No. 2454 of 2018, which reads as under:-

> *"6. Ordinarily, this Court would be reluctant in granting relief to a person alleged to be an encroacher over the Government property, especially when the construction is also said to have been raised without getting the building plan*

sanctioned. At the same time, it is not expedient for us to express any view on merits, as the title dispute is subjudice before the Assistant Collector, 1st Grade, Nahan. Any observation in relation to this issue is likely to have impact on the merits of that case.

7. The question that falls for consideration is whether the petitioner, as an interim measure, be allowed the basic amenities of water and electricity. There is no gain in saying that potable water or electricity are integral part of Right of Life within the meaning of Article 21 of the Constitution of India. These are basic necessities for human being and can well be termed as essential of human rights. If the title dispute, owing to the prescription of right to appeal under the Statute remains pending for considerable long period, we see no reason to deny the petitioner's family the basic amenities of water and electricity, subject to their payment of requisite charges. It goes without saying that in the event of petitioner's having failed to prove his right to retain the possession, both facilities will also go alongwith the residential house."

16. In ordinary course, for availability of alternative remedy, instead of entertaining petition under Article 226 of Constitution of India, parties are relegated to avail such remedy, but in a case like present one where petitioner is being deprived from her basic amenity which is integral part of right of life within the meaning of Article 21 of Constitution of India, I find that relegating the petitioner, that too at this stage, particularly when petition has been admitted by the Division Bench for hearing on merits, to Regulatory Commission, shall amount to grave injustice to her, more particularly when in similar circumstances (i.e. in CWP No. 2454 of 2018), the Division Bench of this Court has directed to release the electricity connection to the petitioners therein.

17. Learned counsel for the petitioner has also relied upon another judgment passed by the Division Bench of this High Court passed in CWP No. 2581 of 2018, titled Harsh Nagar Vs. State of H.P. and others, wherein electricity connection released to an encroacher has been protected till conclusion of appropriate proceeding regarding his encroachment in accordance with law.

18. At this stage it would also be relevant to refer judgment dated 25.8.2020 passed by Madras High Court in *W.P. No. 10506 of 2020, titled S. Ramanjaneyalu Vs. The Assistant Engineer (Pallavaram West)*, which has been relied upon on behalf of petitioner. In this case, with respect to right of encroacher to have electricity connection, by relying another judgment passed by the said High Court in case *T.M. Prakash Vs,. District Collector, Tiruvannamalai District), reported in 2013 (6) CTC 849*, has been observed as under:-

> *"11. This Court has recognized the right of an encroacher to receive electricity connection in the judgment that was cited by the learned counsel for the petitioner. Therefore, this Court does not want to once again to into the same issue with regard to the entitlement of an encroacher to get electricity connection."*

19. In light of above discussion, Writ Petition is allowed and disposed of in following terms:

"(i) Respondents are directed to ensure release and providing of electricity connection to the petitioner on or before 10th June, 2021.

(ii) Petitioner or her family or successors shall not be entitled to claim benefit of electricity connection for continuation of their possession over the property, in any proceeding initiated in accordance with law.

(iii) The petitioner shall continue to pay the requisite charges for electricity supply and in the event of any default, the authority shall be at liberty to disconnect the supply.

Writ Petition stands disposed of in aforesaid terms, so also pending application(s), if any.

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

Dinesh Gulati. ...Petitioner.

Versus

State of H.P. & others. ...Respondents.

CWP No. 2183 of 2021
Reserved on: 28.4.2021
Date of decision: 13.5.2021

The Petition for quashing order repatriating the petitioner to his parent department from District Institute of education and training (D.I.ET) and posting respondent No.4 in DIET – Held,- for transferring an employee on receiving a complaint, it is not necessary that inquiry to be conducted by the employer/ Authority must be a regular departmental inquiry However some sort of inquiry, fact verification or preliminary inquiry must be there before taking an administrative decision of transfer in such eventuality. The authority/employer cannot be made to wait till finalization of Departmental regular inquiry for transferring an employee for administrative reasons- Preliminary enquiry or verification of facts are mandatory exercise to be undertaken by employer/ authority before transfer of an employee in pursuance to the complaint so as to ensure that employee must not be transferred for bogus or baseless complaint- transfer or repatriation of an employee is the right of employer/ authority and transfer or repatriation in itself is not a punishment but incidence of service- No employee has a vested right for his posting at a particular place or portfolio- in the present case Competent authorities have undertaken exercise for verification of facts with respect to conduct of petitioner and after application of mind at various levels a prudent decision to transfer and repatriate the petitioner has been taken Which warrants no interference.

Cases referred:

Somesh Tiwari Vs. Union of India & Others, (2009) 2 SCC 592;

For the Petitioner: Mr.Sanjeev Bhushan, Senior Advocate with Mr.Rajesh Kumar, Advocate, through Video Conferencing.

For the Respondents: Mr.Desh Raj Thakur, Additional Advocate General, for respondents No. 1 to 4, through Video Conferencing.

Mr.Vivek Singh Attri, Advocate, for respondent No. 5, through Video Conferencing.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Petitioner has approached this Court for quashing two even dated impugned orders dated 26.3.2021 (Annexures P-2 and P-3), whereby vide order Annexure P-2 petitioner, posted in District Institute of Education and Training (DIET) Nahan, District Sirmour, H.P., has been repatriated to his parent department i.e. Higher Education and has been ordered to be posed at GSSS Dhamwari, District Shimla, H.P. against vacancy as Lecturer/Lecturer School New (Mathematics) and vide separate even dated order (Annexure P-3) respondent No. 4, serving as Lecturer/Lecturer School New (Mathematics) in Higher Education Department and posted at GSSS Ludhiana, District Sirmour, has been transferred/posted in DIET Nahan, District Sirmour H.P. against resultant vacancy.

2. Petitioner has laid challenge to his repatriation and transfer order on the ground that he has been transferred on the basis of D.O. letter, but not for administrative exigency, despite the fact that since last 18 years he has been performing his duties to the best of his abilities in DIET Nahan and

his repatriation and posting as well as transfer/adjustment of respondent No. 4, is in violation of norms notified by Education Department vide notification dated 10.10.2013 (Annexure P-4) issued as per National Council for Teacher Education (NCTE) guidelines.

3. Case advanced on behalf of the petitioner is that he had made complaints against Principal pointing out financial irregularities, whereupon Principal, being inimical to the petitioner, had started making complaints against petitioner and in the meanwhile respondent No. 4 approached Hon'ble Education Minister and in sequel thereto petitioner has been repatriated and transferred and respondent No. 4 has been accommodated despite the fact that there was ban on transfers, wherein transfers could not have been ordered, except on medical grounds or administrative exigency.

4. It is further case of the petitioner that in addition to his academic qualification to be appointed as a Lecturer Mathematics, petitioner has also done Master in Education (M.Ed.), which is essential qualification for appointment as a Lecturer in Education in DIET, which is evident from qualification prescribed against the category of Lecturer in Education reflected in chart Annexure P-5 placed on record with the petition. It is case of the petitioner that petitioner was posted in DIET Nahan in the year 2002 and, now, after issuance of notification dated 10.10.2013, fresh induction, at any point of time, thereafter, shall be by centralized Selection Process at the level of Director Higher Education as provided in clause 5(ii) of this Notification, but in present case such procedure has not been followed and, therefore, impugned orders are not sustainable in the eye of law.

5. For submission on behalf of petitioner, respondents-Department was directed to file reply and also to produce the record. Respondent department has not chosen to file reply but has produced record. Learned Additional Advocate General at the time of production of record has stated that impugned orders have not been issued on the basis of D.O. letter, but

Annexure P-2 has been issued for complaints against the petitioner and Annexure P-3 has also been issued on request of respondent No. 4 made to the competent authority, whereupon, in addition to other contentions raised on behalf of petitioner, learned counsel for the petitioner has also submitted that issuance of impugned orders on the basis of complaints against the petitioner is an act of malice in law, as a transfer on the basis of complaints, in lieu of punishment but without inquiry is not permissible and before transferring an employee on the basis of complaints, an employer is under obligation to hold an inquiry, may be preliminary. To substantiate his submissions, learned counsel for the petitioner has relied upon ***Somesh Tiwari Vs. Union of India & Others, (2009) 2 SCC 592*** and also judgments passed by the Division Benches of this High Court in *CWP No. 8590 of 2014, titled Raj Kumar Vs. State of H.P. & others and CWP No. 2587 of 2019, titled Sh.Joginder Rao Vs. State of Himachal Pradesh and another.*

6. In response, under instructions, learned Additional Advocate General has submitted that though notification dated 10.10.2013 has been issued by the Government of Himachal Pradesh, however, the same has not been implemented till date and procedure and process prescribed therein for induction of employees in DIETs is not in practice, rather employees are being deputed/transferred to and repatriated/transferred from DIET by way of transfer, but with consultation of State Project Director Samagra Shiksha Himachal Pradesh (respondent No. 3) and prior approval of competent authority, and the same procedure has been followed in present case also and, therefore, petitioner has not been singled out by following a different procedure for his repatriation/posting, rather the same procedure has been adopted for passing the impugned orders, which is in practice and is being followed in case of each and every similarly situated employee to be posed in and/or repatriated from DIETs and, therefore, process and procedure adopted for passing impugned orders is justified. It is further submitted by learned

Additional Advocate General that after due verification of facts, keeping in view the continuous conduct of indiscipline of the petitioner, he has been repatriated and transferred on recommendation of respondent No. 3 State Project Director for smooth functioning of DIET and for maintaining peaceful and harmonious atmosphere in the Institution and the transfer of petitioner is not in lieu of punishment, as a separate Departmental inquiry to inquire the complaints against petitioner has been ordered by the Competent Authority.

7. Learned Counsel for respondent No. 4 endorsing the submissions made by learned Additional Advocate General, has further stated that in a recent case, Division Bench of this High Court in *CWP No. 1997 of 2020, title Jagdish Chand Vs. State of H.P. and others*, has upheld the transfer of petitioner therein from DIET to the office of Deputy Director (Elementary Education), which was ordered by following the same procedure, as has been adopted in present case and further that another Division Bench of this High Court in *CWP No. 2871 of 2020, titled Sarita Sharma Vs. State of H.P. & others*, has upheld transfer and posting of teacher/Lecturer in and from DIET, wherein the same procedure was followed, as has been followed in present case.

8. On perusal of record related to transfer/repatriation of petitioner and photocopies of other documents produced by the respondents, it has surfaced that petitioner was posted in DIET, Nahan on 7th November, 2002 and since then he was serving in the same Institution. On 3.12.2016, explanation was called from him by the then Principal for not submitting the question papers of his subject for house examination of D.El.Ed students till November, 2016, whereas session had started in April, 2016. In the year 2018, vide show cause notice dated 29.3.2020, explanation was called from the petitioner for proceeding on casual leave to monitor Primary Teacher Training without permission and also for leaving the Institution without any information and prior approval of the competent authority on 5.10.2018 and

6.10.2018. On conclusion of this enquiry, penalty of 'Censure' was imposed upon him by Director Higher Education which was maintained by Appellate Authority also as appeal preferred by petitioner was dismissed on 26.9.2020, by Secretary (Education), to the Government of Himachal Pradesh. In the year 2018 itself, petitioner had faced another complaint before Sexual Harassment Committee which was withdrawn by the complainant on 23.10.2018 for undertaking given by the petitioner that he will not use such language in future.

9. It is further apparent from the record that petitioner was also having charge of Hostel Warden and vide orders dated 15.12.2018 and 2.1.2019, he was directed by the Principal to handover the complete charge of Hostel Warden to Deputy Hostel Warden, but petitioner had ignored the said orders of the Principal and the said information was submitted by the Principal to the State Project Director vide communication dated 4.1.2019. The matter does not end here, as petitioner did not vacate the accommodation occupied by him as Hostel Warden, the Principal was constrained to lodge a report with the Police and during that inquiry as evident from communication dated 16.2.2019 sent by SHO Police Station Nahan to Principal DIET petitioner had undertaken to vacate the accommodation occupied by him in the hostel immediately after handing over the charge of Hostel Warden, but the charge of Hostel Warden was not handed over by the petitioner, which lead to issuance of another letter dated 23.11.2020 by Principal to give complete charge of Hostel Warden including all registers and relevant records related to hostel, but again instead of handing over the charge, petitioner had submitted a reply on 1.12.2020 by raising some irrelevant objections with respect to matter related to Institution, whereupon Principal again vide letter dated 7.12.2020 had asked the petitioner to handover the complete charge of Hostel on or before 20.12.2020. It appears that till February, 2021, petitioner had not vacated the premises occupied by him which lead to issuance of office

order dated 6.2.2021 by Principal DIET, Nahan, thereby constituting 11 members committee to take possession of rooms by preparing inventory of the articles lying in the rooms and to lock all the rooms of Hostel occupied by petitioner and thereafter handover the keys in the office of Principal for further allotment of those rooms to students.

10. It is also noticeable that petitioner had been staying in accommodation of Hostel despite direction/order of the Principal to handover the charge of the Hostel. Petitioner neither handed over the charge nor vacated the Hostel accommodation and despite continuing to enjoy Hostel accommodation, petitioner was neither paying rent nor electricity and water charges payable for retaining such accommodation since last about 4 years.

11. Vide communication dated 27.3.2021, Deputy Director Elementary Education Nahan, after receiving an information from Principal on this count vide communication dated 8.2.2021, had reported to Director Elementary Education about the continuous disobedience of orders/directions issued by the Principal as well as misconduct, misbehavior by the petitioner with Principal and higher authorities.

12. State Project Director vide communication dated 1.3.2021 had communicated to Director of Higher Education that his office had received various complaints and counter complaints with regard to affairs of DIET, Nahan, District Sirmour and prima facie it was found that petitioner was creating indiscipline in the said DIET and, therefore, in order to maintain sanctity and discipline of education Institution, it was considered necessary to repatriate the petitioner. It was also informed through this communication that proposal regarding repatriation of the petitioner, sent to the Government, had been approved and, therefore, it was requested to repatriate the petitioner from the DIET in the public interest.

13. It is submitted by learned Additional Advocate General that as available on record that in December, 2020 a complaint pointing out the conduct of the petitioner, was also submitted by guardians of students undergoing training in DIET, to the Education Minister, which was marked on 29.12.2020 to the Director Higher Education for putting up with factual position. Thereafter, the concerned Branch had placed entire facts and circumstances before the Director, Higher Education on 6.2.2021, whereupon Director Higher Education on 8.2.2021, had proposed appropriate action to be taken against the petitioner and also to transfer him and then to conduct an inquiry through Deputy Director Higher Education, whereupon Joint Director (Education) on 16.2.2021 had referred the matter to Branch Officer of Transfer Branch of Directorate of Higher Education. In the meanwhile recommendation dated 1.3.2021, of State Project Director (respondent No. 3) was also received in the office of Director Higher Education on 3.3.2021, which was dealt by the concerned Branch, i.e. Inquiry and Transfer Cell, on 4.3.2021. Respondent No. 3, after taking into consideration material before him, prima facie, it had found that petitioner was creating indiscipline in the DIET and thus in order to maintain sanctity of and discipline in the Institution, had proposed to repatriate the petitioner. In the recommendation it was also conveyed that proposal of repatriation of petitioner, sent to Government had also been approved.

14. In the aforesaid facts and circumstances a note was prepared by the Dealing Assistant on 15.3.2021, which was placed before various authorities and finally on 25.3.2021, was approved by the competent authority as proposed after discussion with Hon'ble the Chief Minister and resultantly impugned orders were issued on 26.3.2021.

15. It is evident from the aforesaid facts and circumstances that transfer of petitioner has not been ordered on the basis of D.O. note or to punish him or to accommodate respondent No. 4, but on proposal of

concerned authority in the interest of Institution. It is pertinent to note that the instances of indiscipline reported by Principal DIET against the petitioner are not the incidents occurred during the tenure of one Principal only, but different Principals. Otherwise also, the Principal against whom allegations of enmity have been leveled on behalf of petitioner is neither party nor any such averments have been made in the petition to that effect.

16. It is not a case where transfer order has been issued on the basis of complaint but without verification of facts and without application of mind. It has come on record that concerned authorities have applied their mind to the facts at various levels and thereafter on verification of facts; petitioner has been repatriated and transferred in administrative exigency to maintain discipline in the Institution. For transferring an employee, on receiving a complaint, it is not necessary that inquiry to be conducted by the Employer/Authority must be a regular departmental inquiry. However, some sort of inquiry, fact verification or preliminary inquiry must be there, before taking an administrative decision of transfer in such eventuality. The Authority/Employer cannot be made to wait till finalization of Departmental Regular Inquiry for transferring an employee for administrative reasons. Preliminary inquiry or verification of fact are mandatory exercise to be undertaken by the Employer/Authority before transfer of an employee in pursuance to the complaint so as to ensure that employee must not be transferred for bogus or baseless complaint. Transfer or repatriation of an employee is right of the Employer/Authority and transfer or repatriation, in itself is not a punishment but incidence of service. No employee has a vested right for his posting at a particular place or portfolio.

17. An employee is not only expected but is bound to follow any lawful command of his superiors and in case an employee is aggrieved by any order/direction of his superior, he has to opt a legal and proper course against

such order/direction but never expected and be permitted to defy an order/direction of superior without such course.

18. In present case petitioner had been directed to handover the charge of Hostel Warden to the Deputy Warden and to vacate the accommodation years before but petitioner neither handed over the charge nor vacated the accommodation till February, 2021 and he also deserted from paying rent, electricity and water charge of the premises in his occupation. Competent Authorities have undertaken exercise for verification of facts with respect to conduct of the petitioner and after application of mind at various levels a prudent decision to repatriate and transfer the petitioner has been taken, which warrants no interference.

19. Another issue raised is related to transfer of respondent No. 4 to the DIET. Record pertaining to transfer of respondent No. 4 indicates that the said respondent had approached the Secretary (Education) to the Government of Himachal Pradesh for his transfer against the post of Lecturer Mathematics in DIET Nahan, which was marked to S.O. (Education Branch) and thereafter it was dealt with by the Dealing Hand and it was submitted by S.O (Education-B) to the Deputy Secretary (Higher Education) who had placed it along with his comments to the Secretary (Education) with proposal to put up it before competent authority i.e. Hon'ble Education Minister for relaxation of ban and Secretary (Education) has placed it as such for consideration and approval and it was approved on 4.3.2021 and resultantly communication to that effect was sent from Secretary (Education) to the Director Higher Education vide communication dated 5.3.2021. Thereafter, in sequel thereto respondent No. 4 has been transferred/posted in DIET, Nahan vide order dated 26.3.2021. Thus transfer of respondent No. 4 is not on the basis of D.O./U.O Note.

20. In view of aforesaid circumstances, case law referred by the petitioner is not applicable in present case. However, certain observations of

Division Bench of this High Court in Raj Kumar's case supra, the judgment relied upon by the petitioner, are relevant, which read as under:-

> *"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 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 redress 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 malafides 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, bona fide 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 is passed bonafide or as a measure of punishment."*

21. The transfer in present case evidently has not been effected on the basis of U.O. or D.O Note or as a punishment for complaints received against the petitioner as an independent inquiry has been ordered by the Director (Higher Education) to inquiry into the complaints. As apparent from the records, referred supra, the transfer of the petitioner has been effected in an administrative exigency and in the larger interest of the public after due verification of facts. Otherwise also, petitioner was serving at one place for last 18 years and he has no vested right to continue as such. For the facts and circumstances, it cannot be inferred that power by competent authority has been exercised discriminately, malafide, unreasonably or irrationally, rather it appears to have been exercised in public interest in right manner.

22. Plea of learned Additional Advocate General, that notification dated 10.10.2013 has not been implemented yet, appears to be correct, particularly in view of cases considered by the Division Benches of this High Court in CWP Nos. 1797 of 2020 and 2871 of 2020. But such state of affair is deprecable. Either notification should be withdrawn or it should be given due effect. It is expected from the State to set its house in order at the earliest. However, this notification does not preclude respondent authority from repatriating and transferring the petitioner from DIET Nahan by issuing impugned transfer order. Thus any lapse related to this notification cannot be basis for retaining petitioner in the DIET.

23. By referring photocopy chart Annexure P-5, it has been alleged that respondent No. 4 is not eligible for his posting as Lecturer in DIET. In Annexure P-5, qualification prescribed has been mentioned against each post in DIETs. However, there is nothing therein to indicate that who has published this document and it also does not indicate that in case a person is not having the exact qualification prescribed therein, he shall not be eligible for appointing as Lecturer in DIET. Leaving apart authenticity and source of Annexure P-5, even otherwise, in case respondent No. 4 is not having prescribed qualification for his posting as a Lecturer (Education) in DIET, then also it does not give any right to the petitioner to continue in DIET. For that respondents-Department is directed to look into the matter and take appropriate decision with respect to the eligibility of respondent No. 4 for his posting as a Lecturer (Education) in the DIET and in case he is not eligible to be posted, then repatriate him from the post of Lecturer (Education) immediately and to post a person eligible to be appointed against the said post. At this stage it is also apt to record that from the chart, it is also noticeable that in the DIET, Nahan there are two posts of Lecturer (Mathematics). Respondent No. 4 had requested to post him Lecturer (Mathematics) in the DIET, Nahan and in the impugned order also respondent

No. 4 has not been posted against the post of Lecturer (Education), but he appears to have been transferred as a Lecturer/Lecturer School New (Mathematics) from GSSS Ludhiana, District Sirmour, to DIET and his posting is further subject to the condition of fulfilling the requisite qualification which definitely means that in case he is not fulfilling the requisite qualification for posting in DIET, he shall be liable to be repatriated. So far as eligibility for Lecturer (Mathematics) is concerned, it is only M.A./M.Sc. in Mathematics along with B.Ed. There is no condition of having qualification of M.Ed for posting as Lecturer (Mathematics) in the DIET. Be that as it may be, as directed supra, respondents No. 1 to 3 are directed to take appropriate action/decision with respect to posting/repatriation of respondent No. 4, considering his eligibility for posting to the post against which he has been ordered to be transferred/posted.

Accordingly, the Writ Petition is disposed of in aforesaid terms, so also pending application(s), if any.

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

Shri Jaishi Ram. ...Petitioner.

Versus

Shri Manohar Lal and others. ...Respondents.

RSA No. 261 of 2019
Reserved on: 9.4.2021
Date of decision: 24.5.2021

Appeal against the findings of trial court and first appellate court vide which suit and appeal filed by appellant have been dismissed- Appellant / plaintiff filed Civil Suit seeking declaration that he has acquired ownership rights by way adverse possession- Notices issued to respondents No.7 Nek Singh and respondent No.18 Kuldeep received back with report that they had expired during pendency of first appeal before Ld. District Judge- Held- It is well

settled that decree in favour or against dead person is nullity- for non-substitution of L.R of deceased defendant out of several defendants may cause abatement of appeal against the deceased defendant or as while depending upon the effect of non substitution of L.R. of the deceased defendant on the relief claimed -an application for setting aside abatement and substitution of LRs of deceased defendant should have been made and decided with by the court in which abatement occurred as abatement is automatic irrespective of passing of or not passing of such order by the court and question whether suit to abate in toto or in part has also to be decided by the same court- where during pendency of appeal, one the parties had expired before hearing the arguments and where he was necessary party to the lis and his L.R's have not been brought on record and issues as to whether there was sufficient causes for setting aside the abatement or whether the L.R's of deceased are to be brought on record or not in relation to a suit or appeal ,at the first instance, are also to be decided by the court in which the suit or appeal was pending at the time of death of party or abatement take place. Hence, judgment decree passed in Ld. first appellate court is set aside and case is remanded to first appellate court with direction to allow the appellant to take steps on death of respondent of Nek Singh and Kuldeep respondent No.18 and thereafter to decide question of substitution of their LR's.

Cases referred:

Dewana and another Vs. Gian Chand Malhotra and others, Latest HLJ 2011 (HP) 1420;
Gurnam Singh (dead) by legal representatives and others Vs. Gurbachan Kaur (dead), (2017) 13 SCC 414;
Gurnam Singh (Dead) through Legal Representatives and others Vs. Gurbachan Kaur (Dead) by Legal Representatives, (2017) 13 SCC 414;
Jagan Nath and others Vs. Ishwari Devi, 1988 (2) Shim.L.C 273;
Jagdish Vs. Ram Karan and others 2002(1) Current Law Journal (H.P.) 232;
Jaswant Singh Vs. State of Himachal Pradesh and others, 2015(2) Shim.L.C. 674;
Karam Chand and others Vs. Bakshi Ram and others, 2002(1) Shim. L.C. 9;
Ram Rakha and others Vs. Brahma Nand and others 1994 (Supp) S.L.C. 29;
Sher Singh and others Vs. Raghu Ram and others, 1981 S.L.C. 25;
Tara Wati and others Vs. Suman & others, Latest HLJ 2018(HP) 1046;

For the Petitioner:	Mr.Neeraj Gupta, Senior Advocate along with Ms.Rinki Kashmiri, Advocate.
For the Respondents:	Mr.Ajay Sharma, Senior Advocate, along with Mr.Rakesh Chaudhary, Advocate, for respondents No. 1 and 2.

Respondent No. 13(a) stands deleted vide order dated 9.1.2020.

Respondents No. 3, 5, 6, 10, 11, 12, 13(b), 13(g), 13(h), 14(b), 20, 21, 23(b), 23(c), 24(a), 27, 28, 29, 30 and 21 ex parte vide order dated 17.7.2020.

Respondent No. 25 ex parte vide order dated 14.8.2020.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Appellant/plaintiff has approached this Court assailing concurrent finding of the Courts below. Suit as well as appeal filed by him have been dismissed by the trial Court and first Appellate Court respectively. Respondents or their predecessors-in-interest are/were defendants in the suit. Parties, for convenience shall be referred as plaintiff and defendants.

2. Civil Suit filed by plaintiff on 3.8.2004, seeking declaration that he has acquired ownership right in the suit land by way of adverse possession, was dismissed on 30.9.2013 by the trial Court. Appeal preferred by plaintiff on 2.11.2013 has also been dismissed by first Appellate Court on 23.2.2019.

3. On filing present appeal on 22.5.2019, notices were issued to the respondents and during service of respondents, notices issued to respondent No. 7 Nek Singh and Respondent No. 18 Kuldeep Singh have been received back with report that Nek Singh has expired on 30.9.2017, whereas respondent No. 18 Kuldeep Singh had expired on 7.2.2016, which indicates that both of them had expired during pendency of first appeal before learned District Judge (1), Kangra at Dharamshala.

4. Appellant/plaintiff has preferred two applications CMP (M) Nos. 54 and 55 of 2020 for substitution of aforesaid deceased respondents through their respective legal heirs after setting aside the abatement, if any, on the ground that factum of death of these respondents was not in the knowledge of appellant/plaintiff and appellant/plaintiff has gained knowledge about their death only when notices issued to them in present appeal were received back with such report.

5. Relevant provision, dealing with substitution/deletion of deceased defendant or exemption to the plaintiff from necessity of substituting legal representatives of any deceased defendant, is Order 22 Rule 4 C.P.C. which reads as under:-

> *"4.* ***Procedure in case of death of one of several defendants or of sole defendant****.—(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.*
>
> *(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.*
>
> *(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.*
>
> *(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.*

(5) Where—

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit had, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified therefor in the Limitation Act, 1963 (35 of 1963), for setting aside the abatement and also for the admission of that application under section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said act,

the Court shall, in considering the application under the said section 5 have due regard to the fact of such ignorance, if proved."

6. Order 22 Rule 4(1) C.P.C. provides that legal representatives of deceased defendant shall be made party on an application made in that behalf and thereafter Court shall proceed with the suit. Rule 4(4) provides that Court may exempt the plaintiff from necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing and judgment may, in such case, be pronounced against defendant, notwithstanding the death of such defendant which indicates that such exemption is to be granted by the Court before pronouncement of judgment. There is another provision under Rule 4(5), which provides filing of an application for substitution of legal representatives of defendant after expiry of limitation period, but with an application under Section 5 of Indian Limitation Act, on the ground that plaintiff had, by reasons of ignorance of death of defendant, sufficient cause for not making the application for substitution within the period specified and in such eventuality Court shall

consider the application under the aforesaid Section 5 having due regard to the fact of such ignorance, if proved.

7. Learned counsel for the appellant in view of pronouncement of the Supreme Court in ***Gurnam Singh (Dead) through Legal Representatives and others Vs. Gurbachan Kaur (Dead) by Legal Representatives,*** reported in ***(2017) 13 SCC 414*** and judgments of learned Single Judges of this High Court in case titled as ***Sher Singh and others Vs. Raghu Ram and others, 1981 S.L.C. 25; Ram Rakha and others Vs. Brahma Nand and others 1994 (Supp) S.L.C. 29; Jagdish Vs. Ram Karan and others 2002(1) Current Law Journal (H.P.) 232***, referred in ***Dewana and another Vs. Gian Chand Malhotra and others, Latest HLJ 2011 (HP) 1420*** and also judgments in ***Jaswant Singh Vs. State of Himachal Pradesh and others, 2015(2) Shim.L.C. 674; Jagan Nath and others Vs. Ishwari Devi, 1988 (2) Shim.L.C 273; Karam Chand and others Vs. Bakshi Ram and others, 2002(1) Shim. L.C. 9; Gurnam Singh (dead) by legal representatives and others Vs. Gurbachan Kaur (dead), (2017) 13 SCC 414,*** referred in ***Tara Wati and others Vs. Suman & others, Latest HLJ 2018(HP) 1046***, has prayed for remanding the case to the first appellate Court, enabling the appellant to avail appropriate remedy before the said Court available to him under law.

8. Learned counsel for the contesting respondents has objected for remanding the case to the first appellate Court by submitting that technicalities of procedure should not be allowed to defeat the purpose, i.e. justice to the parties, and issue of abatement, partial or as a whole, of the appeal, grant of exemption and substitution of legal representatives of deceased respondent can be considered in present appeal also so as to avoid further unnecessary delay in deciding the lis between the parties.

9. It is well settled that a decree in favour of or against a dead person is nullity. For non substitution of legal representatives of deceased

defendant, out of several defendants, may cause abatement of appeal against the deceased defendant or as a whole, depending upon the effect of non substitution of legal representatives of deceased defendant on the relief claimed. Appellant/plaintiff has set up a case of ignorance of death of defendants.

10. In view of judgments relied upon by the appellant, referred supra, an application for setting aside abatement and substitution of legal representatives of deceased defendants should have been made and dealt with by the Court in which abatement occurred as abatement is automatic irrespective of passing of or not passing of such order by the Court and question whether suit to abate in toto or in part, has also to be decided by the same Court where during pendency of the appeal one of parties had expired before hearing the arguments and where he was a necessary party to the lis and his legal representatives have not been brought on record, and issues as to whether there was sufficient cause for setting aside the abatement or whether the legal representatives of deceased are to be brought on record or not in relation to a suit or appeal, at the first instance, are also to be decided by the Court, in which the suit or appeal was pending at the time of death of party and the abatement took place.

11. There is another aspect related to the issue involved herein. Order 41 Rule 14 CPC provides that Appellate Court shall cause publication and service of notice upon respondent(s) to appear and answer the issue raised in the appeal. Rule 14(3) provides that notice, to be served upon respondent(s), shall be accompanied by copy of memorandum of appeal. There is addition to sub rule (3) by way of an amendment applicable to Delhi, Himachal Pradesh and Punjab, Haryana and Chandigarh High Courts, which reads as under:-

> *"**Delhi, Himachal Pradesh and Punjab, Haryana and Chandigarh**.—(i) Add the following as sub-rule (3):*

> *"(3) it shall be in the discretion of the appellate court to make an order, at any stage of the appeal whether on the application of any party or on its own motion, dispensing with service of such notice on any respondent who did not appear, either at the hearing in the court whose decree is complained of, or at any proceedings subsequent to the decree of that court, or on the legal representatives of any such respondent:*
>
> *Provided that—*
>
> *(a) that court may require notice of the appeal to be published in any newspaper or in such other manner as it may direct:*
>
> *(b) no such order shall preclude any such respondent or legal representative from appearing to contest the appeal."*

12. The aforesaid amendment provides that Appellate Court may dispense with service of notice on any respondent who did not appear either at the hearing in the Court whose decree is complained or any proceedings subsequent to decree of that Court, or on legal representatives of any such respondent. Therefore, service of respondent, who after service, does not appear in the trial Court and is proceeded ex parte and thereafter also does not appear before the first Appellate Court and is proceeded ex parte, can be dispensed with by the appellate Court i.e. High Court in Regular Second Appeal and in such eventuality there would be no need for substitution of such respondent through his legal representatives as the aforesaid provision also provides that service of legal representatives of any such respondent may also be dispensed with and in such eventuality there would be no question of setting aside the impugned judgment on the ground that respondent who was proceeded ex parte before the Courts below has expired during pendency of matter in the courts below. In such circumstances, appeal can be heard and decided by the Appellate Court on merits after dispensing with service of such respondent. In present case respondent No. 18 Kuldeep Singh was proceeded ex parte in the trial Court as well as in first Appellate Court, therefore, he did not contest the matter in either Courts and as such his service or service upon

his legal representatives may be dispensed with in present appeal. However, another deceased respondent No. 7 Nek Singh, though was proceeded ex parte in the first Appellate Court, but was duly represented by an Advocate in the trial Court. Therefore, even if service upon respondent No. 18 or his legal representatives is dispensed with, then also issue with respect to deceased respondent No. 7 Nek Singh would be governed by the case law referred hereinabove. Thus this aspect is kept open to be discussed and decided in an appropriate case, and present case is disposed of in the light of its peculiar facts and circumstances.

13. In view of exposition of law in judgments referred supra, there is no alternative, but to set aside the judgment and decree passed by the first Appellate Court, i.e. Additional District Judge-1, Kangra at Dharamshala in Civil Appeal No. 86-1/XIII/2013, dated 23.2.2019, titled as Jaishi Ram V. Manohar Lal and others and remit the case to the said Court for adjudication of the aforesaid issue.

14. Consequently, the judgment and decree passed by the Appellate Court is quashed and set aside and case is remanded to first Appellate Court with direction to allow the appellant to take consequential steps on the death of respondent No. 7 Nek Singh and respondent No. 18 Kuldeep Singh and thereafter to decide the question of substitution of their legal representatives, if any, and question of exemption to the plaintiff from necessity of substituting the legal representatives of deceased defendants, and also question of abatement, if any, as the case may be on the basis of steps so taken by the appellant. Needless to say that first Appellate Court shall consider and decide all the pleas and counter pleas of the parties after affording the parties due opportunity of being heard.

15. The contesting parties are directed to ensure their appearance through their legal counsel representing them before learned first Appellate Court on 5th July, 2021 either virtually or physically as possible and

permissible in peculiar circumstances on account of pandemic Covid-19. It is made clear that no fresh notice shall be issued to the parties by learned first Appellate Court for ensuring their presence. It shall be personal responsibility of contesting parties to ensure their presence in the first Appellate Court. It is clarified that respondents who have been already proceeded against ex parte before first Appellate Court and also in present Court shall not be necessary to be served afresh. First Appellate Court shall hear the contesting parties and decide the appeal afresh in accordance with law.

16. Consequential steps on account of death of respondents shall be taken by the plaintiff/appellant preferably on the first date of hearing, but not later than two weeks thereafter. Reply thereto, if any also be filed within four weeks, positively and the first appellant shall make an endavour to decide the application and appeal preferably on or before 30th November, 2021.

Appeal stands disposed of in aforesaid terms along with pending applications.

Copy of judgment be transmitted to learned first Appellate Court for record/compliance.

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

M/s Himprastha Financiers (P) Ltd. and others ....Appellants.

Vs.

Union of India and others .....Respondents.

RSA No.: 277 of 1996
Reserved on: 15.03.2021
Date of Decision: 28.05.2021

Appeal- Seeking setting aside the judgment and decree passed by trial court affirmed by Ld. first appellate court whereby suit filed by appellant was dismissed- Held- It is settled law that when a party approaches the appellate

court with an application under order, XLI, rule 27 CPC- then the application has to be decided one way or the other, by the appellate court and same cannot remain undecided on the court record, because none can say as to what would have been the effect of the decision of the same on the final judgment, if the application was allowed by the court- in this case , by not deciding the application under order XLI rule 27 CPC ,first appellate court has committed a material irregularity which renders the judgment and decree passed by it nonest in eyes of law - appeal is allowed- judgment and decree passed by first appellate court is set aside and case is remanded back to first appellate court for adjudication fresh.

For the appellants: Mr. Ajay Kumar, Senior Advocate, with Mr. Dheeraj K. Vashisht, Advocate.

For the respondents: Mr. V.B. Verma, Advocate, for the Union of India.

M/s Sumesh Raj, Dinesh Thakur & Sanjeev Sood, Additional Advocate Generals, with M/s Kamal Kant Chandel & Divya Sood, Deputy Advocate Generals, for the State.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this appeal, the appellants have prayed for the following relief:

"That in the facts and circumstances set out hereinabove, the appellants/plaintiffs humbly pray that this appeal may very kindly be allowed and the judgment and decree of the learned Appellate Court affirming the judgment and decree of the Trial Court may very kindly be set aside throughout with costs. In the alternative, the appellants/plaintiffs humbly pray that since the judgment and decree of both the Courts below are against law and facts on record, the

case may be sent for re-trial under the provisions of Order 41 Rule 23 A CPC."

2. Brief facts necessary for the adjudication of the appeal are as under:

Appellants/plaintiffs (hereinafter referred to as 'the plaintiffs) filed a suit for injunction restraining the respondents/defendants (hereinafter referred to as 'the defendants') from interfering over the possession of the plaintiffs upon property known as 'Him Prastha Bhawan and Central Hotel Annexe' comprised in Khasra Nos. 62/2 and 490/62/A, measuring 1016 square yards 3 square feet. Pursuant to order dated 02.06.1984 purportedly passed by defendant No. 3 and for restraining the defendants from realizing the rent of the property from its tenants etc. As per the plaintiffs, plaintiff No. 1 was a Private Limited Company and property known as Central Hotel Estate situated in Shimla was an evacuee property and same formed part of compensation pool, which was put to auction under the orders of Regional Settlement Commissioner, Jullundur in four different lots, namely, (i) Lot No. 119 comprising Central Hotel Main Bldg. And land attached thereto; (ii) Lot No. 119(a) comprising of Central Hotel Annexe; (iii) Lot No. 119(b) comprising of stable and servant Qrs.; and (iv) Lot No. 119(c) comprising of Central Hotel and additional house above the stables. Out of these four lots, Central Hotel Main building, i.e., lot No. 119 was purchased by one Shri Kala Ram Khanna, Benamidar of Smt. Shakuntla Kochhar for a sum of Rs.67,225/-. Said Kala Ram Khanna was issued sale certificate on 29.03.1963 with regard to the property purchased by him on behalf of Shakuntala Kochhar as per the provisions of the Displaced Persons (Compensation and Rehabilitation) Act, 1954 (hereinafter referred to as 'the 1954 Act') as also Rules made thereunder, wherein the boundaries and details of the property sold to Kala Ram Khanna were also mentioned. Said Kala Ram Khanna, sometime in July 1963 relinquished all his

rights, titled and interest in the property in favour of Smt. Shakuntla Kochhar, who was the real and actual owner of the property in issue and on whose behalf, Sh. Kala Ram Khanna was the Benamidar of the property. As per the plaintiffs, Shakuntla Kochhar was the actual owner of the property known Central Hotel Main Building bearing lot No. 119 and land attached thereto right from the beginning. Out of lot No. 119, Central Hotel Main Building and the land attached thereto, Smt. Shakuntla Kochhar sold an area of 1016 sq. yards and 3 sq. feet comprising of building known as Central Hotel Annexe bearing Khasra No. 61/2 and land appurtenant thereto comprised in Khasra No. 490/62/A, measuring 864 sq. yards and 2 sq. feet vide sale deed dated 06.10.1967 for a consideration of Rs.27,000/- to the plaintiffs. Pursuant to the said sale deed, the plaintiffs were put in possession of the property, which was so purchased by them from Shakuntla Kochhar. Thereafter, plaintiff No. 1 started development work on the property so purchased and constructed partly a single storeyed and partly a double storeyed building known as Him Prastha Bhawan, consisting of a basement and one storey above it on the portion of vacant land purchased from Shakuntla Kochhar. Out of the aforesaid newly constructed building, plaintiff No. 1 sold portions thereof to plaintiffs No. 2 to 5 as mentioned in the plaint. Plaintiffs No. 2 to 5 were also put in legal possession of their respective portions of the property purchased by them. The Central Hotel Stables and servant Qtrs. bearing lot No. 119(b) were purchased by one Shri Dina Nath Malhotra vide sale certificate dated 28.06.1961. Subsequently, vide a deed of sale dated 17.01.1962, he sold the servant quarters and stable to one Shri Kundan Lal Ahuja. Some time in June 1971, Shri Kundan Lal Ahuja filed a complaint with the Chief Settlement Commissioner, Relief and Rehabilitation, Himachal Pradesh against Shakuntla Kochhar alleging that she had wrongly and illegally usurped the Central Hotel Annexe, being lot No. 119(a) and included the same in the sale certificate by extending the boundaries of her estate. It was mentioned in the complaint that land sold by Shakuntla Kochhar

to one Shri H.D. Sardana belonged to him (Kundan Lal Ahuja) and she had wrongly usurped the same and sold it to Shri H.D.Sardana.

3. On receipt of the said complaint, the Chief Settlement Commissioner, H.P. Shimla initiated proceedings against Smt. Shakuntla Kochhar under Section 24 of the Act. He passed an order against her of ejection from the property, i.e., lot No. 119 (a) Central Hotel Annexe, measuring 531 sq. yards, on the ground that said property was never sold to her and she had wrongly included the same in her sale certificate by extending boundaries in her sale certificate. However, Chief Settlement Commissioner did not return any findings qua area purchased by Shri H.D. Sardana, which was claimed by Kundan Lal Ahuja to be his own. Shakuntla Kochhar filed a revision petition under the provisions of the 1954 Act before the Secretary to the Government of H.P. Vide order dated 16.06.1972, the findings of the Chief Settlement Commissioner were set aside on the ground that he had no jurisdiction in the matter. Vide same order, the Secretary, taking cognizance of the complaint of Kundan Lal under Section 33 of the Act suo moto recast the boundaries of Smt. Shakuntla Kochhar and amended her sale certificate to the extent excluding therefrom he property known as Central Hotel Annexe, i.e., lot No. 119(a), on the ground that the said property was never sold to her. Vide said order, the Officer also ordered the eviction of the plaintiff from Central Hotel Annexe lot No. 119(a), measuring 531 sq. yards. Feeling aggrieved, plaintiff No. 1 and other aggrieved parties preferred a writ petition in the High Court of Himachal Pradesh. Same was dismissed by the High Court vide judgment dated 14.04.1975. High Court upheld the findings of the Secretary that the sale certificate of Smt. Shakuntla Devi was void to the extent that it included the boundaries of Central Hotel Annexe. Thereafter, the defendants wrote a letter No. 543 dated 24.05.1982 to plaintiff No. 1, calling upon said plaintiff to surrender the vacant possession of Central Hotel Annexe, measuring 531 sq. yards. On receipt of the said communication, plaintiff No. 1 approached the

Settlement Officer, Evacuee Properties, Department of Rehabilitation, Government of H.P., Una for settlement of the dispute regarding the said area measuring 531 sq. yards. The Settlement Officer agreed to settle the matter on the condition that plaintiff No. 1 withdraws its Special Leave Petition preferred by it, which was subsequently withdrawn by plaintiff No. 1. Thereafter, Settlement Officer, Una settled the entire matter with respect to the aforesaid disputed property for an amount of Rs.1,85,000/- as cost of the said property as also damages for its occupation, which plaintiff No. 1 agreed to honour. However, said order was never communicated to plaintiff No. 1, for the reasons best known to the defendants. Despite above mentioned settlement, defendant No. 3 vide letter No. 443, dated 09.09.1983 served a show cause notice under Section 19(2) of the 1954 Act, calling upon the plaintiff No. 1 as to why it should not be ejected from the area of 1016 sq. yards of Central Hotel Annexe purchased by it from Shakuntla Kochhar. Plaintiff No. 1 filed its reply dated 03.10.1983 pointing out that eviction order passed by the Secretary only pertained to an area of 531 sq. yards and therefore, show cause notice was wholly illegal, void and without any jurisdiction beyond that. It was also mentioned in the reply that in view of settlement of the entire matter, the defendants were not entitled to re-open the said matter again. Thereafter, vide order dated 02.06.1984, defendant No. 3 ordered the ejection of plaintiff from the property, i.e., Central Hotel Annexe and land measuring 1016 sq. yards by rejecting the contention of plaintiff No. 1. Plaintiff No. 1 was also directed not to take any rent from the tenants occupying the property. As per the plaintiff, said order dated 02.06.1984 passed by defendant No. 3 under Section 19(2) of the 1954 Act was illegal, null and void, ultra vires and without jurisdiction for the following reasons:

> *"(a) Impugned order was passed behind the back of plaintiffs No. 2 to 5, without affording them any opportunity of being heard and thus the same was not binding upon them.*

(b) Defendants were illegally and erroneously interpreting the order dated 16.06.1972, passed by the Secretary, Government of H.P., as the said order only pertained to Annexe portion measuring 531 sq. yards.

(c) The provisions of 1954 Act were not applicable to property beyond 531 sq. yards, as said property stood legally and properly transferred to the plaintiffs by its predecessor-in-interest.

(d) The provisions of the 1954 Act were not applicable to the property, which stood disposed of by the Central Government, because it was lot No. 119(a) only which had ben held to be unsold."

4. On the strength of these pleadings, the plaintiffs prayed for the following reliefs:

"It is, therefore, prayed that a decree for permanent prohibitory injunction be passed in favour of the plaintiffs and against the defendants restraining the defendants or its agents or servants from in any manner disturbing or interfering with the peaceful possession or enjoyment of the plaintiffs with respect to the property known as Central Hotel Annexe and Himprastha Bhawan comprised in Khasra Nos. 62/2 and 490/62/A/2, 490/62/A/3,490/62/ 1/1 and 490/ 62/A/1/A, measuring in all 1016 sq. yards and 3 sq. ft. situated in Central Hotel Estate, Shimla or from recovering any rent from the occupiers or tenants of the said buildings Central Hotel Annexe or Himprastha Bhawan or from initiating any proceedings under the said Displaced Persons (Compensation and Rehabilitation) Act, 1954 against the plaintiffs with respect to the said property or such other order or relief as this learned Court deems fit and proper in the facts and circumstances of the case may also be passed in favour of the plaintiffs and against the defendants and costs of the suit be also allowed to the plaintiff against the defendants."

5. The suit was resisted by the defendants. As per the defendants, the plaintiffs had no *locos standi* to maintain the suit and plaintiffs had no right, titled or interest over the suit land. According to the defendants never acquired any right, title or interest of any kind over the suit land. According to the defendants, the suit was bad for want of a proper notice and was also barred by principle of res judicata, as also under the provisions of Section 36 of the 1954 Act. Defendants also challenged the valuation of the suit as also their locus to file and maintain the suit. They denied that suit land was purchased by Kala Ram Khanna, Benamidar of Shakuntla Kochhar. As per the defendants, sale made by Shakuntla Kochhar in favour of plaintiff No. 1 was of no value and plaintiffs were in fact encroachers upon the suit land and were therefore, liable to be ejected. As per the defendants, the suit land was wrongly included in the sale certificate issued to Shakuntla Kochhar, therefore, the orders passed by Chief Settlement Commissioner and Secretary were correct orders and the boundaries of Smt. Shakuntla Kochhar's sale certificate stood rightly amended, because Central Hotel Annexe and adjoining area in fact was never sold to Shakuntla Kochhar and the same was wrongly included in the sale certificate. As per the defendants, the suit land remained to the evacuee property and, therefore, defendants claimed that they had every right to eject the plaintiffs.

6. By way of replication, the plaintiffs reiterated their claim.

7. On the basis of pleadings of the parties, learned Trial Court framed the following issues:

> *"1. Whether plaintiffs are owners in possession of suit property as alleged? OPP*
> *2. If issue No. 1 is proved in affirmative, whether the defendants are interfering over the suit land, as alleged? OPP*

3. Whether the suit property is evacuee property or not? O.P. Parties
4. Whether no notice has been served upon the defendant, as alleged? OPD
5. Whether this Court has no jurisdiction to try the suit as alleged?OPD
6. Whether the suit is barred by res-judicata? OPD
7. Whether the suit is not properly valued for purpose of Court fee and jurisdiction? OPD
8. Whether the suit is barred by limitation? OPD
9. Relief.

8. On the basis of evidence adduced by the respective parties in support of their respective claims, the following findings were returned by learned trial Court on the issues so framed:

"Issue No. 1:	*Plaintiffs are not owners, though they are in possession of part of it.*
Issue No. 2:	*No.*
Issue No. 3:	*Yes.*
Issue No. 4:	*Yes-but permission under Section 80(2) C.P.C. has been granted.*
Issue No. 5:	*No.*
Issue No. 6:	*No.*
Issue No. 7:	*No.*
Issue No. 8:	*No.*
Relief:	*Suit dismissed."*

9. The suit was dismissed by the learned Trial Court, *inter alia,* by holding that plaintiffs were not owners of the suit land and the suit property was an evacuee property and defendants being owners, were within their right to

take steps for getting their property back through lawful means and the same did not amount to interference.

10. Feeling aggrieved, the plaintiffs filed an appeal, i.e., Civil Appeal No. 107-S/13 of 1994, which was dismissed by the Court of learned Additional District Judge, Shimla vide judgment and decree dated 03.06.1996. The appeal was dismissed by the learned Appellate Court, *inter alia,* by holding that as auction sale had not taken place with the help of Khasra numbers and area thereof, thus, auction of all four lots took place with the help of natural boundaries and in construing the grant of land, a description by fixed boundaries had to be preferred, to a conflicting description by area. It held that the natural boundaries of all four lots stood indicated at the time of auction sale. In the sale certificate as originally issued and subsequently amended, the natural boundaries of Central Hotel main building stood indicated and at no stage, plaintiffs had been able to work out the exact areas of either Central Hotel main building or Central Hotel Annexe. On these basis, it held that it was not open to the plaintiffs to claim ownership and possession of any area beyond the boundary so determined by the Secretary vide order dated 16.06.1972. Learned Court also held that plaintiffs were not entitled to the benefit of Section 41 of the Transfer of Property Act, as was held by this Court while dismissing their Writ Petition vide judgment dated 14.04.1975. It also held that the application filed under Order 41 Rule 27 of the Code of Civil Procedure was liable to be rejected, as the additional evidence intended to be produced by the plaintiffs at appellate Court was of no assistance. Thus, learned Appellate Court while dismissing the appeal, upheld the findings returned by the learned Trial Court.

11. I have heard learned counsel for the parties and have also gone through the judgments passed by the learned Courts below as well as the record of the case.

12. This appeal was admitted on 08.09.2011 on the following substantial question of law:

"1. Whether the Lower Appellate Court has wrongly rejected the application filed by the plaintiffs-appellants for leading additional evidence. The said application was within the parameter and scope of Order 41 Rule 27 CPC as the documents were already on the record?

2. Whether the judgment and decree passed by both the learned Courts below are the result of misreading the documentary evidence, particularly the title deeds of the respective parties, sale deeds and the plans depicting the boundaries of the four Lots of the evacuee property?

3. Whether the judgments and decrees passed by both the learned Courts below are illegal on account of failure on the parts of both the learned Courts below to appreciate the fact that the property in dispute lost its character as an evacuee property and no longer was a part of the compensation pool, and the proceedings initiated against the plaintiffs-appellants assailing the property to be evacuee property were apparently without jurisdiction?

4. Whether the Courts below have wrongly permitted the defendants to rake up the issue regarding the area of Lot No. 119-A i.e. Central Hotel Annexe when the matter was finally settled in various previous proceedings, whether such pleas were barred by res judicata?

5. Whether both the learned Courts below have failed to take into consideration that the Authorities who initiated proceedings for ejectment against the plaintiffs-appellants had no jurisdiction and further their orders were against the principles of natural justice. In these circumstances, whether the Courts below have wrongly declined the relief of injunction to the plaintiffs-appellants, who were in established possession of the suit property?"

13. The Court will first decide substantial question of law No. 1. Record demonstrates that during the pendency of the First Appeal, the appellants therein filed three applications under Order XLI, Rule 27 read with other provisions of the Code of Civil Procedure. As these applications apparently do not contain any numbers, therefore, they will be referred to in terms of the date of preparation contained in the same. It is clarified that all these applications are on record and an integral part of the file of the learned First Appellate Court.

(a). There is is one application on record filed under Order 41, Rule 27 read with Order 18, Rule 17A and Sections 94 & 151 of the Code of Civil Procedure, dated 07.11.1994, in which, a prayer stood made by the appellants/plaintiffs to lead additional evidence by tendering the "judgment" dated 21.06.1994, passed by the High Court of Himachal Pradesh mentioned therein in evidence.

(b). There happens to be another application filed under Order Order 41, Rule 27 read with the Section 151 & 107 of the Code of Civil Procedure on record, which is dated 13.11.1995. By way of this application, the appellants prayed to lead additional evidence by placing on record a copy of "*Musavi*".

(c). Vide another application dated 24.04.1996, the documents which the appellants/plaintiffs intended to place on record by way of additional evidence were:

> *"(a) Sale Certificate issued by the U.O.O. to Shri Dina Nath, predecessor-in-interest of Shri Kundan Lal Ahuja;*
> *(b) Sale Deed executed in favour of Shri Kundan Lal Ahuja by Shri Dnna Nath; and*
> *(c) Judgment and compromise deeds of cases filed by Shri Kundan Lal alongwith applications."*

The reason mentioned in the application as to why these documents were intended to be placed on record by way of additional evidence was to prove and exhibit the actual boundary position of the suit land.

14. A perusal of the judgment passed by the learned First Appellate Court demonstrates that applications filed under Order 41, Rule 27 of the Code of Civil Procedure have been dismissed by holding as under:

> *"18. The plaintiffs were not entitled to the benefit of Section 41 of the Transfer of Property Act as held by the Hon'ble High Court while dismissing their CWPs. vide judgment dated 14.04.1975. The doctrine of promissory estoppel was not applicable as the suit property was evaccue property. The plaintiffs had applied for additional evidence so as to tender in evidence the copy of judgment dated 21.06.1994 passed by the Hon'ble High Court of H.P. Simply because the Hon'ble High Court of H.P. had quashed criminal proceedings against the predecessor-in-title of the plaintiffs and some others established nothing. The Hon'ble High Court vide judgment dated 21.6.1994 had not determined the ownership and possession of the plaintiffs of the suit property. It has been established as a fact that the suit property was beyond the limits of Central Hotel main building and, hence the plaintiffs were rank trespassers. The copy of field map sought to be produced by the plaintiffs at appellate stage was of no assistance to the plaintiffs. The field maps already on record were, in no way, different from the copy sought to be produced at appellate stage. Hence, application for additional evidence is rejected."*

15. Order XLI, Rule 27 of the Code of Civil Procedure, *inter alia,* provides for production of additional evidence in Appellate Court, if the Court from whose decree the appeal is preferred has refused to admit evidence which

ought to have been admitted, or the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed.

16. In the considered view of this Court, when an Appellate Court is dealing with an application under Order Order XLI, Rule 27 of the Code of Civil Procedure, the first call which the Court has to take is as to whether the same meets the conditions contemplated under Order Order XLI, Rule 27 of the Code of Civil Procedure or not. In other words, in case the additional evidence is not required by the Appellate Court for pronouncement of a judgment, then it is the duty of the Appellate Court to see as to whether the additional evidence sought to be produced, was refused to be admitted by the Court from whose decree the appeal is preferred or whether the party seeking to produce additional evidence, notwithstanding due diligence, or even after exercise of due diligence, was not able to produce it on record.

17. I have referred to in some detail the documents which were intended to be placed on record by the appellants/plaintiffs before the learned First Appellate Court by way of applications filed under Order XLI, Rule 27 of the Code of Civil Procedure. In para-18 of the judgment of the learned First Appellate Court only two applications have been discussed with regard to documents, i.e., (a) copy of the judgment dated 21.06.1994; and (b) a copy of field map. The prayer of the plaintiffs/appellants by way of third application dated 24.04.1996 filed under Order XLI, Rule 27 of the Code of Civil Procedure was to place on record the following documents:

> *"(a) Sale Certificate issued by the U.O.O. to Shri Dina Nath, predecessor-in-interest of Shri Kundan Lal Ahuja;*
>
> *(b) Sale Deed executed in favour of Shri Kundan Lal Ahuja by Shri Dnna Nath; and*

(c) Judgment and compromise deeds of cases filed by Shri Kundan Lal alongwith applications."

This application dated 24.04.1996 in fact has not been decided by the learned First Appellate Court, as no order has been passed in the judgment with regard to the fate of this application.

18. It is settled law that when a party approaches the Appellate Court with an application under Order XLI, Rule 27 of the Code of Civil Procedure, then the application has to be decided one way or the other by the Appellate Court and the same cannot remain undecided on the Court record, because none can say as to what would have been the effect of the decision of the same on the final judgment, if the application was allowed by the Court. In this case, by not deciding this third application dated 24.0.4.1996 filed under Order XLI, Rule 27 of the Code of Civil Procedure, the learned First Appellate Court has committed a material irregularity, which renders the judgment and decree passed by it non est in the eyes of law. It is again reiterated that this Court is not suggesting as to what order should have been passed on the said application by the learned First Appellate Court and all that this Court is laying stress upon is that once this application was on record, learned First Appellate Court was duty bound to decide it.

19. It is relevant to state here that Zimini order passed by the learned First Appellate Court dated 24.04.1996 is self speaking that it was on this date that an application under Order XLI, Rule 27 of the Code of Civil Procedure was filed and the same was ordered to be listed by the learned First Appellate Court on the next date fixed, i.e., 29.04.1996. Thus, here it is not a case where the cognizance of the application had not been taken by the Court. In these circumstances, it is reiterated that non-adjudication of this application by the learned First Appellate Court renders the judgment and decree passed by

it bad in law. Substantial question of law No. 1 is answered accordingly and in view of this, the other substantial questions of law call for no adjudication.

20. Accordingly, this appeal is allowed on this point alone by setting aside the judgment and decree dated 03.06.1996, passed by the learned First Appellate Court in Civil Appeal No. 107-S/13 of 1994, titled as *M/s Himprastha Financers (P) Ltd. and others Vs. The Union of India and others* and the case is remanded back to the learned First Appellate Court for adjudication afresh.

As it is quite an old appeal, learned First Appellate Court is requested to make an endeavour to decide the same as expeditiously as possible and preferably before 31st December, 2021. Miscellaneous applications, if any, also stand disposed of.

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

Shri Shanti Swaroop Sardana (since deceased)
through his legal representatives Smt. Anju Sardana
and others. ....Appellants.

Vs.

Union of India and another .....Respondents.

RSA No. 282 of 1996
Reserved on: 15.03.2021
Date of Decision: 28.05.2021

Appeal- Seeking setting aside the judgment and decree passed by trial court affirmed by first appellate court whereby suit filed by appellant's predecessor was dismissed – Held-Record demonstrates that during pendency of first appeal, appellant filed three applications under order 41 rule 27 CPC. These applications are on record and as integral part of the file of first appellate court -Order 41 rule 27 CPC interalia provides for production of additional evidence in appellate court ,if court from whose decree appeal is preferred, refused to admit evidence which ought to have been admitted or party seeking to adduce additional evidence establishes that notwithstanding the exercise of

due diligence such evidence was not within his knowledge or could not after exercise of due diligence be produced by him at the time when the decree appealed against was passed- when an court is dealing with an application under order 41 rule 27 CPC, court to first to decide whether same meets the conditions contemplated under order 41 rule 27 CPC or not-it is settled law that when a party approaches the appellate court with an application under order 41 rule 27 CPC the application has to be decided one way or other by appellate court and same cannot remain undecided in court record because none can say as to what would have been the effect of decision of same on the final adjudication if the application was allowed by the court. The appellate court by not deciding the third application under order 41 rule 27 CPC has committed a material irregularity which renders the decree passed by it nonest in eyes of law -appeal is allowed by setting aside judgment and decree passed by first appellate court and case is remanded back to first appellate court for adjudication fresh.

For the appellants: Mr. Satyen Vaidya, Senior Advocate,
with Mr. Vivek Sharma, Advocate.

For the respondents: Mr. V.B. Verma, Advocate, for the Union of India.

M/s Sumesh Raj, Dinesh Thakur & Sanjeev Sood, Additional Advocate Generals, with M/s Kamal Kant Chandel & Divya Sood, Deputy Advocate Generals, for the State.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this appeal, the appellants have prayed for setting aside the judgment and decree dated 31.12.1993, passed by the Court of learned Sub-Judge, 1st Class, Court No. 2, Shimla in Case No. 128-1 of 1992/83, titled as *Smt. Jai Devi Sardaha and others Vs. The Union of India and another*, vide which, the suit filed by their predecessors was dismissed, alongwith the judgment and decree dated 03.06.1996, passed by the Court of learned Additional District Judge, Shimla, H.P. in Civil Appeal No. 108-S/13 of

1994, titled as *Shri Gian Chand Sardaha and others Vs. The Union of India and another*, vide which, the appeal filed by the appellants against the judgment and decree dated 31.12.1993, passed by the learned Trial Court, was also dismissed.

2. Brief facts necessary for the adjudication of this Regular Second Appeal are that the predecessors-in-interest of the present appellants instituted a suit for permanent prohibitory injunction against the defendants for restraining them from interfering with the ownership and possession of the plaintiffs over the suit property known as 'Sardana House' comprised in Kasra No. 490/62/B, measuring 300 sq. yards, 3 sq. feet, situated in Station Ward Chhota Shimla. According to the plaintiffs, Central Hotel Estate Shimla was evacuee property and was part of a compensation pool. It was put to auction on 18.11.1955. The same was divided into four lots. Lot No. 119 was purchased by Sh. Kala Ram Khanna as Benamidar on behalf of Smt. Shakuntla Kochhar. A sale certificate was issued in favour of the owner on 29.3.1963. Sh. Kala Ram Khanna relinquished his possession and interest with regard to lot No. 119 in favour of Smt. Shakuntla Kochhar. On 09.01.1970, Smt. Shakuntla Kochhar sold 300 sq. yards and 3 sq. feet of the land to Sh. H.D. Sardana (predecessor-in-interest of the plaintiffs), who developed the same and constructed a building known as 'Sardana House' over the same. Lot No. 119-B was purchased in the auction by Sh. Dina Nath Malhotra, who sold the same to one Sh. Kundan Lal Ahuja in the year 1962. Sh. Kundan Lal Ahuja filed a complaint against Smt. Shakuntla Kochhar to the effect that she had usurped lot No. 119-A and got the said lot included within the boundaries of her sale certificate. It was also alleged that Smt. Shakuntla Kochhar had sold land measuring 300 sq. yards and 3 sq. feet in Khasra No. 490/62/B to H.D. Sardana, which belonged to him, i.e., Sh. Kundan Lal Ahuja. The complaint was filed before the Chief Settlement Commissioner (Relief & Rehabilitation). Said Commissioner held the sale certificate to be bad by holding that it included, within its boundary, the Central Hotel Annexe and land attached thereto. This order was challenged by the

plaintiffs as well as M/s Himprastha by way of a Revision Petition. The Revisional Authority, i.e., Secretary to the Government of Himachal Pradesh observed that the chief Settlement Commissioner had no jurisdiction to pass the order, against which revision was preferred, but the Secretary *suo moto* took cognizance of the matter under Section 33 of the Displaced Persons (Compensation and Rehabilitation) Act, 1954 and passed orders for eviction of the plaintiffs from Central Hotel Annexe, measuring 531 sq. yards.

3. Feeling aggrieved, plaintiffs preferred CWP No. 89 of 1972 in the High Court of H.P., which stood dismissed. After dismissal of the writ petition, the plaintiffs and their predecessor-in-interest surrendered the possession of Central Hotel Annexe and land measuring 531 sq. yards attached thereto. Despite said settlement, defendants issued notice for eviction of the plaintiffs from the suit property comprised in Khasra No. 490/62/B, measuring 300 sq. yards and defendants passed orders for eviction of the plaintiffs from the suit property on 02.06.1984. Feeling aggrieved by the issuance of which, the suit was filed.

4. The same was resisted by the defendants, *inter alia,* on the ground that the suit property was an evacuee property and it stood vested in the State of Himachal Pradesh. Neither Kala Ram Khanna nor Smt. Shakuntla Kochhar had purchased the suit property in open auction. The plaintiffs in collusion with their predecessor-in-interest had encroached upon the same and defendants were well within their rights in evicting the plaintiffs.

5. On the basis of pleadings of the parties, the following issues were framed by the learned Trial Court:

> *"1. Whether the plaintiffs are owners in possession of suit property as alleged? OPP*
> *2. If issue No. 1 is proved in affirmative, whether the defendants are interfering over the suit land, as alleged? OPP*
> *3. Whether the suit property is evacuee property or not? O.P. Parties*

4. Whether no notice has been served upon the defendants, as alleged? OPD
5. Whether this Court has no jurisdiction to try the suit as alleged?OPD
6. Whether the suit is barred by res-judicata? OPD
7. Whether the suit is not properly valued for purpose of Court fee and jurisdiction? OPD
8. Whether the suit is bad for non-joinder of necessary parties? OPD.
9. Relief.

6. On the basis of evidence adduced by the respective parties in support of their respective claims, the following findings were returned by learned trial Court on the issues so framed:

"Issue No. 1:	*Plaintiffs are not owners, though they are in possession of it.*
Issue No. 2:	*No.*
Issue No. 3:	*Yes.*
Issue No. 4:	*Yes-but permission under Section 80(2) C.P.C. has been granted.*
Issue No. 5:	*No.*
Issue No. 6:	*No.*
Issue No. 7:	*No.*
Issue No. 8:	*No.*
Relief:	*Suit dismissed."*

The suit was thus dismissed by the learned Trial Court vide judgment and decree dated 31.12.1993.

7. Feeling aggrieved, the plaintiffs preferred an appeal against the judgment and decree dated 31.12.1993, which also stood dismissed by the

Court of learned Additional District Judge vide judgment and decree dated 03.06.1996.

8. Feeling aggrieved by the judgment and decree dated 03.06.1996, the appellants preferred the present Regular Second Appeal, which was admitted by this Court on the following substantial questions of law:

> *"1. Whether the Lower Appellate Court has wrongly rejected the application filed by the plaintiffs-appellants for leading additional evidence. The said application was within the parameter and scope of Order 41 Rule 27 CPC as the documents were already on the record?*
>
> *2. Whether the judgment and decree passed by both the learned Courts below are the result of misreading the documentary evidence, particularly the title deeds of the respective parties, sale deeds and the plans depicting the boundaries of the four Lots of the evacuee property?*
>
> *3. Whether the judgments and decrees passed by both the learned Courts below are illegal on account of failure on the parts of both the learned Courts below to appreciate the fact that the property in dispute lost its character as an evacuee property and no longer was a part of the compensation pool, and the proceedings initiated against the plaintiffs-appellants assailing the property to be evacuee property were apparently without jurisdiction?*
>
> *4. Whether the Courts below have wrongly permitted the defendants to rake up the issue regarding the area of Lot No. 119-A i.e. Central Hotel Annexe when the matter was finally settled in various previous proceedings, whether such pleas were barred by res judicata?*
>
> *5. Whether both the learned Courts below have failed to take into consideration that the Authorities who initiated proceedings for ejectment*

against the plaintiffs-appellants had no jurisdiction and further their orders were against the principles of natural justice. In these circumstances, whether the Courts below have wrongly declined the relief of injunction to the plaintiffs-appellants, who were in established possession of the suit property?"

9. The suit was dismissed by the learned Trial Court, *inter alia,* by holding that plaintiffs were not owners of the suit land and the suit property was an evacuee property and defendants being owners, were within their right to take steps for getting their property back through lawful means and the same did not amount to interference.

10. Feeling aggrieved, the plaintiffs filed an appeal, i.e., Civil Appeal No. 108-S/13 of 1994, which was dismissed by the Court of learned Additional District Judge, Shimla vide judgment and decree dated 03.06.1996. The appeal was dismissed by the learned Appellate Court, *inter alia,* by holding that as auction sale had not taken place with the help of Khasra numbers and area thereof, thus, auction of all four lots took place with the help of natural boundaries and in construing the grant of land, a description by fixed boundaries had to be preferred, to a conflicting description by area. It held that the natural boundaries of all four lots stood indicated at the time of auction sale. In the sale certificate as originally issued and subsequently amended, the natural boundaries of Central Hotel main building stood indicated and at no stage, plaintiffs had been able to work out the exact areas of either Central Hotel main building or Central Hotel Annexe. On these basis, it held that it was not open to the plaintiffs to claim ownership and possession of any area beyond the boundary so determined by the Secretary vide order dated 16.06.1972. Learned Court also held that plaintiffs were not entitled to the benefit of Section 41 of the Transfer of Property Act, as was held by this Court while dismissing their Writ Petition vide judgment dated 14.04.1975. It also held that the application filed

under Order 41 Rule 27 of the Code of Civil Procedure was liable to be rejected, as the additional evidence intended to be produced by the plaintiffs at appellate Court was of no assistance. Thus, learned Appellate Court while dismissing the appeal, upheld the findings returned by the learned Trial Court.

11. I have heard learned counsel for the parties and have also gone through the judgments passed by the learned Courts below as well as the record of the case.

12. This appeal was admitted on 08.09.2011 on the following substantial question of law:

> *"1. Whether the Lower Appellate Court has wrongly rejected the application filed by the plaintiffs-appellants for leading additional evidence. The said application was within the parameter and scope of Order 41 Rule 27 CPC as the documents were already on the record?*
>
> *2. Whether the judgment and decree passed by both the learned Courts below are the result of misreading the documentary evidence, particularly the title deeds of the respective parties, sale deeds and the plans depicting the boundaries of the four Lots of the evacuee property?*
>
> *3. Whether the judgments and decrees passed by both the learned Courts below are illegal on account of failure on the parts of both the learned Courts below to appreciate the fact that the property in dispute lost its character as an evacuee property and no longer was a part of the compensation pool, and the proceedings initiated against the plaintiffs-appellants assailing the property to be evacuee property were apparently without jurisdiction?*
>
> *4. Whether the Courts below have wrongly permitted the defendants to rake up the issue regarding the area of Lot No. 119-A i.e. Central Hotel Annexe when the matter was finally settled in various previous*

proceedings, whether such pleas were barred by res judicata?

5. Whether both the learned Courts below have failed to take into consideration that the Authorities who initiated proceedings for ejectment against the plaintiffs-appellants had no jurisdiction and further their orders were against the principles of natural justice. In these circumstances, whether the Courts below have wrongly declined the relief of injunction to the plaintiffs-appellants, who were in established possession of the suit property?"

13. The Court will first decide substantial question of law No. 1. Record demonstrates that during the pendency of the First Appeal, the appellants therein filed three applications under Order XLI, Rule 27 read with other provisions of the Code of Civil Procedure. As these applications apparently do not contain any numbers, therefore, they will be referred to in terms of the date of preparation contained in the same. It is clarified that all these applications are on record and an integral part of the file of the learned First Appellate Court.

(a). There is is one application on record filed under Order 41, Rule 27 read with Order 18, Rule 17A and Sections 94 & 151 of the Code of Civil Procedure, dated 07.11.1994, in which, a prayer stood made by the appellants/plaintiffs to lead additional evidence by tendering the "judgment" dated 21.06.1994, passed by the High Court of Himachal Pradesh mentioned therein in evidence.

(b). There happens to be another application filed under Order Order 41, Rule 27 read with the Section 151 & 107 of the Code of Civil Procedure on record, which is dated 13.11.1995. By way of this application, the appellants prayed to lead additional evidence by placing on record a copy of "*Musavi*".

(c). Vide another application dated 24.04.1996, the documents which the appellants/plaintiffs intended to place on record by way of additional evidence were:

> *"(a) Sale Certificate issued by the U.O.O. to Shri Dina Nath, predecessor-in-interest of Shri Kundan Lal Ahuja;*
> *(b) Sale Deed executed in favour of Shri Kundan Lal Ahuja by Shri Dnna Nath; and*
> *(c) Judgment and compromise deeds of cases filed by Shri Kundan Lal alongwith applications."*

The reason mentioned in the application as to why these documents were intended to be placed on record by way of additional evidence was to prove and exhibit the actual boundary position of the suit land.

14. A perusal of the judgment passed by the learned First Appellate Court demonstrates that applications filed under Order 41, Rule 27 of the Code of Civil Procedure have been dismissed by holding as under:

> *"18. The plaintiffs were not entitled to the benefit of Section 41 of the Transfer of Property Act as held by the Hon'ble High Court while dismissing their CWPs. vide judgment dated 14.04.1975. The doctrine of promissory estoppel was not applicable as the suit property was evaccue property. The plaintiffs had applied for additional evidence so as to tender in evidence the copy of judgment dated 21.06.1994 passed by the Hon'ble High Court of H.P. Simply because the Hon'ble High Court of H.P. had quashed criminal proceedings against the predecessor-in-title of the plaintiffs and some others established nothing. The Hon'ble High Court vide judgment dated 21.6.1994 had not determined the ownership and possession of the plaintiffs of the suit property. It has been established as a fact that the suit property was beyond the limits of Central Hotel main building and,*

> *hence the plaintiffs were rank trespassers. The copy of field map sought to be produced by the plaintiffs at appellate stage was of no assistance to the plaintiffs. The field maps already on record were, in no way, different from the copy sought to be produced at appellate stage. Hence, application for additional evidence is rejected."*

15. Order XLI, Rule 27 of the Code of Civil Procedure, *inter alia,* provides for production of additional evidence in Appellate Court, if the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed.

16. In the considered view of this Court, when an Appellate Court is dealing with an application under Order Order XLI, Rule 27 of the Code of Civil Procedure, the first call which the Court has to take is as to whether the same meets the conditions contemplated under Order Order XLI, Rule 27 of the Code of Civil Procedure or not. In other words, in case the additional evidence is not required by the Appellate Court for pronouncement of a judgment, then it is the duty of the Appellate Court to see as to whether the additional evidence sought to be produced, was refused to be admitted by the Court from whose decree the appeal is preferred or whether the party seeking to produce additional evidence, notwithstanding due diligence, or even after exercise of due diligence, was not able to produce it on record.

17. I have referred to in some detail the documents which were intended to be placed on record by the appellants/plaintiffs before the learned First Appellate Court by way of applications filed under Order XLI, Rule 27 of

the Code of Civil Procedure. In para-18 of the judgment of the learned First Appellate Court only two applications have been discussed with regard to documents, i.e., (a) copy of the judgment dated 21.06.1994; and (b) a copy of field map. The prayer of the plaintiffs/appellants by way of third application dated 24.04.1996 filed under Order XLI, Rule 27 of the Code of Civil Procedure was to place on record the following documents:

> *"(a) Sale Certificate issued by the U.O.O. to Shri Dina Nath, predecessor-in-interest of Shri Kundan Lal Ahuja;*
> *(b) Sale Deed executed in favour of Shri Kundan Lal Ahuja by Shri Dnna Nath; and*
> *(c) Judgment and compromise deeds of cases filed by Shri Kundan Lal alongwith applications."*

This application dated 24.04.1996 in fact has not been decided by the learned First Appellate Court, as no order has been passed in the judgment with regard to the fate of this application.

18. It is settled law that when a party approaches the Appellate Court with an application under Order XLI, Rule 27 of the Code of Civil Procedure, then the application has to be decided one way or the other by the Appellate Court and the same cannot remain undecided on the Court record, because none can say as to what would have been the effect of the decision of the same on the final judgment, if the application was allowed by the Court. In this case, by not deciding this third application dated 24.0.4.1996 filed under Order XLI, Rule 27 of the Code of Civil Procedure, the learned First Appellate Court has committed a material irregularity, which renders the judgment and decree passed by it non est in the eyes of law. It is again reiterated that this Court is not suggesting as to what order should have been passed on the said application by the learned First Appellate Court and all that this Court is laying

stress upon is that once this application was on record, learned First Appellate Court was duty bound to decide it.

19. It is relevant to state here that Zimini order passed by the learned First Appellate Court dated 24.04.1996 is self speaking that it was on this date that an application under Order XLI, Rule 27 of the Code of Civil Procedure was filed and the same was ordered to be listed by the learned First Appellate Court on the next date fixed, i.e., 29.04.1996. Thus, here it is not a case where the cognizance of the application had not been taken by the Court. In these circumstances, it is reiterated that non-adjudication of this application by the learned First Appellate Court renders the judgment and decree passed by it bad in law. Substantial question of law No. 1 is answered accordingly and in view of this, the other substantial questions of law call for no adjudication.

20. Accordingly, this appeal is allowed on this point alone by setting aside the judgment and decree dated 03.06.1996, passed by the learned First Appellate Court in Civil Appeal No. 108-S/13 of 1994, titled as *Shri Gian Chand Sardana and others Vs. The Union of Indian and another* and the case is remanded back to the learned First Appellate Court for adjudication afresh.

As it is quite an old appeal, learned First Appellate Court is requested to make an endeavour to decide the same as expeditiously as possible and preferably before 31st December, 2021. Miscellaneous applications, if any, also stand disposed of.

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

Lekh Ram @ Suneel Kumar ...Petitioner

Versus

State of H.P. ....Respondent

Cr.MP(M) No.743 of 2021
Date of Decision 24th May, 2021

The application for Bail for commission of offence under section 363,376 IPC and Section 4 prevention of Children from sexual offences Act (POCSO Act) Held-The delay in lodging FIR is immaterial as victim was minor at the time of commission of offence and lodging FIR- The contradictions in the statement of prosecutrix in examination-in –chief- are to be taken into consideration at the time of final conclusion of trial along with other evidence on record- At the time of considering bail application the court should not go into such detail-Minute assessment or evaluation of evidence- Court did not find fit the case for grant of bail- the Bail application dismissed.

For the Petitioner: Mr. Peeyush Verma, Advocate, through Video Conferencing.

For the Respondent: Mr. Gaurav Sharma, Deputy Advocate General, through Video Conferencing.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

Petitioner has approached this Court seeking bail in case FIR No. 210 of 2018 dated 08.09.2018 registered in Police Station Sundernagar, under Sections 363 and 376 IPC and Section 4 of Prevention of Children from Sexual Offences Act (in short 'POCSO Act').

Status report stands filed. Besides, petitioner has also filed copies of statements of prosecutrix and her mother recorded during the trial.

Main grounds seeking bail are that there is delay of six months in lodging the FIR and also that after alleged commission of offence by petitioner, victim had attended the marriage of sister of petitioner as well as petitioner, about 2-3 months after the alleged date of offence and before 2-3 months of lodging of FIR, but, at that time also, she did not make any

complaint on that day also and after or before that and in her examination-in-chief in the trial Court, victim has stated that at about 9 PM petitioner had taken her in his car from Nalwar fair towards Mahamaya temple and violated her forcibly in the car, whereas, in cross-examination, she has stated that she remained in Mela ground on that day from 7 PM to 9.30 PM and thereafter, she had stayed in the house of sister of petitioner.

In the status report, it is stated that on the basis of date of birth certificate of victim, her age, at the time of commission of offence, was about 16 years and being a minor, she was not competent to exercise her discretion and further that she did not disclose the incident to anyone in her family and it came into light when victim made a complaint of stomachache whereupon she was taken to hospital by mother, and on medical examination, she was found pregnant and thereupon, matter was reported to Police Station Sadar Bilaspur and thereafter, referred to Police Station Sundernagar for commission of offence in jurisdiction of that Police Station. It is also stated in status report that victim has delivered a child and on DNA profiling, petitioner has been found biological father of the said child. It is also stated in status report that when after the incident, victim informed petitioner about missing of mensuration, then petitioner had assured to marry her and thereafter, petitioner had also confirmed the pregnancy through test and had again assured to marry her.

The allegation of violation of person of victim is duly corroborated by DNA profiling as petitioner has been found biological father of child delivered by victim.

So far as delay in lodging the FIR is concerned, that is immaterial in present case as victim was minor at the time of commission of offence as well as at the time of lodging the report she had not attained the age of discretion and FIR has been lodged, at the first instance, when commission of offence came in the knowledge of the parents without any delay.

The delay in FIR, at the most, can be taken a consent of victim with respect to act committed by petitioner, but, on account of age of victim, consent is immaterial.

So far as attending the marriage of sister of petitioner and that of petitioner in between, i.e. after commission of offence and before reporting the matter to police, is concerned, it has been stated by victim in her cross examination that she had gone to attend the marriage of sister of accused and she was not knowing that marriage of petitioner was also being solemnized on the very same day. Further, it is not a case where victim had disclosed the commission of offence, but, it is a case where commission of offence has come in the light when she was found pregnant during medical checkup and whereafter, during inquiry, she disclosed the incident and on verification on the basis of scientific evidence, her version was found to be true.

So far as contradictions in the statement of prosecutrix in examination-in-chief with respect to timings of staying in Mela ground and taking by accused in his car and ravishing her, are concerned, that is to be taken into consideration by trial Court at the time of final conclusion of trial along with other evidence on record.

At the time of considering this application for bail, I do not think that this Court should go into such minute assessment or evaluation of evidence. Otherwise also, for the other material on record, I do not find that it is a fit case for enlarging the petitioner on bail at this stage.

In view of above discussion, application stands dismissed. Any observation made in this order shall not affect the merits of case in any manner and will strictly confine for the disposal of this bail application filed.

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

Suresh Kumar ...Petitioner.

Versus

State of H.P. ...Respondent.

Cr.MP(M) No. 766 of 2021
Reserved on: May 5, 2021.
Date of Decision: May 6, 2021

The petition under section 439 Cr.P.C. for regular bail for commission of offences under section 341, 342, 323, 370, 374, 376, 34 IPC & 75, 79 J.J Act and section 8 of POCSO Act- Victim of 14 years of age – Doctor had not ruled out the possibility of sexual intercourse- The mere fact that on medical examination of victim hymen was not found ruptured does not go to rule out the possibility of sexual intercourse – Victim –Thin, lean poorly nourished and as per her, when she felt pain, accused left her- These allegation itself show that accused might not have penetrated his male organ deep enough rupturing hymen- The court is not inclined to grant bail- The petition dismissed.

Cases referred:

Parminder alias Ladka Pola v. State of Delhi, (2014) 2 SCC 592;

For the petitioner: Mr. Satyen Vaidya, Sr. Advocate with Mr. Varun Chandel, Advocate.

For the respondent: Mr. Nand Lal Thakur, Additional Advocate General.

THROUGH VIDEO CONFERENCE

FIR No.	Dated	Police Station	Sections
226/2020	**1.11.2020**	**West, District, Shimla H.P.**	**341, 342, 323, 370, 374, 376, 34, IPC & 75, 79 of Juvenile Justice (Care and Protection of Children) Act, 2015 and S.8 of POCSO Act**

The following judgment of the Court was delivered:

Anoop Chitkara, Judge.

The petitioner, incarcerating upon his arrest for alluring and raping a minor girl, has come up before this Court seeking regular bail on the grounds that he is in jail w.e.f. 8.11.2020.

2. Earlier, the petitioner had filed a petition under Section 439 CrPC before the concerned Sessions Court. However, vide order dated 17.12.2020 learned Special Judge, Shimla HP, dismissed the petition because of the gravity of the offence. After that the petitioner filed a petition before this Court, which was registered as Cr.MP(M) No.104 of 2021. However, on 4.2.2021, the same was dismissed as withdrawn with liberty to file fresh one.

3. In Para 10 of the bail application, the petitioner declares having no criminal history. The status report also does not mention any criminal past of the accused.

4. Briefly, the allegations against the petitioner are that on 1.11.2020, on some information of a whistle blower, the police officials inspected the house of one Brij Lal Puri. On search, they noticed a small girl, who was employed as a domestic help who belonged to Madhya Pradesh. She further informed the police that before lockdown, she was brought to Shimla by the son of her uncle to do household work in the house of Brij Lal Puri. Said Brij Lal Puri and his wife Aarti not only kept the victim in their house without the consent of her parents but also did not inform the police about it. The victim cannot speak or understand Hindi. On this, the Police registered the FIR mentioned above.

5. Subsequently, the victim was taken to IGMC for ossification test, where the doctors opined her age to be between 12 to 14 years. The police also took

into possession CCTV footage. The police was experiencing communication difficulty because the victim belongs to remote area of Madhya Pradesh. After recording the statement of the victim under Section 161, Cr.PC, she was sent to Child Care Institute, Tuti Kandi. Subsequently, her statement under Section 164, Cr.PC was recorded on 5.11.2020. After that, father of the victim and one relative visited Shimla and joined investigation. On 7.11.2020, the father of the victim told the investigator that while interacting with her, she disclosed to him that she was sexually exploited by Suresh Kumar (bail petitioner herein), who is employee of Brij Lal Puri. Upon this, she was sent to IGMC for medical examination and MLC was procured. Investigation further revealed the age of the victim as 14 years. The genetic material obtained from the victim tested negative in the absence of human semen on all the exhibits, however, the doctor opined that the possibility of sexual intercourse cannot be ruled out.

6. Status report revealed that police has launched prosecution on 7.1.2021 by filing a complaint under Section 173(8), Cr.PC. Impliedly, report under Section 173(2), Cr.PC was also prepared.

7. Mr. Satyen Vaidya, learned Senior Advocate, assisted by Mr. Varun Chandel, learned counsel for the petitioner argued that in the first statement recorded on 1.11.2020, the victim did not mention about any rape. Learned counsel argued that it was on 7.11.2020, when the victim mentioned about the rape in her statement recorded under Section 161 Cr.PC. Further, learned counsel has drawn attention to the medical report which shows that hymen of the victim was intact and learned counsel argued that the victim in her statement under Section 161 Cr.PC, in answer to question No.15, had stated that the accused had raped her on three occasions. Had that been so, her hymen would have definitely been ruptured, as there was none to stop the accused from complete penetration. Learned counsel further submits that the

presence of hymen shows that the victim improved her story and falsely implicated the accused.

8. On the contrary, the State contends that the Police have collected sufficient evidence against the bail petitioner. Another argument on behalf of the State is that the crime is heinous, the accused is a risk to law-abiding people, and bail might send a wrong message to society.

REASONING:

9. At the time of commission of offence, the victim was just 14 years of age. She belonged to under privileged parents who because of poverty were forced to send her to work. Perusal of her MLC shows that she is a thin, lean and poorly nourished child, who was wearing torn and stitched clothes. In answer to question No.17, she specifically stated that when she felt pain then the accused left her. These allegations itself shows that the accused might not have penetrated his male organ deep enough rupturing hymen. Neither the victim stated about her consent to sexual act nor was it a case of romantic love.

10. At this stage, reference be made to three Judges Bench judgment of Hon'ble Supreme Court, in ***XYZ vs. State of Gujrat, 2020 Criminal Law Journal, 660.***

11. In ***Parminder alias Ladka Pola v. State of Delhi***, (2014) 2 SCC 592, Hon'ble Supreme Court holds,

> *PW-15, the doctor who conducted the medical examination of the prosecutrix on 31.01.2001, however, has stated that there was no sign of injury on the prosecutrix and the hymen was found intact. The High Court has considered this evidence and has held that the non-rupture of hymen is not sufficient to dislodge the theory of rape and has relied on the following*

passage from Modi in Medical Jurisprudence and Toxicology (Twenty First Edition):

"Thus, to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is, therefore, quite possible to commit legally the offence of rape without producing any injury to the genital or leaving any seminal stains."

Section 375, IPC, defines the offence of 'rape' and the Explanation to Section 375, IPC, states that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. This Court has accordingly held in Wahid Khan v. State of Madhya Pradesh, 2010 2 SCC 9] that even the slightest penetration is sufficient to make out an offence of rape and depth of penetration is immaterial. In the aforesaid case, this Court has relied on the very same passage from Modi in Medical Jurisprudence and Toxicology (Twenty Second Edition) quoted above. In the present case, even though the hymen of the prosecutrix was not ruptured the High Court has held that there was penetration which has caused bleeding in the private parts of the prosecutrix as would be evident from the fact that the underwear of the prosecutrix was stained by blood. In our considered opinion, the High Court was right in holding the appellant guilty of the offence of rape and there is no merit in the contention of the learned counsel for the appellant that there was only an attempt to rape and not rape by the appellant.

12. Learned counsel for the petitioner has also made several other arguments. Still, given that this Court is not inclined to grant bail, on the reasons mentioned above, discussion of the same will be an exercise in futility. Any detailed analysis of the evidence may prejudice the case of the prosecution or the accused.

13. Given above, in the facts and circumstances peculiar to this case, at this stage, the petitioner fails to make out a case for bail. The petition is dismissed with liberty to file an appropriate bail application by referring to the documents upon which the petitioner is seeking bail.

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

15. 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.

16. *There would be no need for a certified copy of this order for furnishing bonds, and any Advocate for the Petitioner can download this order alongwith the case status from the official web page of this Court and attest it to be a true copy. In case the attesting officer or the Court wants to verify the authenticity, such an officer can also verify its authenticity and may download and use the downloaded copy for attesting bonds.*

In the given facts, the instant petition is dismissed.

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

Nandini Thakur ....Petitioner.

Versus

State of H.P. and others ....Respondents.

