THE

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HIMACHAL SERIES, 2022

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(April to May, 2022)

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SUBJECT INDEX

'A'

Arbitration and Conciliation Act, 1996 – Section 8 - Matter referred to arbitrator - Conditions to be fulfilled – Held - Conditions which are required to be satisfied under sub-section (1) and (2) of Section 8 before the court can exercise its powers are 1) there is an arbitration agreement .2) a party to the agreement brings an action in the court against other party 3) subject matter of arbitration agreement 4) the other party moves the court for referring the parties to arbitration before it submits his first statement on the substance of the dispute – This last provision creates right in the person bringing the action to have the dispute adjudicated by Court, once the other party has submitted his first statement of defence – But if the party wants the matter to referred to arbitration apply to the court after submission of his statement and the party who has brought the action does not object, as is the case before us, there is no bar on the court referring the parties to arbitration- Petition allowed. (Paras 6 & 8) Title: Vishal Singh Mehta vs The Director, Department of IT, Govt. of H.P. Page-783

Arbitration and Conciliation Act, 1996- Sections 11 and 12- Appointment of independent Arbitrator to resolve the dispute between the parties- Held- Arbitrator has adjudicatory role to perform and, therefore, he must be independent to the parties as well as impartial- Application allowed. (Para 11, 15) Title: M/s Gurnam Singh Construction Company vs. Sacred Heart Sen. Sec. School Page-90

'C'

Code of Civil Procedure, 1908 - Order 8 Rule 1 – Striking of defence in commercial suits – Plaintiff filed application within 120 days - Held - Till the period of 120 days is over the plaintiff cannot call up on the Court to close the right of defendant from filing the written statement – Application without merits – Application dismissed. (Para 34) Title: Boehringer Ingelheim International GMBH & another vs. Dr. Reddy's Laboratories Ltd. Page-712

Code of Civil Procedure, 1908 – Order 8 Rule 1A(3) - Placing on record the document by the defendant at the stage of arguments – Scope of – Held - The order in the matter was not pronounced and the matter thereafter was

repeatedly fixed for hearing of arguments - It is still at the stage of advancing of arguments – The application in question was moved by the defendant on 27.7.2019 – What is sought to be produced in terms of this application is certain order sheets and Memorandum of appeal in R.S.A. No. 574 of 2008 instituted before this court – Documents are necessary for arriving at just decision of the case - In view of stand taken by the respondent plaintiff in his pleading, no prejudice will be caused to him in case the application is allowed - Application filed under order 8 rule 1A (3)read with section 151 CPC is allowed subject to costs of Rs. 10,000/-. (Para 5) Title: Roomi Ram vs. Tej Singh Page- 509

Code of Civil Procedure, 1908- Order VII Rule XI- **The Patents Act 1970**- Section 53(4)- Held- Court does not concur with the contentions of defendant that plaint is liable to be rejected being barred by law- Appeal dismissed. (Para 31, 32) Title: Boehringer Ingelheim International GMBH & Co. & another vs. Macleods Pharmaceuticals Ltd. Page-396

Code of Civil Procedure, 1908- Order 21 Rule 66, Rule 58, 29- Order 22, Rule 10- Section 47- Preliminary decree for recovery of Rs.3,56,989/- along with interest passed in favour of decree holder Bank with the condition to put the mortgaged property to sale in case of failure to pay the amount- Objection petition dismissed- Held- Executing Court cannot go beyond the decree except when the decree is nullity or is without jurisdiction as Executing Court has no jurisdiction to modify the decree, but it has to execute a decree as it is- Executing Court is not travelling beyond the decree or exceeding its jurisdiction- Petition disposed of with directions to executing Court. (Para 15, 27, 28, 30) Title: M/s Century Heatreats (P) Ltd. & another vs. Punjab National Bank Page-102

Code of Civil Procedure, 1908 – Order 39 Rule 1 and 2 - Grant of injunction - Scope of interference - Held - Plea has been taken that prejudice being caused to the petitioner by raising of construction by the defendant /respondent cannot be accepted at the stage when both the learned Courts below observed that the construction was started by the respondent/ defendant in the year 2015 and at that time the construction was not objected to by the plaintiff - No advantage can be taken by the petitioner from the report of local Commissioner at the stage as the report is yet to be proved in accordance with law - The contentions put forth by the learned Counsel for

the petitioner are to be proved during trial in accordance with law - The petition found without merits - Petition dismissed. [Paras 5(c) and 5 (d)] Title: Raj Kumar vs. Rakesh Kumar Page-484

Code of Civil Procedure, 1908 – Order 39 rules 1 and 2 read with Section 43 of Patent Act, 1970 - Interim injunction - The Subject Patent is old and well established - Defendant neither has any patent in its name nor did it lay any challenge at time when plaintiff if had applied for the subject patent or even after the patent was granted in favour of the plaintiff – Held – The facts do create prima facie case and balance of convenience in favour of the plaintiff – Temporary injunction granted. Title: Boehringer Ingelheim International GMBH & another vs. Dr. Reddy's Laboratories Ltd. Page-712

Code of Civil Procedure, 1908- Order 39 Rule 1 & 2- Order of Ld. Additional District Judge-III, Kangra at Dharamshala, directing the parties to maintain status quo qua the nature and possession of the suit property has been assailed- Held- Once the title of the defendant is not questioned by seeking appropriate relief in accordance with law, plaintiff cannot be said to have right to seek injunction against the defendant- Prima facie case not be made out- Petition allowed- Order of Ld. Additional District Judge is set aside. Title: Sangeeta vs. Kalpana Sood Page-117

Code of Civil Procedure, 1908- Order 39 Rule 1 and 2- **The Patents Act 1970**- Section 13(4) – Suit of the plaintiff for permanent injunction for restraining the defendant infringing the patent rights of the plaintiff- Held- Patent in issue i.e. 'IN301' was granted in favour of the plaintiff- Prima facie case and balance of convenience in favour of the plaintiff- Ad-interim protection made absolute. (Para 16, 17, 23) Title: Boehringer Ingelheim International GMBH & Co. & another vs. Macleods Pharmaceuticals Ltd. Page-396

Code of Civil Procedure, 1908 – Order 47 - Review - Ground of – Held - Review, under aforesaid provision of law is available to any person considering himself aggrieved against an order on account of some mistake or error apparent on face of the record or who, from discovery of new and important matter or evidence which, after the exercise of due diligence are not within his knowledge or could not be produced by him when the order was passed is able to make out a case - Where as, the right of appeal is absolute and such right can always be exercised by assailing the order impugned on the ground

of illegality and material irregularity, which can have wide scope - The exercise of right to seek review of an order, if rejected, will not bar the remedy to file appeal - Petition allowed. (Paras 13 & 14) Title: Raj Kumar Sood vs. Commissioner, Municipal Corporation, Shimla Page-503

Code of Civil Procedure, 1908- Section 100- Order 23- Regular Second Appeal- Petitioner challenged the judgment and decreed passed by Additional District Judge-I, Shimla (Camp at Rohru) affirming the judgment and decree passed by Ld. Civil Judge (Junior Division), Jubbal, whereby suit of the plaintiff for declaration and injunction came to be dismissed- Held - Careful perusal of Order 23 Rule 1(4)(b)CPC, clearly reveals that where the plaintiff withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim- Appeal dismissed. (Para 11, 12) Title: Krishan Kumar & another vs. Kalawati & others Page-41

Code of Civil Procedure, 1908 - Section 115 - Defendant Bank initiated the process of recovery against the plaintiff by taking possession of vehicle belonging to the plaintiff, which was challenged – Held -- Paintiff defaulted in making the payment of installment of loan account, as a consequence of which, defendant bank was compelled to issue notice / remainder upon the plaintiff enabling her to deposit the amount, but once she failed to do so, defendant bank cannot be estopped from taking consequential action pursuant to breach of terms and conditions of the loan agreement including taking possession of the vehicle in question - Mere fact that defendant bank with a view to recover the loan amount initiated recovery proceedings before the DRT Chandigarh cannot be ground to grant Ad-interim injunction in favour of the plaintiff, who is a defaulter - The plaintiff was required to prove that prima-facie case is in her favour and in case the interim relief is denied to her great prejudice and irreparable loss which cannot be compensated would be caused to her - The plaintiff is defaulter so is estopped to claim that there is prima-facie case in her favor -- Onus was upon her to prove that possession of the vehicle is being taken illegally and unauthorizedly in violation of terms and conditions of the loan agreement by the defendant bank, which she failed to do - Petition dismissed.(Paras11, 12 &13) Title: Tara Vati vs. UCO Bank Page-516

Code of Criminal Procedure, 1973- Section 374- **Indian Penal Code, 1860**-

Sections 302, 323, 324- **Arms Act, 1959**- Sections 25 & 27- Appeal against conviction- Held- Defence of false implication not probable- Nothing on record to discredit the version of eye witness. (Para 15, 18) Title: Lakhvir Singh @ Happy vs. State of H.P. **(D.B.)** Page-130

Code of Criminal Procedure, 1973- Section 374- **Indian Penal Code, 1860**- Sections 447, 147, 506, 323, 325, 452, 302 read with Section 149- **Scheduled Castes and Scheduled Tribes Act, 1989**- Section 3 (1)(v)(x)- Appeal against conviction- Held-

A. Enmity- the enmity is always a double-edged weapon. It can be the motive of offence or can be the means to falsely implicate the enemy. (Para 11, 29)

B. Reasonable doubt- The very genesis of prosecution story is rendered doubtful and prosecution has failed to prove it's case beyond are reasonable doubts. (Para 12 to 28, 31)