CWPOA No.1633 of 2019
Reserved on : 19.4.2021
Date of Decision: May 13, 2021

Petition for quashing office order whereby benefit of regularization extended to petitioner w.e.f, 1.1.2002 as per state policy on completion of 8 years continuous service with 240 days in each calendar year has been withdrawn and her date of regularization as complaint attendant has been modified as 30.12.2006 i.e, from the date of appointment/ regularization of similarly situated persons junior to her.- Held- Petitioner was appointed as complaint

attendant (Class-III post) on daily wage bases in April 1992- After serving as such for 92 days- She was posted as Inquiry attendant (Class IV post) w.e.f July 1992 till November, 1993 & again appointed as complaint attendant w.e.f November 1993- Petitioner is a daily wager appointed before 1.1.1994 who had completed 240 days in calendar year , as daily wager prior to 31.12.93- As such entitled for benefits of Mool Raj Upadhaya's case for conferment of work charge status or regularization on completion of 10 years continuous service with 240 days in each calendar year from date of her initial appointment. Petitioner had served as a Daily wager against two posts i.e, complaint attendant (Class-III) and enquiry attendant (Class-IV) - From initial date of appointment i.e, April 1992, she would have been entitled for conferment of work charge status or regularization on completion of 10 years service in April 2002 in lower grade after counting service of both grades. As per 2000 policy, petitioner acquired right of conferment of work charge status or regularization on completion of 8 years service- Petitioner has completed 8 years service in higher grade in September/December, 2001, Period of service against higher grade at any point of time during entire continuous service without any break is to be taken for consideration for deciding the claim of petitioner for regularization / conferment of work charge status against post of higher grade- petition is allowed.

Cases referred:

Mool Raj Upadhyaya v. State of H.P. & others, 1994 Supp (2) SCC 316;

For the Petitioner	:	Mr. Dalip K. Sharma, Advocate.
For the respondent	:	Mr. Raju Ram Rahi, Deputy Advocate General.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Petitioner Nandini Thakur alias Nandi Thakur has approached this Court for quashing impugned Office Order dated 25.10.2012 (Annexure P-6), passed by Superintending Engineer, IPH Circle, Kullu (HP) (respondent No.2), whereby benefit of regularization, extended to the petitioner w.e.f.

1.1.2002, as per Policy of State, on completion of eight years continuous service with 240 days in each Calendar Year, has been withdrawn and her date of regularization as Complaint Attendant has been modified as 30.12.2006, i.e. from the date of appointment/ regularization of similarly situate persons junior to her.

43. For the purpose of adjudication of present case, Policy formulated by the respondents-State and approved by the Supreme Court of India in ***Mool Raj Upadhyaya*** *v.* ***State of H.P. & others*****, 1994 Supp (2) SCC 316** further explained in ***Gauri Dutt & others*** *v.* ***State of H.P.,*** **Latest HLJ 2008 (HP) 366,** and Regularization Policy framed and circulated by the respondents-State in the year 2000, shall be relevant.

44. Policy approved by the Supreme Court in ***Mool Raj Upadhyaya's case*** reads as under:

> "4. Taking into consideration the facts and circumstances of the case, we modify the said scheme by substituting paragraphs 1 to 4 of the same by the following paragraphs:
>
> > "(1) Daily-wage/muster-roll workers, whether skilled or unskilled, who have completed 10 years or more of continuous service with a minimum of 240 days in a calendar year on 31-12-1993, shall be appointed as work-charged employees with effect from 1-1-1994 and shall be put in the time-scale of pay applicable to the corresponding lowest grade in the government;
> >
> > (2) daily-wage/muster-roll workers, whether skilled or unskilled, who have not completed 10 years of continuous service with a minimum of 240 days in a calendar year on 31-12-1993, shall be appointed as work-charged employees with effect from the date they complete the said period of 10 years of service and on such appointment they shall be put in the time-scale of pay applicable to the lowest grade in the government;

> (3) daily-wage/muster-roll workers, whether skilled or unskilled who have not completed 10 years of service with a minimum of 240 days in a calendar year on 31-12-1993, shall be paid daily wages at the rates prescribed by the government of Himachal Pradesh from time to time for daily-wage employees falling in Class III and Class IV till they are appointed as work-charged employees in accordance with paragraph 2;
>
> (4) daily-wage/muster-roll workers shall be regularised in a phased manner on the basis of seniority-cum-suitability including physical fitness. On regularisation they shall be put in the minimum of the time-scale payable to the corresponding lowest grade applicable to the government and would be entitled to all other benefits available to regular government servants of the corresponding grade."

45. Right of regularization/work-charge status of a Daily-Wage Worker, where the worker/employee has rendered service, on daily-wage basis, on different posts in lower and higher grades, has been explained in ***Gauri Dutt's case,*** as under:

> "18. The last question raises some interesting points. There have been instances where some employee has worked as beldar for some time and thereafter he has been engaged in a higher scale as mate or supervisor etc. The Tribunal in most of these cases has directed that the employee should be granted work charge status in the higher post on completion of 10 years of service after combining the service rendered in the lower scale and the higher scale. The State is aggrieved by these directions. According to the learned Advocate General the State has offered work charge status to these employees on completion of 10 years of combined service in the lower of the two scales and the State cannot be directed to grant work charge status in the higher scale. On the other hand, it is contended on behalf of the

employees that since the employees are already working in the higher scale, it would not be fair and equitable to grant them work charge status in the lower scale.

19. We have considered the arguments from all angles. We are of the view that the employee cannot be given the benefit of combining service rendered in both the scales and be granted work charge status in the higher scale. We do, however, feel that at times it may be inequitable to grant the employee work charge status in the lower scale without giving him an option in this regard. We are giving two examples to illustrate two extreme positions. In example (i) we will deal an employee (A) who joined service on 1.1.1990. He works in the lower scale of beldar from 1.1.1991 to 31.12.1999. He is thereafter posted as Supervisor in the higher scale. Should he be granted work charge status as beldar or as Supervisor w.e.f. 1.1.2001? The other example is converse. Supposing employee (B) has worked as beldar w.e.f. 1.1.1991 to 31.12.1991 and from 1.1.1992 he has worked as Supervisor. From which date should we grant him work charge status and in what scale? It is obvious that in the first case the employee would not mind being granted work charge status even in the lower scale after 10 years w.e.f. 1.1.2000 since grant of work charge status would mean that he would get regular scale of pay. But should the employee be granted work charge status in the higher scale? We cannot agree with this preposition.

20. After considering all the pros and cons and keeping in view the fact that various anomalous situations may arise we are of the considered view that when an employee completes 10 years of continuous service combined in two scales, an option should be given to the employee to either accept work charge status in the lower scale or he may continue to work on daily rated basis in the higher scale and claim work charge status in the higher scale on completion of 10 years of continuous service in the said scale. In the examples given above, employee (A) may prefer to accept work charge status w.e.f. 1.1.2001 even in the lower scale of beldar because otherwise he may have to wait for 9

years before he is granted work charge status. On the other hand, employee (B) in the second example may prefer to delay the grant of work charge status by one year so that he can get work charge status in the higher scale. We feel that in each case the choice should be left to the employee. However, if the employee on being given a chance to exercise his option does not convey his option within 30 days, he shall be granted work charge status in the lower scale by combining the service rendered in both the scales. This answers the fourth question."

46. Relevant operative portion of orders dated 3.4.2000 and 6.5.2000, issued by Government of Himachal Pradesh, notifying and circulating terms for regularization of daily-wage workers in the year 2000, on completion of eight years continuous service, are as under:

Order dated 3.4.2000:

"……

In partial modification of this Department letter of even number dated 8th July, 1999 on the above subject, I am directed to say that the Government has now decided that the Daily Waged/Contingent Paid workers in all Departments including Public Works and Irrigation and Public Health Department (other than work-charged categories)/Boards/Corporations/Universities, etc. who have completed 8 years of continuous service (with a minimum of 240 days in a calendar year) as on 31-03-2000 will be eligible for regularization. It has further been decided that completion of required years of service makes such daily wager/contingent paid worker eligible for consideration to be regularized and regularization in all cases will be from prospective effect i.e. from the date the order of regularization is issued after completion of codal formalities.

2. In view of the above decision and in order to avoid any litigation and also any hardship to daily wagers departments

shall do the regularization based on seniority and they will ensure that senior persons are regularized first rather than regularizing junior persons first.

3. Other terms and conditions like fulfillment of essential qualification as prescribed in R&P Rules, etc. etc. as laid down in this department letter dated 8th July, 1999, as referred to above, shall continue to be operative.

4. These instructions may kindly be brought to the notice of all concerned for strict compliance.

5. These instructions have been issued with the prior approval of the Finance Department obtained vide their Dy. No.852 dated 23-03-2000."

Order dated 6.5.2000:

"…….

2. During the process of regularization of daily wagers, various issues and problems relating to these workers concerning their regularization have been brought to the notice of the Government. The Government in order to avoid such confusion or problems has decided to streamline the existing procedure/ instructions in order to bring uniformity of procedure in various departments of the Government. It has, therefore, been decided that henceforth:

(i) Daily Waged/Contingent Paid Workers who have completed required years of continuous service (with a minimum of 240 days in a calendar year except where specified otherwise for the tribal areas) which as per latest instructions issued vide this Department letter of even number dated 3-4-2000 is 8 years as on 31-03-2000 shall be eligible for regularization. However, in Departments/Corporations/Boards, where the system

> of the work charge categories also exists, eligible daily wagers will be considered first for bringing them on the work charge category instead of regularization. Such eligible daily waged workers/contingent paid workers will be considered for regularization against vacant posts or by creation of fresh posts and in both these events prior approval of Finance Department will be required as per their letter No.Fin-1-C(7)-1/99 dated 24.12.1999. The terms and conditions for such regularization shall be governed as per Annexure -'A'."

47. A Division Bench of this High Court in **CWP No.2735 of 2010,** titled as ***Rakesh Kumar v. State of H.P. & others,*** decided on 28.7.2010, has held that till the new scheme, if introduced, comes into being, the old scheme shall be in force, and employees, till introduction of new scheme, shall be entitled for benefits of previous scheme. In other words, on introduction of new scheme, employees shall be entitled for benefits of new scheme, particularly when applicability of subsequent scheme is more beneficial to the employees than the old scheme. The employees, who are governed by old scheme, but are also governed under new scheme devolving benefits better than earlier scheme, are definitely entitled for benefits of the latest scheme.

48. An employee, eligible for getting benefit under two Policies, shall be entitled for benefit of the Policy which is more beneficial to him/her. On notification/circulation/ adoption of new Policy, an employee is to be governed by new Policy. Undoubtedly, benefits extended to an employee by the judgment passed by the Court, in present case by the Supreme Court in ***Mool Raj Upadhyaya's case***, cannot be taken away by any decision/policy of the Government, but, at the same time, an employee cannot be excluded from extension of benefits of subsequent policy/decision of the Government which is more beneficial than the benefits available to the employee for judgment of the Court. An employee cannot be relegated to disadvantageous position under

the garb of old policy or judgment of the Court by debarring him from benefits of more beneficial policy framed by the State Government subsequently.

49. One example, may be elaborating the aforesaid discussion more clearly. Benefits of ***Mool Raj Upadhyaya's case*** are available to an employee appointed before 1.1.1994 on daily-wage basis, who has completed service of minimum 240 days in a calendar year. An employee appointed on or after 1.1.1994 shall be governed by subsequent policy. Say an employee is appointed on daily-wage basis on 1.1.1993 and another on 1.1.1994. First employee completes ten years of service with 240 days in each calendar year as on 31.12.2003 and he, as per ***Mool Raj Upadhyaya's*** policy, will be, thus, entitled for work-charged status/regularization on completion of ten years service, w.e.f. 1.1.2004. The other employee appointed on 1.1.1994 shall not be entitled for benefit of ***Mool Raj Upadhyaya's case*** but on introduction/framing of subsequent policy in the year 2000, he would be entitled under subsequent Policy for work-charge status/regularization on completion of eight years, with continuous service of minimum 240 days in each calendar year, on 1.1.2002. In case, benefit of subsequent policy is not extended to the employees entitled for benefit of ***Mool Raj Upadhyaya's case*** policy, then it shall cause miscarriage of justice, as senior daily-wage employees would be entitled for work-charge status or regularization at a later point of time than his juniors. Therefore, irrespective of the fact that employee is governed under ***Mool Raj Upadhyaya's case***, such employee shall be entitled for benefits of subsequent policy, if it is not taking away the benefits of earlier policy and is more beneficial to the concerned employee.

50. It is an admitted fact that petitioner was appointed as Complaint Attendant (Class-III Post), on daily-wage basis, in April 1992 and, after serving as such for 92 days, she was posted as Enquiry Attendant (Class-IV Post), w.e.f. July 1992. Petitioner was engaged as Enquiry Attendant till November 1993. Thereafter, she was again appointed as Complaint Attendant w.e.f.

December 1993. Petitioner is a Daily-Wager appointed before 1.1.1994, who had completed 240 days in a calendar year as a Daily-Wager prior to 31.12.1993. Thus, she was entitled for benefit of ***Mool Raj Upadhyaya's case*** for conferment of work-charge status or regularization, on completion of ten years of continuous service, with 240 days in each calendar year, from the date of her initial appointment.

51. Undisputedly, petitioner has been serving since April 1992 continuously, with 240 days in each calendar year, as evident from Mandays Chart filed with reply of respondents as Annexure R-1.

52. Petitioner had served as a Daily-wager against the posts of two categories, i.e. Complaint Attendant (Class-III Post) and Enquiry Attendant (Class-IV Post). From initial date of appointment, i.e. April 1992, she would have been entitled for conferment of work-charge status or regularization, on completion of ten years service in April 2002, in the lower grade after counting combined service of both grades.

53. For claim to consider her against higher grade, by extending benefit of ***Mool Raj Upadhyaya's case***, she would have completed ten years continuous service in higher grade with 240 days in each calendar year on 1.12.2003 and in case of counting of 92 days of her service as Complaint Attendant in year 1992, ten years would have been completed on 1.9.2003.

54. Before completion of service of petitioner for a period of ten years on daily-wage basis, entitling her for benefits of ***Mool Raj Upadhyaya's case***, State of Himachal Pradesh had issued Regularization Policy in the year 2000, terms whereof have been circulated by the Government in two Orders dated 3.4.2000 and 6.5.2000, quoted supra.

55. As per 2000 Policy, petitioner acquired right of conferment of work-charge status or regularization on completion of eight years service, as explained and held in ***Rakesh Kumar's case*** supra. Applying principle of ***Gauri Dutt's case,*** she would be entitled for regularization in lower grade, on

completion of eight years daily-wage service with 240 days in each calendar year, in April 2000, and for claim of her right against the post of higher scale/grade, she would have been entitled for regularization/conferment of work-charge status in September/December, 2001.

56. Petitioner has completed eight years service in higher grade in September/December 2001. Therefore, regularization of the petitioner vide Order dated 10.1.2003 (Annexure P-2), w.e.f. date of actual joining of the post, was rightly corrected vide Order dated 25.3.2008 (Annexure P-3) w.e.f. 1.1.2002, as prior to that date petitioner had completed eight years continuous service in the higher grade with 240 days in each calendar year and was entitled for benefit of Regularization Policy of the State framed/notified in the year 2000.

57. Date of initial appointment of the petitioner against higher post is April 1992. Thereafter, she served on the same post as well as on the post of lower grade, but in every year she had completed 240 days without any break. Therefore, for the purpose of counting of years of service for extension of benefit of the Scheme, initial date of appointment of April 1992 is to be taken into consideration. However, for extension of benefit of service against the higher post, period for which petitioner has served against the post of lower grade is to be excluded. In other terms, period of service against higher grade, at any point of time, during entire continuous service, without break, is to be taken for consideration for deciding the claim of petitioner for regularization/conferment of work-charge status against the post of higher grade.

58. Though petitioner would have been entitled for her regularization on completion of eight years service in September 2001, after taking into account her 92 days service as Complaint Attendant in the year 1992 with subsequent period of her service on the same post but it has neither been

claimed nor argued by and on behalf of petitioner and otherwise also there is not much difference between September 2001 and January 2002.

59. In view of above discussion, I find that not only the impugned Office Order dated 25.10.2012 (Annexure P-6) but the reasons assigned by the respondents-State, in the reply, for justifying the said order, are also misconceived and not tenable. Therefore, order dated 25.10.2012 (Annexure P-6) is quashed and Office Order dated 25.3.2008 read with Order dated 10.1.2003 is maintained. Petitioner shall be entitled for all consequential benefits accordingly.

Writ Petition is allowed and disposed of, in the aforesaid terms, so also pending application, if any.

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

Punjab National Bank and another .....Petitioners.

Vs.

State of Himachal Pradesh and others .....Respondents.

CWP No.: 1638 of 2017
Reserved on 20.04.2021
Date of Decision: 19.05.2021

Writ of certiorari for quashing the actions of official respondents attaching the property already stands mortgaged with petitioner by respondent no 4 by creating and claiming their first charge upon the property and quashing notice vide which respondents have claimed the first charge over the secured asset of petitioner notwithstanding the fact that mortgagee rights of a borrower prevails upon the tax liability of a defaulting borrower. Held- the Petitioner being "Secured Creditors" has preference over state with regard to the debts due from respondent no 4 - Department cannot claim first charge over secured asset of petitioners, as petitioner has first charge over secured assets in view of provision of SARFESI Act 2002 and Recovery of debt and bankruptcy Act. The provision of Sec 26 of H.P. Vat Act shall have to give way to the provision of Sec 26 E of the SARFAESI Act 2002, Sec 31 b recovery of debt and bankruptcy Act- the petition allowed.

Cases referred:
Bank of Baroda Vs. Commissioner of Sales Tax, M.P., Indore and another, (2018) 55 GSTR 210 (MP);
Central Bank of India Vs. State of Kerala, (2009) 4 SCC 94;
The Assistant Commissioner (CT) Anna Salai-III Assessment Circle, 'Chennai Vs. The Indian Overseas Bank, Chennai and another, AIR 2017 Madras 67;

For the petitioners:	Mr. B.C. Negi, Senior Advocate, with M/s Vipul Dharmani, Sugam Seth, Arvind Sharma & Nitin Thakur, Advocates.
For the respondents:	Mr. Ajay Vaidya, Senior Additional Advocate General, for respondents No. 1 to 3 & 5.
	None for respondent No. 4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge :

By way of this writ petition, the petitioners have primarily prayed for the following relief:

> *"(a) A writ in the nature of certiorari be issued quashing the impugned actions of the official respondents attaching the property in question already stands mortgaged with petitioners by respondent No. 4, by creating and claiming their first charge upon the same and also quashing of the Notice dated 24.06.2017 (Annexure P-10) vide which the respondents have claimed the first charge over the secured assets of the petitioners notwithstanding the fact that the mortgagee rights of the petitioner over the mortgaged assets of a borrower prevails upon the tax liability of a defaulting borrower and all other actions undertaken by the respondents No. 1 to 3 in this regard."*

2. The case of the petitioners is that they are "Body Corporates" constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and are carrying on business as Bankers. Their grievance is primarily against respondents No. 1 to 3, who according to the petitioners have acted in contravention of law and failed to discharge their statutory duties.

3. Respondent No. 4, which is a private limited company, had started banking with petitioner No. 1 in the year 2004. Said respondent was released a cash credit hypothecation limit of Rs.140.00 lacs, cash credit (book debt) facility of Rs.100.00 lacs, term loan facility of Rs.1000.00 lacs, FLC DP within Term Loan of Rs.60.00 lacs and ILC/IFC facility of Rs.200.00 lacs by petitioner No. 1. In consideration thereof and in addition to the security documents having been executed, respondent No. 4 also created an equitable mortgage of its factory land and building. The facilities so extended to respondent No. 4 were enhanced on the request of respondent No. 4 and said respondent was also advanced financial facilities by way of cash credit against stock and book debts, term loan for project expansion and letter of credit (F) for import of raw materials under DP/DA in the year 2006.

4. Petitioners No. 1 and 2 formed a consortium and combined all fund based working capital facilities and non-fund based facilities, which were granted to respondent No. 4. Petitioner No. 1 was acting as a lead Bank. An agreement in this regard was duly executed between the petitioners. Thereafter, a joint deed of hypothecation and working capital consortium agreement was also executed between the petitioners in favour of the consortium members in the year 2007.

5. Apart from other properties and secured assets, the land and building constructed on land measuring 71 bighas 13 biswas, situated in Village Bir Plasi, Hadbast No. 101, Pargana Plasi, Tehsil Nalagarh, District Solan, Himachal Pradesh in the name of M/s Rupana Paper Mills Private Ltd.

and the plant and machinery lying therein was duly mortgaged in favour of petitioner No. 1 by respondent no. 4 while availing the loan facilities etc. and a mutation was duly sanctioned vide report No. 471, dated 12.07.2013 and the same was duly recorded in the revenue record by the concerned Department, evidencing the charge of the petitioner-Bank upon the said property.

6. The petitioner-Bank also got recorded the said charge in the Central Registry of Securitisation Asset Reconstruction and Security Interest of India (see Annexure P-3). Petitioner-Bank also got recorded the charge of the said loan facility with the Registrar of Companies in the account of respondent No. 4-Company in terms of the provisions of the Companies Act.

7. As respondent No. 4 failed to adhere to the financial discipline enshrined in the loan documents and constantly defaulted in the timely payments of loan premiums, the petitioners classified the accounts of respondent No. 4, as Non Performing Assets. Petitioners jointly filed a recovery suit, i.e., Original Application bearing OA No. 151 of 2016, titled as Punjab National Bank and another Vs. M/s Rupana Paper Mills Pvt. Ltd. and others under Section 19 of the RDDBFI Act before the Debt Recovery Tribunal-I at Chandigrah for recovery of an amount of Rs.220,27,83,199/- as on the date of filing, i.e., 23.12.2015 alongwith pendente lite and future interest. This Original Application was transferred to learned Debts Recovery Tribunal-II, Chandigarh after change of territorial jurisdiction and was re-numbered as OA No. 934 of 2017. Said Original Application was allowed by the learned Tribunal vide order dated 28.06.2017 and it was held by the Tribunal that respondent No. 4 was liable to pay and petitioner-Bank was entitled to recover an amount of Rs.220,27,83,199.99/- alongwith simple interest @11% per annum on reducing balance with costs from 22.12.2015 from all the defendants therein till recoveries are effected (see Annexure P-4).

8. To recover its outstanding dues, the petitioner simultaneously initiated proceedings under Section 13 of the Securitization and

Reconstruction of Financial Assets Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the SARFAESI Act"). Notice under Section 13(2) of the Act dated 13.03.2015 was issued to respondent No. 4. As respondent No. 4 did not clear the outstanding dues within the statutory period of 60 days as per the mandate of the Act, petitioner-Bank acting within its rights, issued a "Possession Notice" and took possession of the "Secured Assets". It put the said "Secured Assets" on auction vide e-Auction/Sale Notice dated 03.06.2017, which was duly published in accordance with the provisions of the SARFAESI Act and Rules framed thereunder in the newspapers on 04.06.2017. The reserve price of the land and building constructed on the land measuring 71 bighas and 13 biswas, situated in Village Bir Palasi, Tehsil Nalagarh, District Solan, H.P. was valued at Rs.1300.00 lacs and the reserve price qua plant and machinery lying in the said premises was valued at Rs.2350.00 lacs and the date and time of auction was mentioned to be 29.06.2017. Copy of the said e-Auction/Sale Notice dated 03.06.2017 is appended with the petition as Annexure P-7. As per the petitioners, at the time of putting the said property in question alongwith plant and machinery on auction vide Sale Notice dated 03.06.2017, the petitioner-Bank was not having any knowledge with regard to any payable dues by the respondent No. 4 to any Department of the Government of Himachal Pradesh. According to the petitioner-Bank, it was informed of this fact by some of the prospective bidders of the said e-auction that during their "due diligence" of the properties, it was found that respondent No. 2-Department had got a mutation bearing report No. 31 dated 15.09.2016 recorded regarding the fact that the said property stands charged with respondent No. 2. As per the petitioners, due to said attachment order, the Bank was unable to auction its Secured Assets by way of e-auction. The prospective bidders specifically informed the petitioner-Bank that they were ready and willing to bid for the properties, but due to notice of charge by respondent No. 2, they did not bid for the same. After this fact came into the notice of the petitioner-Bank, it approached the respondents No. 2 and

3 vide Legal Notice dated 17.06.2017 regarding creation of its charge upon the property belonging to respondent No. 4 without informing the Bank, especially when the Bank was having the first charge upon the said property being a Secured Creditor, coupled with the fact that even the physical possession of the said property was taken over by the Bank in the year 2015. The Bank asked respondents No. 2 and 3 to provide the authenticated copies of all the relevant documents, on the basis of which, charge in favour of said respondents was created qua the property in issue. Respondents vide Notice dated 24.06.2017 represented that they were having the first charge upon the property by virtue of the provisions of Section 16-B of the Himachal Pradesh General Sales Tax Act, 1968 read with Section 26 of the Himachal Pradesh Value Added Tax Act, 2005 (hereinafter referred to as 'the 2005 Act'), which by virtue of a non obstante provision overrides and creates a mandatory first charge upon the dealer. It was further the stand of the respondents that since the Government was having first charge upon the property of the said dealer, therefore, the petitioner-Bank can not proceed with the sale of the assets. Respondent-Department further mentioned in the Notice that in case the petitioner-Bank had sold any plant and machinery or other capital goods lying in the said premises of respondent No. 4, then the Bank was liable to deposit the sale proceeds in the account of the State exchequer within 15 days from the date of receipt of Notice dated 24.06.2017, which is impugned by way of this petition as Annexure P-10.

9. Feeling aggrieved, the petitioners have filed this writ petition, seeking for the quashing of Notice dated 24.06.2017 (Annexure P-10), inter alia on the ground that the right of the petitioners to recover its outstanding dues from the defaulting borrower, as governed by the provisions of SARFAESI Act, 2002 as well as Recovery of Debts and Bankruptcy Act, 1993 (hereinafter referred to as "the RDB Act), which by virtue of an amendment carried out in the Recovery of Debts and Bankruptcy Act, 1993 in the year

2016, vide which, Section 31B was added in the Act, clearly confers upon the petitioners an overriding right over the claims of the respondent-Department.

10. According to the petitioners, Section 35 of the SARFAESI Act provides that the provisions of said Act shall have an overriding effect on other laws. Section 17(7) of the SARFAESI Act provides that the Debts Recovery Tribunal shall deal with an application under the SARFAESI Act in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. This Act was amended in the year 2016 and its nomenclature has been changed by way of an amendment dated 28.05.2016 to "Recovery of Debts and Bankruptcy Act, 1993". Section 31B of the Act specifically provides for priority to secured creditor by envisaging that "notwithstanding anything contained in any other law for the time being in force, the rights of secured creditors to release secured debts due and payable to them by sale of assets over which security interest is created, shall have priority and shall be paid in priority over all other debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or local authority" by way of amendment. Respondent-Department claims first charge upon the property to recover the outstanding liability from respondent No. 4 by relying upon Section 26 of the Himachal Pradesh Value Added Tax Act, 2005, without appreciating that Section 35 of the SARFAESI Act 2002 clearly provides that said Act shall have an overriding effect on any other law for the time being in force and ambiguity, if any, has already been removed by issuance of necessary clarification by the Legislators through the incorporation of Section 31B in the RDB Act. Further, according to the petitioners, even if it was to be presumed that respondent No. 4 was having a tax liability which was recoverable by respondents No. 1 to 3, then also, provisions of Section 26 of the Himachal Pradesh Value Added Tax Act, 2005 have to give way to the provisions of Section 35 of the SARFAESI Act 2002, which is a Central Act having been incorporated by virtue of Article 246(1) of the

Constitution of India. Thus, as per the petitioners, they have the right to recover the outstanding dues flowing from the SARFAESI Act Act and the RDB Act and these Central Acts shall prevail over the State Acts to the extent of inconsistency. It is in this background that the petition has been filed praying for the reliefs already enumerated hereinabove.

11. The petition is opposed by respondents No. 1 to 3 on the strength of the reply filed by respondents No. 2 and 3, inter alia, on the ground that the statutory provisions of the Himachal Pradesh Value Added Tax Act, 2005, in view of the contents of Section 26 thereof, confer an overriding right in favour of the said respondents and, therefore, as an amount of Rs.33,46,84,420/- was due from respondent No. 4 under the provisions of VAT Act, 2005 and Central Sales Tax Act, 1956, said respondents were having first charge over the concerned property. According to the revenue, the provisions of the 1993 Act and SARFAESI Act 2002 do not create any first charge in favour of the Banks, Financial Institutions or any other secured creditors, as has been held by the Hon'ble Supreme Court in ***Central Bank of India Vs. State of Kerala,*** (2009) 4 SCC 94. As per them, Communication dated 24.06.2017 is a valid Communication and, therefore, the petition deserves to be dismissed.

12. Respondent No. 5 has filed a separate reply and taken the stand that the Authorized Officer of petitioner No. 1-Bank had filed an application under Section 14 of the 2002 Act with a request to take steps against the borrower by taking possession of the secured assets in favour of the Bank and the then District Magistrate, Solan, after considering the application of petitioner No. 1, had passed an appropriate order on 14.08.2015 and has acted in a lawful manner and discharged its duties, as envisaged in law.

13. By way of rejoinders, which have been filed to the replies of the respondents, the petitioners have reiterated their claim by denying the stand, especially taken by respondents No. 1 to 3 in the reply filed by respondents No. 2 and 3.

14. I have heard learned counsel for the parties and also gone through the pleadings.

15. The moot issue involved in the present case is as to whether the petitioners will be having first charge upon the property of the dealer in terms of the provisions of the RDB Act and the SARFAESI Act, as amended from time to time or, whether the first charge shall be that of respondents No. 1 to 3 in terms of the provisions of Section 26 of the Himachal Pradesh Value Added Tax Act, 2005? During the course of arguments, there was no dispute between the parties that this is the main moot issue, which the Court has to decide.

16. Before proceeding any further, it is relevant to refer to the relevant statutory provisions, which have bearing upon the adjudication of this case.

17. "Secured Asset" is defined in Section 2(zc) of the SARFAESI Act 2002, which reads as under"

> *"2(zc) "Secured Asset" means the property on which security interest is created."*

Section 2(zf) defines the "Security Interest", which reads as under:

> *"2(zf) "Security Interest" means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in Section 31."*

18. Section 26E of the SARFAESI Act 2002 Act provides as under:

> *"26E.* ***Priority to secured creditors.***— *Notwithstanding anything contained in any other law for the time being in force, after the registration of security interest, the debts due to any secured creditor*

shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority.

Explanation.—For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code."

This Section was incorporated by way of Enforcement of Security Interest and Recovery of Debts and Loans and Miscellaneous Provision (Amendment) Act, 2016. This Section has come into force w.e.f. 24th January, 2020.

19. Section 35 of the SARFAESI Act 2002 Act provides as under:

"35. ***The provisions of this Act to override other laws:***

The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

20. Section 31B of the Recovery of Debts and Bankruptcy Act, 1993 provides as under:

*"**Section 31B. Priority to secured creditor**:*

Notwithstanding anything contained in any other law for the time being in force, the rights of secured creditors to release secured debts due and payable to

> *them by sale of assets over which security interest is created, shall have priority and shall be paid in priority over all other debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or local authority."*

This Section came into force w.e.f. 01.09.2016 by way of Enforcement of Security Interest and Recovery of Debts and Loans and Miscellaneous Provision (Amendment) Act, 2016 in general and Chapter-III, Section 41 thereof in particular.

21. Section 26 of the Himachal Pradesh Value Added Tax Act, 2005, relied upon by learned Senior Additional Advocate General, appearing for respondents No. 1 to 3 & 5 provides as under:

> *"26. Notwithstanding anything to the contrary contained in any law, any amount of tax and penalty including interest, if any, payable by a dealer or any other person under this Act shall be a first charge on the property of the dealer or such other person."*

22. Before the aforesaid amendments were carried out in the SARFAESI Act and the RDB Act, the law as settled by the Hon'ble Supreme Court in ***Central Bank of India*** Vs. ***State of Kerala,*** (2009) 4 SCC 94 was to the effect that the non obstante Clauses contained in the RDB Act and Section 35 of the SARFAESI Act could not be invoked for declaring that the first charge created in State Legislations will not operate qua or affect the proceedings initiated by Banks/Financial Institutions/Other Secured Creditors for recovery of their dues or enforcement of security interest. Relevant paras of the judgment of Hon'ble Supreme Court in ***Central Bank of India's case*** (*supra*) are quoted hereinbelow:

"106. In R.S. Raghunath v. State of Karnataka and another [(1992) 1 SCC 335], a three-Judge Bench referred to the earlier judgments in Aswini Kumar Ghose v. Arabinda Bose [AIR 1952 SC 369], Dominion of India v. Shrinbai A. Irani [AIR 1954 SC 596], Union of India v. G.M. Kokil [1984 (Supp.) SCC 196], Chandavarkar Sita Ratna Rao v. Ashalata S. Guram [(1986) 4 SCC 447] and observed:

".....The non-obstante clause is appended to a provision with a view to give the enacting part of the provision an overriding effect in case of a conflict. But the non-obstante clause need not necessarily and always be co-extensive with the operative part so as to have the effect of cutting down the clear terms of an enactment and if the words of the enactment are clear and are capable of a clear interpretation on a plain and grammatical construction of the words the non-obstante clause cannot cut down the construction and restrict the scope of its operation. In such cases the non-obstante clause has to be read as clarifying the whole position and must be understood to have been incorporated in the enactment by the legislature by way of abundant caution and not by way of limiting the ambit and scope of the Special Rules.....

109. The committees headed by Shri T. Tiwari and Shri M. Narasimham suggested that the existing legal regime should be changed and special adjudicatory machinery be created for ensuring speedy recovery of the dues of banks and financial institutions. Narasimham and Andhyarujina Committees also suggested enactment of new legislation for securitisation and empowering the banks etc. to take possession of the securities and sell them without intervention of the Court.....

126. While enacting the DRT Act and Securitisation Act, Parliament was aware of the law

laid down by this Court wherein priority of the State dues was recognized. If Parliament intended to create first charge in favour of banks, financial institutions or other secured creditors on the property of the borrower, then it would have incorporated a provision like Section 529A of the Companies Act or Section 11(2) of the EPF Act and ensured that notwithstanding series of judicial pronouncements, dues of banks, financial institutions and other secured creditors should have priority over the State's statutory first charge in the matter of recovery of the dues of sales tax, etc. However, the fact of the matter is that no such provision has been incorporated in either of these enactments despite conferment of extraordinary power upon the secured creditors to take possession and dispose of the secured assets without the intervention of the Court or Tribunal. The reason for this omission appears to be that the new legal regime envisages transfer of secured assets to private companies.

127. The definition of "secured creditor" includes securitisation/reconstruction company and any other trustee holding securities on behalf of bank/financial institution. The definition of "securitisation company" and "reconstruction company" in Section 2(v) and (za) shows that these companies may be private companies registered under Companies Act, 1956 and having a certificate of registration from the Reserve Bank under Section 3 of Securitisation Act. Evidently, Parliament did not intend to give priority to the dues of private creditors over sovereign debt of the State.

128. If the provisions of the DRT Act and Securitisation Act are interpreted keeping in view the background and context in which these legislations were enacted and the purpose sought to

be achieved by their enactment, it becomes clear that the two legislations, are intended to create a new dispensation for expeditious recovery of dues of banks, financial institutions and secured creditors and adjudication of the grievance made by any aggrieved person qua the procedure adopted by the banks, financial institutions and other secured creditors, but the provisions contained therein cannot be read as creating first charge in favour of banks, etc.

129. If Parliament intended to give priority to the dues of banks, financial institutions and other secured creditors over the first charge created under State legislations then provisions similar to those contained in Section 14A of the Workmen's Compensation Act, 1923, Section 11(2) of the EPF Act, Section 74(1) of the Estate Duty Act, 1953, Section 25(2) of the Mines and Minerals (Development and Regulation) Act, 1957, Section 30 of the Gift- Tax Act, and Section 529A of the Companies Act, 1956 would have been incorporated in the DRT Act and Securitisation Act.

130. Undisputedly, the two enactments do not contain provision similar to Workmen's Compensation Act, etc. In the absence of any specific provision to that effect, it is not possible to read any conflict or inconsistency or overlapping between the provisions of the DRT Act and Securitisation Act on the one hand and Section 38C of the Bombay Act and Section 26B of the Kerala Act on the other and the non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act cannot be invoked for declaring that the first charge created under the State legislation will not operate qua or affect the proceedings initiated by banks, financial institutions and other secured creditors for recovery of their dues or enforcement of security interest, as the case may be."

23. A perusal of the judgment of Hon'ble Supreme Court which was dealing with the statutory provisions of the SARFAESI Act 2002 and Recovery of Debts and Bankruptcy Act, 1993 vis-a-vis the provisions of the Kerala Value Added Tax Act demonstrates that before the incorporation of Section 26E in SARFAESI Act 2002 and Section 31B in the Recovery of Debts and Bankruptcy Act, 1993, these Statutes were not operating in a manner so as to create a better right for recovery in favour of the Banks/Financial Institutions over the revenue. These provisions were incorporated in the respective Statutes post the judgment of the Hon'ble Supreme Court to override this lacunae. After amendments in the SARFAESI Act and the RDF Act, the situation has altered. Thereafter, by virtue of the amendments incorporated in the Central Statutes, the Financial Institutions now have priority over the rights claimed by the Revenue. Section 26E of the SARFAESI Act 2002 and Section 31B of the Recovery of Debts and Bankruptcy Act, 1993 create "First Charge" by way of priority in favour of the Banks and Financial Institutions de hors any non obstante Clause contained in any Local Statute. The Legislators were aware of the lacunae which were existing in the SARFAESI Act and the Recovery of Debts and Bankruptcy Act, on account of which, the Banks/Financial Institutions were not having first charge by way of priority to recover and satisfy their debts vis-a-vis the Revenue in lieu of the statutory provisions contained in the Local Acts. It was to over ride this difficulty that the amendments were incorporated.

24. This entire aspect has been dealt with at length by the Hon'ble High Court of Kerala while deciding an issue akin to the one involved in this petition in ***State Bank of India*** Vs. ***State of Kerala and others,*** WP (C) No. 28316 of 2016 and other connected matters, decided on 30th July, 2019, relevant portions of which judgment are quoted hereinbelow in extensio:

> *"37. That so said, the next question that arises is whether Section 26E of the SARFAESI Act and Section 31B of the RDB Act create an overriding and first right in favour of the Banks/Financial Institutions to recover*

their dues, over and above the rights of the Revenue created through the KGST Act/KVAT Act. In fact, this enquiry has been rendered relatively easy for this Court because, in Central Bank of India v. State of Kerala and Others ((2009) 4 SCC 94), the Honble Supreme Court considered the right of the Banks/Financial Institutions as regards recovery of their dues prior to the afore two provisions being introduced in the SARFAESI Act and in the RDB Act. The conclusions of the Honble Supreme Court are unequivocally worded that, in the absence of these provisions in the respective Statutes, the Banks/Financial Institutions cannot claim any priority over the Revenues First Charge on the properties concerned for recovery of dues of Sales Tax/Value Added Tax. The disposition of the Honble Court in this area is lucid and available in paragraphs 126, 129 and 130 of the said judgment, which requires to be read in full and is, therefore, re-produced as under:

"126. While enacting the DRT Act and the Securitisation Act, Parliament was aware of the law laid down by this Court wherein priority of the State dues was recognised. If Parliament intended to create first charge in favour of banks, financial institutions or other secured creditors on the property of the borrower, then it would have incorporated a provision like Section 529 A of the Companies Act or Section 11(2) of the EPF Act and ensured that notwithstanding series of judicial pronouncements, dues of banks, financial institutions and other secured creditors should have priority over the States statutory first charge in the matter of recovery of the dues of sales tax, etc. However, the fact of the matter is that no such provision has been incorporated in either of these enactments despite conferment of extraordinary power upon the secured creditors to take possession and dispose of the secured assets without the intervention of the court or Tribunal. The reason for this omission

appears to be that the new legal regime envisages transfer of secured assets to private companies.

129. If Parliament intended to give priority to the dues of banks, financial institutions and other secured creditors over the first charge created under State legislations then provisions similar to those contained in Section 14-A of the Workmens Compensation Act, 1923, Section 11(2) of the EPF Act, Section 74(1) of the Estate Duty Act, 1953, Section 25(2) of the Mines and Minerals (Regulation and Development) Act, 1957, Section 30 of the Gift Tax Act, and Section 529-A of the Companies Act, 1956 would have been incorporated in the DRT Act and the Securitisation Act.

130. Undisputedly, the two enactments do not contain provision similar to the Workmens Compensation Act, etc. In the absence of any specific provision to that effect, it is not possible to read any conflict or inconsistency or overlapping between the provisions of the DRT Act and the Securitisation Act on the one hand and Section 38-Cof the Bombay Act and Section 26-B of the Kerala Act on the other and the non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act cannot be invoked for declaring that the first charge created under the State legislation will not operate qua or affect the proceedings initiated by banks, financial institutions and other secured creditors for recovery of their dues or enforcement of security interest, as the case may be."

38. When one reads the afore opinion of the Honble Supreme Court, it is left without any doubt that, but for Section 26E of the SARFAESI Act and Section 31B of the RDB Act, such Statutes do not, in any manner, operate to create a better right for recovery in favour of the Banks/Financial Institutions over that of the Revenue. However, these provisions were brought in and incorporated in the respective Statutes after this judgment, clearly with the intend to override this lacuna.

Therefore, the resultant question is whether these provisions would create a better right in favour of the Banks/Financial Institutions, which is superior to that enjoyed by the Revenue under the KGST Act/KVAT Act.

39. The learned Additional Advocate General, as I have already seen above, has built his entire arguments on the assertion that the statutory First Charge creates a right for the State over the properties and that such right can be extinguished only if the Revenue sells the property and in no other manner. However, as has already been held by me above, the First Charge claimed by the Revenue does not and cannot create any right over the property but only enables it to deal with the same as a simple mortgagee would be entitled to. Obviously, therefore, the contention of the Revenue built on a claim of right over the properties fails, without any further requirement for expatiation; corollarily, enjoining me to consider if the provisions of the KGST Act/KVAT Act would still grant to the Revenue the First Right to proceed against it for recovery of the tax arrears.

40. It is here that the specific provisions of Section 26E of the SARFAESI Act and Section 31B of the RDB Act become necessary for a detailed evaluation.

41. As has been extracted above, Section 26E of the SARFAESI Act provides that the debts due to any secured creditor shall be paid in priority over all other debts and all revenue, taxes, cesses and other rates payable to the Central Government or State Government or Local Authority. Section 31B of the RDB Act takes this one step forward and elevates the right of the secured creditors to realise their debts, by sale of the secured assets, to enjoy priority and then re-affirms that such debts will be paid in priority over the revenue, taxes, cesses and other rates payable to the Central Government or State Government or Local Authority. It is thus irrefragible and in fact, expressly conceded to by the learned Additional Advocate General that the

Banks/Financial Institutions have the First Right to have their debts extinguished; but, as has been recorded above, the Revenue merely claims that they have right to sell the property first. This argument again is flawed because the First Charge creating no right over the property, the Revenue cannot claim a First Right to proceed against it either in the face of the provisions of the SARFESI Act or RDB Act with which we are dealing in this case. In fact, on a closer look and in the ultimate analysis, the concept of First Charge and debt being paid in priority are fraternal twin provisions which virtually means the same - both giving the holder such rights, the benefit of selling the property and recovering their dues before any other.

42. A further test of the afore proposition, if so necessary, is not different because the principles of priority in payment of dues in the context of the Companies Act have been considered by the Honble Supreme Court in several judgments and many of them have been cited by the learned counsel for the respondents Banks/Financial Institutions. I will briefly deal with a few of them solely to confirm that my view as afore do not suffer from error.

43. In Textile Labour Association (supra), the provisions of Sections 529 and 529A of the Companies Act, 1956 were closely examined and the Honble Supreme Court declared its ambit as under:

"The effect of Sections 529 and 529-A is that the workmen of the company become secured creditors by operation of law to the extent of the workmens dues provided there exists secured creditor by contract. If there is no secured creditor then the workmen of the company become unsecured preferential creditors under Section 529-A to the extent of the workmens dues. The purpose of Section 529-A is to ensure that the workmen should not be deprived of their legitimate claims in the event of the liquidation of the company and the assets of the company

would remain charged for the payment of the workers dues and such charge will be pari passu with the charge of the secured creditors. There is no other statutory provision overriding the claim of the secured creditors except Section 529-A. This section overrides preferential claims under Section 530 also. Under Section 529-A the dues of the workers and debts due to the secured creditors are to be treated pari passu and have to be treated as prior to all other dues."

44. Thereafter, in Maharashtra State Cooperative Bank Limited (supra), the Honble Court alluded Textile Labour Association (supra) and re-affirmed the afore-extracted view, in paragraph 40 of the said judgment.

45. A year later, in 2011, the Honble Court, in Official Liquidator of Esskay Pharmaceuticals Limited (supra) exhaustively went into the issues relating to the recovery of crown debts juxtaposed against Sections 529/529A of the Companies Act and Section 11(2) of the EPF Act and held that the provisions of the Companies Act and the EPF Act offer a statutory priority to the amounts payable under it notwithstanding the States claim, thus making it luculent that priority in recovery of the amounts protected by these two Statutes override the First Charge claimed by the State or its Revenue under the Taxing Statutes or such other.

46. Finally, in 2013, the Honble Supreme Court, in Jitendra Nath Singh (supra), again considered these issues in the context of certain specific facts relating to the priority in recovery of secured debts and the rights of workmen under Sections 529 and 529A of the Companies Act and emphatically stated as under in paragraphs 14 and 16.2 thereof:

"14. Section 529-A of the Companies Act states that notwithstanding anything contained in any other provision of the Companies Act or any other law for the time being in force, in the winding up of a company - (a)

workmens dues; and (b) debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of Section 529 of the Companies Act pari passu with such dues, shall be paid in priority to all other debts. This would mean that the workmens dues and only the debts due to the secured creditors to the extent such debts rank pari passu with workmens dues under clause (c) of the proviso to sub-section (1) of Section 529 will have priority over all other debts of the company. The entire object of Section 529-A of the Companies Act is to ensure overriding preferential payment of (a) the workmens dues and (b) debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of Section 529 pari passu with the workmens dues. The effect of the non obstante clause in the opening part of Section 529-A of the Companies Act, therefore, is that notwithstanding anything in the Companies Act and any other law including the Insolvency Act, workmens dues and dues of the secured creditor which could not be realised because of the pari passu charge in favour of the workmen under the proviso to sub-section (1) of Section 529 and only to the extent such dues rank pari passu with the dues of the workmen under clause (c) of the said proviso are paid in priority over all other dues.

16.2. Over the security of every secured creditor, a statutory charge has been created in the first limb of the proviso to clause (c) of sub-section (1) of Section 529 of the Companies Act in favour of the workmen in respect of their dues from the company and this charge is pari passu with that of the secured creditor and is to the extent of the workmens portion in relation to the security of any secured creditor of the company as stated in clause (c) of sub-section (3) of Section 529 of the Companies Act."

47. The above cited judgments certainly support my views as afore and it axiomatically becomes justified

for me to hold that Section 26E of the SARFAESI Act and Section 31B of the RDB Act create a First Charge by way of a priority to the Banks/Financial Institutions to recover and satisfy their debts, notwithstanding any statutory First Charge in favour of the Revenue under the KGST Act/KVAT Act. It is so declared.

48. My conclusions as afore being indited, it, normally, may not have been necessary to evaluate the submissions of the learned Counsel for the Banks/Financial Institutions with respect to the repugnancy between the Statutes involved or the principles of dominant legislation and primacy to the Central Legislation under Articles 254 and 246(1) of the Constitution of India. However, the submission of the Revenue that since Section 26E of the SARFAESI Act has not yet been notified, its provisions cannot be enjoyed by the Banks/Financial Institutions as claimed by them, enjoins me to consider these issues in some depth. As noticed earlier, the learned Additional Advocate General seeks substantial support for the Revenues claim over the property on the fact that Section 26E of the SARFAESI Act has yet not been notified and this is virtually accepted even by the petitioners. The crucial question, therefore, is whether this factum would enervate the claim of priority of the Banks/Financial Institutions. I am afraid that even this contention of the learned Additional Advocate General cannot be found legally untenable, because it has been unreservedly affirmed by the Honble supreme Court in Mar Appraem Kuri Company Limited (supra) that the concepts of primacy of legislation and repugnancy would be invited as soon as the Parliament made a Statute, which is to say even before it is notified. The above views of the Honble Court is available in paragraphs 47, 59 and 61 of the judgment, which are excerpted under:

"47. The question of repugnancy between parliamentary legislation and State legislation arises in

two ways. First, where the legislations, though enacted with respect to matters in their allotted spheres, overlap and conflict. Second, where the two legislations are with respect to matters in the Concurrent List and there is a conflict. In both the situations, the parliamentary legislation will predominate, in the first, by virtue of non obstante clause in Article 246(1); in the second, by reason of Article 254(1).

59. Let us assume for the sake of argument that the State of Kerala were to obtain the assent of the President under Article 254(2) of the Constitution in respect of the insertion of Section 4(1)(a) by the Kerala Finance Act 7 of 2002. Now, Article 254(2) deals with the situation where State legislation is reserved and having obtained the Presidents assent, prevails in the State over the Central law. However, in view of the proviso to Article 254(2), Parliament could have brought a legislation even to override such assented-to State Finance Act 7 of 2002 without waiting for the Kerala Finance Act 7 of 2002 to be brought into force as the said proviso states that nothing in Article 254(2) shall prevent Parliament from enacting at any time, any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the State Legislature. [emphasis supplied].

61. The entire above discussion on Articles 245, 246, 250 and 251 is only to indicate that the word "made" has to be read in the context of the law-making process and, if so read, it is clear that to test repugnancy one has to go by the making of law and not by its commencement."

49. The above conclusions of the Honble Court certainly places a lid on this argument made on behalf of the Revenue and in any event of the matter, they themselves concede that Section 31B of the RDB Act has been notified. Hence, even assuming and is taken that Section 26E of the SARFAESI Act cannot apply for want of notification, it would be of no avail to the Revenue,

because the provisions of Section 31B of the RDB Act clearly place the right of the secured creditor to proceed against the property as well as their right to recover the secured debts in a position of priority over all tax arrears claimed by the Revenue.

50. That said, solely for the purpose of completing the narrative, if one is to suspect that there is either repugnancy or conflict between the provisions of the KGST Act/KVAT Act on one hand and the SARFAESI Act/RDB Act on the other, it is indubitable from a reading of Santosh Gupta (supra), J.B. Educational Society (supra) and Dipak Debbarma (supra) that in the event of any such or even in the event of incidental encroachment of the provisions of the former into that of the latter under the constitutional mandate of Articles 254 and 246(1) of the Constitution of India, the latter would prevail, since they have been enacted under List II Entry 45 therein. Pertinently, no expatiation on this is required at my hand, since the learned Additional Advocate General concedes to this proposition and admits, as has been recorded ut supra, that even if the Revenue sells the property first, the secured debts will have to be honoured before the tax arrears can be recovered. I, therefore, leave it there.

51. The only remaining question is whether the provisions of the KGST Act/KVAT Act or that of the RR Act can obtain protection under Section 37 of the SARFAESI Act, thus enabling the Revenue to seek that their amounts also be allowed to be recovered complementary to the action of the secured creditors. The answer to this is not difficult to obtain since I have to only read paragraph 39 of the judgment of the Honble Supreme Court in Madras Petrochem Limited (supra), which dispels all doubt that it is not so, while stating as under:

"This is what then brings us to the doctrine of harmonious construction, which is one of the paramount doctrines that is applied in interpreting all statures. Since neither Section 35 nor Section 37 of the

Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 is subject to the other, we think it is necessary to interpret the expression "or any other law for the time being in force" in Section 37. If a literal meaning is given to the said expression, Section 35 will become completely otiose as all other laws will then be in addition to and not in derogation of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002. Obviously this could not have been the parliamentary intendment, after providing in Section 35 that the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 will prevail over all other laws that are inconsistent therewith. A middle ground has, therefore, necessarily to be taken. According to us, the two apparently conflicting sections can best be harmonised by giving meaning to both. This can only be done by limiting the scope of the expression "or any other law for the time being in force" contained in Section 37. This expression will, therefore, have to be held to mean other laws having relation to the securities market only, as the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 is the only other special law, apart from the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002, dealing with recovery of debts due to banks and financial institutions. On this interpretation also, the Sick Industrial Companies (Special Provisions) Act, 1985 will not be included for the obvious reason that its primary objective is to rehabilitate sick industrial companies and not to deal with the securities market."

52. The position being ineluctably as above, as rightly pointed out by Sri. Madhu Radhakrishnan, the views of the other High Courts in The Indian Overseas Bank (supra) and Axis Bank Limited (supra) persuades me to follow them and hold that a secured creditor, under

> *Section 26E of the SARFAESI Act and Section 31B of the RDB Act, obtains priority over the right claimed by the Revenue both in proceeding against the properties in question or in recovering the secured debt."*

25. At this stage, it is necessary to quote the provisions of Section 38 of the Kerala Value Added Tax Act, 2003 (KVAT Act), which read as under:

> *"**Tax payable to be first charge on the property**.- Notwithstanding anything to the contrary contained in any other law for the time being in force, any amount of tax, penalty, interest and any other amount, if any, payable by a dealer or any other person under this Act, shall be the first charge on the property of the dealer, or such person."*

A perusal of the provisions of Section 38 of the KVAT Act and Section 26 of the HP VAT Act demonstrates that these provisions are almost *pari materia*. This Court concurs with the reasoning of the Hon'ble High Court of Kerala that after coming into force of Section 31B of the RDB Act read with Section 26E of the SARFAESI Act, the first charge is created by way of priority in favour of the Banks/Financial Institutions to recover and satisfy their debts, notwithstanding any local statutory "first charge" in favour of the Revenue.

26. It is also necessary to take note of one fact that though Section 26E of the SARFAESI Act has come into force from 24.01.2020, yet the same will not have any effect on the issue of the Banks/Financial Institutions having first charge on the property of the dealer, as the provisions of Section 31B of the RDB Act shall over ride the provisions of Section 26 of the HP VAT Act, 2005, especially in view of the observations contained in the judgment of Hon'ble Supreme Court in ***Central Bank of India's case*** (*supra*).

27. There is in force in the State of Tamil Nadu, the Tamil Nadu Value Added Tax Act, 2006. Section 42(2) of the said Act reads as under:

> *"**42. Payment and recovery of tax, penalty, etc.--...***
> *(2) Any tax assessed on or has become payable by, or any other amount due under this Act from a dealer or person and any fee due from him under this Act, shall, subject to the claim of the Government in respect of land revenue and the claim of the Agriculture and Rural Development Bank in regard to the property mortgaged to it under sub-section (2) of section 28 of the Tamil Nadu Co-operative Societies Act, 1983 (Tamil Nadu Act 30 of 1983), have priority over all other claims against the property of the said dealer or person and the same may without prejudice to any other mode of collection be recovered, -- (a) as land revenue, or (b) on application to any Magistrate, by such Magistrate as if it were a fine imposed by him: Provided that no proceedings for such recovery shall be taken or continued as long as he has, in regard to the payment of such tax, other amount or fee, as the case may be, complied with an order by any of the authorities to whom the dealer or person has appealed or applied for revision, under sections 51,52,54,57,58,59 or 60."*

28. A reference was made to a Full Bench of the Hon'ble Madras High Court in ***The Assistant Commissioner (CT) Anna Salai-III Assessment Circle, 'Chennai*** Vs. ***The Indian Overseas Bank, Chennai and another,*** AIR 2017 Madras 67 on the following issues:

> *"(a) As to whether the Financial Institution, which is a secured creditor, or the department of the Government concerned, would have the Priority of Charge' over the mortgaged property in question, with regard to the tax and other dues.*

(b) As to the status and the rights of a third party purchaser of the mortgaged property in question."

The same has been answered by the Hon'ble Full Bench of the Madras High Court as under:

"The writ petitions have been listed before the Full Bench in pursuance to the reference order in W.P.No.6267 of 2006 and W.P.No.253 of 2011, in respect of the following issues:-

"a) As to whether the Financial Institution, which is a secured creditor, or the department of the government concerned, would have the 'Priority of Charge' over the mortgaged property in question, with regard to the tax and other dues.

b) As to the status and the rights of a third party purchaser of the mortgaged property in question."

2. We are of the view that if there was at all any doubt, the same stands resolved by view of the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016, Section 41 of the same seeking to introduce Section 31B in the Principal Act, which reads as under:-

"31B. Notwithstanding anything contained in any other law for the time being in force, the rights of secured creditors to realise secured debts due and payable to them by sale of assets over which security interest is created, shall have priority and shall be paid in

priority over all other debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or local authority.

Explanation. - For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016, in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code."

3. There is, thus, no doubt that the rights of a secured creditor to realise secured debts due and payable by sale of assets over which security interest is created, would have priority over all debts and Government dues including revenues, taxes, cesses and rates due to the Central Government, State Government or Local Authority. This section introduced in the Central Act is with "notwithstanding" clause and has come into force from 01.09.2016.

4. The law having now come into force, naturally it would govern the rights of the parties in respect of even a lis pending.

5. The aforesaid would, thus, answer question (a) in favour of the financial institution, which is a secured creditor having the benefit of the mortgaged property.

6. In so far as question (b) is concerned, the same is stated to relate only to auction sales, which may be carried out in pursuance to the rights exercised by the secured creditor having a mortgage of the property. This aspect is also covered by the introduction of Section 31B, as it includes "secured debts due and payable to them by sale of assets over which security interest is created".

> *7. We, thus, answer the aforesaid reference accordingly.*
>
> *8. The matters be placed before the roster Division Bench for dealing with the individual cases."*

29. Section 48 of the Gujarat Value Added Tax Act,2003 reads as under:

> *"**48. Tax to be first charge on property.**- Notwithstanding anything to the contrary contained in any law for the time being in force, any amount payable by a dealer or any other person or account of tax, interest or penalty for which he is liable to pay to the Government shall be a first change on the property of such dealer, or as the case may be, such person."*

This provision is also *pari materia* to the provisions of Section 26 of the Himachal Pradesh Value Added Tax Act, 2005.

The Hon'ble High Court of Gujarat in ***Bank of Baroda through its Assistant General Manager*** Vs. ***State of Gujarat & 3 others***, R/Special Civil Application No. 12995 of 2018, decided on 16.09.2019, while interpreting the provisions of Section 48 of the Gujarat VAT Act vis-a-vis the provisions of Section 26 of the SARFAESI Act and Section 31B of the RDB Act has held that the first priority over the secured assets shall be of the Bank and not of the State Government on account of Section 48 of the Gujarat VAT ACT, 2003.

30. The Hon'ble Madhya Pradesh High Court also in ***Bank of Baroda*** Vs. ***Commissioner of Sales Tax, M.P., Indore and another,*** (2018) 55 GSTR 210 (MP) had the occasion to consider an identical issue while interpreting Section 31-B of the RDB Act vis-a-vis Section 33 of the MP VAT Act, 2002, which contained a non obstante Clause and created first charge on the property of a dealer in favour of the Government. It held that the State Government cannot be permitted to auction the property as the Bank was

having priority in the matter in light of the amendment, i.e., Section 31B of the RDB Act.

31. A similar view has been taken by the Hon'ble High Court of Bombay in ***State Bank of India*** Vs. ***The State of Maharashtra***, Writ Petition (ST.) No. 92816 of 2020, decided on 17th December, 2020, in which, the said Court has held that if any Central Statute creates priority of a charge in favour of a secured creditor, the same will rank above the charge in favour of a State for a tax due under the value added tax of the State.

32. Thus, Hon'ble High Court of Bombay has also held that in light of the provisions of Section 31B of the RDB Act, 1993, the first charge shall be that of the Banks/Financial Institutions and not the Revenue. However, it is important to state at this stage that there is a slight difference in the statutory provisions of Section 26 of the HP VAT Act vis-a-vis Section 37 of the Maharashtra Value Added Tax Act, 2002, which Section expressly also contains that the first charge on the property of the dealer of the State shall be subject to any provision regarding creation of first charge in any Central Act for the time being in force.

33. Be that as it may, a perusal of the judgment of the Hon'ble High Court of Bombay demonstrates that it has taken into consideration the pronouncements of all other Hon'ble Courts with regard to their respective VAT Acts, which contained a non obstante Clause in favour of the State akin to Section 26 of the H.P. VAT Act, 2005 vis-a-vis the amendments contained in the SARFAESI Act and the RDB Act

34. Thus, from what has been discussed above, now there is no ambiguity that in view of the provisions of Section 26E of the SARFAESI Act 2002 and Section 31B of the Recovery of Debts and Bankruptcy Act, 1993, a secured creditor has priority over the rights claimed by the Revenue.

35. During the course of arguments, learned Senior Additional Advocate General has not been able to draw the attention of this Court to any

judgment post amendments in the SARFAESI Act 2002 and Recovery of Debts and Bankruptcy Act, 1993, referred to hereinabove, from which it can be inferred that even after the amendments so incorporated in the said Statutes, the Revenue has priority over the debts, as compared to a secured creditor.

36. Therefore, this Court has no hesitation in holding that the petitioners being "Secured Creditors" have preference over the respondent-State with regard to the debts due from respondent No. 4. Accordingly, this writ petition is allowed by quashing Annexure P-10, dated 24.06.2017 and by holding that the respondent-Department cannot claim first charge over secured assets of the petitioners belonging to the private respondent-Company, as the petitioners have first charge over the secured assets in view of the provisions of the SARFAESI Act 2002 and Recovery of Debts and Bankruptcy Act, 1993, as amended from time to time. It is further held that the provisions of Section 26 of the H.P. VAT Act, 2005 shall have to give way to the provisions of Section 26E of the SARFAESI Act 2002 and Section 31B RDB Act, 1993. Miscellaneous applications, if any, also stand disposed of. No order as to costs.

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

Chaman Lal ....Petitioner.

Versus

Smt. Dropti and others ....Respondents.

CMPMO No.400 of 2020
Reserved on : 19.4.2021
Date of Decision: 21.5.2021

Petitioner filed suit restraining defendant no 1 Dropti from encroaching valuable portion and dispossessing him from his land, jointly owned by him, defendant no 1 and others till partition of suit land along with application under order 39 rule 1 and 2 CPC. Held- The mere fact that parties are co-owners is not sole criteria for granting or refusing injunction. It may be one of

the criteria but has to be considered along with other facts and each case is to be decided in its peculiar facts and circumstances by applying the parameters required to be taken into consideration for grating temporary injunction.
The plaintiff/ petitioner has not disclosed complete facts and detail with respect to entire property jointly owned by him, defendant no 1 and other co-sharer but selected only there khasra Nos, regarding exclusive possession, where of defendant no 1 has placed on record sufficient material- except a bald statement that deft No. 1 is adamant to raise construction of hotel over suit land by occupying valuable portion- no other material has been placed on record to establish that land being occupied by defendant no 1 is more valuable than land occupied by plaintiff comprised in other khasra Nos. owned jointly by parties - how and in what manner, rights of plaintiff are going to be adversely affected on account of construction of defendants has not been reflected either in plaint or documents relied upon by plaintiff—Ld District Judge has rightly appreciated material on record.

Cases referred:

Ashok Kapoor v. Murtu Devi, 2016(1) Shim.LC 207;
Smt. Kalawati v. Netar Singh & others, AIR 2016 HP 85;
Sarla Devi v. Madan Singh & others, Latest HLJ 2018 (HP) 430;
Chanchal Kumar v. Prem Parkash and antoher, 2019(1) Civil Court Cases 793 (HP);

For the Petitioner	:	Mr. Maan Singh, Advocate.
For the respondents	:	Mr. Dibender Ghosh, Advocate, for respondent No.1. Mr. Raju Ram Rahi, Deputy Advocate General, for respondents No.2 & 3.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Petitioner herein is plaintiff in the suit filed by him against the defendants-respondents, with prayer for permanent prohibitory injunction, restraining defendant No.1 Dropti from encroaching upon valuable portion and dispossessing the plaintiff, by raising construction of hotel over the suit

land comprised in Khasra No.1525, 1526 & 1527, situated in Mohal, Phati and Kothi Jagatsukh, Tehsil Manali, District Kullu, Himachal Pradesh, owned jointly by plaintiff, defendant No.1 and others, till partition of the suit land, with alternative prayer for mandatory injunction, in case defendant No.1 succeeds in raising construction of hotel during pendency of suit, to demolish the construction and putting the suit land in its original position at the cost and expenses of defendant No.1. In addition, prayer has also been made to restrain defendants No.2 and 3 from issuing NOC to defendant No.1 on the basis of illegal Mauka Tatima, submitted by defendant No.1, till partition of the suit land.

60. Basis for filing suit, as averred in the plaint, is that plaintiff and defendant No.1 Dropti are joint owners in possession of the suit land, referred supra, alongwith other co-owners/co-sharers and the land has not been lawfully partitioned between the co-sharers/co-owners and defendant No.1, without consent of the plaintiff, has started raising construction of hotel over the valuable portion and front side of the suit land by dispossessing the plaintiff forcibly from the suit land, with help of illegal Mauka Tatima of the spot issued by Revenue Authorities, reflecting defendant No.1 in exclusive possession of the suit land, but contrary to the record.

61. Plaintiff, alongwith suit, had also filed an application under Order 39 Rules 1 & 2 of the Code of Civil Procedure, seeking temporary injunction, restraining defendant No.1 from raising any sort of unlawful construction of hotel on the suit land and from occupying more valuable portion and front side thereof, by dispossessing the plaintiff from his share in the suit land and also to restrain defendants No.2 & 3 from issuing NOC on the basis of illegal Mauka Tatima, till final disposal of the suit.

62. Defence of defendant No.1, in nutshell, is that plaintiff and defendant No.1 alongwith other co-sharers are not reflected as co-sharers only in Khasra No.1525, 1526 & 1527 but also in Khasra Nos.1499, 1500, 1501,

1504, 1505 and 1511, and land comprised in all these khasra numbers, divided in separate chunks of land, is in exclusive and settled possession of each co-sharer/family of co-sharers as per family arrangement/partition amongst all co-sharers effected long back and defendant No.1 is in exclusive and settled possession of the land comprised in Khasra No.1525, 1526 & 1527 and the plaintiff had already raised construction of double storeyed lintel-roofed building many years back and a double storeyed tin-roofed cowshed on the land comprised in aforementioned khasra numbers, other than Khasra No.1525, 1526 & 1527, and not only plaintiff but other co-sharers, namely Rishi Kumar and Tikki Devi, have also constructed single storeyed lintel-roofed house, which is also under construction on the alleged joint land and further that late father of defendant No.1 Bhola Ram was also having old house on the suit land comprised in Khasra No.1525 and there is an orchard developed by defendant No.1 and her predecessor-in-interest on the suit land comprised in Khasra No.1525, 1526 & 1527 and defendant No.1 had entered into agreements for sale of the crop, vide written agreement for the years 2009 to 2013 with one contractor and in the year 2017 with another contractor, which indicates exclusive possession of defendant No.1 on the suit land.

63. It is also case of defendant No.1 that after demolition of her old house, situated in Khasra No.1525, she had also constructed a single storeyed tin-roofed residential house on the land falling in her share, in May 2018, to the notice and knowledge of the plaintiff and other co-sharers and further that thereafter she had started construction of the hotel building on the suit land in the month of November, 2018 and had completed one storey of the hotel by laying a lintel on the same well before filing of the suit and also with the notice and knowledge of the other co-sharers, including plaintiff, after getting necessary approval from the Town and Country Planning Department (TCP), NOC from Gram Panchayat and Mauka Tatima from Revenue Authorities. Defendant No.1 had also placed on record letter of approval from TCP, copy of

Jamabandi, approved building plan, photographs of the buildings of the plaintiff and defendant No.1, hotel and old house, electric bill of old house of defendant No.1 and photographs of Rishi Kumar's and Tikki Devi's houses and also NOC issued by Gram Panchayat Jagatsukh as well as Mauka Tatima issued by Revenue Authorities. Defendant No.1 had also placed on record agreements dated 14.1.2009 and 23.3.2017 entered for sale of crop of orchard, situated on Khasra No.1525, 1526 & 1527, with Mohan Lal and Nishant Thakur respectively in respective agreements.

64. Mr. Maan Singh, learned counsel for the plaintiff, relying upon judgment of a Coordinate Bench of this Court in ***Ashok Kapoor v. Murtu Devi*, 2016(1) Shim.LC 207**, has submitted that defendant No.1 is claiming ouster of plaintiff and other co-sharers in the suit land despite admitting that she has been reflected a co-owner of the property in the revenue record, which is inconsistent with rights of other co-owners, amounting to denial of their legal rights and, therefore, defendant No.1 cannot claim right to raise construction upon suit land without consent of the plaintiff and other co-owners which is detrimental to the interests of other co-owners. Learned counsel has further submitted that defendant No.1 is not raising construction of her house but of a hotel and, therefore, plea that plaintiff and other co-owners already had raised construction of their houses on the suit land is not available to defendant No.1 as she, in addition to construction of her house, is raising construction of hotel on the suit land which is yet to be partitioned.

65. Learned counsel for defendant No.1 has submitted that despite the fact that plaintiff and defendant No.1 have been recorded joint-owners over the land comprised in several Khasra numbers, i.e. from 1499 to 1527, as referred supra, the suit has been filed only with respect to Khasra No.1525, 1526 & 1527, without disclosing the fact that plaintiff and defendant No.1 are not joint owners only in these khasra numbers, shown as suit land, but also

in other khasra numbers wherein other co-owners/co-sharers, including plaintiff, had already raised construction of their respective houses.

66. It is further case of defendant No.1 that she had already filed proceedings for partition of the suit land, wherein initially plaintiff had chosen not to be represented and was proceeded exparte and thereafter he had filed appeal before Sub Divisional Collector which stands dismissed and thereafter dismissal of the appeal has been assailed by the plaintiff before Divisional Commissioner, wherein no stay has been granted in favour of the plaintiff, and instead of cooperating for culmination of partition proceedings, the plaintiff is trying to linger on the same in order to defeat legal right of defendant No.1.

67. Learned counsel for defendant No.1 has further submitted that defendant No.1 is not raising any new construction on the spot but has raised construction of her house after dismantling the old house inherited by her from her father and construction of hotel is being raised on the vacant land, left after construction of her house in the suit land, and the entire suit land comprised in Khasra No.1525, 1526 & 1527 is in her exclusive possession, whereas plaintiff and other co-sharers/co-owners are in exclusive possession of other khasra numbers reflected as joint in the revenue record, but the plaintiff had suppressed material facts from the Court and did not approach the Court with clean hands and had not disclosed the entire facts so as to paint construction raised by defendant No.1 as illegal and unauthorized in order to cause unnecessary loss to defendant No.1.

68. Learned counsel for defendant No.1 has also referred to photographs, placed on record, wherein old house owned and possessed by defendant No.1 is existing, surrounded by a boundary wall, on the spot and thereafter subsequent photograph wherein new construction on the same spot after dismantling the old house, surrounded by boundary wall, is visible. Learned counsel has also referred to photographs wherein houses of defendant No.1, co-owner Rishi Kumar and plaintiff have been reflected.

69. Learned counsel for defendant No.1 has also submitted that construction was started in the year 2018 and substantial construction of first floor upto lintel level was complete even before filing of the suit and while construction of second floor was in progress, plaintiff filed the suit but, without disclosing complete facts, obtained interim stay order from the trial Court, which has rightly been set aside by the learned District Judge in the appeal preferred by defendant No.1.

70. Learned counsel for defendant No.1 has placed reliance upon a judgment passed by Single Bench of this Court in **CMPMO No.117 of 2008,** titled as ***Parmeshwari Dass v. Ichha Ram,*** **decided on 23.5.2008,** wherein it has been observed as under:

> "Normally, in case where joint possession of co-sharers is recorded this Court would have granted a stay but the facts of the present case show that though the land in the revenue record may be shown as joint in actual fact almost all co-sharers have raised construction on some specific portion of the suit land. Now the plaintiff wants to protect the vacant portion on the ground that he has developed an orchard over the same. This cannot be permitted. The plaintiff should have sought partition of the entire holding before himself raising construction. Once he raised the construction without obtaining partition then he cannot claim that the other co-sharers should be restrained from raising construction on the vacant portion."

71. Reliance on behalf of defendant No.1 has also been placed on ***Smt. Kalawati v. Netar Singh & others,*** **AIR 2016 HP 85,** wherein this Court has made the following observations:

> "10. It would be evident from the decision, the mere fact that the parties are co-owners and joint owners etc. is not the sole criteria for granting or refusing injunction, the conduct of the parties too plays an important role and in such like cases, the plaintiff conduct has to be free from blame so as to enable the court to conclude that the plaintiff has approached the Court with clean

> hands. But here is a case where the petitioner though claims herself to be a joint owner with the respondents after having already raised construction over the suit land seeks an injunction against the respondents without even disclosing this fact.
>
> 11. The injunction being an equitable relief, the person seeking injunction must come with clean hands. The well known mechanism that applies in such matter is "he who seeks equity must do equity". Since the petitioner has admittedly raised construction of her house(s) on a portion of the suit land, she is estopped and has waived of her right to assail and question the construction being raised by the respondents. The fact that the petitioner has not approached the court with clean hands in itself is a sufficient ground for not granting the relief of injunction."

72. Reliance has also been placed on ***Sarla Devi v. Madan Singh & others*,** **Latest HLJ 2018 (HP) 430;** and ***Chanchal Kumar v. Prem Parkash and antoher*,** **2019(1) Civil Court Cases 793 (HP),** wherein it has been held that where plaintiff himself/herself has constructed a house over one portion of joint land, there he or she is not entitled to raise objection, if any, qua construction over other portion of the land by defendant(s).

73. In rebuttal, though existence of construction of house by plaintiff and co-owners is not disputed in other khasra numbers, jointly owned by plaintiff, defendant No.1 and other co-owners, however, it has been submitted that facts in present case are entirely different from facts in the case law referred on behalf of defendant No.1, as plaintiff is residing in the suit land since long whereas defendant No.1 is not permanent resident of the village but has inherited the property from her father and she is not constructing her residential house but a hotel upon the joint land without consent of co-owners, though after dismantling the old building but covering much more

area of vacant land than the area existing beneath the old house and, therefore, such construction, without consent of co-owners, is not permissible.

74. It is further submitted on behalf of plaintiff that partition proceedings filed by defendant No.1 are not disputed but the same have been filed after filing of the suit wherein plaintiff has wrongly been proceeded ex-arte and, therefore, he is assailing the mode of partition adopted by the Assistant Collector and further, in any case, filing of partition proceedings also reflects that suit land has not been partitioned yet.

75. In ***Ashok Kapoor's case***, relied upon by the plaintiff, the Court, after considering plethora of judgments, had summarized certain principles, which may be relevant in this case also, which read as under:

> "46. .....
>
> (i) a co-owner is not entitled to an injunction restraining another co-owner from exceeding his rights in the common property absolutely and simply because he is a co-owner unless any act of the person in possession of the property amounts to ouster prejudicial or adverse to the interest of the co-owner out of possession.
>
> (ii) Mere making of construction or improvement of, in, the common property does not amount to ouster.
>
> (iii) If by the act of the co-owner in possession the value or utility of the property is diminished, then a co-owner out of possession can certainly seek an injunction to prevent the diminution of the value and utility of the property.
>
> (iv) If the acts of the co-owner in possession are detrimental to the interest of other co-owners, a co-owner out of possession can seek an injunction to prevent such act which is detrimental to his interest.

(v) before an injunction is issued, the plaintiff has to establish that he would sustain, by the act he complains of some injury which materially would affect his position or his enjoyment or an accustomed user of the joint property would be inconvenienced or interfered with.

(vi) the question as to what relief should be granted is left to the discretion of the Court in the attending circumstances on the balance of convenience and in exercise of its discretion the Court will be guided by consideration of justice, equity and good conscience.

47. .....

(i) existence of a prima facie case as pleaded, necessitating protection of the plaintiff's rights by issue of a temporary injunction;

(ii) when the need for protection of the plaintiff's rights is compared with or weighed against the need for protection of the defendant's right or likely infringement of the defendant's rights, the balance of convenience tilting in favour of the plaintiff; and

(iii) clear possibility of irreparable injury being caused to the plaintiff if the temporary injunction is not granted. In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiff's conduct is free from blame and he approaches the Court with clean hands."

76. The mere fact that the parties are co-owners and joint owners etc. is not the sole criteria for granting or refusing injunction. It may be one of the criteria but has to be considered alongwith other facts and each case is to

be decided in its peculiar facts and circumstances by applying the parameters required to be taken into consideration for granting temporary injunction.

77. In present case, plaintiff has not disclosed complete facts and detail with respect to the entire property owned jointly by the plaintiff, defendant No.1 and other co-sharers but he has selected only three khasra numbers, regarding exclusive possession whereof defendant No.1 has placed on record sufficient material, and further except making a bald statement that defendant No.1 is adamant to raise construction of hotel over the suit land in order to occupy more valuable portion and front side, no other averment or material has been placed on record to establish that land being occupied by defendant No.1 is more valuable being front side than the land occupied by plaintiff comprised in other khasra numbers owned jointly by the parties. How and in which manner rights and interests of the plaintiff are going to be affected adversely, on account of construction being raised by defendant No.1, has not been reflected either in the plaint or from the documents relied upon by the plaintiff. There is no material on record reflecting that the act of defendant No.1 is causing any loss or injury, muchless substantial loss or injury, for construction being raised by her. Case of the plaintiff is simliciter that defendant No.1 is raising construction on the suit land, that too of a hotel, but without consent of the joint owners. Joint ownership and absence of consent of co-owner(s) is definitely a relevant fact to be considered for granting stay in suit filed by a co-owner but it cannot be a straitjacket formula to grant stay in each and every case and, at the same time, construction already raised by plaintiff on the joint land may not be a rule for disqualifying the plaintiff from obtaining the stay against construction being raised by one or more of the co-owners/co-sharers but, in such eventuality, plaintiff (co-owner) has to establish on record the substantial loss or injury to the plaintiff being caused by the construction being undertaken/raised by co-sharer/co-

owner, to tilt the balance of convenience in favour of the plaintiff for granting the interim stay.

78. In present case, trial Court has failed to appreciate the material and facts on record in right perspective for the purpose of granting or refusing interim stay, whereas learned District Judge, in my opinion, has appreciated the material on record in its right perspective.

79. It is made clear that observations made by this Court as well as learned District Judge are to be construed to have been made only for the purpose of adjudication of prayer for interim stay made by the plaintiff, which shall not have any effect or bearing on the merits of the case which are to be assessed by the trial Court after evaluating the evidence led before it, in accordance with law and in case, on conclusion of trial, merit in the case of plaintiff is found on the basis of material on record, defendant No.1 shall not have any equitable right or claim for construction raised during pendency of the suit on the suit land and in that eventuality trial Court shall pass appropriate orders in this regard.

In view of the above discussion and the case law relied upon by the parties, present petition, being devoid of merit, is dismissed. Interim stay stands vacated. Pending application(s), if any, also stand disposed of.

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

Suman ....petitioner

Versus

State of Himachal Pradesh ..... respondent

Cr.M.P.(M) No. 580 of 2021
Decided on: 10.05.2021

The petition for regular bail in F.I.R. u/s 21,29 NDPS Act- Allegations are that- during raid in the house of Anchal- Anchal along with his two daughters including bail petitioner, minor son SARANG were present the other son of Anchal, Sikandar was not present- when courtyard within boundary of house was dug, digging led to recovery of a steel box containing Rs. 1,74,000/ and

from other place, a carry bag was recovered containing a brown coloured substance ascertained as Heroine weighing 377.8 gm Held- mere presence of daughter (Petitioners) aged 20 years, a student in her home along with her father at around 10. P.M. in month of January in a village in district Kangra would not lead to an automatic inference that she had any knowledge about the contraband allegedly recovered from beneath the courtyard with in the house belonging to her father. There is no material on record which can deduce at this stage that petitioner was in joint procession along with other co- accused or in exclusive procession or was in control of place from where contraband was recovered –in status report, there is no linkage of petitioner with source of contraband- though all these aspects are to be deliberated by trial court during trial where inter alia, complicity of petitioner would require to be proved in accordance with law, cumulative effect of these facts is that there are reasonable ground to believe that petitioner is not guilty of offense alleged against her -the observation are only for limited purpose of adjudicating the bail petition in light of rider placed in sec 37 of Act- Petitioner is behind bars, unmarried lady aged 20 years, a student ,a local resident and has no criminal history - Bail petition is allowed subject to conditions on furnishing bonds.

Cases referred:

Mohan Lal Vs. State of Rajasthan 2015 (6) SCC 222;

Stateof Kerala and others Versus Rajesh and others, (2020) 12 SCC 122;

Sujit Tiwari Versus State of Gujarat and another, (2020) 13 SCC 447;

For the petitioner : Mr. Vijender Katoch, Advocate.

For the respondent : Mr.Amit Dhumal, Deputy Advocate General.

(Through video conferencing)

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J *(Oral)*

The petitioner seeks regular bail in FIR No.11/2021, dated 25.01.2021 registered under Section 21 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'NDPS Act') at Police Station Damtal, District Kangra.

2. I have heard learned counsel for the parties and

gone through the status report filed by the respondent-State as well as the documents placed on record.

3. The prosecution case in nutshell is that on 25.01.2021, while a police party was on patrolling duty near Excise Barrier Toki, it received a secret information at around 9.35 P.M. that one Sh. Aanchal
and his family members were doing business of selling of Heroin in their house and further that a raid of their house at that point of time could lead to recovery of huge quantity of heroin. Since the information was reliable, therefore, the procedure as contemplated in law was followed by the police officials. Search of the house belonging to said Sh. Aanchal was carried out at around 10.10 p.m. in presence of Sub- Divisional Police Officer. During search, Aanchal alongwith his two daughters including bail petitioner and minor son Sarang was present in the house. His other son Sikandar was not present there. The raiding party dug up the courtyard within the boundary of the house. This digging led to recovery of a steel box containing Rs. 1,74,000/- from one place and from the other place a carry bag was recovered containing a brown coloured substance, which was ascertained as Heroin. The contraband weighed 377.8 grams. All codal formalities were completed. The recovery of contraband led to registration of the FIR in question. Petitioner alongwith her family members present in the house were arrested on 25.1.2021. Since then, petitioner is in custody.

4. Learned counsel for the petitioner contended that the petitioner was innocent and has been falsely implicated with the alleged offences. Petitioner's presence in her house was in natural course and cannot lead to an inference that she was aware about the presence of the contraband in the house or that she was in conscious possession of the contraband or that she had control over the contraband allegedly

recovered in the FIR or control over the spot from where the recovery was allegedly effected. Learned counsel further submitted that the petitioner will abide by all the conditions, which may be imposed upon her in case of grant of bail and that she will not influence the prosecution witnesses or temper with the prosecution evidence in any manner.

Learned Deputy Advocate General while opposing the bail plea, argued that the instant is a case of recovery of commercial quantity of contraband, therefore, Section 37 of the NDPS Act would be attracted and that the petitioner has failed to satisfy the conditions prescribed under Section 37 of the NDPS Act.

5. Since quantity of the contraband recovered in the FIR is commercial, therefore, provisions of Section 37 of the NDPS Act are attracted, which read 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 offences under section 19 of 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."

In order to avail bail, the petitioner has to satisfy following twin conditions imposed in Section 37 of the NDPS Act:-

(i) *Court should be satisfied that there are reasonable grounds for believing that the petitioner is not guilty of such offence; and*

(ii) *Petitioner is not likely to commit any offence while on bail.*

Hon'ble Apex Court in ***(2020) 12 SCC 122, titled State of Kerala and others Versus Rajesh and others***, after considering various pronouncements held that the expression 'reasonable grounds' used in Section 37 of the NDPS Act means something more than prima-facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of alleged offence. It would be appropriate to extract relevant paras from the judgment:-

"19. 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.

20. 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."

It will also be appropriate to refer to ***(2020) 13 SCC 447, titled Sujit Tiwari Versus State of Gujarat and another***, wherein following was observed in relation to satisfaction of requirement under Section 37 of the NDPS Act vis-à-vis facts of that case:-

"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 4-8-2017 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."

It would also be appropriate to refer to ***2015 (6) SCC 222 titled as Mohan Lal Vs. State of Rajasthan,*** wherein it was observed that the terms "possession" consists of two elements. First, it refers to the corpus or the physical control and the second, it refers to the animus or intent which has reference to exercise of the said control.

Present was a case of recovery of commercial quantity of the contraband from beneath a courtyard within the house and for this reason all the family members residing in the house have been made accused in the FIR viz:- Aanchal aged 56 years; Suman D/O Aanchal aged 20 years; Seema D/O Aanchal aged 21 years; Sarang S/O Aanchal aged 17 years

and Sikandar S/O of Aanchal aged 36 years. But for Sikandar, all the other family members including the bail petitioner were arresed on 25.01.2021. Sikandar, who statedly absconded, was arrested on 26.3.2021. Sarang S/O Aanchal, being juvenile was released on bail by the learned Principal Magistrate Juvenile Justice Board Kangra on 25.2.2021. No doubt reverse burden under the NDPS Act would be on the petitioner to prove that she had no knowledge regarding the presence of the contraband and that she was not in conscious possession thereof. In the instant case, the facts as they emerge from the record are that the house belonged to co-accused Aanchal, who is father of the bail petitioner. The house was searched in cold winter month of January at around 10.10 P.M. The petitioner is daughter of co-accused Aanchal. She is aged 20 years and is neither married nor employed. She is a student. Her presence in the house of her father would definitely has to be construed in natural course. No overt act has been alleged against her by the investigating agency. Status report does not indicate any criminal history of the petitioner rather it is her father (Aanchal) against whom many cases are statendly registered in the past. Further as per the status report, petitioner's brother (Sikandar) had also absconded and could be arrested only on 26.3.2021.

Mere presence of daughter (bail petitioner) aged 20 years and a student, in her home alongwith her father at around 10.10 P.M. in the month of January in a village in District Kangra would not lead to an automatic inference that she had any knowledge about the contraband allegedly recovered from beneath the courtyard within the house belonging to her father Aanchal. There is no material on record, which it can be deduced at this stage that the petitioner was in joint possession of the contraband alongwith other co-accused persons or that she was in exclusive possession of the contraband or was in control of the place from

where the contraband was allegedly recovered. Status report also does not indicate that during investigation, petitioner had admitted her knowledge or possession about the contraband allegedly recovered in the FIR. Also, in the status report, there is no linkage of the petitioner to the source of the contraband. Though all these aspects are to be deliberated by the learned Trial Court during trial, where, inter alia, complicity of the petitioner would require to be proved in accordance with law. However, on cumulative consideration of all these facets, it can be safely inferred at this stage that the petitioner has been able to show that she neither had the knowledge nor possession of the contraband recovered in the FIR. There are reasonable grounds to believe that petitioner is not guilty of offence alleged against her in the FIR. By way of abundant caution, it is clarified that the observations made in this judgment are not to be treated as if final verdict of petitioner being not guilty has been pronounced. The observations made herein are only for limited purpose of adjudicating the bail petition in light of riders placed in Section 37 of the NDPS Act. Petitioner is behind the bars since 25.01.2021. Petitioner is an unmarried lady aged 20 years, a student and a local resident. She has no criminal history. Therefore, it can be believed that she is not likely to commit any offence during bail. To ensure this, stringent conditions can also be imposed upon her. Petitioner is resident of Village, PO and Tehsil-Indora, District Kangra, Himachal Pradesh, therefore, her presence can be ensured in the trial.

Accordingly, the present petition is allowed. Petitioner is ordered to be released on bail in the aforesaid FIR on her furnishing personal bond in the sum of Rs.75,000/- (Rupees Seventy Five Thousand only) with one local surety in the like amount to the satisfaction of the

learned trial Court having jurisdiction over the Police Station concerned, subject to the following conditions:-

(i). The petitioner shall join and cooperate the investigation of the case as and when called for by the Investigating Officer in accordance with law. However she shall not be called in the police station before 9.00 A.M. and after 5.00 P.M;

(ii). The petitioner shall not temper with the evidence or hamper the investigation in any manner whatsoever. (iii).The petitioner will not leave India without prior permission of the Court.

(iv). The petitioner shall not make any inducement, threat or promise, directly or indirectly, to the Investigating Officer or any person acquainted with the facts of the case to dissuade him/her from disclosing such facts to the Court or any Police Officer.

(v). Petitioner shall attend the trial on every hearing, unless exempted in accordance with law.

(vi). Petitioner shall inform the Station House Officer of the concerned police station about her place of residence during bail and trial. Any change in the same shall also be communicated within two weeks thereafter. Petitioner shall furnish details of his Aadhar Card, Telephone Number, E-mail, PAN Card, Bank Account Number, ifany.

(vii).Petitioner shall not indulge in any criminal activities. It is made clear that in case the petitioner is arraigned as an accused in future in any FIR, then this bail is liable to be cancelled. It is open for the Investigating Agency to move appropriate application in that regard. This shall also be considered as a negative factor for consideration of her future bail application, if any.

In case of violation of any of the terms & conditions of the bail, respondent-State shall be at libertyto move appropriateapplication for cancellation of the bail. It is

made clear that observations made above are only for the purpose of adjudication of instant bail petition and shall not be construed as an opinion on themerits of the matter. Learned Trial Court shall decide the matterwithout being influenced by any of the observations made hereinabove.

With the aforesaid observations, the present petition stands disposed of, so also the pending miscellaneous applications, if any.

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

Sh. Tilak Raj ....Petitioner.

Versus

Municipal Council, Hamirpur and another ...Respondents.

CWP No. 7811 of 2012
Reserved on: 02.03.2021.
Decided on : 29.04.2021

The petition for direction to allot one shop to petitioner in the complex constructed around the stadium on receipt of assessed amount of Rs. 85,000/- Held- The case of the petitioner is that he was running a stall at a place where respondents proposed to construct a sports complex and he was called upon to vacate the spot along with others so that place could be utilized for sports complex he was assured that he will be allotted a shop in said complex in lieu of vacation of place on depositing of Rs. 85,000/- which, he deposited but his name was arbitrarily removed form list of beneficiaries and amount was returned to him.the eligibility of petitioner for allotment for shop has been denied by respondents. The onus to prove that petitioner was entitled for allotment of shop was upon him who failed to rebut by placing on record any cogent material- the stand of respondents that petitioner was not found running any business in planning area. During spot inspection by S.D.M, petitioner was not found running any business, there is nothing except his bald statement to substantiate his explanation that he was not on the

sport at the relevant time due to illness of his mother, hence it is difficult to believe that petitioner was in fact eligible for allotment of shop and his name was arbitrarily deleted from the list of beneficiaries. By simply paying Rs. 85,000/- no indefeasible right has accrued upon him for allotment of shop. The placing on record, teh bazari, receipt will not improve his case as from the receipts it is not clear that petitioner was running business in the planning area.- there is no merit in petititon to issue a writ of mandamus to issue a direction to respondents to offer shop to petitioner The petition is disposed of with observation that if some shops being still vacant, one of shops be offered to petitioner on same terms in view of reply of respondent no. 2.