Criminal Appeal No. 240 of 2017 is allowed and Criminal appeal No. 281 of 2917 is dismissed. (Para 32, 34) Title: Mukesh alias Bittu & others vs. State of H.P. & others **(D.B.)** Page-139

Code of Criminal Procedure, 1973- Section 374- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 20, 52-A- Appeal against conviction- 4Kg 200 gm of charas- Two samples of 25 gm each were taken out- Held- Investigating Officer had not chosen to comply with Section 52A of the Act- Sample was not representative of entire bulk as such appellants can be held to be in conscious possession of 25 gms of charas which as per the Act is small quantity- Appeals disposed of accordingly- Sentence already undergone. (para 15, 28, 29) Title: Ashok Kumar vs. State of H.P. **(D.B.)** Page-158

Code of Criminal Procedure, 1973- Section 374- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Section 20- Appeal against conviction- Charas weighing 1 kg 600 gms- Held- Statements of spot witness are worth credence and recovery of charas has duly been proved from exclusive and conscious possession of appellant- Non association of independent witness is not fatal- Appeal dismissed. (Para 11, 12, 13) Title: Lal Chand vs. State of H.P. **(D.B.)** Page-232

Code of Criminal Procedure, 1973- Section 397- Appeal dismissed in default- Held- Litigant cannot be allowed to suffer on account of absence of his Counsel, rather in such like situation Court is bound to decide the appeal on

merits- Petition allowed with the direction to Ld. Sessions Judge to decide the appeal afresh in accordance with law. (Para 4, 6) Title: Satpal Chauhan vs. Surender Mohan Sirkeck Page-255

Code of Criminal Procedure, 1973- Sections 397, 227, 228**- Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 8, 20, 29- Quashing of charges- Held- Complaint against the petitioner is filed without prior express permission of the Court and as such, it cannot be held to be maintainable- Power to file supplementary complaint is subject to prior permission of the Court and power to file supplementary complaint is akin and drawable from the power enshrined in Section 173 (8) Cr.P.C.- Petition allowed- Complaint and proceedings quashed and set aside. (Para 13, 18, 20, 21) Title: Mohar Singh vs. Narcotics Control Bureau Page-239

Code of Criminal Procedure, 1973- Sections 397, 401 & 156(3)- Revision- Seeking direction to send the complaint filed under Section 156(3) Cr.P.C. for investigation- Ld. Judicial Magistrate First Class, Kasauli dismissed the complaint solely on the ground that FIR No. 60 of 2021 already stands registered against the persons named in the complaint lodged at first instance by the complainant- Held- Court with a view to ascertain the correctness and genuineness at the allegations leveled in the complaint, can either direct lodging of FIR or fresh investigation in the matter- Petition allowed with direction to Ld. Court below to decide complaint filed under Section 156 (3) Cr.P.C. afresh in accordance with law. (Para 21 Title: Vipasa vs. State of H.P. Page-49

Code of Criminal Procedure, 1973 - Section 438 read with Sections 420, 406 Indian Penal Code, 1860 - Grant of anticipatory bail - The cheque book was got issued by the petitioner against the account of complainant in the year 2006 - The fact that complainant signed 25 blank cheques and handed them over to petitioner speaks for itself - As per the allegations, 11 cheques were issued in between 2006 misused, about which the complainant came to know in the year of 2014 - The complaint was filed by the complainant on 25.12.2019 - All these facts prima facie raise inference that transactions inter-se the parties at one stage, were clearly consensual - Bail granted. (Para 10) Title: Mohinder Nath Sofat vs. State of H.P.Page-552

Code of Criminal Procedure, 1973 - Section 439 read with Sections 20, 25 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 - Bail -

Successive bail application -- Maintainability of -- Recovery of 1 kg 555 grams of Charas --Existence of CDR details of accused persons has not been considered as circumstance sufficient to hold prima facie case against accused person and this fact has made out a case for maintainability of successive bail application - Except the existence of CDRs and disclosure statement of accused no other material appears to have been collected against petitioner and the disclosure made by accused cannot be read against petitioner -- It is not the case that on enlargement of petitioner on bail, other trial before the Ld. Special Judge shall be adversely affected - Bail application allowed - Petition disposed of.(Para 17, 18 &19) Title: Saina Devi vs. State of H.P. Page-542

Code of Criminal Procedure, 1973 – Section 439 Read With Section 20 and 29 of Narcotic Drugs and Psychotropic Substances Act 1985 - Bail - Commercial quantity - Recovery of 1 kg and 998 grams of cannabis from accused persons - Held - As per the status report, the cannabis recovered is of commercial quantity so rigors of section 37 of NDPS Act are attracted - In the petition, the petitioner succeeded in making out case for his enlargement on bail on the ground that recovery of contraband in question was effected from the bag belonging to co-accused Deepak Kumar – Search-cum-seizure memo prepared, post recovery of contraband does not bear signatures of the petitioner - From the records, it appears that CDRs does not indicate any call having been made by the petitioner - The factors brought forth by the petitioner are sufficient to be considered as reasonable grounds in terms of section 37 of NDPS Act for believing that petitioner is not guilty of offences alleged against him and therefore, he has made out a case for enlargement on bail --Bail granted -- Petition disposed of. [Para 4 (i) & 4 (ii)] Title: Rakesh Kumar vs. State of H.P. Page-571

Code of Criminal Procedure, 1973 - Section 439 Read With Sections 21 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 and Sections 181,192 and 196 of Motor Vehicle Act, 1988 – Bail – Held -- Recovery of 142 grams heroin from the vehicle occupied by the petitioner - Quantity of contraband in the case is in intermediate quantity and rigor of section 37 of and NDPS Act will not be applicable - Contraband recovered is less than commercial quantity is not itself sufficient to grant bail -- Keeping in view the substantial quantity of heroin recovered from the petitioner, it will not be unreasonable to assume that petitioners were carrying the contraband for sale to consumer which definitely include adolescents and young students -

Absence of any other case against the petitioners does not necessarily means that the petitioners are first offender -- Bail application dismissed. (Para 9, 11 & 12) Title: Dilbar Khan vs. State of H.P. Page-583

Code of Criminal Procedure, 1973- Section 439- Bail application- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 20 and 29- Charas weighing 1 Kg 790 gm- Held- Pre-trial incarceration of the petitioner is not going to serve any fruitful purpose- Complicity of the petitioner in the alleged crime is not prima facie made out- Bail allowed subject to conditions. (Para 11, 12, 13) Title: Dharma Devi vs. State of H.P. Page-261

Code of Criminal Procedure, 1973- Section 439- **Indian Penal Code, 1860**- 376(1), 376(D), 354, 120-B & 201 - **Protection of Children from Sexual Offences Act, 2012**- Sections 6 & 17 - **Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989**- Sections 3(i)(w)(i)(ii) 3(II)(va) – Held- Having read statements of the victim-prosecutrix recorded under Section 164 Cr.P.C. juxtaposing her statement recorded under Section 154 Cr.P.C., there appears to be force in the submission of learned counsel for the petitioners that version put forth by the victim-prosecutrix is totally contradictory and cannot be relied upon on its face value- Victim/ prosecutrix was in touch with all the accused for quite long and even in the past she has been meeting bail petitioners- No reason to curtail the freedom of the bail petitioners- Normal rule is bail and not jail- Bail granted subject to conditions. (Para 8, 15, 17) Title: Ajay Kumar @ Kala vs. State of H.P. Page-68

Code of Criminal Procedure, 1973- Section 439- **Indian Penal Code, 1860**- Sections 376, 363 and 506- **Protection of Children from Sexual Offences Act, 2012**- Sections 6 and 12- Petitioner has approached the Court for seeking regular bail on the ground that statement of the victim has already been recorded in trial- Held- Plea of implied consent of victim not tenable- A Coordinate Bench of this Court had rejected the bail petition of the petitioner and thereafter Ld. Special Judge has also rejected the bail application of petitioner- No changed circumstance to reconsider the bail made out- Petition dismissed. (Para 11, 29) Title: Joginder @ Abhishek vs. State of H.P. Page-181

Code of Criminal Procedure, 1973- Section 439- **Indian Penal Code, 1860**- Section 376- **Protection of Children from Sexual Offences Act, 2012**- Sections 4 & 6- Bail application- Held- Pre-trial incarceration of the petitioner is not going to serve any fruitful purpose- Bail allowed subject to conditions.

(Para 8 & 10) Title: Bhajan Singh vs. State of H.P. Page-266

Code of Criminal Procedure, 1973 - Section 439 Read With Sections 20 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 - Bail - Third successive regular bail application – Maintability of - Recovery of 3 kg and 382 grams of cannabis from possession of accused arrested with the aid of section 29 of NDPS Act – Held – Successive regular bail application under section 439 of CrPC can be maintained only if there are changed circumstances which warrant the grant of bail - While deciding CRMPM number 1531 of 2021, this court had taken into consideration the fact that another case under NDPS Act was pending against the petitioner - Another case under section 20 of NDPS Act is registered against the accused at police station, Manali - Bail cannot be granted - Petition dismissed. (Para 15 & 16) Title: Jeet Ram vs. State of H.P. Page-558

Code of Criminal Procedure, 1973 - Section 439 read with Sections 21 and 29 of Narcotics Drugs and Psychotropic Substances Act, 1985 – Bail in intermediate quantity when second FIR lodged - In earlier FIR heroin measuring 11.20 grams was recovered from the accused - Pending case, the petitioner was found in possession of 4.65 grams which is small quantity heroin - The prosecution has alleged that the accused is involved in the prohibited business of drugs – Held – No material on record suggestive of any sale of heroin to its consumers - Such a quantity cannot be presumed to be possessed for sale to consumers in absence of any specific evidence - The recovery of heroin / contraband from petitioner on earlier occasion also prima-facie reflects his addictive user of heroin – Bail granted – Petition allowed. (Para 6 & 8) Title: Sunil vs. State of H.P. Page-527