For the petitioner : Mr. Suneet Goel, Advocate.

For the respondents : Mr. Anil Kumar God, Advocate for respondent No. 1.
Mr. Ashok Sharma, Advocate General with M/s Sumesh Raj, Dinesh Thakur and Sanjeev Sood, Additional Advocate Generals with Ms. Divya Sood, Deputy Advocate General for respondent No. 2.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this writ petition, the petitioner has sought a direction that the respondents be directed to allot one shop to him in the Complex constructed around the Stadium, Hamirpur, on receipt of assessed amount of `85,000/-.

2. The case of the petitioner is that he was running the business of selling tea, eatables etc. from a stall/rehri near the boundary wall of Taxi Stand-cum-Stadium in Ward No. 6, Hamirpur, for the last many years. The petitioner was duly authorized to hold the stall at the location from where he

was running his business and he was paying an amount of `200/- in this regard to the Municipal Council, Hamirpur. Alongwith the petition, he has appended as Annexure P-2 the Tehbazari tickets to demonstrate that he was paying an amount of `200/- per month to the Municipal Council, Hamirpur. As per the petitioner, in the month of July, 2011, respondents requested him to remove his stall/rehri for the purpose of construction of shops around the Stadium at Hamirpur. In lieu thereof, it was agreed that respondents shall allot one of the shops proposed to be constructed around the Stadium to the petitioner. He was to be rehabilitated/relocated in the said shop on payment of construction cost of `85,000/-. It is further the case of the petitioner that he deposited the said amount vide receipt dated 27.07.2011 (Annexure P-3). As per him, respondent-Council passed resolution No. 7/2011 on 14.06.2011, whereby the shops proposed to be constructed around the Stadium were to be allotted to the existing stall/rehri holders. In the month of February, 2012, petitioner came to know that the respondent-Council was not intending to make allotment of the shop to him as was agreed to by the Council earlier. The petitioner thereafter made a representation to the Sub Divisional Magistrate, Hamirpur, for allotment of one shop to him, who in turn marked his request to the Chief Executive Officer of respondent No. 1. However, vide letter dated 18.02.2012, respondent intimated the petitioner that the list of the beneficiaries stood finalized and it was not possible to accommodate the petitioner. According to the petitioner, spot verification of the stalls/rehris was done to finalize the list of allottees of the shops proposed to be constructed around the Stadium, however, as the petitioner was not present at the spot on the date of spot inspection due to illness of his mother, the amount earlier deposited by him was returned to him vide cheque No. 025306, dated 27.09.2011, after a lapse of about two months. The petitioner again represented to the Sub Divisional Magistrate, Hamirpur, vide annexure P-5. He also approached the Executive Officer of respondent No. 1, but he was

informed that as the list of beneficiaries stood finalized, the petitioner could not be accommodated. Thereafter, the petitioner also made a representation to the Deputy Commissioner (Annexure P-6), but he was again informed vide Annexure P-7 dated 03.05.2012 that as the list of beneficiaries stood finalized, the petitioner could not be accommodated. The petitioner filed a civil suit bearing No. 48 of 2012 in the Court of learned Civil Judge (Senior Division), Court No. 1, Hamirpur, for a decree of permanent prohibitory injunction restraining the respondents from making allotment of shops around the Stadium, and in case, the allotment stood made, then, for a decree of mandatory injunction directing the respondents to make allotment of one shop in his favour also. Alongwith the civil suit, an application for interim relief was also filed. Though initially, interim relief was granted in favour of the petitioner, however, the suit was subsequently withdrawn by the petitioner, with liberty to seek appropriate remedy for the redressal of his grievance. It is in this background that the present petition stood filed by the petitioner praying for the relief already mentioned hereinabove. As per the petitioners, denial of the shop to him by respondents is bad in law as the stall/rehri was vacated by him in lieu of the clear understanding that one shop was to be allotted to the petitioner on the payment of construction cost of `85,000/- and despite the fact that he duly deposited the said amount, no shop was allotted to him and money was also subsequently returned to him, which act of the respondent-Council, according to the petitioner, is arbitrary as other persons similarly situated as the petitioner were accommodated and the petitioner has been wrongly denied the allotment of the shop.

3. The petition is opposed by the respondent-Council *inter alia* on the ground that the sole authority for the purpose of shop allotment was with the Committee of the Society for Promotion of Sports, Culture, Education and other Developmental Activities, which was a society registered under Himachal Pradesh Societies Registration Act 2006 to be headed by Deputy

Commissioner, Hamirpur. It is further the case of said respondent that the allotment of the shops was the sole prerogative of the society and the replying respondent had no major role in the allotment of the shops. As per said respondent, meeting of the society was held on 17.09.2012 to finalize the criteria of allotment of shops, and it was unanimously decided that allotments were to be made to the persons who had been displaced from the places where the shops stood constructed. This was subject to the condition that allotments were to be made to the *bonafide* residents of Himachal Pradesh and only to one person of a family and not to both husband and wife simultaneously. The shopping complex was constructed by Himachal Pradesh Public Works Department, Hamirpur, and replying respondent was only a member of the society and it was the society, which was having the authority to take decisions for allotment of the shops. On the directions of the Deputy Commissioner, Sub Divisional Magistrate alongwith revenue officials had visited the spot where shopping complex was to be constructed to finalize the list of beneficiaries. The petitioner was not found carrying out any business on the spot and the Sub Divisional Magistrate verbally directed the replying respondent to remove his name from the list of beneficiaries. The name of the petitioner was initially added in the list on account of his depositing a sum of `85,000/-, which was thereafter refunded to him. As per the said respondent, at the time of spot inspection, neither the petitioner nor any rehri was found in the planning area, i.e. Taxi Stand-cum-Stadium to be run by the petitioner and as the petitioner was not found eligible to be included in the list of beneficiaries, his name was therefore rightly ordered to be removed from the said list.

4. During the pendency of this petition, an application under Order 1, Rule 10 of the Code of Civil Procedure was moved by the petitioner for impleadment of Committee of the Society for Promotion of Sports, Culture, Education and other Developmental Activities, through Deputy Commissioner,

Hamirpur, as respondent No. 2, which was allowed by this Court vide order dated 24.12.2019.

5. The stand of respondent No. 2 before this Court is that the meeting of the Committee was held on 23.05.2018 in compliance to the order passed by this Court dated 10.05.2018 in CWP No. 10874 of 2012, titled as Balbir Chand & others vs. State of HP and others, for an amicable settlement. In this meeting, the petitioner outrightly declined the offer for allotment of one shop on the top floor of the complex and further a second round of deliberation was held, wherein the petitioner came forth with a written demand to settle the dispute if he was allotted two shops on the ground floor. Another attempt was made wherein it was proposed that the spot be visited alongwith the petitioner to settle the dispute by allotting him a single shop, but in spite of that, the petitioner remained adamant for allotment of two shops. It is further the stand of the said respondent that as the petitioner was not found eligible for allotment of shop in the new complex as he was not running any business within the planning area, nor he was displaced on account of construction of the shops, therefore, his name was rightly removed from the list of beneficiaries and simply because the petitioner deposited some amount, the same could not entitle him for the allotment of the shop. It is further the stand of respondent No. 2 that the construction of the shops was done in the larger interest of public and the process of allotment was done by following due process of law in terms of the eligibility criteria.

6. By way of rejoinder, which has been filed by the petitioner to the replies filed by the respondents, he has reiterated his case and denied the stand of the respondents.

7. I have heard learned Counsel for the parties and also gone through the pleadings as well as record of the case.

8. The case of the petitioner in a nutshell is that he was running a stall/rehri at a place whereupon respondents proposed to construct a Sports

Complex and the petitioner was called upon to vacate the spot alongwith other such persons so that the place could be utilized for the construction of the sports complex. It is further the case of the petitioner that he was assured that in lieu of vacation of the place, he will be allotted a shop in the complex proposed to be constructed on his depositing a sum of `85,000/-, which amount was duly paid by him but despite this, his name was arbitrarily removed from the list of beneficiaries and the said amount was returned to him despite the fact that he was eligible for allotment of the shops.

9. The case of the petitioner that he was eligible for allotment of the shop has been denied by both the respondents. In my considered view, the onus to prove that the petitioner was entitled for allotment of the shop was upon him, who failed to rebut, by placing any cogent material on record, the stand of the respondents, that the petitioner was not found running any business in the planning area. Incidentally, it is the admitted case of the parties that the planning area was visited by Sub Divisional Magistrate alongwith other revenue officers/officials on the direction of the Deputy Commissioner, Hamirpur and during the site inspection, the petitioner was not found running any business at the spot. Though, the petitioner has tried to explain it by saying that he was not present at the spot on the relevant date on account of illness of his mother but except bald assertions so made in the petition, no material has been placed on record by the petitioner to prove this fact. In this background, it is difficult to believe that the petitioner was in fact eligible for the allotment of the shop and that his name was arbitrarily removed from the list of beneficiaries. The Court concurs with the stand taken by the respondents that as the petitioner was not eligible for allotment of the shop, therefore, by simply paying the amount of `85,000/-, no indefeasible right has accrued upon him for allotment of the shop. As far as placing on record the Tehbazari receipts is concerned, in my considered view, this will also not improve the case of the petitioner for the simple reason that from the

said receipts, it is not clear that the petitioner was running any business/stall etc. in the planning area.

10. Incidentally, in the reply which has been filed by respondent No. 2, said respondent has taken a specific stand that the petitioner was offered a shop on the top floor, which he refused to take despite repeated endeavours made in this regard by the said respondent. According to respondent No. 2, the petitioner was insisting upon for allotment of two shops on the ground floor. Be that as it may, though this Court does not finds any merit in the present petition so as to issue a writ of mandamus directing the respondents to offer a shop to the petitioner by holding that the petitioner was wrongly excluded from the list of beneficiaries, yet, keeping in view the stand taken by respondent No. 2, this writ petition is disposed of with the observation that in the event of some shops being still vacant with respondent No. 2, one of the shops be offered to the petitioner within 15 days from today, on same terms on which shops were offered to other persons, and in case the petitioner accepts such offer within 15 days of the receipt of offer, then, appropriate agreement etc. in this regard be entered into with him. It is further clarified that in case the petitioner does not agrees to the offer of allotment of the shop, then, respondent No. 2 shall be at liberty to deal with the vacant shop(s) in such manner as it deems fit.

With these observations, the writ petition stands disposed of. Pending miscellaneous application(s), if any, also stand disposed of accordingly.

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

Sh. Mohan Lal ....Petitioner.

Versus

State of Himachal Pradesh and others ...Respondents.

CWPOA No. 132 of 2020
Decided on: 01.03.2021.

The Petition for direction to respondents to offer appointment as driver to petitioner being more meritorious to respondents no 3 and 4-As per facts –two candidates selected under general category were less meritorious than candidates selected against S.C as well as S. T. Categories –held-it is settled law that a person belonging to S.C or S.T category ,if on merit ,secures more marks in a competition than a candidate of general category, then such a candidate has to be offered appointment against the post meant for general category and resultant seats reserved for S.C and S.T categories are thereafter to be offered to such candidates who are belonging to reserved categories who can occupy the posts on the basis of merit -The department has violated law by not offering the posts belonging to general category to meritorious candidates of S.C and S.T category who have secured more marks than candidates of general category who are appointed against such posts-petition is allowed with direction to offer appointment to petitioner against a post reserved for S.C. category as from the date other incumbents stood appointed - since selected candidates were selected in 2016 and continuously working ,their appointment is not set aside –The department is directed to be careful in future.

Cases referred:
R.K. Sabharwal and others vs. State of Punjab and others (1995) 2 SCC 745;

For the petitioner : Mr. L.N. Sharma, Advocate.

For the respondents : M/s Sumesh Raj, Dinesh Thakur and Sanjeev Sood, Additional Advocate Generals with Ms. Divya Sood, Deputy Advocate General for respondents No. 1 and 2.

: Mr. N.K. Thakur, Sr. Advocate with Mr. Divya Raj Singh, Advocate for respondent No. 3.

: Mr. Balvinder Singh, Advocate
vice Mr. Dalip K. Sharma,
Advocate for respondent No. 5.

: Mr. Pawan Gautam, Advocate for
respondent No. 6.

: Mr. Sandeep K. Pandey, Advocate
for respondent No. 8.

: Mr. Avinash Jaryal, Advocate for
respondent No. 9.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition, the petitioner has prayed for the following reliefs:-

> *"(i) That the impugned appointment order dated 12.1.2016(A-1) (Colly.) and impugned rejection dated 25.5.2016(A-5) may kindly quashed and set aside being contrary to law.*
> *(ii) That the directions may kindly be issued to the respondents to offer appointment as driver to the applicant being more meritorious to respondents No. 3 and 4.*
> *(iii) That any other writ, order or direction as this Hon'ble Court may deem just and proper in the facts and circumstances of the case may also be issued and justice be done."*

2. Brief facts necessary for the adjudication of the present petition are as under:-

In the year 2016, process was initiated by the respondent-department to fill up six posts of drivers. Out of the six posts so advertised, three posts were for open/General category, two posts were reserved for Scheduled Caste category and one post for Scheduled Tribe category. The

petitioner before this Court is a candidate who belongs to Scheduled Caste category. His grievance is that appointment given to the selected candidates by the respondent-department is bad in law as the petitioner who was more meritorious than two of the candidates selected under the General/open category, has been denied appointment to the post of driver by following a procedure for selection of reserved category candidates unknown to law and contrary to law laid down by Hon'ble Supreme Court of India in R.K. Sabharwal and others vs. State of Punjab and others, (1995) 2 Supreme Court Cases 745. He submits that those candidates who have been offered appointment and whose names are reflected in Annexure A-2 appended with the petition, have obtained following final marks:-

(1) Sh. Inderjeet (Sr. No. 40) (General Category) = 35.83;

(2) Sh. Sunil Kumar (Sr. No. 66) (General Category) = 35.83;

(3) Sh. Muni Lal (Sr. No. 91) (General Category) 39.66;
(4) Sh. Harjeet Kumar (Sr. No. 59) (Scheduled Caste category) =36.83;

(5) Sh. Heera Lal (Sr. No. 90) (Scheduled Caste category) = 37.66; and

(6) Sh. Jagdish Singh (Sr. No. 48) (Scheduled Tribe Category) =37.50.

3. The petitioner, as per the final result list, secured 36.33 marks, i.e. more marks than two of the selected candidates, namely, Sh. Inderjeet and Sh. Sunil Kumar, yet petitioner has been denied appointment to the post of Driver on the ground that he secured less marks than candidates selected under Scheduled Caste category and therefore, was not entitled for appointment. The stand of the petitioner is that two of the candidates belonging to Scheduled Caste category admittedly had secured more marks

than the General Category selected candidates. Then in these circumstances, the department should have offered appointment to the meritorious candidates, though belonging to the reserve category against the post meant for General/ open category and the resultant vacancy of reserved category then should have been offered to the candidates belonging to reserved category as per merit. On this count, the contention of the petitioner is that present petition be allowed and appointment of the candidates less meritorious to the petitioner be quashed and set aside and direction be issued to the respondent-department to offer appointment to the petitioner against the post of Driver.

4. Learned Additional Advocate General has supported the act of the department by submitting that there is no illegality committed by the department by offering appointment to the selected candidates because *inter se* merit which was obtained by the candidates of the category concerned has been duly maintained and amongst them whoever was found more meritorious was offered appointment.

5. Learned Counsel appearing for private parties adopted the arguments of the State and further submitted that the criteria which was followed by the Government was fair and equitable, as a candidate, who participated in a particular category, could and should have been considered for that particular category only and as the petitioner belongs to Scheduled Caste category, he could have been considered for appointment against Scheduled Caste category only and admittedly private respondents are more meritorious than the petitioner. Alternatively, it has been argued that in case the Court comes to the conclusion that the candidates belonging to the General Category, who have been offered appointment, are less meritorious than the candidates who stand selected under Scheduled Caste category, then the appointment of the private respondents be protected keeping in view the fact that they have been in service since the year 2016.

6. I have heard learned Counsel for the parties and also gone through the pleadings as well as record of the case.

7. There is no dispute on the factual matrix involved in the case, which demonstrates that admittedly two candidates selected under the General Category, namely, Inderjeet and Sunil Kumar, were less meritorious than the candidates selected against the Scheduled Caste category as well as Scheduled Tribe categories. The act of the respondent-department of not offering appointment to the candidates belonging to Scheduled Caste and Scheduled Tribe Categories on the basis of their merit against the posts meant for General Category when said candidates had secured more marks than the candidates belonging to General Category, is arbitrary, unconstitutional and not sustainable in the eyes of law. It is settled law that a person belonging to Scheduled Caste or Scheduled Tribe category, if on merit, secures more marks in a competition than a candidate belonging to General category, then such candidate has to be offered appointment against the post meant for General category and the resultant seats reserved for Scheduled Caste and Scheduled Tribe categories are thereafter to be offered to such candidates who are belonging to reserved categories and who can occupy the posts on the basis of their merit.

8. A five Judge Bench of Hon'ble Supreme Court of India in **R.K. Sabharwal and others vs. State of Punjab and others** (1995) 2 Supreme Court Cases 745, has been pleased to hold that when a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shown at the reserve points are to be filled from amongst the members of reserve categories and the candidates belonging to general category are not entitled to be considered for the reserved posts. On the other hand, the reserve category candidates can compete for the non-reserve posts and in the event of their appointment to the

said posts, their number cannot be added and taken into consideration for working out the percentage of reservation.

9. This law laid down by Hon'ble Supreme Court of India has been violated by the respondent-department by not offering the posts belonging to General Category to the meritorious candidates of Scheduled Caste and Scheduled Tribe categories, who have scored more marks than candidates of General Category appointed against the said posts. Merit list demonstrates that Shri Muni Lal, a candidate belonging to General Category was No. 1 in the merit followed by Sh. Heera Lal and Shri Jagdish Singh. That being the case, the posts meant for General Category had to be offered to them on the basis of their respective merit and the posts reserved for Scheduled Caste and Scheduled Tribe categories thereafter ought to have been offered to the candidates belonging to these particular categories on the basis of merit obtained by the candidates of these categories. The act of the respondent-department of not preparing a merit list in terms of what has been observed hereinabove has resulted in grave injustice to the candidates like the petitioner who indeed were entitled for appointment against the posts meant for Scheduled Caste category on the basis of merit obtained by them. The Court reiterates that as Shri Heera Lal and Shri Jagdish Singh, candidates belonging to Scheduled Caste and Scheduled Tribe categories respectively, were more meritorious than Shri Inderjeet and Shri Sunil Kumar, the candidates belonging to General Category, these two candidates should have been offered appointment against General categories posts. Shri Harjeet Kumar but obvious had to be offered appointment against the posts meant for Scheduled Caste category as there were only three posts meant for General Category but the second post belonging to Scheduled Caste category had to be offered to the petitioner who was the next candidate in merit after Shri Harjeet Kumar in the merit of Scheduled Caste category candidates.

10. In view of what has been held hereinabove, this writ petition is allowed by holding that the act of the respondent-department of not offering appointment to candidates belonging to Scheduled Caste category against posts meant for General Category on the basis of their merit being higher than candidates belonging to General Category, is bad in law and by further holding that denial of appointment for the post of driver to the petitioner against a post reserved for Scheduled Caste category is also bad in law. Respondents are accordingly directed to offer appointment to the petitioner against a post reserved for Scheduled Caste category as from the date other incumbents stood appointed against said posts. As the selection of the selected candidates has been made as far back as in the year 2016 and since then, they are continuously in service, the Court is not setting aside the appointment of the selected candidates but is directing that the department has to be more careful in future while filling up the posts so that this kind of illegalities are not repeated. The petitioner be offered appointment forthwith but with effect from the date appointment was offered to other incumbents. The appointment shall also entail consequential benefits including that of seniority but the monetary benefits shall be notional, as up to the date the petitioner actually joins the service, and thereafter, actual benefits shall be given to the petitioner.

The petition stands disposed of in above terms, so also pending miscellaneous application(s), if any.

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

Sh. Sant Ram ....Petitioner.

Versus

State of Himachal Pradesh and others ...Respondents.

CWPOA No. 7712 of 2019
Decided on: 01.03.2021.

The petitioner, serving as a class IV employee was earlier retired at the age of years 58. Hon'ble H.C. vide judgment dt. 27.10.2010 held in CWP that, petitioner can be continued upto age of 60 years- The petitioner served the department till the age of 60 years but leave encashment, which he was entitled to in lieu of severing till the age of 60 years has not been paid to him & Same was paid only till the age of 58 years. The writ petition for direction to release the differential amount of leave encashment i.e. 11,505/- with interest @ 12% per annum on account of delay in release of the said amount. Held- the petition filed by the petitioner before the Hon'ble H.C. feeling aggrieved by the act of state Govt. of retiring him at the age of 58 years was allowed in his favour therefore for all intent and purposes the petitioner stood retired from service of deptt at the age of 60 years-when the difference in leave encashment is of meager amount of Rs. 11,055/- petitioner, a class IV employee, in interest of justice, the petition is disposed of with direction to pay balance amount of leave encashment of Rs. 11,055/- to paid to petitioner without insisting upon him to pay interest as demanded by the state.

For the petitioner : Mr. Devender Sharma, Advocate
vice Mr. C.N. Singh, Advocate.

For the respondents : M/s Sumesh Raj, Dinesh Thakur and Sanjeev Sood, Additional Advocate Generals with Ms. Divya Sood, Deputy Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

There is a very limited issue involved in the present writ petition. The petitioner, who was serving as a Class-IV employee with the respondent-department, was earlier retired at the age of 58 years. Feeling aggrieved by the fact that he was retired at the age of 58 years, he approached this Court by way of CWP No. 1693 of

2010, titled as Sant Ram vs. State of H.P. and others, with the prayer that, as the petitioner was serving in the Forest Department of the Government of Himachal Pradesh as a Class-IV employee, therefore, he should be superannuated at the age of 60 years and not at the age of 58 years as his services stood regularized in the year 2010 retrospectively w.e.f. 01.01.2000. Said writ petition was allowed by this Court vide judgment dated 27.10.2010 in the following terms:-

> *"The petitioner approached this Court when he was sought to be superannuated on attainment of age of 58 years on the ground that his regularization is after 2001. During the pendency of the Writ Petition, it is seen that the department has regularized the services of the petitioner retrospectively w.e.f. 01.01.2000. Order dated 20.07.2010, is taken on record. Therefore, in any case, the petitioner can be continued upto the age of 60 years. Accordingly, the writ petition is allowed as above."*

2. Now the surviving grievance of the petitioner is that though he served the respondent-department till the age of 60 years, yet leave encashment, to which he was entitled to in lieu of serving till the age of 60 years, has not been paid to him and the same was paid only till the age of 58 years. It is in this background that this writ petition has been filed with the prayer that the respondents be directed to release the differential amount of leave encashment, i.e. `11,505/- with interest thereon @ 12% per annum on account of delay in release of the said amount.

3. The petition is being opposed by the respondent-State *inter alia* on the ground that it was after his having retired at the age of 58 years that petitioner approached the Court by way of earlier writ petition and as all retiral benefits, including leave encashment stood duly paid to him when petitioner was superannuated at the age of 58 years and as the petitioner did not refund the said amount to the department, therefore, if he insists to be paid difference of leave encashment on having retired from service at the age of 60 years on account of judgment passed by this Court, then the petitioner be directed to pay to the government the interest on the amount of leave encashment which stood paid to him when he was earlier retired at the age of 58 years.

4. I have heard learned Counsel for the petitioner as well as learned Additional Advocate General and I have gone through the pleadings as also the record of the case.

5. Annexure A-5, which is an office order passed by the Divisional Forest Officer, Karsog Forest Division, demonstrates that earlier the leave encashment which was paid to the petitioner on his superannuation at the age of 58 years was `95098/-. As per the same order, leave encashment, as was admissible to the petitioner on retirement at the age of 60 years, was ₹1,06,603/-. The balance leave encashment which was reflected in this order, as payable to the petitioner, was ₹11,505/-.

6. As it is not in dispute that the petition filed by the petitioner before this Court feeling aggrieved by the act of the State Government of retiring him at the age of 58 years, was allowed by this Court in his favour, therefore, now for all intents and purposes, the petitioner stood retired from service of the respondent-department at the age of 60 years. That being the case, when the difference in leave encashment is of a meager amount of ₹11,505/- and as the petitioner happens to be a Class-IV employees, in the considered view of this Court, it will be in the interest of justice, in case, this petition is disposed of with the direction that the balance amount of leave encashment amounting to ₹11,505/- be paid to the petitioner, without insisting upon him to pay interest as demanded by the State.

7. The contention raised by learned Additional Advocate General that this amount can be paid only if the petitioner pays interest on the amount of leave encashment which was earlier released in his favour while retiring him at the age of 58 years is without merit because there is nothing on record to demonstrate that after the petition of the petitioner to the effect that he should be retired at the age of 60 years, was allowed by this Court, any such demand was raised by the State from the petitioner. Even otherwise, the leave encashment earlier paid to the petitioner was so paid to him by taking into consideration the fact that he was to superannuate at the age of 58 years and now only balance of two additional years has to be paid to the petitioner.

8. Accordingly, this petition is allowed with the direction that balance differential amount of ₹11,505/- of leave encashment shall be paid to the petitioner by the respondent-department within a period of three months from today. It is directed that in case balance amount is paid to the petitioner by the respondent-department within the time granted by the Court, then respondent-department shall not be liable to pay interest thereupon, however, in case balance amount is not paid to the petitioner within the said time frame, then respondent-department shall be liable to pay simple interest thereupon at the rate of 6% per annum from the date of this decision.

The petition stands disposed of in above terms, so also pending miscellaneous application(s), if any.

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

Dr. D. R. Barwal (now deceased) through his
Legal Representatives Smt. Usha Barwal & others ....Petitioners.

Vs.

State of Himachal Pradesh and others .....Respondents.

CWPOA No. 1184 of 2020
Reserved on: 07.04.2021
Date of Decision: 04.05.2021

The petitioners are seeking benefits of Notification dt 28.07.1998 being denied to who are pre. 01.09.1997 and pre-2006 retirees whereas same is extended to serving as well as doctors who retired on and after 01.09.1997 and 01.01.2006 respectively vide which the benefit of 25% NPA as Basic pay for the purpose of calculating retiral benefits including revised pension w.e.f. 01.07.1997 and further enhancing the basic pay plus NPA limited to Rs. 79,000/- w.e.f. 01.01.2006 and this is discriminatory in nature and hit by articles 14 and 16 of constitution of India and direction is sought to carry out necessary modification to the notification extending benefit to pre 01.09.1997 and pre-2006 retirees. HELD- it is held in Keshav's case that in case of the retirees prior to specified date their pension would be computed afresh in view of liberalized scheme and would become payable in future commencing from

specified date and no arrears would be payable prior to it. The act of respondent of denying the benefit of notification to the petitioners on the ground that they superannuated before 1.1.1997 is arbitrary and not sustainable in law. Writ petition is allowed.

For the petitioners: Mr. S.P. Chatterji, Advocate.

For the respondents: Mr. Ajay Vaidya, Senior Additional Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition, the petitioners have prayed for the following reliefs:

> *"(A) That the order dated 4th August, 2016, Annexure A-3 of the respondent No. 1, may kindly be quashed and set aside qua applicants.*
> *(B) That vide Notification dated 28.07.1998 (Annexure A-5), the benefit of 25% NPA as basic pay for the purposes of calculating the retiral benefits including revised pension w.e.f. 1.9.1997, and further enhancing the basic pay plus NPA limit to Rs.79,000/- w.e.f. 1.1.2006 (Annexure A-8) have been extended to the serving as well as to the doctors who retired on and after 1.9.1997 and 1.1.2006 respectively but the same is being denied to the applicants who are pre 1.9.1997 and pre-2006 retirees. Therefore these notifications are discriminatory in nature and are hit by Articles 14 and 16 of the Constitution of India. That the respondents be directed to bring necessary modifications in these notifications thereby extending the same benefit to the pre-1.9.1997 and pre-2006 retirees-applicants.*
> *(C) That similarly, the notifications dated 31.8.1989, 14.10.2009 and 21.5.2003 vide Annexure A-6, A-9 & A-10 and all such notifications, orders,*

instructions or provision which denies the benefit of the component of 25% NPA as basic pay for the purposes of calculating the retiral benefits including revised pension to the applicants w.e.f. 1.9.1997 and 1.1.2006 respectively, being arbitrary, discriminatory and ultra vires of Articles 14 & 16 of the Constitution of India, may kindly be ordered to be modified to bring uniformity between pre and post 1.9.1997 and pre and post 1.1.2006 retirees and thereby obliterating the discrimination perpetuated by these notifications.

(D) That by an appropriate order or direction the respondents may be directed to:

(i) Pay applicants enhanced pension on emoluments of 25% NPA on and w.e.f. 1.9.1997.

(ii) Re-calculate the pension payable to the applicants by adding the element of 25% NPA on and w.e.f. 1.1.2006, irrespective of their date of retirement.

(E) That due and admissible arrears be ordered to be paid/released to each of the applicants with interest at market rate from due date till payment is made.

(F) Any other order which appears to be just and correct in the interest of justice may also be passed."

2. The case of the petitioners is that they served the respondent-State as General Duty Officers in the Himachal Pradesh Health Services, Class-I (Generalists) and retired before 01.09.1997. There are seven petitioners in all. Petitioner No. 1-Dr. D. R. Barwal (who died during the pendency of this petition and whose legal representatives have been brought on record) joined as a Medical Officer in the year 1968 and superannuated on 28.02.1993, petitioner No. 2-Dr. P.P. Vaidya superannuated as a Medical Officer on 31.05.1993, petitioner No. 3-Dr. (Mrs.) Raj Vaidya superannuated as such in the year 1996, petitioner No. 4-Dr. Ramesh Chand Thakur joined as a Medical

Officer on 10.07.1969 and superannuated as such on 28.02.1993, petitioner No. 5-Dr. B. L. Kapoor joined as a Medical Officer on 27.07.1962 and retired as such on 29.02.1994, petitioner No. 6-Dr. Prem Chand joined as a Medical Officer on 30.09.1969 and superannuated as such on 30.07.1992 and petitioner No. 7-Dr. Randhir Singh Chandel joined as a Medical Officer on 18.05.1972 and superannuated as such on 31.03.1993.

3. Their case, in a nut-shell, is that vide Notification dated 9th June, 1989 (Annexure A-4), the respondent-State revised the rates of Non-Practicing allowance of the Medical Officers serving with the Health Department of the State of Himachal Pradesh in the following terms:

"Pay range in the revised pay scale *Rate of N.P.A. admissible*

1.	*Basic pay below Rs.3000/-*	*Rs.600/- P.M.*
2.	*Basic pay Rs.3000/- and above but below Rs.3700/-*	*Rs.750/- P.M.*
3.	*Basic pay Rs.3700/- and above*	*Rs.900/-P.M.*

The N.P.A. will be treated as pay for the grant of various allowances, such as Dearness allowance, TA/DA etc. as well as for the calculation of retirement benefits."

4. Thereafter, vide Notification dated 28th July, 1998 (Annexure A-5), the respondent-State ordered that the Non-Practicing Allowance, presently admissible to certain categories in the Department of Health and Family Welfare as well as Indira Gandhi Medical College and its allied Institutions, shall stand revised w.e.f. 01.09.1997 at the uniform rate of 25% of the basic pay in the revised pay scales sanctioned to the said categories from 01.01.1996, subject to the condition that the pay plus Non-Practicing Allowance at revised rates shall not exceed Rs.25,500/- per month. It was further mentioned in the Notification that other terms and conditions for the grant of Non-Practicing Allowance shall

remain the same and the Non-Practicing Allowance shall be paid in cash with effect from 1st July, 1998 and arrears payable from 01.09.1997 to 30.06.1998 shall be credited to the General Provident Fund of the concerned Officer. It was further mentioned that the Non-Practicing Allowance shall be treated as pay for the purpose of grant of Dearness Allowance/T.A./D.A. as well as calculations of retirement benefits. This was followed by issuance of various Notifications from time to time, in terms whereof, the Non-Practicing Allowance was ordered to be continued to be paid @25% of the basic pay, subject to the conditions mentioned in the Notifications, yet, the benefit thereof has been denied to the petitioners, only on the ground that they stand superannuated before 01.09.1997. Vide one such Notification dated 26th August, 2009 (Annexure A-8), the limit of pay plus NPA was enhanced from Rs.38,500/- to Rs.79,000/-. This was followed by Office Memorandum dated 21st May, 2013 (Annexure P-10), issued by the Finance (Pension) Department, Government of Himachal Pradesh, vide which, pension was ordered to be stepped up and a concordance table was enclosed with the said Memorandum reflecting the pay scales w.e.f. 01.01.1986, 01.01.1996 and 01.01.2006.

5. The petitioners earlier approached the erstwhile learned Himachal Pradesh Administrative Tribunal by way of OA No. 5429 of 2015, which was disposed of by the learned Tribunal vide order dated 01.01.2016 by directing the competent authority to consider the case of the original applicants therein, in terms of the decision of this Court rendered in CWP No. 4961 of 2010, titled as *Keshav Sigh Vs. State of Himachal Pradesh and others* and the connected matters. Thereafter, vide order dated 04.08.2016, passed by the Principal Secretary (Health) to the Government of Himachal Pradesh, the case of the petitioners was rejected by holding that the case of the original applicants in O.A. No. 5429/2015 was not similar to the petitioners in CWP No. 4961 of 2010 and their prayer for grant of 25% NPA on the analogy of the judgment dated 13th June, 2012, passed in CWP No. 4961 of 2010, could not be accepted. It is in this

background that the petitioners have filed this petition, which was originally filed before the learned Tribunal, praying for the reliefs already enumerated hereinabove.

6. The stand of the respondent-State is that the matter of Non-Practicing allowance, as claimed by the petitioners, was taken up with the Finance Department, which vide its letter dated 19th August, 2016, issued instructions to the effect that the State Government does not follow the Government of India and the cases of Allowances and NPA are decided by the State Government independently. The Government of India's Office Memorandums are not applicable to the employees of the State of Himachal Pradesh, unless the same have been adopted by the Government of Himachal Pradesh and Office Memorandum dated 18th February, 2015, issued by the Government of India was not adopted by the State Government. Further, the serving Doctors were granted NPA @25% of the basic pay so that they may not do any private practice during service, but Non-Practicing Allowance granted to the Medical Officers does not form part of the scale of pay. It is further the stand of the respondent-State that Non-Practicing Allowance is calculated @25% of the basic pay drawn by a doctor from time to time and it may not form part of pay under FR-9(21)(a)(i) of the Fundamental and Supplementary Rules. As per the State, pension is subject to limitation and in the case of Himachal Pradesh Government employees, maximum pension and family pension could not be more than Rs.39500/- and Rs.23700/-, respectively, i.e., 50% and 30% of the maximum pay of Rs.79000/- per month. According to the State, the contention of the petitioners has been rightly decided by the competent authority vide order dated 04.08.2016 (Annexure A-3) and the petitioners are in the habit of litigating. Since the grievance of the petitioners is not genuine and the same is not sustainable, therefore, the writ petition be dismissed.

7. By way of rejoinder, the petitioners have reiterated their contentions and denied the stand taken by the respondents.

8. I have heard learned counsel for the parties and gone through the impugned order as well as the documents appended with the petition.

9. According to me, the issue raised in this petition is in a very narrow compass. The same is as to whether the petitioners are entitled for calculation of their retiral benefits by treating the Non-Practicing Allowance to be 25% of the basic pay, as revised from time to time w.e.f. 1.1.1997 onwards?

10. It is not in dispute that before the issuance of Notification dated 28th July, 1998, the petitioners were being paid pension by treating Non-Practicing Allowance to be a part of their Pay Scale, in terms of various Notifications issued by the respondent-State from time to time, including Notification dated 9th June, 1989 (Annexure A-4). The only difference which exists between Notification dated 9th June, 1989 and Notification dated 28th July, 1998 is that whereas as per earlier Notification the rate of NPA was fixed on the basis of basic pay, vide the latter Notification, Non-Practicing Allowance was made applicable at the uniform rate of 25% of basic pay.

11. The stand of the respondent-State that Non-Practicing Allowance cannot be treated to be a part of pay etc. or the same cannot be taken into consideration for calculating retirement benefit, is outrightly liable to be rejected in view of the language of Notification dated 28th July, 1998 (Annexure A-5), issued by the Financial Commissioner-Cum-Secretary (Finance) to the Government of Himachal Pradesh, in which, in para-3, it is specifically mentioned that Non-Practicing Allowance shall also be treated as pay for the purpose of grant of Dearness Allowance/T.A./D.A **as well as calculations of retirement benefits.** In other words, the Non-Practicing Allowance was to be treated as pay for the purpose of calculations of retirement benefits and simply because the petitioners stood superannuated before 01.09.1997 can be no ground for denying the same to the petitioners by the Government. In fact, because Notification dated 28th July, 1998 is to be given effect from 01.09.1997,

its natural corollary is that the calculations of retiral benefits by treating NPA to be 25% of the basic pay in the revised pay, is to be conferred upon the petitioners from 01.09.1997 with prospective effect and they cannot claim its benefit from the date of their retirement. However, the stand of the Government that as the petitioners stood superannuated before 01.09.1997, therefore, they are not entitled for the benefit of this Notification, is not sustainable in law. Similarly, the contention of the State that in terms of the Finance Department letters, NPA is the domain of the State Government and they are not bound by the Office Memorandums of the Central Government etc. also has no force in the facts of this case, because the petitioners are laying their claim primarily on the basis of Notification dated 28th July, 1998, which has been issued by the State Government and subsequent Notification of the State, which is also to the same and similar effect.

12. Rejection of representation of the petitioners vide order dated 04.08.2016 is also not sustainable in the eyes of law, because while issuing the said order, the Principal Secretary (Health) to the Government of Himachal Pradesh, in fact, has not appreciated the contention of the petitioners in right perspective. The competent authority erred in not appreciating that in *Keshav Singh's* case (*supra*), one of the moot issue decided by this Court, as affirmed by the Hon'ble Division Bench in LPA, was as to whether distinction could be carved on the basis of date of retirement of employees to deny them the benefit of subsequent Notifications pertaining to enhancement of NPA and its effect on retirement benefits. This is evident from paras-13 onwards of the judgment of this Court in CWP No. 4961 of 2010, titled as *Keshav Singh Vs. State of Himachal Pradesh and others,* decided on 13th June, 2012, which read as under:

> *"....13. As already stated above, earlier the NPA was allowed only to the Ayurvedic Doctors, but thereafter respondent-State took a conscious decision to extend it to Veterinary Doctors on and with effect from*

1.4.1997. Thereafter there was a revision of pay scales, as indicated in the letter dated 10.6.2005, supra, but this enhancement of 25% NPA was kept as a separate entity and was not counted/taken into account for any other purpose like calculation of allowances etc. as indicated therein. Vide Office Memorandum dated 7.7.2007 quoted above, it was conveyed that the reckoning of DP for the purpose of calculation of NPA in respect of Veterinary Doctors and reckoning of element of enhanced NPA at the rate of 25% of pay for calculation of all allowances/benefits in respect of Veterinary Doctors was allowed w.e.f. 1.7.2007, as mentioned therein and the upper limit for basic pay plus NPA plus DP of the Doctors was kept Rs.38,500/- per month from that date. To my mind this Office Memorandum does not make any distinction to such employees retiring prior to 1.7.2007 or thereafter. Rather its careful perusal would reveal that the enhancement of 25% NPA of Veterinary Doctors would be taken into account for calculation of all allowances, DP and retirement benefits to retirees who would even retire on and with effect from 1.7.2007. Therefore, this is an upward revision of the existing benefit from the date mentioned above. No arrears are involved to the retiree doctors prior to 1.7.2007 because to that extent the scheme is prospective. All the pensioners whenever they retire, in my opinion, are covered by the liberalized pension scheme because the scheme for payment of pension to a pensioner is governed by 1972 Pension Rules. Thus, the date of retirement appears to be wholly irrelevant. As stated supra, the Office Memorandum dated 7.7.2007 is operative from the date mentioned therein and would bring under its umbrella all existing pensioners who even retired subsequent to 1.7.2007, but in case of the retirees prior to the specified date aforesaid their pension would be computed afresh in view of the liberalized scheme and

would become payable in future commencing from specified date and no arrears would be payable prior to it, which would take care of the grievance of retrospectively, making a marginal difference in the case of past pensioners because their emoluments are not revised and these stood already granted to them, as per the Office Memorandum issued in the year 2005 quoted above.

14. The interpretation of any other decision of the State Government as ventilated by the learned Additional Advocate General, qua the Office Memorandum dated 7.7.2007, that it is applicable only to the retirees on and w.e.f. 1.7.2007, is introducing a mischief and is vulnerable as denying equality and introducing an arbitrary fortuitous circumstance to a homogenous class, which can easily be severed being arbitrary and discriminatory.

18. It is well settled that whenever a classification is held to be impermissible and the measure can be retained by removing the unconstitutional portion of classification, by striking down words of limitation, the resultant effect may be of enlarging the class, that is, what is called reading down the measures.

19. Non-contributory pension under 1972 Rules is a State obligation. It is an item of expenditure voted year to year depending upon the number of pensioners and the estimated expenditure. Now when the liberalized pension scheme was introduced, it is justifiably assumed that the government servants would retire from the next day of the coming into operation of the scheme and the burden will have to be computed as imposed by the liberalized scheme. Even the government has been granting since nearly a decade temporary increases from time to time to pensioners. Therefore, there will be a marginal difference as the old pensioners are on the way out

and their number is fast decreasing. This number will keep on dwindling. Therefore, the financial burden is no ground which could detract the government from covering pre 2007 pensioners.

20. In V. Kasturi v. Managing Director, State Bank of India, Bombay and another, (1998) 8 SCC 30, the Supreme Court observed that if the person retiring is eligible for pension at the time of his retirement and if he survives till the time of subsequent amendment of the relevant pension scheme, he would become eligible to get enhanced pension or would become eligible to get more pension as per formula of computation of pension subsequently brought into force, he would be entitled to get the benefit of the amended pension provision from the date of such order as he would be a member of the very same class of pensioners when the additional benefit is being conferred on all of them. In such a situation, the additional benefit available to the same class of pensioners cannot be denied to him on the ground that he had retired prior to the date on which the aforesaid additional benefit was conferred on all the members of the same class of pensioners who had survived by the time the scheme granting additional benefit to these pensioners came into force. It was observed that the line of decisions tracing their roots to the ratio of Nakara's case (supra), would cover this category of cases.

21. In my opinion, the object sought to be achieved by the Office Memorandum dated 7.7.2007 is not to create a class within a class, but to ensure that the benefit of pension was made available to all persons of the same class equally. The decision of the State Government as projected or to hold otherwise would cause violation to the provisions of Article 14 of the Constitution. It is well settled law that when there is a clear violation of a statute or a constitutional

> *provision or there is arbitrariness in the 'Wednesbury sense', the Court has every right to interfere even with the policy decisions."*

The above referred judgment was upheld by the Hon'ble Division Bench of this Court in the Letters Patent Appeal, which was filed by the State and the SLP preferred by the State was dismissed.

13. The above clearly demonstrates that the petitioners were rightly relying upon the judgment of this Court in *Keshav Singh's case (supra),* especially in view of the findings returned therein that petitioners whenever they retire, are covered by the liberalized pension scheme and the date of retirement is wholly irrelevant. More so, it was also held in *Keshav Singh's case (supra)* that in case of the retirees prior to the specified date, their pension would be computed afresh in view of the liberalized scheme and would become payable in future commencing from specified date and no arrears would be payable prior to it.

14. From the discussion held hereinabove as well as the findings returned in the case of *Keshav Singh (supra),* the act of the respondent-Department of denying the benefit of Notification dated 28th July, 1998 as well as subsequent Notifications to the petitioners on the ground that they superannuated before 01.01.1997, is arbitrary and not sustainable in law. The denial of the same in fact is a complete misreading of the Notifications so issued, because the petitioners were entitled for the benefit of revision of their pay scale by taking NPA to be 25% of the basic pay, w.e.f. 01.01.1997 and thereafter, in terms of Notification dated 28th July, 1998 and subsequent Notifications issued on the subject by the State Government.

15. In view of the observations made hereinabove, this writ petition is allowed by quashing order dated 4th August, 2016 (Annexure A-3) and by holding that the petitioners are entitled to the benefit of Notification dated 28th July, 1998 (Annexure A-5) and subsequent Notifications issued by

the Government, pertaining to Non-Practicing Allowance and calculations of retiral benefits thereupon w.e.f. 01.09.1997 onwards. The arrears be paid to the petitioners within a period of four months from today, failing which, the same shall entail simple interest @6% per annum from the date of pronouncement of the judgment. Revised pension/family pension be paid to the petitioners in terms of the present judgment. Miscellaneous applications, if any, also stand disposed of.

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

Mohd. Asad ...Petitioner.

Versus

State of Himachal Pradesh ..Respondent.

Cr.M.P.(M) No. 555 of 2021
Reserved on: 20.04.2021
Date of Decision: May 4, 2021

Petition for bail under section 439 Cr.PC in complaint under section 18 (c) & 18 (A) of Drug and Cosmetics Act punishable under section 27 (b) (ii) and 28 of Act- On appearance of petitioner before Ld. JMIC after filing of complaint- Petitioner was arrested and sent to judicial custody- His bail application under section 439 Cr.P.C. rejected by Ld. Special Judge- Held- a new section 36 AC has been inserted providing that offence punishable under section 28 of the Act shall be cognizable and non- bailable- in this section under sub-section (1) (6) the provision identical to section 39 of NDPS Act has been incorporated which provides special consideration to be taken into account by the court before granting bail to a person accused of offence punishable under section enumerated in section 36 AC of Act itself but in proviso to section 36A (i) (b) of Act it has been provided that a person, who is under the age of 16 years or a woman or sick or infirm may be released on bail if the special court directs- section 36AC of the Act creates restriction upon the court to be take into consideration before granting bail ,submission of public prosecutors and also to satisfy itself that there are reasonable grounds for believing that petitioner

is not guilty of such offence and he is not likely to commit any offence while on bail- Petitioner is 62 years old – alleged offence was committed by him in September, 2018 and nothing has been placed on record that since then till date petitioner was found involved in repeating the offence which reflects that petitioner is not likely to commit same offence again while on bail – He has been arrested in January 2020 for commission of offence in September, 2018- He did not flee away but has submitted to jurisdiction of court on the date when he was called to attend the court- Petitioner can be enlarged on bail – Petition allowed.

For the Petitioner: Mr.Surinder Saklani, Advocate.

For the Respondent: Mr.Raju Ram Rahi, Deputy Advocate General.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J (Oral)

Present petition has been filed on behalf of the petitioner, seeking his enlargement on bail under Section 439 Code of Criminal Procedure (in short 'Cr.P.C.'), in Complaint Case No.2 of 2021, titled as *Drug Inspector, through State of H.P. vs. Mohd. Asad,* under Sections 18(c) and 18A of the Drugs and Cosmetics Act, 1940 (hereinafter referred to as 'the Act') punishable under Sections 27(b)(ii) and 28 of the Act.

2. Reply has been filed on behalf of the respondent-State through Drug Inspector complainant. Record has also been produced.

3. It has emerged from the record that on 24.09.2018, business premises/shop of petitioner was raided by Drug Inspector alongwith police and independent witnesses wherein petitioner was found doing business of stocking and exhibiting for sale huge quantity of allopathic drugs without licence and he also failed to produce complete sale/purchase records and other particulars related to the said allopathic drugs and also to disclose name and address and other particulars of those from whom he had acquired the

said allopathic drugs and, thus, petitioner was found to have committed an offence under Sections 18(c) and 18A of the Act and Rules made thereunder.

4. Drugs Inspector had completed investigation after performing all codal formalities and following prescribed procedure and filed complaint before the Magistrate on 31.10.2020, concluding that petitioner had been found to have committed offence under Section 18(c) punishable under Section 28(b)(ii) of the Act and also under Section 18A punishable under Section 28 of the Act.

5. Upon receiving complaint, learned Judicial Magistrate 1st Class issued notice to the petitioner for 08.03.2021 and on that day, on appearance of the petitioner before the Magistrate, petitioner was ordered to be arrested and sent to judicial custody on the same day.

6. Petitioner had approached the Court of learned Special Judge-II, Sirmaur at Nahan, under Section 439 Cr.P.C., for enlarging him on bail, but his bail application was rejected by learned Special Judge-II vide order dated 17.03.2021, on the ground that in view of provisions of Section 36AC of the Act, offence committed by the petitioner is cognizable and non-bailable and there is statutory bar created under the law under Section 36AC(1)(b)(i) and (ii) which provides that before considering application for bail filed by the accused in a case for commission of offence enumerated in Section 36AC(1)(b) of the Act, an opportunity to oppose such application has to be given to the Public Prosecutor and where Public Prosecutor opposes the application, Court shall not release the applicant on bail or on his own bond unless 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.

7. Learned counsel for the petitioner has submitted that petitioner is 62 years old and he has been made an accused in a case pertaining to year 2018 alleging that on 24.09.2018 he was found involved in the business of stocking and exhibiting sale of allopathic drugs without any licence to do so and thereafter, he was summoned by the Court in March 2021 and during

intervening period, there is no instance of commission of the same or similar offence by the petitioner and petitioner, being a law abiding citizen, had followed the direction of the Court and had appeared before the Magistrate in compliance of notice issued to him in present case. Further that petitioner has roots in the society and is ready to furnish local surety bond ensuring his availability during trial and further that rigours of Section 36AC of the Act are not applicable in present case. He has further stated that for the offences alleged to have been committed by the petitioner are not cognizable rather bailable and police is not empowered to take cognizance thereof and Court can take cognizance for commission of these offences on a complaint filed by the Drug Inspector, who has no authority to arrest the petitioner and thus arrest and detention of petitioner is illegal.

8. As per Section 27(b)(ii) offence committed under Section 18(c) of the Act is punishable for a term which shall not be less than three years, but which may extend to five years, and with fine not less than one lac rupees or three times value of drugs confiscated whichever is more.

9. For commission of offence under Section 18A of the Act maximum imprisonment provided under Section 28 of the Act is one year or with fine which shall not be less than twenty thousand rupees or with both.

10. Earlier, before amendment of 2008, applicable w.e.f. 10.08.2009, punishment under Section 27(b)(ii) of the Act was not to be less than two years but extendable to three years and with fine not less than five thousand rupees. It appears that learned counsel for the petitioner has not noticed the amendment carried out in Section 27(b)(ii) of the Act, whereby quantum of sentence which can be imposed under this Section has been enhanced. Otherwise also, irrespective of quantum of punishment provided under Section 27(b)(ii) and 28 of the Act, a new Section 36AC has been inserted in the Act providing that offence punishable under Section 28 of the Act shall be cognizable and non-bailable. In the same Section under sub-Section (1)(b) the

provision identical to Section 37 of the Narcotic Drugs and Psychotropic Substances Act (in short 'NDPS Act') has been incorporated which provides special consideration to be taken into account by the Court before granting bail to a person accused for offence punishable under Section enumerated in Section 36AC of the Act itself. But at the same time, in proviso to Section 36AC(1)(b) of the Act, it has been provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs.

11. Undoubtedly, Section 36AC of the Act creates restriction upon the Court to take into consideration, before granting bail, submissions of Public Prosecutor and also to satisfy itself that there are reasonable grounds for believing that petitioner is not guilty of such offence and he is not likely to commit any offence while on bail.

12. Petitioner is a 62 years old person. It is noticeable that alleged offence was committed by the petitioner in September 2018 and nothing has been produced on record that since then till date, petitioner was found involved in repeating the offence committed by him which reflects that petitioner is not likely to commit same offence again while on bail as after raid on his shop till date, he has not committed any such offence.

13. Petitioner has been arrested in January 2021 for commission of offence committed in September 2018. Petitioner did not flee away, but has submitted himself to the jurisdiction of the Court on the date when he was called to attend the Court. For conduct of the petitioner, after the alleged commission of offence by him in the year 2018, it can be inferred that he is not likely to commit any such offence while on bail.

14. Considering the facts in entirety, including age of the petitioner and his conduct, I find that in present case petitioner can be enlarged on bail at this stage.

15. Accordingly, petition is allowed and petitioner is ordered to be released on bail in Complaint Case No.2 of 2021, titled as *Drug Inspector, through State of H.P. vs. Mohd. Asad*, on his furnishing personal bond in the sum of `1,00,000/- with one surety in the like amount, to the satisfaction of the trial Court, within three weeks from today, upon such further conditions as may be deemed fit and proper by the trial Court, including the conditions enumerated hereinafter, so as to ensure presence of petitioner/accused at the time of trial and also subject to following conditions:-

(i) That the petitioner shall make himself available to the police or any other Investigating Agency or Court in the present case as and when required;

(ii) that the petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to Court or to any police officer or tamper with the evidence. He shall not, in any manner, try to overawe or influence or intimidate the prosecution witnesses;

(iii) that the petitioner shall not obstruct the smooth progress of the investigation/trial;

(iv) that the petitioner shall not commit the offence similar to the offence to which he is accused or suspected;

(v) that the petitioner shall not misuse his liberty in any manner;

(vi) that the petitioner shall not jump over the bail;

(vii) that in case petitioner indulge in repetition of similar offence(s) then, his bail shall be liable to be cancelled on taking appropriate steps by prosecution;

(viii) that the petitioner shall not leave the territory of India without prior permission; and

(ix) that the petitioner shall inform the Police/Court his contact number and shall keep on informing about change in address and contact number, if any, in future.

16. It will be open to the prosecution to apply for imposing and/or to the trial Court to impose any other condition on the petitioner as deemed

necessary in the facts and circumstances of the case and in the interest of justice and thereupon, it will also be open to the trial Court to impose any other or further condition on the petitioner as it may deem necessary in the interest of justice.

17. In case the petitioner violates any condition imposed upon him, his bail shall be liable to be cancelled. In such eventuality, prosecution may approach the competent Court of law for cancellation of bail, in accordance with law.

18. Trial Court is directed to comply with the directions issued by the High Court, vide communication No.HHC.VIG./Misc. Instructions/93-IV.7139 dated 18.03.2013.

19. Observations made in this petition hereinbefore, shall not affect the merits of the case in any manner and are strictly confined for the disposal of the bail application.

20. Petition is disposed of in aforesaid terms.

21. Copy dasti.

22. Petitioner is permitted to produce a copy of this judgment, downloaded from the web-page of the High Court of Himachal Pradesh, before the authorities concerned, and the said authorities shall not insist for production of a certified copy but if required, may verify it from Website of the High Court.

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

Urmila Chauhan ....Petitioner.

Versus

The Managing Director and others ...Respondents.

CWP No. 480 of 2017
Reserved on: 23.03.2021

Decided on : 04.05.2021

The petition for writ of mandamus directing the respondents to regularize the service of the petitioner as TGT Music who has been working as T.G.T. Music from last 11 years, to renew the contract of service of petitioner as TGT Music w.e.f. 25.04.2017, held-though initially, the petitioner was engaged on temporary basis but she was offered appointment on contact basis, also in continuation of services rendered by her on temporary basis vide appointment letter date 01.04.2009 , period of contract was specified from 03.04.2009 to 02.04.2012. It was mentioned that service conditions of the petitioner were to be governed by AWES Rules & Regulations for Army Schools, thereafter on expiry of every three years petitioner continued to be engaged afresh on contractual basis. The continuation of the petitioner on contract basis by respondent society conferred upon her the right of regularization in term of clause 128 (i) of chapter 7 of 2021 Rules. It is not the case of respondents that either petitioner was not qualified to be TGT Music or that she was not fulfilling the eligibility criteria as per rules. Hence act of respondent society of not regularizing the services of petitioner in terms clause 128 (i) upon completion of specified number of years of service by the petitioner on contact basis is arbitrary, not sustainable in law and colorable exercise of power by respondent-society. The bargaining power of the petitioner cannot be compared with that of respondents. The writ petition is allowed and respondent is directed to regularize the service of the petitioner as TGT Music after completion of five years of service by taking her appointment on contract basis in 2011 when Awes rules come into force.

For the petitioner : Mr. Sevedaman Rathore, Advocate.

For the respondents : Mr. V.B. Verma, Advocate for respondents No. 1 and 2.

Mr. Rahul Mahajan, Advocate for respondent No. 3.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this writ petition, the petitioner has prayed for the following substantive reliefs:-

> *"A. Issue of a writ, order or direction in the nature of mandamus directing the respondents No. 1 to 4 to regularize the service of the petitioner as TGT Music who has been working as TGT Music from last 11 years.*
>
> *B. Issue of a writ, order or direction in the nature of mandamus directing the respondents No. 1 to 4 to renew the contract of service of petitioner as TGT Music w.e.f. 25.04.2017.*
>
> *C. Issue of an ex parte ad interim order or direction to respondents No. 1 to 4 to not to discontinue the contract of service of the petitioner and further not to recruit any other person for the said job, during the pendency of the writ petition."*

2. The case of the petitioner is that she did her M.A. in Music (Vocal), in the year 2003, followed by M.Phil. in Music in the year 2004. She thereafter did her Ph.D in Music (Vocal) in the year 2014 from Himachal Pradesh University. She qualified UGC NET examination twice in the year 2004 and 2005 and also State Level Eligibility test in the year 2004. She also passed Sangeet Prabhakar examination from Prayag Sangeet Samiti Allahabad in the year 2004 as well as All India Written Test for teachers conducted by Army Welfare Education Society in the year 2009. Respondent-Society advertised the post of TGT Music in the year 2006. The petitioner participated in the selection process undertaken and being successful was appointed as TGT Music from 8th April, 2006 to 31st March, 2007. She thereafter was again subjected to the selection process and was appointed as TGT Music from 9th April, 2007 to 31st March, 2008. In the year 2008, respondent-Society again advertised the post of TGT Music and petitioner being successful in the interview was again offered appointment on temporary basis from 08.04.2008 to 31st March, 2009. She was again subjected to selection process in the year 2009, and being successful, was again offered

appointment as TGT Music on contract basis vide letter dated 01.04.2009 from 03.04.2009 to 02.04.2012. The petitioner was thereafter engaged on contractual basis from 10.04.2012 to 09.04.2015. She was engaged from 17.04.2015 to 16.04.2016 and from 25.04.2016 to 24.4.2017.

3. According to the petitioner, she had submitted various representations praying for her regularization but as the services of the petitioner were not being regularized, despite her being in service of respondent-Society for more than a decade, she filed present writ petition praying for issuance of the directions to the said respondent to regularize her services. It was further pleaded in the writ petition that on account of her being in family way, she had sought maternity leave, which stood granted in her favour, and she was apprehending that respondent-Society may engage someone else by not granting extension to her services, and therefore, a prayer was made that during the pendency of the petition, no other person be appointed in her place. It is on this background that this writ petition stood filed. The petition was filed in the Court on 17th of March, 2017.

4. The petition is opposed by respondent No. 3/ Society *inter alia* on the ground that respondent-Society is not a State within the meaning of Article 12 of the Constitution of India because it is neither funded by Central Government nor by State Government. As per it, respondent No. 3 is a school run by Army Welfare Education Society, which is a registered Society under the Societies Registration Act, 1860 and as its infrastructure was created out of Regimental Funds which are not public funds, therefore, said respondent is not amenable to the writ jurisdiction of this Court. The factum of the petitioner having been engaged as TGT Music on temporary and contract basis is not disputed in the response, but it stood mentioned in the reply that as the petitioner was appointed on temporary/contract basis in terms of the letter of appointment issued to her, wherein it was clearly stipulated that on coming to an end of the period of her job, to which she was engaged, she will

have no lein over the job, and therefore, her services stood automatically terminated. It further stood mentioned in the reply that respondent-Society conducted fresh selection process for the post of TGT Music by holding interviews, in which the petitioner did not participate and one Mrs. Sangeeta Sahota stood appointed as TGT Music on 21st April, 2017. As per respondent-Society, as the petitioner was aware that her appointment on temporary and contractual basis did not confer upon her any right of regularization, she had no right to pray for regularization of her services. It is further the stand of said respondent that even the working of the petitioner was not satisfactory and the same stood reflected in the annual confidential reports so prepared of the petitioner.

5. By way of rejoinder, the petitioner reiterated the stand taken in the petition and has denied the averments made in the reply.

6. During the pendency of the writ petition, name of respondent No. 1 was deleted from the array of respondents and no independent reply to the petition has been filed by respondents No. 2 and 3 (who post deletion of name of respondent No. 1 have become respondents No. 1 and 2 and respondent-Society, which was initially arrayed as respondent No. 4, has become respondent No. 3 post amendment of memo of parties and is being mentioned hereinafter as respondent No. 3).

7. I have heard learned Counsel for the parties and gone through the pleadings as well as record of the case, which was made available by respondent No. 3/Society.

8. Respondent No. 3 is a Society registered under the Societies Registration Act, 1860 as Army Welfare Education Society. In terms of Army Welfare Education Society Rules and Regulations Act, Volume-I, for Army Public Schools, said society in August, 2011, was running 128 schools and 12 professional colleges all over India. The parameters which now stand well settled by the Hon'ble Supreme Court of India are that the expression "any

person or authority" used in Article 226 of the Constitution of India are not only confined to statutory authorities and Instrumentalities of the State but may, in appropriate case, include any other person or body performing "public function/duty". It is also well settled that imparting education to students at large is a public function and if any Body or Authority, as the case may be, is actually imparting education to the students at large, then irrespective of the status of any such authority, it should be made amenable to writ jurisdiction of the High Court under Article 226 of the Constitution of India. {see (2015) 16 Supreme Court Cases 530, titled as Janet Jeyapaul vs. SRM University and others, decided on 15.12.2015}.

9. As mentioned above, respondent No. 3 is a Society registered under the Societies Registration Act, 1860. Vol.-1 of the Rules and Regulations for Army Public Schools which are run by the said Society defines its aims and objectives mentioned in Chapter 1 thereof as under:-

> "Aims and Objectives
>
> *5. The aims and objectives of the Army Welfare Education Society as under:-*
>
> *(a) To create or augment Educational and Technical/Professional/Vocational training facilities to meet the needs of children of Army Personnel including widows & ex-servicemen (Army).*
>
> *(b) To promote/impart higher education including technical and professional education to the wards of Army personnel including widows and ex-servicemen (Army). Professional education will include disciplines of Engineering, Medicine, Hospitality, Law, Education, Management, Fashion and Design and any other subject that will be considered relevant from time to time.*

(c) To develop co-educational Army Public Schools for imparting quality education at affordable cost to the children of Army personnel including ex Army personnel.

(d) To issue guidelines, co-ordinate curriculum and empower teachers with respect to Army Pre Primary Schools to facilitate smooth transition of students to schools.

(e) To prepare the students for All India Secondary School and All India Senior School Certificate (10+2 stage) examinations of the Central Board of Secondary Education with a common syllabi thus enabling the children of personnel who are transferred to be admitted in mid-session.

(f) To promote development of academic excellence, discipline, personal character, high sense of values and national integration among the children of Army personnel.

(g) To promote sports and co-curricular activities.

(h) To gradually create adequate hostel facilities in selected institutions/ Stations on as required basis.

(j) To encourage all educational institutions established by the Society to attain financial self-sufficiency within a reasonable period so that welfare funds allotted for educational facilities can be utilized for other educational projects.

(k) Undertaking fund raising activities for augmenting the resources made available from welfare funds.

(l) To do such other things which are incidental to the promotion of the aforementioned aims and objectives."

10. Clause 11 of Chapter-2 thereof further provides as under:-

"<u>General</u>

11. Army Welfare Education Society is a registered body under the Societies Registration Act XXI of 1860 vide Registrar of Societies Delhi Administration, Delhi, Certificate No. S/13459, dated 29 April 1983 for the purpose of establishing and running Army Public Schools and vocational colleges/institutions. The Certificate of Registration of Army Welfare Education Society issued by Registrar of Societies, Delhi is attached as ***Appendix A.****"*

11. In terms of Clause 14 of Chapter 2 (supra), the Board of Governors of the respondent-Society comprises of the following:-

*"**Board of Governors***

14. Board of Governors is the Governing Body which would lay down policy guidelines for the management and functioning of the institutions. The Governing Body shall consist of the under mentioned officers and any other person(s) nominated by the President of elected by the governing Body.

President	-	*Chief of the Army Staff.*
Vice Presidents	-	*Vice Chief of the Army Staff.*
	-	*General Officer Commanding-in-Chief HQ Southern Command.*
	-	*General Officer Commanding-in-Chief HQ Eastern Command*

- *General Officer Commanding-in-Chief HQ Western Command*

- *General Officer Commanding-in-Chief HQ Central Command*

- *General Officer Commanding-in-Chief HQ Eastern Command*

- *General Officer Commanding-in-Chief HQ Northern Command*

- *General Officer Commanding-in-Chief HQ South Western Command*

- *General Officer Commanding-in-Chief HQ ARTRAC*

Members - *Adjutant General*

- *Quartermaster Generals*

- *Engineer-in-Chief*

- *Director General, Ceremonials & Welfare.*

Member Secretary - *Managing Director Army Welfare Eduction Society."*

12. The aims and objectives of the Society leave no doubt that the society has been constituted to create or augment Educational and Technical/Professional/Vocational training facilities to meet the needs of children of Army Personnel etc.

13. High Court of Allahabad in Rachna Gupta vs. Union of India "Case:-Service Single No.-7910 of 2010), decided on 24th April, 2014, has held that writ petition against Army Public Schools is maintainable. While arriving at the said conclusion, it relied upon the observations made by Uttrakhand High Court in case titled as Trilochan Singh vs. Committee of Management, Army School, Hempur and others (Special Appeal No. 371 of 2012), in which, Uttarakhand High Court observed that society and the schools established by the society are directly and substantially part of the Indian Army and, accordingly, it cannot be said that the society and its schools are not authority within the meaning of Article 12 of the Constitution of India. Allahabad High Court also relied upon a Division Bench judgment of the said Court in Shreyaskar Tripathi vs. State of U.P. and Others (Special Appeal No. 1501 of 2007), decided on 26.11.2010, in which, the Division Bench had held that writ petition under Article 226 of the Constitution of India was maintainable even against a private body if the body was discharging public duty or public obligations of public nature. Allahabad High Court further held that the Army Public Schools affiliated with Central Board of Secondary Education has to perform functions according to the provisions of the Act, instructions and regulations framed by the CBSE. Army Public School is imparting education from Class I to class XII, which is a public function and since public duty has been imposed by the Act 35 of 2009 in view of Article 21A of the Constitution of India, a writ is certainly maintainable. On these

bases, Hon'ble Allahabad High Court held that Army Public School was certainly amenable to the writ jurisdiction of the High Court.

14. Similarly, Delhi High Court in Writ petition (c) No. 1845 of 2014, titled as Anita Soharu Guleria vs. Directior of Education and others and other connected matters, in exercise of its jurisdiction under Article 226 of the Constitution of India, allowed the writ petition filed against an Army Public School obviously run by the respondent-Society by holding as under:-

> *"8. I am really perturbed to note that Army public School seems to think itself above the law. In spite of the finality achieved to the judgment in the case of Narendra Singh Nain (supra), inasmuch as, the said judgment has achieved finality being not set aside by the higher courts. Army Public School even thereafter insists on overreaching the provisions of the Delhi School Education Act and Rules, 1973as also the law as laid down by this Court. There are literally, I can say so, dozens of cases that have come up for hearing where Army Public School has acted in a most unbecoming manner by insisting that its illegal actions must be overlooked and condoned by the court. This is unacceptable and I hope that the management of the Army Public School takes notice and acts in accordance with law failing which in my opinion the Directorate of Education must stop in and it must cause the Army Public School to act in accordance with law with DSEAR 1973.*
>
> *9. In view of the above, the writ petition is allowed. Petitioner will be taken to have been confirmed in services from the first date of working of the fourth academic year in which the petitioner would have commenced working with the respondent No.3-School in the present case the said date would be 8.4.2013.Considering that Army Public School is consistently and*

defiantly violating the law, the writ petition is allowed with costs of Rs. 20,000/-."

15. Said judgment was assailed by way of a letters patent appeal alongwith other connected appeals and the appeal was dismissed by the Division Bench of Hon'ble High Court of Delhi, vide judgment dated 29th October, 2015, passed in LPA No. 223 of 2015, titled as Army Welfare Education Society and another vs. Manju Nautiyal and another. While upholding the order passed by learned Single Judge, Hon'ble Division Bench, that too in the matter of regularization of contractual employees, held as under:-

"27. Concerning directions issued by the learned Single Judge that the Director of Eduction should look into the working of the two schools established by the first appellant, we agree with the same for the reason we find that large number of employees of the two Army Public Schools in litigation with their managing committee and we find that the appellants are indiscriminately restoring to contract appointments notwithstanding existence of permanent posts. In some cases like that of Sheeja Benoy, notwithstanding the nature of the work being perennial the appellants are not sanctioning a permanent post. The Director of Education would look into the strength of students and keeping in view the applicable norms determine the number of posts of teachers in various categories to the sanctioned. The Director of Education would also look into repeated tenure appointments made and extended for period between 5 to 10 years. We would expect the visit by the Director of Education to be friendly and intended to guide the appellants through the allays of the law and not to find false to take action against the management. We would

also hope and expect that the appellants would work with transparency and as per law."

Incidentally, the Special Leave to Appeal filed by Army Welfare Education Society against the judgment of the Hon'ble Division Bench of Delhi High Court was dismissed by Hon'ble Supreme Court of India vide order dated 12.02.2016.

16. This also demonstrates that the respondent-Society is amenable to the writ jurisdiction of the High Court, and therefore, the preliminary objection of the respondent-Society that it is not amenable to the writ jurisdiction of the High Court and the present writ petition is not maintainable, cannot be accepted.

17. Now, coming to the merits of the case, the appointment letters of the petitioner stand appended alongwith its reply filed by respondent No. 3 as Annexure RA/4. Perusal thereof demonstrates that the petitioner was engaged vide letter dated 7th April, 2006 as TGT Music on temporary basis for a specific period from 08.04.2006 to 31st March, 2007, in the pay scale of `5500-175-9000 per month and she was also to get dearness allowance and other allowances as applicable and free messing for self and subsidized accommodation. She was engaged thereafter vide letter dated 30th March, 2007, again on temporary basis as TGT Music on 9th April, 2007 to 31st March, 2008. This was followed by her engagement again vide letter dated 28th March, 2008 from 8th April, 2008 to 31st March, 2009 again on same terms and conditions. Thereafter, vide appointment letter dated 01.04.2009, the petitioner was appointed as TGT Music for a period of three years from 3rd April, 2009 to 2nd April, 2012 in the revised pay scale as per AWES, i.e. Army Welfare Education Society, Rules and Regulations Vol.-I amended from time to time. It was mentioned in this communication that the performance of the petitioner was to be reviewed after completion of one year, and also that after expiry of three years from the date of joining, she will automatically cease to

be an employee of the school. Thereafter, vide appointment letter dated 24th March, 2012, the petitioner was again appointed on contract basis as TGT Music from 10th April, 2012 to 9th April, 2015 on total basic pay of `16,205/- per month. This was followed by issuance of another appointment letter dated 26th February, 2015, in terms whereof, the petitioner was again appointed on contract basis as TGT Music from 17th April, 2015 to 16th April, 2016. Vide appointment letter dated 26th February, 2016, the petitioner was again appointed on contract basis as TGT Music for a period of one year w.e.f. 25th April, 2016 to 24th April, 2017.

18. One thing which is evident from the communications referred to above is that *de hors* the fact that the petitioner was engaged on temporary/contractual basis for the period mentioned in the aforesaid appointment letters, the petitioner uninterruptedly and continuously served with respondent No. 3 as TGT Music from 8th April, 2006 onwards and she is still continuing on the rolls of respondent No. 3 by virtue of interim order passed by this Court. At this stage, it is relevant to point out that the reliefs with which the petitioner has approached the Court are already enumerated hereinabove. This petition was filed on 9th March, 2017. The term of the appointment letter in vogue at the time when the present writ petition was filed, was from 25th April, 2016 to 24th April, 2017. Yet, before the expiry of this period, respondent No. 3 appointed on Mrs. Sangeeta Sahota vide communication Annexure RB/4 as TGT Music on *ad hoc* basis for a specific period from 17th April, 2017 to 16th March, 2018. She is stated to have joined as such on 21st April, 2017. How and why respondent No. 3 offered appointment to said person is beyond the understanding of the Court keeping in view the fact that the period of contract last entered into between the petitioner and respondent No. 3 had not yet expired, and this act of respondent No. 3, in fact, gives credence to the apprehension of the petitioner as expressed in the petition, that on taking advantage of the fact that the

petitioner was on maternity leave, respondent No. 3 was intending to appoint someone else in her place. Be that as it may, as Mrs. Sangeeta Sahota is not before this Court and further as her appointment in terms of Annexure R4/B is purely on *ad hoc* basis and only for a period of one year, this Court is not making any opinion on the same, save and except this Court is only adjudicating the prayer of the petitioner as to whether she has a right of regularization and continuation or not.

19. Herein above, I have already given the details of the appointment of the petitioner by respondent No. 3 from time to time on temporary/contract basis. Now a perusal of the terms and conditions of the appointment of the petitioner especially vide appointment letters dated 01.04.2009, 24.03.2012, 26.02.2015, demonstrates that it was specifically mentioned in these appointment letters while offering appointment to the petitioner on contractual basis, that her service conditions were to be governed by the Army Welfare Education Society (AWES) Rules and Regulations Vol.-1 for Army Public Schools, April 2008 and 19.09.2011.

20. Chapter 7 of the said Rules and Regulations of 2011 deals with classification, recruitment, qualifications and terms and conditions of Service. Clause 116 of this Chapter classifies the teaching staff into five categories: (a) Regular; (b) Contractual; (c) Temporary/Adhoc; (d) Casual and (e) Part time. In terms of this Clause, contractual appointments may be made for a fixed period of three years and pay and allowances of teachers employed on contract basis are to be at par with the regular teachers. The services of the contractual teachers are liable to be terminated as per the terms of agreement/appointment letter. The service conditions of contractual teachers are envisaged in Clause 128 of the said Chapter. This Clause *inter alia* contemplates that contractual teachers will be appointed for a maximum period of three years, and after its expiry, their appointment shall automatically be terminated and if a fresh contract is made, then there will be

a break of minimum seven days. Clause 128(j) of said Chapter provides as under:-

> *"(j) <u>For Contractual TGTs only:</u>- Contractual TGTs will be appointed as regular TGTs after completion of two years works experience in the same school as contractual TGTs in the relevant category subject to the percentages laid down in the SOP for teachers selection. The requirement of one year probation period on their appointment as regular TGTs will be dispense with provided the gap between ceasation of appointment of contractual TGT and assumption of regular TGTs is not more than 60 days in the same school."*

21. Thus in terms of the abovementioned clause, a contractual TGT has a right for regularization after completion of five years work experience in the same school as contractual TGT in the relevant category, subject to the percentages laid down in the SOP for teachers selection. The term of five years in the copy of regulations handed over to the Court by respondent No. 3 has been cut by hand and the word 'five' has been substituted by 'two'. Meaning thereby that the term of five years work experience on contract basis has now been reduced to two years. Be that as it may, the fact of the matter still remains that a contractual employee was entitled for regularization of services as TGT in the relevant category upon completion of five/two years service, as the case may be.

22. Coming to the facts of the present case, though initially, the petitioner was engaged on temporary basis but she was offered appointment on contract basis also in continuation of services rendered by her on temporary basis vide appointment letter dated 01.04.2009. The period of contract specified in this appointment letter was from 03.04.2009 to 02.04.2012. It was further mentioned in the appointment letter that the service conditions of the petitioner were to be governed by AWES Rules and Regulations Vol-I for Army Schools/Army Public Schools (Red Book Apr 2008 Edition) as amended from time to time. After expiry of this contractual period,

the petitioner was again engaged on contract basis vide appointment letter dated 24.03.2012 w.e.f. 10.04.2012 to 09.04.2015. In this appointment letter, it was *inter alia* mentioned that service conditions of the petitioner were to be governed by Army Welfare Education Society Rules and Regulations as amended from time to time with reference to Rules and Regulations Vol.-1 for Army Public Schools (September 2011 Edition). After the expiry of this term, the petitioner continued to be engaged afresh on contractual basis, as has been mentioned in detail by me earlier also. This demonstrates that the continuation of the petitioner on contract basis by the respondent-Society conferred upon her the right of regularization in terms of Clause 128(j) of Chapter 7 of 2011 Rules.

23. It is not the case of respondent No. 3 before the Court that either the petitioner was not qualified to be appointed as a TGT Music or that she was not fulfilling the eligibility criteria contemplated in the 2008 Rules and Regulations or 2011 Rules and Regulations, regulating the appointment and regularization of TGT contract teachers. In this background, the act of respondent-Society of not regularizing the services of the petitioner in terms of Clause 128(j) upon completion of specified number of years of service by the petitioner on contract basis is arbitrary and not sustainable in law. The denial of regularization to the petitioner is an act of colourable exercise of power by respondent No. 3-Society, as what the Society has been conveniently doing is that it has been extracting the work of a regular Music Teacher from the petitioner from the year 2006 till the filing of the petition by her, either on temporary or on contractual basis, thus denying the benefits of regular appointment to the petitioner. This is not acceptable from a Society, which is performing a public duty. An argument has been raised on behalf of respondent No. 3/Society that as the petitioner had duly accepted the terms and conditions of her engagement, be it on temporary or on contractual basis, she was bound by the same and the contractual appointment did not confers

upon her any right of regularization. In my considered view, in the peculiar facts of this case, this contention of respondent No. 3 does not have any merit. As has been mentioned hereinabove also, the Rules and Regulations framed by respondent-Society governing the appointments of contractual TGTs confers upon such appointees a right of regularization after prescribed number of years of service. This right of regularization has been denied to the petitioner by respondent No. 3 by not following its own Rules and Regulations. Even otherwise, this Court cannot loose sight of the fact that the bargaining power of the petitioner cannot be compared with that of respondent No. 3, and obviously, the petitioner had to agree to the terms and conditions which stood incorporated in the appointment letters issued to her by respondent No. 3 and also agreements signed by her with respondent No. 3, are nothing but dotted line agreements.

24. Accordingly, this writ petition is allowed. Respondent No. 3 is directed to regularize the services of the petitioner as TGT Music after completion of five years of service on contract basis, by taking her appointment on contract basis w.e.f. 19th September, 2011, i.e. the date when Army Welfare Education Society, Vol.-1, Rules and Regulations for Army Public Schools are stated to have come in force, with all consequential benefits. This direction is being passed by the Court keeping in view the fact that though the petitioner was initially appointed since 07.04.2006 on year to year basis, on temporary basis, however, thereafter as from 03.04.2009, her appointment was on contractual basis, through, initially for a period of three years in two terms, followed by fresh contractual appointment for one year thereafter, which was continuing as on the date when this petition was filed. This Court is not making any observation with regard to the effect of this judgment on the appointment of Mrs. Sangeeta Sahota, as she was appointed only for a period of one year on *ad hoc* basis and her rights, if any, qua

respondent No. 3, are independent and the adjudication of this petition in favour of the petitioner will have no effect upon the same.

The petition is disposed of in above terms with the direction that in case the consequential benefits which has accrued to the petitioner are paid to her within a period of 90 days from today, then no interest shall be payable on it and if the same is not paid within abovesaid period, then simple interest @ 6% per annum shall be payable on the amount due as from the date of pronouncement of this judgment. Pending miscellaneous application(s), if any, also stand disposed of accordingly.

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

Sh. Balbir Chand and others ....Petitioners.

Versus

The State of Himachal Pradesh and others ...Respondents.

CWP No. 10874 of 2012
Reserved on: 02.03.2021.
Decided on : 03.05.2021

The petition seeking setting aside allotment of shops as allotment of shops has not been made on the basis of any rational, valid & legal policy and criteria. Held- the case of the petitioners that they were running their business over the land where shopping complex stood constructed by respondent society has been denied by respondents-Neither with petition nor with rejoinder to replies of respondents any cogent material has been placed on record to demonstrate that they were actually carrying their business over the land where the shopping complex was constructed. As it was the case of petitioners that they were running their business over the said land, onus was squarely upon them to have had proved and substantiated this fact, in the absence of material being placed by the petitioners to this effect the only conclusion which can be drawn that contention of respondents is correct that petitioners were not dislocated or displaced on account of construction of shops as such there is no infirmity in the factum of their names not being

included in list of beneficiaries. The petitioners being stranger to the issue otherwise have no local standi to challenge the mode and manner in which shops were allotted or as to why an amount of Rs. 85,000/- was charged from the beneficiaries for the construction of the shops.

For the petitioners	:	Mr. Romesh Verma, Advocate.
For the respondents	:	Mr. Ashok Sharma, Advocate General with M/s Sumesh Raj, Dinesh Thakur and Sanjeev Sood, Additional Advocate Generals with Ms. Divya Sood, Deputy Advocate General for respondents No. 1, 2 and 4.
	:	Mr. Anil Kumar God, Advocate for respondent No. 3.
	:	Mr. Bhuvnesh Sharma, Advocate, for respondents No. 5(i) to 5(ii).

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this petition, the petitioners have prayed for the following substantive reliefs:-

> *"i) That the respondents may be ordered to produce the entire record regarding construction and allotment of shops detailed above for the perusal of this Hon'ble Court.*
>
> *ii) That since allotment of shops has not been made on the basis of any rational, valid and legal policy and criteria, therefore, all the allotments as made may kindly be set-aside and quashed.*

iii) That the correctness and validity of the allotment of shops may kindly be examined by this Hon'ble Court so that unlawful allotment of shops whatsoever is found to have been made may be set-aside and quashed.

(iv) That necessary orders may kindly be passed so that remaining shops 3 in number are allotted to the present Petitioners in the order of seniority and the 4th Petitioner may be ordered to be allotted a shop allotment whereof may be cancelled by this Hon'ble Court or by the respondents out of the shops already allotted in favour of the person who is/are not found eligible for such allotment."

2. The case of the petitioners is that they are earning their livelihood by running small business in rehris/pharis/thadis for the last many years. Large numbers of people have been running their small business similar to the petitioners by way of thadis/pharis/rehris over the land comprised in Khasra No. 2140/1997/803, measuring 5250.33 sq. meters, which area falls within Municipal Council, Hamirpur.

3. Petitioner No. 1, Balbir Chand, started running his business in the month of June, 1987, on the payment of Tehbazari fees to the Municipal Council, Hamirpur. Initially, the Tehbazari fees was `30/- per month, which up to the year 2012 stood increased to `200/- per month. Similarly, petitioner No. 2, Tirath Ram, also started his business at the aforesaid place in the year 1991. Petitioner No. 3, Piar Chand, started his business in the year 1991 on payment of Tehbazari fees and petitioner No. 4, Shakti Chand, started his business in the year 1988 on payment of Tehbazari fees.

4. Their grievance is that the respondents started construction work of shops over Khasra No. 2140/1997/803, measuring 5250.33 sq. metres during the year 2011-12 with the intent that shops were to be provided to all the persons running their business by way of

thadis/pharis/rehris. As per the petitioners, though, they were not having the complete details of the resolution which stood passed by the Municipal Council, Hamirpur, in this regard and also with regard to the collection of funds, yet, initially a demand was set up by Municipal Council, Hamirpur, for collection of funds from persons who were running their business over the land mentioned above in the manner explained in the petition. Though, initially a sum of `82,000/- was to be taken from the beneficiaries, however, the same was subsequently raised to `85,000/-. According to the petitioners, the procedure adopted by the respondents to set up this demand of `85,000/- from the people running their business over the area in lieu of the allotment of shops to them, was arbitrary and without adopting any proper and set procedure in this regard. It is further their case that they were never called upon to pay the amount of `85,000/-, and therefore, could not apply for the shops in question. Their inquiries revealed that no criteria stood adopted by the respondents for the allotment of the shops whereas the information garnered by the petitioners under the Right to Information Act demonstrated that the shops in question had been constructed with the aid of funds provided by the Government, but the allotment of the shops was not made on the basis of any rational or equitable and just criteria. As per the petitioners, the allotment was made unlawfully and in certain cases, both father and son were given the benefit of allotment of shops, who otherwise were persons with means, whereas persons like the petitioners, who were actually entitled for the allotment of the shops, stood discriminated against. It is in this background that the petition has been filed *inter alia* with the prayers that the allotment of the shops in issue be quashed and set aside and directions be passed that three shops which were still vacant be allotted to the petitioners in the order of seniority and 4th petitioner be allotted a shop by cancelling the allotment of the shops which stood allotted in arbitrary manner.

5. Reply filed by respondent No. 1 is to the effect that said respondent has been wrongly and unnecessarily arrayed as respondent, because all actions, subject matter of the writ petition, were taken by the local authorities, i.e. respondent No. 2, without any reference to or approval from respondent No. 1. Said respondent also stated that it had no objection in case the Court intended to examine the correctness of the allotment of the shops.

6. Reply filed to the petition on behalf of respondent No. 2 demonstrates that in the preliminary submissions it stood mentioned that the sole authority for the purpose of allotment of shops, subject matter of the writ petition, was with the Committee of the Society for Promotion of Sports, Culture, Education and other Developmental Activities, which was a Society registered under Himachal Pradesh Societies Registration Act, 2006 and was headed by the Deputy Commissioner, Hamirpur. It was further mentioned that in a meeting of the Society held on 17.09.2012, it was decided that the allotment of the shops be made to such persons, who were displaced from the places where shops had been constructed for the purpose of their rehabilitation, provided that the allotments were made to the *bonafide* residents of Himachal Pradesh and only one member of a family was allotted a shop. It is further the stand of the said respondent that in the meeting of the house of the Municipal Council, Hamirpur, held on 04.08.2012, a list of 78 beneficiaries was prepared vide resolution of the same date for the purpose of allotment of the shops constructed in L-Shape Shopping Complex, Main Bazaar to Sabzi Mandi. Those khokha holders were rehabilitated by way of allotment of shops who were disturbed/dislocated on account of the construction of the shops. It was also mentioned that the petitioners were not running their business on the place where construction activity was carried out and none of them were disturbed or dislocated from the places where they were carrying out their business, therefore, they were not entitled for the allotment of the shops. The dislocated/displaced persons deposited a sum of

`85,000/- as construction cost for the construction of the shopping complex and the amount deposited by a beneficiary was to be deducted from the monthly rent after paying 12 month regular payment of rent as per the terms of the agreement. It has been denied by the said respondent that the allotment of the shops was done in an arbitrary manner as alleged and as the petitioners were not disturbed or dislocated by the construction work of the shopping complex, therefore, it was reiterated that they were not entitled for the allotment of the shops.

7. The response filed by respondent No. 3 is also to the same effect and it stands mentioned therein that the area where the petitioners were carrying out their business did not fall under the planning area and the petitioners had not been disturbed due to the construction work of the shopping complex.

8. By way of rejoinder filed by the petitioners to the reply filed by respondent No. 2, though mentioned as rejoinder to the response of respondents No. 1 and 2, petitioners have reiterated their case that they have been wrongly excluded from the list of beneficiaries with regard to allotment of the shops and they reiterated that shops were allotted in an arbitrary manner by the respondents. During the pendency of this petition, certain directions were passed from time to time by the Court upon pleas raised by the parties, in compliance whereto, affidavits and compliance reports were filed by the department. It is relevant to refer to the compliance report filed by respondent No. 2 in terms of the order passed by this Court dated 10.05.2018, relevant portion whereof is being quoted herein below:-

> *"4. That it is submitted that in compliance to orders dated 10.05.2018, a meeting was convened on 23.05.2018 by joining the present petitioners in proceedings for amicable settlement of issue.*

5. At the outset it is humbly submitted before the Hon'ble Court that the shopping complex was constructed so as to rehabilitate the street vendors and it is pertinent to bring to the notice of the Hon'ble Court that petitioner namely Sh. Balbir Chand, Piar Chand, Shakti Chand, Tilak Rajj and Braham Dass have not been displaced from their present place of occupation in any manner, hence as such the petitioners do not have a right to claim relief in this case. However as per the directions of the Hon'ble High Court the district Administration took a pro active step so as to settle the dispute and accommodate the petitioners by allotting them the vacant shops to their liking.

6. That a preliminary meeting was held on dated 22.05.2018 with the petitioner. In the meeting a proposal was put forth to the petitioners seeking relief regarding the allocation of shops so as to arrive at an amicable settlement. It was proposed in the preliminary meeting, they would be accommodated by allotment of shops in running numbers subject to the standard codal formalities, however the petitioner namely Sh. Piar Chand, Sh. Tirath Ram, Sh. Shakti Chand, Sh. Balbir Chand & Sh. Tilak Raj declined the offer, outrightly for the shops on the top floor of the complex. Henceforth another proposition was mooted that the petitioners be accommodated on any floor, provided all the shops would be in contiguous situation. The petitioners were requested to put forth their demands in writing before the committee on 23rd May 2018 befoe 4:00 PM. In the second round of deliberations held under the chairmanship of the undersigned on 23.5.2018, which were video recorded; the petitioners namely Sh. Piar Chand, Sh. Tirath Ram, Sh. Balbir Chand stated orally that they are not willing to accept the offer made to them against the now

eighty nine vacant lying shops. Petitoner Sh. Tilak Raj had come forth with a written demand that he is willing to settle the dispute with the authorities if he is allotted two shops o the ground floor, citing reasons regarding his nature of business and the dimensions of the shops. At the conclusion another attempt was made for Sh. Tilak Raj by proposing that a spot be visited by the SDM and EO, MC along with the petitioner so as to better appreciate the future business prospects of the location and to settle the dispute by getting a single shop allotted to himself. However even after the spot-proposal the petitioner Sh. Tilak Raj remained adamant on his request for two shops as the 'fronts' of the shops were not to his liking. Copy of proceedings of meeting of the society dated 23.05.2018 enclosed as R-I for kind perusal of this Hon'ble High Court.

Therefore, it is respectfully prayed that compliance report on behalf of respondent Nos. 2 to 4 may kindly be taken on record in the interest of justice please."

9. I have heard learned Counsel for the parties and also gone through the pleadings as well as documents appended therewith.

10. Whereas it is the case of the petitioners that they were running their business in the mode and manner explained in the petition, over the land where the shopping complex stood constructed by the respondent-Society, but this has been completely denied by the respondents and the stand of the respondents is clear and categoric, especially the stand of respondents No. 2 and 3, that the petitioner were not carrying out business over the place where the shopping complex was constructed and as they were never displaced or dislocated from the place where they were carrying out their business, therefore, their names were rightly not included in the list of beneficiaries and they were not entitled for the allotment of the shops. It is

also explained by these respondents that an amount of `85,000/- was paid by the beneficiaries as contribution for the construction of the shops in which they have been rehabilitated after the construction of the shopping complex. Neither with the petition nor with the rejoinder filed by the petitioners to the replies of respondents No. 2 and 3, any cogent material has been placed on record by the petitioners to demonstrate that they were actually carrying their business over the land where the shopping complex in dispute was constructed by the respondent-Society. As it was the case of the petitioners that they were running their business over the said land, in the considered view of this Court, onus was squarely upon them to have had proved and substantiated this fact. In the absence of any material being placed on record by the petitioners to this effect, the only conclusion which can be drawn by this Court is this that the contention of respondents No. 2 and 3 is correct that the petitioners were not dislocated or displaced on account of construction of the shops, subject matter of this petition. That being the case, this Court finds no infirmity in the factum of the names of the petitioners not being included in the list of beneficiaries because when they were not dislocated or displaced on account of construction of the shops over the land in dispute, but natural, their names were not supposed to be included in the list of beneficiaries. In this view of the matter, in the considered view of this Court, the petitioners being strangers to the issue otherwise have no locus to challenge the mode and manner in which the shops were allotted or as to why an amount of `85,000/- was charged from the beneficiaries for the construction of the shops. In this regard, grievance, if any, could have been raised by those persons who actually were dislocated or displaced on account of construction of the shops over the area from where they were running their business earlier. Incidentally, all the persons against whom allegations stand made in the petition/ rejoinders to the effect that they were the wrong

beneficiaries of the arbitrary allotment of the shops, have not been impleaded as parties.

11. Be that as it may, as this Court otherwise does not finds any merit in the present case, because the petitioners have miserably failed to demonstrate that they were dislocated or displaced on account of construction of the shopping complex in issue, the petition is accordingly dismissed. However, as is evident from the compliance affidavit filed by the Deputy Commissioner, Hamirpur, dated 24.05.2018, that an endeavour was made to allot the vacant shops to the petitioners, to which the petitioners did not agree, it is observed that the petitioners may be again be offered vacant shops, if any, in any of the complexes of the Society in issue in Hamirpur town within a period of two weeks from today and if the petitioners express their willingness to accept the allotment of the same, then the shops be allotted to them on the same terms and conditions, as have been allotted to those persons who were displaced on account of constructions of the shopping complex, subject matter of the writ petition. It is clarified that the above observation made by the Court does not, in any way, mean that on merit the Court has found any substance in the petition but this observation is being made by the Court on account of the contents of the compliance affidavit filed by respondent No. 2 mentioned hereinabove. In case, the petitioners did not accept the proposal of respondent No. 2 in terms of above observations within two weeks as from the date of the proposal being communicated to the petitioners, then the respondent-Society shall be at liberty to deal with the vacant shop(s) in such manner as it deems fit.

With these observations, the writ petition stands disposed of. Pending miscellaneous application(s), if any, also stand disposed of accordingly.

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J

Dharam Pal Singh .....Petitioner.

Versus

Himachal Pradesh University .....Respondent.

CWP No.722 of 2021.
Date of decision: 04.05.2021.

The petition for quashing decision of University, not to consider additional higher educational qualification i.e. Ph.D obtained by petitioner after issuance of advertisement and direction to consider the same.

It is settled law that where the applications are called for prescribing a particular date as the last date for filling applications, the eligibility of the candidates, has to be judged with reference to that date and that date alone. A person, who acquires the prescribed qualification subsequent to such prescribed date cannot be considered at all- An advertisement or notification issued or published calling for application constitutes a representation to the public and the authority issuing it is bound by such representation and it cannot act contrary to it. The mere fact that the University has extended time limit of the advertisement does not mean that university is bound to take into consideration the higher/additional qualification, that the applicants may have acquired after issuance of original advertisement -there is no allegation of any bias or malafides against any officer of respondent and therefore, in absence of such allegations the court will not interfere with action of respondent- petition dismissed.

Cases referred:

Alka Ojha vs. Rajasthan Public Service Commission and Anr., AIR 2011 SCC 3547;

Ashok Kumar Sharma and others vs. Chander Shekhar and another (1997) 4 SCC 18;

Dheeraj Mor vs. High Court of Delhi (2020) 7 SCC 401;

Rakesh Kumar Sharma vs. Govt. of NCT of Delhi & Ors. 2013 (10) Scale 42;

For the Petitioner : In person.

For the Respondent : Mr. Ashok Sharma, Senior Advocate with Mr. Surender Verma, Advocate.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

Whether a qualification acquired by a candidate subsequent to the prescribed date can be taken into consideration to adjudge the eligibility or acquisition of higher qualification is the moot question to be decided in the instant petition?

2. The respondent-University issued an Advertisement No.Rectt.-17/2019 dated 30.12.2019 for filling up various teaching and administrative posts through direct recruitment. In terms of the advertisement, the crucial date i.e. the closing date for determining the eligibility of all candidates in respect of essential qualification(s) and experience, if any, etc. was 30.01.2020; as is evident from important Instruction No.2 appended with the advertisement which reads as under:-

> "2. Date for determining eligibility of all candidates in respect of essential qualification(s) and experience, if any, etc. shall be the prescribed closing date for submission of Online Application i.e. 30-01-2020 (Closing date)."

3. The petitioner is an applicant for the post of Assistant Professor in Computer Science (BCA/MCA/PGDCA) in ICDEOL, Himachal Pradesh University, for which post the minimum qualification is as per the UGC Regulations on Minimum Qualifications for Appointment of Teachers and other Academic Staff in Universities and Colleges and Measures for the

Maintenance of Standards in Higher Education, 2018 (hereinafter to be called as 'UGC Regulations, 2018').

4. As per the decision taken in the meetings of the Executive Council held on 10.06.1981 and and 12.06.1981, an advertisement is to be operational upto one year. However, in the instant case, the time limit for the advertisement was extended by another six months upto 30th June, 2021.

5. It is the admitted case of the parties that as on the closing date for determining the eligibility of candidates i.e. 30.01.2020, the petitioner had not been awarded Ph.D. Degree as the same was obtained by him only in the month of December, 2020.

6. However, the petitioner made a representation to the respondent-University to consider the additional higher qualification obtained by him after the closing date as per the advertisement, but the same was rejected vide communication dated 30.01.2021 (Annexure P-5) and aggrieved thereby the petitioner has filed the instant petition for grant of the following relief:-

> "That the decision taken by the respondent university (Annexure P-5), not to consider the additional higher educational qualification i.e. the Degree of Ph.D. obtained by the petitioner after the issuance of the advertisement for the post of Assistant Professor in Computer Science (BCA/MCA/PGDCA) in ICDEOL, Himachal Pradesh University, advertised vide Advertisement No. 17/2019, issued on 30/12/2019; may kindly be quashed and set aside and the writ of mandamus may kindly be issued, directing the respondent university to take into consideration the additional higher educational qualification i.e. Ph.D. in Computer Science, for the above mentioned post of Assistant Professor in Computer Science (BCA/MCA/PGDCA) in ICDEOL, HPU, Shimla-05; for which the interviews are yet to be conducted and for which the petitioner has already applied and is eligible as per UGC regulations, 2018 at the time of applying for the said post of Assistant Professor Or alternatively the decision taken by the respondent university in the meeting of Executive Council on 21/11/2020 (Annexure P-9)

to extend the time limit of the advertisement for other six months after the expiry of the time limit of one year, may kindly be quashed and set aside in the interest of justice."

7. The respondent has filed its reply wherein it is stated that due to outbreak of Covid-19 Pandemic, the State Government imposed lockdown and, therefore, the recruitment process on the basis of the advertisement could not be started till mid August, 2020. Resultantly, the selection process on all the advertised posts could not be completed within the prescribed validity period of advertisement. Hence, the matter was placed before the competent body of the University for decision i.e. Executive Council which approved the extension of validity period of the advertisement upto 30.06.2021.

8. As regards the acquisition of higher qualification of Ph.D., it is averred that since this Degree was acquired by the petitioner after the last date of online application, therefore, the same cannot be taken into consideration and the representation of the petitioner has rightly been rejected by the respondent.

9. We have heard the petitioner, who has appeared in person as also Shri Ashok Sharma, Senior Advocate assisted by Shri Surender Verma, Advocate, for the respondent-University and have also perused the material placed on record.

10. It is more than settled that where the applications are called for prescribing a particular date as the last date for filing applications, the eligibility of the candidates has to be judged with reference to that date and that date alone. A person, who acquires the prescribed qualification subsequent to such prescribed date, cannot be considered at all. An Advertisement or Notification issued/published calling for applications constitutes a representation to the public and the authority issuing it is bound by such representation and it cannot act contrary to it.

11. Reference in this regard can conveniently be made to the judgment rendered by three Hon'ble Judges of the Hon'ble Supreme Court in ***Ashok Kumar Sharma and others*** *vs.* ***Chander Shekhar and another (1997) 4 SCC 18*** wherein it was held as under:-

> "6. The Review petitions came up for final hearing on March 3, 1997. We heard the learned counsel for the review petitioners, for the State of Jammu and Kashmir and for the 33 respondent So far as the first issue referred to in our order dated Ist September, 1995 is concerned, we are of the respectful opinion that majority judgment (rendered by the Dr. T.K. Thommen and V. Ramaswami, JJ) is unsustainable in law,. the proposition that where applications are called for prescribing a particular date as the last date for fling the applications, the eligibility of the candidates shall have to be judged with reference to that date and that date alone, is a well-established one. A person who acquires the prescribed qualification subsequent to such prescribed date cannot be considered at all. An advertisement or notification issued/published calling for applications constitutes a representation to the public and the authority issuing it is bound by such representation. It cannot act contrary to it. One reason behind this proposition is that if it were known that persons who obtained the qualifications after the prescribed date but before the date of interview would be allowed to appear for the interview would be allowed to appear for the interview, other similarly placed persons could also have applied. Just because some of the persons had applied notwithstanding that they had not acquired the prescribed qualifications by the prescribed date, they could not have been treated on a preferential basis. Their application ought to have been rejected at the inception itself. This proposition is indisputable and in fact was not doubted or disputed in the majority Judgement. This is also the proposition affirmed in Rekha Chaturvedi (Smt.) v. University of Rajasthan and others [1993 Suppl. (3) S.C.C 168]. The reasoning in majority opinion that by allowing the 33 respondents to appear for the interview, the Recruiting Authority was able to get the bests talent available and that such course was in furtherance of

> public interest is, with respect, an impermissible Justification It is, in our considered opinion, a clear error of low and an error apparent on the face of the record. In our opinion, R.M. Sahai, J. (and the Division Bench of the High Court) was right in holding that the 33 respondents could not have allowed to appear for interview."

12. The entire issue has been considered at length by the Hon'ble Supreme Court in ***Rakesh Kumar Sharma*** *vs.* ***Govt. of NCT of Delhi & Ors. 2013 (10) Scale 42*** wherein while dealing with a similar case where the appellant had though appeared for the B.Ed. Examination which was pre-requisite qualification for the post, but his result had not been declared. It was in this background that it was observed as under:-

> "4. The facts are not in dispute. As per the advertisement, applications had to be submitted by 29.10.2007 and the Appellant made a representation that he had obtained the B. Ed degree but could not submit a copy of the marks sheet or Degree certificate. The appointment letter dated 19.6.2009 was temporary/provisional, subject to verification of various aspects including that of educational qualification. The Appellant was permitted to join services on the basis of provisional appointment letter and therefore, the sole question involved herein is whether the Appellant could claim any relief, if for one reason or the other his result had not been declared upto the last date of the submission of the application form.
>
> 5. A three Judge Bench of this Court in State of Punjab and Ors. v. Surinder Kumar and Ors., AIR 1992 SC 1593 dealt with a case where regular appointment had not been made. The court held that unless a person holds the post permanently, his services would be governed by the terms and conditions incorporated in the appointment letter and the court must in all circumstances enforce the terms specifically stated therein.
>
> 6. There can be no dispute to the settled legal proposition that the selection process commences on the date when applications are invited. Any person eligible on the last date of submission of

the application has a right to be considered against the said vacancy provided he fulfils the requisite qualification.

7. In U.P. Public Service Commission, U.P., Allahabad and Anr. v. Alpana, (1994) 2 SCC 723, this Court, after considering a large number of its earlier judgments, held that eligibility conditions should be examined as on last date for receipt of applications by the Commission. That too was a case where the result of a candidate was declared subsequent to the last date of submission of the applications. This Court held that as the result does not relate back to the date of examination and eligibility of the candidate is to be considered on the last date of submission of applications, therefore, a candidate, whose result has not been declared upto the last date of submission of applications, would not be eligible.

8. A three Judge Bench of this Court, in Dr. M.V. Nair v. Union of India and Ors., (1993) 2 SCC 429, held as under:

> "It is well settled that suitability and eligibility have to be considered with reference to the last date for receiving the applications, unless, of course, the notification calling for applications itself specifies such a date."
>
> (Emphasis added)

9. In Smt. Harpal Kaur Chahal v. Director, Punjab Instructions, Punjab and Anr., 1995 Suppl 4 SCC 706, this Court held:

> "It is to be seen that when the recruitment is sought to be made, the last date has been fixed for receipt of the applications, such of those candidates, who possessed of all the qualifications as on that date, alone are eligible to apply for and to be considered for recruitment according to Rules."

10. This Court in Rekha Chaturvedi v. University of Rajasthan, 1993 Supp (3) SCC 168 held:

> "The contention that the required qualifications of the candidates should be examined with reference to the date of selection and not with reference to the last date for making applications has only to he stated to be rejected. The date of selection is

> invariably uncertain. In the absence of knowledge of such date the candidates who apply for the posts would be unable to slate whether they are qualified for the posts in question or not, if they are yet to acquire the qualifications. Unless the advertisement mentions a fixed dale with reference to which the qualifications are to be judged, whether the said date is of selection or otherwise, it would not be possible for the candidates who do not possess the requisite qualifications in praesenti even to make applications for the posts. The uncertainty of the date may also lead to a contrary consequence, viz., even those candidates who do not have the qualifications in praesenti and are likely to acquire them at an uncertain future date, may apply for the posts thus swelling the number of applications. But a still worse consequence may follow, in that it may leave open a scope for malpractices. The date of selection may be so fixed or manipulated as to entertain some applicants and reject others, arbitrarily. Hence, in the absence of a fixed date indicated in the advertisement/notification inviting applications with reference to which the requisite qualifications should be judged, the only certain date for the scrutiny of the qualifications will be the last date for making the applications. Reference in this connection may also be made to two recent decisions of this Court in A.P. Public Service Commission v. B. Surat Chandra, (1990) 2 SCC 669; and District Collector and Chairman. Vizianagaram Social Welfare Residential School Society v. M. Tripura Sundari Devi, (1990) 3 SCC 655."

11. In Ashok Kumar Sharma v. Chander Shekhar, 1993 Supp (2) SCC 611 [hereinafter referred to as Ashok Kumar (1993), the majority view was as under:

> "The fact is that the Appellants did pass the examination and were fully qualified for being selected prior to the date of interview. By allowing the Appellants to sit for the interview and by their selection on the basis of their comparative merits,

> the recruiting authority was able to get the best talents available. It was certainly in the public interest that the interview was made as broad based as was possible on the basis of qualification. The reasoning of the learned Single Judge was thus based on sound principle with reference to comparatively superior merits. It was in the public interest that better candidates who were fully qualified on the dates of selection were not rejected, notwithstanding that the results of the examination in which they had appeared had been delayed for no fault of theirs. The Appellants were fully qualified on the dates of the interview and taking into account the generally followed principle of Rule 37 in the State of Jammu & Kashmir, we are of opinion that the technical view adopted by the learned Judges of the Division Bench was incorrect.
>
> (Emphasis added)

However, the opinion of Justice R.M. Sahai had been that these 33 persons could not have been allowed to appear for the interview as they did not possess the requisite eligibility/qualification on the last date of submission of applications.

12. A three-Judge Bench of this Court in Ashok Kumar Sharma v. Chander Shekhar, (1997) 4 SCC 18 reconsidered and explained the judgment of Ashok Kumar Sharma (1993) observing:

> "The proposition that where applications are called for prescribing a particular date as the last date for filing the applications, the eligibility of the candidates shall have to be judged with reference to that date and that date alone, is a well-established one. A person who acquires the prescribed qualification subsequent to such prescribed date cannot be considered at all. An advertisement or notification issued/published calling for applications constitutes a representation to the public and the authority issuing it is bound by such representation. It cannot act contrary to it. One reason behind this proposition is that if it were known that persons who obtained the qualifications after the prescribed date but before the date of

> interview would be allowed to appear for the interview, other similarly placed persons could also have applied. Just because some of the persons had applied notwithstanding that they had not acquired the prescribed qualifications by the prescribed date, they could not have been treated on a preferential basis. Their applications ought to have been rejected at the inception itself. This proposition is indisputable and in fact was not doubted or disputed in the majority judgment."
>
> (Emphasis added)

The Court further explained that the majority view in Ashok Kumar Sharma (1993) was not correct, rather the dissenting view by Justice R.M. Sahai was correct as the Court held as under:

> "The reasoning in the majority opinion that by allowing the 33 Respondents to appear for the interview, the recruiting authority was able to get the best talent available and that such course was in furtherance of public interest is, with respect, an impermissible justification. It is, in our considered opinion, a clear error of law and an error apparent on the face of the record. In our opinion, R.M. Sahai, J. (and the Division Bench of the High Court) was right in holding that the 33 Respondents could not have been allowed to appear for the interview."
>
> (Emphasis added)

It may also be pertinent to mention here that in the aforesaid case reference to Rekha Chaturvedi appears to have been made by a typographical error as the said judgment is by a two-Judge Bench of this Court. Infact the court wanted to make a reference to the case of Ashok Kumar Sharma (1993) (supra).

13. In Bhupinderpal Singh v. State of Punjab, AIR 2000 SC 2011 this Court placing reliance on various earlier judgments of this Court held:

> "The High Court has held (i) that the cut-off date by reference to which the eligibility requirement must be satisfied by the candidate seeking a public employment is the date appointed by the relevant service rules and if there be no cut-off date appointed by the rules then such date as may be

> appointed for the purpose in the advertisement calling for applications; (ii) that if there be no such date appointed then the eligibility criteria shall be applied by reference to the last date appointed by which the applications have to be received by the competent authority. The view taken by the High Court is supported by several decisions of this Court and is therefore well settled and hence cannot be found fault with."

14. This Court lately in State of Gujarat v. Arvind Kumar T. Tiwari, AIR 2012 SC 3281 held:

> "A person who does not possess the requisite qualification cannot even apply for recruitment for the reason that his appointment would be contrary to the statutory rules, and would therefore, he void in law. Lacking eligibility for the post cannot be cured at any stage and appointing such a person would amount to serious illegality and not mere irregularity. Such a person cannot approach the court for any relief for the reason that he does not have a right which can be enforced through court. (Sec Prit Singh v. S.K. Mangal, 1993 Supp1 SCC 714 and Pramod Kumar v. U.P. Secondary Education Services Commission, 2008 7 SCC 153.)
>
> (Emphasis added)

15. A similar view has been re-iterated by this Court in Pramod Kumar v. U.P. Secondary Education Services Commission, (2008) 7 SCC 153; and State of Orissa v. Mamta Mohanty, (2011) 3 SCC 436.

16. In the instant case, the Appellant did not possess the requisite qualification on the last date of submission of the application though he applied representing that he possessed the same. The letter of offer of appointment was issued to him which was provisional and conditional subject to the verification of educational qualification, i.e., eligibility, character verification etc. Clause 11 of the letter of offer of appointment dated

23.2.2009 made it clear that in case character is not certified or he did not possess the qualification, the services will be terminated. The legal proposition that emerges from the settled position of law as enumerated above is that the result of the examination docs not relate back to the date of examination. A person would possess qualification only on the date of declaration of the result. Thus, in view of the above, no exception can be taken to the judgment of the High Court.

17.It also needs to be noted that like the present Appellant there could be large number of candidates who were not eligible as per the requirement of rules/advertisement since they did not possess the required eligibility on the last date of submission of the application forms. Granting any benefit to the Appellant would be violative of the doctrine of equality, a backbone of the fundamental rights under our Constitution. A large number of such candidates may not have applied considering themselves to be ineligible adhering to the statutory rules and the terms of the advertisement.

There is no obligation on the court to protect an illegal appointment. Extraordinary power of the court should be used only in an appropriate case to advance the cause of justice and not to defeat the rights of others or create arbitrariness. Usurpation of a post by an ineligible candidate in any circumstance is impermissible. The process of verification and notice of termination in the instant case followed within a very short proximity of the appointment and was not delayed at all so as to even remotely give rise to an expectancy of continuance."

13. Similar reiteration of law can be found in the judgment rendered by this Court in ***CWP No. 1919/2018*** titled ***Sanjay Mishra*** *vs.* ***State of H.P. and others*** along with connected matter, decided on 30.12.2019, wherein it was observed as under:-

> "18. The question whether candidate must have prescribed educational and other qualifications as on a particular date specified in the Rules or the advertisement is no longer *res intergra.* It is more than settled that cut off date by reference to which eligibility requirement must be satisfied by the candidate seeking a public employment is the date appointed by the relevant service rules and if there be no cut off date appointed by the rules then such date as may be appointed for the purpose in the advertisement calling for applications and that if there be no such date appointed then the eligibility criteria shall be applied by reference to the last date appointed by which the applications have been received by the competent authority.
>
> 19. Reference in this regard can conveniently be made to the judgment of the Hon'ble Supreme Court in **Alka Ojha vs. Rajasthan Public Service Commission and Anr., AIR 2011 SCC 3547,** wherein it was observed as under:-
>
> > "14. The question whether the candidate must have the prescribed educational and other qualifications as on the particular date specified in the Rule or the advertisement is no longer res intergra. In Bhupinderpal Singh vs. State of Punjab (2000) 5 SCC 262; (AIR 2000 SC 2011: 2000 AIR SCW 1888), this Court referred to the earlier judgments in A.P. Public Service Commission vs. B. Sarat Chandra (1990) 2 SCC 669, District Collector and Chairman, Vizianagaram Social Welfare Residential School Society vs. M. Tripura Sundari Devi (1990) 3 SCC 655, M. V. Nair (Dr.) vs. Union of India (1993) 2 SCC 429:(1993) AIR SCW 1412), Rekha Chaturvedi vs. University of Rajasthan 1993 Supp. (3) SCC 168, U.P. Public Service Commission, U.P., Allahabad vs. Alpana (1994 AIR SCW 2861) (supra) and Ashok Kumar Sharma vs. Chander Shekhar (supra) and approved the following proposition laid down by the Punjab and Haryana High Court:

> "….. that cut off date by reference to which eligibility requirement must be satisfied by the candidate seeking a public employment is the date appointed by the relevant service rules and if there be no cut off date appointed by the rules then such date as may be appointed for the purpose in the advertisement calling for applications and that if there be no such date appointed then the eligibility criteria shall be applied by reference to the last date appointed by which the applications have to be received by the competent authority."

14. The ratio laid down by the Hon'ble Supreme Court in ***Ashok Kumar Sharma's case*** (supra) has thereafter been followed consistently by the Hon'ble Supreme Court and reference in this regard can conveniently be made to two recent judgments of the Hon'ble Supreme Court.

15. In ***Dheeraj Mor*** *vs.* ***High Court of Delhi (2020) 7 SCC 401,*** it was observed as under:-

> "88. This court is of the opinion that the decision in Vijay Kumar Mishra v. High Court of Patna (2016) 9 SCC 313, as far as it makes a distinction between consideration, of a candidate's eligibility, at the stage of selection, and eligibility reckonable at the time of appointment, is incorrect. There is clear authority to the proposition that eligibility of any candidate is to be reckoned, not from the date of his or her selection, but in terms of the rules, or the advertisement for the post. In Ashok Kumar Sharma & Ors. vs. Chander Shekhar & Ors (1997) 4 SCC 18, a three-judge bench of this court held as follows: (Ashok Kumar Sharma case[42], SCC pp. 21-22, para 6)
>
> > **"6....The proposition that where applications are called for prescribing a particular date as the last date for filing the applications, the eligibility of the candidates shall have to be judged with reference to that date and that date alone, is a well- established one. A person who acquires the prescribed qualification subsequent to such prescribed date cannot be considered at all. An advertisement of**

notification issued/published calling for application constitutes a representation to the public and the authority issuing it is bound by such representation. It cannot act contrary to it. One reason behind this proposition is that if it were known that persons who obtained the qualifications after the prescribed date but before the date of interview would be allowed to appear for the interview, other similarly placed persons could also have applied. Just because some of the person had applied notwithstanding that they had not acquired the prescribed qualifications by the prescribed date, they could not have been treated on a preferential basis. Their applications ought to have been rejected at the inception itself. This proposition is indisputable and in fact was not doubted or disputed in the majority Judgment. This is also the proposition affirmed in Rekha Chaturvedi v. University of Rajasthan and Ors. 1993 Supp (3) SCC 168. The reasoning in the majority opinion that by allowing the 33 respondents to appear for the interview, the Recruiting Authority was able to get the best talent available and that such course was in furtherance of public interest is, with respect, an impermissible justification. It is, in our considered opinion, a clear error of law and an error apparent on the face of the record. In our opinion, R.M. Sahai, J.(and the Division Bench of the High Court) was right in holding that the 33 respondents could not have been allowed to appear for the interview."

This reasoning is similar to other decisions, such as U.P. Public Service Commission v Alpana (1994) 2 SCC 723 and Bhupinderpal Singh & Ors. vs. State of Punjab & Ors (2000) 5 SCC 262. Therefore, the observation in Vijay Kumar Mishra (supra) that: (SCC p. 320, para 7)

"the right of such a person to participate in the selection process undertaken by the State for appointment to any post in public service (subject to other rational prescriptions

> **regarding the eligibility for participating in the selection process such as age, educational qualification etc.) and be considered is guaranteed under Art. 14 and 16 of the Constitution."**
>
> **is not correct. With respect, the distinction sought to be made, between "selection" and "appointment" in the context of eligibility, is without foundation. A selection process begins with advertisement, calling for applications from eligible candidates. Eligibility is usually defined with reference to possession of stipulated qualifications, experience, and age, as on the last date (of receipt of applications, or a particular specified date, etc). Anyone fulfilling those eligibility conditions, with reference to such date, would be ineligible. Therefore, the observation that the right to participate in the selection process, without possessing the prescribed eligibility conditions, is guaranteed, is not correct; the right is guaranteed only if the candidate concerned fulfils the requisite eligibility criteria, on the stipulated date. As pointed out by the three judge bench decision, if the contrary is correct, one acquiring the stipulated qualifications subsequent to the prescribed date cannot be considered. Also, one not fulfilling the conditions cannot be allowed to participate, because, as held in Ashok Kumar Sharma (supra), if it were known, that such ineligible candidates can be considered, those who do not apply, but are better placed than the ineligible candidates who are allowed to participate, would be left out. Moreover, the authority publishing the advertisement/ notification represents to the members of the public that it is bound by such representation."**

16. In ***Civil Appeal No. 554/2021*** titled ***Suman Devi and others*** *vs.* ***State of Uttarakhand and others***, decided on 25.03.2021, the Hon'ble Supreme Court observed as under:-

> "....Furthermore, it is useful to recollect that the eligibility of a candidate or applicant for a public post or service, is to be adjudged as on the last date of receipt of applications for such post or service, in terms of the relevant advertisement, and the prevailing service rules. This position is recognized by settled

authority in Ashok Kumar Sharma v Chander Shekhar (1997) 4 SCC 18, a three Judge Bench of this Court ruled in this context that:

> "6. The proposition that where applications are called for prescribing a particular date as the last date for fling the applications, the eligibility of the candidates shall have to be judged with reference to that date and that date alone, is a well-established one. A person who acquires the prescribed qualification subsequent to such prescribed date cannot be considered at all. An advertisement or notification issued/published calling for applications constitutes a representation to the public and the authority issuing it is bound by such representation. It cannot act contrary to it."

17. From the conspectus of laws on the subject, some of which have been noted above, the position appears to be as follows:-

(i) That the suitability and eligibility of a candidate have to be considered with reference to the last date for receiving the applications, unless, of course, the notification calling for the applications itself specifies such a date;

(ii) When the recruitment is sought to be made, the last date has been fixed for receipt of the applications, such of those candidates, who are possessed of all the qualifications as on that date, alone are eligible to apply for and to be considered for recruitment according to Rules;

(iii) In the absence of a fixed date indicated in the advertisement/notification inviting applications with reference to which the requisite qualifications should be judged, the only certain date for the scrutiny of the qualifications will be the last date for making the applications;

(iv) Where the applications are called for prescribing a particular date as the last date for filing the applications, the eligibility of the candidates shall have to be judged with reference to that date and that date alone. As a

necessary corollary, a person, who acquires the necessary qualification subsequent to the prescribed date cannot be considered at all;

(v) A person who does not possess the requisite qualification on the appointed date cannot even apply for recruitment for the reason that his appointment would be contrary to the statutory rules and therefore would be void in law. Lacking eligibility for the post cannot be cured at any stage and appointing such a person would amount to serious illegality and not mere irregularity. Such a person cannot approach the Court for any relief for the reason that he does not have a right which can be enforced through court.

The question of law, as framed, is answered accordingly.

18. To be fair to the petitioner, he has placed strong reliance on the notification dated 11.01.2016 issued by the Department of Personnel and Training (DoPT) under the Ministry of Personnel, P.G. & Pensions, Government of India, whereby instructions have been given to all the Ministries and Departments to ensure that the entire recruitment process including and starting from advertisement, conducting written examination or holding of interview may be completed within six months and since this has not been done in the instant case, therefore, the respondent-University is bound to take into consideration the higher qualification of Ph.D. as acquired by the petitioner in the meanwhile.

19. We do not find any merit in this contention for the simple reason that due to outbreak of Covid-19 Pandemic the State Government had imposed lockdown and because of which there were travelling and movement restrictions and consequently the recruitment process in terms of the advertisement could not be initiated till mid August, 2020.

20. In addition to the above, the mere fact that the University has extended time limit of the advertisement for the reasons stated above does not mean that the University is bound to take into consideration the

higher/additional qualification that the applicants may have acquired after issuance of the original advertisement on 30.12.2019.

21. Noticeably, there is no allegation of any bias or malafides against any Officer of the respondent and, therefore, in absence of such allegation, the Court will not interfere with the action of the respondent, which as observed above, is in consonance with law.

22. In view of the aforesaid discussion, we find no merit in the instant writ petition and the same is accordingly dismissed along with pending application(s), if any, leaving the parties to bear their own costs.

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

Bishan Singh Chandel .....Petitioner

Versus

Himachal Pradesh University and another .....Respondents

CWPOA No.5378 of 2019
Reserved on: 29th April, 2021
Decided on: 5th May, 2021

The petitioner claims, his promotion to the post of Planning and Development Officer along with the pay scale from a retrospective date, on the ground that University in an arbitrary and discriminatory manner, did not exercise the discretionary power to relax the rules in his favour as was done in case of similarly situated employees. Held- It is well settled that exercise of discretion should be legitimate, fair and without any aversion, malice or affection. The discretionary power to relax, should be exercised sparingly to meet exceptional situations warranting such exercise. From the facts it appears that respondent University did not exercise the discretionary power of relaxation in a judicious or in an equitable manner. The Principle that relaxation should be only be an exception and not the rule was not kept in mind. Apparently the principle that adherence to R&P Rules should not ordinarily be considered as a hardship for a person seeking appointment or promotion there under was not followed strictly, the cases of grant of

relaxation by University being relied by the petitioner, for claiming similar treatment are neither before the Court nor same can be gone into at this stage however on analogy of exercise of this discretionary power of relaxation, in favour of some incumbents, the respondent University, cannot be directed to exercise same, discretion in favour of petitioner, Exercise of discretionary power of relaxation in one's favour cannot be claimed as matter of right. Therefore, claim of petitioner for retrospective promotion, to the post of planning and development Officer by way of relaxation of requisite length of service under R&P Rules is not tenable.

Further held – the petitioner had admittedly discharged the duties of higher post till superannuation, pursuant to order passed by competent authority petitioner deserves to be granted, the pay scale attached to said post. The petition disposed of.

Cases referred:

Amrik Singh and others Versus Union of India and others, (1980) 3 SCC 393;

Suraj Parkash Gupta and others Versus State of J&K and others, (2000) 7 SCC 561;

Syed Khalid Rizvi and others Versus Union of India and others, 1993 Supp (3) SCC 575;

For the Petitioner: Mr. Sanjeev Bhushan, Senior Advocate with Mr. C.D. Negi, Advocate.

For the Respondents: Mr. Surender Verma, Advocate. (Through Video Conference)

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge

The petitioner claims his promotion to the post of Planning & Development Officer alongwith the pay scale attached to it from a retrospective date. This claim stands on two planks. *Firstly*, that the respondent-University in an arbitrary and discriminatory manner, did not exercise the discretionary power to relax the applicable rules in favour of the petitioner for his promotion to the

post of Planning & Development Officer, while at the same time, in exercise of this very power, similarly situated employees were promoted by the respondent to the post of Deputy Registrar etc. and *secondly*, notwithstanding above, the respondents had given additional charge of the post of Planning & Development Officer to the petitioner w.e.f 12.11.2014.The petitioner superannuated on 31.03.2015 while discharging the duties of Planning & Development Officer, therefore, the pay scale attached to this post is required to be released in his favour.

2. Facts:-

2(i). On 29.11.2011, the Executive Council of the respondent-University had before it an Agenda No.17 regarding providing relaxation in the Recruitment & Promotion Rules (in short 'R&P Rules') while effecting promotions to the vacant posts of Deputy Registrar and Special Secretary. The Executive Council resolved and authorized the Vice-Chancellor of the respondent-University to take appropriate decision on matters pertaining to relaxation of R&P Rules in favour of the incumbents keeping in view their seniority as well as justification for relaxation in their favour.

2(ii). The petitioner had joined the respondent-University in the year 1974. He was promoted as Deputy Registrar on ad hoc basis vide office order dated 21.01.2014 by granting him relaxation of one and a half months' service period as Assistant Registrar. His ad-hoc promotion was regularized w.e.f. 10.03.2014 vide office order dated 21.10.2014. The

petitioner was senior-most serving Deputy Registrar at that time.

2(iii). In terms of the Himachal Pradesh University Ministerial and Administrative Service (Recruitment, Promotion and Certain Conditions of Service) Rules framed by the Executive Council of the respondent-University as notified on 06.01.1973, further promotion from the post of Deputy Registrar could either be to the post of Additional Controller of Examinations or to the post of Planning & Development Officer. The post of Additional Controller of Examinations and Planning & Development Officer are to be filled up 100% by promotion from the feeder channel of Deputy Registrars. The relevant rules providing the required length of service as Deputy Registrar for promotion to these two avenues read as under:-

i) Minimum length of approved service.	*Three years as Deputy Registrar.* *OR* ***Two years as Deputy Registrar** and withat least two years as Assistant Registrar.*

"14.18: Additional Controller of Examinations:

14.19: Planning & Development Officer:

i) Minimum length of approved service.	*Three years as Deputy Registrar.* *OR* ***Two years as Deputy Registrar** and with at*

2(iv). One post of Planning & Development Officer became available in the respondent-University on 31.07.2014. Petitioner was serving as senior-most Deputy Registrar at the

time. His case for promotion to this post was processed by granting him relaxation in the requisite length of service. Though the Vice-Chancellor of the respondent-University on 12.11.2014 did not exercise the power to grant relaxation in favour of the petitioner for facilitating his promotion to the post of Planning & Development Officer, however, noticing that work against the post of Planning & Development Officer was of urgent nature and somebody needed to be posted there, ordered to give additional charge of the post to the petitioner without any financial benefits.

2(v). Aggrieved against (i) respondent's refusal to relax the condition of length of service required for petitioner's promotion to the post of Planning & Development Officer and (ii) also aggrieved against non- grant of the pay scale (financial benefits) attached to the post of Planning & Development Officer, i.e. the work, which the petitioner was discharging w.e.f. 12.11.2014 till his superannuation on 31.03.2015, the petitioner has preferred the instant petition for the following substantive reliefs:-

> *"I) That the respondents may kindly be directed to promote the applicant as Planning and Development Officer either w.e.f. 1st September, 2014 or in the alternative w.e.f. 12.11.2014 from which date the applicant has been performing the work of Planning and Development Officer with all consequential benefits of pay arrears etc.*
>
> *II) That the respondents may kindly be directed to pay the arrears to the applicant with interest @ 9% per annum in the interest of law and justice."*

3. Contentions:-

Heard learned counsel for the parties and gone through the record.

3(i). Learned Senior Counsel for the petitioner submitted that in the circumstances similar to that of petitioner, the respondent-University had relaxed the length of service required under the R&P Rules for promotion to the post of Deputy Registrar. S/Sh. Waryam Singh Bains and Nitya Nand Sharma were promoted as Assistant Registrars w.e.f. 01.02.2014 and 10.03.2014, respectively, vide office order dated 21.10.2014. Their names figured at Sr. Nos.3 and 4 in order of seniority. One Sh. Mohinder Kumar Gupta was promoted as Assistant Registrar vide same order of 21.10.2014 w.e.f. 27.01.2014. He was senior to Sh. Waryam Singh Bains and Nitya Nand Sharma and was accordingly reflected above them at Sr. No.2. Under the Rules, an Assistant Registrar with two years of service as such is eligible for further promotion to the post of Deputy Registrar. Ignoring the claim of senior incumbent Sh. Mohinder Kumar Gupta, the respondent-University on 12.11.2014 promoted S/Sh. Waryam Singh Bains and Nitya Nand Sharma as Deputy Registrars by granting them relaxation of one year and three months' in the service required as Assistant Registrar. Learned Senior Counsel argued that the case of the petitioner was at much better footing as compared to S/Sh. Waryam Singh Bains and Nitya Nand Sharma for grant of relaxation as petitioner was the senior-most Deputy Registrar serving with the respondent-University when the post of Planning & Development Officer became available. No

one would have been superseded had he been promoted to the said post by way of relaxation of R&P Rules. Whereas, S/Sh. Waryam Singh Bains and Nitya Nand Sharma were promoted to the post of Deputy Registrar in relaxation of length of service required under the R&P Rules, superseding their senior Sh. Mohinder Kumar Gupta. Length of service required to be relaxed in case of the petitioner's promotion was almost the same as relaxed in case of S/Sh. Waryam Singh Bains and Nitya Nand Sharma. Therefore, learned Senior Counsel contended that the respondent-University has discriminated against the petitioner in refusing to relax the length of service required under the R&P Rules for his promotion to the post of Planning & Development Officer. Petitioner, therefore, is required to be promoted as Planning & Development Officer w.e.f. 01.09.2014.

It is also contended by learned Senior Counsel for the petitioner that in any case the respondent had taken the work of Planning & Development Officer from the petitioner w.e.f. 12.11.2014. The petitioner superannuated on 31.03.2015 while discharging the duties of the said post. The action of the respondents in not giving the financial benefits attached with the post of Planning & Development Officer while extracting this work from him was absolutely illegal. Therefore, learned Senior Counsel prayed that the petitioner deserves to be granted the monetary benefits attached to the post of Planning & Development Officer w.e.f. 12.11.2014.

3(ii). Learned Standing Counsel for the respondent- University produced the relevant record during hearing of the case. While admitting the main factual aspects of the matter, learned counsel submitted that an amendment had

been carried out in the Himachal Pradesh University Act, 1970 w.e.f. 16.03.2015, whereby following Sub-Section (1) was substituted for Section 28(1) of the Principal Act:-

> *"(a) for sub-section(1), the following sub-section shall be substituted, namely:-*
>
> *"(1) There shall be a Finance Committee and its constitution, the term of office of its members other than ex-officio members shall be as laid down in the Statutes. All financial matters and service matters relating to service conditions of the employees of the University including creation, up-gradation or filling of the posts, framing of Recruitment and Promotion Rules, revision of pay and allowances shall first be placed before the Finance Committee, and thereafter such matters shall be placed before the Executive Council with its recommendations."*

Learned counsel for the respondent-University submitted that in accordance with the above amendment carried out in the Himachal Pradesh University Act, 1970, the matters regarding service of employees of the respondent-University are now required to be considered first by the Finance Committee and thereafter the matters are to be placed before the Executive Council with its recommendations. After coming into force of the amendment on 16.03.2015, the respondent-University has not relaxed the conditions prescribed in the applicable rules for promotion of its employees. It is for this reason that the case of ad-hoc promotion of the petitioner to the post of Planning & Development Officer could not be favourably considered even during the month in which he was to retire, i.e. March, 2015.

4. Observations:-

4(i). Claim of retrospective promotion:-

Petitioner, in essence, claims that respondent-University be directed to exercise discretionary power of relaxation of the Recruitment & Promotion Rules in his favour for his retrospective promotion to the post of Planning & Development Officer. This claim is based upon analogy of relaxation power exercised by the respondent- University while promoting some other incumbents.

4(i)(a). The Executive Council on 29.11.2011 had authorized the Vice-Chancellor to decide all those cases, which required relaxation in the R&P Rules keeping in view the seniority and justification for such relaxation.

4(i)(b). The record shows that the cases of the petitioner, Sh. Waryam Singh Bains and Sh. Nitya Nand Sharma for granting them relaxation in the length of service required under the rules for their promotion to the next higher post, were considered by the Vice-Chancellor of the respondent-University simultaneously on 12.11.2014. Following was observed while refusing to exercise the power of relaxation in favour of the petitioner and for exercising this power in favour of other two employees:-

> *"1. There is no justification to promote Sh. Bishan Singh Chandel, Deputy Registrar (Estate) to the post of Planning & Development Officer. However, keeping in view the requirement of work, he is given the additional charge of the*

said post without any financial benefits till further orders.

2. *Sh. Waryam Singh Bains and Sh. Nitya Nand Sharma would be superannuating this month, therefore, there is justification to give them relaxation in the service period and they may be promoted to the post of Deputy Registrar during their service tenure by giving them relaxation."*

Respondent did not find any justification to relax the length of service required under the Rules in favour of the petitioner for his promotion to the post of Planning & Development Officer. However, only on the ground that S/Sh. Waryam Singh Bains and Nitya Nand Sharma, serving as Assistant Registrars, were due for superannuation in the ongoing month, they were promoted to the next higher post of Deputy Registrar in relaxation of length of service required under the R&P Rules. While exercising power of relaxation in favour of these two incumbents for purposes of their promotion to the post of Deputy Registrar, the respondent-University also overlooked the claim of their senior-Sh. Mohinder Kumar Gupta. During hearing of the case, learned Standing Counsel for the respondent-University informed that subsequent to the promotions of his juniors, Sh. Mohinder Kumar Gupta approached the erstwhile learned H.P. Administrative Tribunal by way of Original Application No.477 of 2015, which was decided on 27.04.2015. On the directions issued by the learned Tribunal, the respondent- University on 29.04.2015 promoted said Sh. Mohinder Kumar Gupta to the post of Deputy Registrar.

The reasoning advanced by the respondent-University for granting relaxation in required length of service to S/Sh. Waryam Singh Bains and Nitya Nand Sharma is at sharp variance to the one given, while refusing to exercise relaxation power in favour of the petitioner despite the fact that attending circumstances in all the three cases were almost similar. It is an admitted position that the petitioner was the senior-most Deputy Registrar. He also needed relaxation in length of service of around a year and three months for promotion to the post of Planning & Development Officer. This period almost equals the period relaxed in favour of S/Sh. Waryam Singh Bains and Nitya Nand Sharma. Considering the necessity of work to be discharged against the promotional post of Planning & Development Officer, the respondent though gave additional charge of the said post to the petitioner, but refused to relax length of service required under the R&P Rules for his promotion to this post. Whereas, requisite length of service was relaxed in favour of S/Sh. Waryam Singh Bains and Nitya Nand Sharma in view of their impending retirement within next few days and that too by ignoring the claim of their senior. These facts leave no manner of doubt that the discretionary power to relax the rules had been indiscriminately exercised by the respondent-University.

4(i)(c). In ***Amrik Singh and others Versus Union of India and others, (1980) 3 SCC 393***, power to relax rules and regulations in certain cases conferred under Rule 3 of the All India Services (Conditions of Service-Residuary Matters) Rules, 1960, was being considered. It was held "that Government must be satisfied, not subjectively but

objectively, that any rule or regulation affecting the conditions of service of a member of the All India Services causes undue hardship, then the iniquitous consequence thereof may be relieved against by relaxation of the concerned Rule or Regulation. There must be undue hardship and, further the relaxation must promote the dealing with the case "in a just and equitable manner". These are perfectly sensible guide-lines. What is more, there is implicit in the Rule, the compliance with natural justice so that nobody may be adversely affected even by administrative action without a hearing."

In ***Syed Khalid Rizvi and others Versus Union of India and others, 1993 Supp (3) SCC 575,*** while considering All India Services (Conditions of Service- Residuary Matters) Rules, 1960, it was held that no employee has a right to promotion, but he has only the right to be considered for promotion as per Rules. Conditions of recruitment and conditions of service are distinct and the latter is preceded by an appointment according to rules. The former cannot be relaxed. Relevant paras are as under:-

> *"31. No employee has a right to promotion but he has only the right to be considered for promotion according to rules. Chances of promotion are not conditions of service and are defeasible Accordingly we hold*
>
> *that seniority, though, normally an incidence of service, Seniority Rules, Recruitment Rules and Promotion Regulations form part of the conditions of recruitment to the Indian Police Service by promotion, which should be strictly complied with*

before becoming eligible for consideration for promotion and are not relaxable.

33. *Rule 3 of the Residuary Rules provides the power to relax rules and regulations in certain cases – where the Central Government is satisfied that the operation of – (i) any rule made or deemed to have been made under the Act, or (ii) any regulation made under any such rule, regulating the conditions of service of persons appointed to an All India Service "causes undue hardship in any particular case", it may, by order, dispense with or relax the requirements of that rule or regulation, as the case may be, to such an extent and subject to such exceptions and conditions as it may consider necessary for dealing with the case in a "just and equitable manner". Rule 3 empowers the Central Government to relief undue hardship caused due to unforeseen or unmerited circumstances. The Central Government must be satisfied that the operation of the rule or regulation brought about undue hardship to an officer. The condition precedent, therefore, is that there should be an appointment to the service in accordance with rules and by operation of the rule, undue hardship has been caused, that too in an individual case. The Central Government on its satisfaction of those conditions, have been empowered to relieve such undue hardship by exercising the power to relax the condition. It is already held that conditions of recruitment and conditions of service are distinct and the latter is preceded by an appointment according to Rules. The former cannot be relaxed. The latter too must be in writing that too with the consultation of UPSC ....."*

Hon'ble Apex Court in ***Suraj Parkash Gupta and others Versus State of J&K and others, (2000) 7 SCC 561***, after taking note of various pronouncements on the subject, observed that relevant Recruitment Rule for promotion cannot itself be treated as one producing hardship. Relevant para in this regard reads as under:-

"32. On facts, the reasons given in the Cabinet note for granting relaxation are hopelessly insufficient. In fact, the letter of the Commission dated 25-11-1997, shows that the Commission was prepared to give its opinion in regard to regularisation of each promotee but the Government backed out when the Commission called for the records relevant for considering suitability for regular promotion. In our view, there can be no hardship for a person seeking appointment or promotion to go by the procedure prescribed therefor. The relevant Recruitment Rule for promotion cannot itself be treated as one producing hardship. Narender Chadha case must be treated as an exception and not as a rule. In fact, if such relaxation is permitted in favour of the promotees then the same yardstick may have to be applied for direct recruits. In fact the J&K Government has already started to do so and this has not been accepted by this Court in Narinder Mohan case and Dr. Surinder Singh Jamwal case referred to above. If it is to be held that direct recruitment can also be permitted without consulting the Service Commission (in case it is required to be consulted there will, in our opinion, be total chaos in the recruitment process and it will lead to backdoor recruitment at the whims and

fancies of the Government). Such a blanket power of relaxation of Recruitment Rules cannot be implied in favour of the Government."

In the facts of instant case, relaxation in requisite length of service period was granted by the respondent-University in favour of some employees for the purpose of their next promotion only on the ground of their impending retirement even ignoring the claim of their senior, while exercise of same power was refused in favour of others, who also needed relaxation in required length of service by the same period and exercise of such power in their favour would not have resulted in any supersession. It

is well settled that exercise of discretion should be legitimate, fair and without any aversion, malice or affection. The discretionary power to relax should be exercised sparingly to meet exceptional situation warranting such exercise. From the facts, it appears that the respondent-University did not exercise the discretionary power of relaxation either in a judicious or in an equitable manner. The principle that relaxation should only be an exception and not the rule, was not kept in mind by the respondents while exercising this power. Apparently, the principle that adherence to Recruitment & Promotion Rules should not ordinarily be considered as hardship for a person seeking appointment or promotion thereunder, was also not followed strictly. Be that as it may. The cases of grant of relaxation by the respondent-University being relied by the petitioner for claiming similar treatment are neither before this Court nor the same can be gone into at

this stage. However, on the analogy of exercise of this discretionary power of relaxation in favour of some incumbents, the respondent-University cannot be directed to exercise same discretion in favour of the petitioner. Exercise of discretionary power of relaxation in one's favour cannot be claimed as a matter of right. It remains a fact that subsequent to the amendment carried out in the Himachal Pradesh University Act, 1970 on 16.03.2015, power of relaxation has not been used by the respondent. It is not for the Court to use the power and effect relaxation. Therefore, the claim of the petitioner for retrospective promotion to the post of Planning & Development Officer by way of relaxation of requisite length of service under the R&P Rules is held to be not tenable. By way of abundant caution, it is clarified that observations made heretofore with respect to mode and manner of exercise of discretionary power of relaxation are only for the purpose of adjudication of petitioner's claim and shall have no effect upon the concluded cases.

4(ii). Claim of pay scale attached to the higher post:-

4(ii)(a). While refusing to exercise in petitioner's favour, the discretionary power to relax the period of service required for promotion to the post of Planning & Development Officer, the respondent-University had given him additional charge of the same post keeping in view the work requirement. The decision in this regard as contained in Note No.261 dated 12.11.2014 reads as under:-

> *"1. There is no justification to promote Sh. Bishan Singh Chandel, Deputy Registrar (Estate) to the post of Planning & Development Officer. However, keeping in view the requirement of work, he is given the additional charge of the said post without any financial benefits till further orders."*

This was followed by an order dated 12.11.2014, whereunder petitioner was to look after the work of Planning & Development Officer in addition to his own duties without any financial benefits till further orders:-

> *"Shri Bishan Singh Chandel, Deputy Registrar, Estate Office will look after the work of Planning & Development Officer with immediate effect in addition to his own duties without any financial benefits till further orders."*

It is an admitted fact that the petitioner worked as Planning & Development Officer w.e.f. 12.11.2014 till his superannuation on 31.03.2015. In support of petitioner's claim of pay of this post, reliance has been placed upon a decision rendered in CWP(T) No.7099 of 2008.

4(ii)(b). In ***CWP(T) No.7099 of 2008***, titled ***Shiv Dayal Kataria Versus Himachal Pradesh University,*** a Co-ordinate Bench of this Court while taking note of the fact that the petitioner therein had worked as Superintending Engineer in the respondent-University, held him entitled for financial benefits attached to the post. Paras 8 and 9 of the judgment read as under:-

"8. Now, the Court has to advert to the second limb of argument of Mr. Dilip Sharma. According to him, his client was permitted to discharge the duties of Superintending Engineer. This order was passed by the Registrar of the respondent-University on 03.03.1994, whereby the petitioner was invested with the powers of Superintending Engineer and was to function as overall Incharge of the three engineering wings (Construction, Design & Architectural) of the respondent-University. He made representation seeking benefit of the services, he had rendered as Superintending Engineer on 09.09.1997. The Vice-Chancellor on 11.09.1997 as per his endorsement stated as follows:

> *"Allowed if it is on record that Sh. S.D. Kataria has performed the duties of S.E. for more than 3 years."*

9. It is not denied by the respondents in the reply that the petitioner has not worked as Superintending Engineer. The objection raised by the respondent-University is that firstly it was made clear to the petitioner that he will not get any financial benefits as per office order dated 03.03.1994 and secondly, the Vice-Chancellor had no jurisdiction/authority under the Himachal Pradesh University Ordinances to pass orders on 11.09.1997. According to the respondent-University, the competent authority in the case of category-B is the Executive Council of the University and not the Vice-Chancellor. It is true that to take a decision with regard to appointment, suspension, removal from office, fixing of salary, control or any other

kind of matter, as far as employees of categories 'A' and 'B" are concerned, the competent authority was the Executive Council. The petitioner was also informed on 03.03.1994 that he will not be entitled to any financial benefits. However, fact of the matter is that petitioner has worked for more than three years as Superintending Engineer and an endorsement was also made by the Vice Chancellor on 11.09.1997 in favour of the petitioner. An employee cannot be deprived of his right to get higher salary if he discharges the duties of higher office. In this case, the petitioner was permitted to work as Superintending Engineer. Superintending Engineer is a higher post and the post of Executive Engineer is in feeder category. ***A person, who performs the duties of higher office, must get the salary of the same post. He cannot waive of his fundamental/legal right to get the higher salary, even if an endorsement was made in the office order that the petitioner will not get the monetary benefits. Petitioner is also entitled to get the salary of the post of Superintending Engineer on the well recognized principle of "equal pay for equal work".*** *The Executive Council no doubt is the competent authority to take decisions with regard to 'A' and 'B' categories of employees, governing their conditions of service, but once the endorsement has been made by the Vice-Chancellor, the matter was required to be taken before the Executive Council. The respondent-University in its own wisdom has not taken up the matter with the*

Executive Council. ***The petitioner was permitted to discharge the duties of the post of Superintending Engineer. The Court has also taken note of the fact that even though the post of Superintending Engineer was not available, however, the petitioner was still invested with the powers as were exercised by the Superintending Engineer of H.P.P.W.D. In view of this, the petitioner cannot be denied the salary of the post of Superintending Engineer for working more than three years as Superintending Engineer.***"

LPA No.100 of 2010, preferred by the respondent-University against the above judgment, was dismissed vide judgment dated 27.10.2015. Learned Standing Counsel for the respondent has not disputed the fact that the above judgment has since attained finality and stands implemented. The ratio of the above judgment applies to the facts of the instant case as well. Here also the petitioner had admittedly discharged the duties of the higher post of Planning & Development Officer w.e.f. 12.11.2014 till his superannuation on 31.03.2015. This was pursuant to an order passed by the respondent in terms of the decision taken by the Competent Authority. The post of Planning & Development Officer lying vacant
w.e.f. 21.07.2014, was a higher post in line of promotion from the post of Deputy Registrar substantively held by the petitioner. Therefore, following the dictum of Shiv Dayal Kataria's case, *supra*, in the facts and attending circumstances of the case,

petitioner deserves to be granted the pay scale attached to the said post.

No other point was urged by either of the parties.

In view of above discussion, petitioner's claim for retrospective promotion to the post of Planning & Development Officer w.e.f. 01.09.2014 is held to be not tenable. However, respondent-University is directed to release the pay and allowances alongwith consequential benefits to the petitioner for discharging the duties of Planning & Development Officer w.e.f. 12.11.2014 to 31.03.2015, within a period of six weeks from today.

The writ petition is disposed of in the above terms. Pending miscellaneous application(s), if any, also stand disposed of.

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

Sahil Kumar ...Appellant

Versus

HRTC and another ....Respondents

FAO No. 349 of 2019
Judgment Reserved on 22nd April,2021
Date of Decision 13th May, 2021

Appeal against the award passed by M.A.C.T whereby claim petition preferred by appellant has been dismissed. Held- it stands proved on record that incident had occurred where in debris of wall collapsed with hit of bus owned and possessed by respondent No 1 being driven by its employee respondent No 2 had damaged scooty of appellant, respondent No 2 despite having entered in

to compromise has denied the occurrence and his undertaking to indemnify the appellant-Respondent No. 02 and his employee has failed to compensate appellant-it is matter of record that quantum of loss has not been proved by leading cogent, reliable and satisfactory evidence. It is hard fact that because of false denial on the part of respondents, appellant has been relegated to MACT as well as Hon'ble H.C. Thus appellant deserves to be compensated at least for that, therefore respondents are liable to pay Rs. 15,000/- in lump sum to appellant- Appeal partly allowed.

Cases referred:

National Insurance Co. Ltd. vs. Syeda Najmunnissa and others, 2011 ACJ 1222;
Oriental Insurance Company Ltd. vs. Gian Chand and others, III(2002) ACC 168 (DB);
P.C. Purushothama Reddiar vs. S. Perumal, AIR 1972 SC 608;
Sona and others vs. Haryana Roadways, 1996 ACJ 421;
United India Assurance Company Ltd. vs. Kamla Rani, 1997 ACJ 1081 (P&H);

For the Appellant: Mr. P.M. Negi, Advocate, through Video Conferencing.

For the Respondents: Mr. Vikas Rajput, Advocate, for respondent No.1 through Video Conferencing.

Mr. Arun Raj, Advocate for respondent No.2,through Video Conferencing.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

In this appeal, challenge has been laid to award passed by Motor Accident Claims Tribunal (hereinafter in short 'MACT') in MAC Petition No. 102 of 2017, titled as Sahil Kumar vs. Himachal Road Transport Corporation (HRTC) and another whereby claim petition preferred by appellant has been dismissed.

2 Appellant had preferred the claim petition for recovery of damages caused to his scooty by debris of wall, which collapsed with hit of

bus being driven by respondent No.2 on 30.3.2017 at Bus Stand Hamirpur when it dashed with wall while respondent No.2 was reversing it.

3 It is the case of appellant that Bus Stand Hamirpur is adjacent to his house and is separated by brick wall over a retaining wall and on 30.3.2017 at about 8 AM his scooty was parked in his courtyard adjacent to retaining wall whereupon brick wall of Bus Stand was existing and at that time when respondent No. 2 was parking his bus towards petrol pump of HRTC located at Bus Stand Hamirpur, the bus had hit the wall and with its impact wall collapsed and debris had fallen on scooty of appellant.

4 According to appellant, incident was informed to Police Post, Hamirpur and Insurance Company. However, respondent No.2, in the Police Post, situated at Bus Stand Hamirpur, had entered into a compromise and therefore, report with police was not recorded formally, rather a compromise deed was reduced into writing as Ext.PW1/A, which was signed by respondent No.2 and appellant and also by witnesses.

5 Defence of respondents is denial simplicitor. The occurrence as well as causing of damage to scooty and compromise in the matter by respondent No.2 vide writing Ext.PW1/A have been denied.

6 Appellant, including himself, has examined four witnesses, whereas, respondent No.2 has examined himself as a defence witness.

7 The High Court of Andhra Pradesh in ***National Insurance Co. Ltd. vs. Syeda Najmunnissa and others,*** reported in ***2011 ACJ 1222,*** referring judgment of Punjab and Haryana High Court in case ***United India Assurance Company Ltd. vs. Kamla Rani,*** reported in ***1997 ACJ 1081 (P&H),*** has reiterated that Motor Vehicles Act is not governed by Rules or procedure envisaged by the Civil Procedure Code and Evidence Act and Tribunal is entitled to evolve its own procedure to meet the ends of justice based on principles of justice, equity and good conscience.

8 The Punjab and Haryana High Court in another pronouncement in case ***Sona and others vs. Haryana Roadways,*** reported in ***1996 ACJ 421,*** has observed that Motor Vehicles Act is legislation which was enacted for the benefit of claimants and therefore, the rule of strict compliance of provisions of Civil Procedure Code is not to be applied to the accident cases.

9. It is settled legal position that strict principles of Civil Procedure Code and Evidence Act are not applicable to the enquiries to be made in the claim petition. It is also settled that in claim case, evidence is to be evaluated on the basis of principle of preponderance of probability.

10 Appellant, in his examination-in-chief, has reiterated the incident and has stated that he intended to lodge report in Police Chowki, but, respondent No.2 had entered into the compromise by stating that he would indemnify the loss caused to the scooty, whereupon, compromise deed Ext.PW1/A was reduced into writing, which, apart from him, was signed by respondent No.2 Ashok Kumar and witnesses Surender Kumar, Varun Kumar and Nilaksh Chopra. He has further stated that he got his scooty repaired from agency. To substantiate his claim, he had produced the bill Ext.PW1/B on record to prove the expenditure incurred by him for repairing his scooty from the Agency. He has further stated that on refusal of Ashok Kumar to make the payment as agreed, he was constrained to file claim petition.

11 PW2 Varun Kumar, whose signatures are on agreement and compromise deed Ext.PW1/A, which he has admitted, has stated that he did not remember where the compromise was reduced in writing and he has refused to identify the signatures of respondent No.2 on compromise deed. In his cross-examination, he has stated that agreement was already prepared before his arrival and he was only asked to put his signatures thereon. According to him, he had put his signatures in Police Chowki. He is friend of the appellant but he has deposed in most natural manner and without making

any attempt to help the appellant out of the way, he has narrated the facts and circumstances in which he had put signatures on the compromise.

12 PW3 Nilaksh, another witness to the agreement, has identified his signatures in red encircle 'C' and has also identified the signatures of appellant Sahil, respondent No.2 Ashok Kumar and he has reiterated that respondent No.2 had admitted his guilt and had agreed to indemnify the appellant. He has also stated that agreement was reduced into writing in Lady Police Chowki located on the Bus Stand, but, no Lady Constable had signed thereon. According to him, he had arrived on spot after hearing the sound of collapse of wall.

13 Respondent No.2 appearing as RW1, has refuted the compromise arrived at between him and appellant, and has also not admitted his signatures on Ext.PW1/A. However,in examination-in-chief as well as in cross examination, he has admitted that on 30.3.2017 he was on duty on Bus No. HP-67-1840 which was parked at Bus Stand Hamirpur and he was present at Bus Stand on duty at 8 AM. He has also admitted that mobile number mentioned on agreement below his name belonged to him. Though, he has denied his signatures on agreement, however, it is evident on comparison with naked eye that signatures put on compromise and signatures put by respondent No.2 in his statement recorded in the Court, while appearing as RW1, are having identical strokes leading to clear inference that both signatures have been put by one and the same person.

14 It is also noticeable that at the time of production of compromise on record and exhibiting it as Ext.PW1/A, no objection with respect to its admissibility or mode of proof was ever taken. Denial of execution of a document is one thing, whereas, objection with respect to admissibility or mode of proof is another thing. Even where execution of a document has been denied, a party has a right to raise objection with respect to admissibility as well as mode of proof at the time of its production and exhibition.

Undoubtedly, even if a document is admitted in evidence and its mode of proof has not been questioned, then also, it does not mean that contents thereof have been proved to be genuine. Admissibility of a document in evidence and correctness and/or genuineness of contents thereof are two separate things. Even after admitting a document in evidence, its genuineness as well as relevance can be determined either way on the basis of material on record.

15 As held by the Supreme Court in ***P.C. Purushothama Reddiar vs. S. Perumal,*** reported in ***AIR 1972 SC 608,*** that when no objection is raised regarding the admissibility of documents, the documents shall be deemed to have been duly proved in accordance with law and can be read in evidence. This principle has again been reiterated by the Supreme Court in ***P.C. Thomas vs. P.M. Ismail and others,*** reported in ***AIR 2010 SC 905,*** observing that once a document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that mode adopted for proving the documents is irregular, cannot be allowed to be raised at any stage subsequent to marking of document as exhibit. This principle has also been followed by Division Bench of this High Court in ***Oriental Insurance Company Ltd. vs. Gian Chand and others,*** reported in ***III(2002) ACC 168 (DB)***.

16 In the present case, at the time of accepting the documents i.e. compromise Ext.PW1/A and bills Ext.PW1/B no objection with respect to admissibility of these documents and mode of proof was raised. Therefore, these documents are to be considered to have been placed on record in accordance with law and are to be admitted in evidence. However, genuineness, correctness of contents and relevancy thereof may be determined by Court by taking into consideration the contents thereof or other material on record.

17 To prove the quantum of damage suffered by appellant is concerned, he has examined PW4 Lekh Raj as a motor mechanic, who had

repaired his scooty. In his examination-in-chief, the said witness has stated that after repairing of scooty, he had issued bill Ext.PW1/C, however, there is no such bill on record. The appellant as PW1, in his statement has stated that bills of repair are Ext.PW1/B. As a matter of fact, invoice Nos. 322, 323 and 324 issued by/on behalf of Ms/ Narainder Motors Hamirpur have been placed on record by appellant as Ext.PW1/B. Leaving this apart, even if it is considered that bills referred as Ext.PW1/C in statement of PW4 are the bills referred in statement of PW1 as Ext.PW1/B then also I find that these bills are of no help to appellant for reasons enumerated hereinafter.

18 These bills, in fact, are not bills, but invoices issued by or on behalf of M/s Narainder Motors Hamirpur. PW4 in his statement nowhere stated that how he is linked with M/s Narainder Motors. In his examination-in-chief, he has stated that these bills were issued by him, whereas, in his cross-examination, he has stated that these bills were prepared by Manager Pankaj, who has left the job. With whom Pankaj was Manager and from which concern, he had left the job is not clear from statement of PW4. Further PW4 has also not stated that in which capacity he had issued these bills. He, in his statement, has nowhere stated that he is working as an employee or otherwise associated with M/s Narainder Motors. He has simply stated that he is motor mechanic and he had repaired the scooty of appellant and had issued the bills to appellant and appellant had made payment thereof.

19 Further, it is also not clear that to whom payment was made, either to M/s Narainder Motors or to PW4 and if to PW4 in which capacity he had received the payment whether it was received as an individual or an employee of M/s Narainder Motors and in case, he had repaired the scooty as an individual motor mechanic then how and why he had issued the bills on behalf of M/s Narainder Motors. All these questions raise doubt about genuineness of these bills and amount claimed to have been spent for repair of scooty as mentioned in these bills.

20 In his cross-examination, appellant has stated that he had purchased the scooty for a consideration of Rs.50-55 thousand 3-4 years ago. Appellant has not produced registration certificate as well as insurance of vehicle on record. In compromise deed, it is stated that matter was also reported to Insurance Company, but, appellant is completely silent as to whether any claim was submitted to Insurance Company or not and if so, whether any claim was received by him from Insurance Company or not. Even if it is considered that he has not claimed anything from Insurance Company, then, also there is no cogent and reliable evidence on record to establish the actual expenditure incurred by appellant for repairing the scooty as bills placed on record have been issued by and on behalf of M/s Narainder Motors, whereas, PW4 is completely silent about his link or association with M/s Narainder Motors. No person from M/s Narainder Motors has been examined. Though, it is claimed that amount mentioned in these bills has been paid by appellant, but, to whom or through which mode is not clear as these bills Ext.PW1/B are not bills or cash memos but the invoices without indication as to whether these were issued after receipt of payment or before that. No proof of mode of payment against the invoices placed on record has been produced and proved.

21 As scooty was bought about four years ago for a consideration of Rs.50-55 thousand and therefore, after four years its value must have decreased. As per norms adopted by Insurance Company, within a period of 3 to 4 years, value of vehicle is assessed after depreciating 40% value thereof. Though no proof has been placed on record with respect to actual purchase value of scooty, however, taking it as Rs.55,000/-, as claimed by appellant, after four years its value by applying 40% depreciation would have been Rs.33,000/-, whereas, appellant has placed on record invoices Ext.PW1/B for Rs. 34571/- as a cost of repair of scooty. It is also pertinent to note that in claim petition a claim of Rs.1,00,000/- has been putforth.

22 For evidence on record, referred supra, I find that appellant has failed to establish on record the actual quantum of expenditure incurred by him for repairing the scooty. Therefore, in absence of cogent and reliable evidence, it is not possible to determine the quantum of damages suffered by appellant.

23 In view of discussion herein-above, I find that all grounds in reference regarding damage probability caused to scooty and compromise arrived at between appellant and respondent No.2 has been established on record. However, evidence to quantify the damage for which appellant is entitled has not been established by leading cogent and reliable evidence.

24 However, it stands proved on record that incident had occurred wherein debris of wall, collapsed with hit of bus owned and possessed by respondent No.1 being driven by its employee respondent No.2, had damaged the scooty of appellant. But, respondent No.2 despite having been entered into compromise has denied the occurrence and his undertaking to indemnify the appellant. Respondent No.1 Corporation has also followed the same suit. Therefore, respondent No.2 and its employer, respondent No.1, are liable to compensate appellant. It is also matter of record that quantum of loss has not been proved by leading cogent, reliable and satisfactory evidence. At the same, it is also a hard fact that because of false denial on the part of respondents, appellant has been relegated to the MACT as well as this Court and thus, appellant, deserves to be compensated, at least for that and therefore, respondents are held liable to pay Rs.15,000/- in lump sum to appellant on this count. Accident had occurred during course of employment of respondent No.1 while he was performing his official duty. Therefore, being employer respondent No.1 Corporation is directed to pay Rs.15,000/- to the appellant on or before 15th June, 2021.

Appeal is allowed partly in aforesaid terms.

BEFORE HON'BLE MR. JUSTICE L. NARAYANA SWAMY, CHIEF JUSTICE AND HON'BLE MR. JUSTICE ANOOP CHITKARA, J.

M/s. Amit Singla .... Appellant.

Versus

State of Himachal Pradesh & others .... Respondents.

LPA No.78 of 2020.
Reserved on: March 2, 2021.
Date of Decision: April 24, 2021.

Appeal against the refusal of ld single judge to quash the evaluation proceedings and tender process vide which the tender was allotted to respondent no 9-Held once the bid document required a contractor to show that he was in physical possession of a particular kind of machinery in working order –he cannot explain that he would produce the same in future-The essence of civil construction is time limit within which the construction must be completed-The violation of time limit leads to price escalation and throwing out of gear the schedules of so many other units and things which depends upon the project's timely completion. There is no error in the evaluation for declaring the appellant's bid as non responsive and there is no reason to interfere in tender process –appeal dismissed.

For the Appellant: Mr. Gaurav Chopra, Mr. Pranay Pratap Singh and Mr. Reshabh Bajaj, Advocates.

For the respondents: Mr. Ashok Sharma, A.G. with Mr. Nand Lal Thakur, Addl. A.G and Mr. Rajat Chauhan, Law Officer, for respondents No.1 to 8.
Mr. J.S. Bhogal, Senior Advocate with Mr. Suneet Goel, Advocate for respondent No.9.

The following judgment of the Court was delivered:

Anoop Chitkara, Judge.

Aggrieved by the refusal of learned Single Judge to quash the evaluation proceedings and the tender process by which the tender allotted to the respondent no. 9; the petitioner has come up before this Court.

2. Under the Standard Bidding Document, the petitioner had participated in the invitation for bid for improvement and strengthening of Thalout-Thachi-Somagd Road Km 0/0 to 34/0 (Section Thalout Panjain to Thachi Km 0/0 to 25/0) (Job No.CRF-HP-2018-19-161) (SH:- ROFD/FC, M/T, CD Works, R/wall, B/Wall, PCC V-Shape Drain, Parapets, Crash Barrier, Road Furniture, Rain Shelter and Sign Board).

3. Vide communication dated 11.10.2019 (Annexure P/8) addressed to the petitioner by Chief Engineer, HP.PWD, Mandi Zone, it was pointed out that the tender was under process of technical evaluation and they sought clarification primarily qua the following two points:

1). Invoice-cum-delivery challan for Batching Plant - CP1881518900 costing Rs.23,75,000/- as uploaded by you doesn't seem to be as per requirement of item No.16 (P/L bituminous concrete with 100-120 TPH batch type hot mix plant.....)

2). Tax invoice No.INV-000561 dated 19.07.2019 as uploaded by you doesn't seem to be as per requirement of Track mounted mobile stone crusher as provided in the bid document.

3). xxx xxx xxx

4). xxx xxx xxx

5). xxx xxx xxx

4. In response to Annexure P/8, the petitioner informed vide communication (Annexure P/11) dated 30.10.2019. The response of the petitioner to points No.1 and 2 is extracted as follows: -

1. In reply to the said point, it may be brought to your notice that point no.16 (P/L bituminous concrete with 100-120 TPH batch type hot mix plant....), that you have mentioned in this point,

is a part of the financial bid and not a part of the qualifying criteria or Technical Bid. There is no such point in the standard Bidding Document as available with us. Even the list where a proper list of machinery has been published only a condition for Batching Plant is mentioned. There is no mention of a Batch Mix Plant to be used for making Cementous concrete or bituminous mix. We have already shown the ownership of a Cement Batch Mix plant and are further also submitting an undertaking from the owner of a similar Batch Mix plant and are further also submitting an undertaking from the owner of a similar Batch Mix Plant as desired by you as per letter dated 11.10.2019 (annexed herewith as **Annexure A-1**). This undertaking clearly states that if we are awarded this work then the company giving the undertaking and owner of the similar Batch Mix Plant shall give this plant on hire basis to our firm to complete the said work. Rather, as per the additional conditions as per the latest IRC Codes of Practice, stated on page 75, it is clearly mentioned that an affidavit has to be given for installing the Batch Type Hot Mix Plant within 25 km from the location of the work and for the same an affidavit duly attested by not less than Executive Magistrate has to be appended with the tender documents. This condition has been duly complied with by our firm.

2. In reply to point No.2, it is submitted that the invoice provided by us is for the crusher machine jaw, plate for stone crusher machine with conveyor belt and idler roller and fully in consonance with the requirement of Track mounted mobile stone crusher as provided in the bid document. The only difference between the invoice provided by us and the requirement of the tender is that our crusher is Wheel mounted while the department is asking for a track mounted crusher. The mode of mounting of the crusher will have no impact on the output of the crusher. Rather, the wheel mounted crusher will be much more portable for a work to be executed in almost 25 KM. Additionally, we are annexing the

> ownership proof and an undertaking of the firm which has consented to provide us with the said crusher on hire basis provided the work is awarded to our firm (Annexed herewith as **Annexure A-2).**

5. The petitioner annexed an undertaking of NH Construction Private Limited. The company had assured to lease out a Batch Mix Plant to the petitioner for the work described above. Similarly, it gave the undertaking to lease out Jaw Crusher (track mounted mobile stone crusher).

6. The petitioner also submitted documents regarding works of Kalpa Division.

7. During the evaluation of the tender documents, the Evaluation Committee vide proceedings dated 4.11.2019 found the petitioner's offer and bid as non-responsive. In contrast, it found the technical bid submitted by the 9th respondent as responsive.

8. As per the proceedings of Evaluation Committee, Annexure P/16, the petitioner had not attached documents of Batch Mix Plant and Track Mounted Mobile Stone Crusher. Apart from the shortcomings mentioned in column No.19 (4.5.4) of the Evaluation Committee, another stipulation was mentioned in column No.17 (4.5.3, sub-clause B), as per which the petitioner's performance for the works carried out in Kalpa Division were to be considered.

9. Challenging the declaration of the technical bid of the petitioner as non-responsive, the petitioner came up before this Court by filing CWP No.3368 of 2019. In the said writ petition, the petitioner sought quashing of the evaluation proceedings dated 4.11.2019 of Evaluation Committee (Annexure P/16); directing the respondents to open the financial bid of the petitioner, and restraining the first respondent from finalizing the tender process, and further to restrain from awarding of the work mentioned above.

10. Vide judgment dated 14.12.2020, learned Single Judge of this Court dismissed the writ petition. Challenging the dismissal of the petition for

quashing of the declaration of the technical bid as non-responsive, the petitioner came up before this Court by filing an Intra Court Appeal under Clause 10 of the Letters Patent constituting the High Court of Judicature at Lahore, the 21st March 1919, as extended to the High Court of Himachal Pradesh.

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

12. The Evaluation Committee vide proceedings dated 4.11.2019 (Annexure P-16) had declared the bid of the appellant-petitioner as non-responsive due to the reasons that the documents of Batch Mix Plant, as well as Track, Mounted Mobile Stone Crusher were not attached in terms of the Standard Bidding Document relating to the procurement of civil works (Annexure P/1).

13. As per the response of the State, as mentioned in para 2, sub-clause D, the petitioner did not fulfill condition No.4.5.5 of the Instructions to Bidders (ITB).

14. Another reason for rejection of the technical bid was that Track Mounted Mobile Stone Crusher's requirement was not fulfilled despite giving opportunities. The petitioner uploaded a lease agreement as per which there was a promise to lease out a Wheel Mounted Stone Crusher. It was contrary to the requirement given the strata of land, which necessitated a track-mounted stone crusher and not a wheel-mounted stone crusher. Furthermore, the lease was yet to occur, it was not on stamp papers, and there was no assurance that the lessee would fulfill its promise.

15. Learned counsel for the appellant argued that the petitioner had removed the deficiencies in the initial facts of the bid documents. He stated that vide Annexure P/11, they had attached an undertaking given by one NH Construction Private Limited. The latter were owners of bituminous Batch Mix Plant and owners of Roljack Jaw crusher (Track mounted mobile stone crusher). NH Construction Private Limited had undertaken to lease out the

same for the execution of the work described above. To substantiate the ownership, one commercial and tax invoice was annexed, which shows the ownership of NH Construction Private Limited.

16. Mr. Ashok Sharma learned Advocate General argued that these undertakings could not be relied upon because, in case of refusal of NH Construction Private Limited, the work would suffer, which has to be completed in a time-bound manner and particularly during summer seasons because the area gets lots of rain and snow.

ANALYSIS AND REASONING:

17. The Evaluation Committee vide proceedings dated 4.11.2019 (Annexure P-16) had declared the petitioner-appellant bid as non-responsive. The two primary reasons mentioned were that the 'Batch Mix Plant' and the 'Track Mounted Mobile Stone Crusher' documents were not attached. The petitioner's stand was that they had removed the shortcomings as reflected in Annexure P-11 and had placed on record undertakings by one NH Construction Private Limited, who had undertaken to lease out both this equipment for usage in work described above. Before the technical bid's rejection, the concerned Chief Engineer, the 3rd respondent, had informed the petitioner about the deficiencies. It was explicitly pointed out that the requirement was a "Track Mounted Mobile Stone Crusher." A perusal of the undertaking letter, Annexure P-11 on page 212-F, is a tax invoice issued by the manufacturer in favor of M/s. NH Construction Private Limited, describing the crusher described above. At this stage, it is relevant to extract the undertaking given by NH Construction Private Limited, which is reproduced as under:

"**UNDERTAKING**

We hereby undertake that we are the owners of the Roljack Jaw Crusher (Track Mounted Mobile Stone Crusher). We

hereby undertake that we will lease out our Roljack Jaw Crusher (Track Mounted Mobile Stone Crusher) to M/s. Amit Singla Chandigarh on hire basis for the execution of the work of "Improvement and Strengthening of Thalout-Thachi-Somagd Road Km.0/0 to 34/0 (Section Thalout Panjan to Thachi Km 0/0 to 25/0) (Job no.CRF-HP-2018-19-161) (SH:- ROFD/FC, M/T, CD Works, R/walls, B/wall, PCC V-Shape Drain, Parapets, Crash Barriers, Road Furniture, Rain Shelter and Sign Board)"in Himachal Pradesh."

18. Now, main reference is made to the tax invoice, the description of goods, in Tax invoice (Annexure P-11) reads as follows:

"Roljack jaw crusher, size:24"x16" Heavy Duty Single Toggle Machine, Molded Swing Jaw, Doubt Wheel, Lubrication GREASE Type, Jaw Plate Magnanese Steel, chrome alloy, Grade-7, Hydraulic Chrome Alloy, Grade 7, Hydraulic jack for jaw Gap Setting Bear "

19. A perusal of this description does not point out that it is a track-based crusher. Mr. Ashok Sharma learned Advocate General stated on instructions that the strata of the concerned road are slushy. The area gets lots of rain and snow due to which the possibility of wheel mounted stone crusher being struck up in the slush would be there, and to rule out that situation, the department insisted on a track-mounted mobile stone crusher. We can take judicial notice that a track-mounted mobile stone crusher is similar to a battle tank, which moves on a self-laid track. It is in contrast to any vehicle that moves on wheels, which may get stuck up in snow, slush, or marshy lands. The concerned engineers who were experts in hill road making could conceive the possible bottlenecks in the construction. To ensure timely and speedy construction, they insisted upon a track-mounted mobile stone crusher. Initially, the petitioner did not annex the documents and subsequently annexed a document of ownership of another private limited company with its undertakings and that too of a crusher which did not establish with certainty

that it was track mounted. Except the undertaking, there is no other document on record to show that the machinery was track mounted.

20. A perusal of the undertaking given by M/s. NH Construction Private Limited reveals that they had undertaken (supra) to lease out such machinery without specifying any terms and conditions. Neither the company's resolution to the said effect was attached, nor the amount of lease money for such undertaking. The date from which they will hand over the machinery was also not given. It was also not mentioned that such machinery was presently in working condition as of the undertaking's date.

21. Once the bid document required a contractor to show that he was in physical possession of a particular kind of machinery in working order, he cannot explain that he would procure the same in the future. The essence of civil construction is the time limit within which the construction must be completed. The violation of the time limit leads to the escalation of price and throwing out of gear the schedules of so many other units and things, which depend upon the project's timely completion.

22. Resultantly, there is no error in the Evaluation Committee for declaring the petitioner-appellant's technical bid as non-responsive. Consequently, there is no reason to interfere in this tender process.

23. The learned Single Judge vide his detailed and very well-reasoned judgment had also arrived at the similar conclusion.

Given above, there is no merit in the appeal, which is accordingly dismissed.

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

Ram Nath ....Appellant.

Versus

Oriental Insurance Company and others ...Respondents.

RSA No. 654 of 2008
Decided on: 09.03.2021.

Appeal against the judgment and decree passed by trial court affirmed by first appellate court vide which suit of plaintiff appellant was dismissed- Plaintiff- Appellant was sanctioned a loan of Rs. 2 lacs by SBP Kullu- Enhanced to Rs. 5 lacks- Plaintiff hypothecated stock, machinery- Defendant No. 2 got an insurance policy from defendant No.3 by depositing the premium from loan account of plaintiff- A report was lodged by plaintiff with Police with due information to defendant No.2 but defendant No.2 failed to claim the amount of loss from defendant No.3 and defendant No.2 failed to pay the same to plaintiff through defendant No.3 causing double prejudice to plaintiff by defendant No.2&3 on account of nonpayment of claim amount which was to be further credited to loan account of plaintiff for adjustment of liability which was not done- Held- No case is made out by appellant that despite due diligence the evidence could not be led before the trial court- application under order XLI rule 27 CPC does not fulfill the criteria laid down by Hon'ble apex court with regard to applicability of provision of order XLI rule 27 CPC- In this case the saw mill which was brunt was neither owned by appellant/plaintiff nor he had taken loan qua the same from defendant No.2 , bank- Neither any insurance policy was taken by defendant No.2 for said saw mill from defendant No.3 for which premium was debited in account of plaintiff- The saw mill happened to be owned by son of appellant plaintiff and he was only a guarantor with regard to loan taken by son of plaintiff qua saw mill- plaintiff failed to place on record any evidence to show against the loan so sanctioned to him by defendant no 2, his stock material was insured and any fire policy was purchased in this regard from defendant No.3 Appeal dismissed.

Cases referred:

Karnataka Board of Wakf Vs. Government of India and others, (2004) 10 SCC 779;

State of Gujrat vs. Mahinder Kumar, AIR 2006 SC 1864;

For the appellant : Mr. Sanjeev Kuthiala, Sr. Advocate with Ms. Anida Kuthiala, Advocate.

For the respondents : Mr. G.C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

Brief facts necessary for the adjudication of this appeal are as under:-

Appellant before this Court filed a suit for declaration with consequential relief of mandatory injunction on the pleadings that the plaintiff was sanctioned a loan of `2.00 lac by State Bank of Patiala, Kullu, which was further enhanced to `5.00 lac. In order to secure and safeguard the interests of the bank of recovering risk to hypothecated stock, machinery etc., defendant No. 2 got an insurance policy from defendant No. 3 by debiting the premium from the loan account of the plaintiff. A rapat was lodged by the plaintiff dated 15.10.2003 with Police Station, Kullu and due information in this regard was given by the plaintiff to defendant No. 2 after filing the complaint with the police. Said defendant failed to claim the amount of loss/damages from defendant No. 3 and defendant No. 2 failed to pay the same to the plaintiff through defendant No. 3. Plaintiff was caused double prejudice and loss by defendants No. 2 and 3 on account of non-payment of the claim amount which was to be further credited to the loan account of the plaintiff for adjustment of the liability which was not done. Defendant No. 2 filed a suit for recovery against the plaintiff, however, plaintiff was unable to go into the details of the recovery suit, in which execution proceedings were continuing. His claim arose out of a fire in the saw mill of guarantor of the loan granted to the plaintiff who was his son. Cause of action accrued in favour of the plaintiff when fire broke in the saw mill on 15.10.2003 and thereafter when claim case was filed by defendant No. 2 with defendant No. 3 and was still continuing. On these pleadings, suit for decree of declaration that the act of defendant No. 2 of not claiming damages/loss from defendant No. 3, on account of the fire which broke out in the intervening night of 15-16.10.2003 at about 12:30 a.m. in the timber stock of the saw mill, insured

with defendant No. 3 as banker, to cover risk, premium whereof was paid by debit to loan account of the plaintiff, was wrong and illegal and was a motivated act of the defendants to cause loss to the plaintiff who was entitled to get the same credited towards his loan amount, and for mandatory injunction for issuance of a direction to defendant No. 2 to recover the claim from defendant No. 3 and adjust the same towards the liability of the plaintiff stood filed.

2. The suit was resisted by the defendants. In the written statement filed by defendants No. 1 and 2, it was mentioned that no cause of action had accrued in his favour to institute the suit. It was further the stand of defendants No. 1 and 2 that plaintiff had not hypothecated stock, machinery, store articles etc., as was alleged in the plaint. No premium was paid by the plaintiff, and the suit, which stood filed by defendant No. 2 for recovery against the plaintiff, stood decreed by the Court of learned District Judge, Kullu, on 01.11.2003, execution of which decree was pending adjudication.

3. Defendant No. 3 in its written statement also took the stand that no cause of action accrued to the plaintiff to file and maintain the suit. Defendant No. 3 also denied that the plaintiff had insured his hypothecated stock, machinery, stock articles etc. with defendant No. 3 or any premium in this regard was paid by him.

4. The suit of the plaintiff was dismissed by the Court of learned Civil Judge (Sr. Divn.), Kullu, vide judgment dated 11.10.2007. The appeal filed against said judgment was also dismissed by learned Appellate Court vide judgment and decree dated 15.09.2008.

5. Feeling aggrieved, the plaintiff has filed this regular second appeal, which was admitted on 16.12.2008, on the following substantial questions of law:-

> *"1. Whether both the learned courts below have misread and mis-appreciated the pleadings of the parties as also the oral as well as*

documentary evidence, especially, the statements of PW-1 to PW-3, Ext. PA, Ext. PW/3/A, Ext. DA to Ext. DC?

2. *Whether the financial institution, who had given the loan and processed the loan documents as also the agreement, hypothecation agreement, and other documents and had also undertaken to get the stocks and hypothecated goods and machinery insured by way of debiting the loan account for the purpose of insurance policy and subsequently failing to do so would be liable to indemnify the plaintiff with respect to the loss so caused?*
3. *Whether it was incumbent upon the learned trial court in terms of the directions given by the Hon'ble High Court in CR No. 160 of 2007, dated 19.9.2007, to allow the production of evidence by summoning the concerned Manager of the Bank alongwith the record, as prayed for, in accordance with the application given under Order 16 Rule 6 of the Code of Civil Procedure, was to ensure the compliance of such orders and whether non-compliance of such orders and failure to take such evidence by taking appropriate steps deserves the matter to be remanded to the court below for the purpose of evidence?*

4. *Whether the learned First Appellate Court ought to have invoked the provisions of Order 41 Rule 23 and 25 of the Code of Civil Procedure read with Section 151 of the Code of Civil Procedure with directions to the trail court to determine and try such issue on such question of fact which had been pleaded and whether failure to do so entails the matter to be remanded to the learned trial court for such specific findings and determination of the lis to establish the factum of liability?*
5. *Whether an insured person whose policy has been taken by way of deduction and debit from his account by the financial institution can be held to be liable for any loss so incurred during the pendency of such policy or on the lapse of the financial institution to get the renewal of the policy, the insured can be held to be liable or whether it is the such financial institution on account of whose lapse the renewal has not been made is to held liable by way of vicarious negligence?*

6. I have heard learned Counsel for the parties and also gone through the judgments and decrees passed by both the learned Courts below as well as the record of the case.