Code of Criminal Procedure, 1973 - Section 439 read with Sections 21 and 29 of NDPS Act, 1985 – Bail in intermediate quantity - Ground of parity - Similar allegations against both accused persons – one accused already been released on bail by Court on similar allegations levelled against him - The petitioner is also entitled to bail on the ground of priority -- Bail granted.(Para 8) Title: Sunil vs. State of H.P. Page-527

Code of Criminal Procedure, 1973 - Section 439 Read With Sections 341, 323, 302, 201 read with Section 34 of Indian Penal Code, 1860 -- Bail in Murder case -- As per the prosecution, the cause of death was due to assault with sticks on head of the deceased - No medical evidence that the blunt force

injuries found present on the body of deceased were accumulatively or singly sufficient to cause death - Medical opinion suggests the cause of death from asphyxia secondary to antemortem wet downing - Held - The material on record is not sufficient to arrive at prima facie conclusions to allegations against the petitioner - Bail granted - Petition allowed. (Paras 5 & 8) Title: Pankaj vs. State of H.P. Page-564

Code of Criminal Procedure, 1973 - Section 439 read with Sections 39 (1)(A), 39(2) 40 & 44 of HP Excise Act and Sections 420, 467, 468, 471 and 120–B of IPC --Criteria of bail-Petitioners contended that investigation for them has already been completed and nothing incriminating has been found against them - As petitioners, Harish Kumar and Kartar Singh Alias Karan, were simply the salesman working under contractor Neeraj Thakur and obeyed the dictates of their master only and other petitioner Sunil was running licenced Ahata - There is no allegations against the petitioners that they had any role in manufacture of such liquor or its procurement and investigation reveals that consignment was received through another employee of the contractor – Held - Petitioners are in custody since 25.01.2022 and their custody will not yield any fruitful purpose – Pre-trial incarceration cannot be ordered as a matter of rule and further the petitioners are permanent residents of State of Himachal Pradesh so there is no likelihood of their absconding from the course of justice -Bail granted - Petition allowed.(Para 7, 10 & 13) Title: Harish Kumar alias Rishu vs. State of H.P. Page- 587

Code of Criminal Procedure, 1973 - Section 482 read with Section 186, Indian Penal Code, 1860 - Questions of pending proceedings - Complaint filed on behalf of Sub Divisional Police Officer, Parwanoo against the accused under section 186 IPC - Held - Prosecution under section 186 IPC is governed by provisions of section 195 of Cr PC, wherein it is provided that no court shall take cognizance of offence punishable under section 186 IPC except on the complaint in writing of public servant concerned or of some other public servant to whom the said public servant is administratively subordinate - These provisions are mandatory and its non compliance is fatal to the prosecution - Complaint has been filed by SHO Police Station, Parwanoo and there is no complaint made either by SDPO, Parwanoo or any other officer higher in rank to him - In view of non compliance of provisions of section 195 Cr PC prosecution of petitioner not sustainable and accordingly quashed –

Petition stands disposed of. (Para 4, 5 & 6) Title: Tirtha Nand vs. State of H.P. Page-532

Code of Criminal Procedure, 1973 – Section 482 – Inherent jurisdiction - Prayer for interim relief not to arrest petitioner being proclaimed offender - Held - The petitioner was declared as proclaimed offender after following prescribed procedure and therefore he was not entitled for anticipatory bail - Accepting the custody of petitioner and enlarging him on bail would be equivalent to granting him anticipatory bail - Proclaimed offender has to surrender before the court and explain the reasons for his absence and in the event of finding sufficient grounds for his absence or non-availability, the court may recall declaration of pronouncing him proclaimed offender or otherwise to pass an appropriate order for his Police or judicial custody as the case may be - Petition dismissed with the direction to the petitioner to surrender before the Ld. Court for explaining reasons for his non-availability by filing appropriate application.(Paras17 & 21) Title: Jagdish vs. State of H.P. Page-534

Code of Criminal Procedure, 1973 – Section 482 read with Section 336 Indian Penal Code, 1860 -- Quashing of final report prepared under section 173 of Cr PC - Held -- Provisions of section 482 CrPC cannot be invoked by a party at the throw of the hat when there is a procedure prescribed under CrPC which has to be adhered to after lodging of FIR -- In case the High Courts start interfering with this procedure by invoking section 482 of Criminal Procedure Code at any and every stage without permitting the trial courts to exercise the jurisdiction which stands conferred upon them the entire machinery of trial court is likely to collapse as every accused would approach this Court under section 482 of code of criminal procedure asking for quashing of FIR as well as subsequent criminal proceedings -- Proceedings are ordered to be closed but with the observations that petitioner shall be at liberty to raise the issue before Ld. Trial Court at appropriate stage – Petition stands disposed of. (Para 4 & 5) Title: Dinesh Dutt vs. State of H.P. Page-696