7. During the pendency of this appeal, an application was filed under Order XLI, Rule 27 read with Section 151 of the Code of Civil Procedure by the appellant/plaintiff to place on record the copy of statement of accounts of the respondent/ defendant No.3-Bank. It was mentioned in the application that the documents appended therewith were necessary for the adjudication of the appeal and the same could not be adduced earlier as the same were in the file of the Advocate, who was conducting the previous case, which was filed by State Bank of Patiala against the plaintiff. It was only after the Counsel in the present appeal asked the appellant to get the complete record of the previous case that it emanated that the said statement of accounts was already exhibited in the civil suit and the same being *per se* admissible be taken on record as additional evidence.

8. Reply was filed to the application by the respondent-Insurance Company opposing the same *inter alia* on the ground that additional evidence sought to be produced was neither relevant for the adjudication of the case, and even otherwise, the appellant/applicant cannot be allowed to fill up the lacunae left in the case under Order XLI, Rule 27 of the Code of Civil Procedure.

9. Before adverting to the merits of the case, it is necessary to dispose of said application filed by the appellant. Order XLI, Rule 27 of the Code of Civil Procedure reads as under:-

> *"Production of additional evidence in Appellate Court-(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if-*

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted , or

[(aa) the party seeking to produce additional evidence established that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be procured by him at the time when the decree appealed against was passed , or]

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission".

10. In **State of Gujrat vs. Mahinder Kumar**, AIR 2006 SC 1864, Hon'ble Supreme Court of India has been pleased to observe as under :-

"12. Mr. Sorabjee appearing on behalf of the respondents rightly submitted that Order XLI, Rule 27 of the Code of Civil Procedure cannot be invoked by a party to fill up the lacunae in his case. The State found itself in dilemma when confronted with two sets of documents conflicting with each other. There was no plea that the documents sought to be produced by way of additional evidence could not be produced earlier despite efforts diligently made by the State or that such evidence was not within its knowledge. In fact, no ground whatsoever was made out for adducing additional evidence, and the sole purpose for which the State insisted upon adducing additional evidence was to persuade the Court to accept the point of view urged on behalf of the State, since the evidence on record did not support the case of the appellants/State. Having considered all aspects of the matter we are satisfied that the High Court rightly reject ted the applications filed by the State of adducing additional evidence at the stage of appeal which was intended only to fill up the lacunae in its case. (Emphasis supplied)"

11. Similarly in **Karnataka Board of Wakf Vs. Government of India and others**, (2004) 10 Supreme Court Cases 779, Hon'ble Supreme Court has been pleased to hold that a party is not entitled to produce additional evidence unless it is shown that evidence could not be produced before the learned trial Court despite the existence of due diligence. In this case Hon'ble Supreme Court held as under:-

> *"The scope of Order XLI, Rule 27, CPC is very clear to the effect that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary unless they have shown that in spite of due diligence, they could not produce such documents and such documents are required to enable the Court to pronounce proper judgment."*

12. A careful perusal of the application filed under Order XLI, Rule 27 of the Code of Civil Procedure demonstrates that no case is made out by the applicant that despite due diligence the evidence could not be led before the learned Trial Court. In this view of the matter, as the application does not fulfills the criteria laid down by the Hon'ble Supreme Court of India, in various pronouncements made by it with regard to the applicability of provisions of Order XLI, Rule 27 of the Code of Civil Procedure, this application can not be allowed and the same is accordingly dismissed and ordered to be tagged with main case file.

13. Now reverting the merits of the case. On the basis of the pleadings of the parties, learned Trial Court framed the following issues:-

"1. Whether the plaintiff is entitled to the relief of declaration? OPP
2. Whether the plaintiff is entitled to mandatory in junction as prayed for? OPP
3 Whether the plaintiff has no cause of action?
4. Whether the plaintiff is stopped by his act and conduct to file the present suit? OPD
5. Whether the suit is liable to be staged under Section 10 of CPC as alleged? OPD

6. *Whether the suit is not within limitation? OPD*
7. *Whether the suit is bad for mis-joiner of necessary party? OPD.*
8. *Whether the suit has not been properly valued for the purpose of court fee and jurisdiction? OPD*
9. *Whether the plaintiff has not taken fire policy from the defendants and no insurance premium has been paid by the plaintiff to the defendants . If so, its effects? OPD*
10. *Relief."*

14. The Issues so framed were answered as under on the basis of the evidence which was led by the respective parties in support of their respective contentions:-

Issue No. 1 : No.
Issue No. 2 : No.
Issue No. 3 : No.
Issue No. 4 : Yes.
Issue No. 5 : No.
Issue No. 6 : Yes.
Issue No. 7 : No.
Issue No. 8: No.
Issue No.9: Yes.
Issue No. 10: Suit is dismissed vide operative portion of the judgment."

15. A perusal of the plaint at the first blush, gives the impression as if the plaintiff was sanctioned a loan of `2.00 lac by the State Bank of Patiala in terms of loan application dated 09.09.1998 and the same was enhanced to `5.00 lac. To secure the risk cover of this particular loan, an insurance policy was carried out by defendant No. 2 with defendant No. 3 for which premium etc. was paid from the account of the plaintiff and debited from his loan account. After a saw mill for which the loan was so taken got burnt, the plaintiff brought this fact into the notice of the police and simultaneously informed defendant No. 2 also. Defendant No. 2 failed to take up the case with

defendant No. 3 to reclaim the loss in terms of the insurance policy and adjust the same against the loan account of the plaintiff.

16. However, the case is not as straight forward as the appellant wanted the Courts to believe. In fact, in this case, the saw mill which was burnt, was neither owned by the appellant/plaintiff nor he had ever taken any loan qua the same from defendant No. 2-Bank. Neither in lieu of insurance cover taken for the said saw mill, any insurance policy was carried out by defendant No. 2 from defendant No. 3, for which premium was debited in the account of the plaintiff, as has been tried to be portrayed by the plaintiff. The saw mill happened to be owned by the son of the plaintiff and the plaintiff was only a guarantor with regard to the loan which was taken by the son of the plaintiff qua the said saw mill. It is apt to refer the contents of para-9 of the plaint, which reads as under:-

> *"9. That with the settlement of the claim arising out of fire in the Saw mill of Guarantor of the loan granted to the plaintiff who is son of the guarantor the amount will be adjusted towards bank due in the loan and thus amount so paid will be more tha the existing liability."*

17. In the present case, no insurance policy has been exhibited on record by the plaintiff to demonstrate what has been pleaded in the plaint. Ext. PW3/A is not the copy of the insurance policy but is just a schedule of a policy and from the same, it cannot be deciphered that the policy was undertaken for what purpose. Not only this, a perusal of Ext. PW3/A demonstrates that currency of the policy was from 26.03.2001 to 25.03.2002, whereas the date of the alleged fire was 15.10.2003.

18. Plaintiff failed to place any evidence on record to demonstrate that against the loan so sanctioned to him by defendant No. 2, his stock material etc. was insured and any fire policy was purchased in this regard from defendant No. 3.

19. In fact, he has failed to prove on record that the saw mill purportedly burnt on 15.10.2003 was owned by him or that with regard to the same, he had obtained any loan from defendant No. 2. He has failed to demonstrate payment of any premium of insurance qua the same from his account and also the factum of his stock, machinery etc. being duly insured. Not only this, it is a matter of record that as plaintiff had defaulted in paying off the loan amount taken from defendant No. 2-Bank, a suit for recovery stood instituted by the said Bank against him, which was decreed.

20. Besides this, the plaintiff had also filed a complaint under Section 12 of the Consumer Protection Act against defendant No. 2-Bank, on almost similar cause, which was also dismissed. All these facts demonstrate that the appellant/plaintiff has miserably failed to prove that his hypothecated stock, machinery, store articles etc. were indeed insured from defendant No. 3 by defendant No. 2, and on account of breaking of fire in the saw mill on 15.10.2003, any loss was caused to him.

21. Therefore, it cannot be said that either statements of PW1 to PW3 or the documents exhibited on record have been mis-appreciated or mis-read by the learned Courts below. Similarly, when the appellant/plaintiff was not the owner of the saw mill, burning of which was the cause, which led to filing of the suit by the plaintiff, it cannot be said that, in this case, the financial institutions were liable to indemnify the plaintiff or that the Trial Court had not acted in terms of the directions given by the this Court in CR No. 160 of 2007, dated 19.09.2007.

22. Further, there was no occasion for the first appellate Court to invoke the provisions of Order XLI, Rules 23 and 25 of the Civil Procedure Code, especially, when no cause of action had accrued in favour of the plaintiff, on account of burning of the saw mill, which admittedly was neither owned by him, nor it can be said that any loan was taken by the plaintiff for the same from defendant No. 2-Bank. There is no lapse etc. at the instance of

the financial institutions in this case even with regard to the purported renewal etc. of the policy, because as mentioned above, the very foundation of the case of the plaintiff is based on an attempt to mislead the Courts as the plaintiff wanted the Courts to believe that somehow it was he, who had taken the loan qua the saw mill, which was gutted in fire on 15.10.2003, which is totally incorrect. Substantial questions of law are answered accordingly.

In view of above discussion, the appeal being devoid of merit is dismissed with costs. Pending miscellaneous application(s), if any, also stand disposed of accordingly.

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

Seema .....petitioner

Versus

State of Himachal Pradesh ..... respondent

Cr.M.P.(M) No. 581 of 2021
Decided on: 10.05.2021

The petition for regular bail in F.I.R. No. 11/2021 U/s 21 & 29 N.D.P.S Act- Allegations are that during raid in house of Anchal, Anchal along with her two daughters, including bail petitioner and minor son SARANG was present. His other son Sikander was not present- when courtyard with in boundary of house was dug-digging led to recovery of a steel box containing Rs. 1,74,000/ and at some other place, a carry bag containing brown coloured substance ascertained to be as Heroine weighing 377.8 gm, held- mere presence of daughter bail petitioner, aged 21 years, a student in her home along with her father at about 10 PM in January in a village in district Kangra would not lead to an automatic inference that she had any knowledge about the contraband allegedly recovered from beneath the courtyard within house belonging to her father Anchal- there is no material on record which can deduce at this stage that the petitioner was in joint possession with other co-accused or in exclusive procession or was in control of place from where contraband was allegedly recovered - in status report there is no linkage of the petitioner to the source of contraband. Though these aspects are to be deliberated by the trial court during trial inter alia complicity of the petitioner would require to

be proved in accordance with Law -cumulative effect of these facts are that there are reasonable ground to believe that petitioner is not guilty of offence alleged against her- The observations are only for limited purpose of adjudicating the bail petition in light of rider placed in sec 37 of the Act- petitioner is behind the bars, unmarried girl, 21 year of age, a student, a local resident and has no criminal history - bail petition is allowed subject to conditions on furnishing bonds.

Cases referred:
Mohan Lal Vs. State of Rajasthan 2015 (6) SCC 222;
Stateof Kerala and others Versus Rajesh and others (2020) 12 SCC 122;
Sujit Tiwari Versus State of Gujarat and another (2020) 13 SCC 447;

For the petitioner : Mr. Vijender Katoch, Advocate.

For the respondent : Mr.Amit Dhumal, Deputy Advocate General.

(Through video conferencing)

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J *(Oral)*

The petitioner seeks regular bail in FIR No.11/2021, dated 25.01.2021 registered under Section 21 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'NDPS Act') at Police Station Damtal, District Kangra.

2. I have heard learned counsel for the parties and gone through the status report filed by the respondent-State as well as the documents placed on record.

3. The prosecution case in nutshell is that on 25.01.2021, while a police party was on patrolling duty near Excise Barrier Toki, it received a secret information at around 9.35 P.M. that one Sh. Aanchal and his family members were doing business of selling of Heroin in their house and further that a raid of their house at

that point of time could lead to recovery of huge quantity of heroin. Since the information was reliable, therefore, the procedure as contemplated in law was followed by the police officials. Search of the house belonging to said Sh. Aanchal was carried out at around 10.10 p.m. in presence of Sub- Divisional Police Officer. During search, Aanchal alongwith his two daughters including bail petitioner and minor son Sarang was present in the house. His other son Sikandar was not present there. The raiding party dug up the courtyard within the boundary of the house. This digging led to recovery of a steel box containing Rs.1,74,000/- from one place and from the other place a carry bag was recovered containing a brown coloured substance, which was ascertained as Heroin. The contraband weighed 377.8 grams. All codal formalities were completed. The recovery of contraband led to registration of the FIR in question. Petitioner alongwith her family members present in the house were arrested on 25.1.2021. Since then, petitioner is in custody.

4. Learned counsel for the petitioner contended that the petitioner was innocent and has been falsely implicated with the alleged offences. Petitioner's presence in her house was in natural course and cannot lead to an inference that she was aware about the presence of the contraband in the house or that she was in conscious possession of the contraband or that she had control over the contraband allegedly ecovered in the FIR or control over the spot from where the recovery was allegedly effected. Learned counsel further submitted that the petitioner will abide by all the conditions, which may be imposed upon her in case of grant of bail and that she will not influence the prosecution witnesses or temper with the prosecution evidence in any manner.

Learned Deputy Advocate General while opposing the bail plea, argued that the instant is a case of recovery of commercial

quantity of contraband, therefore, Section 37 of the NDPS Act would be attracted and that the petitioner has failed to satisfy the conditions prescribed under Section 37 of the NDPS Act.

5. Since quantity of the contraband recovered in the FIR is commercial, therefore, provisions of Section 37 of the NDPS Act are attracted, which read 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 offences under section 19 of 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."*

In order to avail bail, the petitioner has to satisfy following twin conditions imposed in Section 37 of the NDPS Act:-

> ***(i)*** *Court should be satisfied that there are reasonable grounds for believing that the petitioner is not guilty of such offence; and*
> ***(ii)*** *Petitioner is not likely to commit any offence while on bail.*

Hon'ble Apex Court in ***(2020) 12 SCC 122, titled State of Kerala and others Versus Rajesh and others***, after considering various pronouncements held that the expression 'reasonable grounds' used in Section 37 of the NDPS Act means something more than prima-facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of alleged offence. It would be appropriate to extract relevant paras from the judgment:-

> *"19. 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.*
>
> *20. 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."*

It will also be appropriate to refer to ***(2020) 13 SCC 447, titled Sujit Tiwari Versus State of Gujarat and another***, wherein following was observed in relation to satisfaction of requirement under Section 37 of the NDPS Act vis-à-vis facts of that case:-

> *"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 4-8-2017 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."

It would also be appropriate to refer to ***2015 (6) SCC 222 titled as Mohan Lal Vs. State of Rajasthan,*** wherein it was observed that the terms "possession" consists of two elements. First, it refers to the corpus or the physical control and the second, it refers to the animus or intent which has reference to exercise of the said control.

Present was a case of recovery of commercial quantity of the contraband from beneath a courtyard within the house and for this reason all the family members residing in the house have been made accused in the FIR viz:- Aanchal aged 56 years; Suman D/O Aanchal aged 20 years; Seema D/O Aanchal aged 21 years; Sarang S/O Aanchal aged 17 years and Sikandar S/O of Aanchal aged 36 years. But for Sikandar, all the other family members including the bail petitioner were arrested on 25.01.2021. Sikandar, who statedly absconded, was arrested on 26.3.2021. Sarang S/O Aanchal, being juvenile was released on bail by the learned Principal Magistrate Juvenile Justice Board Kangra on 25.2.2021. No doubt reverse burden under the NDPS Act would be on

the petitioner to prove that she had no knowledge regarding the presence of the contraband and that she was not in conscious possession thereof. In the instant case, the facts as they emerge from the record are that the house belonged to co-accused Aanchal, who is father of the bail petitioner. The house was searched in cold winter month of January at around 10.10 P.M. The petitioner is daughter of co-accused Aanchal. She is aged 21 years and is neither married nor employed. She is a student. Her presence in the house of her father would definitely has to be construed in natural course. No overt act has been alleged against her by the investigating agency. Status report does not indicate any criminal history of the petitioner rather it is her father (Aanchal) against whom many cases are statendly registered in the past. Further as per the status report, petitioner's brother (Sikandar) had also absconded and could be arrested only on 26.3.2021.

Mere presence of daughter (bail petitioner) aged 21 years and a student, in her home alongwith her father at around 10.10 P.M. in the month of January in a village in District Kangra would not lead to an automatic inference that she had any knowledge about the contraband allegedly recovered from beneath the courtyard within the house belonging to her father Aanchal. There is no material on record, which it can be deduced at this stage that the petitioner was in joint possession of the contraband alongwith other co-accused persons or that she was in exclusive possession of the contraband or was in control of the place from where the contraband was allegedly recovered. Status report also does not indicate that during investigation, petitioner had admitted her knowledge or possession about the contraband allegedly recovered in the FIR. Also, in the status report, there is no linkage of the petitioner to the source of the contraband. Though all these aspects are to be deliberated by the learned Trial Court during trial, where, inter alia, complicity of the

petitioner would require to be proved in accordance with law. However, on cumulative consideration of all these facets, it can be safely inferred at this stage that the petitioner has been able to show that she neither had the knowledge nor possession of the contraband recovered in the FIR. There are reasonable grounds to believe that petitioner is not guilty of offence alleged against her in the FIR. By way of abundant caution, it is clarified that the observations made in this judgment are not to be treated as if final verdict of petitioner being not guilty has been pronounced. The observations made herein are only for limited purpose of adjudicating the bail petition in light of riders placed in Section 37 of the NDPS Act. Petitioner is behind the bars since 25.01.2021. Petitioner is an unmarried lady aged 21 years, a student and a local resident. She has no criminal history. Therefore, it can be believed that she is not likely to commit any offence during bail. To ensure this, stringent conditions can also be imposed upon her. Petitioner is resident of Village, PO and Tehsil-Indora, District Kangra, Himachal Pradesh, therefore, her presence can be ensured in the trial.

Accordingly, the present petition is allowed. Petitioner is ordered to be released on bail in the aforesaid FIR on her furnishing personal bond in the sum of Rs.75,000/- (Rupees Seventy Five Thousand only) with one local surety in the like amount to the satisfaction of the learned trial Court having jurisdiction over the Police Station concerned, subject to the following conditions:-

(i). The petitioner shall join and cooperate the investigation of the case as and when called for by the Investigating Officer in accordance with law. However she shall not be called in the police station before 9.00 A.M. and after 5.00 P.M;

(ii). The petitioner shall not temper with the

evidence or hamper the investigation in any manner whatsoever. (iii).The petitioner will not leave India without prior permission of the Court.

(iv). The petitioner shall not make any inducement, threat or promise, directly or indirectly, to the Investigating Officer or any person acquainted with the facts of the case to dissuade him/her from disclosing such facts to the Court or any Police Officer.

(v). Petitioner shall attend the trial on every hearing,unless exempted in accordance with law.

(vi). Petitioner shall inform the Station House Officer of the concerned police station about her place of residence during bail and trial. Any change in the same shall also be communicated within two weeks thereafter. Petitioner shall furnish details of his Aadhar Card, Telephone Number, E-mail, PAN Card, Bank Account Number, ifany.

(vii).Petitioner shall not indulge in any criminal activities. It is made clear that in case the petitioner is arraigned as an accused in future in any FIR, then this bail is liable to be cancelled. It is open for the Investigating Agency to move appropriate application in that regard. This shall also be considered as a negative factor for consideration of her future bail application, if any.

In case of violation of any of the terms & conditions of the bail, respondent-State shall be at libertyto move appropriateapplication for cancellation of the bail. It is made clear that observations made above are only for the purpose of adjudication ofinstant bail petition and shall not be construed as an opinion on themerits of the matter. Learned Trial

Court shall decide the matter without being influenced by any of the observations made hereinabove.

With the aforesaid observations, the present petition stands disposed of, so also the pending miscellaneous applications, if any.

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

Jitender Kumar ...Petitioner

Versus

State of Himachal Pradesh ....Repondent

Cr. Revision No.113 of 2021
Decided on: 17th May, 2021

The petition against the order passed by Ld. Special Judge, modifying/ altering the charge against the petitioner by adding section 13 (1) (C.) PC Act. Held- charge u/s13 (2) PC Act, stood already framed against the petitioner - trial court by allowing application of state u/s 216 Cr. P.C. added section 13 (1)(C.) PC Act- No new evidence was intended to be brought on record either by prosecution or defense- thus no prejudice whatsoever has been shown to have been caused to the accused by alteration/modification of the charge- petition dismissed.

Cases referred:

Dr. Nallapareddy Sridhar Reddy Versus State of Andhra Pradesh and others, (2020) 12 SCC 467;

For the Petitioner: Mr. Dalip K. Sharma, Advocate.

For the Respondent: Mr. Anil Jaswal, Additional Advocate General with Mr. Manoj Bagga, Assistant Advocate General.

(Through Video Conference)

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge (Oral)

Aggrieved against the order dated 18.08.2020 passed by the learned Special Judge (Forests), Shimla/Trial Court, modifying/altering the charge against the petitioner, instant revision petition has been preferred.

State moved an application for addition of charge under Section 120B of the Indian Penal Code (IPC) as well as for alteration of charge under Section 13(1)(c) read with Section 13(2) of the Prevention of Corruption Act, 1988. It was alleged that the accused persons had connived with each other to hatch a conspiracy and misappropriated public funds. This application was allowed by the learned Trial Court on 18.08.2020 to the extent that charge for offence of criminal misconduct under Section 13(1)(c) of the Prevention of Corruption Act was altered/modified. Aggrieved, the petitioner has challenged the aforesaid order.

2. Heard learned counsel for the parties and gone through the documents appended with the petition.

3. It is not in dispute that on 04.08.2014, learned Trial Court held that no case was made out against the accused persons, namely Sant Ram Shandil, Sant Ram Tanwar and Sher Singh Negi. These persons were discharged. Criminal Revision No.358 of 2014 filed by the State, challenging this order, has been dismissed by this Court on 23.09.2015. Learned counsel for the petitioner contends that when the other co-accused persons stood discharged, then there is no point for framing charge under Section 120B IPC against the petitioner.

Primarily, aggrieved against the alleged framing of additional charge against the petitioner under Section 120B IPC, instant petition has been preferred. However, this contention is not required to be raised at all as the learned Trial Court has not at all agreed to add charge under Section 120B IPC against the sole accused, i.e. petitioner. The relevant observations of the learned Trial Court in this regard are as under:-

> *"..... Since all the other accused aforementioned already stand discharged it is not appropriate at this stage to add charge under Section 120-B of IPC against sole accused Jitender. Therefore, this addition in charge in the considered opinion of this court cannot be made ....."*

In view of the observations of the learned Trial Court, there is no reason for the petitioner to feel aggrieved. The amended charge appended at page 17 of the petition also does not make any reference to Section 120B IPC.

4. Insofar as addition/alteration of charge under Section 13(1)(c) of the Prevention of Corruption Act is concerned, the objection of learned counsel for the petitioner is that the charges were framed on 11.4/8.2014. Almost six years thereafter, the application for addition/ alteration of charges has been made by the State at the stage when the matter was fixed for arguments. Such an application deserves to be dismissed. I am not inclined to accept this contention for the following reasons:-

(i). On 11.4/8.2014, the petitioner had already been charged for the offences under Section 409 IPC and Section

13(2) of the Prevention of Corruption Act. Section 13(1)(c) gives basic ingredients of the offence, i.e. "if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do."

(ii). Section 216 Cr.PC, which is relevant for alteration/modification of the charge, was recently considered by the Hon'ble Apex Court in ***(2020) 12 SCC 467,*** titled ***Dr. Nallapareddy Sridhar Reddy Versus State of Andhra Pradesh and others***, wherein the appellant therein was charged only for offences under Section 498A IPC alongwith Sections 3 and 4 of the Dowry Prohibition Act. In an application moved by the State under Section 216 Cr.PC for addition of charges under Sections 406 and 420 IPC, it was observed as under:-

> *"15. In order to adjudicate upon the dispute, it is necessary to refer to Section 216 of CrPC:*
>
> *"216. Court may alter charge.—(1) Any court may alter or add to any charge at any time before judgment is pronounced.*
>
> *(2) Every such alteration or addition shall be read and explained to the accused.*
>
> *(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.*

(4) *If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the court, to prejudice the accused or the prosecutor as aforesaid, the court may either direct a new trial or adjourn the trial for such period as may be necessary.*

(5) *If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded."*

16. Section 216 appears in Chapter XVII CrPC. Under the provisions of Section 216, the court is authorised to alter or add to the charge at any time before the judgment is pronounced. Whenever such an alteration or addition is made, it is to be read out and explained to the accused. The phrase "add to any charge" in Sub- Section (1) includes addition of a new charge. The provision enables the alteration or addition of a charge based on materials brought on record during the course of trial. Section 216 provides that the addition or alteration has to be done "at any time before judgment is pronounced". Sub-Section (3) provides that if the alteration or addition to a charge does not cause prejudice to the accused in his defence, or the persecutor in the conduct of the case, the court may proceed with the trial as if the additional or alternative charge is the original charge. Sub-Section (4) contemplates a situation where the addition

or alteration of charge will prejudice the accused and empowers the court to either direct a new trial or adjourn the trial for such period as may be necessary to mitigate the prejudice likely to be caused to the accused. Section 217 of the CrPC deals with recalling of witnesses when the charge is altered or added by the court after commencement of the trial.

17. *The decision of a two-judge Bench of this Court in P. Kartikalakshmi v Sri Ganesh, dealt with a case where during the course of a trial for an offence under Section 376 of the IPC, an application under Section 216 was filed to frame an additional charge for an offence under Section 417 of the IPC.*

F.M. Ibrahim Kalifulla, J. while dealing with the power of the court to alter or add any charge, held:

"6. … Section 216 CrPC empowers the Court to alter or add any charge at any time before the judgment is pronounced. It is now well settled that the power vested in the Court is exclusive to the Court and there is no right in any party to seek for such addition or alteration by filing any application as a matter of right. It may be that if there was an omission in the framing of the charge and if it comes to the knowledge of the Court trying the offence, the power is always vested in the Court, as provided under Section 216 CrPC to either alter or add the charge and that such power is available with the Court at any time before the judgment is pronounced. It is an enabling provision for the Court to exercise its power under certain contingencies which comes to its notice or brought to its notice. In such a situation, if it comes to the knowledge of the Court that a necessity has arisen for the charge to be

> *altered or added, it may do so on its own and no order need to be passed for that purpose. After such alteration or addition when the final decision is rendered, it will be open for the parties to work out their remedies in accordance with law."*
>
> *(emphasis supplied)"*

Thus, the charge could be altered at any time before the pronouncement of the judgment subject to conditions set forth in Section 216 Cr.PC as elucidated above.

Instant was a case where charge under Section 13(2) of the Prevention of Corruption Act stood already framed against the petitioner. By allowing the application moved by the State under Section 216 Cr.PC, the learned Trial Court had only allowed alteration of charge to the extent that Section 13(1)(c) of the Prevention of Corruption Act was added. During hearing of the case before the learned Trial Court, learned Public Prosecutor stated that the evidence was already over and no witness was to be recalled or re-summoned or to be called or examined even after alteration of the charge. Similarly, learned counsel for the accused/petitioner also stated that the petitioner does not intend to recall or re-summon or examine any witness with regard to the altered charge. Thus, no prejudice whatsoever has been shown to have been caused to the accused by the alteration/modification of the charge.

In view of the above, the present petition lacks merit and is accordingly dismissed alongwith pending miscellaneous application(s), if any.

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

Jitender Kumar ...Petitioner

Versus

State of Himachal Pradesh ....Repondent

Cr. Revision No.114 of 2021
Decided on: 17th May, 2021

The petition against the order passed by Ld. Special Judge modifying/altering the charge against the petitioner by adding charge for offence of criminal misconduct u/s 13 (1) (C.) PC Act- held- charge u/s 13 (2) PC Act stood already framed against the petitioner- the trial court by allowing application of State U/s 216 Cr.P.C added Sec 13 (1) (C.) PC Act- no new evidence was intended to be brought on record either by prosecution or defense thus no prejudice whatsoever has been shown to have been caused to accused by the alternation/ modification of the charge -petition dismissed.

For the Petitioner: Mr. Dalip K. Sharma, Advocate.

For the Respondent: Mr. Anil Jaswal, Additional Advocate General with Mr. Manoj Bagga, Assistant Advocate General.
(Through Video Conference)

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge (Oral)

Aggrieved against the order dated 18.08.2020 passed by the learned Special Judge (Forests), Shimla/Trial Court, modifying/altering the charge against the petitioner, instant revision petition has been preferred.

State moved an application for addition of charge under Section 120B of the Indian Penal Code (IPC) as well as

for alteration of charge under Section 13(1)(c) read with Section 13(2) of the Prevention of Corruption Act, 1988. It was alleged that the accused persons had connived with each other to hatch a conspiracy and misappropriated public funds. This application was allowed by the learned Trial Court on 18.08.2020 to the extent that charge for offence of criminal misconduct under Section 13(1)(c) of the Prevention of Corruption Act was altered/modified. Aggrieved, the petitioner has challenged the aforesaid order.

2. Heard learned counsel for the parties and gone through the documents appended with the petition.

3. It is not in dispute that on 04.08.2014, learned Trial Court held that no case was made out against the accused persons, namely Sant Ram Tanwar and Sher Singh Negi. These persons were discharged. Criminal Revision No.358 of 2014 filed by the State, challenging this order, has been dismissed by this Court on 23.09.2015. Learned counsel for the petitioner contends that when the other co-accused persons stood discharged, then there is no point for framing charge under Section 120B IPC against the petitioner. Primarily, aggrieved against the alleged framing of additional charge against the petitioner under Section 120B IPC, instant petition has been preferred. However, this contention is not required to be raised at all as the learned Trial Court has not at all agreed to add charge under Section 120B IPC against the sole accused, i.e. petitioner. The relevant observations of the learned Trial Court in this regard are as under:-

> *"..... Since other accused aforementioned already stand discharged it is not*

appropriate at this stage to add charge under Section 120-B of IPC against accused Jitender and Pawan between whom no criminal conspiracy is alleged. Therefore, this addition in charge in the considered opinion of this court..... cannot be made "

In view of the observations of the learned Trial Court, there is no reason for the petitioner to feel aggrieved. The amended charge appended at page 17 of the petition also does not make any reference to Section 120B IPC.

Insofar as addition/alteration of charge under Section 13(1)(c) of the Prevention of Corruption Act is concerned, the objection of learned counsel for the petitioner is that the charges were framed on 11.4/8.2014. Almost six years thereafter, the application for addition/ alteration of charges has been made by the State at the stage when the matter was fixed for arguments. Such an application deserves to be dismissed. I am not inclined to accept this contention for the following reasons:-

(i). On 11.4/8.2014, the petitioner had already been charged for the offences under Section 409 IPC and Section 13(2) of the Prevention of Corruption Act. Section 13(1)(c) gives basic ingredients of the offence, i.e. "if he dishonestly or fraudulently misappropriates or otherwise converts for his own use any property entrusted to him or under his control as a public servant or allows any other person so to do."

(ii). Section 216 Cr.PC, which is relevant for alteration/modification of the charge, was recently considered by the Hon'ble Apex Court in ***(2020) 12 SCC 467,*** titled ***Dr.***

Nallapareddy Sridhar Reddy Versus State of Andhra Pradesh and others, wherein the appellant therein was charged only for offences under Section 498A IPC alongwith Sections 3 and 4 of the Dowry Prohibition Act. In an application moved by the State under Section 216 Cr.PC for addition of charges under Sections 406 and 420 IPC, it was observed as under:-

> *"15. In order to adjudicate upon the dispute, it is necessary to refer to Section 216 of CrPC:*
>
> *"216. Court may alter charge.—(1) Any court may alter or add to any charge at any time before judgment is pronounced.*
>
> *(2) Every such alteration or addition shall be read and explained to the accused.*
>
> *(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.*
>
> *(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the court, to prejudice the accused or the prosecutor as aforesaid, the court may either direct a new trial or adjourn the trial for such period as may be necessary.*
>
> *16. If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a*

prosecution on the same facts as those on which the altered or added charge is founded."

17. *Section 216 appears in Chapter XVII CrPC. Under the provisions of Section 216, the court is authorised to alter or add to the charge at any time before the judgment is pronounced. Whenever such an alteration or addition is made, it is to be read out and explained to the accused. The phrase "add to any charge" in Sub- Section (1) includes addition of a new charge. The provision enables the alteration or addition of a charge based on materials brought on record during the course of trial. Section 216 provides that the addition or alteration has to be done "at any time before judgment is pronounced". Sub-Section (3) provides that if the alteration or addition to a charge does not cause prejudice to the accused in his defence, or the persecutor in the conduct of the case, the court may proceed with the trial as if the additional or alternative charge is the original charge. Sub-Section (4) contemplates a situation where the addition or alteration of charge will prejudice the accused and empowers the court to either direct a new trial or adjourn the trial for such period as may be necessary to mitigate the prejudice likely to be caused to the accused. Section 217 of the CrPC deals with recalling of witnesses when the charge is altered or added by the court after commencement of the trial.*

18. *The decision of a two-judge Bench of this Court in P. Kartikalakshmi v Sri Ganesh, dealt with a case where during the course of a trial for an offence under Section 376 of the IPC, an application under Section 216 was filed to frame an additional charge for an offence under Section 417 of the IPC.*

F.M. Ibrahim Kalifulla, J. while dealing with the power of the court to alter or add any charge, held:

> *"6. ... Section 216 CrPC empowers the Court to alter or add any charge at any time before the judgment is pronounced. It is now well settled that the power vested in the Court is exclusive to the Court and there is no right in any party to seek for such addition or alteration by filing any application as a matter of right. It may be that if there was an omission in the framing of the charge and if it comes to the knowledge of the Court trying the offence, the power is always vested in the Court, as provided under Section 216 CrPC to either alter or add the charge and that such power is available with the Court at any time before the judgment is pronounced. It is an enabling provision for the Court to exercise its power under certain contingencies which comes to its notice or brought to its notice. In such a situation, if it comes to the knowledge of the Court that a necessity has arisen for the charge to be altered or added, it may do so on its own and no order need to be passed for that purpose. After such alteration or addition when the final decision is rendered, it will be open for the parties to work out their remedies in accordance with law."*
>
> *(emphasis supplied)"*

Thus, the charge could be altered at any time before the pronouncement of the judgment subject to conditions set forth in Section 216 Cr.PC as elucidated above.

Instant was a case where charge under Section 13(2) of the Prevention of Corruption Act stood already framed against the petitioner. By allowing the application moved by the State under Section 216 Cr.PC, the learned Trial Court had only allowed alteration of charge to the extent that Section 13(1)(c) of

the Prevention of Corruption Act was added. During hearing of the case before the learned Trial Court, learned Public Prosecutor stated that the evidence was already over and no witness was to be recalled or re-summoned or to be called or examined even after alteration of the charge. Similarly, learned counsel for the accused/petitioner also stated that the petitioner does not intend to recall or re-summon or examine any witness with regard to the altered charge. Thus, no prejudice whatsoever has been shown to have been caused to the accused by the alteration/modification of the charge.

In view of the above, the present petition lacks merit and is accordingly dismissed alongwith pending miscellaneous application(s), if any.

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

M/s Five Star Builders ...Petitioner

Versus

State of Himachal Pradesh and another ...Respondents

Arb. Case No. 37 of 2010
Reserved on: 07.04.2021
Date of Decision:22.04.2021

The petition u/s 34 Arbitration & Conciliation Act for settling aside award made by Arbitral tribunal comprising S.E. Arbitration Circle H.P.P.W.D. Solan in respect of disputes pertaining to work of "Construction of pavement on Shimla bye Pass and Providing side drains" Held- the perusal of record shows that when it was on account of acts of omission & commission of respondents that material could not be placed on record to substantiate what transpired in the 25th hearing in arbitration proceedings, there is merit in claim of petitioner that arbitrator has completely ignored the fact of omissions on the part of

respondent executive Engineer therefore conclusions drawn by arbitrator are not sustainable.

Ld Arbitrator has not gone into effect of communication mentioning that contractor was required to arrange the stone, bajri etc. from any of quarries, Arbitrator has not dwelled into the aspect that if testing of stone crusher in and around Shimla, was going on, how material could have been procured by the contactor. These facts negate the finding of Arbitrator as findings are not in consonance with evidence. Ld Arbitrator has failed to substantiate his finding by giving reasons, even grounds of claims of contractor have also not been addressed - thus findings are liable to be set aside being in conflict with public policy of India, findings returned by Ld. Arbitrator are contradictory. As such, there is no due application of Judicial mind- petition is allowed by setting aside award passed by the Ld. Arbitrator. Matter is remanded back to adjudicate the same afresh.

For the petitioner: Mr. J.S. Bhogal, Sr. Advocate with Mr. T.S. Bhogal, Advocate.

For the respondents: M/s Sumesh Raj, Dinesh Thakur and Sanjeev Sood, Additional Advocate Generals.

(Though Video Conference)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge:

By way of this petition filed under Section 34 of the Arbitration and Conciliation Act, 1996, the petitioner/claimant has prayed for setting aside award dated 17.04.2010, made by the Arbitral Tribunal comprising of Superintendent Engineer, Arbitration Circle, HPPWD Solan, in respect of disputes pertaining to the work of "Construction of pavement on Shimla Bye Pass Km 0/0 to 1/750 and providing side drains.

2. The case of the petitioner is that it is a firm which carries on the business of Contractor and was awarded the work relating to the construction

of pavement on Shimla Bye Pass Km 0/0 to 1/750 and providing side drains by respondent No. 1 through Executive Engineer, Shimla, Division No. 2, who at the relevant time was in-charge of the work. An agreement for the execution of the work was duly executed between the parties, i.e. agreement No. 54 of 1991-92.

3. After award of the work, the petitioner made all necessary arrangements for timely execution of the same but respondents failed to honour their reciprocal promises and also did not provide reasonable facilities to the petitioner for the purpose of completion of the contract. Respondents committed willful breach of the contract by having parts of the work awarded to the petitioner executed from another contractor at much higher rates and also by paying the said contractor for certain works executed by the petitioner. The contract entered into between the parties specified quarries for the procurement of stone and aggregate at Dhalli, a suburb of Shimla and the petitioner therefore quoted its rates on such basis. The same was also taken into consideration by the respondents for working out the justification of the rates. However, after the award of the work to the petitioner, the stone crushers in Shimla and its suburbs stood closed on account of a Court order, as a result of which, the petitioner was forced to procure the stone and aggregate from Panchkula after duly informing the respondents. The requests of the petitioner to pay increased costs so incurred by it on account of procuring the material from Panchkula were not acceded to by the respondents. These facts coupled with non-payment of amount for the work executed by the petitioner led to disputes and Superintending Engineer, Arbitration Circle, HPPWD, Solan, was appointed as an arbitrator to adjudicate upon the same.

4. An award was passed by the Arbitrator on 17.04.2010. Signed copy of which was received by the petitioner on 21.04.2010, which stands assailed by the petitioner by way of this petition.

5. According to the petitioner, learned Arbitrator failed to take into consideration the fact that respondents had not only awarded parts of the work allotted to the petitioner, to another contractor, but also paid said contractor for the works executed by the petitioner, which approach of the learned Arbitrator showed total non-application of judicial mind qua the controversy between the parties. The observations made by learned Arbitrator at page 8 to 10 of the award are incorrect as perusal of the proceedings of 25th hearing would demonstrate that contention of the contractor has been read out of context by incorporating only a part of the sentence which too out of context. Learned arbitrator has ignored that respondents had not complied with the directions given during the previous hearings regarding placing on record the details of works executed by the petitioner. Despite reasonable opportunities having been granted, respondents failed to place any material on record regarding entries of works awarded to the petitioner, which had been entered in the name of M/s P.K. Construction Company, i.e. other contractor engaged by the respondents, and therefore, adverse inference ought to have been drawn against the respondents, which learned Arbitrator failed to do. The claim for additional costs for procuring the aggregate from Panchkula was rejected by the Arbitrator despite the fact that the contract stipulated the source of said material to be from Dhalli, which quarries stood closed on account of the order passed by the High Court. The information to this effect placed on record by the petitioner was ignored by the learned Arbitrator. While rejecting the claim of the petitioner for delay in execution of the works, learned Arbitrator failed to consider the details of hindrances, which led to delay in the execution of the work. The findings returned by the learned Arbitrator in the award that delay was caused on account of non-settlement of rates of extra work and work executed beyond the stipulated period of agreement does not holds water and were against the law settled by Hon'ble Supreme Court of India. Claim No. 3 stood adjudicated upon by the Arbitrator by failing to apply

the law laid down by Hon'ble Supreme Court of India in Union of India vs. Khetra Mohan Bannerjee (Civil Appeal No. 206 of 1961), which had caused great prejudice to the petitioner. The award was liable to be also set aside on account of non-consideration of documents filed by the petitioner alongwith letter dated 13.01.2005 showing the interest actually paid by it to the financial institutions. According to the petitioner, the infirmities in the award demonstrated that the award passed by learned Arbitrator was in conflict with the public policy of India, and therefore, the same required interference. The petitioner has accordingly prayed for setting aside of the award passed by learned Arbitral Tribunal dated 17.04.2010.

6. The petition is opposed by the respondents *inter alia* on the ground that the grounds raised in the petition assailing the award are not covered under the provisions of Section 34 of the Arbitration and Conciliation Act 1996. It is further the case of the respondents that all reciprocal promises, required to be performed by the respondents, were duly performed. The site of the work was duly handed over to the contractor/petitioner well in time. Materials such as bitumen which, though was not stipulated to be supplied by the respondents, yet was supplied. The machineries, though not stipulated to be provided by the respondents, were also provided on hire basis to the petitioner for speedy and timely completion of the work. Yet, the petitioner failed to complete the work, not only within the stipulated period i.e. 14.11.1992, but also in a reasonable time beyond the stipulated period for completion. In these circumstances, the respondents were left with no alternative but to get the small unexecuted parts of work executed through another agency. Entire work executed by the petitioner was duly measured and payment was made to the petitioner as agreed to by him during the arbitration proceedings, as is clear from the arbitral award itself. The stone crusher's quarries of Dhalli as stipulated were not closed by the Court during the period of contract which expired on 14.11.1992 as stay on quarries

remained operative w.e.f. 14.01.1993 to 26.07.1993 only. Therefore, the petitioner was bound to procure the stone aggregate from the stipulated quarries only and respondents never gave consent for use of stone aggregate from quarries other than the stipulated quarries as per the contract. Respondents deny that the award passed by learned Arbitral Tribunal was in conflict with public policy of India or the details of the work executed by the petitioner or M/s P.K. Construction Company were not placed before the Arbitral Tribunal. According to the respondents, the petitioner had accepted all the measurements of the work done by him and no work of profile correction in RD1/465 to 1/495 was ever executed by the petitioner. The delay in the execution of the work at the behest of the petitioner was without any reasonable cause and the alleged short supply of stone aggregate from Dhalli quarries was pointed out by the petitioner only vide letter dated 22.09.1992, when about 67% of the stipulated period of completion had already elapsed. No explanation was given by the petitioner during the course of arbitral proceedings as to why he did not procure material from Dhalli quarries during the four months of stipulated period of six months and reasons for delay in execution of work were well within the control of the petitioner, which was evident from the fact that the petitioner avoided for applying for extension of time for completion of work as required under Clause 5 of the Contract. Learned Arbitrator had judiciously inferred that there was no breach of contract by the respondents which could entitle the petitioner for any kind of damages as all contractual obligations were duly performed by the respondents. It was the petitioner who delayed the execution of the work. As per the respondents, the petitioner during the arbitration proceedings failed to demonstrate that it had to pay huge amounts on account of interest for the delay in performance of the contract. On these grounds, the petition is resisted by the respondents, who prayed for dismissal of the same.

7. By way of rejoinder, the petitioner reiterated and reaffirmed its stand qua the award passed by the Arbitral Tribunal to be against the Public Policy of India.

8. I have heard learned Counsel for the parties and gone through the record of the case.

9. The award under challenge is dated 17.04.2010 and the same has been announced by Superintending Engineer, Arbitration Circle HPPWD, Solan. A perusal of the same demonstrates that by way of the statement of facts and claims, the claimant/contractor, prayed for the grant of following claims in the same:-

> *"Claim No. 1:- Payment of final bill. Rs.4,25,779-93.*
> *Claim No. 2:- Payment for carriage of grit from Panchkula Rs.15,30,000/-*
> *Claim No. 3:- Payment for market rates in respect of deviated items of soling 63-40 mm. Rs.2,72,036.15*
> *Claim No. 4:- Payment of price escalation in respect of work done after stipulated date of completion. Rs.10,09,643.47.*
> *Claim No. 5:- Damages for prolongation of working period. Rs.7,50,000/-*
> *Claim No. 6:- Refund of security deposit Rs.98,483/-*
> *Claim No. 7:- Interest on the withheld amounts @ 24% per annum.*
> *Claim No. 8:- Loss of profit Rs. 60937.44"*

10. The genesis of the claim was the award of work C/o Pavement of Shimla Bye Pass km. 0/0 to 1/750 and providing side drains against agreement No. 54 of 1991-92, which work was awarded to the claimant/contractor by the respondent/Executive Engineer vide award letter NoSD-II-EST-Tender/92-4994-5004, dated 30.03.1992. The estimated cost of the tender was `4,52,810/-. The tendered amount of work was `20,47,591-03 with stipulated time period of six months for its completion. The date of commencement of work was 15.5.92 and stipulated date of completion was 15.11.92. The claims raised before the learned Arbitrator by the claimant were

on account the disputes, which arose between the contractor and the respondents during the execution of the work in issue.

11. Defence statement to the statement of facts and claims of the claimant was filed by respondent/Executive Engineer and following counter claims were also raised:-

> *"Counter claim No. (i): Damages on account of inconvenience caused by non performance of the contract in time due to negligence on the part of the contractor. Interest on the invested amount of market rate of 18% for prolongation of the contract. Rs. 3,42,223/-.*
> *Counter claim No. (ii) On account of pending statutory/contractual recoveries. Rs. 1,22,497/-.*
> *Counter claim No.(iii) For not filing mandatory labour returns as per provisions of clause 19D.Rs.2800/-*
> *Counter Claim No. (iv). For non-deployment of qualified Engineer at site as per provisions of clause 39 of the agreement Rs. 56,000/-."*

12. Vide impugned award, Claim No. 1 was decided by the learned Arbitrator by holding that the Contractor had admittedly done total work of gross value of `18,29,612/- as per 9th and final bill and he was paid up to 8th running bill a gross value of `18,00,255/-. Accordingly balance gross value of the work amounting to `29357/- was awarded in favour of the claimant/ contractor. Claim No. 2 was decided against the claimant. Claim No. 3 was answered by awarding an amount of `83,453/- in favour of the claimant. Claims No. 4 and 5 were decided against the claimant. Claim No. 6 was answered in favour of the claimant by awarding simple interest @ 7.5% per annum on an amount of `1,49,477/- for a period of 14 years in favour of the claimant. Claim No. 8 was answered in favour of the claimant by award of 8.7% on the amount of `2,08,200/- in favour of the claimant. Counter claim No. 1 was rejected. Counter Claim No. 2 was awarded in favour of the respondents to the tune of `35,006/-. Counter claims No. 3 and 4 were awarded against the Counter Claimant.

13. The Award which was passed by learned Arbitrator in favour of the claimant/contractor was as under:

"Sr. No. Description of claim Amount demanded Amount awarded Remarks

1.	2.	3.	4.	5.
1.	Payment of final bill	Rs. 4,25,779.93	Rs.29,357/-	
2.	Payment of carriage of Grit from Panchkula	Rs. 15,30,000/-	Rs. nil	
3.	Payment for market rates in respect of deviated items of soling 63-40 mm.	Rs. 2,72,036.15	Rs.83,453/-	
4.	Payment of price escalation in respect of work done after stipulated date of completion.	Rs.10,09,643.47	Rs. Nil	
5.	Damages for prolongation of working period.	Rs. 7,50,000/-	Rs. Nil	
6.	Security deposit.	Rs. 98,483/-	Rs.96,734/- (Rs. 42,674/- in the shape of FDR and 54060/- in cash).	
7.	Interest on the withheld amounts. i.e.	@24% per annum.	Simple interest @ 7.5% per annum on an amount of Rs. 1,49,977/- for a period of 14 years upto the date of award.	
8.	Loss of profit	Rs. 60,937/-	Rs. 18,113/-	

14. The award which was passed by learned Arbitrator in favour of the respondent/Executive Engineer is as under:-

Sr. No.	Description of Counter Claim	Amount demanded	Amount awarded	Remarks

1.	2.	3.	4.	5.
Counter Claims:-				
(i)	Damages on account of inconvenience caused by non performance of the contract in time due to negligence on the part of the contract-Interest on the invested amount on market rate of 18% for prolong-ation of the contract.	Rs.3,42,223/-		Rs. Nil
(ii)	On account of pending statutory/ Contractual recoveries	Rs. 1,22,497/-		Rs. 35006/-
(iii)	For not filing mandatory Labour returns as per provisions Of clause 19D	Rs. 2800/-		Rs. Nil.
(iv)	For non-deployment of qualified Engineer at site as per provisions of clause 39 of the agreement.	Rs.56,000/-		Rs. Nil.

Cost of stamp duty amounting to Rs. 120 has been borne by the Claimant/Contractor.

No order as to costs.

The award has been made and signed by me today the 17th April, 2010 at Solan and is embossed on the Non-judicial papers of the value of Rs. 120/-.

Arbitrator-cum-
Superintending Engineer,
Arbitration Circle, HPPWD,
Solan."

15. In this backdrop, the Court shall now examine the legality of the award passed by learned Arbitrator in view of the contents of this petition read in conjunction with the parameters, which have to be adhered to by this Court in terms of the provisions of Section 34 of the Arbitration and Conciliation Act, 1996.

16. At this stage itself, it is profitable to state that the coordinate Bench of this Court in Arbitration Case No. 1 of 2016, titled as State of Himachal Pradesh and another vs. Sh. Santosh Kumar Shushta, decided on 21st November, 2016, while discussing the scope of Section 34 of the Arbitration and Conciliation Act, 1996, has been pleased to hold as under:-

> *"9. This Court in Arb. Case No. 60 of 2015, titled as Sh. Ashok Kumar Thakur Versus The State of Himachal Pradesh through Secretary HP PWD & another, decided on 09.03.2016, has observed as under:-*
>
> *3. It is settled proposition of law that award can be set aside only within the exceptions stipulated under Section 34, which has to be read in conjunction with Section 5 of the Act, wherein it is provided that no judicial authority shall intervene with the award, save and except as provided in Part – I of the Act, wherein Section 34 also finds place.*
>
> *4. Courts cannot proceed to comparatively adjudicate merits of the decision. What is to be seen is as to whether award is in conflict with the Public Policy of India. Merits are to be looked into only under certain specified circumstances i.e. being against the Public Policy of India, which connotes public good and public interest. Award which is ex facie and patently in violation of the statutory provisions cannot be said to be in public interest.*
>
> *5. In Oil & Natural Gas Corporation Ltd. Vs. Saw Pipes Ltd. (2003) 5 SCC 705 the Court reiterated the principle laid down in*

Renusagar Power Co. Ltd. vs. General Electric Co., 1994 Supp (1) SCC 644 holding that the award can be set aside if it is contrary to: (a) the fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality, or (d) in addition, if it is patently illegal. However, such illegality must go to the root of the matter and if it is trivial in nature, then it cannot be said to be against public policy. Only such of those awards which, being unfair and unreasonable, shocks the conscious of the court can be interfered with.

6. The principles continued to be reiterated by the apex Court in McDermott International Inc. vs. Burn Standard Co. Ltd. (2006) 11 SCC 181 and Centrotrade Minerals & Metals Inc. vs. Hindustan Copper Ltd. (2006) 11 SCC 245.

7. Eventually in DDA vs. R. S. Sharma and Co. (2008) 13 SCC 80 the Court culled out the following principles:

"21. From the above decisions, the following principles emerge:

(a) An award, which is

(i) contrary to substantive provisions of law; or

(ii) the provisions of the Arbitration and Conciliation Act, 1996; or

(iii) against the terms of the respective contract; or

(iv) patently illegal; or

(v) prejudicial to the rights of the parties; is open to interference by the court under Section 34(2) of the Act.

(b) The award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interest of India; or

(c) justice or morality.

(c) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(d) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India."

8. Recently the apex Court in Associate Builders vs. Delhi Development Authority (2015) 3 SCC 49 has further explained the meaning of the words "fundamental policy of Indian law"; "the interest of India"; "justice or morality"; and "patently illegal". Fundamental policy of Indian law has been held to include judicial approach, non violation of principles of natural justice and such decisions which are just, fair and reasonable. Conversely such decisions which are perverse or so irrational that no reasonable person would arrive at, are held to be unsustainable in a court of law. The court observed that:-

> *"29. It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary and whimsical would obviously not be a determination which would either be fair, reasonable or objective.*
>
> *30. The audi alteram partem principle which is undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34(2)(a)(iii) of the Arbitration and Conciliation Act. These sections read as follows:*
>
> > *"18. Equal treatment of parties. – The parties shall be treated with equality and each party shall be given a full opportunity to present his case.*
> >
> > * * *

> *34. Application for setting aside arbitral award. – (1)*
> ** * **
> *(2) An arbitral award may be set aside by the court only if –*
> *(a) the party making the application furnishes proof that –*
> ** * **
> *(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;"*

31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

> *(i) a finding is based on no evidence, or*
> *(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or*
> *(iii) ignores vital evidence in arriving at its decision,*
> *such decision would necessarily be perverse."*

9. Further, in the very same decision, while relying upon Excise and Taxation Officer-cumAssessing Authority vs. Gopi Nath & Sons, 1992 Supp (2) SCC 312; Kuldeep Singh vs. Commr. of Police, (1999) 2 SCC 10; and P. R. Shah, Shares & Stock Brokers (P) Ltd. vs. B.H.H. Securities (P) Ltd., (2012) 1 SCC 594, the Court clarified the meaning of the expression 'perverse' so as to include a situation where the Arbitrator proceeds to ignore or exclude relevant material or takes into consideration irrelevant material resulting into findings which are so outrageous, that it defies logic

and suffers from the vice of irrationality. What would be "patent illegality" was clarified in the following terms:-

> *"42. In the 1996 Act, this principle is substituted by the "patent illegality" principle which, in turn, contains three subheads:*
>
> *42.1. (a) A contravention of the substantive law of India would result in the death knell of an arbitral award. This must be understood in the sense that such illegality must go to the root of the matter and cannot be a of a trivial nature. This again is really a contravention of Section 28(1)(a) of the Act, which reads as under:*
>
> > *"28. Rules applicable to substance of dispute. – (1) Where the place of arbitration is situated in India –*
> >
> > *(a) in an arbitration other than an international commercial arbitration, the Arbitral Tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India;"*
>
> *42.2. (b) A contravention of the Arbitration Act itself would be regarded as a patent illegality – for example if an arbitrator gives no reasons for an award in contravention of Section 31(3) of the Act, such award will be liable to be set aside.*
>
> *42.3.(c) Equally, the third subhead of patent illegality is really a contravention of Section 28(3) of the Arbitration Act, which reads as under:*
>
> > *"28. Rules applicable to substance of dispute. – (1) - (2) **
> >
> > ** **
> >
> > *(3) In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take*

> *into account the usages of the trade applicable to the transaction."*

This last contravention must be understood with a caveat. An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do.

43. In McDermott International Inc. vs. Burn Standard Co. Ltd. (2006) 11 SCC 181, this Court held as under:

> *"112. It is trite that the terms of the contract can be express or implied. The conduct of the parties would also be a relevant factor in the matter of construction of a contract. The construction of the contract agreement is within the jurisdiction of the arbitrators having regard to the wide nature, scope and ambit of the arbitration agreement and they cannot be said to have misdirected themselves in passing the award by taking into consideration the conduct of the parties. It is also trite that correspondences exchanged by the parties are required to be taken into consideration for the purpose of construction of a contract. Interpretation of a contract is a matter for the arbitrator to determine, even if it gives rise to determination of a question of law. [See: Pure Helium India (P) Ltd. v. Oil and Natural Gas Commission, (2003) 8 SCC 593 and D.D. Sharma v. Union of India, (2004) 5 SCC 325].*
>
> *113. Once, thus, it is held that the arbitrator had the jurisdiction, no further question shall be raised and the court will not exercise its jurisdiction unless it is found that there exists any bar on the face of the award."*

44. In MSK Projects (I) (JV) Ltd. v. State of Rajasthan, (2011) 10 SCC 573, the Court held:

> *"17. If the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if he wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error. Extrinsic evidence is admissible in such cases because the dispute is not something which arises under or in relation to the contract or dependent on the construction of the contract or to be determined within the award. The ambiguity of the award can, in such cases, be resolved by admitting extrinsic evidence. The rationale of this rule is that the nature of the dispute is something which has to be determined outside and independent of what appears in the award. Such a jurisdictional error needs to be proved by evidence extrinsic to the award. [See: Gobardhan Das v. Lachhmi Ram, AIR 1954 (SC) 689, Thawardas Pherumal v. Union of India, AIR 1955 (SC) 468, Union of India v. Kishorilal Gupta & Bros., AIR 1959 (SC) 1362, Alopi Parshad & Sons Ltd. v. Union of India, AIR 1960 (SC) 588, Jivarajbhai Ujamshi Sheth v. Chintamanrao Balaji, AIR 1965 (SC) 214 and Renusagar Power Co. Ltd. v. General Electric Co., (1984) 4 SCC 679.]"*

45. In Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran, (2012) 5 SCC 306, the Court held:

> *"43. In any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator.*
>
> *44. The legal position in this behalf has been summarised in para 18 of the judgment of this Court in*

SAIL v. Gupta Brother Steel Tubes Ltd., (2009) 10 SCC 63 and which has been referred to above. Similar view has been taken later in Sumitomo Heavy Industries Ltd. v. ONGC Ltd., (2010) 11 SCC 296 to which one of us (Gokhale, J.) was a party. The observations in para 43 thereof are instructive in this behalf.

45. This para 43 reads as follows: (Sumitomo case, (2010) 11 SCC 296, SCC p. 313)

> *'43. ... The umpire has considered the fact situation and placed a construction on the clauses of the agreement which according to him was the correct one. One may at the highest say that one would have preferred another construction of Clause 17.3 but that cannot make the award in any way perverse. Nor can one substitute one's own view in such a situation, in place of the one taken by the umpire, which would amount to sitting in appeal. As held by this Court in Kwality Mfg. Corpn. v. Central Warehousing Corpn., (2009) 5 SCC 142 the Court while considering challenge to arbitral award does not sit in appeal over the findings and decision of the arbitrator, which is what the High Court has practically done in this matter. The umpire is legitimately entitled to take the view which he holds to be the correct one after considering the material before him and after interpreting the provisions of the agreement. If he does so,the decision of the umpire has to be accepted as final and binding.'"*

17. The above demonstrates that the law as it stands today is that under Section 34 of the Act, an award can be interfered with being in conflict with public policy of India provided: (a) it is contrary to the substantive provisions of law; or (b) it is contrary to the provisions of the Arbitration and Conciliation Act, 1996; or (c) it is against the terms of the contract; (d) it is patently illegal; or (e) it is prejudicial to the rights of the parties; or (f) it was so unfair and unreasonable that it shocks the conscience of the Court; (g) it is a

result of non-judicial approach; or (h) there is failure of principles of natural justice or the same is so perverse or irrational that no reasonable person would arrive at the conclusions as stand arrived at in the award by the Arbitrator. It is in this backdrop that this Court shall venture to scrutinize the award under challenge.

18. While deciding Claim No. 1, learned Arbitrator has held that during the 25th hearing held on 20.09.2007, the Contractor had stated that he agreed to all the measurements recorded in the M.B. except that no entry of measurement for profile correction in 63mm to 40mm/90mm to 40mm WBM in R.D.1/465 to 1/495 had been made in the M.B. On this, directions were issued to lead evidence to prove that the profile correction as stated was actually carried out at the site but no evidence was led to prove the same. Learned Arbitrator further also held that as the item of profile correction is a hidden item, the contractor was required to adhere to the provisions of Clause 16 of the agreement. As this was not done by the Contractor, therefore, objection of non-recovery of measurements was not tenable and measurements of the work as recorded in the M.B., to which the Contractor had agreed, are binding and final. According to the petitioner, these findings are bad as the proceedings of 25th hearing would demonstrate that the admission made by the petitioner was read out of context by incorporating only a part of the sentence and the Arbitrator ignored that the respondents had not complied with the directions given during the previous hearings with regard to placing details of the work executed by the petitioner on record. As per the petitioner, despite several opportunities having being afforded, respondents failed to place any material on record regarding entries of work awarded to the petitioner, which was entered in the name of M/s P.K. Construction Company, i.e. the contractor engaged by the respondents, which as per the petitioner, made the contract to be in conflict with the public policy of India.

19. A perusal of the record of the arbitration proceedings demonstrates that in the 25th hearing of the arbitration proceedings held on 20.09.2007, it is recorded that the contractor stated that he agreed to all the measurements recorded in the M.B. by Sh. B.L. Verma, A.A.E., but no entry from R.D.1/465 to 1/495 for profile correction done by him in 63mm to 40mm/90mm to 40mm WBM was made by Junior Engineer in the M.B. It further stood recorded that the contractor had, in the said proceeding, produced a copy/note book in which levels of existing formation of the road from the proposed finished level of the new work had been copied by him from a chart prepared by the respondents before the execution of the work. Arbitrator thus directed the respondent Executive Engineer/B.L. Verma, AAE, to locate the said chart from the office record and check whether record entry of profile correction from RD 1/465 to 1/495 has actually been left. It further stood recorded that in case said chart was not traceable and no clue was available from the same, then both the parties were to visit the site and find out the depth of the road crust between RD 1/465 to 1/495 by digging holes at a suitable number of places and submit a joint report on or before the next date of hearing. The case was thereafter ordered to be listed for further proceedings on 15.11.2007, at 11:00 a.m. Record further demonstrates that in the 26th hearing held on 15.11.2007, the case was deferred for 15.12.2007 on the statement of the respondent Executive Engineer that a letter was written on 03.10.2007 to the Executive Engineer, Shimla Division No. 2, of H.P.P.W.D. to supply the said chart, but he, vide letter dated 31.10.2007, had intimated that record was transferred to Shimla Division No. 1 and the same might be obtained from there. Thereafter, a letter was duly written to Executive Engineer of Shimla Division No. 1, to supply the chart but no reply had been received yet with regard thereto. The next arbitration proceeding on record, i.e. 27th hearing, dated 26.02.2008. A perusal of the same demonstrates that Executive Engineer, Shimla Division No. 1 had intimated that record, as was

sought from him, was not found despite search. The contractor stated before the Arbitrator that the estimate for the work must contain the chart showing the existing profile of the road, and on this, the Executive Engineer was directed to produce relevant estimate for the work and to submit copy of the relevant part of the estimate indicating the profile of the road on the next date of hearing, which was fixed on 05.04.2008. As per record, the 28th hearing of the arbitration proceedings were held on 05.04.2008, in which proceeding, the respondent/Executive Engineer was not present on the pretext that there was a visit of Hon'ble Chief Minister. Next date was thus fixed for 23.04.2008. 29th hearing was held on 27.06.2008. A perusal of which demonstrates that the respondent/Executive Engineer did not place on record the relevant estimate of the work in terms of the 27th proceeding. In this background, when it was on account of acts of omission and commission of the respondents that material could not be placed on record to substantiate what transpired in the 25th hearing held on 20.09.2007 in the arbitration proceedings, there is merit in the submission of learned Senior Counsel appearing for the petitioner that learned Arbitrator has read the statement of the Contractor in the 25th hearing out of context and while deciding Claim No. 1. Learned Arbitrator has completely ignored the factum of the omissions on the part of the respondent/Executive Engineer to place on record either the chart as referred to in 25th hearing or the estimate of profile. Therefore, the conclusions which have been drawn by learned Arbitrator against the contractor while deciding Claim No. 1 are definitely not sustainable in law as the same are contrary to record and the findings returned are thus definitely in conflict with the public policy of India.

20. Coming to Claim No. 2, according to the petitioner, by not awarding any amount towards the additional costs incurred by the petitioner towards procuring the materials from Panchkula as against the agreed source at Dhalli, learned Arbitrator has acted contrary to the terms of the agreement

between the parties, rendering the award to be in conflict with public policy of India. While deciding Claim No. 2, learned Arbitrator has held that a conjoint reading of the contents of letter dated 14.02.1992 produced on record by the respondents demonstrated that on the said date, a negotiation letter was signed by the Contractor and the members of the Tender Negotiation Committee, in terms whereof the stones, ballast, bajri etc. required for use on the work were to be brought from Dhalli Quarries conforming to the Ministry of Surface Transport Specifications and the validity of the tender was extended up to 15.03.1992. Thereafter, the work stood awarded by the respondents to the contractor vide letter dated 30.03.1992 on the terms that the contractor was to arrange stone, ballast, bajri etc. from the approved quarries conforming to M.O.S.T. specifications. The approved quarries stood mentioned in condition No. 3 of the specifications and conditions for Civil Works and for face stone and other stones, the approved quarries were at Bhattakuffer/Barog and for sand and ballast, the same were are Barog and Tara Devi. Learned Arbitrator held that as per the agreement, the work was required to be commenced by 15.05.1992 and completed by 14.11.1992, but the work was actually completed on 29.12.1994. It further held that the version of the contractor that the material could not be procured from the approved quarries for the reason that there was a stay on the operation of the quarries at Dhalli by the High Court of Himachal Pradesh cannot be believed because stay on quarries by the High Court remained operative from 14.01.1993 to 26.07.1993, i.e. after the stipulated date of completion of the work, i.e. 14.11.1992 and no policy document was placed on record, which could substantiate the stand of the contractor that Government had adopted the policy of shifting stone crushers at Dhalli immediately after the work was started by him.

21. Having heard learned Senior Counsel appearing for the petitioner as well as learned Additional Advocate General, in the considered view of the

Court, the findings so returned by the learned Arbitrator cannot be upheld. A perusal of the statement of facts and claims submitted on behalf of the claimant/contractor demonstrates that in para-5 thereof it was mentioned *inter alia* that after the start of the work, a policy was adopted by respondent No. 1 for shifting the stone crushers at Dhalli and the claimant wrote to the respondents on 22.09.1992 requesting for the allotment of a quarry. A copy this letter stood appended with statement of claims as Annexure C-3. Respondent No. 1 also directed the site staff to verify the non-availability of the materials at Dhalli and also proposed to allot a quarry in the event of the materials not being available there, as is evident from communication dated 01.10.1992, Annexure C-4. According to the claimant, no quarry was allotted to him, and on 14.01.1993, High Court of Himachal Pradesh vide order passed in CWP No.51 of 1993 closed the operation of the stone crushers operating in Shimla and its suburbs. The claimant conveyed this fact to the respondents vide letter dated 03.03.1993, Annexure C-5 and as per the contractor, respondents adopted a very unreasonable stand that as the source of the materials has not been specified, they refused to settle the rate difference in view of the changed source of supply.

22. In the defence statement, these averments stand controverted by the respondents by averring that during the currency of the agreement, there existed no impossibilities in performance of the execution of the work and the claimant deliberately on account of his mismanagement and ill planning, could not make adequate arrangements. As per the respondents, the defined quarry remained suspended for operation in between 14.01.1993 to 27.07.1993. The claimant-contractor had only been coming up with proposals to procure material from Panchkula but the respondents never accepted the proposals being beyond the stipulations in the agreement, and accordingly, directed the claimant for arranging the materials from the approved quarries and to expedite the completion of the work, which was already over delayed.

No circumstance warranted the claimant to do the work in question by procuring aggregates from unspecified quarries when during the execution performance, the stipulated quarry at Dhalli was in operation. This is the stand in defence taken by the respondents.

23. The Court will now briefly refer to the relevant communications mentioned by the claimant in the statement of claims. The first is communication dated 29th September, 1992, written to the Executive Engineer, Shimla Division No. 2, by the claimant in which it was mentioned that on account of the policy of the government to shift the Dhalli crushers that the permits for quarrying were being restricted in that area, as a result of which, it shall not be possible to obtain large quantities of the said materials required for the work within the time frame expected. It was mentioned in this communication that in order to enable the contractor to execute the work within the shortest time, it shall be necessary to obtain a quarry or the source to be substituted with another one. It was also mentioned that the contractor be alloted the quarry on the truck-able road, preferably on the Shimla bye-pass to enable the contractor to obtain the requisite material for the work. In response thereto, the Executive Engineer, Shimla Division No. 2, wrote a letter to the Assistant Engineer, Vidhan Sabha Sub Division, H.P.P.W.D., dated 01.10.1992, in which, while referring to the letter of the contractor dated 29.09.1992 (wrongly referred to letter dated 22.07.1992), it stood mentioned that Assistant Engineer concerned should ensure that whether the material was available at Dhalli quarry or not and in case it was not available in Dhalli quarry, as reported by the contractor, then alternative quarry with complete lead chart and test report, as per MOT specifications, be sent to the office of the Executive Engineer, Shimla Division No. 2. A copy thereof was forwarded to the claimant with the note that with reference to the letter of the contractor dated 08.04.1992, the instructions are that till alternative quarry is not selected by the respondent No. 1, no material other than approved quarry,

should be brought to the site. Thereafter, vide communication dated 03.03.1993, the claimant wrote again to the Executive Engineer, Shimla Division No.2, and by referring to earlier communication dated 22.09.1992 and response dated 01.10.1992, mentioned therein that in terms of the directions of the authorities, the contractor had not brought any material to the site of the work, and in the meanwhile, while testing of the material from various quarries in and around Shimla was being conducted by the Executive Engineer, the High Court of Himachal Pradesh vide order dated 14.01.1993, passed in CWP No. 51 of 1993 had passed orders with regard to mining operations in the suburbs of Shimla, as a result of which, all mining and crushing operations have come to a halt and no stone/aggregate was available at the quarries in the suburbs of Shimla, including that at Dhalli. It was mentioned in this communication that in view of the said situation, as the work had come to a halt, the contractor be allotted a suitable quarry for procuring soiling stone and broken metal required for the work. It was also mentioned in the said communication that the only source from which the contractor can arrange adequate quantities of crushed aggregate of suitable specifications was from Panchkula and the alternative source will involve extra load of nearly 100 kms., which shall have to be borne by the department. Thus, the contractor called upon the authorities to convey their decision with regard to the proposal as was contained in the said communication of the contractor. This was followed by another communication addressed to the respondents by the contractor Annexure C-6, dated 28th June, 1993. Record demonstrates that vide Annexure R-2, appended with the defence statement of the respondents, which is dated 05.05.1993, the Executive Engineer, Shimla Division No.2, communicated to the contractor that the stipulated quarry for procurement of Ballast, Bajri etc., as per agreement, was Dhalli quarries. Mining and crushing operations in Dhalli quarries and suburbs of Shimla have been stopped by High Court on 14.01.1993. It was further mentioned in

this letter that the work was required to be completed by the contractor by 12.10.1992 and had the work progressed as per time schedule, then no controversy would have arisen. It was further mentioned in this communication that the contractor was required to arrange the stone ballast, Bajri etc. from any of the quarries conforming to MOT specifications, irrespective of the fact that whether it is Dhalli quarries or Panchkula quarries and no additional amount was payable to the contractor on this account as this aspect should have been seen by him before tendering for the work. Now a perusal of the award passed by learned Arbitrator demonstrates that the effect of this communication has not at all been gone into by the learned Arbitrator. The arbitrator has erred in not appreciating that it is not as if the respondents had specifically directed the contractor not to get any material from Panchkula but what the respondents had called upon the contractor to do was to procure the material, as was specified, from any quarry, be it at "**Panchkula**". What was the effect of communication dated 05.05.1993, issued by the respondents has not been at all gone into by the learned Arbitrator. Besides this, he has also not dwelled into this aspect of the matter that if the testing of the stone etc. of the crushers in and around Shimla was going on with the office of the respondents, as has been mentioned in this communication, then how the material could have been procured by the contractor when the same have not been finally approved by the respondents, because incidentally, the factum of testing of the material, as mentioned in the communications of the contractor, has not been specifically denied by the respondents. These facts negate the findings returned by learned Arbitrator qua claim No. 2. As the findings returned by learned Arbitrator are not in consonance with the evidence on record, which makes the award passed qua claim No. 2 in conflict with the public policy of India.

24. As far as claim No. 3 is concerned, learned Arbitrator held that the item of 63-40mm WBM layer does not pertain to foundation and it was

within the purview of clause 12-A for revision of rate for quantity beyond the deviation limit. It also held that as per Clause 12-A, the contractor was required to claim revision of rate within 7 days from the receipt of order to execute the quantity in excess of the deviation limit. The contractor demanded revision of rate vide letter dated 28th June, 1993, when he had already laid a quantity of 1048.79 m3 up to 02.02.1993 as per M.B. No. 2578. Learned Arbitrator further held that the contractor pleaded that for remaining quantity, he was entitled for reasonable market rate even if he failed to demand revision of rate in time. Learned Arbitrator further held that this plea of the contractor was tenable as period of 7 days does not appear to be of essence and on the directions of said Tribunal, respondent/ Executive Engineer had placed on record the analysis of rate for the item on the prevailing market rates at the relevant time vide letter dated 21.11.2009 and had worked out a rate of Rs.484.15 per cubic meter, which appeared to be the reasonable. On these bases, learned Arbitrator held the contractor to be entitled for the difference between the amount balance @ 484.15 per cubic meter after deducting the amount which already stood paid. In the Considered view of the Court, while deciding this claim, learned Arbitrator while holding that the rate of Rs. 484.13 per cubic meter was reasonable, has failed to substantiate this finding by giving any reason as to why this amount was reasonable and as to why the amount claimed by the Contractor could not be awarded. The grounds mentioned in the statement of claims as to why the contractor was entitled for the rate being claimed therein have also not been addressed to by the learned Arbitrator in the award, and therefore, on this count, the findings returned on this claim, are also liable to be set aside being in conflict with the public policy of India as the same lack reasoning.

25. With regard to claim No. 4, the contention of the petitioner is that learned Arbitrator has mis-applied and misunderstood the law laid down by Hon'ble Supreme Court of India to the effect that once it is found that there

was delay in the execution of the contract due to the conduct of the respondent, the respondent was liable for the consequences of the delay, namely, increase in prices. Record demonstrates that while deciding this issue, learned Arbitrator held that the date of completion of the work in terms of the agreement was 14.11.1992 but the same was actually completed on 29.12.1994. He held that contractor had alleged delay on account of the reasons attributable to the respondents, but a reading of the statement of facts and claims of the contractor shows that the main reason for prolongation of the contract was the alleged non-availability of the material from the Dhalli quarries as stipulated in the agreement. Learned Arbitrator held that frustration of the contract on this account has not been proved, as has been held in detail by it while giving reasons qua claim No.2. It further held that even if it was to be assumed that there was the non-availability of material from Dhalli quarries, then also, responsibility could not be attributed to the respondents as the same did not amount to breach of contract by the respondents. Learned Arbitrator held that Clause 10-C of the agreement was applicable for escalation of prices during the progress of the work and progress of work either can be during the stipulated period of completion of the work or during the extended period of completion of the same. It further held that the contractor never applied for extension of time under Clause 5 of the agreement and there was no valid extension qua the date of completion, as was envisaged in the agreement. It thus held that even statutory increase beyond 10% under Clause 10C after the contract date of completion was prohibited. It also held that the judgment relied upon by the contractor did not further its case as the same pertain to the cases where delay was attributable to the respondent, whereas in the present case, there was no established delay due to breach of contract by the respondents. In my considered view, the findings which have been returned while deciding this claim by the learned Arbitrator are self contradictory. While observing that the contractor had relied

upon the judgment of Hon'ble Supreme Court of India in P.M. Paul v. Union of India, AIR 1989 SC 1034, learned Arbitrator held that said judgment was for damages due to cost escalation on account of delay resulting from breach of contract, but, there was no cost escalation clause in the agreement in issue. It further went on to hold that Delhi High Court in Delhi Development Authority vs. J.L. Kashyap,1999 (1) Arb L.R.88, has held that an arbitrator is said to have exceeded the jurisdiction vested in him if he adopts a formula different from that set out in the agreement. Learned Arbitrator further held that any increase in prices of materials and labour, payment should have been in terms of the escalation formula given in the contract not only for the work done during the stipulated period but also for such period for which the contract was validly extended. It further held that in the present case, though there was cost escalation clause in the agreement, however, there was no established delay due to breach of contract by the respondents. On this count, it rejected the said claim. As observed above the findings returned by the learned Arbitrator are self contradictory for the reasons that while dismissing the judgment of the Hon'ble Supreme Court of India relied upon by the contractor, learned Arbitrator observed that said judgment pertained to the damages due to cost escalation on account of delay resulting from breach of contract, however, there was no cost escalation clause in the agreement in issue and in the same breath, he went on to hold that there was cost escalation clause in the agreement but there was no established delay due to breach of contract by the respondent/Executive Engineer. It is not understood as to how while discarding the judgment of the Hon'ble Supreme Court, learned Arbitrator could have held that there was no cost escalation clause in the agreement when he has thereafter held that cost escalation clause was there in the agreement but there was no established delay on the part of the respondent-department. This demonstrates that there is no due application of judicial mind while deciding this claim by the learned Arbitrator, and

therefore, the findings returned qua claim No. 4 are also liable to be set aside being in conflict with the public policy of India.

26. As far as claims No. 5 to 8 as well as the counter claims are concerned, the findings returned by the learned Arbitrator while deciding claims No. 1 to 4 have been relied upon by him and as this Court has already held that findings qua claims No. 1 to 4 are in conflict with the public policy of India, therefore, the findings which have been returned qua claims No. 5 to 8 as well as qua counter claims are also not sustainable in law, as this Court is of the considered view that it will be in the interest of justice in case after setting aside the award passed by the learned Arbitrator in its entirety, the same is remanded back to him for adjudication afresh both on the claims of the contractor as well as on the counter claims. Ordered accordingly.

In view of above discussion, this petition is allowed by setting aside award dated 17.04.2010, passed by the learned Arbitrator and the matter is remanded back to him to adjudicate the same afresh on the claims of the contractor as well as on the counter claims. Pending miscellaneous application(s), if any, also stand disposed of accordingly.

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

Virender Singh ...Petitioner.

Versus

State of H.P. ...Respondent.

Cr.MP(M) No. 77 of 2021
Reserved on: 20.1.2021.
Date of Decision: 4.2.2021.

The petition for regular bail in FIR U/s 363, 376 IPC, Sec 6 of POCSO Act Allegations- father of victim aged 16 years, reported that her daughter is missing and on search, realized that petitioner had allured her away- victim is

noticed in compound of petitioner's house, told her parents that she had voluntarily left home being in love with petitioner and refused to return home- after that, victim and her parents visited the counselor of child welfare centre where victim told her mother that petitioner allured her- on these allegations case was registered. Held- neither sec 376 IPC nor Sec 6 POCSO Act creates any restriction on grant of bail-undoubtedly victim is minor under 18 years of age, legally neither accused could have taken her from her parent's house nor she could consent to coitus. The girl was bold enough to declare that she was in love with petitioner- it seems that petitioner and victim knew each other and were romantically involved. It is not case of forcible sexual intercourse-instead victim surrendered to him out of her love and affection towards him, therefore, the rigor to reject bail and reasons to continue incarceration are reduced by mitigating factors in present case- kidnapping and rape are indeed very heinous offences. At the bail stage, the court has to consider prima facie under what circumstances the offence is committed by accused, considering the same, petitioner has made out a case for bail- bail granted subject to conditions.

Cases referred:

Anversinh alias Kiransinh Fatesinh Zala v State of Gujarat, 2021 SCC OnLine SC 19;

For the petitioner: Mr. Sudhir Thakur, Sr. Advocate with Mr. Karun Negi, Advocate.

For the respondent: Mr. Ajay Vaidya, Senior Addl. Advocate General with Mr. Bhupinder Thakur and Mr. Gaurav Sharma, Dy.A.Gs & Mr. Rajat Chauhan, Law Officer.

THROUGH VIDEO CONFERENCE

FIR No.	Dated	Police Station	Sections
74/2020	3.11.2020	Shillai, Distt. Sirmaur	363 and 376, IPC & 6 of POCSO Act

The following judgment of the Court was delivered:

Anoop Chitkara, Judge.

An unmarried boy aged 24 years, who is in custody for around three months, because a minor girl aged 16 years, came to his home as they love each other, stayed there, had coitus, which on the intervention of her parents led to the registration of FIR, has now come up before this Court seeking regular bail on the ground of the conduct of the victim.

2. Earlier, the petitioner had filed a bail petition under Section 439 CrPC before this Hon'ble High Court, which was registered as Cr.MP(M) No.2126/2020. However, vide order dated 17.12.2020, the bail petition was dismissed as withdrawn.

3. The bail petition is silent about criminal history, however, Mr. Karun Negi, Advocate, learned counsel for the bail petitioner states on instructions that the petitioner has no criminal past relating to the offences prescribing sentence of seven years and more, or when on conviction, the sentence imposed was more than three years. Status report also does not mention any criminal history.

4. Briefly, the allegations against the petitioner are that on 1st Nov 2020, the victim's father informed Police Station, Shillai that his daughter is missing from home. He also told the police that after a frantic search, they realized that one Virender Singh (petitioner herein) had allured her away with him. After that, they noticed the victim in the compound of Virender Singh's house, who himself was not present at home on that day. On interaction with her parents, she said that she had voluntarily left home because she was in love with Virender. She refused to return home. Despite efforts, she refused to accompany them. After that, the victim and her parents visited the Counselor of Child Welfare Centre in Nahan, where the victim told her mother that the petitioner allured her.

5. Based on these allegations, the police registered FIR under Section 363, IPC. On 3rd Nov 2020, the police took the victim for her medical examination in CHC, Shillai. A lady doctor examined the victim and preserved swabs from her body. Subsequently, she was produced before the learned Additional Chief Judicial Magistrate, Paonta Sahib, for recording her statement under Section 164 CrPC. On the evening of 3rd Nov 2020, the police arrested the petitioner. On 5th Nov 2020, the petitioner absconded from the police custody; however, he was nabbed without much time loss. The investigation further revealed that the petitioner used to propose to the victim for the last two years. In September 2020, the petitioner brought her to his sister's house, which was nearer to the victim's house. In his sister's home, the petitioner established coitus with her. She stayed there for 6-7 days, and the petitioner gave a proposal for a wedding. On 31st Oct 2020, the accused again met her on the village path and allured her to come to his home under the pretext of tutoring her. On 1st Nov 2020, at 6 in the morning, she fell into his trap and went towards his house. The accused met her on the way and took her with him. The investigation further revealed the victim's age to be 16 years, as her birth date was 26.6.2004. Thus, being under 18 years of age, she could not have consented to leave her home and agree to sexual intercourse.

6. Mr. Sudhir Thakur, Sr. Advocate, representing the petitioner contends that incarceration before the proof of guilt would cause grave injustice to the petitioner and family.

7. Mr. Ajay Vaidya, Ld. Sr. Additional Advocate General, contends the victim was minor and could not have consented to sex. The alternative contention on behalf of the State is that if this Court is inclined to grant bail, such a bond must be subject to very stringent conditions.

8. The possibility of the accused influencing the investigation, tampering with evidence, intimidating witnesses, and the likelihood of fleeing justice, can be taken care of by imposing elaborative and stringent conditions. In **Sushila Aggarwal**, (2020) 5 SCC 1, Para 92, the Constitutional Bench held that unusually, subject to the evidence produced, the Courts can impose restrictive conditions.

REASONING:

9. Neither S. 376 of the Indian Penal Code, 1860, (IPC), nor S. 6 of the Protection of Children from Sexual Offences Act, 2012, (POCSO) create any restriction on grant of bail. If the legislature intended to bar bails altogether, then nothing had stopped them from making a similar bar as they put in place vide S. 37 of the Narcotics Drugs and Psychotropic Substances Act, 1985, (NDPS) or for S. 438 under Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989, (SCSTPOA).

10. Until 19th June 2012, when the Government notified POCSO, and till 1st April 2013, when the Government notified IPC amendments, the age of consent was 16 years. It is common knowledge that today's generation is far ahead then what they were in the 20th century. Availability of smartphones and better access to internet has brought all knowledge instantly to their palms. Be that as it may, in a democracy, the Legislative wisdom reflects the people's will. In this backdrop, the Courts have to be overly concerned. When the legislature says that a child under 18 years of age cannot consent, then how much mature, intelligent, or informed a child maybe, she cannot consent.

11. Undoubtedly, the victim is a minor under 18 years of age, and legally, neither accused could have taken her from her parents nor consented to

coitus. It is also beyond any cavil that if the accused had taken a minor away even by alluring or on a false promise, it again prima facie is an offence. The ground reality is that even earlier, the victim had stayed out of her home for six days. This time, she left her family on her own. The statutory difficulty of the accused is that the girl was a minor, and the accused allegedly allured her to leave home.

12. On the contrary, the girl was bold enough to declare that she was in love with the accused. When her parents asked her to return home, she refused to go with them because she was in love with the petitioner. The girl's unequivocal declaration about her passion for the boy is not an ordinary activity for a young girl in a Hindu rural society.

13. The boy is aged 24 years, whereas the girl is aged 16. Even though the age gap between them is enormous, this is probably because of social background. Families arrange marriages in the Indian social setup. In such arrangements, mostly, the bride is younger than the groom, sometimes with a considerable age gap. The children also notice that their father is older than their mother. Such social settings might be a catalyst for a girl to fall in love with a more senior boy. Even otherwise, it is not unusual that a girl aged 16 years of age falls in love with a boy aged 24 years or vice-versa. Love is indeed blind.

14. Undoubtedly, he should not have had coitus with the victim, but allegedly still, he went ahead with it. It is also beyond any comprehension that he should have refrained from caressing, fondling, and talking of the penetrative act. Undoubtedly, due to the lack of an appropriate curriculum on sex education in schools, people do not know what is legally prohibited. It is for the Executive to think about sex education. However, it is a policy matter

for the policymakers to consider, and this Court refrains from commenting upon it.

15. After perusing the case's facts and circumstances, it seems that the petitioner and the victim knew each other and were romantically involved. It is not a case of forcible sexual relationship; instead, the victim surrendered to the petitioner's physical desires out of her love and affection towards him. The victim's boldness to declare her passion towards the petitioner in the presence of her father and Police speaks volumes. Further, she also told them explicitly that she left her home out of her own free will and refused to go back with her father. These facts point out that the victim, being 16 years of age, though a minor, voluntarily left her home. Therefore, the rigors to reject bail and reasons to continue incarceration are reduced by the mitigating factors in the present case.

16. Kidnapping and rape are indeed very heinous offences. However, at the bail stage, the Court has to consider prima facie under what circumstances the offence is committed by the accused. Considering the same, the Court believes that the petitioner has made out a case for bail, and his further incarceration is uncalled for.

17. In **Anversinh alias Kiransinh Fatesinh Zala v State of Gujarat**, 2021 SCC OnLine SC 19, a three Judge bench of Supreme Court holds,

> **ANALYSIS**
> ***I. Whether a consensual affair can be a defence against the charge of kidnapping a minor?***
> **11.** Having given our thoughtful consideration to the rival submissions, it appears to us that although worded succinctly, the impugned judgment does not err in appreciating the law on kidnapping. It would be beneficial to extract the relevant parts of Sections 361 and 366 of IPC

which define 'Kidnapping from Lawful Guardianship' and consequential punishment. These provisions read as follows:

"361. Kidnapping from lawful guardianship*.—Whoever takes or entices any minor under [sixteen] years of age if a male, or under [eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.*

Explanation.—The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

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366. Kidnapping, abducting or inducing woman to compel her marriage, etc.*—Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, 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 whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid]."*

12. A perusal of Section 361 of IPC shows that it is necessary that there be an act of enticing or taking, in addition to establishing the child's minority (being sixteen for boys and eighteen for girls) and care/keep of a lawful guardian. Such 'enticement' need not be direct or immediate in time and can also be through subtle actions like winning over the affection of a minor girl. [*Thakorlal D Vadgama* v. *State of Gujarat*, (1973) 2 SCC 413][2] However, mere recovery of a missing minor from the custody of a stranger would not ipso-facto establish the offence of kidnapping. Thus, where the prosecution fails to prove that the incident of removal was committed by or at the instigation of the accused, it would be nearly impossible to bring the guilt home as happened in the cases of *King*

Emperor v. *Gokaran* [AIR 1921 Oudh 226] and *Emperor* v. *Abdur Rahman* [AIR 1916 All 210].

13. Adverting to the facts of the present case, the appellant has unintentionally admitted his culpability. Besides the victim being recovered from his custody, the appellant admits to having established sexual intercourse and of having an intention to marry her. Although the victim's deposition that she was forcefully removed from the custody of her parents might possibly be a belated improvement but the testimonies of numerous witnesses make out a clear case of enticement. The evidence on record further unequivocally suggests that the appellant induced the prosecutrix to reach at a designated place to accompany him.

14. Behind all the chaff of legalese, the appellant has failed to propound how the elements of kidnapping have not been made out. His core contention appears to be that in view of consensual affair between them, the prosecutrix joined his company voluntarily. Such a plea, in our opinion, cannot be acceded to given the unambiguous language of the statute as the prosecutrix was admittedly below 18 years of age.

15. A bare perusal of the relevant legal provisions, as extracted above, show that consent of the minor is immaterial for purposes of Section 361 of IPC. Indeed, as borne out through various other provisions in the IPC and other laws like the Indian Contract Act, 1872, minors are deemed incapable of giving lawful consent [*Satish Kumar Jayanti Lal Dabgar* v. *State of Gujarat*, (2015) 7 SCC 359]. Section 361 IPC, particularly, goes beyond this simple presumption. It bestows the ability to make crucial decisions regarding a minor's physical safety upon his/her guardians. Therefore, a minor girl's infatuation with her alleged kidnapper cannot by itself be allowed as a defence, for the same would amount to surreptitiously undermining the protective essence of the offence of kidnapping.

16. Similarly, Section 366 of IPC postulates that once the prosecution leads evidence to show that the kidnapping was with the intention/knowledge to compel marriage of the girl or to force/induce her to have illicit intercourse, the enhanced punishment of 10 years as provided thereunder would stand attracted.

17. The ratio of *S. Varadarajan* [(1965) 1 SCR 243], although attractive at first glance, does little to aid the

appellant's case. On facts, the case is distinguishable as it was restricted to an instance of "taking" and not "enticement". Further, this Court in *S. Varadarajan* (supra) explicitly held that a charge of kidnapping would not be made out only in a case where a minor, with the knowledge and capacity to know the full import of her actions, voluntarily abandons the care of her guardian without any assistance or inducement on part of the accused. The cited judgment, therefore, cannot be of any assistance without establishing: first, knowledge and capacity with the minor of her actions; second, voluntary abandonment on part of the minor; and third, lack of inducement by the accused.

18. Unfortunately, it has not been the appellant's case that he had no active role to play in the occurrence. Rather the eye-witnesses have testified to the contrary which illustrates how the appellant had drawn the prosecutrix out of the custody of her parents. Even more crucially, there is little to suggest that she was aware of the full purport of her actions or that she possessed the mental acuities and maturity to take care of herself. In addition to being young, the prosecutrix was not much educated. Her support of the prosecution version and blanket denial of any voluntariness on her part, even if presumed to be under the influence of her parents as claimed by the appellant, at the very least indicates that she had not thought her actions through fully.

19. It is apparent that instead of being a valid defence, the appellant's vociferous arguments are merely a justification which although evokes our sympathy, but can't change the law. Since the relevant provisions of the IPC cannot be construed in any other manner and a plain and literal meaning thereof leaves no escape route for the appellant, the Courts below were seemingly right in observing that the consent of the minor would be no defence to a charge of kidnapping. No fault can thus be found with the conviction of the appellant under Section 366 of IPC.

II. Whether the punishment awarded is just, and ought there be leniency given the unique circumstances?

20. Having held so, we feel that there are many factors which may not be relevant to determine the guilt but must be seen with a humane approach at the stage of sentencing. The opinion of this Court in *State of Madhya Pradesh* v. *Surendra Singh [*(2015) 1 SCC 222*]* on the need

for proportionality during sentencing must be re-emphasised. This Court viewed that:

"13. We again reiterate in this case that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. ***It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence.*** *The court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment. Meagre sentence imposed solely on account of lapse of time without considering the degree of the offence will be counterproductive in the long run and against the interest of the society."*

[emphasis supplied]

21. True it is that there cannot be any mechanical reduction of sentence unless all relevant factors have been weighed and whereupon the Court finds it to be a case of gross injustice, hardship, or palpably capricious award of an unreasonable sentence. It would thus depend upon the facts and circumstances of each case whether a superior Court should interfere with, and resultantly enhance or reduce the sentence. Applying such considerations to the peculiar facts and findings returned in the case in hand, we are of the considered opinion that the quantum of sentence awarded to the appellant deserves to be revisited.

22. We say so for the following reasons: first, it is apparent that no force had been used in the act of kidnapping. There was no pre-planning, use of any weapon or any vulgar motive. Although the offence as defined under Section 359 and 361 of IPC has no ingredient necessitating any use of force or establishing any oblique intentions, nevertheless the mildness of the crime ought to be taken into account at the stage of sentencing.

23. *Second*, although not a determinative factor, the young age of the accused at the time of the incident cannot be overlooked. As mentioned earlier, the appellant was at the precipice of majority himself. He was no older than about

eighteen or nineteen years at the time of the offence and admittedly it was a case of a love affair. His actions at such a young and impressionable age, therefore, ought to be treated with hope for reform, and not punitively.

24. *Third*, owing to a protracted trial and delays at different levels, more than twenty-two years have passed since the incident. Both the victim and the appellant are now in their forties; are productive members of society and have settled down in life with their respective spouses and families. It, therefore, might not further the ends of justice to relegate the appellant back to jail at this stage.

25. *Fourth*, the present crime was one of passion. No other charges, antecedents, or crimes either before 1998 or since then, have been brought to our notice. The appellant has been rehabilitated and is now leading a normal life. The possibility of recidivism is therefore extremely low.

26. *Fifth*, unlike in the cases of *State of Haryana* v. *Raja Ram* [(1973) 1 SCC 544] and *Thakorlal D. Vadgama* v. *State of Gujarat* [(1973) 2 SCC 413], there is no grotesque misuse of power, wealth, status or age which needs to be guarded against. Both the prosecutrix and the appellant belonged to a similar social class and lived in geographical and cultural vicinity to each other. Far from there being an imbalance of power; if not for the age of the prosecutrix, the two could have been happily married and cohabiting today. Indeed, the present instance is an offence: *mala prohibita*, and *not mala in se*. Accordingly, a more equitable sentence ought to be awarded.

27. Given these multiple unique circumstances, we are of the opinion that the sentence of five years' rigorous imprisonment awarded by the Courts below, is disproportionate to the facts of the this case. The concerns of both the society and the victim can be respected, and the twin principles of deterrence and correction would be served by reducing the appellant's sentence to the period of incarceration already undergone by him.

CONCLUSION

28. In light of the above discussion, we are of the view that the prosecution has established the appellant's guilt beyond reasonable doubt and that no case of acquittal under Sections 363 and 366 of the IPC is made out. However, the quantum of sentence is reduced to the period of imprisonment already undergone.

18. An analysis of entire evidence does not justify further incarceration of the accused, nor is going to achieve any significant purpose. Without commenting on the merits of the case, the stage of the investigation and the period of incarceration already undergone would make out a case for bail. Thus, in the facts and circumstances peculiar to this case, the petitioner makes out a case for release on bail.

19. Given the above reasoning, the Court is granting bail to the petitioner, subject to strict terms and conditions, which shall be over and above and irrespective of the contents of the form of bail bonds in chapter XXXIII of CrPC, 1973.

20. In **Manish Lal Shrivastava v State of Himachal Pradesh**, CrMPM No. 1734 of 2020, after analysing judicial precedents, this Court observed that any Court granting bail with sureties should give a choice to the accused to either furnish surety bonds or give a fixed deposit, with a further option to switch over to another.

21. The petitioner shall be released on bail in the FIR mentioned above, subject to his furnishing a personal bond of Rs. Twenty-five thousand (INR 25,000/-), and shall furnish two sureties of a similar amount, to the satisfaction of the Judicial Magistrate having the jurisdiction over the Police Station conducting the investigation, and in case of non-availability, any Ilaqa Magistrate. Before accepting the sureties, the concerned Magistrate must satisfy that in case the accused fails to appear in Court, then such sureties are capable to produce the accused before the Court, keeping in mind the Jurisprudence behind the sureties, which is to secure the presence of the

accused.

22. **<u>In the alternative</u>**, the petitioner may furnish aforesaid personal bond and fixed deposit(s) for Rs. Twenty-five thousand only (INR 25,000/-), made in favour of "Chief Judicial Magistrate, District Sirmaur, H.P.,"

a) Such Fixed deposits may be made from any of the banks where the stake of the State is more than 50%, or any of the stable private banks, e.g., HDFC Bank, ICICI Bank, Kotak Mahindra Bank, etc., with the clause of automatic renewal of principal, and liberty of the interest reverting to the linked account.

b) Such a fixed deposit need not necessarily be made from the account of the petitioner and need not be a single fixed deposit.

c) If such a fixed deposit is made in physical form, i.e., on paper, then the original receipt shall be handed over to the concerned Court.

d) If made online, then its printout, attested by any Advocate, and if possible, countersigned by the accused, shall be filed, and the depositor shall get the online liquidation disabled.

e) The petitioner or his Advocate shall inform at the earliest to the concerned branch of the bank, that it has been tendered as surety. Such information be sent either by e-mail or by post/courier, about the fixed deposit, whether made on paper or in any other mode, along with its number as well as FIR number.

f) After that, the petitioner shall hand over such proof along with endorsement to the concerned Court.

g) It shall be total discretion of the petitioner to choose between surety bonds and fixed deposits. It shall also be open for the petitioner to apply for substitution of fixed deposit with surety bonds and vice-versa.

h) Subject to the proceedings under S. 446 CrPC, if any, the entire amount of fixed deposit along with interest credited, if any, shall be endorsed/returned to the depositor(s). Such Court shall have a lien over the deposits up to the expiry of the period mentioned under S. 437-A CrPC, 1973, or until discharged by substitution as the case may be.

23. The furnishing of the personal bonds shall be deemed acceptance of the following and all other stipulations, terms, and conditions of this bail order:

a) The petitioner to execute a bond for attendance to the concerned Court(s). Once the trial begins, the petitioner shall not, in any manner,

try to delay the proceedings, and undertakes to appear before the concerned Court and to attend the trial on each date, unless exempted. In case of an appeal, on this very bond, the petitioner also promises to appear before the higher Court in terms of Section 437-A CrPC.

b) The attesting officer shall, on the reverse page of personal bonds, mention the permanent address of the petitioner along with the phone number(s), WhatsApp number (if any), e-mail (if any), and details of personal bank account(s) (if available), and in case of any change, the petitioner shall immediately and not later than 30 days from such modification, intimate about the change of residential address and change of phone numbers, WhatsApp number, e-mail accounts, to the Police Station of this FIR to the concerned Court.

c) The petitioner shall not influence, browbeat, pressurize, make any inducement, threat, or promise, directly or indirectly, to the witnesses, the Police officials, 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.

d) The petitioner shall join the investigation as and when called by the Investigating Officer or any Superior Officer; and shall cooperate with the investigation at all further stages as may be required. In the event of failure to do so, it will be open for the prosecution to seek cancellation of the bail. Whenever the investigation occurs within the police premises, the petitioner shall not be called before 8 AM and shall be let off before 5 PM, and shall not be subjected to third-degree, indecent language, inhuman treatment, etc.

e) In addition to standard modes of processing service of summons, the concerned Court may serve or inform the accused about the issuance of summons, bailable and non-bailable warrants the accused through E-Mail (if any), and any instant messaging service such as WhatsApp, etc. (if any). [Hon'ble Supreme Court of India in Re Cognizance for Extension of Limitation, Suo Moto Writ Petition (C) No. 3/2020, I.A. No. 48461/2020- July 10, 2020]:

i. At the first instance, the Court shall issue the summons.

ii. In case the petitioner fails to appear before the Court on the specified date, in that eventuality, the concerned Court may issue bailable warrants.

iii. Finally, if the petitioner still fails to put in an appearance, in that eventuality, the concerned Court may issue Non-Bailable Warrants to procure the petitioner's presence and may send the petitioner to the Judicial custody for a period for which the concerned Court may deem fit and proper to achieve the purpose.

24. During the trial's pendency, if the petitioner repeats or commits any offence where the sentence prescribed is more than seven years or violates any condition as stipulated in this order, the State may move an appropriate application before this Court, seeking cancellation of this bail. Otherwise, the bail bonds shall continue to remain in force throughout the trial and after that in terms of Section 437-A of the CrPC.

25. Any Advocate for the petitioner and the Officer in whose presence the petitioner puts signatures on personal bonds shall explain all conditions of this bail order, in vernacular and if not feasible, in Hindi.

26. 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 to 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.

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

28. 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.

29. In return for the protection from incarceration, the Court believes that the accused shall also reciprocate through desirable behavior.

30. The SHO of the concerned Police Station or the Investigating Officer shall arrange to send a copy of this order, preferably a soft copy, to the victim, at the earliest. In case the victim notices any objectionable behavior or violation of any terms or conditions of this order, the victim may inform the SHO of the concerned Police Station or the Trial Court or even to this Court.

31. I express my gratitude to my interns Adv **Apoorva Maheshwari** and Adv **Sakshi Attri** for their excellent perspective.

32. *There would be no need for a certified copy of this order for furnishing bonds, and any Advocate for the Petitioner can download this order alongwith case status from the official web page of this Court and attest it to be a true copy. In case the attesting officer or the Court wants to verify the authenticity, such an officer can also verify its authenticity and may download and use the downloaded copy for attesting bonds.*

The petition stands allowed in the terms mentioned above.

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

Suresh Kumar

...Petitioner.

Versus

State of H.P.

...Respondent.

Cr.MP(M) No. 656 of 2021
Reserved on: April 24, 2021

Date of Decision: May 5, 2021

The petition for regular bail- In F.I.R. u/s 376 IPC, Sec 04 POCSO Act- Petitioner aged 26 years, letting the victim aged 17 years, who was his friend, take lift in his jeep and after that instead of allowing her to alight ,bringing the vehicle to an isolated place- then after intimidation establishing coitus despite her protest- Held- the victim had left her home, at 10 AM to visit a Doctor and on reaching home, she narrated the incident to her mother. The incident occurred in the day time and not in odd hours, victim arrived home in time. There is no mention of anyone enquiring her about being seen with a boy. This prima facie points towards the genuineness of incident- scientific evidence points towards the presence of blood and semen in victims underwear. As per her statement u/s 164 Cr. P. C, she said 'NO' for sex and accused told her not to cry otherwise he would force himself upon her- in such circumstances of threat and coercion in a secluded area, victim was forced to co-operate which explains, absence of injuries on her body-Neither the absence of resistance nor unwilling submission implies consent in any language-in facts and circumstances of case petitioner fails to make a case for bail –The petition dismissed.

For the petitioner: Ms. Rittika Jassal, vice Mr. Aditya Thakur, Advocate.

For the respondent: Mr. Nand Lal Thakur, Additional Advocate General.

THROUGH VIDEO CONFERENCE

FIR No.	Dated	Police Station	Sections
105 of 2020	**17.12.2020**	**Rajgarh, District Sirmaur, H.P.**	**376 of the IPC and Section 4 of POCSO Act.**

The following judgment of the Court was delivered:

Anoop Chitkara, Judge.

The petitioner, aged 26 years, in custody since 18-12-2020, for letting the victim aged 17 years, who was his friend, take the lift in his Jeep,

and after that, instead of allowing her to alight, bringing the vehicle to an isolated place and then after intimidation and establishing coitus, despite her protests, has come up before this Court seeking regular bail,

2. Earlier, the petitioner had filed a petition under Section 439 CrPC before this Court, which was registered as Cr.MP(M) No.210 of 2021, but the same was dismissed with liberty to file fresh.

3. In Para 2 of the bail application, the petitioner declares having no criminal history. The status report also does not mention any criminal past of the accused

4. Briefly, the allegations against the petitioner are that on 17.12.2020, the victim was waiting for the bus at the bus stand. Around noon, accused, who was her friend, reached the said place in his pickup Jeep and offered that he would drop her at her home. The victim boarded the vehicle, but the accused took a detour on the way. On enquiry by the victim, he said that he would take a U-turn ahead and drop her at her home. However, he did not do so, took the Jeep to a secluded place, and started inappropriately touching the victim. The girl said NO to him but instead, the accused told her that if she would cry, then he would force himself upon her. He then asked her if she would marry him, to which the girl said no. After that, the accused undressed the victim and had sexual intercourse with her. After doing so, he left for Solan, and the victim came home by bus. On reaching home, she informed her mother about the incident. Based on these allegations, the Police registered the FIR mentioned above.

5. I have heard Ms. Ritika Jassal, Ld. Counsel for the accused. She has argued that the victim stated in her statement under S. 164 CrPC that she

was friend of the accused, and her taking lift in his vehicle further proved that the friendship was cordial, resultantly, the sexual intercourse, if any, took place with active consent and without any force on her by the accused. Thus, the conduct of the victim would entitle the accused for grant of bail. On the contrary, Mr. Nand Lal Thakur, Ld. Additional Advocate General for the State, drew attention to Para 3 of the petition wherein the allegations are that the Police was trying to save the actual culprits.

REASONING:

6. The victim had left her home at 10 in the morning to visit a Doctor. On reaching home, she narrated the unfortunate incident to her mother. The incident occurred in the daytime and not in the odd hours, and the victim arrived home in time. There is no mention of the victim reaching home late or anyone enquiring her about being seen with a boy. Had she consented to the coitus, then there was no reason for her to reveal it to her mother. Since she had gone to visit the doctor, she could have easily made up excuses to come home late from the doctor's clinic, e.g., the doctor was not available, there were many patients, or that she could not find a bus, etc. The question involved here is what prompted the girl to inform about the incident to her mother. It is not the case that she reached home late in the night or that her parents questioned her or started a search looking for her. She would have kept it discreet because, as per her version, no one had noticed them. If the sexual act was with her will, she would not have told anyone about the same and tried to conceal the same. The victim voluntarily narrated the incident to her mother, prima facie points towards the genuineness of the incident. It would be correct to say that it was courageous for the victim girl to talk about the unfortunate incident to her mother and later come forward and report the same with the police.

7. Furthermore, the scientific evidence points towards the presence of blood and semen on the victim's underwear. It also states that no physical injuries were found on her body. As stated by the victim in her Section 164 CrPC statement that she had said NO for sex to the accused, and the accused told her not to cry; otherwise, he would force himself upon her. In such circumstances of threat and coercion in a secluded area, the victim was forced to cooperate with the accused, which explains the absence of physical injuries on her body, and the presence of semen, indicating unprotected sex.

8. Neither the absence of resistance nor the unwilling submission implies consent in any language. She explicitly said no to the accused, but he did not stop. When the curriculum does not include the proper sex education, the children raised by such societies fail the women time and again. NO MEANS NO- The simplest of sentences have become the most difficult for some men to understand. No does not mean yes, it does not mean that the girl is shy, it does not mean that the girl is asking a man to convince her, it does not mean that he has to keep pursuing her. The word NO doesn't need any further explanation or justification. It ends there, and the man has to stop. Be that as it may, the victim, in this case, said no to the accused when he started touching her, but he continued. It nowhere implies consent, or zeal and desire to explore and feel each other in romantic love.

9. Counsel for the parties have also made several other arguments. Still, given that this Court is not inclined to grant bail, on the reasons mentioned above, discussion of the same will be an exercise in futility. Any detailed analysis of the evidence may prejudice the case of the prosecution or the accused.

10. Given above, in the facts and circumstances peculiar to this case, at this stage, the petitioner fails to make out a case for bail. The petition is dismissed with liberty to file a new bail application in case of changed circumstance.

11. I express my gratitude to my Law Clerk-cum-Research Assistant, Ms. Apoorva Maheshwari, for excellent perspective.

12. 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 is dismissed.

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

M/s Rikhi Ram Amar Nath ..... Petitioner.

Versus

Shri Chamba Mal Bhagra
(since deceased), through his legal
representatives Vishal Sood & another ..... Respondents.

Civil Revision No.:07 of 2020
Reserved on: 04.03.2021
Decided on: 29.04.2021

Code of Civil Procedure - Order 22 Rule 3 read with section 151- Respondents / Petitioners filed application for impleading them as Legal Representatives of deceased landlord / petitioner on the basis of will bequeathing the rental accommodation in their favour – Application was allowed by Rent Controller – Challenged – Held, that pleadings set up in eviction petition clearly demonstrate that the eviction of tenant was sought for personal use and occupation for setting up business of the then landlord and his son/grandsons – Not disputed that property stood bequeathed by original

landlord in favour of grandsons – No infirmity in order passed by Rent Controller impleading present respondents as petitioners/landlords in eviction petition – Revision Petition dismissed. Paras (10,11,12)

For the petitioner : Mr. Neeraj Gupta, Senior Advocate,
with Mr. Ajeet Jaswal, Advocate.

For the respondents : Mr. Ajay Kumar Sood, Senior Advocate,
with Mr. Sumit Sood, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this Civil Revision, the petitioner has prayed for the following reliefs:-

> " It is, therefore, prayed that after calling for the record of the case from the Court of learned Rent Controller (2), Shimla (H.P.) the present petition may be accepted and impugned Order dated 13.12.2019 passed by Learned Rent Controller Court No.(2) Shimla (HP) in Rent Petition Case No.18-2 of 2016/12 may be ordered to be set aside and consequently the application under Order 22 Rule 3 read with Section 151 of the Code of Civil Procedure filed by landlords-respondents may be ordered to be dismissed with costs, by passing such further order as may be deemed fit in the facts and circumstances of the case."

2. Brief facts necessary for the adjudication of the present petition are as under:-

The predecessor-in-interest of the respondents herein filed an Eviction Petition against the present petitioner, under Section 14 of the H.P. Urban Rent Control Act, 1987. The premises in issue are non-residential and in terms of the contents of the Eviction Petition, the demised premises are a shop, approximately measuring 450 square feet, in the ground floor of the building and

a godown/store with approximately same area in the first floor of the building, No.48, Lower Bazar, Shimla, H.P. The grounds mentioned in the petition for eviction of the tenant, *inter alia*, are that the eviction of the tenant is sought, as the demised premises were bonafidely required by the landlord for his personal use and occupation and for setting up business. It further stood mentioned in the Eviction Petition that the landlord, who was doing retail business of electrical parts and equipment in a rented shop at Middle Bazar, Shimla, H.P., bonafidely required the rented accommodation for his own use, with a view to start new business with his son and grand-son. During the pendency of this petition, the landlord died.

3. The respondents herein filed an application, under Order 22, Rule 3 read with Section 151 of the Code of Civil Procedure Code, before learned Rent Controller, Shimla, District Shimla, H.P., for impleading them as legal representatives of the deceased landlord. It was mentioned in the application that petitioner/landlord (Chamba Mal Bhagra) had expired on 24.10.2018. The deceased (Shri Chamba Mal Bhagra), vide Will dated 03.10.2018 had bequeathed the rented accommodation in favour of the applicants, i.e. his grand-sons, to succeed his estate, which was in possession of the respondents. As per the applicants, as they had stepped into the footsteps of the deceased/landlord and had become owners of the property in question, they prayed for their impleadment as legal heirs of the deceased/landlord.

4. The application was resisted by the tenants, *inter alia*, on the ground that the applicants had failed to supply the copies of Will and mutation etc. and the application was otherwise not maintainable, as the Eviction Petition was filed by the landlord/petitioner, on the grounds of his personal use and occupation and after the death of Shri Chamba Mal Bhagra, the alleged requirement had ceased to exist.

5. This application was allowed by the learned Rent Controller, vide order dated 13.12.2019. Learned Rent Controller, after taking into consideration

the respective stand of the parties held that the factum of Shri Chamba Mal Bhagra having executed a Will, dated 03.10.2018, whereby he bequeathed and devised the demised premises in favour of his grand-sons, was not disputed by the tenant and the objection taken was that as deceased/landlord was having one son and one daughter, therefore, they were required to be impleaded as legal representatives. Learned Rent Controller held that the copy of Will and Mutation attested on the basis of the same were placed on record and perusal thereof demonstrated that as the grand-sons of original petitioner, namely Vikas Sood and Vishal Sood, were bequeathed the property, therefore, they could be termed to be the legal representatives of deceased Chamba Mal Bhagra, as they had entered into his shoes as landlords and owners of the demised premises. Learned Court held that the contention of the tenant that as the petition was filed by the landlord on the ground of his bonafide requirement and the same ceased to exist after his death was concerned, was having no merit in view of the law laid down by the High Court of Himachal Pradesh, in *Civil Revision No.124 of 2019*, titled *M/s Kanshi Ram Amar Nath* Versus *Vikas Sood & anrs*, decided on *23.09.2019*. Learned Rent Controller held that the legal representatives of Shri Chamba Mal Bhagra had every right to pursue the eviction petition and on these basis, it allowed the application, filed under Order 22, Rule 3 of the Code of Civil Procedure and impleaded the grand-sons of Shri Chamba Mal Bhagra, i.e. the present respondents, as petitioners/ landlord.

6. Feeling aggrieved, the tenant has filed the present Revision Petition.

7. I have heard learned counsel for the parties and have gone through the impugned order as well as other record appended by the parties, alongwith the pleadings.

8. In my considered view, the contention of learned Senior Counsel, appearing on behalf of the petitioner that the impugned order is not sustainable in the eyes of law, as learned Rent Controller has erred in not appreciating that as the eviction of the tenant was sought by the landlord for his own personal

use, therefore, the right ceased to exist after the death of the landlord in the facts of this case, is without merit.

9. I have already enumerated hereinabove the contents of para-18 of the Eviction Petition i.e. the grounds on which the eviction was sought of the tenant by the landlord. It is specifically mentioned in the said para that eviction of the tenant was sought by the landlord on the ground that the rented premises were bonafidely required by the landlord for his personal use and occupation for setting up a business with his son and grand-sons. It is also pleaded in para-18 of the petition that the landlord, his son Ravinder Sood and grand-son Vishal Sood were all dependent on earnings, which they earned from the business being run in a rented shop at Middle Bazar, Shimla, H.P., which earnings were hardly sufficient for needs and requirements of the family. It further stood pleaded that the landlord's grand-son was of marriageable age and on account of change in financial requirements and needs of the family, the petitioner intended to set up business in the rented accommodation with a view to increase his income and help his son and grand-son to earn their livelihood and raise their standard of leaving. Further it was pleaded that the petitioner alongwith his son and grand-son had decided to open a departmental store or Multi-National Brand Show Room in the same with a view to increase their income as per the change in financial requirements of the family.

10. In my considered view, said pleadings clearly demonstrate that the eviction of the tenant was not sought by the landlord for his own personal use and occupation only as is being contended by the tenant, but the eviction was sought for personal use and occupation for setting up business of the then landlord as well as his son and grand-sons. It is not in dispute that by way of Will dated 03.10.2018, the property stood bequeathed by the landlord in favour of his grand-sons, alongwith one of whom, he intended to start business in the demised premises after getting the same vacated from the tenant.

11. In this view of the matter, this Court finds no infirmity with the order passed by learned Court below, vide which the application filed by the present respondents, under Order 22, Rule 3 read with Section 151 of the Code of Civil Procedure, for being impleaded as petitioners in place of original petitioner/ landlord, who had died during the pendency of the eviction proceedings, was allowed.

12. Accordingly, this petition being devoid of any merit, is dismissed, so also pending miscellaneous applications, if any. Interim order, if any, stands vacated.

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

Rishi Gautam alias Rishu & others ....Petitioners.

Versus

State of Himachal Pradesh & another ...Respondents.

Cr.MMO No.115 of 2021
Decided on: 23.04.2021

Code of Criminal Procedure -- Section 482 ------ Prayer for quashing F.I.R. No. 16/2017 dated 14-01-2017 U/SS 147, 149, 341, 504, 506 & 427 IPC, P.S. Sadar, Bilaspur on the ground that matter has been settled amicably between the parties --Held, that allegations perse in FIR are serious -- Direction under Section 482 CrPC can not be exercised to give benefit to the accused by permitting them to go scot free simply because the matter has been settled between the parties -- Petition dismissed. (Paras 5, 6)

For the petitioners : Mr. Mandeep Chandel, Advocate, vice Mr. Atul Kumar, Advocate.

For the respondents : Mr. Sumesh Raj, Mr. Dinesh Thakur, Additional Advocates

General, with Mr. Kamal Kant Chandel, Deputy Advocate General, for respondent No.1.

Mr. Sudhanshu Jamwal, Advocate, for respondent No.2.

(through Video Conferencing)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (oral)

Mr. Sudhanshu Jamwal, Advocate has put in appearance on behalf of respondent No.2.

2. By way of this petition, filed under Section 482 of the Criminal Procedure Code, a prayer has been made for quashing of F.I.R. No.16/2017, dated 14.01.2017, registered under Sections 147, 149, 341, 504, 506 & 427 of the Indian Penal Code, at Police Station Sadar Bilaspur, District Bilaspur, H.P. and the proceedings pending before learned Chief Judicial Magistrate, Bilaspur, District Bilaspur, H.P., in Criminal Case No.187/02 of 2017, on the ground that the matter which led to the registration of the F.I.R. has been amicably settled between the parties.

3. The allegations against the accused in the F.I.R. are that the complainant, who was driver of truck bearing registration No.HP 31D-5124, was on his way from Ludhiana to Rewalsar-Durgapur, taking the truck load of bricks in his vehicle, on 13.01.2017. At around 11:30 p.m., when the truck reached at place Chakli (Benla Brahmna), suddenly a car from behind took pass from the truck and the same, thereafter, was stopped parked in front of the truck, forcing the truck to be stopped. The accused, who were the occupants of the car, came out of the said car and started abusing the complainant. When he inquired the reason as to why he was being abused by the accused, the accused started

manhandling him. Thereafter, the complainant shut himself in the vehicle and the accused left in the car towards Kandror. Further, as per the complainant, out of fear he parked his truck on the road side and hided himself in the fields. After some time, the accused returned back in the same car and one more Pick-up Jeep. The registration number of the car was HP 23A-1998. The accused were under the influence of liquor. They besides physically abusing the complainant, broke the wind screen as well as the lights of the truck. It is on these allegations that the F.I.R. stood registered against the accused.

4. Reply to the petition has been filed by the State. It stands mentioned therein that after lodging of the F.I.R., investigation was carried out, which confirmed involvement of the accused with the offence. After completion of investigation, challan was presented before learned Trial Court, where the matter is pending. According to the State, on the basis of statement of witnesses and evidence on record, a strong case is made out against the accused.

5. Having perused the contents of the F.I.R. and having gone through the response which has been filed by the State to the present petition, this Court is of the view that the discretion conferred upon the Court, under Section 482 of the Criminal Procedure Code cannot and should not be exercised in such like cases so as to give benefit to persons like the accused by permitting them to go scot free qua the allegations leveled against them in the F.I.R., simply because the matter has been settled between them and the complainant. The allegations, *per se*, are serious. The alleged offences cannot be ignored by the Court to be innocuous, dehors the fact that the matter may have been be settled between the petitioners i.e. the accused and the complainant.

6. This petition is, therefore, dismissed, vide which prayer stands made for quashing of the F.I.R., as the Court does not finds the present case to be a fit case to exercise discretion vested in it under Section 482 of the Criminal Procedure Code to quash the F.I.R. on account of the matter having been

amicably settled between the parties. Pending miscellaneous applications, if any, stand disposed of.

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

Medh Ram ....Petitioner.

Versus

Madan Lal & others ..... Respondents.

Criminal Revision No.135 of 2012
Decided on: 31.03.2021

Code of Criminal Procedure --- Sections 397, 401---Revision against judgment acquitting the accused passed in Criminal case No. ½ of 09/2015 dt. 26-02-2010, titled as State ---- vs. --- Madan Lal & Others by Court of Ld. JMFC Nalagarh and Judgment passed in appeal by Ld. Additional Sessions Judge, Solan upholding the judgment of Trial Court ------- Accused were charged and tried for commission of offences under Sections 380 & 427 read with Section - 34 IPC ----- Held, that in view of findings returned in civil suits between parties disposed by common judgment, Ext, D-1, evidence adduced by prosecution not sufficient to prove possession of the complainant over disputed house as well as the articles lying therein ----- Ld. Trial Court rightly acquitted the accused and appeal also rightly dismissed-----Revision petition dismissed. (Paras 8,9,11)

For the petitioner : Mr. T.S. Chauhan, Advocate.

For the respondents : None for respondents No.1 to 3.

Mr. Dinesh Thakur and Mr. Sanjeev Sood, Additional Advocates General, for respondent No.4.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral)

By way of this revision petition, filed under Sections 397 and 401 of the Code of Criminal Procedure, the petitioner/complainant has assailed the judgment passed by the Court of learned Judicial Magistrate, 1st Class, Court No.2, Nalagarh, District Solan, H.P., in Criminal Case No.1/2 of 09/2005, dated 26.02.2010, titled as State of H.P. Versus Madan Lal & others, vide which judgment, learned Court below acquitted the accused therein of the offences punishable under Sections 380 and 427 of the Indian Penal Code and further ordered the case property to be returned to the accused, as well as the judgment passed by the Court of learned Additional Sessions Judge, Solan, District Solan, H.P., in Criminal Appeal No. 3-NL/10 of 2010, titled as Medh Ram Versus State of Himachal Pradesh & others, decided on 31.12.2011, vide which learned Appellate Court while dismissing the appeal filed by present petitioner, upheld the judgment passed by learned Trial Court.

2. Brief facts necessary for the adjudication of the present petition are as under:-

Respondents No.1 to 3 herein were charged and tried for the commission of offences punishable under Sections 380 and 427 read with Section 34 of the Indian Penal Code, on the basis of F.I.R. No.66 of 2004, dated 14.05.2004, registered against them at the behest of present petitioner, at Police Station, Barotiwala, District Solan, H.P.

3. The case of the complainant was that he was owner of a house at village Patta, which was in his possession and the same stood locked by him as he was residing at village Bishian for the last ten years. On 10.05.2004, the complainant went to village Patta and found that one wall and roof of his house was damaged and certain domestic articles were also missing. It was the case of the complainant that the accused, in furtherance of their common intention, had committed theft of the household articles by damaging the wall and roof of the

house of the complainant. After lodging of the F.I.R., the investigation was carried out and challan was filed in the Court. On finding a *prima facie* case against the accused, charges were framed against them, under Sections 380 and 427 read with Section 34 of the Indian Penal Code.

4. To prove its case, the prosecution examined ten witnesses. Accused persons denied the prosecution story and claimed themselves to be innocent and according to them, it were the accused who were in possession of the house in issue.

5. On the basis of evidence which was led before learned Trial Court, vide judgment dated 26.02.2010, learned Trial Court acquitted the accused and ordered return of the case property to the accused. While acquitting the accused, learned Trial Court held that Ext.D1, which was copy of judgment of Civil Court, clearly demonstrated that it was not the complainant who was in possession of the suit property. It held that statement of PW-2 especially cross-examination of said witness demonstrated that this witness had admitted that Medh Ram (present petitioner) was residing in village Bishian and Banti Devi was residing at village Patta for last more than twenty five years. Banti Devi is the mother of accused Asha Ram and Asha Ram is father of other two accused. Learned Court below also held that the evidence led by the prosecution revealed that Banti Devi was residing in the disputed house and complainant and his father never remained in possession of the same. It held that it was for the prosecution to prove that the complainant was in possession of the disputed house and that the accused had committed theft, which the prosecution had failed to demonstrate. Learned Court also held that the prosecution had failed to prove that the articles stolen by the accused belonged to the complainant. It also held that statement of PW-5 demonstrated that Banti Devi had lodged a complainant against the complainant in the Panchayat. On these basis, learned Trial Court acquitted the accused.

6. In appeal, the findings of learned Trial Court were upheld by learned Appellate Court. It was held by learned Appellate Court that the copy of judgment of Civil Court, dated 19.03.2009, Ext.D1, clearly demonstrated that complainant Medh Ram had filed a civil suit against the accused persons on the ground that he was owner in possession of the disputed house, which stood decided by the Court of learned Civil Judge (Senior Division), Nalagarh, District Solan, H.P., vide common judgment dated 19.03.2009, dismissing the same. Learned Appellate Court also held that Asha Ram (accused) had also filed a civil suit qua the same property, which was decreed by the Court of learned Civil Judge (Senior Division), Nalagarh, District Solan, H.P., same common judgment dated 19.03.2009. It held that therefore, it could not be said that the complainant was in possession of the house and the articles lying therein were also in his possession. Learned Appellate Court further held that the evidence adduced by the prosecution was not sufficient to prove the possession of the complainant over disputed house as well as the articles lying therein. On these basis, it upheld the judgment passed by learned Trial Court while dismissing the appeal. Present revision petition as mentioned above is directed against the said judgments.

7. I have heard learned counsel for the parties and have also gone through the judgments passed by learned Court below as well as the record of the case.

8. During the course of arguments, the factum of a civil suit filed by the complainant, qua the suit property, claiming ownership over the same having been dismissed, could not be proved to the contrary by learned counsel for the petitioner. In fact, a perusal of Ext.D1 demonstrates that both the learned Courts below have correctly held that the Civil Court had decided the factum of the suit property being in possession of accused Asha Ram while dismissing the claim of the complainant over the same, as this was in consonance with findings returned in Ext.D1.

9. In this view of the matter, when there is a judicial verdict in favour of the accused, that they were in possession of the disputed house, no fault can be attributed to the findings returned by the learned Courts below, whereby they have held that the prosecution was not able to prove that the house was in possession of the complainant. That being the case, when the house itself was in possession of the accused, then by no stretch of imagination, the articles lying therein could be said to be in possession of the complainant. In this background, learned Trial Court has rightly acquitted the accused of the commission of offences punishable under Sections 380 and 427 of the Indian Penal Code, and learned Appellate Court has rightly dismissed the appeal filed by the complainant against the judgment passed by learned Trial Court.

10. During the course of arguments, learned counsel for the petitioner otherwise could not point out any perversity with the findings returned by both the learned Courts below by referring to the evidence on record.

11. Accordingly in view of the discussion held hereinabove, as this Court does not finds any merit in this petition, the same is dismissed, so also pending miscellaneous applications, if any.

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

Narinder Kumar Datta ....Petitioner.

Versus

State of H.P. & others .... Respondents.

CWP No.561 of 2020
Reserved on: 05.05.2021
Decided on: 12.05.2021

Constitution of India --Article 226 -- Petitioner appointed as clerk on compassionate basis in the year 1985 -- On account of voluntary transfer sought by petitioner from District Chamba to District Kangra, lost seniority of

District Chamba -- Petitioner promoted to the post of Senior Assistant in the year 2015, after he completed his 10+2 in 2014 and not before ----Now, petitioner prays to issue direction to respondents to consider his name for promotion as Senior Assistant from the due date i.e. 2012 after receiving DPC on 10-07-2012 and 05-06-2014 alongwith consequential benefits-- Held, that petitioner initially recruited against the post of clerk on compassionate basis not disputed -- Communication dated 31-03-2005 issued by Financial Commissioner-cum-Secretary Revenue of Govt. of H.P. exempts clerks recruited on compassionate basis from possessing minimum qualification as 10+2 for promotion to the post of Senior Assistant — Non- recommendation of petitioner for promotion to the post of Senior Assistant for not possessing qualification of 10+2 not justifiable in law --- Petition allowed. (Paras 10,12,,13,14)

For the petitioner : Mr. Varun Chandel, Advocate.

For the respondents : Mr. Sumesh Raj, Mr. Dinesh Thakur, Additional Advocates General, Ms. Divya Sood, Deputy Advocate General, for the respondents No.1 to 4-State.

Respondents No.5 and 6 *ex parte*.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this petition, the petitioner has, *inter alia*, prayed for the following relief:-

> "*That the respondents may be directed to consider the name of the petitioner for promotion as Senior Assistant from the due date i.e. 2012 after receiving the DPC on 10.07.2012 and 05.06.2014, also placing the name of the petitioner in accordance with the corrected seniority list. Further the respondent may be directed to provide the*

petitioner all consequential benefits after granting his promotion w.e.f. 2012."

2. The case of the petitioner is that he was appointed as a Clerk on compassionate basis in the year 1985. He was initially posted at D.C. Office Chamba, District Chamba, H.P., but on account of his family circumstances, he got himself transferred from District Chamba to District Kangra and was posted as a Clerk/Junior Assistant in the Office Deputy Commissioner, Kangra at Dharamshala, H.P. w.e.f. 31.01.1990. On account of this voluntarily transfer sought by the petitioner, he lost his seniority of District Chamba. In terms of his seniority as determined from the date when he joined in District Kangra, he was assigned seniority at serial No.60 in terms of the seniority list issued by the respondent-department, vide Annexure P-1, dated 31.12.2007. A Departmental Promotion Committee was convened for considering eligible candidates for promotion to the post of Senior Assistant, on 15.11.2011 and name of the petitioner was recommended at serial No.12 in the probable list prepared for the purpose of promotion, however, the petitioner was not promoted. Thereafter, vide Notification dated 18.04.2012 (Annexure P-3 Colly), the Himachal Pradesh, Department of Personnel, Senior Assistant, Class-III (Non-Gazetted, Ministerial Services) Common Recruitment and Promotion Rules, 2011 were amended to the effect that the post of Senior Assistant was now to be filled 100% by promotion, *inter alia*, from amongst Clerks/ Junior Assistants of concerned departments, possessing ten years regular service or regular combined with continuous adhoc service, provided they possesses the minimum educational qualification of 10+2. The next meeting of the Departmental Promotion Committee was held on 10.07.2012 (Annexure P-4), vide which the name of the petitioner alongwith other incumbents mentioned therein, which included incumbents similar to the petitioner who were only matriculate, were recommended for promotion to the post of Senior Assistant. Though,

persons senior to the petitioner, but matriculate, were promoted to the post of Senior Assistant on the recommendation of the Departmental Promotion Committee, however, the petitioner was not promoted, as sufficient number of promotional posts were not available. Thereafter, again a Departmental Promotion Committee was convened in the month of June, 2014, but the name of the petitioner was not recommended for promotion to the post of Senior Assistant as per his seniority, on the ground that he was not possessing the qualification of 10+2. The petitioner was promoted to the post of Senior Assistant in the year 2015, after he completed his 10+2 in the year 2014.

3. The grievance of the petitioner is that the act of the respondent-department of denying him promotion simply on the ground that he was not possessing the qualification of 10+2 in the year 2014, is bad in law as the respondent-department erred in not appreciating that as the petitioner was initially appointed by way of compassionate appointment, then in terms of the communication dated 31.03.2005, issued by the Financial Commissioner-cum-Secretary Revenue, to the Government of Himachal Pradesh, the petitioner could not have been ignored for promotion to the post of Senior Assistant, on the ground that he was not possessing 10+2 qualification as there was an exemption from possessing the qualification of 10+2, in case of employees who were appointed as Clerks on compassionate basis, provided they possessed the qualification of matriculation. It is in this background that this petition has been filed, praying for the reliefs already enumerated hereinabove.

4. The petition is opposed by respondents-State, *inter alia*, on the ground that as the Recruitment and Promotion Rules to the post of Senior Assistant stood modified in the year 2012 and the minimum qualification necessary for promotion was 10+2, therefore, in the absence of the petitioner possessing the said qualification, he was not eligible to be considered for promotion till he attained the qualification of 10+2. It is further the stand of the State that though in the year 2012, name of the petitioner was recommended by

the Departmental Promotion Committee, but he could not be promoted, as number of posts available, were occupied by his seniors, whereas the Departmental Promotion Committee convened on 05.06.2014, rightly did not recommend the name of the petitioner for promotion to the post of Senior Assistant as he was not possessing the qualification of 10+2.

5. By way of rejoinder, the petitioner has reiterated the stand taken in the petition and denied the averments made in the reply as far as they are contrary to the stand of the petitioner.

6. I have heard learned counsel for the parties and also gone through the pleadings and documents appended therewith.

7. It is not in dispute that the petitioner was initially recruited against the post of Clerk on compassionate basis. It is also not in dispute that there is a communication issued by the Financial Commissioner-cum-Secretary Revenue to the Government of Himachal Pradesh, dated 31.03.2005, on the subject regarding "*modification in Recruitment and Promotion Rules for promotion as Senior Assistant*", which reads as under:-

> "*I am directed to refer to your letter No.1 (247)-4854/Ka/Sha, dated 14.09.2004 on the above subject and to say that the condition for acquiring of higher qualification of Matric 2nd division or 10+2 examination pass for promotion to the post of Senior Assistant to those incumbents of the posts of Clerks who were promoted from Class-IV employees with the qualification of Matric pass or matric in English only with Hindu Rattan pass and the incumbents appointed as clerks on compassionate grounds with the qualification of Matric third division prior to 27.11.1991, will not be applicable. As such the incumbents who are working on the posts of clerks with lower qualification prior to 27.11.1991 can not be debarred from promotion to the post of Senior Assistant. Similarly, the instructions issued by the Department of Personnel on dated 30.01.2002 will also not be applicable to those incumbents of class-IV employees who had been promoted/appointed as clerk prior to 27.11.1991.*
>
> *It is also informed that the proviso below Rule-7(ii) and added Rule 7(iii) in the Recruitment and Promotion Rules for the posts of*

Clerk have been notified vide this department Notification Rev. A(B)3-16/95, dated 23.07.1999 and corrigendum of even number dated 04.10.1999, which is not desirable now and therefore, it is required to omit aforesaid proviso and Rule-7(iii) from the Rules as these conditions have already been withdrawn by the Government and the common Recruitment Rules, 1984 for the post of Clerks have also been amended accordingly by the Department of Personnel (AP-III) vide Notification No. Per(AP-IIA(3)-2/84-III, dated the 17-07-1998.

You are therefore, requested to take further action in the matter accordingly and send proposal through concerned Divisional Commissioner for amending R&P Rules for the post of Clerks in D.C. Offices alongwith various other amendments which are to be carried out in the said Rules immediately."

8. A perusal of this communication demonstrates that it is not as if it was only in the year 2012, that the minimum qualification necessary for promotion to the post of Senior Assistant was prescribed as 10+2. However, an exemption was carved out earlier also in favour of those Clerks, who stood recruited on compassionate basis for promotion to the post of Senior Assistant, provided that they were matriculate.

9. During the course of arguments, learned Additional Advocate General could not demonstrate that communication dated 31.03.2005 was later on rescinded.

10. There is another important aspect of the matter which requires mentioning, at this stage. As has been observed by me hereinabove also, the condition of possessing 10+2 as the minimum qualification was existing prior to the year 2012 for promotion from the post of Clerk/ Junior Assistant to the post of Senior Assistant, yet the Departmental Promotion Committee which was held on 10.07.2012 (Annexure P-4), recommended not only the name of the petitioner for promotion to the post of Senior Assistant, but names of other incumbents, including one Shri Nirbhay Kumar and Smt. Darshana Devi, who as per the petitioner were also possessing the qualification of matriculation only and who

admittedly on the recommendation of the said Departmental Promotion Committee's proceedings were promoted to the post of Senior Assistant in the year 2012 itself.

11. In this background, the stand of the State that as the Recruitment and Promotion Rules to the post of Senior Assistant were amended in the year 2011-12 and 10+2 was made the minimum qualification for promotion, also does not holds any water for the reason that if that was the case, then why even in the year 2012, matriculates were promoted to the post of Senior Assistant, could not be explained by learned Additional Advocate General during the course of arguments.

12. In this background, in the year 2014, when the Departmental Promotion Committee was convened for recommending the candidates to the post of Senior Assistants from amongst Junior Assistants i.e. the Departmental Promotion Committee, dated 05.06.2014, the non-recommendation of the petitioner for promotion to the post of Senior Assistant simply on the ground that he was a matriculate and was not possessing the qualification of 10+2, is not justifiable in law.

13. This is more so for the reason that the factum of there being a communication issued by Secretary Revenue to the Government of Himachal Pradesh, to the effect that an incumbent appointed as a Clerk on compassionate basis, was eligible for promotion to the post of Senior Assistant, provided he was matriculate, has not been denied by the State in its reply, especially in response to para-10 of the writ petition. It is in this para of the writ petition, that the petitioner had averred about the existence of this exemption and the averments of this para stand admitted by the State. Therefore, the denial of promotion to the petitioner on the basis of his seniority in the year 2014, is not sustainable in law, as in the considered view of this Court, the petitioner having been appointed on compassionate basis, was exempted from possessing the qualification of 10+2 for promotion to the post of Senior Assistant, which was a non-selection post.

14. Accordingly, this writ petition is allowed to the extent that the act of the Departmental Promotion Committee of the respondent-department, convened on 05.06.2014, of not recommending the petitioner for promotion to the post of Senior Assistant on the ground that he was not possessing the qualification of 10+2, is held to be bad in law and respondent-department is directed to promote the petitioner, as from the date when person Junior to him was actually promoted to the post of Senior Assistant, on the basis of the recommendations of the Departmental Promotion Committee, convened on 05.06.2014. For this purpose, if necessary, supernumerary post of Senior Assistant shall be created, which shall be personnel to the petitioner. The promotion shall stand conferred upon the petitioner with all consequential benefits including monetary benefits and needful be done within three months from today.

15. With these observations, this writ petition stands disposed of, so also pending miscellaneous applications, if any. Interim order, if any, stands vacated.

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

Mahesh Thakur ....Petitioner.

Versus

State of Himachal Pradesh & others ..... Respondents.

CWP No.2246 of 2019
Decided on: 19.03.2021

Constitution of India --Article 226 -- Post of Junior Office Assistant advertised by the respondent Commission vide advertisement No. 32-3/2016 - Petitioner's candidature rejected on the ground that the qualification so possessed by him was not valid and result was declared vide order dated 23-02-2019 --- Challenge thereof ---- Held, that eligibility for the post of Junior Office Assistant in advertisement was one year diploma in Computer Science,

Computer Application or Information Technology --Petitioner possessed Diploma in Computer Application ---- Respondent / Commission held the petitioner ineligible for consideration having gained Diploma from unrecognized institution on the basis of Report of Committee ----- Act of respondent/Commission arbitrary as no order passed by Commission holding qualification of the petitioner to be invalid ---- Petition allowed ---- Respondent/Commission directed to reassess the candidature of petitioner for the post in issue on the basis of merit secured by him in the recruitment process. (Paras 9,10,11,12)

For the petitioner : Ms. Reeta Hingmang, Advocate.

For the respondents : Mr. Ajay Vaidya, Senior Additional Advocate General, with Mr. Dinesh Thakur, Additional Advocate General and Ms. Divya Sood, Deputy Advocate General, for the respondents- State.

Mr. Angrez Kapoor, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral)

CMPST No.8286 of 2021

By way of this application, a prayer has been made by the applicant/petitioner to place on record the copies of the diploma of applicant/ petitioner. Copy thereof stands supplied to learned counsel for the respondents.

Having heard learned counsel for the parties, this application is disposed of by taking the documents appended therewith on record as it is not in dispute that the documents in issue were submitted by the applicant/petitioner alongwith her Application Form for appointment to the post in issue.

CWP No.2246 of 2019

By way of this petition, petitioner has prayed for the following reliefs:-

> "(i) That a writ of certiorari may kindly be issued thereby quashing order dated 23.02.2019 (annexure P-3) issued by respondent No.3 whereby the respondents have declared the final result regarding the post of JOA-IT 556.
> (ii) that a writ of mandamus may kindly be issued directing the respondent authorities not to give the appointment letter to any of the candidates till the final disposal of the pending matters regarding the matter under adjudication by this Hon'ble Court."

2. The grievance of the petitioner is with regard to rejection of his candidature to the post of Junior Office Assistant, which stood advertised by the respondent-Commission vide advertisement No.32-3/2016 (Annexure P-2), appended with the petition.

3. Brief facts necessary for the adjudication of the present petition are, that vide advertisement No.32-3/2016, which was issued in the month of September 2016, various posts were advertised by the respondent-Commission to be filled up in various departments of the Government of Himachal Pradesh. This also included the posts of Junior Office Assistant (on contract basis) in the pay scale of 5910-20200+1950 (GP). The number of posts advertised in the advertisement were 704, which the Court stands informed were subsequently increased to 1156, in various departments including the department of Excise and Taxation. Incidently, though the advertisement reflected that the post is to be filled up on contract basis, but as far as department of Excise and Taxation is concerned, against this particular department 85 posts were reflected which were to be filled up on regular basis. The eligibility criteria, *inter alia,* envisaged the following qualifications to be possessed for the prospective candidates:-

556. Junior Office Assistant	i. 10+2 from a recognized Board of School Education/University. ii. One year diploma in Compute Science/Computer

	Application/Information Technology from a recognized University/Institution. iii. Computer typing speed of 30 words per minute in English or 25 words per minute in Hindi. OR i 10+2 from a recognized Board of School Education/University. ii. 'O' or 'A' level Diploma from National Institute of Electronics & Information Technology (NELIT). iii. Computer typing speed of 30 words per minute in English or 25 words per minute in Hindi. OR i. 10+2 from a recognized Board of School education/University. ii. Diploma in Information Technology (IT) from a recognized ITI/Institution. iii. Computer typing speed of 30 words per minute in English or 25 words per minute in Hindi.

Thereafter, vide notification dated 23.02.2019, appended with the present petition as Annexure P-3, the final result on the basis of written objective test etc. was declared by the Commission and this is where the grievance of the petitioner originated as feeling aggrieved by not finding his name in the said list, when enquiries were made by him, the petitioner was appraised that his candidature stood rejected on the ground that the qualification so possessed by him was not valid for the purpose of appointment to the post in issue.

4. Today, by way of a miscellaneous application i.e. CMPST No. 6286 of 2021, which has been allowed by the Court, the petitioner has placed on record the certificate which was obtained by him from Hi-tech Computer Education in the course of 'Diploma in Computer Application".

5. I have heard learned counsel for the parties and gone through the documents appended with the pleadings.

6. As, I have already mentioned hereinabove, the qualifications mentioned in the advertisement rendering a candidate eligible for appointment to

the post of Junior Office Assistant, *inter alia,* were one year diploma in Computer Science, Computer Application, or Information Technology, from a recognized University/Institution. The diploma, which is possessed by the petitioner, is in Computer Application. On a pointed query put forth by the Court to the learned counsel appearing for the Commission as to on what basis the qualification so possessed by the petitioner was not a valid qualification as per the Commission, he submitted on the basis of reply that the eligibility of petitioner was tested by the Commission on the basis of report of a Committee appended with the reply filed by respondent-Commission as Annexure R-3, dated 15.06.2019.

7. A perusal of the proceedings of the said Committee demonstrates that said Committee was constituted in compliance to the orders of this Court, passed on 21.05.2019, in CWP's No.161 and 629 of 2019 and the Committee was to examine and give its recommendations on the following issues:-

> "(i)Equivalence of the academic/technical qualifications prescribed under the Recruitment & Promotion Rules for the post of Junior Office Assistant (IT).
> (ii) Recognition of the institutions imparting trainings and running courses in computer/IT related subjects.
> (iii) Higher qualifications vis-à-vis the minimum essential and other qualifications prescribed under the Recruitment & Promotion Rules for the post."

8. This Committee after due deliberation, held as under:-

> "Thus, keeping in view the facts and circumstances narrated as above, the Committee unanimously concluded that no equivalent qualification can be considered/recommended in the absence of a specific clause to this effect in the R& P Rules.
>
> (ii)**Recognition of various Institutions/ Training Centres**
>
> The Members Secretary informed that the HPSSC, Hamirpur had formed an internal Committee to ascertain the eligibility of

candidates for posts of JOA(IT). This Committee went through the documents of all the candidates and segregated them in different groups based on their qualifications and recognition of their institutes. It was informed that a large number of candidates had obtained their qualifications from unrecognized institutes and thus their candidature was rejected by the Commission.

The Committee then examined and discussed the report of the internal Committee in detail. The Committee further deliberated on the issue of recognition of institutes and it was unanimously felt that no impart quality training, an institute must have following attributes:-

. Training Faculty

. Well defined curriculum

. Well defined system of instructions

. Well defined system of assessment

. External evaluation and certification

.Good Infrastructure

. Affiliation to any Government body or regulatory agency

. Inspection by external agencies.

The Committee was in consensus that any institute lacking above attributes will not be able to provide quality training and essential skills and the candidates possessing any qualification from such institutions cannot be considered for public service as per R&P Rules. It was also deliberated in the meeting that a number of such institutes have mushroomed all over the Stat and are neither imparting quality education nor essential skills in computer education. On the other hand, the Institutes affiliated/recognized by Regulators/ Government agencies like UGC/AICTE/ SCVT/ NCVT etc. have well established

infrastructure, defined curriculum, evaluation system, trained faculty etc. Thus, it is clear that the recognized affiliated Institutes are only able to impart required skills and quality education to the students and have all the attributes mentioned in the proceeding para.

Thus, keeping in view, the Committee agreed that only qualifications obtained from recognized institutes be considered for recruitment of JOA(IT) and the ZONE OF CONSIDERATION/ Selection cannot expanded after the start of the selection process."

9. In the considered view of this Court, even if the contention of the Commission that it contested the eligibility of the petitioner on the basis of report of the Commission has to be accepted, then also the Commission was duty bound to have had passed some kind of order in the case of petitioner, holding the qualification possessed by petitioner to be an invalid qualification. This admittedly was not done. In the absence of the same and further in the absence of any competent authority having held that the Institution from which petitioner had obtained the diploma was unrecognized or the diploma of petitioner was unrecognized the candidature of petitioner could not have arbitrarily rejected as has been done by the Commission.

10. In fact, no material has been placed on record by the Commission to substantiate that the diploma possessed by petitioner or the institution from which the diploma has been gained by petitioner is either bad or not recognized, especially as the Commission was in possession of the diploma of the petitioner.

11. In these circumstances, the act of the respondent-Commission of holding the petitioner to be ineligible for consideration to the post in issue is highly arbitrary. In a number of cases, this Court has observed that the respondent-Commission which has been entrusted with the responsibility of recruiting employees from various departments of the Government of Himachal

Pradesh, is acting in a slipshod manner. There appears to be no due application of mind at the time of scrutiny of applications for assessing the suitability of a candidate. This Court cannot lose sight of the fact that the country is full of unemployed youth and what more frustration can be caused to them, but by the fact that institutions like respondent-Commission are arbitrarily rejecting the candidature of eligible candidates. The Court is refraining from making any further observations in this regard, but a caveat is being issued to the Commission that the act of ascertaining eligibility of a candidate being a sacrosanct act should be undertaken by the Commission with due application of mind.

12. With these observations, this writ petition is allowed to the extent that rejection of the candidature of petitioner by respondent-Commission is held to be bad and respondent-Commission is directed to reassess the candidature of petitioner for the post in issue on the basis of merit secured by him in the recruitment process. In case, the petitioner is eligible for appointment, then the same be offered to him against unfilled/vacant post without disturbing the appointed candidates. Petition stands disposed of, so also pending miscellaneous applications, if any. Interim order, if any, stands vacated.

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

Shamsher Singh & another .... Petitioners.

Versus

State of H.P. & others .... Respondents.

CWP No.2476 of 2021
Decided on: 22.04.2021

Constitution of India, Article --- 226 --- Prayer made by the petitioner for quashing of the order passed by the Court of Ld. District Judge, Shimla in Execution Petition --- Held, that the judicial orders of Civil Court are not

amenable to the writ jurisdiction --- Petition dismissed being not maintainable. (Paras 5, 6)

For the petitioners : Mr. R.S. Chandel, Advocate.

For the respondents: Mr. Sumesh Raj, Mr. Dinesh Thakur, Additional Advocates General, with Mr. Kamal Kant Chandel, Deputy Advocate General, for respondent No.1.
Mr. Sanjay Gandhi, Advocate, for respondents No. 2 and 3.

(Through Video Conferencing)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral)

By way of this petition, petitioner has prayed for the following reliefs:-

"i. That the respondent No.1 may very kindly be directed to stop the auction proceedings (Annexure P-1) in the interest of law and justice.
ii) that further with a pray that the order passed by Ld. District Judge, Shimla vide its order dated 09.12.2020 in execution petition No.455-S of 2018 titled as HDB Finance V/s Shamsher Singh and others (Annexure P-3) may very kindly be quashed and set aside.
iii) Further with a pray that direct the respondent No.1 not to execute the order of Ld. District Court, Shimla for the auction of land/property of petitioner No.2 which is situated in khasra Nos.657, 658 & 659, total measuring 00-41-12, situated at Mohal Nanno, Tehsil Theog, District Shimla, H.P. in the interest of justice.
iv) That further with a pray that direct the respondents No.2 and 3 to apprise this Hon'ble Court about the selling price of the said vehicle which has been illegally taken away and sold the same without the consent of petitioner No.1 and further may very kindly be directed the respondents No.2 and 3 to adjust the selling price

i.e. Rs. 10,00,000/- against the loan amount according to the relevant value of the insurance at that time."

2. Having heard learned counsel for the parties, this Court is of the view that the reliefs prayed for by the petitioner cannot be granted in a petition filed under Article 226 of the Constitution of India. In fact, filing of this petition is nothing but abuse of the process of law.

3. It is settled law that this Court in exercise of its writ jurisdiction, cannot entertain petitions against the judicial orders passed by the competent Court of Law.

4. By way of this petition, the prayer of the petitioner is for quashing of the order passed by the Court of learned District Judge, Shimla, District Shimla, H.P. dated 09.12.2020, in Execution Petition No.455-S of 2018, titled as HDB Financial Services Ltd. Versus Shamsher Singh & others and also for issuance of direction that respondent No.1 shall not execute the order of learned District Judge, Shimla, District Shimla, H.P., with regard to auction of the property of petitioner No.2.

5. In *Radhey Shyam and Another* Versus *Chhabi Nath and Others (2015) 5 Supreme Court Cases 423*, a three Judges Bench of Hon'ble Supreme Court has been pleased to hold that the judicial orders of Civil Court are not amenable to the writ jurisdiction under Article 226 of the Constitution of India.

6. In this view of the matter, as the present petition filed under Articles 226 of the Constitution of India is not maintainable, the same is dismissed, so also pending miscellaneous applications, if any.

7. At this stage, learned counsel for the petitioner submits that dismissal of the petition may not be a bar to the petitioner as far as other remedies available in accordance with law are concerned. It is clarified that petitioner shall be at liberty to avail such remedies qua the cause raised in this petition as are admissible in law.

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

Hem Raj ....Petitioner.

Versus

State of Himachal Pradesh & another ...Respondents.

CWPOA No.94 of 2019
Reserved on: 23.03.2021
Decided on: 07.04.2021

Constitution of India, Article 226 --- Public notice inviting applications from eligible candidates for appearing in counseling for the post of Pharmacist issued by Director Health Services, H.P. --- Petitioner being eligible appeared for counseling and was selected --- Petitioner has claimed that he being physically handicapped, act of the respondent department of not offering him appointment to the post of Pharmacist qua the post reserved for Physically handicapped person is arbitrary --- Held that candidates sponsored by Physically Handicapped Cell did not participate in counseling --- Non - sponsoring of the name of petitioner by Physically Handicapped Cell does not render the candidature of petitioner bad in law --- Petitioner suffering from Locomotor Impairment (orthopedic handicap) was eligible to be considered for appointment against the post in issue --- Petition allowed. (Paras 10,11,12)

For the petitioner : Mr. J.L. Bhardwaj, Advocate.

For the respondents : Mr. Ajay Vaidya, Senior Additional Advocate General, with Mr. Dinesh Thakur, Mr. Sanjeev Sood, Additional Advocates General and Ms. Divya Sood, Mr. Kamal Kant Chandel, Deputy Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this petition, the petitioner has prayed for the following reliefs:-

> "i) That the respondents may very kindly be directed to offer appointment of Pharmacist to the applicant with effect from the date when other selected candidates have been offered the appointment with all consequential benefits.
> ii) That the respondents may further be directed to offer regular appointment to the applicant without any further delay with all consequential benefits."

2. Brief facts necessary for adjudication of the present petition are as under:-

Vide public notice (Annexure A-2), Director Health Services, Himachal Pradesh, invited applications from eligible candidates for appearing in counseling for appointment against the posts of Pharmacist on batch wise basis. In terms of the public notice, there were in all 65 posts and desirous candidates of all categories including physically handicapped category were called upon to appear for counseling at the places mentioned in the public notice, on the dates mentioned against the said places. Eligible candidates were to possess 10+2 certificate issued by the Board of School Education or its equivalent as also the Mark List of 1st and 2nd year diploma in Pharmacy, issued by the concerned authority. Besides this, a Registration Certificate issued by Registrar, Himachal Pradesh Pharmacy Council, registration with Employment Exchange Card and a Physically Handicapped Certificate, issued by the Medical Board, were required to be submitted by a candidate applying under the physically handicapped persons.

3. Petitioner did his diploma course in Pharmacy (Non- Engineering), from Government Polytechnic, Rohru, under the Himachal Pradesh Takniki Shiksha Board, in the year 2001. A copy of said diploma is appended with this petition as Annexure A-1. Detailed marks certificate of 1st and 2nd year diploma course of the petitioner are appended with the petition as Annexure A-2.

According to the petitioner, as he was eligible to participate in the process of recruitment, he appeared for counseling on 05.08.2014 and on the recommendations of the Selection Committee, he stood selected for appointment against the post of Pharmacy, on contract basis. Alongwith the petition, list of the candidates selected for the post of Pharmacy, on contract basis, on the basis of the process initiated vide public notice Annexure A-2, is appended as Annexure A-3 and name of the petitioner figures at serial No.63 therein. In the said list, petitioner is depicted as a General Category candidate belonging to physically handicapped category with Locomotor Impairment of 40%. Note-1 in the said annexure, reads as under:-

> "At present two posts of physical handicapped has been advertised by this directorate for batch wise appointment of pharmacist, only four candidates have appeared in the counseling. It is further submitted that three names have been sponsored by the physically handicapped cell (visual impaired) but they have not attended the counsel out of two posts one post got to the general visual impaired and other post deaf and dumb. But no name has been sponsored by the physical handicapped cell. It is recommended that before issuing the appointments above names candidates it may be cleared/clarified from the handicapped cell."

4. The grievance of the petitioner is that when appointments were offered to the selected candidates, on 15.01.2015, vide Annexure A-4, the name of the petitioner did not figure in the same. Petitioner has appended with the petition a Notification issued by the Department of Health and Family Welfare, Government of Himachal Pradesh, dated 23.03.2012, as Annexure P-5, which Notification issued under Section 33 of Persons with Disabilities (Equal Opportunities, Protection of Right and Full Participation) Act, 1995, demonstrates that the post of Pharmacist is identified for a person who is physically handicapped and suffers from Orthopedic handicapped. The claim of the petitioner is that the act of the respondent-department of not offering

appointment to him against the post of Pharmacist, qua the posts reserved for physically handicapped persons is arbitrary because as it is not in dispute that petitioner does belongs to physically handicapped category and further as he was eligible for being appointment against the post of Pharmacist even in terms of Notification dated 23.03.2012, denial of the appointment simply on the ground that his name was not sponsored by a Physically Handicapped Cell, is not sustainable in law. Accordingly, he has prayed that the petition be allowed and the respondents be directed to offer appointment to the petitioner as from the date when other persons were offered appointment against the post of Pharmacist.

5. The petition is opposed by the respondents, primarily on the ground that the name of the petitioner and other similarly situated persons, belonging to physically handicapped category, who had participated in the counseling, but were not sponsored by the Physically Handicapped Cell, were not recommended for appointment. It is further the stand of the respondents that as the posts advertised were specifically belonging to the category of 'General Visually Impaired' and 'Deaf and Dumb', therefore also the petitioner was not recommended for appointment against the post in issue. It has not been disputed that none was offered appointment under the category of physically handicapped persons.

6. I have heard learned counsel for the parties and have gone through the pleadings as well as documents appended therewith.

7. During the course of hearing of the case, the Court had put a query to learned Senior Additional Advocate General, on the basis of the abbreviation used in the Notification dated 23.03.2012, as to what was the full form of abbreviation 'HI (PD)' and 'OI (OH)', which stood mentioned against the category of Pharmacist in the same and the Court was informed that 'HI (PD)' stood for 'Hearing Impaired (partially deaf)', whereas 'OI (OH)' stood for 'Orthopedically Impaired (Orthopedically Handicapped)'.

8. A perusal of the public notice (Annexure A-2) demonstrates that it was a general notice issued to all eligible candidates with regard to the counseling which was to be conducted for 65 posts of Pharmacist on batch wise basis and it stated that all desirous candidates of all categories including 'physically handicapped' were to appear for counseling at State Health and Family Welfare Training Centre, Parimahal, District Shimla, H.P., on the date mentioned against each district. This public notice nowhere mentioned that the post in issue was reserved exclusively for the categories of 'General Visually Impaired' and 'Deaf and Dumb', as is mentioned in the reply filed by respondents No.1 and 2. It is further not in dispute that the petitioner otherwise possessed educational qualifications to be considered against the post in issue and his name was included in the list of selected candidates for the post of Pharmacist by the Selection Committee, as is evident from Annexure A-3. A perusal of Annexure A-3 demonstrates that Note No.1 thereof, *inter alia*, contained that only four candidates had appeared in the counseling against two posts of Physically Handicapped and three persons who were sponsored by the Physically Handicapped Cell (visual impaired) had not attended the counseling. It further stood mentioned therein that out of two posts, one post was to go to 'General Visually Impaired' and other to the 'Deaf and Dumb' category, but as no name has been sponsored by the Physically Handicapped Cell, it was recommended that before issuing appointments, the names of the selected candidates be cleared/clarified from the Physically Handicapped Cell.

9. The documents appended with the reply demonstrate that correspondence was exchanged between Director Health Services, Himachal Pradesh and the Physically Handicapped Cell of the Directorate of Labour and Employment with regard to the appointment of petitioner and other similarly situated persons, who had participated in the process, but the same lead to no definite conclusion.

10. Be that as it may, in the present case, admittedly, the candidates who were sponsored by the Physically Handicapped Cell, did not participate in the counseling. The petitioner, whose name was not sponsored by the Cell concerned, otherwise participated in the counseling and in view of the settled law of the land, that it is not a mandatory condition that only those persons whose names are sponsored by the Cells concerned, have a right of consideration and all eligible candidates have a right of participate in the process, in my considered view, non-sponsoring of the name of the petitioner by the Physically Handicapped Cell, does not renders the candidature of the petitioner bad in law. This is more so for the reason that it is not the case of the respondents that petitioner was not suffering from physical disablement or was not entitled for benefits provided for differently abled persons under the 1995 Act. Therefore, the act of the respondent-department of not offering appointment to the petitioner on the ground that his name was not sponsored by the Physically Handicapped Cell, is not sustainable in law.

11. The stand of the respondents to the effect that petitioner could not be offered appointment for the reason that the posts were reserved for 'General Visually Impaired' and 'Deaf and Dumb' category, is also not sustainable in law. In fact, this stand of the respondents is in complete contradiction to the contents of Notification, dated 23.03.2012 (Annexure A-5), in terms whereof, the post of Pharmacist has been identified as to be filled up from amongst physically handicapped persons, who suffer from Orthopedic Handicap. Petitioner is suffering from Locomotor Impairment to the extent of 40%, which is a orthopedic handicap. Therefore, the petitioner otherwise was eligible to be considered for appointment against the post in issue.

12. In view of the discussion held hereinabove, as the act of respondent-department of not offering appointment to the petitioner against the post of Pharmacist, qua the posts reserved for physically handicapped persons, is not sustainable in the eyes of law, especially when the petitioner was

recommended by the Selection Committee for appointment and his name figured at serial No.63 against 65 posts in all advertised and at merit position No.1, as far as physically handicapped persons are concerned, accordingly, this writ petition is allowed by directing the respondents to offer appointment to the petitioner against the post of Pharmacy, reserved for physically handicapped persons, from the date when other persons were offered appointment on the said post, on contract basis, vide Annexure A-1, with all consequential benefits including that of seniority. The benefits shall be notional as up to the date of pronouncement of the judgment and thereafter, actual benefit shall be given to the petitioner. Petition stands disposed of in above terms, so also pending miscellaneous applications, if any.

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

Puran Chand .... Petitioner.

Versus

H.P. Tourism Development Corporation Limited ..... Respondent.

CWPOA No.3776 of 2019
Decided on: 10.03.2021

Constitution of India, Article 226 ---Petitioner joined as a washer boy in respondent Corporation in the year 1986 --- Transferred to Engineering Wing of the Corporation after his request to perform duties of Junior Draughtsman considered on obtaining Diploma in Draughtsman --- Petitioner prays to be appointed as Junior Draughtsman since 1987 and payment of difference of the salary alongwith interest --- Held, that factum of the petitioner actually performing duties of Junior Draughtsman not disputed by respondent Corporation --- Also, petitioner possessed minimum qualification for being appointed as Junior Draughtsman --- Petition allowed and respondent Corporation directed to upgrade the post of Washer boy to that of Junior Draughtsman and confer upon him the wages and benefits of Junior Draughtsman (Paras 7,8,9)

For the petitioner : Ms. Ranjana Parmar, Senior Advocate, with Mr. Karan Singh Parmar, Advocate.

For the respondent : Mr. Naresh Kaul, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral)

By way of this petition, the petitioner has prayed for the following reliefs:-

"i. That the petitioner may very kindly be declared to be appointed as Junior Draughtsman since 1987 that is the date from which the petitioner is working as such with all consequential benefits.

ii) That the respondent may kindly be directed to pay the difference of the salary to the petitioner alongwith interest without any delay.

iii) That the cost of writ petition may kindly be ordered to be paid."

2. The case of the petitioner is that he joined the service of the respondent-Corporation as a Washer Boy, in its Transport Wing, in the year 1986. The petitioner after his matriculation obtained Diploma in the trade of Draughtsman, from I.T.I. Shimla. When the petitioner was engaged as a Washer Boy, the respondent-Corporation at the relevant time was having many projects under execution, for which people with qualification akin to the one possessed by the petitioner were required. The petitioner made a request that he may be engaged to perform the duties of Junior Draughtsman in the Engineering Wing of the respondent-Corporation. His request was considered, vide Note No.8, dated 29.09.1987 and vide same Note, the petitioner was transferred to the Engineering Wing of the respondent-Corporation, though in his own pay scale.

The respondent-Corporation assured him that in due course of time, a regular post will be created to accommodate him. The petitioner continued to perform the duties in the Engineering Wing of a Junior Draughtsman against his own pay till the filing of the petition. As per the petitioner, he has been making requests to the concerned authority from time to time to grant him regular pay scale of the post of Junior Draughtsman, i.e. the pay of the work actually performed by him. He also filed a representation (Annexure P-1) in this regard, dated 13.06.2005. The matter was taken up in the Meeting of the Board of Directors of the respondent-Corporation and an Agenda (Annexure P-2) was prepared on 14.07.2010 in this regard. As per the petitioner, copy of Agenda (Annexure P-2) demonstrates that the petitioner, who was initially appointed as a Washer Boy, but was a qualified Draughtsman, was indeed performing the duties of a Draughtsman in the respondent-Corporation and the Board of Directors had proposed that one post of Washer Boy be re-designated and upgraded to the post of Junior Draughtsman to regularize the services of the petitioner. However, as the post of Washer Boy has not been upgraded to that of Draughtsman and as the petitioner was not being paid the wages of a Draughtsman despite the fact that he was performing the duties of a Draughtsman in the Construction Wing of the respondent-Corporation, he has approached the Court by way of the prayer already enumerated hereinabove.

3. In the reply filed by the respondent-Corporation, it has not been disputed that though the services of the petitioner were engaged as a Washer Boy, yet he is performing the duties of Draughtsman in the Construction Wing of the respondent-Corporation. It is also the stand of the respondent-Corporation that as the post of a Junior Draughtsman is to be filled up 100% by way of direct recruitment, therefore, the representation of the petitioner for appointment against the said post by way of regularization or otherwise could not be allowed. According to the respondent-Corporation, the prayer of the petitioner was still

under consideration of the of the Service Committee of the respondent-Corporation.

4. By way of rejoinder, the petitioner has reiterated his case as mentioned in the petition and has denied the stand of the respondent-Corporation.

5. During the pendency of this petition, by way of CMP-T No.125 of 2021, the respondent-Corporation has placed on record the proceedings of the Meeting of the Service Committee of the respondent-Corporation, held on 14.12.2020, perusal of which demonstrates that while considering the request of the petitioner for appointment against the post of Junior Draughtsman, the Service Committee recommended additional monthly amount of Rs.1000/- to be paid to the petitioner from the date of filing of the petition, but has not accepted his prayer for re-designating him as a Junior Draughtsman, on the ground that the petitioner has already crossed the age of fifty eight years on 31.03.2019.

6. I have heard learned counsel for the parties and also gone through the pleadings and documents appended therewith.

7. This case has very peculiar facts. The petitioner though was engaged as a Washer Boy by the respondent-Corporation, but since 29.09.1987, was called upon to perform the duties of a Junior Draughtsman, in the Construction Wing of the respondent-Corporation, as he was possessing the requisite qualification required to be appointed as a Junior Draughtsman. Annexure P-2, which is a copy of the proposed item of Agenda for consideration in the Meeting of the Board of Directors for respondent-Corporation, demonstrates that the proposal contained in the same was to the effect that the post of Washer Boy be re-designated/upgraded to the post of Junior Draughtsman, as the services of the incumbents be regulated, accordingly, in view of the fact that the services of the petitioner were being utilized by the

respondent-Corporation for performance of work of a Junior Draughtsman. In its reply filed to the writ petition, the factum of the petitioner actually performing the duties of a Junior Draughtsman has not been disputed by the respondent-Corporation.

8. The respondent-Corporation is "Other Authority" within the meaning of Article 12 of the Constitution of India, as said Corporation is fully owned and controlled by the Government of Himachal Pradesh. This being the case, said Corporation cannot be allowed to treat an employee in the manner as has been done in the present case. It took the services of a Draughtsman from the petitioner right from the year 1987 onwards, without upgrading his post to that of Junior Draughtsman as was proposed vide Annexure P-2. Yet, in acknowledgment of the petitioner, rendering and performing the duties of a Draughtsman with the respondent-Corporation, the Service Committee vide its proceedings held on 14.12.2020, has now recommended that he be provided additional monthly amount of Rs.1,000/- as from the date of filing of the petition.

9. In the considered view of the Court, in the peculiar facts of the case, interest of justice would have been met, if the respondent-Corporation had upgraded the post of the Washer Boy, against which the petitioner was recruited, to that of Junior Draughtsman as a matter personal to him till the age of his superannuation. It is not in dispute that the petitioner possessed the minimum qualification for being appointed against the post of Junior Draughtsman.

10. In this view of the fact, coupled with the fact that the respondent-Corporation extracted the work of Junior Draughtsman from the petitioner right from the year 1987 onwards, it does not behove upon the respondent-Corporation to deny at least this much succor to the petitioner. Though, the petitioner was also entitled to the minimum of the wages drawn by a Junior Draughtsman, as from the date when he was called upon to perform the duties of a Junior Draughtsman, yet this writ petition is being disposed of by issuance

of a mandamus to the respondent-Corporation, to upgrade the post of Washer Boy, held by the petitioner, to that of a Junior Draughtsman, as from the date of filing of the present petition and confer upon him the wages etc. of a Junior Draughtsman, from the said date till the date of his superannuation. Actual benefits as shall accrue to him on account of this order, shall be conferred upon the petitioner.

11. It is clarified that the benefits of this order shall accrue to the petitioner only up to the age of superannuation prescribed for a Junior Draughtsman. With these directions, this writ petition is disposed of, so also pending miscellaneous applications, if any. No order as to costs.

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

Manish Bhatia ....Appellant.

Versus

The State of Himachal Pradesh & another ...Respondents.

RFA No.302 of 2012
Reserved on: 12.05.2021
Decided on: 19.05.2021

Regular First Appeal --- Land Acquisition Collector awarded an amount of Rs. 3,65,188/- for land of the appellant which stood acquired --- Feeling aggrieved Reference Petition was filed, wherein it was held that landowner not entitled to enhancement of compensation --- Challenged by way of present appeal --- Held, sale deeds (Ext. P-A to Ext. P-C) relied upon by appellant bonafide could not have been discarded by Reference Court --- Being close to the date of acquisition, sale deeds were the best evidence to assess the value of land and fair compensation assessed to be Rs. 15,000/- per biswa --- Appeal allowed --- Enhancement of the award amount awarded in favour of Land owner by LAC ordered. (Paras 15, 16, 17).

For the appellant : Mr. K.D. Sood, Senior Advocate, with Mr. Sukrit Sood, Advocate.

For the respondents : Mr. Sumesh Raj, Additional Advocate General, with Ms. Divya Sood, Deputy Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

This Regular First Appeal is directed against the Award, passed by the Court of learned District Judge, Mandi, District Mandi, H.P., in Reference Petition No.4 of 2005, titled as Manish Bhatia Versus State of H.P. & another, decided on 06.12.2011, vide which learned Reference Court has held that the petitioner therein i.e. the present appellant was not entitled for any enhancement of compensation, as the market value of the land as well as non-fruit bearing trees stood rightly assessed by the respondents.

2. Brief facts necessary for the adjudication of the present appeal are as under:-

The land of the appellant situated near the road head, in village Jilhan/Jhantingeri, Tehsil Padar, District Mandi, H.P., was acquired by the respondents with the intent of developing the same as a tourist place. Notification under Section 4 of the Land Acquisition Act was issued on 05.06.1997. Land measuring 7-18-0 bighas, in village Jilhan was purchased by the appellant on 19.09.1996, for a sum of Rs.2,00,000/-. Thereafter, on 27.12.1996, he again purchased land measuring 0-16-3 bigha in the same mauja, for a sum of Rs.50,000/-.

3. Land Acquisition Collector awarded an amount of Rs.3,65,188/- for 8-14-3 bighas of the land which stood acquired, whereas as per the appellant, the market value of the land was Rs.4,40,000/- per bigha. It was further the

case of the appellant that he had spent huge amount for development of the land, for which no compensation stood awarded to him and, therefore, he was entitled for an Award of Rs.2,00,000/- on this behalf also. Feeling aggrieved, he filed the reference.

4. The Reference Petition was answered by learned District Judge, Mandi, District Mandi, H.P., by holding that the land owner was not entitled for any enhancement of compensation, as the compensation awarded to the land owner by Land Acquisition Collector was adequate.

5. The issues which were framed by learned Reference Court for adjudication in the Reference Petition were as under:-

> "1. Whether the petitioner is entitled for the enhancement of compensation as alleged? OPP.
> 2. Whether the petition is not maintainable in the present form? OPR.
> 3. Whether the petition is bad for non-joinder of necessary parties, as alleged? OPR.
> 4. Relief."

6. The issues were answered by learned Reference Court as under:-

> "Issue No.1 No.
> Issue No.2 No.
> Issue No.3 No.
> Relief:- The petitioner is not entitled for enhancement in the value of the acquired land."

7. While answering issue No.1, learned Reference Court held that to prove its case, the petitioner examined one Kashmir Singh as PW-1, who being Registration Clerk of Tehsil Padhar, proved the copies of Sale deeds dated 16.05.1997, Ext.PA to Ext.PC. Petitioner himself entered the witness box as PW-2. He admitted the purchase of acquired land vide sale deeds Ext.RA and RB, dated 19.09.1996 and 27.12.1996. He mentioned in his cross-examination that

some trees were already standing on the acquired land and he also planted trees upon the land.

8. Respondents examined Ram Partap Sharma as RW-1, who deposed about market value of the acquired land. RW-2, Mohan Lal, Patwari deposed that adequate compensation stood paid to the land owner. RW-3, Ramesh Kumar had prepared average price of the land as Ext.RW3/A. RW-4, Sameer Rastogi assessed the value of non-fruit bearing trees. RW-5, K.L. Mastana deposed regarding the fact that he visited the acquired land and found debris of one house upon the same.

9. Learned Reference Court held that Notification under Section 4 of the Land Acquisition Act was issued on 05.06.1997. The acquired land stood purchased by the petitioner for a sum of Rs.2,50,000/-, in the year 1996. Petitioner wanted to rely upon three sale deeds (Ext.PA to Ext.PC) as exemplar sale deeds, which admittedly were executed by his father on 16.05.1997 about 19 days prior to the issuance of Notification under Section 4 of the Land Acquisition Act. It also held that by virtue of Award No.1, the respondents acquired land measuring 8-14-3 bighas, belonging to the petitioner, for which Land Acquisition Collector assessed value of the same as Rs.3,55,188/-. Learned Reference Court observed that the value so assessed by Land Acquisition Collector was just value. It further held that the sale deeds relied upon by the petitioner as exemplar sale deeds did not fall within the definition of bonafide sale transactions, as the sale deeds Ext.RA and Ext.RB were the best sale instances to be taken into consideration in order to determine market value of the land. It further held that Land Acquisition Collector rightly assessed market value of the land and awarded a sum of Rs.6,24,793/- as value of the trees, whereas the land alongwith all the rights apertinent thereto were purchased by the plaintiff for a sum of Rs.2,50,000/-. On these basis, the Reference Petition stood answered by learned Reference Court by holding that the compensation awarded by Land Acquisition Collector was adequate.

10. Learned Senior Counsel, appearing for the appellant has argued that the Award passed by learned Reference Court was not sustainable in the eyes of law, as the sale deeds relied upon by the appellant as exemplar sale deeds were discarded by learned Reference Court erroneously. He further argued that simply because the sale deeds were executed by the father of the petitioner was no valid basis for discarding the same and similarly because the same were executed 19 days prior to issuance of Notification under Section 4 of the Land Acquisition Act, was also no valid ground for discarding the same. He argued that even if other things are taken to be as they are, then also the compensation paid to the appellant has to be enhanced in terms of the sale deeds exhibited by the appellant.

11. Opposing the plea, learned Additional Advocate General submitted that there was no infirmity with the Award passed by learned Reference Court. He argued that learned Reference Court correctly observed that as adequate compensation stood paid to the land owner, taking into consideration the fact that he had purchased the entire property for a sum of Rs.2,50,000/- only, therefore, the award called for no interference.

12. I have heard learned counsel for the parties and have also gone through the award passed by learned Reference Court as well as record of the case.

13. It is not in dispute that the acquired land was purchased by the appellant for a sum of Rs.2,50,000/- in all, vide two sale deeds, dated 19.09.1996 and 27.12.1996. It is also not in dispute that Notification under Section 4 of the Land Acquisition Act for the purpose of acquisition of the land was issued on 05.06.1997.

14. The appellant had approached learned Reference Court for enhancement of the compensation on the basis of three sale deeds, i.e. Ext.PA, dated 22.03.1997, registered on 16.05.1997, Ext.PB, dated 19.03.1997, registered on 16.05.1997 and Ext.PC, dated 19.03.1997, registered on

16.05.1997. Vide sale deed Ext.PA, 0-3-0 bigha of land, situated in Mohal Jilhan, Sub-Tehsil Padar, was sold by one Shri Jai Prakash Bhatiya to one Shri Pritam Singh, for a sale consideration of Rs.66,000/-. Similarly, vide sale deed Ext.PB, land measuring 0-3-0 bigha, situated in Muhal Jilhan, Tehsil Joginder Nagar, District Mandi, H.P. was sold by one Shri Jai Prakash Bhatia to one Shri Gulab Singh, for a sum of Rs.66,000/- and similarly, vide sale deed Ext.PC, Shri Jai Prakash Bhatia sold the land measuring 0-1-10 bigha, for a sum of Rs.33,000/-, in Muhal Jilhan, Sub-Tehsil Padar, District Mandi, H.P. to Shri Inder Singh. Thus, one biswa of land was sold by way of these three sale deeds by Shri Jai Prakash Bhatia, the vendor, who admittedly happens to be the father of the present appellant, for a sum of Rs.22,000/- in two cases and Rs.33,000/- in one case. These three sale deeds have been discarded by learned Reference Court only on the ground that the same were executed by the father of the land owner about 19 days prior to the issuance of Notification under Section 4 of the Land Acquisition Act.

15. In the considered view of the Court, this reason was not sufficient for learned Reference Court to have had discarded said three sale deeds, until and unless it stood proved on record that the father of the present appellant was having knowledge with regard to acquisition of the land and these three sale deeds were not executed with a bonafide intent by the father of the present appellant. There are no such findings returned on record by learned Reference Court. Not only this, no evidence has been placed on record by the respondents to demonstrate that the sale deeds (Ext.PA to Ext.PC) relied upon by the present appellant were not bonafide sale deeds, but were executed by the father of the present appellant just to artificially enhance the value of the land in the vicinity as he was aware of the process of acquisition of the same. In the considered view of this Court, the factum of the value at which the acquired land was purchased by the land owner, lost its significance, as there were subsequent sale deeds on record executed of the land in immediate vicinity before the issuance of

Notification under Section 4 of the Land Acquisition Act. It is reiterated that in the absence of any material being on record to demonstrate that said sale deeds were actuated with malafide to reflect an artificial inflation of the price of the land of the area in vicinity, the same could not have been discarded, as these sale deeds being close to the date of acquisition, were the best evidence to assess the value of the land.

16. Now, the next question that arises is as to what can be termed to be a fair price of the land acquired by the respondents. In terms of Ext.PA to Ext.PC, three biawas of land were sold for a sum of Rs.66,000/-, whereas one biawa of land was sold for a sum of Rs.33,000/-. Thus, the average price of one biswa of land sold by way of these three sale deeds is between Rs.22,000/- to Rs.33,000/-. However, as the land subject matter of these three sale deeds is small as compared to the land acquired of the present appellant, in the considered view of this Court, the fair compensation in favour of the land owner can be said to be Rs.15,000/- per biswa.

17. Accordingly, this appeal is allowed, by setting aside the award passed by learned Reference Court and by ordering the enhancement of the Award amount awarded in favour of the appellant by Land Acquisition Collector, by assessing the same at the rate of Rs.15,000/- per biswa. Rest of the Award passed by Land Acquisition Collector shall remain as it is. The appeal stands disposed of, so also pending miscellaneous applications, if any.

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

Ram Singh & another ....Petitioners.

Versus

State of H.P. & others ...Respondents.

CWPOA No.3511 of 2020

Decided on: 08.03.2021

Constitution of India, Article 226 --- Petitioners appointed as Sanitary Inspector in Respondent Corporation on contract basis --- Petitioners regularized upon directions issued in Writ Petition preferred by them, but after completion of fourteen years of contract service, now claim entitlement for regularization upon completion of eight years of service --- Held, that Respondent Corporation has regularized service of one Roop Chand and Vinod Kumar upon actual completion of eight years contract service in terms of order dt. 28-06-2017 passed by erstwhile H.P. Administrative Tribunal in Roop Chand --- Vs. --- State of H.P. & Ors. --- Services of certain Junior Engineers also regularized by Respondent Corporation upon completion of eight year contract service --- Petitioners also entitled for regularization of their services as Sanitary Inspector upon completion of eight year contract service with all consequential benefits --- Petition allowed. (Paras 8,9,10)

For the petitioners : Mr. Sanjeev Bhushan, Senior Advocate, with Ms. Abhilasha Kaundal, Advocate.

For the respondents : Mr. Sumesh Raj, Mr. Dinesh Thakur, Additional Advocates General, with Mr. Kamal Kant Chandel, Deputy Advocate General, for the respondents No.1and 3.
Ms. Reeta Thakur, Advocate, forrespondent No.2.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (oral)

By way of this petition, the petitioners have prayed for issuance of a direction to respondent-Corporation to regularize their services as Sanitary Inspector upon completion of eight years of contract period service as from the date of their initial appointment, with all consequential benefits of pay, arrears and seniority etc., with interest.