Code of Criminal Procedure, 1973- Section 482- **Contract Labour (Regulation and Abolition) Act, 1970**- Sections 28(3), 29(1), 35(2)- Held- Labour Inspector has considered the petitioner as a contractor without any material on record, as such, petitioner cannot be said to be a contractor- No action has been taken against the contractor but against a person who was

not liable to be prosecuted in his individual capacity- No material to prosecute petitioner- Petition allowed. (Para 13, 14, 18) Title: Nikhil S. Nayak vs. State of H.P. Page-197

Code of Criminal Procedure, 1973- Section 482- **Indian Penal Code, 1860**- Sections 279, 337 & 338- Held- The offence involved in the case does not involved moral turpitude and as such have no harmful effect on the society or its moral fabric- Petition allowed. (Para 9, 10) Title: Vipin Kumar vs. State of H.P. & others Page-192

Code of Criminal Procedure, 1973- Section 482- **Indian Penal Code, 1860**- Section 306 read with Section 34- Petition to quash the proceedings in the court of Ld. Additional Sessions Judge, Nalagarh, on the ground that no case is made out against the petitioner- Suicide note nowhere specifically discloses the name of the petitioner- Element of abatement is absolutely missing- Petition allowed- FIR and consequent proceedings in the Court of Additional Sessions Judge, Nalagarh are quashed and set aside. Title: Ashish Kumar vs. State of H.P. Page- 206

Code of Criminal Procedure, 1973- Section 482- **Negotiable Instruments Act, 1881**- Section 138- Ld. Court below found sufficient grounds to proceed against the accused for his having committed offence punishable under Section 138 of the Act- Revision before Ld. Additional Sessions Judge also dismissed on the ground that there is a triable issue that cannot be decided in the present proceedings- Held- No illegality and infirmity in the well reasoned order of Ld. Additional Sessions Judge- Petition dismissed. (Para 7, 9, 10) Title: M/s Sohan Lal Vinod Kumar vs. Raj Kumar Page-62

Constitution of India 1950 – Article 226 – Service matter - The learned HP State Administrative Tribunal directed the Commission through Secretary to consider the case of petitioner for change of category from General to scheduled caste in terms of order dated 2.11.2017, passed by the Tribunal in T A. number 3825 of 2015 –Held-Respondent was admitted to selection process under general category where as he should have been rejected at the time of scrutiny - Respondent despite his having wrongly ticked his category as general that too on Blue form was permitted to participate in written test and thereafter in qualification skill test and it was only at the time of interview when the respondent claim to be candidate belonging to scheduled caste he was not interviewed and his candidature was rejected -There was report of

committee constituted by the commission itself that there is no fault of respondent and it had recommended to consider the candidates of respondent under scheduled caste category-As such the petitioner had no option but to consider him under the category of scheduled caste and thereafter offered appointment if he was selected-The order passed by the Tribunal was not suffering from any illegality and infirmly and accordingly up held - Petition dismissed.(Para 8 & 9) Title: H.P. Staff Selection Commission vs. Rajesh Chauhan & another **(D.B.)** Page-648

Constitution of India, 1950 -- Article 226 -- Minimum educational qualification for compassionate appointment – Held -- The case of the candidate for appointment on compassionate grounds has to be assessed in terms of scheme /circular prevalent as on the date of death of deceased employee -- Case of the petitioner was rejected on the basis of subsequent instructions / circular which came into existence in the year 2016, so, the impugned act of respondent department is not sustainable – Petition allowed and the respondent department is directed to consider the case of the petitioner for grant of appointment on compassionate basis in terms of policy in vogue as on the date of death of deceased employee read with office memorandum dated 24-02-2016.(Paras 7 & 8) Title: Om Prakash vs. State of H.P. Page-700

Constitution of India, 1950 – Article 226 – Petitioner claimed that since he has been married to Sadiq Mohammed, who belong to a Caste/Community, which is recognized as OBC in State of Himachal Pradesh, so, respondent may be directed to allow her application for issuance of a certificate for eligibility for reservation of jobs for Other Backward Classes - In order to protect the salutary principle enshrined in Articles 341 and 342 of the Constitution of India, Hon'ble Apex Court repeatedly has held that migration for whatsoever reason from one state to another cannot be a sufficient ground for cleaning benefit of being SC/ST/OBC in the migratee State - The objective criteria for declaration of a particular caste or tribe as SC/ST/OBC in one State is the specific level of backwardness social disparage and economic disadvantages prevalent in such state -- Though, one caste notified as SC/ST/OBC in one State may also find place in the list of notified SC/ST/OBC in the other but the same has not been held to be sufficient for claiming the benefit in other State by a person after migration for the reason that degree of disadvantages of various elements which constitute the data for specification may be entirely

different - Petitioner is married in the state of Himachal Pradesh to a person belonging to OBC and even the caste to which petitioner belonged in the state of her origin has been declared as OBC in the state of Himachal Pradesh which cannot be held sufficient to carve out an exception to the mandate of law - Petition found without merits – Petition dismissed.(Paras 19, 20 & 22) Title: Subeena Sabri vs. State of H.P. **(D.B.)** Page-627