2. The case of the petitioners is that petitioner No.1

was appointed as a Sanitary Inspector in respondent- Corporation in the month of May, 1997 and petitioner No.2 was appointed as such in the month of August, 1997. They were having requisite qualification, i.e. 'Diploma in Sanitation', which was required for the purpose of appointment against the post in issue. The Government of Himachal Pradesh was following a policy of regularization of contract employees upon completion of eight years of service as such. Earlier there existed a cadre of Sanitary Inspectors in the Municipal Corporation, but the same was, thereafter, disbanded and Sanitary Inspectors were taken on deputation from the Government. In the case of petitioners, they were appointed as Sanitary Inspectors by respondent-Corporation on contract basis and they fulfilled the eligibility criteria contained in the Recruitment and Promotion Rules for appointment of Sanitary Inspectors by the Government. It is further the case of the petitioners that there were certain Junior Engineers, working in respondent-Corporation on contract basis, whose cadre otherwise existed in the Public Works Department of the Government of Himachal Pradesh, yet their services were regularized by respondent-Corporation upon completion of eight years of service. As the services of the petitioners were not regularized, they approached the High Court of Himachal Pradesh, by way of a writ petition, which was disposed of the High Court, vide judgment dated 27.04.2011 (Annexure A-1). As no decision in terms of the directions passed by the High Court was taken by the competent authority, the petitioners filed a petition before this Court i.e. COPC No.722 of 2011, titled as Ram Singh & anr. Versus Sh. P.C. Dhiman, which was disposed of vide order dated 29.03.2012, in the following terms:-

> " The complaint is that the judgment dated 27.4.2011 has not been complied with. The issue pertains to

> regularization. It is seen from the reply that the petitioners have been regularized. However, it is the case of the petitioners that they are entitled to restrospective regularization. In case the petitioners have any other surviving grievance, they may either pursue before the Municipal Corporation or approach in appropriate proceedings, subject to the above and in view of theapology tendered in the affidavit for the delay, the contempt petition is dismissed. Rule discharged."

3. The grievance of petitioners is that though their services were regularized subsequently by respondent- Corporation, yet the same was done after completion of around fourteen years of contract service with respondent- Corporation, whereas they were entitled for regularization upon completion of eight years of service, as was done by respondent-Corporation in case of other employees includingcertain Junior Engineers serving in respondent-Corporation on contract basis. It is in this background that the petition stands filed with the prayer already enumerated hereinabove.

4. Reply to the petition has been filed by respondent No.2, wherein the stand of the said respondent is that the applicants were initially engaged as Sanitary Inspectors on contract basis for a period of 89 days in the Health Department of respondent-Corporation and their contract was renewed from time to time upto 31.03.2011. During the year 1988, the Government of Himachal Pradesh, vide Notification, dated 28.01.1988, took over the services of Chief Sanitary Inspector and Sanitary Inspectors, by merging their services in the corresponding cadre of the Government. During the year 2004, the Health Department of the Government of Himachal Pradesh issued no objection to respondent- Corporation to fill up the posts of Sanitary Inspectors on account of non-availability of Sanitary Inspectors in the

Health Department. Respondent-Corporation took over the services of Sanitary Inspectors on merger of entire SADA area in respondent-Corporation alongwith staff, in the year 2006. Respondent-Corporation took up the case with the Government for creation of the posts of Sanitary Inspectors and the Government sanctioned two posts of Sanitary Inspectors, on 14.03.2012. After receiving Government's approval, services of the petitioners were regularized, vide order dated 21.03.2012. The services of the petitioners could not be regularized upon completion of eight years of services, as prayed by them, for the reason that no posts of Sanitary Inspectors were existing in the respondent-Corporation, as on the date when petitioners completed eight years of service on contract basis. On these basis, respondent-Corporation has prayed for dismissal of the petition.

5. I have heard learned counsel for the parties and have also gone through the relevant record pertaining to the exercise undertaken by respondent-Corporation for the purpose of regularization of services of the petitioners.

6. During the course of arguments, learned Senior Counsel, appearing for the petitioners, submitted that learned erstwhile Himachal Pradesh Administrative Tribunal, vide order dated 28.06.2017, in T.A. No.4141 of 2015, titled as Roop Chand Versus State of Himachal Pradesh and others, directed the regularization of services of the applicant therein as Junior Draftsman, on completion of requisite number of years of service, to be counted from 25.11.1995, with further direction to create a post of Junior Draftsman by upgrading the post against which the applicant was working with the post being personal to him by restricting actual financial benefits to a period of three years prior to filing of the transfer application. Learned

Senior Counsel stated that this order passed by learned Tribunal stood implemented by respondent- Corporation and retrospective regularization was given to Shri Roop Chand upon completion of eight years of service as from the date of initial engagement on contract basis in terms of the policy of regularization of the State Government by restricting the arrears admissible post re-fixation of pay to three years prior to the date of filing of the petition. He further submitted that similar directions passed in the case of one Shri Vinod Kumar were also implemented by the Municipal Corporation and retrospective regularization of Shri Vinod Kumar was done.

7. In this background, on 06.03.2021, this Court passed the following order:-

> "Heard in part. Learned Counsel representing respondent No.2-Corporation to apprise the Court as to whether the directions passed by erstwhile learned Himachal Pradesh Administrative Tribunal vide order dated 28.6.2017, in T.A. No.4141 of 2015, titled as Roop Chand vs. State of Himachal Pradesh and others, which order passed by learned Tribunal, as per learned Senior Counsel appearing for the petitioner, stands affirmed by this Court, has attained finality and stands implemented in letter and spirit.
>
> List for continuation, as prayed for, on 08.03.2021."

8. Today, learned counsel for respondent No.2 has fairly submitted that the directions passed in the case of Roop Chand Versus State of Himachal Pradesh and others (supra), stand implemented in letter and spirit. That being the case, in my considered view, the petitioners before this Court have to be granted similar relief as stood granted to Roop Chand and Vinod Kumar, by

learned Tribunal. As respondent- Corporation has regularized the services of the above named two incumbents upon actual completion of eight years' service on contract basis and further as it has also not been disputed by respondent No.2 that the services of certain Junior Engineers engaged on contract basis were also regularized as from the date of completion of eight years of services on contract basis, the petitioners are also entitled for regularization of their services Sanitary Inspector upon completion of eight year of service as such on contract basis. The Court is aware of the fact that as on the date when the petitioners had completed eight years of service as Sanitary Inspectors, no such post was existing in the Municipal Corporation, but then it is also a fact that when the petitioners were engaged against the posts of Sanitary Inspectors in respondent-Corporation by the said Corporation, then also no such post was existing in the Corporation, as the posts stood taken over by the State, yet respondent- Corporation engaged the petitioners.

9. Even otherwise, creation of posts was not in the hands of the petitioners and therefore also, as the act of creation of posts was the domain of the respondent/State as well as Municipal Corporation, Shimla, H.P., the petitioners cannot be made to suffer in case posts were not created in time so as to regularize the services of the petitioners on contract basis upon completion of eight years of service as such in terms of the policy of regularization of the Government in vogue at the relevant time.

10. Accordingly, this writ petition is allowed, with the direction that the services of the petitioners are ordered to be regularized against the post of Sanitary Inspector as from the date of completion of eight years' service, with all consequential benefits.

However, the actual financial benefit will be restricted to three years prior to filing of the transfer application. In the event of the arrears being paid within a period of six months, the same shall not entail any interest. If the arrears are not paid within a period of six months as fromthe date of pronouncement of the judgment, the same shall entail simple interest at the rate of 6% as from the date of pronouncement of the judgment. Petition stands disposed of, so also, pending miscellaneous applications, if any. Interim order, if any, stands vacated.

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

Harbans Singh ....Appellant.

Versus

Sh. Ramesh Chand ...Respondent.

RSA No.265 of 2020
Decided on: 02.03.2021

Code of Civil Procedure, Section 100 --- Suit for possession for vacation of shop existing alongwith arrears of rent (mesne profit) @ Rs. 2000 p.m. in suit land / filed by respondent against present appellant, decreed by Trial Court --- First appeal partly allowed--- Mesne profits being use and occupation reduced to Rs. 1,300/- p.m. --- Challenge thereof – Held, that no substantial question of law involved in the present appeal --- Findings of fact referred by Learned Courts below based on correct appreciation of pleadings and evidence on record --- Appeal being devoid of merits dismissed. (Paras 9, 10, 12)

For the appellant : Mr. Ashok Kumar Thakur, Advocate.

For the respondent: Mr. Subhash Sharma, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge(oral)

Heard learned counsel for the parties.

Brief facts necessary for the adjudication of the present appeal are as under:-

Respondent Ramesh Chand filed a suit for possession against present appellant, for vacation of shop alongwith rent, from 24.12.2012 to 31.03.2014 and mense profits, from 01.01.2014 till vacation of the premises, *inter alia*, on the grounds that the land comprised in khata No.35, khatauni No.45, khasra No.35/1,measuring 0-00-25 hectares, situated in Mohal Bankhandi, Tehsil Dehra, District Kangra, H.P., was recorded in the ownership of Onkar Chand, who wassucceeded by Sudershan Kumar, Smt. Lalita and Chanchala. Both Lalita and Chanchala relinquished the property in favour of Sudershan Kumar as per mutation No.223. There were shops, constructed on the land. Plaintiff purchased one shop comprised in khasra No.35/1 from Sudershan Kumar, vide registered sale deed, dated 24.12.2013. Defendant was inpossession of the shop, when the same were purchased by the plaintiff, on monthly tenancy of Rs.1,000/-, which was earlier received by Sudershan Kumar. Plaintiff purchased the shop toextend his business. He terminated the tenancy of defendant vide registered notice, dated 28.02.2014, after giving time to defendant to vacate on or before 31.03.2014. This notice was received and replied by the defendant on 13.03.2014. The shopwas not vacated and possession was not handed over to the plaintiff. No rent of the shop was paid from 24.12.2013 till 31.03.2014, by the defendant. In this background, suit stood filed by the plaintiff for

possession of the shop as well as for recovery of rent with interest as well as mesne profits with interest.

2. The suit was contested by the defendant, *inter alia*, on the ground that onus was upon the plaintiff to prove that he had purchased the shop. As per the defendant, the plaintiff came to his shop and showed a registered sale deed, calling upon the defendant to vacate the shop, after which, the defendant served a legal notice upon the plaintiff. According to the defendant, he had already paid an advance of Rs.1,50,000/- to the original owner of the shop and his tenancy was never terminated as alleged by the plaintiff and thus, there was no question of vacating the shop and handing over the possession thereof to the plaintiff.

3. On the basis of the pleadings of the parties, learned Trial Court framed the following issues:-

"1) Whether the plaintiff is entitled for decree of vacant possession of the suit property i.e. shop by mark ABCD as shown in the attached site plansituated in the suit land, as prayed for? ...OPP.

2) Whether the plaintiff is entitled for recovery of arrears of rent w.e.f. 24.12.2013 to 31.03.2014 amounting to Rs. 3,000/- alongwith mense profit at the rate of Rs. 2,000/- per month from 01.04.2014 till vacation of the suit property alongwith interest@ 12 % per annum, as prayed for? ...OPP.

3) Whether the plaintiff has cause of action to filethe present suit?...OPP.

4) Whether the suit is not maintainable in the present form?... OPD

5) Relief."

4. On the basis of evidence led by the parties in support of their respective contentions, the issues were answered by learned Trial Court as under:-

"ISSUE NO.1: Yes.

ISSUE NO.2: Part

ly Yes.ISSUE NO.3: Yes

ISSUE NO.4: Not Presses.

RELIEF : Suit of the plaintiff is decreed, as per operative part of the judgment".

5. The suit was thus decreed by the learned Trial Court by holding the plaintiff to be entitled to possession of the shop and directing the defendant to vacate the same within three months and also to pay arrears of rent, w.e.f. 24.12.2013 to 31.03.2014, amounting to Rs. 3,000/-, alongwith mense profit from 01.01.2014, till the vacation of suit premises at the rate of Rs.2,000/- per month, with interest at the rate of 6% per annum.

6. Feeling aggrieved, the defendant filed an appeal.

7. Vide judgment dated 14.01.2020, the Court of learned Additional District Judge (II), Kangra at Dharamshala, (H.P), disposed of the appeal by partly allowing the same in the following terms:-

"19. In the instant case, it has come on the record that the shop is situated in the bazaar and as per Sudarshan Kumar the adjoining owners are also fetching Rs. 1000/- as rent. The very purpose of awarding mesne profit or use and occupation charges is to put a check on diabolical

plans of tenant who has been ordered to be evicted and ensure that he does not squat on premises by paying a meager rent. At the same time even landlord is also compensated to receive higher rent than contractual rent but it would be reasonable, reasonable would mean what is just, fair and equitable in contradiction to anything whimsical, capricious etc. In the instant case, the premises in question admittedly are the shops and are non residential and landlord has not produced anything on record to show what is the rent in the adjoining landlord and beside this there is only bald statement. Therefore, I am of the opinion that Rs. 2000/- is more and not reasonable and accordingly it is modified that the plaintiff is entitled for the mesne profit being use and occupation at the rate of Rs. 1300/- per month from 1.4.2014 till its realization alongwith interest at the rate of 6% per annum and accordingly the point is partly decided in favour of the appellant.

20. As a sequel to my findings on point No.1 above, the instant appeal is partly allowed and the defendant is directed to vacate the possession mark ABCD as shown in site plan Ex. Pw-1/A situated in land comprised in khata No. 35, Khatauni No. 45, Khasra No. 35/1 measuring 0-00-25 hectares situated in Mohal Bankhandi, Tehsil Dehra, District Kangra, HP and also to pay arrear of rent from 24.12.2013 to 31.3.2014 amounting to Rs. 3000/- alongwith use and occupation charges from 1.4.2014 till vacation of premises at the rate of Rs. 1300/- per month alongwith interest at the rate of 6% per annum. Parties are left to bear their own costs. Decree sheet be drawn accordingly. Send down the records along with an authenticated copy of this judgment. Record of this court after its due completion be consigned to the record room." Still feeling aggrieved, the defendant has filed this second appeal.

8. Having gone through the judgments and decrees passed by learned Courts below and having heard learned counsel for the parties, this Court does not finds any substantial question of law involved in the present appeal. There are concurrent findings returned by both learned Courts below, holding that the plaintiff was entitled for possession of the shop in issue, as he had duly purchased the shop from its previous owner Sudershan Kumar and had, thereafter, terminated the tenancy of defendant in accordance with law. The factum of rent not having been paid by the defendant from 24.12.2013 to 31.03.2014,

amounting to Rs. 3000/-, has also been decided concurrently by both learned Courts below against the defendant.

9. During the course of the arguments, learned counsel for the appellant could not point out that these findings as returned by the learned Courts below were perverse and contrary to the record. It is not in dispute that the land comprised in Khasra No. 35, measuring 0-00-93 hectares was previously owned and possessed by one Onkar Chand and after his death it was inherited by Sudershan Kumar and his sisters. The sisters relinquished their share in favour of Sudershan Kumar, who sold the suit property by way of a sale deed in favour of the plaintiff. The shop was sold vide sale deed, dated 24.12.2013, which is also not in dispute. The factum of the shop being in possession of the defendant, earlier under Sudershan Kumar, is also not so much in dispute between the parties. Now, incidently DW-2 Sudershan Kumar himself admitted that he was receiving rent at the rate of Rs.1000/- per month from defendant No.1. The legal notice issued by plaintiff, terminating tenancy, is also on record as Ext. PW1/C. Reply thereof is also on record as Ext. PW2/C. That being the case, the findings returned by learned Courts below that plaintiff was entitled for vacant possession of the shop as well as arrears of rent, are correct findings of fact and based upon correct appreciation of pleadings as well as evidence on record.

10. Incidently, learned Appellate Court has also shownindulgence in favour of defendant by reducing the use and occupation charges to Rs. 1300/- per month in place of Rs. 2,000/- per month.

11. As already mentioned hereinabove, as this Court is of the view, that there is no substantial question of law involved in present appeal and the findings of fact returned by learned Courts below are based on correct appreciation of pleadings and evidence on record, this appeal being devoid of merit, is dismissed, however, no order as to costs. Pending miscellaneous applications, if any, stand dismissed. Interim order, if any, stands vacated.

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

The New India Assurance Company Limited ....Appellant.

Vs.

Sarla Devi and others .....Respondents.

FAO (MVA) No. 115 of 2019
Date of Decision: 16.6.2021

Motor Vehicle Act, Section – 166 – Petitioners being legal heirs of deceased Ramesh Chand, who died in a motor vehicle accident awarded compensation to the tune of Rs. 10,26,000/- by MACT --- Challenge thereof by Insurance Company --- Held, that amount of consortium awarded by Ld. Tribunal is on the higher side and children of the deceased are also entitled for loss of consortium alongwith spouse --- Award modified accordingly to the tune of Rs. 5,31,000/- . (Paras 12, 13)

Cases referred:

National Insurance Company Limited Vs. Pranay Sethi and others (2017) 16 SCC 680;

New India Assurance Company Limited Vs. Somwati and others (2020) 9 SCC 644;

For the appellant: Mr. Praneet Gupta, Advocate.

For the respondents: Mr. Ashok Verma, Advocate, for respondents No. 1 to 3.

Mr. Romesh Verma, Advocate, for respondents No. 4 and 5.

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

CMP No. 5991 of 2021

No order is required to be passed on this application, as with the consent of learned counsel for the parties, the main appeal itself has been taken up for final consideration.

FAO No. 115 of 2019

2. Brief facts necessary for the adjudication of the present appeal are as under:

A petition was filed by respondents No. 1 to 3 herein (hereinafter referred to as 'the petitioners') under Section 166 of the Motor Vehicles Act, 1988 for grant of compensation to the tune of Rs.7,00,000/- on account of death of Shri Ramesh Chand Mehra, son of Shri Nathu Ram before the Court of learned Motor Accident Claims Tribunal-IV, Kangra at Dharamshala, District Kangra, H.P. The case of the petitioners was that they were the legal heirs of deceased Ramesh Chand, who died in a motor vehicle accident on 25.11.2009. As per the petitioners, age of the deceased at the time of accident was 55 years and he used to work as a *Munshi* (Clerk) with M/s Mahinder Pal & Hari Ram Potato Merchant and was also an agriculturist. His income as *Munshi* (Clerk) was Rs.5,000/- per month and besides this, he also used to earn Rs.5,000/- per month from agricultural activities. As per the petitioners, the deceased had died in the course of his employment and they were entitled to compensation to the tune of Rs.7,00,000/-.

3. The petition was resisted by the respondents before the learned Tribunal by way of separate replies. The stand of the owner of the vehicle was that the accident in issue did not take place on account of rash and negligent driving of the driver concerned and the deceased in fact was hit near a residence where the vehicle was parked.

4. The claim was resisted by the Insurance Company, *inter alia,* on the ground that the driver concerned was not holding any valid and effective Driving Licence and at the time of accident and the vehicle was being plied in violation of the terms and conditions of the Insurance Policy.

5. On the basis of pleadings of the parties, learned Tribunal framed the following issues:

> *"(1) Whether Ramesh Chand died in an accident caused due to rash and negligent driving of vehicle No.HP-68-2482 by respondent No. 2 on 25.11.2009 at 8:30 p.m. at Pathiar Chowk? OPP*
> *(2) If issue number 1 is proved in affirmative, to what amount of compensation, the petitioners are entitled and from whom? OPP*
> *(3) Whether the driver of the vehicle was not holding a valid and effective driving licence at the time of accident? OPR*
> *(4) Whether the deceased was travelling in the vehicle as gratuitous passenger? OPR*
> *(5) Whether the respondent No. 2 was driving the vehicle No. HP-68-2482 in contravention of terms and conditions of the insurance policy? OPR*
> *(6) Relief."*

6. On the basis of evidence adduced by the respective parties in support of their respective pleadings and contentions, the following findings were returned by learned Tribunal on the issues so framed:

> "Issue No. 1: Yes.
> *Issue No. 2: Yes. The petitioners are entitled to get compensation to the tune of Rs.10,26,000/- (Rupees ten lacs and twenty six thousands only) with interest from all the respondents.*
> *Issue No. 3: No.*
> *Issue No. 4: No.*
> *Issue No. 5: No.*
> *Relief: The claim petition is allowed as per operative portion of the award."*

7. The claim petition was allowed by the learned Tribunal in the following terms:

> *"34. In view of my findings on the aforesaid issues, the petition is allowed with costs and all the petitioners are held entitled for compensation to the tune of Rs.10,26,000/- (Rupees ten lacs and twenty six thousands only) and all the respondents are jointly and severally held liable to make the payment of the aforesaid compensation amount with 9% simple interest from the date of petition i.e. 15.07.2011 till the compensation amount is deposited. The respondents shall deposit the amount of compensation in the Tribunal within 45 days from the date of order. The amount of compensation so awarded is apportioned between the petitioners/claimants as under:-*
>
> | | | |
> |---|---|---|
> | *Petitioner No. 1* | *:* | *Rs.5,00,000/-* |
> | *Petitioner No. 2* | *:* | *Rs.2,63,000/-* |
> | *Petitioner No. 3* | *:* | *Rs.2,63,000/-* |
> | *Total* | *:* | *Rs.10,26,000/-* |
>
> *This amount of compensation is inclusive of the amount, if any awarded under Section 140 of M.V. Act. Memo of costs be prepared accordingly. The file after its due completion be consigned to the record room.*
>
> *Announced and signed in the open Court today i.e. 3rd October, 2017."*

8. Feeling aggrieved, the award has been challenged by the Insurance Company by way of this appeal.

9. Mr. Praneet Gupta, learned counsel appearing for the appellant while drawing the attention of this Court to paragraph-30 of the award passed by the learned Tribunal has submitted that the impugned award is liable

to be set aside in view of the judgment of the Hon'ble Supreme Court in ***National Insurance Company Limited*** *Vs.* ***Pranay Sethi and others*** (2017) 16 Supreme Court Cases 680, as the loss of consortium/love and affection, which has been awarded by the learned Tribunal in favour of all the petitioners to the tune of Rs.2,00,000/- each is not sustainable in the eyes of law, as consortium can be granted only to the tune of Rs.40,000/- and that too only to the spouse. Mr. Gupta has further submitted that the last rites and funeral charges which have been awarded by the learned Tribunal to the extent of Rs.30,000/- are also liable to be modified, as only an amount of Rs.15,000/- can be awarded under this Head. On these bases, Mr. Gupta has prayed that the appeal be allowed and the impugned award be ordered to be modified accordingly.

10. Learned counsel for respondents No. 1 to 3/petitioners has argued that even if the contention of learned counsel for the appellant that the amount of consortium awarded by the learned Tribunal has to be reduced, is to be accepted, even then, in view of subsequent judgment of the Hon'ble Supreme Court in ***New India Assurance Company Limited*** Vs. ***Somwati and others*** (2020) 9 Supreme Court Cases 644, it is not as if only the spouse is entitled for consortium and the other petitioners being the children of the deceased are also entitled for the same.

11. I have heard learned counsel for the parties and also gone through the impugned award passed by learned learned Court below as well as record of the case.

12. As the controversy involved in this appeal has already been narrowed down, in view of the respective submissions made by learned counsel for the appellant with regard to the grievance of the appellant qua the award in issue as also learned counsel for respondents No. 1 to 3/claimants, therefore, this Court is adjudicating as to whether there is merit in the contentions raised by learned counsel for the appellant or not. As mentioned hereinabove, as per

the appellant, the loss of consortium assessed at the rate of Rs.2,00,000/- each in favour of all the petitioners is not sustainable in the eyes of law and funeral expenses are also on higher side, in view of the judgment of the Hon'ble Supreme Court in ***Pranay Sethi's case*** (*supra*). A perusal of the said judgment demonstrates that the Hon'ble Supreme Court in para-52 thereof has been pleased to hold that reasonable figures on conventional heads, namely, loss of estate, loss of consortium and funeral expenses should be Rs.15,000/-, Rs.40,000/- and Rs.15,000/- respectively. In this view of the matter, in the considered view of this Court, there is merit in the contention of learned counsel for the appellant that the amount of consortium awarded by the learned Tribunal is on the higher side and it is not in consonance with the judgment *(supra).* However, there is merit in the contention of learned counsel for respondents No. 1 to 3 also that it is not the spouse only, who is entitled for loss of consortium, but children are also entitled for the same in view of the judgment of the Hon'ble Supreme Court in ***Somawati's case*** (*supra*), in which, Hon'ble Supreme Court in paras-30 and 39 thereof has been pleased to observe that from the earlier judgments on the issue by the Hon'ble Supreme Court, it cannot be deciphered that consortium is payable as spousal consortium and consortium is not payable to children and parents. This means that children of the deceased are also entitled for the grant of consortium. Accordingly, though this Court upholds the grant of consortium by the learned Tribunal in favour of all the petitioners, but the amount awarded thereof is ordered to be reduced from Rs.2,00,000/- each to Rs.40,000/- each and last rites and funeral charges are also ordered to be reduced from Rs.30,000/- to Rs.15,000/-.

13. As a result of modification of the award passed by the learned Tribunal by this Court, the claimants shall be entitled to compensation in the following terms:

Sr. No.	Heads	Calculation

(i)	Income of deceased	Rs.4,000/- per month
(ii)	1/4th of the income deducted as personal expenses of the deceased=	Rs.4,000-1,000=Rs.3,000/- per month
(iii)	Compensation after multiplier of 11 is applied	(Rs.3,000 x 12 x11)=**Rs.3,96,000/-.**
(iv)	Loss of consortium/love and affection.	Rs.40,000/- each to petitioners No. 1 to 3, i.e., total Rs.**1,20,000/-.**
(v)	Last rites and Funeral Charges	Rs.**15,000/-**
Total compensation awarded=		**Rs.5,31,000/-**

Remaining part of the award is maintained by this Court and is not disturbed. Appeal stands disposed of accordingly. Miscellaneous applications, if any, also stand disposed of.

14. At this stage, a request has been made by learned counsel for respondents No. 1 to 3 that the award amount, as shall be assessed post the decision of present appeal, be released in favour of respondents No. 1 to 3. He further submits that details of bank account are already on record, as are contained in CMP No. 5991 of 2021. A request has also been made by learned counsel for the appellant that the amount which now becomes refundable to the appellants, be ordered to be released in favour of the appellant alongwith proportionate interest.

15. Registry is directed to release the claim amount, as now becomes payable to the claimants, in terms of the judgment passed by this Court today with up-to-date interest in their respective bank accounts and the balance amount is ordered to be refunded in the account of the appellant, bank details whereof shall be supplied by learned counsel for the appellant within one week from today.

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

Cr.MP(M) No. 892 of 2021
Hari Singh ...Petitioner

Versus

State of H.P. ....Respondent

Cr.MP(M) No. 893 of 2021
Ringu Ram @ Rinku ....Petitioner

Versus

State of H.P. ....Respondent

Cr.MP(M) Nos. 892 and 893 of 2021
Date of Decision 17th June, 2021

Code of Criminal Procedure, Section --- 439 --- FIR No. 6 of 2021 dated 10-01-2021, P.S. Padhar, District Mandi registered against Petitioners U/s 20, 29 ND & PS Act --- Prayer made for grant of bail on the ground that as per FSL report, weight of recovered contraband with carrying bag found to be more than 1 Kg. but without envelope it weighted 978 grams which is less than commercial quantity not attracting rigors of Section -37 ---Held, that though quantity of contraband alleged to be recovered from the petitioners is less than commercial but nearer to commercial quantity --- At the time of grant of bail, not only interest of accused, but, that of victim as well as society is also to be taken into consideration --- Petitions dismissed. (Paras 16, 18, 20)

Cases referred:
Gurubaksh Singh Sibbia vs. State of Punjab (1980)2 SCC 565;
Kalyan Chandra Sarkar vs. Rajesh Ranjan @ Pappu Yadav AIR 2005 SC 921;
Sanjay Chandra vs. Central Bureau of Investigation AIR 2012 SC 830;
State of Kerala vs Raneef AIR 2011 SC 340;

For the Petitioner(s): Mr. Mandeep Chandel, Advocate, through Video Conferencing.

For the Respondent(s): Mr. Desh Raj Thakur, Additional Advocate General, through Video Conferencing.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

Both petitions are being disposed of by this common judgment, as they arise out of the same FIR.

2 Petitioners have approached this Court seeking regular bail in case FIR No. 6 of 2021, dated 10.01.2021, registered in Police Station Padhar, District Mandi, under Sections 20 and 29 of Narcotic Drugs and Psychotropic Substances Act (in short NDPS Act).

3 Status report(s) stand filed. Petitioners have also placed on record copy of challan and other documents on record. Petitioners have been arrested on 10th January, 2021 and after remaining in police custody, they are in judicial custody.

4 In status report, details of circumstances, in which charas weighing approximate one Kilogram has been recovered from petitioners, have been narrated. Petitioners had approached learned Special Judge-III, Mandi seeking regular bail by filing separate petitions, which stand dismissed on 30th April, 2021.

5 It is submitted on behalf of petitioners that learned Special Judge has committed a mistake by treating the recovered contraband of commercial quantity, alleged to have been recovered from petitioners. On the basis of report of State FSL Junga, he submits that weight of recovered contraband along with carrying bag has been found to be more than 1 Kg., but, without envelope, the weight of contraband has been found 979 grams, which is less than commercial quantity and therefore, learned Special Judge has wrongly invoked rigors of Section 37 of NDPS Act.

6 Learned counsel for the petitioner has further submitted that rule is bail, but, not jail as it is trite law that personal liberty cannot be taken away except in accordance with procedure established by law as personal liberty is a constitutional guarantee. Further that object of jail is to secure the appearance of accused person during trial by reasonable amount of bail and object of bail is neither punitive nor preventative and deprivation of liberty must be considered a punishment, unless it is required to ensure presence of an accused in his trial. Learned counsel has further submitted that there is possibility of delay in concluding the trial and, therefore, it is contended that there is no reason to deny the bail to the petitioners, rather, petitioners deserve to be enlarged on bail. To substantiate the plea taken on behalf of petitioners, seeking their enlargement on bail, learned counsel has relied upon judgments of Supreme Court in ***Gurubaksh Singh Sibbia vs. State of Punjab,*** reported in ***(1980)2 SCC 565; Kalyan Chandra Sarkar vs. Rajesh Ranjan @ Pappu Yadav,*** reported in***AIR 2005 SC 921; Sanjay Chandra vs. Central Bureau of Investigation,*** reported in ***AIR 2012 SC 830;*** and ***State of Kerala vs Raneef,*** reported in ***AIR 2011 SC 340.***

7 Learned counsel for the petitioner has also relied upon two other judgments passed by Coordinate Benches of this Court in cases ***Cr.MP(M) No. 603 of 2020,*** titled as ***Gokul Chand vs. State of HP*** and ***Cr.MP(M) No. 925 of 2021,*** titled ***Durga Singh vs. State of HP.*** He further submits that in ***Gokul Chand's case*** the accused for alleged possession of 989 grams of charas has been enlarged on bail and in ***Durga Singh's case,*** the accused in a case of recovery of 954 grams, of charas has been granted anticipatory bail.

8 Learned Additional Advocate General has submitted that though bail is rule and jail is exception, but, at the same time the Court cannot shut its eyes from prevailing menace of drug abuse. He further submits that though, technically, recovered contraband is less than commercial quantity, however, it is nearest to commercial quantity. He further submits that though

Section 37 of NDPS Act may not be attracted, but, for betterment of society and larger interest of public, petitioners are not entitled for bail for commission of heinous crime which is not only against State, but, also the interest of society at large. Therefore, he has pleaded for dismissal of bail petitions.

9 For adjudication of bail application, order passed in other cases arising out of different FIRs would rarely be a precedent. Only in a situation when every fact and circumstance in two cases is identical, it may be considered a binding precedent, however, otherwise, a single different factor or a circumstance may cause different result in adjudication of bail application particularly when two cases with different sets of circumstances are to be taken into consideration with each other. Only broad principles, parameter and factors are to be considered with consistency.

10 In ***Gokul Chand's case***, though bail has been granted in a case where alleged recovery of contraband was 989 grams, but, the Coordinate Bench has categorically recorded that contraband was recovered from a locked house, which, according to bail petitioner, was neither owned nor occupied by him and Court has observed that there was no positive evidence on record to show any contrary position and, therefore, it was observed that whether contraband allegedly recovered from locked house belonged to petitioner or not, locked house belonged to petitioner or not and alleged recovery was effected in accordance with law were the questions to be answered after appreciation of evidence to be led during trial. Therefore, it cannot be said that facts in ***Gokul Chand's case,*** except one that recovered contraband was slightly less than commercial quantity, are similar, much less identical, to each other.

11 Similarly, in ***Durga Singh's case***, petitioner therein was considered to be an accused on the basis of disclosure statement of co-accused from whose possession 954 grams charas was recovered. Petitioner

therein was not main accused, but was a person who was considered to have been involved in commission of offence on the basis of statement made by other accused person apprehended on the spot by connecting petitioner with them on the basis of phone call conversation. Therefore, ***Durga Singh's case*** is also distinguishable.

12 It is true that normally, particularly when petitioner is ready to abide by conditions to be imposed by Court to ensure his presence in trial, bail should be granted, unless there is legal impediment to do so. But, at the same time, it is not allowed that every person is to be enlarged on bail in any circumstance. The discretion has been left on Court to exercise its power judiciously to adjudicate the issue whether petitioner before it is entitled for bail or not.

13 In ***Gurbaksh Singh Sibbia's case,*** it has been observed that question, whether to grant bail or not, depends for its answer upon a variety of circumstances and final verdict would be on the basis of cumulative effect of such circumstances and any single circumstance cannot be treated as of universal validity or necessary justifying the grant or refusal of bail.

14 In ***Kalyan Chandra Sarkar's case*** it has been clarified that a person, accused of offence which is non-bailable, is liable to be detained in custody during pendency of trial unless he is enlarged on bail in consonance with law and such detention cannot be questioned as being violative of Article 21 since such detention is authorized by law and in such cases, the accused person is entitled for bail if the Court concerned comes to the conclusion that prosecution has failed to establish a prima facie case against him or if the Court is satisfied for reasons to be recorded that in spite of existence of prima facie case there is a need to release such person on bail.

15 In ***Raneef's case*** also, it has been observed by Court that detention for a long time is not the only factor, but is certainly one of important factors, in deciding whether to grant bail or not.

16 It is more than settled that at the time of grant of bail, not only interest of accused, but, that of victim as well as society is also to be taken into consideration. In present case, society is victim. The drug abuse not only spoils the life of addicts, but also spoils their families resulting into collapse of fabric of society leading to anarchy. Therefore, though quantity of contraband alleged to be recovered from petitioners, is less than commercial quantity, however, it is an admitted fact that the contraband, weighing nearer to commercial quantity, has been recovered. It is true that at this stage petitioners are to be considered innocent, but, at the same time, it is not a case where it can be said that ex-facie no case is made out against the petitioners. Whether a case is made out or not for convicting the petitioners is an issue which is to be considered and decided by the trial Court/Magistrate/Special Judge after evaluation/assessment of material placed before them in accordance with law. In case under NDPS Act, provision of reverse onus is also a relevant factor.

17 Petitioners have been arrested in January, 2021. At this sage, I also do not find any force in contention that petitioners are entitled for bail on the ground that conclusion of trial may take place after a considerable long time.

18 Without commenting upon merits of case, considering the cumulative effect of entire facts and circumstances placed before me, I do not find it a fit case to enlarge the petitioners on bail, at this stage.

19 Learned counsel for petitioners in alternative has submitted that in case of dismissal of petition, liberty may be granted to petitioners to approach this Court again.

20 In my opinion, an accused has a right to file successive bail applications, as permissible under law, and therefore, no liberty from the Court is necessary for filing such bail application either in this Court or in the Court of Special Judge having jurisdiction to decide the same.

Accordingly, the petitions are dismissed.

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

Rajinder Singh & another ...Petitioners.

Versus

The State of H.P. & others ...Respondents.

CWPOA NO. 2098 of 2020
Date of Decision: June 22, 2021

Constitution of India, Article 226 --- Petitioners enrolled for three years as members of Home Guards, were put in reserved force --- Original Application preferred in 2017 before erstwhile H.P. State Administrative Tribunal --- In CWP No. 3628 of 2020 arising out of O.A. No 374 of 2018, in a similar matter, directions were issued to the concerned authority to consider the petitioner therein for his enrolment as volunteer in Home Guard --- Prayer made to consider the case of petitioners being similarly situated --- Held, that being similarly situated, petitioners are also entitled for same treatment as extended to the petitioner in CWP No. 3628 of 2020 --- Directions issued in said petition shall be mutatis mutandis applicable in the present case for all intends and purposes --- Petition disposed of accordingly. (Paras 3, 4, 5)

For the Petitioners: Mr. A.K. Gupta, Advocate and Ms.Babita Chauhan, Advocate, through Video Conferencing.

For the Respondents: Mr. Raju Ram Rahi, Deputy Advocate General, through Video Conferencing.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J. (oral)

Petitioners Rajinder Singh and Ram Chander were enrolled for three years as members of Home Guards in 4th Battalion, Nahan, H.P. on 26.12.1991 and 18.10.1991 respectively. Petitioner No.1-Rajinder Singh was put in reserved force on 13.02.2001 as he did not undergo Refresher Course in the

year 1997-98 and also did not attend the routine duty. Petitioner No.2-Ram Chander did not attend routine and emergency duty etc. and he did not submit any application for his renewal after completion of his three years of enrollment and, therefore, he was also put into reserved force on 02.06.1995.

2. After putting them in reserved force, petitioners did not approach any authority or Court except filing present petition as an Original Application, in the year 2017, before erstwhile H.P. State Administrative Tribunal. There is an inordinate delay in approaching the Court, therefore, though, their petition may have been dismissed on the ground of unexplained inordinate delay in filing the petition, however, learned counsel for the petitioners, has placed on record a judgment dated 05.01.2021 passed by a Division Bench of this High Court in CWP No.3628 of 2020, titled as *Inder Singh vs. State of H.P. and others,* arising out of identical petition bearing O.A. No.374 of 2018 wherein petitioner therein was enrolled as a Home Guard on 15.01.1997 and thereafter was put in reserved force on 15.02.2001 and he had approached the erstwhile H.P. State Administrative Tribunal in the year 2017 i.e. after lapse of 17 years. In that case the Division Bench has directed the concerned authority to consider the petitioner therein for his enrollment as a volunteer in Home Guards subject to certain conditions enumerated in the judgment on the basis of norms and rules dealing with the issue.

3. For the aforesaid judgment passed by the Division Bench, learned counsel for the petitioners, has prayed for issuing similar directions for petitioners herein on the ground of parity, being similarly situated to the petitioner in CWP No.3628 of 2020.

4. Operative part of the judgment in CWP No.3628 of 2020 is as under:-

> "2. Be that as it may, the effects of all the afore may, become undone, rather only for ensuring that since, the writ petitioner, is otherwise, not, declared, in the reply, on affidavit, sworn by the

respondent, to be unfit, for performing the apposite duties, nor, is declared therein, to, during the tenure, of, his service as a volunteer in the Home Guards, qua his not performing his duties, with lack of efficiency, and, or his mis-conducting, himself, (i) thereupon, besides when the perusal, of , Annexure P-2, discloses that the persons aspiring to be re-enlisted as volunteer(s) in the Home Guards, are not, to cross the prescribed therein age bar of 50 years, (ii) thereupon, when it is stated at the bar by the learned counsel for the petitioner, that the writ petitioner has not crossed the apposite age bar, hence, the respondents concerned, are, directed to, subject, to his also meteing compliance with Rule 3, of Annexure P-2, inasmuch as, his being (a) not less than 18 years and not more than 50 years of age, (b) is of good moral character; (c) is physically fit to undergo arduous out-door duties and has been medically examined and found to be of normal health; (d) is at least literate in Hindi; (e) is not wholly engaged in any course of study in any educational institution and has an employment or profession; (f) is not a member of the Territorial Army; (g) takes an oath of allegiance to the Constitution of India and to the Government of Himachal Pradesh as laid down in the form of pledge appended to these rules, hence proceed to consider the request of the respondent, for, his re-enrollment, as a volunteer in the Home Guards.

3. In view of the afore, the writ petition is disposed of. Also, the pending application(s), if any, are also disposed of. No costs."

5. Being similarly situated person, petitioners are also entitled for the same treatment as has been extended to the petitioner in CWP No.3628 of 2020. Therefore, in case judgment in the said petition has been accepted and implemented by the respondents then, the same treatment shall also be extended to the petitioners in the same terms. Directions issued in CWP

No.3628 of 2020 shall be *mutatis mutandis* applicable in the present case for all intent and purposes.

Present petition is disposed of in the aforesaid terms, so also pending application(s), if any.

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

Prithvi Chand ...Appellant

Versus

State of HP & others ....Respondents

RSA No. 202 of 2014
Judgment Reserved on 29th May, 2021
Date of Decision 23rd June, 2021

Code of Civil Procedure, Section - 100 – Suit for declaration filed by Plaintiff claiming that he, alongwith proforma – defendants have become owners of suit land automatically by operation of H.P. Tenancy and Land Reforms Act, 1975, dismissed by trial court --- Appeal filed by plaintiff also dismissed --- Regular Second Appeal --- Held, that plaintiff approached the Civil Court after initiation of eviction proceedings under P.P. Act with respect to which Civil Court lacks jurisdiction --- Plaintiff had right and opportunity to establish title upon suit land in the proceedings under P.P Act --- The suit land in ownership of Devta Surya Narayan which is diety / idol and a perpetual minor, is incapable of cultivating its holding personally --- No person can acquire ownership rights for tenancy in such land --- No perversity in concurrent findings of fact recorded by the Courts below --- Appeal dismissed. (Paras 56, 62, 64, 65)

Cases referred:

Bishwanath and another vs. Sri Thakur Radha Ballabhji and others, AIR 1967 SC 1044;

Chuhniya Devi Vs. Jindu Ram 1991 (1) Sim.L. C. 223; Not

Damodar Lal vs. Sohan Devi and others (2016)3 SCC 78;

Gurvachan Kaur and others vs. Salikram (dead) thruogh LRs (2010)15 SCC 530;

Jiten K. Ajmera vs. M/s Tejas Cooperative Housing Society 2019(6) SCC 128;

Khazana Ram vs. Ghungar 1996(1) CLJ (HP) 424;
Krishnan vs. Backiam and another (2007)12 SCC 190;
Lachhman Singh (Deceased) through Legal Representatives and others Vs. Hazara Singh (Deceased) through Legal Representatives and others, (2008) 5 SCC 444;
Narain Dass and others vs. Bhup Singh and others 1997(3) Sim.LC 380;
Narendra Kumar Tripathi vs. Karuna Auddy and others (2020)3 SCC 22;
Syeda Rahimunnisa vs. Malan Bi (dead) by LRs and another (2016)10 SCC 315;
Narotam Chand vs. Kashmir Singh and others 2018(2) Shim.LC 1009;
Prabhu Das vs. State of Rajasthan and others 1991(2) RLR 657;
Prem Dass and others vs. Jagdish 1997(2) S.L.J. 984;
Ram Karan vs. The Financial Commissioner and others 1980 PLJ 295;
Ram Lal vs. Board of Revenue 1990(1) RLR 161;
Ravinder Kaur Grewal and others vs. Manjit Kaur and others (2019)8 SCC 729;
Sarwan Kumar and another Vs. Madan Lal Aggarwal (2003) 4 SCC 147;
State of HP vs. Ajay Vij and others 2011(2) Shim.LC 43;
State of HP vs. Chander Dev and others 2007(2) Shim.LC 7;
Surjeet Kaur vs. Jarnail Singh 1965 PLJ 137;
Temple of Thakurji Village Kansar vs. State of Rajasthan and others AIR 1998 Rajasthan 85;
Union of India vs. K.V. Lakshman and others 2016(13) SCC 124;
Vinay Kumar and others vs. Parshotam Dass and others 1992 PLJ 77;

For the Appellant: Mr. Bhupinder Gupta, Sr. Advocate with Mr.Janesh Gupta, Advocate, through Video Conferencing.

For the Respondents: Mr. Desh Raj Thakur, Additional Advocate General, for respondent No.1, through Video Conferencing.

Respondents No. 2 and 3 are already ex-parete.

Ms. Yogita Dutta, Advocate, for applicant/proposed respondent No.4 in CMP No. 6273 of 2020.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

Plaintiff (appellant herein) has approached this Court against concurrent findings of Courts below whereby suit as well as appeal filed by him have been dismissed by trial Court and first Appellate Court.

2 The plaintiff has filed a suit for declaration that he along with proforma-defendants (respondents No. 2 and 3 herein) is owner of land comprised in Khasra No. 1403/323/419 min (old) and Khasra No. 1403/323/419 min (old) denoted by new khasra Nos. 1779 and 1780 situated in village and mauja Nirath, Tehsil Rampur Bushehr, District Shimla with consequential relief of permanent injunction restraining the defendant State of HP from interfering in possession of plaintiff and proforma-defendants in any manner. Plaintiff has set up a claim that predecessors-in-interest of plaintiff and proforma-defendants were in possession of suit land, which is now in possession of plaintiff and proforma-defendants, as non-occupancy tenants under the owner Devta Surya Narayan, Temple Surya Narayan Nirath and on enactment of H.P. Ceiling on Land Holdings Act, 1972 (hereinafter referred as Ceiling Act) ownership of land was vested from Devta Surya Narayan to State of HP vide mutation No. 1746 dated 8.6.1975. It is the case of plaintiff that possession of suit land remained with plaintiff and proforma-defendants continuously, physically, actually and without any interruption and further that like predecessors-in-interest, plaintiff and proforma-defendants are still paying money and rendering the services to the Temple Surya Narayan whenever so required by Kardars of temple, however, actually and in law they have become owners automatically by operation of H.P. Tenancy and Land Reforms Act (hereinafter to be referred as Tenancy Act) which came into force from November 1975 and thus, they are not liable, now, to pay any money to Temple Surya Narayan or render service in lieu of rent of tenancy and thus, they are also not liable to be ejected from suit land by defendant/State.

However, despite that, defendant/State has initiated ejectment proceedings against plaintiff and proforma-defendants which are pending before Authorized Officer-cum-Divisional Forest Officer, Rampur Bushehr with respect to Khasra No. 1779 whereas plaintiff and proforma-defendants are neither encroachers nor in unauthorized possession, but, are in authorized possession as tenants of Surya Narayan Temple Nirath and continue as such also. Claim of plaintiff is that he and proforma-defendants have become owners automatically by application of Tenancy Act of 1972.

3 Defendant/State has refuted the claim of plaintiff on the ground that suit land has vested in the State free, from all encumbrances, on application of Ceiling Act and the said process was completed by attestation of mutation No. 1746 on 8.6.1975 and it is contended that as a matter of fact, plaintiff and Prem Chand, predecessor-in-interest of proforma-defendants was found as encroacher over the part of suit land comprised in Khasra No. 1779 whereas remaining part of suit land comprised in Khasra No 1780 was found in illegal possession of one Sohan Lal son of Phundu Ram and separate encroachment proceedings vide Missal No. 83 dated 6.1.1990 have been initiated by competent authority against him. It is further contended that Prem Chand, predecessor-in-interest of proforma-defendants, had filed affidavit in the year 2002 admitting therein that he was an encroacher over the part of suit land comprised in Khasra No. 1779 belonging to State Government with respect to which proceedings under the Himachal Pradesh Public Premises and Land (Eviction and Rent Recovery) Act, 1971 (PP Act) have been initiated. Claim of induction of plaintiff and proforma-defendants or their predecessor-in-interest as tenant over the suit land and automatic acquisition of ownership by them by operation of Tenancy Act, either from Devta or from State, has been denied. It is further contended that there is no entry in column of cultivation, at the relevant point of time, in favour of plaintiff and proforma-defendants or their predecessors-in-interest, much less

with respect to payment/receipt of rent or Lagan, as tenant. Rather, it is claimed that plaintiff and proforma-defendants have been found in illegal possession by Revenue Authorities during settlement, and, therefore, they are liable to be ejected from part of suit land in due process of law and jurisdiction of Civil Court, for initiation of proceedings under PP Act, has also been disputed by defendant/State. Claim of plaintiff regarding service of notice under Section 80 CPC has also been disputed in the written statement.

4 After appreciation of material placed on record, the trial Court had dismissed the suit filed by plaintiff. First appeal preferred by plaintiff also stands dismissed by first Appellate Court affirming the judgment and decree passed by trial Court. An application under Order 41 Rule 27 CPC seeking permission to lead additional evidence, filed during the pendency of first appeal, also stands dismissed by first Appellate Court.

5 Present appeal has been admitted on following substantial question of law:-

> 1. Whether on account of mis-appreciation of the pleadings and misreading of the oral as well as documentary evidence available on record the findings recorded by both Courts below are erroneous and as such the judgment and decree impugned in this appeal being perverse and vitiated is not legally sustainable?
>
> 2. When the defendant-respondent did not take objection of jurisdiction of the Civil Court in the written statement and did not claim issue thereupon, has not the Lower Appellate Court committed grave error of law and jurisdiction in wrongly applying the provisions of H.P. Public Premises and Land (Eviction and Rent Recovery) Act, 1971 to hold that the jurisdiction of the Civil Court qua the part of the suit land is barred?

6 I have heard learned counsel for parties at length and have also gone through record.

7 It is apt to record here that during pendency of this appeal an application bearing CMP No. 6273 of 2020 under Order 1 Rule 10(2) CPC, has been preferred by Satluj Jal Vidyut Nigam Limited (SJVNL) for impleadment of SJVNL as respondent No.4 on the ground that applicant/proposed respondent No. 4 has signed Memorandum of Understanding on 29.5.2019 with Government of HP for execution of Luhri Stage-1 210 MW Hydro Electric Project in Satluj River Basin in Himachal Pradesh and for execution of project work, lease agreement with Deputy Commissioner, Shimla is required to be signed, but SDM Rampur Bushehr, at the time of forwarding the case, had declined No Objection Certificate (NOC) in respect of land comprised in Khasra Nos. 1779 ad 1780 for pendency of RSA No. 202 of 2014 (present case), titled Prithvi Chand vs. State of HP i.e. present appeal as this Court has passed an interim order in this appeal directing the parties to maintain status quo and, thus, cause of action has arisen to applicant Company for its impleadment as party for getting the interim order suitably modified as Company, in case of allowing the RSA, is ready to deposit due compensation in favour of plaintiff and proforma-defendants as per law as suit land, for falling in the reservoir area of project, is essentially/urgently required for execution of work and complete the project as per DPR approved by Central Electricity Authority, and further that though suit land comprised in Khasra Nos. 1779 and 1780 is essentially required by Company for timely execution of project, but, applicant-company is not in a position to proceed to acquire the suit land for interim orders passed in present RSA and in these circumstances, it is canvassed that Company is interested and a proper party to be impleaded as respondent No.4 in main appeal for seeking permission of Court to take possession of suit land subject to final outcome of appeal.

8 A separate application CMP No. 6275 of 2020 has also been filed by SJVNL for modification of interim order passed by this Court in this appeal.

9 Both applications filed by SJVNL have been opposed by non-applicant/appellant on the ground that SJVNL has no right, title or interest vested in its favour and, thus, has no locus standi to file such applications. It is further contended that such applications are not maintainable on behalf of SJVNL who was neither a party in the civil suit nor in first appeal and further, in case, if SJVNL has signed the Memorandum of Understanding with Government of Himachal Pradesh, then application for modification of stay should have been filed by defendant/State, not by third party having no role in lis.

10 Taking the entire facts and circumstances into consideration, I am of the considered view that in case there was an urgency or necessity for vacation of stay or modification of interim stay granted by this Court, the defendant/State should have come forward for modification/vacation of interim order as State of HP is party to the Memorandum of Understanding filed with SJVNL for execution of Hydro Electric Project and, thus, stakes of State, which is already party to appeal, are also involved and, thus, when State is there to represent the interest of public for early execution of Hydro Electric Project by applicant Company and to take care of public interest with right to file proper application for vacation or modification of interim stay, then, I do not find any reason for allowing the applications filed by SJVNL and thus the same are dismissed.

11 One of contentions raised by learned arguing counsel for the appellant, is that at the time of rejection of application filed on behalf of plaintiff under Order 41 Rule 27 CPC, the observations of first Appellate Court are perverse for the reason that documents proposed to be placed on record in evidence would definitely establish that plaintiff and proforma-defendants and their other family members were in possession of Khasra Nos. 1779 and 1780 and, therefore, rejection of application is based on erroneous and a stray finding, returned by first Appellate Court, is contrary to material on record.

12 It is contended on behalf of plaintiff that defendant/State had failed to file any document in rebuttal to documents filed by plaintiff in appeal, sought to be produced by way of additional evidence, for establishing his claim of possession upon the suit land, issuance of notice under Section 80 CPC and also to corroborate the evidence already placed on record by way of revenue documents. Learned arguing counsel has submitted that the documents sought to be produced in additional evidence were and are relevant and necessary for complete, proper and final adjudication of issue involved and for deciding the rights of parties to do complete justice and the nature of documents is such that these documents could not have been created, manufactured and fabricated by plaintiff and pleadings regarding the facts sought to be proved through these documents are already on record and these documents have come in possession of plaintiff after decision of suit by the trial Court despite exercise of due diligence by plaintiff and there was justifiable reason for not filing the documents at the trial stage and, therefore, irrespective of the fact that these documents were in the knowledge of plaintiff, to do substantial justice to parties, the application ought to have been allowed by first Appellate Court. It is further submitted that allowing the application would not have caused any injustice to defendant/State as Court is under obligation to give opportunity to other side to file additional evidence by way of rebuttal and evidentiary value of these documents is to be considered by the Court in the light of other material on record.

13 It is lastly submitted that authenticity of documents sought to be produced by way of additional evidence has never been disputed by defendant/State and for all the aforesaid reasons, dismissal of application is definitely contrary to law of land and appreciation of material on record in this regard is perverse.

14 Learned arguing counsel for the plaintiff, to substantiate his submissions on the aforesaid points, has relied upon pronouncements of the

Supreme Court in ***Jiten K. Ajmera vs. M/s Tejas Cooperative Housing Society,*** reported in ***2019(6) SCC 128; Union of India vs. K.V. Lakshman and others*** reported in ***2016(13) SCC 124; Lachhman Singh (Deceased) through Legal Representatives and others Vs. Hazara Singh (Deceased) through Legal Representatives and others,*** reported in ***(2008) 5 SCC 444;*** and also decision of Punjab and Haryana High Court in case ***Ram Niwas vs. Kalu Ram and another,*** reported in ***2012(3) Civil Court Cases 458,*** and has submitted that in the light of ratio of law laid down by the Courts, rejection of application under Order 41 Rule 27 CPC is not sustainable and warrants interference and impugned judgment and decree passed by first Appellate Court deserve to be set aside on this count only.

15 For reasons assigned thereto by first Appellate Court, rejection of application under Order 41 Rule 27 CPC, has also been supported by learned Additional Advocate General.

16 Alongwith aforesaid application filed for leading additional evidence, plaintiff has placed on record some receipts issued by Assistant Engineer, Irrigation and Public Health Department, Sub Division No.1, Rampur Bushehr, wherein plaintiff alongwith Prem Chand (predecessor-in-interest of proforma defendants) has been reflected as a payer of water charges with respect to Khasra Nos. 1650, 1656 and 1779, whereas, with respect to Khasra No. 1780, one Sohan Lal son of Phundu Ram has been reflected as payer of water charges. Another document, sought to be placed on record, is a letter dated 9th January, 2007 addressed to Sub Divisional Officer (Civil) Rampur Bushehr, Shimla from Additional District Magistrate, Shimla which contains an endorsement regarding receipt of notice dated 1.1.2007 sent by Mr.R.M. Gupta, Advocate, on behalf of Prithvi Chand and Prem Chand sons of Jia Lal son of Phundu Ram, residents of Nirath, Tehsil Rampur Bushehr, District Shimla with further endorsement directing the SDO (Civil) to take necessary steps to address the grievances of notice servers. A copy of notice

with seal of Diary clerk of office of Collector, Shimla, copies of jamabandis for the years 1969-70 and 1974-75; Missal Hakiyat alongwith report of Field Kanungo and Patwari Halqua received through RTI have also been sought to be placed on record.

17 So far as notice under Section 80 CPC is concerned, first Appellate Court has not endorsed the findings of the trial Court in its judgment in this regard and has dismissed the claim of plaintiff independent thereof. Therefore, letter dated 9th January, 2007 has lost its relevancy.

18 In other documents, Missal Hakiyat for the year 1969-70 reflects that Devta Surya Narayan through Bhagat Ram son of Tirath Ram Kardar of Temple, is owner of unmeasured (0-0), Khasra No. 1323/419 with entry in the column of cultivation as self- cultivation by owner but with note appended thereon that ownership of this land was transferred to Government of HP on 8.6.1975, and Missal Hakiyat Settlement Second Amended Settlement Jadid reflects the State of HP as an owner of Khasra No. 1779 (new) (old Khasra Nos.1403/1323/419 min) and Khasra No. 1780 (new) (old Khasra Nos. 1403/1323/419 min) with entry of unauthorized possession in the column of cultivation, whereas Nakal Jamabandi for the year 1974-75 reflects Government of HP as owner of unmeasured (0-0), Khasra No. 1402/1323/419 with entry of possession of residents of area in the column of cultivation.

19 The same thing, as reflected in aforesaid revenue papers, has been reported by Field Kanungo to Tehsildar and by Tehsildar to SDO(Civil) with addition that file No. 82 about unauthorized possession of Prithvi Chand (plaintiff) and Prem Chand (predecessor of proforma-defendants No. 2 and 3) upon Khasra No. 1779 and file No. 83 about unauthorized possession of Sohan Lal son of Phundu Ram upon Khasra No. 1780 has been initiated. From the reports of Field Kanungo, Tehsildar and Nakal Jamabandis, it is evident that in the year 1969-70 Devta Surya Narayan was owner, but, plaintiff and proforma defendants or their predecessors-in-interest were not

shown as tenant of Devta and in jamabandi for the year 1969-70 also, when ownership of suit land alongwith other land was transferred from Devta to Government of HP, no person including the plaintiff and proforma defendants or their predecessors-in-interest have been recorded as tenants. Rather, it has come in report and also in revenue papers that Prem Singh and Prithvi Chand were found in illegal possession of Khasra No. 1779 during fresh (amended) settlement whereas one Sohan Lal was found in illegal possession of land comprised in Khasra No. 1780 and accordingly proceedings against encroachment vide file bearing Nos. 82 and 83 were initiated against Prithvi Chand, Prem Chand sons of Jia Lal, and Sohan Lal son of Phundu Ram respectively. Possession of Prithvi Chand and Prem Chand on the land comprised in Khasra No. 1779 is an admitted fact and dispute in this regard is to the extent that plaintiff is claiming that he and proforma-defendants are in possession of it as owners for application of Tenancy Act as the said land was in possession of their predecessors-in-interest as tenants of Devta of Temple followed by their possession, whereas, claim of State is that plaintiff and predecessors-in-interest of proforma-defendants have been found in illegal possession during second amended settlement. Further claim of plaintiff is that they are also in possession of Khasra No.1780, whereas, stand of Government is that one Sohan Lal has been found in illegal possession of Khasra No. 1780.

20 Plaintiff has also placed on record copy of mutation No. 1746 dated 8.6.1975 Ext.PA whereby ownership of the land of Devta Surya Narayan including the suit land was transferred to ownership of Government of HP vide order dated 19.03.1975. At that time, there was no entry with respect to possession of plaintiff, proforma defendants, or their predecessors-in-interest. Rather, before mutation, owner of land in question has been shown as cultivator and after mutation right thereon has been indicated of residents of Mohal.

21 Further plaintiff has also placed on record in evidence application Ext.PA (sic) filed by Sohan Lal with respect to Khasra No. 1323/419/2 for correction of revenue record by entering his name in the columns of possession and cultivation on the basis of his claim that he was in possession and cultivation of the said land since last 20 years. This application was filed on 23.6.1972, but was dismissed on 16.11.1972 as evident from copy of order placed on record by plaintiff as Ext.PC, wherein, it is recorded that applicant did not want to pursue the application, therefore, it was dismissed and consigned to the Record Room. This document reflects that Sohan Lal alone was claiming his possession on land comprised in Khasra No. 1323/419/2 without any reference of plaintiff and proforma defendants.

22 Possession of plaintiff and proforma defendants on Khasra No. 1779 stands admitted by defendant/State for issuance of notice Ext.PD under PP Act and reply thereto Ext.PE has been proved on record by plaintiff.

23 First Appellate Court has considered the documents filed with application and returned reasonable findings with respect to relevancy and necessity of those documents for adjudicating and deciding the lis between the parties. Non-filing of documents, in rebuttal to documents filed with application for additional evidence, cannot be a ground for allowing the said application. Relevancy, necessity and requirement of such documents is to be determined independent thereof as discussed supra and as has also been discussed by the first Appellate Court. Permitting the documents to be produced by way of additional evidence would not have improved the case of plaintiff at all. The plaintiff was having the knowledge of existence of these documents, but, he has failed to assign any reason for not applying to the concerned authorities to obtain these documents. It is not a case, where plaintiff had made an effort to obtain the documents well in time, but, documents were not supplied by concerned authorities to him within a reasonable period. In present case, as evident from material on record,

plaintiff had applied for these documents when case was already at the final stage in the trial Court.

24 No doubt, independent of conduct of plaintiff, the Court has jurisdiction to allow the application for additional evidence, if such documents are required to decide the suit and appeal by Court, but, in present case, these documents, as discussed in detail supra, are not necessary to be brought on record as production thereof would not have any effect on the merits of case. The case law cited on behalf of plaintiff thus is of no help to the plaintiff.

25 It is also relevant to notice that these documents were never produced before trial Court, despite the fact that these were existing at that time and no effort was made by plaintiff to obtain these documents during pendency of suit. Even otherwise it would not have proved the case of plaintiff in any manner.

26 Documents sought to be produced were not proposed to be led in evidence before the trial Court and thus these are not the documents which were refused to be admitted in evidence by the trial Court, which ought to have been admitted.

27 Neither first Appellate Court has considered nor this Court considers that these documents are necessary to be examined to enable the Court to pronounce the judgment or for any other substantial cause, as the facts, sought to be proved by placing these documents on record, stand already proved in the evidence led and even if these documents are taken into consideration, the same shall not be of any help either to the plaintiff or to the Court. Had these document been establishing certain other facts which are not already on record, so as to enable the Court to pronounce the judgment by adjudicating all issues or for any substantial cause, these documents may have been permitted to be placed on record in evidence, irrespective of the fact

that plaintiff had failed to exercise due diligence to obtain these documents, which were in his knowledge.

28 Therefore, I find that findings of first Appellate Court that documents sought to be produced in evidence, filed with application under Order 41 Rule 27 CPC, by adducing additional evidence, were not necessary to be examined to enable the Court to pronounce the judgment or for any substantial cause as these documents were not going to improve the evidence or facts on record in any manner as nothing new would have been established on record on allowing the production of these documents on record. Therefore, I do not find any perversity in this regard in the impugned judgment passed by first Appellate Court.

29 The application for leading additional evidence has rightly been dismissed by the first Appellate Court.

30 Learned arguing counsel for plaintiff has further submitted that first Appellate court has committed a mistake of law by framing an issue with respect to maintainability of suit with reference to provisions of PP Act, as no such issue was framed or proposed to be framed on behalf of defendants during the trial and first Appellate Court has thus committed an error of law and jurisdiction by holding that jurisdiction of the Civil Court qua Khasra No. 1779, a part of suit land, is barred for application of provisions of PP Act.

31 It is contended on behalf of plaintiff that ratio of law laid down in judgment passed by the Supreme Court in ***Sarwan Kumar and another Vs. Madan Lal Aggarwal,*** reported in ***(2003) 4 SCC 147;*** and judgments passed by this High Court in ***Chuhniya Devi Vs. Jindu Ram***, reported in ***1991 (1) Sim.L. C. 223;*** and ***Notified Area Committee Vs. Bhagat Ram,*** reported in ***Latest HLJ 2009 (HP) 816,*** has been applied wrongly and erroneously. He has further submitted that in *Bhagat Ram's case,* suit was filed for restraining the authority from evicting the plaintiff therein by taking recourse of PP Act, whereas present suit has been filed for declaration qua acquisition of

ownership by plaintiff, for application of Tenancy Act, and further that in *Chuhniya Devi's case* also in (para 64) in Answer (b), it has been held that where it is found that statutory authorities envisaged by the Act had not acted in conformity with fundamental principles of judicial procedure or where provisions of the Act had not been complied with, the Civil Court would have jurisdiction to entertain the civil suit and, therefore, it is contended that the impugned judgments and decrees deserve to be set aside and the suit filed by plaintiff deserves to be decreed.

32 On merit, on this issue, referring the pronouncements of the Apex Court in ***Ravinder Kaur Grewal and others vs. Manjit Kaur and others,*** reported in ***(2019)8 SCC 729;*** and ***Narendra Kumar Tripathi vs. Karuna Auddy and others,*** reported in ***(2020)3 SCC 22,*** learned arguing counsel for the plaintiff has submitted that a person in possession cannot be ousted by anyone except by due process of law and a person who has acquired ownership rights even by way of adverse possession can not be ejected and acquisition of rights of ownership can be used by him as a sword being plaintiff as well as a shield being defendant. He further submits that in present case plaintiff is on better footings as there is sufficient material on record to establish the possession of plaintiff and proforma defendants upon the suit land as it is an admitted case of defendant/State that on finding them in possession of suit land, files for removal of encroachment have been prepared and proceedings for their ejectment have been initiated and further that there is sufficient evidence to establish possession of plaintiff and proforma-defendants as tenants upon the suit land, and, thus, plaintiff has every right to file the suit against defendant-State to protect his rights as he alongwith others has perfected the title against State for operation of Tenancy Act.

33 It is contended on behalf of plaintiff that Ex. PA, an application filed by Sohan Lal for correction of revenue entries contains the fact that

tenancy in the suit land was created by Bhagat Ram Mohatmeen of the Temple, but the proceedings in that application were closed for death of Bhagat Ram and non-appointment of any Mohatmeen after his death as evident from copy of order dated 16.11.1972 (Ext.PC) passed by Assistant Collector, and further that possession of plaintiff and performa defendants is also established from entries and remarks of column of Nakal Intkhab Jamabandi for the year 1999-2000 Ex. PG, wherein, in column of possession and cultivation, suit land has been shown in illegal possession and reference of preparation of files of encroachment bearing Nos. 23 and 24 has been given, and further that the possession of plaintiff and proforma-defendants on the suit land is also fortified from notice Ex. PD issued under PP Act and, therefore, it is submitted on behalf of the plaintiff that findings, that plaintiff has not been found in possession of suit land, are perverse and warrants interference for setting aside the impugned judgments and decrees.

34 Learned arguing counsel for plaintiff has contended that trial Court, in para 15 of the judgment, has recorded the findings that no evidence has been placed on record or proved by plaintiff to show that predecessors-in-interest of plaintiff and proforma defendants remained in possession of suit land and they were paying any rent to Devta Surya Narayan Ji, whereas, PW4 Pushpa Dutt, in his examination-in-chief, has deposed that suit land was in possession of ancestors of plaintiff and proforma defendants and after that suit land comprised in Khasra Nos. 1779 and 1780 is in possession of plaintiff and proforma defendants and in lieu of cultivation of land, they continued to pay 50% galla batai and rendered services to Devta from time to time and, thus, they are non-occupancy tenants of Devta and have become owners since November, 1975 for application of Ceiling Act. Further that the possession of plaintiff and proforma defendants upon the suit land has also been admitted by witness of defendant/State, DW1 Dalip Singh Patwari and, therefore,

findings returned by trial Court and affirmed by first Appellate Court in this regard are perverse.

35 Learned Additional Advocate General has contended that oral evidence to prove the tenancy and to rebut the presumption attached to revenue record is insufficient and is not corroborated by any document or cogent and reliable evidence on record, and, findings of Courts below that tenancy has not been proved are not perverse as documents placed on record by plaintiff itself falsify the claim of plaintiff that their predecessor-in-interest was introduced as tenant by the Temple and, as there is no perversity in findings returned by Courts below, thus it is not expected from this Court in Regular Second Appeal to interfere in concurrent findings on question of fact. To substantiate impermissibility of interference in absence of perversity, he has relied upon ***Syeda Rahimunnisa vs. Malan Bi (dead) by LRs and another*** reported in ***(2016)10 SCC 315; Damodar Lal vs. Sohan Devi and others*** reported in ***(2016)3 SCC 78; Krishnan vs. Backiam and another*** reported in ***(2007)12 SCC 190;*** and ***Gurvachan Kaur and others vs. Salikram (dead) thruogh LRs*** reported in ***(2010)15 SCC 530.***

36 It is also contended by learned Additional Advocate General that tenancy is bilateral agreement which is required to be pleaded and proved as such and there must be consent of landlord to create tenancy which is missing in the present case and, thus, findings on this fact by Courts below, not accepting the claim of plaintiff, are correct. In this regard reliance has been placed on ***Narotam Chand vs. Kashmir Singh and others,*** reported in ***2018(2) Shim.LC 1009; State of HP vs. Ajay Vij and others,*** reported in ***2011(2) Shim.LC 43; Khazana Ram vs. Ghungar*** reported in ***1996(1) CLJ (HP) 424; Narain Dass and others vs. Bhup Singh and others,*** reported in ***1997(3) Sim.LC 380; Prem Dass and others vs. Jagdish,*** reported in ***1997(2) S.L.J. 984; Surjeet Kaur vs. Jarnail Singh,*** reported in ***1965 PLJ 137; Ram Karan vs. The Financial Commissioner and others,*** reported in

1980 PLJ 295; Vinay Kumar and others vs. Parshotam Dass and others, reported in ***1992 PLJ 77;*** and ***State of HP vs. Chander Dev and others,*** reported in ***2007(2) Shim.LC 7.***

37 It is also contended on behalf of defendant/State that Devta is not only a perpetual minor but, at the same time, is a disabled person who cannot cultivate personally and, therefore, no ownership rights can be acquired against a minor and such disabled person and reliance has been placed, to substantiate this contention, on judgments in ***Bishwanath and another vs. Sri Thakur Radha Ballabhji and others,*** reported in ***AIR 1967 SC 1044; Temple of Thakurji Village Kansar vs. State of Rajasthan and others,*** reported in ***AIR 1998 Rajasthan 85; Ram Lal vs. Board of Revenue,*** reported in ***1990(1) RLR 161;*** and ***Prabhu Das vs. State of Rajasthan and others,*** reported in ***1991(2) RLR 657***.

38 It is further submitted on behalf of the State that even if it is considered that plaintiff and proforma defendants are/or their predecessors-in-interest were tenants of Devta, even then, in view of provisions of Sub-sections 8 and 9 of Section 104 of Tenancy Act, claim of plaintiff deserves to be rejected as ownership rights cannot be acquired in a tenancy, if owner is perpetual minor as well as disabled person and incapable of cultivating the land personally. It is contended that till application of Ceiling Act, tenants of Devta were not entitled to invoke the provisions of Tenancy Act to acquire ownership and on application of Ceiling Act, the tenants were not entitled to claim tenancy or ownership as under the Ceiling Act, as land has been vested to ownership of State free from all encumbrances whatsoever.

39 Framing of issue at the time of deciding the first appeal by first Appellate Court and returning the findings thereto, has also been justified by learned Additional Advocate General by submitting that Appellate Court has jurisdiction to frame any issue on the basis of material on record and to decide the same and further that, additional issue framed in appeal by first Appellate

Court is well founded in view of material on record and settled legal position, and in case contention of plaintiff is accepted, then provisions of PP Act would be rendered redundant and the very purpose of enactment shall be frustrated.

40 Lastly, it is contended that claim of plaintiff, applying the principle of preponderance of probabilities to the material on record is not sustainable and, thus, no interference of this Court is warranted in this appeal.

41 Plaintiff has examined PW-4 Pushpa Dutt claiming him to be Pradhan of Committee of Temple of Devta Surya Narayan, but his statement, as noticed by Courts below, is vague as he has not stated the specific date since when he is Pradhan, but stated that he is Pradhan since long and further that there is lot of land in the name of Devta Surya Narayan, out of which some land is vested to the State under Ceiling Act and Devta Surya Narayan is cultivating its land through tenancy for rent in the shape of crop. He has not mentioned the date, month and year from which he is President. He is completely silent about the time when tenancy was created. It has also come in evidence of plaintiff that there was Mohatmeen of temple and there is no reference of any Committee of Temple either in the plaint or in the documents, but PW-4 Pushpa Dutt is not the Mohatmeen, but he is claiming to be Pradhan of Mandir Committee, existence whereof and source of right thereof to manage the affairs of the Temple has not been brought on record. In fact, he has nowhere stated that he is the manager of property of the Temple or he is competent to depose with respect to and/or dispose of property belonging to Devta Surya Narayan.

42 DW1 in his examination-in-chief has categorically stated that Sohan Lal son of Phundu Ram was found in illegal possession of Khasra No. 1780 whereas Prem Chand was found in illegal possession of Khasra No. 1779, though he has, in cross examination, admitted that on the spot, plaintiff and proforma defendants are in possession, but he has expressed his

ignorance about the time since when they are in possession. But, he has also reiterated that with respect to illegal possession, encroachment files have been prepared. Thus, witness, nowhere, has admitted tenancy or ownership of plaintiff and proforma defendants.

43 Interestingly, tenancy right has been claimed against Devta Surya Narayan, but it has not been impleaded as party. No agreement of tenancy or evidence of appropriate person competent to depose on behalf of Devta Surya Narayan has been brought on record to prove the factum of tenancy. No receipt qua alleged payment of rent has been proved by the plaintiff.

44 Plaintiff has placed reliance upon entries of Nakal Intkhab jamabandi Ex. PG for the year 1999-2000, but the said jamabandi does not reflect the status of plaintiff and proforma defendants as tenants. It reflects that the suit land is in unauthorized possession of someone. From the statement of DW-1 Dalip Singh and notice Ex. PD issued under PP Act, read with reply thereto Ex. PE, it can be inferred that plaintiff and proforma defendants have been found in unauthorized possession of Khasra No. 1779. There is no document on record reflecting the plaintiff and performa defendants or their predecessors-in-interest as tenants of Devta Surya Narayan. Documents reflecting encroachment upon the suit land pertain to 1999-2000. There is no document even to reflect unauthorized possession, if any, of plaintiff or performa defendants upon the suit land before 1999, much less establishing their tenancy upon the suit land. Rather document Ex. PA, copy of mutation dated 8.6.1975, clearly reflects that at the time of vestment of land to the State of Himachal Pradesh vide order dated 19.3.1975 passed by Collector Rampur, the land comprised in Khasra No. 1323/419/2 alongwith other land, was owned and possessed by Devta Sahib Surya Narayan Ji with clear entry in column of cultivation and possession that it was owned and possessed by the owner.

45 Another document relied upon by plaintiff is an application, which has also been exhibited as Ex. PA. It was filed by one Sohan Lal for correction of revenue entries to record his possession in Khasra No. 1323/419/2, i.e. the suit land which has now been allotted Khasra Nos. 1779 and 1780. In this application, Sohan Lal has nowhere stated that he is in possession of the suit land along with plaintiff and proforma defendants or their predecessor-in-interest. No doubt, Sohan Lal is son of Phundu Ram and plaintiff Prithvi and predecessor-in-interest of performa defendants i.e. Prem Lal are grandsons of Phundu Ram, but their father is Jai Lal, thus Sohan Lal appears to be brother of Jai Lal. Even if contents of Ex.PA, application filed by Sohan Lal, are taken to be a gospel truth, then also it establishes that Sohan Lal was in possession of suit land, but not the plaintiff or proforma defendants or their predecessors-in-interest. There is nothing on record, how and on what basis plaintiff is asserting his claim qua possession on the suit land by referring and relying application filed by Sohan Lal. As argued by learned Additional Advocate General and as also held in numerous judgments cited by him on this count, it is settled law that tenancy is a bilateral agreement, creation whereof in favour of a person, claiming tenancy, is to be pleaded specifically and proved in accordance with law and there must be consent, either express or implied, of the landlord for creation thereof and tenancy can never be created unilaterally or without agreement, oral or written, with the landlord and further rent is an essential ingredient of tenancy.

46 The first Appellate Court has rejected the claim of plaintiff and proforma defendants with respect to Khasra No. 1780 for want of evidence, either placed on record or sought to be placed on record, to establish possession of plaintiff and proforma-defendants upon that Khasra number. From the material on record, it has been proved otherwise, as the evidence indicates, that one Sohan Lal son of Phundu Ram had been asserting

possession on the part of suit land and encroachment proceedings with respect to Khasra No. 1780 have also been initiated against him.

47 In plaint, by drafting it cleverly, specific prayer has not been made to restrain the defendant-State from continuing proceedings for eviction under PP Act, but it has been specifically mentioned in paras 5 to 8 of the plaint that Authorized Officer, under PP Act, has initiated ejectment proceedings with respect to Khasra No. 1779, wherein reply has been filed by the plaintiff and proforma defendants, stating therein that they are neither encroachers nor in unauthorized possession of the suit land of the said number, rather in authorized possession as tenants under Temple Surya Narayan and are continuing as such at present also. It is further pleaded that defendant-State has no right to initiate such proceedings against plaintiff and prprforma defendants. In prayer, declaration has been sought to the effect that plaintiff and proforma defendants have become owners of the suit land by virtue of operation of Tenancy Act and a consequential relief of injunction has also been prayed against defendants, which definitely means that prayer for restraining the defendants from continuing with proceedings under PP Act has been made indirectly. In written statement, a specific objection has been taken that for initiation, continuation and pendency of proceedings under PP Act, Civil Court has no jurisdiction to hear and decide the dispute between the parties. In statements of witnesses of both sides, it has come on record that proceedings under PP Act have been initiated against plaintiff and prpforma defendants before filing of the suit.

48 Ratio of *Bhagat Ram's case* is that once notice under PP Act has been issued to a person in occupation terming him in unauthorized occupation under the PP Act, for provisions of Sections 10 and 15 of the said Act, issues with respect to title of occupant and his right to continue with the possession, are to be raised before the Authorized Officer and to be determined

in the proceedings initiated under the PP Act, but not in a Civil Suit filed by the occupant.

49 In *Chuhniya Devi's* case it has been qualified by the Full Bench of this High Court that Civil Court has jurisdiction in a case where it is found that statutory authorities envisaged by that Act, has not acted in conformity with the fundamental principles of judicial procedure or where the provisions of the Act have not been complied with. In present case, plaintiff has failed to adduce any evidence to substantiate his claim of tenancy upon the suit land and, therefore, there is no question of omission or commission on the part of statutory authority under the Tenancy Act, warranting invocation of the jurisdiction of Civil Court with respect to Tenancy Act and further there is material in evidence placed on record by the plaintiff that he and proforma defendants have been found in unauthorized possession of Khasra No. 1779. Therefore, no case of fault or inconformity with the provisions of law or fundamental principles of judicial procedure is made out in initiation of ejectment proceedings against the plaintiff and proforma defendants and further, as held in *Bhagat Ram's* case, right, title and/or interest of plaintiff and performa defendants, entitling them to continue with the possession with right of conferment of ownership, can be pleaded, adjudicated and decided in the proceedings under PP Act. Therefore, appreciation of *Chuhniya Devi*'s case by the first Appellate Court is in consonance with the ratio of law laid down in the said judgment.

50 In ***Sarwan Kumar's case***, referred supra, the Supreme Court has observed that where Civil Court lacks the inherent jurisdiction to take cognizance of the case and to pass a decree, challenge to such decree on the ground of nullity could be raised at any later stage including the execution proceedings. In present case, though no decree has been passed in favour of plaintiff, but he has approached the Civil Court after the initiation of eviction proceedings under PP Act with respect to which Civil Court lacks jurisdiction,

and when a decree passed in such a case can be objected and nullified in any later stage proceedings, then prayer for passing such decree can definitely be dealt with at any stage including the Appellate stage. Moreover, issue of jurisdiction is a legal question which can be raised at any stage and further that even consent or submission of parties to the jurisdiction of the Court, which has no jurisdiction, does not confer jurisdiction upon such Court to adjudicate the matter regarding which jurisdiction has been barred.

51 The first Appellate Court, replying upon ***Sarwan Kumar, Chuhniya Devi and Bhagat Ram's cases,*** has rightly held that when proceedings with respect to Khasra No. 1779 have been initiated against the plaintiff and proforma-defendants, under PP Act, then they have every right and opportunity to establish their title upon the suit land in the said proceedings and for bar created to file a civil suit, after initiation of ejectment proceedings under the PP Act, the first Appellate Court has rightly held that suit filed by plaintiff was not maintainable in present case. The ratio of law reiterated by the Apex Court in ***Ravinder Kaur Grewal's case*** that a person in possession cannot be ousted except by due process of law has nowhere been ignored by Courts below as plaintiff and proforma-defendants have every right to establish their case before the authorities under PP Act and in the said proceedings a person can be ejected only by following due process of law.

52 The Courts below have rightly recorded findings that no cogent, convincing and corroborating evidence has been placed on record or proved by plaintiff to show that predecessors-in-interest of plaintiff and proforma defendants remained in possession of suit land under Devta and they were paying any rent to Devta Surya Narayan Ji. No receipt qua alleged payment of rent has been proved by plaintiff. The statement of PW4 Pushpa Dutt and other evidence on record has been appreciated in right perspective by the Courts below. However, these findings shall not have any bearing on merits of

the defence of plaintiff and/or proforma defendants if they lead any further evidence to substantiate their claims in addition to the evidence led in present suit. Plaintiff and proforma defendants have every right to contest the ejectment proceeding initiated against them under PP Act by leading cogent, reliable and convincing evidence.

53 The claim of plaintiff is of tenancy under Devta Surya Narayan and further that tenancy has ripen in ownership automatically by operation of law. Section 104 of Tenancy Act provides acquisition of ownership rights by tenants, but with certain exceptions as provided under sub Sections 8 and 9 thereof, which read as under:-

> *"104. Rights of tenant other than occupancy tenant to acquire interests of landowner.*
>
> *(1) to (7) … … … …*
>
> *(8) Save as otherwise provided in sub-section (9), nothing contained in sub-section (1) to (6) shall apply to a tenancy of landowner owner during the period mentioned for each category of such landowners in sub-section (9), who,--*
>
> *(a) is a minor or unmarried woman, or if married, divorced or separated from husband or widow; or*
> *(b) is permanently incapable of cultivating land by reason of any physical or mental infirmity; or*
> *(c) is a serving member of the Armed Forces; or*
> *(d) is the father of the person who is serving in the Armed Forces, up to the extent of inheritable share of such a member of the Armed Forces on the date of his joining the Armed Forces, to be declared by his father in the prescribed manner.*
>
> *(9) In the case of landowners mentioned in clauses (a) to (d) of sub-section (8), the provisions of sub-sections (1) to (6) shall not apply :-*

(a) in case of minor during his minority and in case of other persons mentioned in clauses (a) and (b) of sub-section (8) during their life time;

(b) in case of persons mentioned in clauses (c) and (d) sub-section (8) the period of their service in the Armed Forces subject to resumption of land by such persons to the extent mentioned in first proviso to clauses (d) and (dd) of sub-section (1) of section 34

Provided that nothing contained in this section shall apply to such land which is either owned by or is vested in Government under any law, whether before or after the commencement of this Act, and is leased out to any person."

54 Proviso to Sub-section (9) was inserted in 1988 by way of amendment Act No. 6 of 1988. A Division Bench of this Court in ***State of Himachal Pradesh Vs. Chander Dev and others,*** *reported in* ***2007 (2) Shim. LC 7,*** has held that proviso added at the end of sub section 9 of Section 104 of the Act, by amendment Act No. 6 of 1988, is retrospective in nature and it also takes away the rights of the persons which rights may have vested in them automatically under the provisions of the unamended Act.

55 From the provisions of Section 104(8) and 104(9), it is clear that in case of minor allows in case of a person who is permanently incapable in cultivating land by reason of any physical or mental infirmity, provisions of Sub-sections 1 to 6 shall not apply. Meaning thereby that tenant of such person shall not be entitled to acquire ownership rights in the tenancy land.

56 It is settled law that Idol is a juristic person in whom title of properties of temple vests. But it is only in an ideal sense that the idol is the owner. It has to act through human agency and, therefore, he is a person permanently incapable of managing his property including cultivating the land owned by it personally by reason of his infirmity with respect to his physical existence. It is also settled that Diety/Idol is a perpetual minor and, therefore, for minority as well as for physical disability or infirmity, it is incapable of cultivating its holding personally and, thus, its rights are to be protected by

the Manager/Mohatmeen or by the State. No person can acquire ownership rights for tenancy in land belonging to minor or a person with disability, infirm and incapable of cultivating land personally.

57 I am in agreement with the observation made by learned Single Judge of Rajasthan High Court in case titled ***Temple of Thakurji Vs. State of Rajasthan and others***, reported in ***AIR 1998 Raj 85***, wherein it has been held that it is obligation and function of the State to ensure the welfare of Deity being a person, may be juristic or may be a person on account of fiction of law, but incapable to protect its interest being perpetual minor and physically disabled.

58 In any case for minority or disability or infirmity of Deity, even if plaintiff and performa defendants are accepted to be tenants of Devta, they were and are not having any right of conferment of ownership of the suit land belonging to the Devta. Therefore, till the time the land was in the ownership of Devta, tenants were not having any right of conferment of ownership. Suit land had vested in the State under Ceiling Act vide order dated 19.3.1975. Section 11 of Ceiling Act reads as under:-

> *"11.* ***Vesting of surplus area in the State Government***
>
> *The surplus area of a person shall, on the date on which possession hereof is taken by or on behalf of the State Government be deemed to have been acquired by the State Government for a public purpose on payment of amount hereafter provided and all rights, title interests (including the contingent interest, if any) recognized by an law, custom or usage for the time being in force, of all persons in such area shall stand extinguished and such rights, title and interests shall vest in the State Government free from all encumbrances.*
>
> *Provided that where any land within the permissible area of the mortgagor is mortgaged with possession and falls within the surplus area of the mortgagee, only mortgagee rights shall be deemed to have been acquired by the State Government and the same shall vest in it."*

59. Vesting of land under the Ceiling Act in the State is free from all encumbrances. Otherwise also, even as a tenant, for insertion of proviso to sub section (9) of Section 104 of Tenancy Act, plaintiff and proforma defendants have no right to acquire the ownership in the suit land as this proviso provides that Section 104 also provides that Section 104, entitling the tenant to acquire ownership right upon the tenancy land shall not be applicable to the land which is either owned by or is vested in Government under any law, whether before or after commencement of Tenancy Act, and is leased out to any person.

60 As observed by the Division Bench in *Chander Dev's* case, supra, Section 2(18) of Tenancy Act defines that 'Tenancy' means a parcel of land held by a tenant of a land owner under one lease or one set of conditions and there word 'lease' has been used in the Tenancy Act as synonymous of the work 'Tenancy'. Therefore, tenancy rights on the date of vestment of the land in the State stands extinguished and, therefore, thereafter plaintiff and proforma defendant, even if considered in possession of suit land shall be treated as unauthorized occupant for vestment of land in the State Government free from all encumbrances.

61 Tenancy Act came in force at once on receiving assent of the President of India on 02.02.1974 and Rules framed thereunder came in force on 4.10.1975 i.e. the date of publication in Rajpatra Himachal Pradesh, whereas, Ceiling Act came into force on receiving the assent of the President of India on 10.7.1973 and it was published in Rajpatra Himachal Pradesh on 28.7.1973. However, order of vestment of suit land in Government was passed on 11.03.1975, mutation whereof was attested on 8.6.1975.

62 In aforesaid facts and circumstances, in the light of provision of law discussed herein-above, there is nothing on record to establish that

plaintiff and proforma defendants were and are having any right to be inducted as owners for their tenancy, if any, in the suit land. Therefore, it cannot be said that in given facts and circumstances, statutory authority envisaged either by Tenancy Act or Ceiling Act or PP Act has not acted in accordance with law.

63 In the light of aforesaid evidence I find no perversity in concurrent findings with regard to claim of plaintiff with respect to tenancy upon the suit land.

64 It is more than settled that in absence of perversity, this Court is not expected to interfere in the findings of fact even for inadequacy of evidence or for any other inference from the evidence. As a matter of fact, the findings of fact which may be drawn recorded by the Courts below, are possible plausible view which can be inferred from the material placed on record or proposed to be placed on record along with application under Order 41 Rule 27 C.P.C, by applying principle of preponderance of probability.

65 For the aforesaid discussion, I find no perversity in the findings of fact recorded by the Courts below and there is no perversity or illegality in rejecting the application under Order 41 Rule 27 CPC and the applicant/respondent No. 4 Company has also no right to become a party in present appeal. Substantial questions of law are answered accordingly.

In the light of above discussion, claim of plaintiff is not sustainable in any manner and thus I find no cause, reason or ground for interfering in the impugned judgments and decrees and accordingly appeal is dismissed along with application filed by applicant/respondent No. 4 Company.

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

Maharishi Markandeshwar University & another ...Petitioners.

Versus

State of H.P and others ....Respondents.