Constitution of India, 1950 – Article 226 – Read With Sections 34 (i) (d) and (dd) of HP Tenancy and Land Reforms Act, 1972 challenged on the ground that they are ultra vires to principles of equity as this section tends to create a special class for members of armed forces by entitling them to eject tenant from talented land up to maximum of 5 acres – Held -- The contention of petitioner is misconceived as section 104 (1) (i) operates in completely different domain than the field of operation prescribed by Section 34 of the Act -- The special rights conferred upon the members of armed forces and certain other categories viz., minors, unmarried women, divorced or separated women etc. does not militate against the purpose of the Act, though the Act has been connected for benefit of tenants - The saving of certain rights in favour of a force at categories of persons is justified keeping in view the intent and purpose of the Act - There is no violation of Article 14 of Constitution of India in view of provision of Article 31 (b) of the Constitution of India - Petition dismissed. (Para 5, 11 & 12) Title: Subhash Chand vs. State of H.P. & others **(D.B.)** Page-612

Constitution of India, 1950 – Article 226 – Service matter - Field posting - Candidate has to complete mandatory peripheral service of one year to be eligible to apply for the post of Senior Resident – Held -- There is no serious dispute on the issue that only two incumbents had applied for the post of senior resident in the specialization of hospital administration and the only other candidate was held to be ineligible by the selection committee for want of basic medical educational qualification itself, then, in case this petition is allowed and the petitioner is permitted to join the post of senior resident, no prejudice shall be caused to anyone and rather in turn, State would also be getting a qualified professional to man the post of senior resident in the medical college concerned and his appointment will serve larger interests - The petition allowed by directing the respondent department to offer appointment to the petitioner against the tenure post of senior resident in the specialization of hospital administration, without insisting upon for no objection certificate

on the ground of petitioner having served in the peripheral area / field posting. (Paras 10 & 11) Title: Dr. Abhishek Thakur vs. State of H.P. Page-705

Constitution of India, 1950 - Article 226 - Service matter - Parity in the pay scale -- Petitioners claimed parity of pay scale with their counterparts in Punjab – Held -- The petitioners cannot claim parity of pay scale with their counterparts in Punjab because the pay scales are fixed in view of staffing pattern, recruitment and promotion rules, method of recruitment, educational qualifications and financial resources -- The petitioners cannot claim parity of pay scale with their counterparts in Punjab – However the respondents are directed to reconsider the case of the petitioners by removing the anomaly and allow them appropriate higher pay than pay granted to feeder category post of workshop instructors.(Paras 12, 15 & 18) Title: Attar Singh & others vs. State of H.P. Page-660

Constitution of India, 1950 – Article 226 - Service matter - Petitioner aggrieved from the act of the respondents, as they after his superannuation vide office order dated 19.05.2018 arbitrarily deducted an amount of Rs. 2,35,972/- from retirement gratuity without following any process – Held - Petitioner was not apprised by the department at any stage that certain excess payments stood made to him on account of wrong fixation of his pay and in Rafiq Masih's case Honorable Supreme Court has held that recoveries by employer would not be permissible in law from the employees belonging to class III and class IV service and from retired employees or employees who are due to retire within one year of order of recovery - Office order dated 19.05.2018 is held to be bad to the extent amount of Rs. 2,35,972/- has been deducted on account of excess payment from the retirement gratuity of petitioner and the same is quashed – Respondents are directed to make good the said amount with in a period of 90 days from today - Petition allowed. (Paras 7 & 10) Title: Rattan Lal vs. State of H.P. & others Page-429

Constitution of India, 1950 - Article 226 -- Service Matter -- The respondent ordered to reduce the pay of the petitioner w.e.f the year 1995 and further directed the recovery to be effected from her salary -- Held - Order dated 06.01.2016, 03.12.2008 and order dated 05.11.2014 have attained the finality due to which respondent number 3 cannot supersede these orders and specifically when these orders had imprimatur of this court through orders passed from time to time in different proceedings -- The respondents are

restrained from affecting any recovery from the petitioner in pursuance to order dated 06.01.2016 and 08.01.2016 - The respondents directed to refund the entire amount to the petitioner with interest at the rate of 6% per annum within eight weeks from judgment and the petitioner held entitled for pay band (iv) from due date - Petition stands disposed of.(Paras 13, 14, & 17) Title: Sulekha Sharma vs. State of H.P. & other Page-594