CWP No. 626 of 2021
Reserved on: 17.06.2021
Decided on : 24.06.2021

Constitution of India, Article 226 --- Petitioner No. 1, a Private University is running Petitioner No. 2 Medical College --- Proposal of fee approval for certain disciplines of MD/MS in Medical College for session 2019-20 approved by respondent State while imposing certain conditions --- Four conditions as imposed not acceptable and challenge thereof by way of present Petition --- Held, that respondents cannot impose condition in clause 10 of communication dated 22-04-2020 to charge annual tuition fees in two equal installments --- Clause No. 13 applying the fee approved on 22-04-2020 retrospectively to the academic session 2019-20 not lawful --- Respondents cannot direct the petitioners to reserve 10% seats in all the courses for Himachali Bonafide BPL/IRDP candidates - EWS Candidates --- Respondents at present cannot charge 1% fee (cess) from the petitioners under Section 8(a) of H.P. Private Educational Institutions (Regulatory Commission) Act 2010 and will have to decide by the orders passed in CA 11290/2013 --- Petition allowed accordingly. (Paras 4, 5)

Cases referred:

Islamic Academy of Education and another Vs State of Karnataka and others 2003 (6) SCC 697;

Modern Dental College Vs State of Madhya Pradesh 2016 (7) SCC 353;

T.M.A. PAI Foundation & others Vs State of Karnataka 2002(8) SCC 481;

For the petitioners: Mr. K.D. Shreedhar, Senior Advocate, with Ms. Shreya Chauhan, Advocate

For the respondents: Mr. Ajay Vaidya, Senior Additional Advocate General

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge

Petitioner No.1 is a private university, running petitioner No. 2 medical college. Their proposal, sent on 2.2.2019 seeking fee approval for certain new disciplines of MD/MS in the medical college for academic session 2019-20, was finally approved by the respondent State on 22.4.2020, wherein besides fixing/approving the fee for the already started academic session 2019-20 and for upcoming sessions 2020-21, 2021-22, certain other conditions were also imposed. Four such conditions, including retrospective fixing of fee for academic session 2019-20, are not acceptable to the petitioners. Therefore, they have preferred this petition.

2. Facts

2(i) Petitioner No.1-University was established under the Maharishi Markandeshwar University (Establishment and Regulation) Act 2010 (in short MMU Act). It is running petitioner No.2 medical college in the State, which is the only private medical college in the respondent State.

2(ii) In 2018, Medical Council of India (MCI) granted permission to the petitioners for starting new MD/MS courses in 12 new disciplines from academic session 2019-20 onwards. H.P. Private Educational Institutions Regulatory Commission also gave its approval for these courses on 31.12.2018. The fee for these new courses was to be approved by the respondent State.

2(iii) On 02.02.2019, petitioners submitted their proposed fee structure for 12 new disciplines of MD/MS for academic session 2019-20 for approval to the State. The proposal was sent in terms of Section 32 of the MMU Act 2010, which reads as under:-

"32. (1) the University may, from time to time, prepare and revise, its fee structure and send it to the Government for its approval before 31st December of every preceding academic year alongwith the approval of courses granted by the Regulatory Commission and the ***Government shall convey the approval within three months from the receipt of the proposal.***

Provided further that the fee structure for each course shall be decided before the issue of prospectus and shall be reflected in the prospectus:

Provided further that the fee structure shall not be revised or modified during the academic year.

(2) The fee structure prepared by the University shall be considered by a committee to be constituted by the State Government, in the manner as may be prescribed, which shall submit its recommendations to the Government after taking into consideration whether the proposed fee is:.

(a) sufficient for generating (i) resources for meeting the recurring expenditure of the university; and (ii) the savings required for the further development of the University; and

(b) not unreasonably excessive.

(3) After receipt of the recommendations under sub-section (2), if the Government is satisfied, it may approve the fee structure.

(4) The fee structure approved by the Government under sub-section (3) shall remain valid until next revision."

In terms of Section 32, the fee structure was to be decided for each course before the issuance of prospectus and was to be reflected as such in the prospectus. State had to convey the approval for the fee structure within three months from the receipt of fee proposal. Apart from Section 32 of MMU Act 2010, Sections 3 & 7 of the Himachal Pradesh Private Medical Educational Institutions (Regulation of Admission and Fixation of Fees) Act, 2006 also pertain to fixation of fee in private medical colleges. These read as under:-

"*3.Regulation of admission, fixation of fee and madding of reservation (1) The State Government may regulate admission, fix fee and make reservation for different categories in admissions to Private Medical Educational Institutions.*

(2) The State Government shall ensure that the admission under all the categories in an institution is done in a fair and transparent manner;

(3) The State Government, may constitute an Admission and Fee Committee, (hereinafter referred to as the 'Committee') consisting of such members as may be specified by the State Government by notification, to recommend the mode of admission, making of reservation, allocation of seats and fixation of fees etc. to the State Government.

(4) The State Government, shall oversee the working of Admission and Fee Committee.

(5) The terms and conditions of the Committee constituted under sub-section (3) and its members shall be specified, by the State Government, by notification from time to time.

(6) If the State Government is satisfied that the institution affiliated to the Himachal Pradesh University, has contravened any provision of this Act, it may recommend to the Himachal Pradesh University for withdrawal of recognition or affiliation of such institution.

(6b) Notwithstanding anything contained in this Act, the Private Medical Education Institutions shall be bound to comply with all the rules, directions and notifications issued by the State Government, from time to time, and provide all such facilities and assistance as are required to implement such rules, directions and notifications.

(7) The State Government, shall take appropriate action wherever deemed necessary, with regard to improvement in the system of making admissions in the institutions, charging of fee by the institutions and on any other matter, which may be necessary to facilitate smooth running of the system and to remove grievances……"

7. Fixation of fee- (1) The State Government while determining, or the Committed constituted under sub-section (3) of Section 3 while recommending to the State Government, the fee to be charged by a Private Medical Educational Institution, shall consider the following factors:-

(a) the location of the institution;

(b) the nature of the medical courses;

(c) the cost of land and building;

(d) the available infrastructure and equipment;

(e) the expenditure incurred or being incurred or faculty administration and maintenance:

(f) the reasonable profit, required for the growth and development of the institution; and

(g) any other relevant factor, which the State Government deems just and appropriate for the determination of fee.

(2) Before determining fee under sub-section (1), the State Government or the said Committee, as the case may be, shall give the concerned Private Medical Educational Institutions and the representatives of the students already studying in such institutions and the representatives of the students who intend to seek admission in those institutions, as reasonable opportunity to express their view point in writing in respect to the fee determination.

(3) Notwithstanding anything contained in sub-section (1) and (2) the State Government may, in public interest, determine a provisional fee structure:

Provided that the fee shall be fixed in accordance with the provisions of sub-section (1) and sub-section (2) within a period of ninety days from the fixation of such provisional fee.

(4) Notwithstanding anything contained in sub-sections (1) and (2) the State Government shall have the power to review the fee structure fixed by any Committee, prior to the commencement of this Act."

The Fee Structure Committee, constituted by the State in terms of Act of 2006, recommends the mode of admission, making of reservation, allocation of seats and fixation of fees etc. in the petitioners' medical college to the State Government.

2(iv) On 11.3.2019, the State asked the petitioners to justify their fee proposal, which was responded by the petitioners on 12.3.2019, enumerating reasons for the proposed fee. The respondents convened meeting of the Fee Structure Committee on 28.3.2019 to deliberate upon petitioners' fee proposal for the new MD/MS courses. The minutes of this meeting, placed on record along with supplementary affidavit filed by respondents 1-4, notice the request of petitioners for an early action in approval of fee for the new MD/MS courses, as counselling for MD/MS courses was stated to be scheduled for 4.4.2019. The fee structure for the old MD/MS courses was approved in this meeting. For the new courses, the committee forwarded the proposal to the Director Medical Education (DME) and Research cum Principal, Indira Gandhi Medical College, for getting the inputs from concerned branches. The DME held the meeting on 29.3.2019 and requested for obtaining certain information from the petitioners. The Fee Structure Committee considered the matter on 01.04.2019 and called for certain information from the petitioners. Desired information was supplied by the petitioners on 2.4.2019. While responding, petitioners again requested for expediting the decision on their fee proposal as academic session 2019-20 was about to start.

2(v) The matter thereafter remained pending with the Fee Structure Committee. From time to time, the Committee kept on asking for information from the petitioners and the latter continued supplying the same. No final decision on the fee for the 12 new disciplines of MD/MS courses was taken by the Committee despite petitioners' requests. Meanwhile, prospectus was issued by the State Department of Health & Family Welfare for centralized counselling and admission to post graduate degree (MD/MS) courses.

Petitioners' medical college was included in the prospectus. Its 12 new MD/MS courses were also included in the prospectus for allocation of seats. Petitioners issued its prospectus in April-May 2019 for the ensuing academic session 2019-20 for the MD/MS courses. The fee, as proposed in the letter dated 2.2.2019, was mentioned in the prospectus as the prescribed fee subject to approval of the State. This fee was thereafter charged from the students admitted in these courses. The admitted students deposited this fee with the petitioners. 50, out of available 66 clinical MD/MS seats, were filled in the petitioners' medical college. The admission process was completed and the courses started from June 2019. The respondent State did not decide the issue of fee for these new courses till the start of the courses.

2(vi) It was on 9.3.2020 that the Fee Structure Committee recommended the fee of the approved MD/MS courses for the academic sessions 2019-20, 2020-21 and 2021-22. The recommendations were sent for approval to the State Government. Through a communication dated 22.4.2020 (Annexure P-7), respondents-State conveyed its approval of the fee recommendations dated 9.3.2020 and also added certain conditions for petitioners' compliance. Petitioners had reservation to four such conditions, incorporated in following clauses 10, 13, 21 and 22 of the approval letter ;-

" Clause 10.	*The Tuition fee shall be charged annually, in two equal installments*
. Clause 13.	*The excess fee charged from the students who were enrolled for PG Courses in the academic session 2019-20 will be adjusted in the year 2020-21.*
Clause 21.	*10% (ten percent) seats in all the courses will be reserved for Himachali Bonafide BPL IRDP candidates free of 'Tuition fees'*

Clause 22	*As per the provisions of section 8(a) of the Himachal Pradesh Private Educational Institutions (Regulatory Commission) Act 2010 upto 1% (one) fee as assessed by the Regulatory Commission is required to be credited to the fund established vide Act ibid. To charge such percentage of the total fee as would be assessed by the Regulatory Commissions for the Academic Session 2019-20 is permissible under section 8(a) of the Act ibid subject to the final outcome of the Civil Appeal no. 11290 of 2013 and is to be deposited with the HPPEIRC…"*

2(vii) Petitioners' representations objecting to clauses 10, 13, 21 and 22 in the approved fee structure letter dated 22.4.2020, were turned down by the respondents on 24.7.2020 (Annexure P-9). Taking exception, petitioners have impugned these four clauses in the present petition with following substantive prayers;-

"(i) Issuance of a writ of certiorari quashing Clause No. 10, 13, 21 and 22 as contained in the Letter dated 22.4.2020 (Annexure P-7) along with letter dated 24.7.2020 (Annexure P-9) as illegal, unreasonable, arbitrary and against the mandate of this court as well as the Hon'ble Supreme Court.

ii) Issuance of direction to the respondents to allow the petitioner university to charge the yearly fee of MD/MS courses in one go and not in half yearly installments.

iii) Issuance of direction to the respondents to allow the petitioner college to charge fee from the students admitted in academic batch/session 2019-20 of MD/MS course as per the fee proposal of the petitioner university.

iv) Issuance of direction to the respondents to not press upon reservation of 10% EWS quota seats for Himachali Bonafide BPL/IRDP candidates free of tuition fees in MD/MS courses for academic session 2019-20, 2020-21 and 2021-22 in the petitioner university;

v) Issuance of direction to the respondents not to charge 1% fee from the petitioner university under redundant section 8(a) of the H.P. Private Educational Institutions (Regulatory Commission) Act 2010;……"

3. Contentions

Ld. Senior Counsel for the petitioners contended that the respondents could not impose upon the petitioners the conditions in the above extracted four clauses, rather the same are *per se* illegal. Ld. Senior Additional Advocate General argued that the conditions in the impugned clauses are legal, backed by judicial precedents and have been lawfully imposed upon the petitioners by the State.

3(i) In respect of clause 10, Ld. Senior Counsel relying upon **2003 (6) SCC 697** titled **Islamic Academy of Education and another** Vs **State of Karnataka and others,** submitted that it is within the domain of the petitioners' educational institute to charge advance annual fee for an annual academic session. Insistence of respondents-State to charge annual fee in two equal installments is unauthorized and contrary to the settled legal position.

Ld. Senior Additional Advocate General, argued that the condition was incorporated on the basis of judgment passed in *Islamic Academy's* case and was perfectly legal.

3(ii) Regarding clause 13, whereby respondents fixed fee for academic sessions 2019-20, 2020-21 and 2021-22, Ld Senior Counsel submitted that the decision upon the fee was arrived at by the Fee Structure Committee on 9.3.2020 and finally approved by the State on 22.4.2020. By this time, academic session 2019-20 had already started. Ld. Senior Counsel highlighted that it was on 2.2.2019 that the petitioners had sent their fee proposal for the session 2019-20 for 12 new disciplines of MD/MS courses, yet despite compliance by the petitioners at their end of completing all requisite formalities, the respondents kept on delaying fixing fee for these

courses on one pretext or the other. Respondents were to fix the fee within the timelines, stipulated under Section 32 of the MMU Act 2010, the importance of which has also been highlighted in the directions issued on 20.5.2020 by a Division Bench of this Court in CWP 1465 of 2018. Applicable statutes/stipulations do not give unlimited time to the respondents for approving the fee. Despite receiving petitioners' fee proposal on 02.02.2019 for academic session 2019-20, respondents approved it only on 22.04.2020. The academic session 2019-20 had not only already started, but was about to come to an end by this time. Since the fee was not approved by the respondents by the start of academic session 2019-20 i.e. by June 2019, therefore, petitioners had no option but to charge the fee, as proposed in the letter dated 2.2.2019, from the students admitted in academic session 2019-20. The students had deposited this fee. The respondents, in the facts of the case, cannot direct the petitioners on 22.04.2020 to retrospectively charge a different and reduced fee from such students. This would also involve financial implications for the petitioners' unaided institute.

Ld. Senior Additional Advocate General stated that because of various difficulties faced by the Fee Structure Committee, the fee for petitioners' new MD/MS courses could not be finalized by the State before 22.04.2020. Petitioners should have waited for State's approval of the fee for their 12 new MD/MS courses before commencing the courses. There cannot be a situation where students of later academic sessions pay less fee (approved by the State) than the students of previous batch who pay higher fee (proposed by the petitioners). Therefore, Ld. Senior Additional Advocate General justified retrospective implementation of the fee approved by the State on 22.04.2020 to the academic session 2019-20, which had commenced in June 2019.

3(iii) With respect to Clause 21, the projected case of petitioners is that there was no provision of 10% reservation of BPL/IRDP/EWS candidates

free of tuition fees either in the MMU Act 2010 or in the prospectus issued for the concerned courses. This point was not even deliberated by the Fee Structure Committee. Its incorporation by the State in the letter dated 22.4.2020 was unauthorized, illegal and at variance to the circular issued by the Ministry of Health & Family Welfare Government of India, the decision of Board of Governors in Supersession to Medical Council of India and also contrary to the stand taken by the Union Government before the Hon'ble Apex Court in SLP 20692/2019, decided on 25.2.2020. It was urged that as on date, there is no policy of the Union Government to apply 10% reservation for EWS, as provided in Constitutional Amendment Act 2019 to private unaided medical colleges, like the petitioners' and definitely not for super-specialty courses. It was also contended that had there been such a policy for providing 10% reservation to EWS with free-ship, i.e. without tuition fees, then the petitioners would have challenged the same on the grounds of being contrary to the dictum of Apex Court in **T.M.A. PAI Foundation & others** Vs **State of Karnataka 2002(8)SCC481**, **Modern Dental College** Vs **State of Madhya Pradesh 2016 (7) SCC 353**, **2010 (14) SCC 186**, wherein rights of self financing private educational institutes were expounded.

Opposing this stand, the respondents stated that 10% reservation for EWS is in accordance with the Constitution Amendment Act 2019 and in conformity with the State Government instructions, issued on 20.8.2020, in compliance to the directions issued on 5.9.2017 by a Division Bench of this Court in CWPIL 103/2017 as well as in furtherance of guidelines issued by Ministry of Social Justice and Empowerment.

3(iv) Lastly, it was submitted by Ld. Senior Counsel that the Fee Structure Committee had not deliberated/recommended deposit of 1% fee under Section 8(a) of HP Private Educational Institutions (Regulatory Commission) Act 2010, therefore, this condition could not have been imposed upon the petitioners in clause 22. Referring to certain orders passed by the

Hon'ble Apex Court, it was urged that such a direction could not be thrust upon the petitioners in view of interim orders passed in related matters by the Hon'ble Supreme Court. Ld Senior Additional Advocate General submitted that this aspect is governed by the orders passed by the Hon'ble Apex Court in C.A. No. 11290 of 2013 titled ***State of HP*** *Vs* ***H.P. Private Universities Management Association and another***.

4. Observations

Whether the respondents could lawfully impose conditions under impugned clauses 10, 13, 21 and 22 while approving the fee structure in petitioners' institute, vide communication dated 22.4.2020 (Annexure P-7), is the question raised in this writ petition. For convenience, these clauses, hereinafter, are being considered separately;-

4(i) Clause 10

4(i)(a) *This clause applies following condition on the petitioners;-*

"The Tuition fee shall be charged annually, in two equal installments"

4(i)(b) The legality of charging advance fee for the entire course by some educational institutes came up before the Hon'ble Supreme Court in **Islamic Academy of Education and another** Vs. **State of Karnataka and others 2003 (6) SCC 697.** The institutes justified their action of collecting advance fee for the entire course i.e. for all the course years on the ground that at times students may leave the course midway causing the seats to become vacant for the remainder of the course, which would adversely affect private educational institutes. The Apex Court held as under on the issue:-

> *"8. It must be mentioned that during arguments it was pointed out to us that some educational institutions are collecting, in advance, the fees for the entire course i.e. for all the years. It was submitted that this was done because the institute was not sure whether the student would leave the institute midstream. It was*

submitted that if the student left the course in midstream then for the remaining years the seat would lie vacant and the institute would suffer. In our view an educational institution can only charge prescribed fees for one semester/year. If an institution feels that any particular student may leave in midstream then, at the highest, it may require that student to give a bond/bank guarantee that the balance fees for the whole course would be received by the institute even if the student left in midstream. If any educational institution has collected fees in advance, only the fees of that semester/year can be used by the institution. The balance fees must be kept invested in fixed deposits in a nationalized bank. As and when fees fall due for a semester/year only the fees falling due for that semester/year can be withdrawn by the institution. The rest must continue to remain deposited till such time that they fall due. At the end of the course the interest earned on these deposits must be paid to the student from whom the fees were collected in advance.

157. The institutions shall charge fee only for one year in accordance with the rules and shall not charge the fees for the entire course.

163. However, if for some reason, fees have already been collected for a longer period the amount so collected shall be kept in a fixed deposit in a nationalized bank against which no loan or advance may be granted so that the interest accrued thereupon may enure to the benefit of the students concerned. Ordinarily, however, the management should insist for a bond from the concerned students….."

Hon'ble Apex Court held that institutions shall charge fee only for one year/semester, as the case may be. If an institute felt that its students may leave the course midstream then it may require the students to furnish a bond/bank guarantee that the balance fees for the whole course would be received by the institute even on leaving of course midstream. It was further held by the Court that if any institute had collected advance fee, then only the fees of that semester/year could be used by the institute and remaining fees

was to be deposited in bank till the time the same falls due. Interest earned on such deposits was payable to the students from whom the fees were collected.

4(i)(c) Admitted position here is that MD/MS courses in petitioners' institute are of three years duration, being run on yearly basis and not semester-wise. There are many MD/MS courses offered in petitioners' medical college. 12 such courses in question were approved in 2018 and started w.e.f. academic session 2019-20. The tuition fee for the MD/MS courses was charged on annual basis by the petitioners for the academic session 2019-20 as well as for other ensuing academic sessions.

Though the entire duration of the courses in question is of three years but these courses are being run on yearly basis, therefore, petitioners can definitely charge and collect advance fee for the year from the students admitted in these courses.

4(i)(d) There was no rebuttal on part of the State to an emphatic factual assertion made by the petitioners that in the meeting convened on 9.3.2020, there was neither any agenda before the Fee Structure Committee nor any discussion took place before it for directing the petitioners to charge annual fee in two equal installments. The Committee, therefore, neither discussed nor recommended to the State Government to edict the petitioners to charge and collect annual fees from its students in two equal installments. The only pleaded reason behind insertion of this clause is that charging of tuition fee on half yearly basis is permitted by the Apex Court in *Islamic Academy's case*. The stand taken in the reply is based upon incorrect quotation of sentences from para 8 of judgment delivered in *Islamic Academy's* case. This is apparent from following para 5 of preliminary submissions of the reply filed by respondents No. 1 to 4:-

> *"…5. That the MMU has also sought relief on point no. 10 of letter dated 22.4.2020 that the "tuition fee shall be charged annually, in two equal installments". In this regard, it is submitted that the Hon'ble Apex Court in Writ Petition (civil) 350 of 1993 titled as Islamic Academy of Education*

vs. State of Karnataka has held that "in our view an educational institution can only charge prescribed fees one semester/year. If an institution feels that any particular students may leave in midstream then, at the highest, it may require that student to give a bond/bank guarantee that the balance fees for the whole course would be received by the institute even if the student left in midstream, thus the fee can charge on half yearly basis."

(*emphasis supplied*)

The words *"thus the fee can charge on half yearly basis"* used in above extracted para are neither part of para 8 of the judgment in *Islamic Academy's* case nor reading of para 8 of the judgment (extracted earlier) leads to such a conclusion. As already noticed, the Hon'ble Supreme Court in *Islamic Academy's* case, while deprecating the practice of charging advance tuition fees for the entire course by the private educational institutions, has not debarred them from charging and collecting advance fee for the year/semester, as the case may be. It is not the case of the respondents that the petitioners had been charging and collecting advance fees for the entire course i.e. for all the course years. Petitioners had charged and collected advance fee for a year, as the courses in question run on yearly basis for a total of three years. Since the course in question is being run on yearly basis, therefore, the petitioners are within their right to charge tuition fees, annually, for the yearly session and to collect the same at the start of the academic session. Such an act cannot even be termed as exploitery, as contended by the State. It is not the case of the respondents that the petitioners had collected the fees over and above that was prescribed. During hearing of the case, Ld. Senior Counsel for the petitioners stated that petitioners are themselves sensitive to the genuine financial difficulties faced by any of its students with regard to deposit of advance annual fee and in appropriate cases, this condition is exempted to ameliorate the hardships. The

statement of Ld. Senior Counsel is noted. For all the aforesaid reasons, the respondents cannot assertively impose the condition incorporated in clause 10 of the communication dated 22.4.2020 (Annexure P-7) ordering the petitioners to charge annual tuition fees in two equal installments. This condition is not sustainable. However, at the same time, statement of Ld. Senior Counsel is noted that petitioners are themselves looking after the interest of its students in deserving cases where its students face genuine financial difficulties regarding deposit of advance annual fee, by passing appropriate orders.

4(ii) Clause 13

4(ii)(a) Clause 13 reads as under;-

"*..The excess fee charged from the students who were enrolled for PG Courses in the academic session 2019-20 will be adjusted in the year 2020-21.*"

4(ii)(b) The fee structure in petitioners' medical college is governed by Section 32 of MMU Act 2010 and Sections 3 & 7 of the Himachal Pradesh Private Medical Educational Institutions (Regulation of Admission and Fixation of Fees) Act, 2006. In terms of these provisions (extracted earlier), the fee structure for the courses in petitioners' medical college is to be decided before the issuance of prospectus and has to be reflected there. The Government is to convey its decision upon the fee proposal within three months from the receipt of the proposal.

4(ii)(c) In the year 2018, the Medical Council of India approved MD/MS courses in 12 new disciplines in petitioners' medical college to be started w.e.f. academic session 2019-20. The H.P. Private Educational Institutions Regulatory Commission also gave its nod for introduction of these new courses on 31.12.2018. As per Act of 2010 and Act of 2006, the fee for these courses was to be approved by the State Government. Petitioners sent their fee

proposal for these 12 courses for approval to the State on 02.02.2019. The courses were to start w.e.f. June 2019. The Fee Structure Committee's deliberations over petitioners' fee proposal were outstretched and lasted for more than a year. It was only on 9.3.2020 that the committee could finalize and send its recommendations to the State Government, which were finally approved on 22.4.2020. However, academic session 2019-20 had started by June 2019. It cannot be the respondents' case that commencement of academic session 2019-20 by June 2019 was not in the knowledge of either the Fee Structure Committee or the State Government. Rather, while responding to various communications of the Committee, these aspects were specifically brought to the notice of all the concerned quarters by the petitioners while requesting to expedite finalization of the fee structure keeping in view the commencement of academic session 2019-20. It is the admitted case of the parties that new courses were approved by the MCI and by the Regulatory Commission - respondent No.5. The prospectus for centralized counselling for MD/MS courses was issued by State department of Medical Education and Research. The 12 newly approved MD/MS courses in petitioners' institute were included in this prospectus for allocation of seats in counseling. Petitioners reflected the fee proposed by them in their letter dated 2.2.2019 as the prescribed fee (subject to state's approval) in their prospectus for these courses issued in April 2019. Respondents-State has not established its contention that the petitioners could not have commenced the new PG courses before finalization of the fee for such courses. No letter has been placed on record commanding the petitioners not to commence the courses till the State approves the fee for the courses. The Fee Structure Committee constituted by the State was still deliberating over the fee structure when the courses started in June 2019. Students admitted in these courses deposited the fee as reflected in the prospectus. These students had completed almost one year of the three years course when based on Fee Structure Committee's

recommendation of 9.3.2020, the respondent State on 22.4.2020 approved the fee structure for these 12 new courses and reduced the proposed fee by about 20%. Relevant recommendations made by the Committee are;-

> *"1. The fee structure for the PG Course(s) will be the same for consecutive three batches i.e. 2019-20, 2020-21 and 2021-22.*
> *2. Fee will not be increased till the completion of the course i.e. it will remain fixed for three years duration of the course.*
> 3. *The excess fee charged from the students who were enrolled for PG course(s) in the academic session 2019-20 will be adjusted in the year 20200-21…."*

Condition at serial No.3 above, found its way in impugned clause No. 13 of the communication dated 22.4.2020. Stand of State is that fee for the batches admitted in academic sessions 2020-21 and 2021-22 cannot be less than that of batch admitted in academic session 2019-20. It is also urged by the State that petitioners should have waited for the approval of the fee structure before starting the academic session 2019-20.

4(ii)(d) Decision upon petitioners' fee proposal was to be taken within the timeline stipulated in Section 32 of the MMU Act 2010. The approved fee was to be reflected in the prospectus. The State, in any event, was to decide the fee structure within 3 months from the date of submission of the fee proposal. Facts summarized above clearly indicate that timely decision upon the fee proposed by the petitioners was not taken. Considering the impending commencement of academic session 2019-20, the petitioners, in the prospectus issued for the session, reflected the fee as proposed by them to the State Government. The fee was subject to approval of State Government. This fee was deposited by the students admitted in the courses. State took no decision with regard to the fee by the time courses commenced in June 2019. Almost a year later, the fee structure was approved by the State with around 20% reduction in the proposed fee. In the peculiar facts, the fee approved by the State on 22.4.2020 could certainly be applied and implemented for academic sessions 2020-21 and 2021-22, which were yet to start on 22.4.2020

but not for session 2019-20 which had already started in the interregnum. Academic session 2019-20 had started in June 2019 and had almost completed its one year by the time fee approval came on 22.4.2020. No provision either in the MMU Act 2010 or in the Act of 2006 was brought to my notice permitting retrospective determination or implementation of the fee for a previous academic session. The recommendations and approval of the fee necessarily relate to an ensuing academic session and not for the session gone by. Retrospective fixation of fee even otherwise involves financial implications and may adversely affect an unaided, self financed private medical college. The petitioners are, therefore, justified in contending that the fee structure approved in the notification dated 22.4.2020 can only be applied to the prospective academic sessions i.e. 2020-21 and 2021-22.

4(ii)(e) Timely determination of the fee is the essence of Section 32 of the MMU Act. A Division Bench of this Court, while deciding CWP 1465 of 2018 filed by the petitioners titled *Maharishi Markandeshwar University and another* Vs *State of HP and others* vide judgment dated 20.5.2020, had issued following directions;-

> ***"7.....****Having decided these writ petitions, we also deem it necessary to reiterate well recognized principle that if a Statute ha conferred a power to do an act and has laid down the method in which that power has to be exercised, it prohibits doing of the act in any other manner than that what has been prescribed. (Refer Nazir Ahmed Vs King Emperor AIR 1936 PC 253, State of Uttar Pradesh Vs Singhara Singh & ors AIR 1964 SC 358, Zuari Cement Ltd Vs Regional Director ESIC Hyderabad & ors AIR 2015 SC 2764, Uddar Gagan Properties Ltd Vs Sant Singh & ors 2016(11) SCC 378) We have already held that fee structure for the petitioners is governed by sections 3 & 7 of the Act of 2006 as well as section 32 of Act of 2010. To clarify, we issue following directions, which shall be followed for academic session 2021-22 and onwards;-*
>
> *i) Petitioner university can send its proposal of fee revision for approval to the State by 31st December of every preceding academic year.*

ii) The fee revision proposal shall be examined by the State and/or competent authority in accordance with provisions of section 3 & 7(1) of 2006 Act and Section 32(2) of 2010 Act.

iii) While examining the fee proposal, the competent authority besides granting opportunity of hearing to the petitioners shall also give a reasonable opportunity to the representatives of the students studying and intending to study there to express their views on the proposal, which shall be considered in accordance with law.

iv) Final decision on the proposal shall be taken by the State and conveyed to the petitioners and all concerned authorities on or before 31st March of the next year i.e. within a period of 90 days from the last prescribed date of receipt of the fee revision proposal. In case no decision on the fee revision proposal is communicated by the State to the petitioners within the stipulated period then the fee proposed under the fee revision proposal shall be treated as finally approved.

v) It shall be open for the State to fix provisional fee for the petitioners in public interest with due intimation to them within the stipulated period. However such provisional fee shall be finalized and communicated as such to the petitioners and all concerned authorities within a period of 90 days from the date of fixation of provisional fee or before the issuance of Prospectus, whichever is earlier.

vi) Approved final fee structure for the petitioners for each course shall be reflected in the prospectus for the next academic session.

vii) Fee once finally approved shall not be revised or modified during the academic year and shall remain as such till its next revision in accordance with law…"

Though the above directions are for academic session 2021-22 and onwards, however, the underlying object of direction No. (iv) is timely approval of the fee structure for the courses before the publication of prospectus for the next academic session. As per this direction, in case the State Government does not decide the issue of fee within stipulated time, then the fee proposed by the institute shall be construed to be the approved fee. In the present case, the courses in question were approved by the concerned

authorities. The fee proposal was submitted for these courses by the petitioners on 02.02.2019. Respondents' deliberations over it were still going on when the prospectus for the academic session 2019-20 was published by the State Department of Medical Education & Research, wherein the courses in question in the petitioners' medical college were included for seats allocation during counselling. Petitioners also published the prospectus quoting the fee for the courses as was proposed by them on 02.02.2019 subject to State's approval. State, however, did not take any decision w.r.t. petitioners' fee proposal. The academic session 2019-20 started in June 2019 and the students admitted in the session paid the fee as per the prospectus. The fee finalized a year later by the respondents, in the facts of the case, therefore, cannot be retrospectively applied to the students admitted in academic session 2019-20. Respondent State has not demonstrated that petitioners could not have commenced the PG courses before finalization of the fee. It is admitted case that the new courses were approved by MCI as well as by respondent No.5-the Regulatory Commission. No legal embargo has been pointed out which debarred the petitioners from commencing the courses for want of State's approval of the fee for the courses. The delay in finalization of the fee was not for any fault of the petitioners. Respondents 1 to 4 have themselves owned this delay in their supplementary affidavit. The reasons assigned therein for the delay have not even been attributed to the petitioners. It is also borne out from the record that running of the courses in academic session 2019-20 was in the knowledge of respondents. It is also not the case of respondents that they had ever directed the petitioners not to run the courses before the State approves and fixes the fee.

For all the aforesaid grounds, clause No. 13, applying the fee approved on 22.4.2020 retrospectively to the academic session 2019-20, which had started in June 2019, cannot be held to be lawful.

4(iii) Clause 21

While approving and fixing the fee for the courses in question, the State incorporated following condition in clause 21 of Annexure P-7 dated 22.4.2020:-

> *"10% (ten percent) seats in all the courses will be reserved for Himachali Bonafide BPL IRDP candidates free of 'Tuition fees.'*

Petitioners project that 10% quota for Economically Weaker Sections cannot be applied to their medical college.

4(iii)(a) Genesis of above condition may be traced to the Constitutional Amendment Act 2019. The 103rd Amendment of the Constitution of India {(One hundred and third) Amendment Act 2019} added following sub-clause 6 to Article 15 of the Constitution w.e.f. 14.1.2019:-

> *"(6) Nothing in this article or sub-clause (g) of clause (1) of article 19 or clause (2) of article 29 shall prevent the State from making;-*
>
> *(a) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5); and*
>
> *(b) any special provision for the advancement of any economically weaker sections of citizens other than the classes mentioned in clauses (4) and (5) in Article 15 in so far as such special provisions relate to their admission to education institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30, which in the case of reservation would be in addition to the existing reservations and subject to a maximum of ten per cent of the total seats in each category.*
>
> *Explanation - For the purpose of this article and article 16, 'economically weaker sections' shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage..."*

4(iii)(b) On 29.1.2019, Ministry of Health & Family Welfare Government of India issued a circular regarding reservation for economically weaker

sections (EWS) for admission in Central Educational Institutions. The circular aimed to implement the mandate of 103rd Constitutional amendment. It, inter-alia, provided that every Central Educational Institution, with prior approval of the competent authority, shall increase the seats over and above its annual permitted strength in each branch of study/faculty. This was to ensure that the number of available seats, excluding those reserved for EWS, is not less than the number of such seats available in each category for the academic session immediately preceding the date of coming into force of the guidelines. This reservation was, however, not to be applied in Super Specialty Courses. While issuing the directions for Central Educational Institutes, State Governments/UTs were also requested to give effect to the Constitutional Amendment Act in respect of all higher educational institutions funded/aided directly or indirectly by the State Governments w.e.f. academic session 2019-20. Amongst various bodies, the Board of Governors, in supersession of Medical Council of India, was also asked to take all necessary measures including enabling amendments in the Regulations to facilitate implementation of the provisions of Constitution (Amendment) Act 2019 with immediate effect.

4(iii)(c) The Board of Governors, in supersession of Medical Council of India, convened a meeting on 13.6.2019 and considered the proposals of States/UTs for increase of Undergraduate (UG) seats in medical colleges for implementing 10% EWS quota. It was clarified to BoG that proposal for increase of seats under EWS category is meant only for those who are economically weak and are not eligible under any other quota i.e. SC/ST/OBC etc. Vertical reservation was to be applied to seats under State Quota only. For implementing EWS quota, it was proposed :- (a) not to consider colleges with intake capacity of 250 ; (b) not to consider those colleges which were given letter of permission under Section 10(A) of the MCI Act for academic session 2019-20 ; (c) not to consider colleges denied permission for renewal of seats and (d) not to consider colleges/institutions with very high percentage of

reservation. The increase of seats under EWS quota was to be considered only for colleges duly recommended and forwarded by the State Governments/UTs. The issue of extending EWS quota to institutions other than the State Government Colleges was discussed and it was decided to await and implement Central Government Instructions on the subject. The proposal for increase of undergraduate seats for implementation of 10% EWS quota was recommended for consideration of Central Government.

A reading of the minutes of meeting of BoG makes it crystal clear that the BoG had considered applying 10% EWS reservation only to undergraduate courses and that too in the Government Medical Colleges.

4(iii)(d) Implementation of 10% EWS quota in private unaided institutes was considered by the Apex Court in SLP(C)No. 20692/2019 titled *Priyansh Jain* Vs *Union of India*. The High Court had dismissed the writ petition filed by a private medical institution praying for mandamus to the MCI for granting approval of additional intake of 25% seats under the EWS category for academic session 2019-20. Assailing the judgment, the appellant had urged before the Apex Court that the policy was to cover the self financing institutions as well. On behalf of Union of India, it was submitted that question of formulation of policy involves consultation within various Government departments. The consultation was stated to be underway and appropriate decision was yet to be taken for academic session 2021-22. It was also submitted that policy invoked w.r.t. 2019-20 was only for the Government institutions/Government aided institutions/those who were receiving any kind of aid under PPP mode. Relevant portion of the order is extracted hereinafter :-

> *".....Mr. Nadkarni, learned ASG, appearing for the Union of India submits that the question of formulation of policy is underway since it requires consultation within various departments of the Government of India and with regard to the academic year 2021-2022 the Government of India shall take an appropriate decision. Mr. Nadkarni, learned ASG, submits that as far as the policy, which has been invoked with regard to 2019-20*

was only with regard to the Government Institutions, Government aided institutions and those who were receiving any kind of aid under PPP mode. The writ petition, which was filed in the Delhi High Court, was with regard to academic session 2019-20. The High Court dismissed the writ petition.

The statement having been made before us that Government of India is formulating appropriate policy to implement 10% reservation for EWS category of candidates for the year 2021-2022, we are of the view that nothing more is to be decided in these special leave petitions. However as stated by learned ASG, the Government of India may taken an appropriate decision with regard to 10% reservation for EWS category with respect to session 2021-22 on or before 30.6.2020…"

4(iii)(e)A. Petitioners' is a private unaided self financed medical college dependent upon fee collected from its students. It was established under The Maharishi Markandeshwar University (Establishment and Regulation) Act 2010. Section 31(4) of the MMU Act speaks about reserving 25% seats for admission to each course for bonafide Himachalis. The MMU Act, as it stands today, does not provide for reservation to EWS/BPL/IRDP categories of candidates. Also, there is no provision therein for reserving any seat free of tuition fee (freeship seats). It is also not in dispute that in the prospectus issued for admission to various courses in the petitioners' institutes for 2019-20, there was no mention for reservation of 10% seats for ESW/BPL/IRDP candidates. No amendment in the Act providing for 10% reservation to ESW has yet been carried out.

4(iii)(e)B. The circular issued by Ministry of Health & Family Welfare Government of India on 29.1.2019 pertained to implementing 10% reservation for EWS in Central Educational Institutes. There also, this reservation was not to be applied to Super Specialty courses. For applying 10% EWS reservation, the Central Educational Institutes were to increase the number of seats over and above their annual permitted strength in each branch of faculty to ensure that available seats (excluding those reserved for EWS) is not less than the number of seats available to each category in the academic session

immediately preceding the date of coming into force of the circular. The circular had in fact requested the State Government to give effect to the Constitution Amendment Act 2019 in respect of higher education institutions-funded/aided, directly or indirectly by the States starting from the academic year 2019-20. This circular, therefore, was not applicable to the private unaided medical institute like the petitioners' and certainly not to the Super Specialty courses.

4(iii)(e)C. The circular issued by Central Ministry of Health & Family Welfare on 29.1.2019 had asked various concerned authorities including BoG in supersession of Medical Council of India to take necessary measures, including enabling amendments to facilitate implementation of Constitutional Amendment Act 2019. Pursuant to this, the BoG convened its meeting on 13.6.2019. Increase of seats in medical colleges for implementing 10% EWS quota was decided to be given to Government Medical Colleges (undergraduate seats) for academic session 2019-20 with certain riders. No positive decision was taken by the BoG in this meeting for extending the EWS quota to institutions, other than the State Government Colleges. The BoG decided to await and implement the Central Government Instructions on the subject. The decision taken in BoG meeting, therefore, does not come to the aid of impugned clause 21. There was no decision either of the Central Government or of the BoG in supersession of MCI to implement 10% reservation for EWS in private unaided medical colleges and certainly not in super specialty courses.

4(iii)(e)D. Before the Hon'ble Apex Court, in SLP(C) 20692/2019, Union of India on 25.2.2020 stated that 10% reservation for EWS was only for Government Institutions/Government aided institutions/ institutions receiving any kind of aid under PPP mode for academic session 2019-20. Decision for providing reservation for EWS category w.r.t. academic session 2021-22 was yet to be taken. This stance of Union of India supports petitioners' contention

that 10% reservation for EWS has not yet been made applicable by Union of India to the institutes like petitioners' medical college.

4(iii)(e)E. It is not the case of the respondents that any policy has been framed by Union of India for applying 10% reservation for EWS to the private unaided self financing medical colleges, more specifically to the super specialty courses being run therein. It is also not the case of the respondents that for implementing 10% reservation for EWS, any corresponding increase in the existing admission capacity of the petitioners' institute has been provided for, as envisaged in the circular dated 29.1.2019.

Also, from the documents placed on record, it cannot be said that issue of reserving 10% seats for EWS -free of tuition fees in the petitioners' medical college, was either before or deliberated by the Fee Structure Committee. The issue has financial implications for an unaided self financed medical college. A feeble argument raised by the State that condition has been imposed in the clause for implementing the order passed on 5.9.2017 in **CWPIL 103/2017** titled **Court on its own motion Vs State,** is misfounded. The said order pertains to reservation of seats for persons with disabilities. Also, no benefit can be extracted by the respondents from the communication dated 20.8.2020 which professes to implement the order passed on 5.9.2017 in CWPIL 103/2017 and is otherwise later in point of time to the approval of fee granted by the State on 22.4.2020. No other provision was brought to my notice by the respondents in support of Clause 21.

For all the aforesaid reasons, the respondents, at present, cannot direct the petitioners to reserve 10% seats in all the courses for Himachali bonafide BPL/IRDP candidates- EWS candidates. In view of above discussion it is not necessary, at this stage, to delve on the issue whether a private unaided self financed medical college, like the petitioners' can be compelled to reserve seats free of tuition fees.

4(iv) Clause 22

Clause 22 directs the petitioners to deposit 1% fee as per Section 8(a) of the Himachal Pradesh Private Educational Institutions (Regulatory Commission) Act 2010 and reads as under;-

> " *As per the provisions of section 8(a) of the Himachal Pradesh Private Educational Institutions (Regulatory Commission) Act 2010 upto 1% (one) fee as assessed by the Regulatory Commission is required to be credited to the fund established vide Act ibid. To charge such percentage of the total fee as would be assessed by the Regulatory Commissions for the Academic Session 2019-20 is permissible under section 8(a) of the Act ibid subject to the final outcome of the Civil Appeal no. 11290 of 2013 and is to be deposited with the HPPEIRC…"*

Petitioners contend that Section 8(a) of the Act stands stayed by the Courts and its implementation, at this stage, cannot be insisted upon by the respondents.

4(iv)(a) It is not in dispute that amongst other reliefs, prayed for, the vires of Ss.8(a) of the Act *ibid* were challenged in CWP 10140/2012 titled as *H.P. Private Universities Management Association* Vs *State of H.P. and others*. On 1.12.2012, an order was passed by a Division Bench of this Court staying operation of Section 8(a) of the Act. Relevant extract of this order is as under;-

> **"…***2. There shall be a stay of the operation and implementation of the following provisions of the H.P. Private Educational Institutions (Regulatory Commission) Act, 2010;*
>
> *i) Section 8(a) &*
>
> *ii) Section 11 dealing with penalties except those penalties prescribed under Rule 6 (1)(a) to 6 (1)(g) of the Himachal Pradesh Private Educational Institutions (Regulatory Commission) Rules 2011.*
>
> *3. There shall be a direction to the 3rd respondent to keep all the penalties received under section (d) under separate account.."*

4(iv)(b) CWP 10140/2012 was decided on 19.10.2013 declaring H.P.

Private Educational Institutions (Regulatory Commission) Act 2010 and the Rules framed thereunder as ultra-vires the Constitution of India. The operative part of the judgment reads as follows;-

> *"32. For the reasons already noted, we are inclined to allow this writ petition and make the same absolute in terms of prayer Clauses (a) and (b), as prayed for.*
> *33. Accordingly, this writ petition succeeds. The rule is made absolute in terms of prayer Clauses (a) and (b) of the writ petition, with costs. Prayer clauses (a) and (b) read thus:*
>
> *"a) issue Writ of Mandamus and/or Certiorari or any other appropriate Writ, order or directions to the Respondents declaring Himachal Pradesh Private Education Institution (Regulatory Commission) Act, 2010, and the rules made thereunder, as ultra-vires the Constitution of India;*
>
> *b) consequently, declare that the assessment orders, circulars, notices passed by Respondent No.3 are without authority of law and quash the same;"*

By virtue of the judgment, the Act inclusive of section 8(a) was declared ultra-vires. All assessment orders, circulars and notices passed under the Act were quashed.

4(iv)(c) In Civil Appeal No. 11290/2013 filed by the respondent State challenging the judgment dated 19.10.2013, following order was passed by the Apex Court on 8.5.2014;-

> *"…Heard.*
> *Pending further orders from this Court, we direct that status quo ante, as it prevailed on 18.10.2013 i.e. immediately before the pronouncement of the impugned judgment, shall continue to be maintained.*
> *The hearing of the appeal is expedited.*
> *Liberty is also granted to mention for early hearing…"*

Under the above order, the Apex Court clearly put in place the position as was existing a day prior to the passing of judgment dated 19.10.2013. On 18.10.2013, the Act was though valid but operation and implementation of some of its Sections stood stayed. The suspended Sections

included Section 8(a) under which the respondents have now directed the petitioners to deposit 1% fee under impugned clause 22 of communication dated 22.4.2020.

4(iv)(d) The above sequence poses no difficulty to fathom that in terms of order passed by the Apex Court on 8.5.2014 regarding implementation of the Act, the situation as was prevailing on 18.10.2013 was to continue. Indisputably, implementation and operation of Section 8(a) of the Act stood stayed on 18.10.2013. This was stayed vide an interim order passed on 1.12.2012 in CWP 10140 of 2012. The interim order was in force on 18.10.2013. The H.P. Private Educational Institutions Regulatory Commission-Respondent No.5 in its separate reply has admitted this factual position that on 18.10.2013, the interim order passed on 1.12.2012 was in operation, which had stayed implementation of various provisions of the Act, including Section 8(a). Respondent No.5 has also stated that *"it is strictly adhering to the position as it prevailed on 18.10.2013 and is not charging any fee towards section 8(a) from any Private University including Petitioner University".* In this regard, respondents No. 1 to 4-State has also stated in para 20(R) of its reply on merits that *"Further action in the matter is required to be taken as per directions of the Hon'ble Supreme Court."* When the operation and implementation of Section 8(a) of the Act is stayed then there arises no question of respondents' charging 1% fee under this section from the petitioners.

Considering above position, the respondents at present cannot charge 1% fee (cess) from the petitioners under Section 8(a) of the H.P. Private Educational Institutions (Regulatory Commission) Act 2010. Charging of fee under Section 8(a) of the Act will have to abide by the orders passed in CA 11290/2013.

5. No other point was urged.

Conclusion.

In light of above discussion, this writ petition succeeds and is accordingly allowed as under :-

(a) Clause 10 of the communication dated 22.04.2020 (Annexure P-7) ordering the petitioners to charge annual tuition fee in two equal installments, is quashed and set aside.

(b) Clause 13 of the communication dated 22.04.2020 (Annexure P-7), applying the fee approved on 22.04.2020, retrospectively to the academic session 2019-20 for the courses in question in the petitioners' Medical College is also quashed and set aside.

(c) At present, the respondents cannot direct the petitioners to reserve 10% seats in all the courses for Himachali bonafide BPL IRDP-EWS candidates free of tuition fee. Therefore, Clause 21 is quashed and set aside.

(d) The respondents, at present, cannot charge 1% fee from the petitioners under Section 8(a) of the Himachal Pradesh Private Educational Institutions (Regulatory Commission) Act 2010. Clause 22 of communication dated 22.04.2020 (Annexure P-7) is, therefore, quashed and set aside.

Pending applications, if any, also stand disposed off.

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

Harish Chand .....Petitioner.

Versus

Sarita Devi & anr. .....Respondents.

Cr.MMO No. 282 of 2021
Date of decision: June 26, 2021.

Code of Criminal Procedure --- Section 127 – Petition under section 125 Crpc filed by respondents compromised in Lok Adalat – Maintenance amount of Rs. 2,000/- per month each was awarded to the respondents from the date of award – Application under section 127 Crpc filed for enhancement of maintenance after six years allowed – Maintenance amount enhanced from Rs. 2,000/- to Rs. 10,000/- p.m. for respondent no. 1 (wife) and from Rs. 2,000/-

to Rs. 20,000/- for respondent no. 2 (daughter) which was reduced to Rs.12,000/- in Revision by Ld. Additional Session Judge – Challenge thereof – Held, that there is nothing on record to suggest that respondents have any other source of income except the maintenance amount – Enhanced maintenance amount in favour of respondents just and proper – Petition dismissed. (Para 4)

Cases referred:

Rajnesh vs. Neha and another (2021)2 SCC 324;
Sanjeev Kapoor vs. Chandana Kapoor and others 2020 (13) SCC 172;
Sau Suman Narayan Niphade and another vs Narayan Sitaram Niphade and another 1995 Supp (4) SCC 243;

For the petitioner : Mr. Kulwant Singh Gill, Advocate, through Video Conferencing.

For the respondent s : Nemo.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, *Judge (Oral)*

Cr.MP No. 1013 of 2021

For the reasons stated in the application, the delay in re-filing the main petition is condoned. The application stands disposed of.

Cr.MMO No. 282 of 2021

Heard learned counsel for the petitioner. Maintenance amount of `2,000/- per month each awarded to petitioner's wife and daughter in the year 2010 in proceedings under Section 125 of Code of Criminal Procedure has been enhanced to `10,000/- and `12,000/-, respectively vide impugned order passed by learned Additional Sessions Judge, Hamirpur on 11.9.2020 in a revision petition arising out of proceedings under Section 127 Cr.P.C.. This order is in question in the present petition.

2. Facts.

2(i) The respondents filed petition No. 19/2009 under Section 125 Cr.P.C. claiming maintenance from the petitioner. The petition was compromised before Lok Adalat on 18.12.2010 and maintenance amount of `2000/- per month each was awarded to the respondents from the date of award.

2(ii) Six years later, on 13.12.2016 the respondents moved an application under Section 127 Cr.P.C. for enhancement of maintenance amount to `20,000/- per month each. The enhancement in the maintenance was prayed on the ground that cost of living had increased manifolds, price index had gone up and that the respondents were facing difficulty to maintain their ends meet with the meager maintenance of `2000/- per month each. Respondent No. 2 was a student of sixth class at the time of filing the petition under Section 127 Cr.P.C. and it was pleaded that she was studying in a private school and also taking tuitions. Therefore, need to enhance the maintenance amount was emphasized. It was also stated that the petitioner was posted as Senior Branch Manager in Punjab National Bank and drawing salary of `1,00,000/- per month. It was also alleged that he had not even paid the maintenance amount for the last two years. The respondents submitted that they had no other source of income and, therefore, prayed for enhancing the maintenance amount from `2000/- per month each (earlier awarded to them) to `20,000/- per month each.

2(iii) The petitioner, who is husband of respondent No. 1 and father of respondent No. 2 denied any liability to pay the claimed enhancement. He stated that respondent No. 1 was an able bodied lady and doing private job. He also took up a defence of having loan liability of `23.62 lacs. The petitioner also claimed that he had filed a civil suit before the learned trial Court for declaration that respondent No. 1 was not his legally wedded wife.

2(iv) The parties led evidence. After appreciating the pleadings, evidence and hearing the parties, learned Chief Judicial Magistrate, Hamirpur vide order dated 1.8.2018 enhanced the maintenance amount from `2000/- to `10,000/- per month for respondent No. 1 (petitioner's wife) and from `2000/- to `20,000/- per month for respondent No. 2 (petitioner's daughter). The enhancement was ordered from the date of filing of the petition. The petitioner challenged this order under Section 397 Cr.P.C. before the learned Additional Sessions Judge, Hamirpur. Learned Additional Sessions Judge did not find any substantial error in the findings of the learned Chief Judicial Magistrate. However, the maintenance amount of `20,000/- per month enhanced by learned trial court in favour of petitioner's daughter was reduced to `12,000/- per month. Rest of the order passed by the learned trial count was not interfered. Aggrieved against the enhancement of the maintenance amount awarded in favour of the respondents, petitioner has filed the instant petition.

3. Learned counsel for the petitioner contends that there is no proof on record to show that respondent No. 1 was legally wedded wife of the petitioner. Therefore, no maintenance could have been awarded in her favour. Next he submits that the petitioner has loan liability of around `24 lacs whreas respondent No. 1 is doing private job. Considering these aspects, learned counsel contends that the maintenance amount of `10,000/- and `12,000/-, respectively awarded in favour of the respondents is on the higher side.

4. Observations.

4(i) Income of the petitioner

The petitioner stated before the learned trial court that his income was `37,588.84/- per month. Income certificate was not placed on record. It was also stated that he has to repay loan amount of around `24 lacs. In his defence he also raised a plea that his father was old and had undergone bypass surgery. Learned courts below have noticed that the

petitioner had himself admitted in his evidence that his father was an Ex. Army personnel and had availed ECH facility in the Indian Army. Petitioner's father died in September 2015. Petitioner on one hand expressed his ignorance about his salary but on the other hand he admitted working as Manager since 2011 in Punjab National Bank and stated that he earned more than `70,000/- per month as gross salary and that he was owner of vehicle Swift VDI 2012 model. These facts as noticed by the learned trial Court and by learned Additional Sessions Judge have not even been disputed before me. In fact, learned Additional Sessions Judge has also referred to an order passed by a co-ordinate Bench of this court in Cr.MMO No. 69/2019, decided on 24.4.2019 wherein the petitioner himself pleaded his income as `80,000/- per month. In that case petitioner had challenged an order dated 12.12.2018 passed by learned Additional Sessions Judge directing him to clear arrears and pay monthly maintenance @ `10,000/- per month each to the respondents. Relevant paras of the judgment dated 24.4.2019 run as under:-

> "5. Respondents earlier maintained a petition under Section 125 Cr.P.C. against the petitioner and they were awarded monthly maintenance @ Rs. 2,000/- each. The petitioner herein has stated that his father had undergone bypass surgery and he has loan liability of Rs. 24,00,000/- (rupees twenty four lac). The petitioner could not produce any medical record of his father and he has admitted in his cross-examination that his father is an Ex Army personnel and he availed medical facility under ECH. The petitioner further admitted that since 2012, he is working as Bank Manager and his monthly salary is more than Rs. 70,000/-. He further deposed that he owns vehicle Swift. Admittedly, the petitioner's monthly income is Rs. 80,000/- per month and he is deputed as Senior Manager in Punjab National Bank.
>
> 6. The petitioner had tried to convince this Court that he has to look after his old father and the maintenance allowance, so awarded, is on very higher side. Generally, speaking expression 'maintenance' means appropriate food,

clothing and shelter. The word 'maintenance' is not to be narrowly interpreted. Indeed, maintenance encapsulates constant expenses towards the wife and children. In the instant case, maintenance to respondent No. 1 has been awarded keeping in mind her regular day to day expenses and for respondent No. 2 maintenance has included minimum amount for her education. Indeed, maintenance to a child does not mean providing raiment and food only. Maintenance to only human body is not sufficient, especially in case of children, as the children need to be educated and their overall development has to be kept in mind. In the instant case also, respondent No. 2, who is daughter of the petitioner, has been awarded maintenance by the learned Trial Court keeping in mind her educational expenses. PW-1 Smt. Sarita Devi (respondent No. 1 herein) deposed that educational and other expenses of the daughter (respondent No. 2 herein) are more than Rs. 10,000/- per month. She has further deposed that she has to pay monthly rent of Rs. 6500/-.

7. It has come on record that the petitioner has sufficient source of income, whereas the respondents have no source of income. In the above set of circumstances, this Court finds that respondent No. 2 is totally dependent for her education and other expenses on the petitioner and respondent No. 1 is also dependent upon the maintenance allowance awarded to her. Keeping in view the growing inflation rate as also the overall aspects of the case, this Court finds that the respondents have no source of income to meet their day to day expenses and respondent No. 2 needs money for her education, so it cannot be said that order granting the respondents monthly maintenance allowance of Rs. 10,000/- each is at all unreasonable. However, as the revision petition is pending adjudication before the learned Revisional Court below, the petitioner herein can argue and defend his cause there."

4(ii) Income of respondents

Respondents were awarded maintenance amount of `2000/- per month each on 18.12.2010 in proceedings under Section 125 Cr.P.C. Six

years later on 2016, the respondents moved for enhancement in the maintenance amount on the ground that petitioner's daughter-respondent No. 2 was now studying in 6th class in a private school and also taking tuitions. Higher cost of living and increase in the price index were also taken as grounds for filing the petition under Section 127 Cr.P.C. There was nothing to suggest that respondents had any source of income. Learned Additional Sessions Judge appropriately appreciated the statement made by the petitioner while appearing as RW3 wherein he stated that his wife was earning `15,000/- by cooking meals and sweeping the houses of others and drew correct inference from such statement that this statement speaks volumes about the plight of the respondents. Earning livelihood by the wife of a Senior Manger of the Bank, by working as domestic helper goes to show that she has no source of income and that she is making desperate efforts to make both ends meet and to educate her daughter by accepting the work below her dignity, which she would have enjoyed as wife of the Senior Manager. Her earning by doing such work cannot be taken as source of income.

4(iii) Learned counsel for the petitioner urged that respondent No. 1 is not petitioner's legally wedded wife. However, during hearing he fairly stated that a suit filed by the petitioner in this regard seeking declaration about respondent No. 1 being not his legally wedded wife, has been dismissed by the learned trial Court. In any event, the impugned orders have been passed in proceedings under Section 127 Cr.P.C. The orders passed previously under Section 125 Cr.P.C. are not under challenge. The respondents are only seeking enhancement in the maintenance amount awarded to them on 18.12.2010 in proceedings under Section 125 Cr.P.C.

4(iv) In ***2020 (13) SCC 172*** titled ***Sanjeev Kapoor*** versus ***Chandana Kapoor and others*** it was held by the Apex Court that after passing the judgment in proceedings under Section 125 Cr.P.C., the court does not become functus officio. Section 125 Cr.P.C. itself contains provisions where

order previously passed can be cancelled or altered. It was also held that Section 127 Cr.P.C. discloses legislative intent where the Magistrate is empowered to alter an order passed under Section 125 Cr.P.C. Sub Section (2) of Section 127 Cr.P.C. also empowers the Magistrate to cancel or vary an order under Section 125 Cr.P.C., which has to be interpreted in a manner as to advance justice to protect a woman for whose benefit the provisions have been engrafted.

After considering various precedents, the Apex Court in ***(2021)2 SCC 324,*** titled ***Rajnesh*** versus ***Neha and another***, postulated criteria for determining quantum of maintenance. Some of relevant paras from the judgment are as under:

> "**III Criteria for determining quantum of maintenance**
>
> 77. The objective of granting interim / permanent alimony is to ensure that the dependant spouse is not reduced to destitution or vagrancy on account of the failure of the marriage, and not as a punishment to the other spouse. There is no straitjacket formula for fixing the quantum of maintenance to be awarded.
>
> 78. The factors which would weigh with the Court inter alia are the status of the parties; reasonable needs of the wife and dependant children; whether the applicant is educated and professionally qualified; whether the applicant has any independent source of income; whether the income is sufficient to enable her to maintain the same standard of living as she was accustomed to in her matrimonial home; whether the applicant was employed prior to her marriage; whether she was working during the subsistence of the marriage; whether the wife was required to sacrifice her employment opportunities for nurturing the family, child rearing, and looking after adult members of the family; reasonable costs of litigation for a non-working wife.
>
> 80. On the other hand, the financial capacity of the husband, his actual income, reasonable expenses for his own maintenance, and dependant family members whom he is obliged to maintain under the law, liabilities if any, would

> be required to be taken into consideration, to arrive at the appropriate quantum of maintenance to be paid. The Court must have due regard to the standard of living of the husband, as well as the spiralling inflation rates and high costs of living. The plea of the husband that he does not possess any source of income ipso facto does not absolve him of his moral duty to maintain his wife if he is able bodied and has educational qualifications.
>
> 81. A careful and just balance must be drawn between all relevant factors. The test for determination of maintenance in matrimonial disputes depends on the financial status of the respondent, and the standard of living that the applicant was accustomed to in her matrimonial home. The maintenance amount awarded must be reasonable and realistic, and avoid either of the two extremes i.e. maintenance awarded to the wife should neither be so extravagant which becomes oppressive and unbearable for the respondent, nor should it be so meagre that it drives the wife to penury. The sufficiency of the quantum has to be adjudged so that the wife is able to maintain herself with reasonable comfort."

It was also observed that living expenses of the child would include expenses for food, clothing, residence, medical expenses, education. Extra coaching classes or any other vocational training courses to complement basic education must also be reasonably factored while awarding child support.

In the instant case, maintenance amount of `2000/- per month each was awarded to respondent No. 1 and respondent No. 2 in the year 2010 in proceedings under Section 125 Cr.P.C. Respondents who are wife and daughter of petitioner were certainly within their rights to seek enhancement in the maintenance amount in the year 2016 by invoking provisions of Section 127 Cr.P.C. on the ground of higher cost of living, higher price index. Their circumstances had changed. Respondent No. 2-the daughter of petitioner by 2016 was in sixth class, studying in a private school and also taking coaching.

Her expenses had increased. Respondent No. 1 has deposed that she was paying monthly rent of `6500/-. We are now in the year 2021. Change in circumstances would include rise in cost of living. Fact of inflation, resulting in fall in purchasing power of money and consequent rising cost of commodities can be taken as grounds for enhancing maintenance (see *1996 Cr.L.J. 553, Prafulla Kumar Panda* versus *Smt. Amari Kumari Panda, 1998 Cr.L.J. 1312, Dhan Raj* versus *Kishni and another.* There is nothing on record to suggest that respondents have any other source of income save and except the maintenance amount. Petitioner's contention that his wife-respondent No. 1 is able bodied and earns `15,000/- per month by washing floors and utensils in other people's homes, to escape any liability from paying enhanced maintenance amount, is in a very bad taste. It reflects that respondent No. 1, who is wife of a Senior Manager of Bank is compelled to earn living by doing menial jobs. Petitioner is admittedly working as a Branch Manager in Punjab National Bank. His salary, as has come in the judgment dated 24.4.2019 delivered by a coordinate Bench of this court in Cr.MMO No. 69/2019 (Harish Chand versus Sarita Devi & another), is `80,000/-. He has himself admitted his gross salary to be more that `70,000/-.

Petitioner has tried to evade paying enhanced amount of maintenance by raising plea of illness of his father. Both the learned courts below noticed that father of petitioner was an ex-serviceman and had availed ECH facility. Petitioner's father died in 2015. Another plea pressed to evade enhancement was his loan liability. Hon'ble Apex Court in ***1995 Supp (4) SCC 243***, titled ***Sau Suman Narayan Niphade and another*** versus ***Narayan Sitaram Niphade and another*** held that merely because the husband has incurred liability to pay installments by obtaining loans is no ground for denying maintenance to wife and minor child. Amount of maintenance must be befitting the status of parties and the capacity of spouse

to pay maintenance. Amount of maintenance is dependent upon factual situation of each case.

Considering all the above aspects, I find that the maintenance amount enhanced from `2000/- to `10,000/- per month in favour of petitioner's wife and from `2000/- to `12,000/- per month in favour of petitioner's daughter is just and proper in the facts and circumstances of the case. Hence, no interference in the impugned orders is called for. Petition is dismissed, so also the pending application(s), if any.

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

Om Prakash. ...Petitioner.

Versus

The State of Himachal Pradesh. ...Respondent.

Cr.M.P. (M) No. 838 of 2021
Date of decision: 28.6.2021

Code of Criminal Procedure, Section 439 – Petitioner found in possession of 525 grams charas (intermediate quantity) and arrested under Section 21(b) NDPS Act on 17-03-2021 whereas challan presented in the Court on 17-06-2021 – Prayer for default bail under Section 167(2) Crpc made during pendency of Petition – Held, that maximum period of detention which could be authorized in the present case is 60 days which expired on 16-05-2021 – Challan presented in the court on 17-06-2021 without any extension of time to file challan beyond 60 days – Indefeasible right accrued to the accused under section 167(2) – Petitioner held entitled to "default bail" under section 167(2) and ordered to be released on furnishing bonds and subject to conditions. (Paras 9, 10)

Cases referred:

Bikramjit Singh Vs. State of Punjab, (2020) 10 SCC 616;
M. Ravindran Vs. Intelligence Officer, Directorate of Revenue Intelligence, (2021) 2 SCC 485;
Rakesh Kumar Paul Vs. State of Assam, 2017(15) SCC 67;

For the Petitioner: Mr.Vishal Gupta, Advocate through Video Conferencing.

For the Respondent: Mr.Desh Raj Thakur, Additional Advocate General, through Video Conferencing.

Vivek Singh Thakur, Judge (oral)

Petitioner herein has been arrested on 17.3.2021 in case FIR No. 24 of 2021, dated 17.3.2021 registered in Police Station Parwanoo, District Solan, H.P. under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short NDPS Act). He has approached this Court on 30.4.2021 seeking regular bail under Section 439 of Code of Criminal Procedure (for short Cr.P.C.).

2. During pendency of petition, on 14.6.2021, learned counsel for the petitioner, on the basis of information placed on record in status report, had canvassed for release of petitioner on 'default bail' by invoking provisions of Section 167 of Cr.P.C. However, on that day, matter was adjourned for 17.6.2021, enabling learned Additional Advocate General to have complete instructions with respect to date of filing of challan. On 17.6.2021, matter was adjourned for 18.6.2021 and on that date matter was again adjourned for 21.6.2021, enabling learned Additional Advocate General to have complete instructions with respect to filing of challan. On 21.6.2021, it was informed that challan has been presented in Court on 17.6.2021.

3. Petitioner in present case has been arrested on 17.3.2021 and he was produced before the Magistrate on the same day and since then he is in judicial custody.

4. As per prosecution case, petitioner has been found in possession of 522 grams charas, which is intermediate quantity of contraband under NDPS Act, for which punishment has been provided in Section 21(b) of NDPS Act as rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees. As per section 167(2) of Cr.P.C., the maximum period to which Magistrate may authorize the detention of the accused person in such a case is sixty days, as in present case offence is not punishable with death, imprisonment for life or imprisonment for a terms not less than ten years. Sixty days of detention period of petitioner has completed on 16.5.2021.

5. As per instructions received by learned Additional Advocate General challan has been presented on 17.6.2021, but without any extension of time to file the challan beyond sixty days.

6. Learned counsel for the petitioner, seeking default bail, has placed reliance upon ***Rakesh Kumar Paul Vs. State of Assam, 2017(15) SCC 67; Bikramjit Singh Vs. State of Punjab, (2020) 10 SCC 616*** and ***M. Ravindran Vs. Intelligence Officer, Directorate of Revenue Intelligence, (2021) 2 SCC 485.***

7. In *Rakesh Kumar Paul's* case relevant paras referred by learned counsel for the petitioner read as under:-

> *"38. This Court also dealt with the decision rendered in Sanjay Dutt and noted that the principle laid down by the Constitution Bench is to the effect that if the charge sheet is not filed and the right for 'default bail' has ripened into the status of indefeasibility, it cannot be frustrated by the prosecution on any pretext. The accused can avail his liberty by filing an application stating that the statutory period for filing the charge sheet or challan has expired and the same has not yet been filed and therefore the indefeasible right has accrued in his or her favour and further the accused is prepared to furnish the bail bond.*

39. This Court also noted that apart from the possibility of the prosecution frustrating the indefeasible right, there are occasions when even the court frustrates the indefeasible right. Reference was made to Mohamed Iqbal Madar Sheikh v. State of Maharashtra (1996) 1 SCC 722 wherein it was observed that some courts keep the application for 'default bail' pending for some days so that in the meantime a charge sheet is submitted. While such a practice both on the part of prosecution as well as some courts must be very strongly and vehemently discouraged, we reiterate that no subterfuge should be resorted to, to defeat the indefeasible right of the accused for 'default bail' during the interregnum when the statutory period for filing the charge sheet or challan expires and the submission of the charge sheet or challan in court.

Procedure for obtaining default bail

40. In the present case, it was also argued by learned counsel for the State that the petitioner did not apply for "default bail" on or after 4-1.2017 till 24-1-2017 on which date his indefeasible right got extinguished on the filing of the charge sheet. Strictly speaking this is correct since the petitioner applied for regular bail on 11-1-2017 in the Gauhati High Court – he made no specific application for grant of 'default bail'. However, the application for regular bail filed by the accused on 11-1-2017 did advert to the statutory period for filing a charge sheet having expired and that perhaps no charge sheet had in fact being filed. In any event, this issue was argued by learned counsel for the petitioner in the High Court and it was considered but not accepted by the High Court. The High Court did not reject the submission on the ground of maintainability but on merits. Therefore it is not as if the petitioner did not make any application for default bail – such an application was definitely made (if not in writing) then at least orally before the High Court. In our opinion, in matters of personal liberty, we cannot and should not be too technical and must lean in favour of personal liberty. Consequently, whether the accused makes a written application for 'default bail' or an oral application for 'default bail' is of no consequence. The concerned court must deal with such an application by considering the

statutory requirements namely, whether the statutory period for filing a charge sheet or challan has expired, whether the charge sheet or challan has been filed and whether the accused is prepared to and does furnish bail.

41. We take this view keeping in mind that in matters of personal liberty and Article 21 of the Constitution, it is not always advisable to be formalistic or technical. The history of the personal liberty jurisprudence of this Court and other constitutional courts includes petitions for a writ of habeas corpus and for other writs being entertained even on the basis of a letter addressed to the Chief Justice or the Court.

42-43. … … ….

44. Strong words indeed. That being so we are of the clear opinion that adapting this principle, it would equally be the duty and responsibility of a court on coming to know that the accused person before it is entitled to 'default bail', to at least apprise him or her of the indefeasible right. A contrary view would diminish the respect for personal liberty, on which so much emphasis has been laid by this Court as is evidenced by the decisions mentioned above, and also adverted to in Nirala Yadav.

45-48 … … …

49. The petitioner is held entitled to the grant of 'default bail' on the facts and in the circumstances of this case. The Trial Judge should release the petitioner on 'default bail' on such terms and conditions as may be reasonable. However, we make it clear that this does not prohibit or otherwise prevent the arrest or re-arrest of the petitioner on cogent grounds in respect of the subject charge and upon arrest or re-arrest, the petitioner is entitled to petition for grant of regular bail which application should be considered on its own merit. We also make it clear that this will not impact on the arrest of the petitioner in any other case."

8. In *Bikramjit Singh's* case relevant paras read as under:-

"36. A conspectus of the aforesaid decisions would show that so long as an application for grant of default bail is made on expiry of the period of 90 days (which application need not even be in writing) before a charge sheet is filed, the right to default bail

> *becomes complete. It is of no moment that the Criminal Court in question either does not dispose of such application before the charge sheet is filed or disposes of such application wrongly before such charge sheet is filed. So long as an application has been made for default bail on expiry of the stated period before time is further extended to the maximum period of 180 days, default bail, being an indefeasible right of the accused under the first proviso to Section 167(2), kicks in and must be granted.*
>
> *37. …. … ….*
>
> *38. This being the case, we set aside the judgment of the High Court. The Appellant will now be entitled to be released on "default bail" under Section 167(2) of the Code, as amended by Section 43-D of the UAPA. However, we make it clear that this does not prohibit or otherwise prevent the arrest or re-arrest of the petitioner on cogent grounds, and upon arrest or re-arrest, the petitioner is entitled to petition for the grant of regular bail which application should be considered on its own merit. We also make it clear that this judgment will have no impact on the arrest of the petitioner in any other case.*"

9. In *M. Ravindran's* case, the Supreme Court, after considering its earlier pronouncements including judgments in *Rakesh Kumar Paul's* and *Bikramjit Singh's cases* referred supra has concluded that indefeasible right accruing to the accused under Section 167 (2) Cr.P.C. does not get extinguished by subsequent filing of additional complaint by investigating agency and Court should take into consideration the time of filing of the application for bail based on default of investigating agency, but not the time of disposal of application for bail. The conclusion drawn by the Court is as under:-

> *"25.1 Once the accused files an application for bail under the proviso to Section 167(2) he is deemed to have 'availed of' or enforced his right to be released on default bail, accruing after expiry of the stipulated time limit for investigation. Thus, if the accused applies for bail under Section 167(2) CrPC read*

with Section 36A (4), NDPS Act upon expiry of 180 days or the extended period, as the case may be, the Court must release him on bail forthwith without any unnecessary delay after getting necessary information from the public prosecutor, as mentioned supra. Such prompt action will restrict the prosecution from frustrating the legislative mandate to release the accused on bail in case of default by the investigative agency.

25.2 The right to be released on default bail continues to remain enforceable if the accused has applied for such bail, notwithstanding pendency of the bail application; or subsequent filing of the chargesheet or a report seeking extension of time by the prosecution before the Court; or filing of the chargesheet during the interregnum when challenge to the rejection of the bail application is pending before a higher Court.

25.3 However, where the accused fails to apply for default bail when the right accrues to him, and subsequently a chargesheet, additional complaint or a report seeking extension of time is preferred before the Magistrate, the right to default bail would be extinguished. The Magistrate would be at liberty to take cognizance of the case or grant further time for completion of the investigation, as the case may be, though the accused may still be released on bail under other provisions of the CrPC.

25.4 Notwithstanding the order of default bail passed by the Court, by virtue of Explanation I to Section 167(2), the actual release of the accused from custody is contingent on the directions passed by the competent Court granting bail. If the accused fails to furnish bail and/or comply with the terms and conditions of the bail order within the time stipulated by the Court, his continued detention in custody is valid."

10. Applying the provisions of law, in light of principles propounded by the Supreme Court, to the facts of present case, where challan has been filed after expiry of statutory period of sixty days, without any extension of time from the concerned Court/Magistrate and also after the oral submission made by learned counsel for the petitioner for enlarging the petitioner on default bail by invoking provisions of Section 167 Cr.P.C. coupled with the fact

that petition for bail has been filed on behalf of petitioner in April, 2021 undertaking therein to abide by any condition imposed upon him by the court and learned counsel for the petitioner is constantly contending that petitioner is ready to furnish bail bonds for extending his undertaking averred in para 6 of the application/petition, I find that petitioner is entitled for 'default bail' under Section 167(2) Cr.P.C. and accordingly in case of furnishing personal bond in the sum of `50,000/- with one surety in the like amount to the satisfaction of trial Court/Special Judge, petitioner is ordered to be enlarged on bail, subject to following further conditions:-

(i) *That the petitioner shall make himself available to the police or any other Investigating Agency or Court in the present case as and when required;*

(ii) *that the petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him/her from disclosing such facts to Court or to any Police Officer or tamper with the evidence. He shall not, in any manner, try to overawe or influence or intimidate the prosecution witnesses;*

(iii) *that the petitioner shall not obstruct the smooth progress of the investigation/trial;*

(iv) *that the petitioner shall not commit the offence similar to the offence to which he is accused or suspected;*

(v) *that the petitioner shall not misuse his liberty in any manner;*

(vi) *that the petitioner shall not jump over the bail;*

(vii) *that the petitioner shall keep on informing about the change in address, landline number and/or mobile number, if any, for his availability to Police and/or during trial;*

(viii) *that the petitioner shall not leave India without permission of the Court.*

11. It will be open to the prosecution to apply for imposing and/or to the trial Court to impose any other condition on the petitioner as deemed necessary in the facts and circumstances of the case and in the interest of justice and thereupon, it will also be open to the trial Court to impose any other or further condition on the petitioner as it may deem necessary in the interest of justice.

12. In case the petitioner violates any conditions imposed upon him, his bail shall be liable to be cancelled. In such eventuality, prosecution may approach the competent Court of law for cancellation of bail, in accordance with law.

13. It is made clear that enlargement of petitioner on default bail shall not prohibit or otherwise prevent the arrest or re-arrest of the petitioner on cogent grounds in respect of the subject charge and upon arrest or re-arrest, the petitioner is entitled to file petition for grant of regular bail which application should be considered on its own merit.

14. Learned trial Court is directed to comply with the directions issued by the High Court, vide communication No.HHC.VIG./Misc. Instructions/93-IV.7139 dated 18.03.2013.

15. Observations made in this petition hereinbefore shall not affect merits of the case in any manner and are strictly confined for the disposal of the bail application.

16. The petitioner is permitted to produce copy of order downloaded from the High Court website and the trial Court shall not insist for certified copy of the order, however, it may verify the order from the High Court website or otherwise.

The petition stands disposed of in the aforesaid terms.

Dasti copy on usual terms.

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

Jagdish Kumar & others. ...Petitioners.

Versus

State of Himachal Pradesh & others. ...Respondents.

CWP No. 3047 of 2020
Reserved on: 18.6.2021
Date of decision: 23.6.2021

Constitution of India, Article 226 – Petitioners have sought their induction on completion of 12 years of service as Water Guards (Jal Rakshaks) with 3 years experience of Working with Pump Motors and Electrical accessories against the post of Pump Attendants on contractual basis like other Water Guards – Also, prayer made for striking down condition of educational qualification imposed by respondents for their such induction in erstwhile Department of Irrigation & Public Health now Jal Shakti Vibhag (JSV) – Held, that minimum educational qualification not applicable to the petitioners – Even otherwise, petitioners entitled for appointment to the post of Pump Attendants like other water guards in view of the nature of work performed by them – Respondents directed to engage petitioners as Pump Attendants from retrospective dates with all consequential seniority and monetary benefits – Petition disposed of accordingly. (Paras 16, 17)

Cases referred:
Bhagwati Prasad Vs. Delhi State Mineral Development Corporation, AIR 1990 SC 371;

For the Petitioners: Mr.A.K. Gupta, Advocate, through Video Conferencing.

For the Respondents: Mr.Raju Ram Rahi, Deputy Advocate General, through Video Conferencing.

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Petitioners have approached this Court for their induction on completion of 12 years of service as Water Guards (Jal Rakshaks) with three years experience of working with Pump Motors and Electrical accessories against the post of Pump Attendants on contractual basis, like other Water Guards, after striking down condition of educational qualification imposed by respondents for their such induction in erstwhile Department of Irrigation and Public Health now Jal Shakti Vibhag (JSV).

2. Undisputed facts in present case are that petitioners have been permitted to be appointed by concerned Gram Panchayats in the process of transfer of Rural Drinking Water Supply Scheme (RWSSs) after complying due process for operation and maintenance of water supply schemes below the storage tanks. Appointment of petitioners was made on the basis of recommendations of Selection Committee constituted by the Government after adopting a selection process based on interview and other parameters as per guidelines of transfer of operation and maintenance of Rural Water Supply Scheme to Panchyati Raj Institutions (PRIs). Vide notification/communication dated 17th July, 2019, (Annexure R-1) respondents-State has framed a policy to deploy and appoint Water Guards appointed under Assured Rural Water Supply Scheme (ARWSP) now National Rural Drinking Programme (NRDWP) against vacant posts of Pump Attendants in accordance with provisions contained in Recruitment and Promotion Rules (R&P Rules) of Pump Attendants, purely on contract basis in erstwhile Irrigation and Public Health Department now Jal Shakti Vibhag.

3. During pendency of present Writ Petition, a communication dated 19.6.2020 was sent by Engineer-in-Chief JSV to Secretary JSV to the

Government of Himachal Pradesh, stating therein that 1376 posts of various categories had been converted into posts of Pump Attendants and 945 Jal Rakshaks (Water Guards), fulfilling criteria of Recruitment and Promotion Rules with 12 years complete service, had been appointed as Pump Attendants Class-IV on contract basis, whereas 431 posts were lying vacant and further that 463 Jal Rakshaks, who had completed 12 years service as on 31.12.2018, but not fulfilling the educational qualification criteria prescribed in Recruitment and Promotion Rules, could not be appointed in the category of Pump Attendants Class-IV and, therefore, in this communication, necessary direction/approval of the Government for one time relaxation in Recruitment and Promotion Rules to appoint/induct aforesaid Jal Rakshaks as Pump Attendants on contract basis, was sought.

4. For the aforesaid communication dated 19.6.2020, vide order dated 31.3.2020, Secretary JSV to the Government of Himachal Pradesh was directed to impart instructions with regard to stand of the Government regarding aforesaid recommendation/request made by department for relaxation in Recruitment and Promotion Rules. In response thereto learned Deputy Advocate General has placed on record instructions dated 2.6.2021 received from the office of Secretary (JSV), stating therein that matter has been examined in consultation with Personnel/Finance Departments and both Departments have expressed inability to concur with the proposal of the Administrative Department and, therefore, Government has decided to reject the said proposal and has rejected the same.

5. Learned counsel for the petitioners has submitted that petitioners and other similarly situated persons are serving as Water Guards since more than 12 years and are having sufficient experience of working with Pump Motor and Electrical accessories and, therefore, for their conversion to the establishment of JSV as contract Pump Attendant, minimum educational

qualification prescribed in Recruitment and Promotion Rules is not applicable to them. According to him, educational qualification is to be taken into consideration at the time of initial appointment, but not on conversion of service of employees like petitioners, who are performing the similar job since last more than 12 years and are having sufficient experience to hold the post irrespective of their educational qualification. To substantiate his plea, reliance has been placed on a judgment of the Supreme Court in ***Bhagwati Prasad Vs. Delhi State Mineral Development Corporation, AIR 1990 SC 371.***

6. Learned Deputy Advocate General has refuted the contention raised on behalf of petitioners by submitting that petitioners are employees of Gram Panchayats, but not the employees of Department and, therefore, it is not a case where the employees of the same Department are to be absorbed against the posts in the same Department and, therefore, judgment in *Bhagwati Prasad's case* is not applicable in present case. He has further submitted that in absence of approval of relaxation by the Government in the condition of minimum educational qualification, appointment/conversion of petitioners and other similar Water Guards is not permissible under law. Relying upon Rule 7 of Recruitment and Promotion Rules, he submits that unless a candidate possess essential qualification, he cannot be appointed/engaged as a Water Guard by Jal Shakti Vibhag and thus he has pleaded for dismissal of petition.

7. On perusal of documents filed by petitioners as well as respondents, it is apparent that vide communication No. IPH-A-A(3)4/2018, dated 17.7.2019 (Annexure R-1), the Government had conveyed its approval for conversion of 1026, Class-IV posts of various categories into Pump Attendants and had decided to appoint Water Guards deployed under ARWSP now NRDWP against vacant posts of Pump Attendants in accordance with

provisions of Recruitment and Promotion Rules of Pump Attendants. Vide communication No. IPH-A-A(3)4/2018-loose, dated 1.10.2019, it was communicated by the Government of Himachal Pradesh to the Department that period of working below storage tanks or managing water supply schemes thereof by the Water Guards, engaged for operation and maintenance of water supply schemes, may be treated as work experience to hold them eligible for having requisite experience to fulfill the eligibility criteria as provided under Recruitment and Promotion Rules for the post of Pump Attendants.

8. Respondents have also placed on record Himachal Pradesh, Irrigation & Public Health Department, Pump Attendant, Class-IV (Non Gazetted) Recruitment and Promotion Rules, 2017, as existing on date after amendment carried therein vide notification dated 5.8.2019. Rules relevant for adjudication of present petition are as under:-

"

7	*Minimum Educational and other qualifications required for direct recruit(s):*	*a) <u>Essential Qualification(s):-</u>* i) Should be Middle pass or its equivalent from a Institute/School duly recognized by the Government. <u>b) Desirable Qualification(s)</u> Knowledge of customs, manners and dialects of Himachal Pradesh and suitability for appointment in the peculiar conditions prevailing in the Pradesh.
8-9	….	…..
10	*Method(s) of recruitment whether by direct recruitment or by promotion/secondment/ transfer and percentage of post(s) to be filled in by*	*100% by direct recruitment on regular basis or by recruitment on contract basis/by transfer from amongst Beldar who possess 5 years experience of working with Pump Motors and*

	various methods:	*Electrical accessories strictly on the basis of seniority/induction from Water Guards after completion of 12 years of service with 5 years experience of working with Pump, Motors and Electrical accessories.*
11	*In case of recruitment by promotion/secondment/ transfer, grade(s) from which promotion/ secondment/transfer is to be made:*	*"By Transfer from amongst the Beldar who possess 5 years experience of working with pump house and electrical accessories strictly on the basis of seniority.*
12-14	*…*	*…*
15	*Selection for appointment to the post by direct recruitment:*	*Selection for appointment to the post in the case of direct recruitment shall be made on the basis of merit of written examination followed by evaluation as specified in APPENDIX-I appended to these rules.*
15-A	*Selection for appointment to the post by contract appointment:*	*Notwithstanding anything contained in these rules, contract appointment to the post will be made subject to the terms and conditions given below:* …*

9. Rule 7 provides essential minimum qualification of Middle standard or its equivalent for direct recruit(s). Rule 10 provides that recruitment shall be 100% by 'direct recruitment' on regular basis or by recruitment on contract basis, but at the same time it also provides recruitment by way of 'transfer' from amongst Beldars with requisite experience prescribed in the rules and also 'induction' from Water Guards with experience prescribed in the rules. Rule 11 clearly indicates appointment

by 'transfer' from amongst Beldars, as provided under Rule 10, is a case of recruitment by 'transfer' which is not covered under 'direct recruitment'. Rule 15 also provides that appointment to the post in case of direct recruitment shall be made on the basis of merit of written examination followed by evaluation as specified in the Appendix to these rules. Rule 15-A provides process to be adopted for appointment to the post of contract appointment.

10. Rule 10 provides three modes of recruitment to the post of Pump Attendant. First is 'direct recruitment', either on regular basis or on contract basis. Second is by 'transfer' from amongst Beldars and third is 'induction' from Water Guards. As provided in Rule 10, the appointment or engagement or conversion of Water Guards as Pump Attendants, either on regular basis or on contract basis, cannot be termed as direct recruitment. 'Direct recruitment' means an appointment made from the open market otherwise than either by promotion during the service or by transfer of an official already in service of Department of Government.

11. Beldars are already working with the Department. Water Guards, though have been engaged by Panchyati Raj institutions, but under the scheme framed and implemented by the Government by adopting a process, wherein Assistant Engineer of the Department was the Chairman to the Selection Committee having, in addition to him, two members i.e. Panchayat Pradhan and Junior Engineer of the Department. The process of engagement was notified by the Government and funds for payment of emoluments for Water Guards have also been provided by the Department. Therefore, Water Guards, if not strictly employees of the Department, but can definitely be termed as quasi Government servants. Taking care of Water Guards, adopting policy for their recruitment as Pump Attendants and considering services rendered by them with the Panchyats as sufficient for experience required for Pump Attendants, definitely establishes that Water

Guards are also at least quasi Government servants. Therefore, neither transfer from amongst Beldars nor induction of Water Guards can be termed as a direct recruitment to the post of Pump Attendant and it is also apparent from Rule 11 where appointment of Beldar to the post of Pump Attendant by transfer has not been considered as a direct recruitment, but appointment by way of transfer.

12. Rule 15 provides that direct recruitment shall be made on the basis of merit of written examination. But no such term has been prescribed for appointment by way of 'transfer' or 'induction'. Thus a condition applicable under Rule 15 for direct recruitment is not applicable for appointment by way of transfer or induction. Similarly condition of minimum educational qualification is applicable only to the 'direct recruits'. As discussed supra, induction from Water Guards, at no stretch of imagination, can be considered as a direct recruitment and, therefore, contrary to decision of the Government minimum educational qualification prescribed in Rule 7 for direct recruits is not applicable to the Water Guards to be inducted against the post of Pump Attendants. Accordingly, no relaxation of minimum educational qualification in case of Water Guards or Beldars is required for appointing/engaging them against the post of Pump Attendants, either on regular or on contract basis, in Jal Shakti Vibhag in pursuance to the provisions of Rule 10 of Recruitment and Promotion Rules.

13. In Rule 10, clause of direct recruitment on regular basis or on contract basis is separate to other clauses, whereby recruitment of Pump Attendants has been provided by transfer and/or induction. This Rule does not say direct recruitment from amongst Beldars or from Water Guards. The recruitment source from amongst Beldars has been provided by way of transfer, whereas recruitment source of Water Guards has been provided through induction. Three different words, 'direct recruitment', 'transfer' and

'induction' have been used in Recruitment and Promotion Rules. These are three different modes dealing with three different sources of recruitment. The condition applicable to mode of direct recruitment cannot be made applicable to other two modes i.e. by transfer or induction, unless specifically provided under the Rules.

14. Denial of appointment/engagement of Water Guards not having passed Middle standard examination, refusal of one time relaxation sought by the Department for their recruitment as Pump Attendants and expression of inability of Departments of Personnel and Finance to concur the proposal of relaxation are based on misconceived notion that condition of minimum educational qualification is also applicable to the persons who are to be appointed/inducted as Pump Attendants under the Recruitment and Promotion Rules. The said minimum educational qualification is applicable only for direct recruits and omissions and commissions on the part of respondents denying appointment to the petitioners and other similarly situated Water Guards to the posts of Pump Attendants are definitely arbitrary, irrational, unreasonable and violative of Constitutional mandate.

15. Petitioners and other similarly situated persons have been wrongly denied their legal, just and valid right. Therefore, they are entitled to be engaged from the date from which their counter parts or juniors have been recruited, on same terms and conditions with retrospective effect along with all consequential benefits including seniority and monetary benefits, as they have been wrongly denied their right.

16. For aforesaid discussion, it is evident that it is not a case where minimum education qualification is applicable to the petitioners, however, in any case, even if minimum educational qualification is made applicable to the petitioners, then also in the facts and circumstances of present case, in view of

pronouncement of the Supreme Court in *Bhagwati Prasad's case*, petitioners would be entitled for their appointment to the post of Pump Attendants like other Water Guards, as the Government itself has arrived at conclusion that keeping in view the nature of work performed by Water Guards, their period of working has to be treated as work experience to hold them eligible for having requisite experience to fulfill the eligibility criteria as provided under Recruitment and Promotion Rules, for the posts of Pump Attendant.

17. For aforesaid conclusion, respondents are directed to engage petitioners as Pump Attendants from retrospective dates i.e. the dates from which their counterparts/juniors have been engaged as Pump Attendants and to extend all consequential benefits including seniority and monetary benefits on or before 31st July, 2021. Payments of arrears of emoluments shall be ensured on or before 31st August, 2021.

The petition stands disposed of in aforesaid terms.