Constitution of India, 1950 - Article 226 - Service matter - Vide order dated 2nd August 2019 the representation of the petitioner for promotion as Headmaster was rejected – Held - It is not in dispute that promotion to the post of lecturer, in the first instance had been forgone by the petitioner and he was promoted subsequently in September, 2006 when he made request by way of correspondence - It is not the case of the respondents there was some other orders whereby petitioner was promoted as lecturer after having afforded him opportunity to opt - The case of petitioner clearly fail within the ambit of directions issued by a Division Bench of this Court in CWP number 1145 of 2011 decided on 05.07.2012 - The order passed against the petitioner quashed and set aside and the respondents are directed to promote him as headmaster from the date his immediate junior was promoted to the post and grant him all consequential benefits - Petition disposed of. (Paras 13 & 14) Title: Balbir Singh vs. State of H.P. Page-603

Constitution of India, 1950 - Article 226 - Service matter / Respondent claimed that since the State of Himachal Pradesh follows Punjab pattern as for as pay scale is concerned, so, the post of junior scale stenographer is required to be upgraded to senior scale stenographer w.e.f. 16.12.1992, which claim of the petitioner refuted by the appellants on the ground that the state of Himachal Pradesh is not bound to follow the Punjab pattern - The respondent claimed before Ld. Single Judge that he himself undertook to forego his promotion in stream of senior scale stenographer and as such, he was promoted as Excise and Taxation Inspector - Petitioner stated no objection if any junior officer is promoted to post of senior scale stenographer - Held - Since promotion of petitioner to the post of Excise and Taxation Inspector was effected after his having furnished undertaking that he will forego his promotion in the stream of senior scale stenographer and in case he is promoted as Excise and Taxation Inspector, there was no occasion for the Ld. Single Judge to issue direction to the appellants to upgrade the post of junior scale stenographer to the post of senior scale stenographer w.e.f. 16.12.1992 -

The order of Ld. Single Judge cannot be said to be justifiable and sustainable in the eyes of law - Appeal allowed and the impugned judgment dated 11.11.2010 and 05.03.2012 passed by the Ld. Single Judge in CWP-T Number 16707 of 2008 and RP number 139 of 2011 are quashed and set aside. (Paras 5 & 6) Title: State of H.P. vs. Pramod Kumar **(D.B.)** Page-685

Constitution of India, 1950 - Article 226 – Service matter -Respondent No.1 framed the Recruitment and Promotion Rules for the posts of AMOs under Article 309 of constitution of India-Petitioner in CWPOA number of 2223 of 2021 regularized as a AMOs with effect from 06.10.2016 and their pay fixation was also made in terms of communication dated 27.11.2015 and was fixed at Rupees 15000 per month as basic pay-Petitioners claimed that their pay fixation is not proper – Held - Fixation of pay and determination of parity in duties is a function of Executive and scope of Judicial review is limited, however, this court cannot be mere mute spectator even in the case where administrative action is found unreasonable, unjust and prejudicial to a section of employees or such action is otherwise harsh and arbitrary - 2012 rules have been framed by the state government in exercise of powers emanating from the proviso to Article 309 of the Constitution of India and once the State Government had omitted to include the category of AMOs in the schedule appended to the said rules it cannot be allowed to turn around and try to justify its action of so called equitable consideration-There was nothing to prevent the State Government to include the category of AMOs in the schedule appended to 2012 Rules-Communication dated 27.11.2015 being mere administrative instructions will not supersede 2012 rules framed under Article 309 of Constitution of India-Both petitions allowed - The respondents are directed to fix the initial pay of petitioners in both the petitions at rupees 18450 from the respective date of their regulation and they will be entitled to consequential benefits. (Paras 10, 19 & 20) Title: Dr. Sanjay Guleria & others vs. State of H.P. Page-786

Constitution of India, 1950 – Article 226 – The petitioners sought relief that in case the seats remain vacant after third round of counseling the Institutions may be allowed to fill the remaining vacancies it's from amongst candidates eligible as per NCTE regulations in consonance with the judgment dated 20.9.2010 of this Court in CWP Number 5728 of 2010 and the petitioner institutes may be allowed to fill up management quota up to extent 20% to 240% of sanctioned seat strength of each Institute and such admissions may

be allowed to be made from any source – Held – The question before full bench of this court after judgment in CWP No. 5728 of 2010 & CWP No. 7688 of 2013 was regarding authority of university to conduct the counseling and allocate the students to B.Ed. colleges, if seats remain vacant, where candidates are available otherwise than counseling – Hon'ble Full Bench held that judgment rendered in CWP No. 5728 of 2010 as not laying good law – Admission of students made on basis of judgment rendered in CWP No. 5728 is in jeopardy in view of decision of Full Bench – The interest of the students who have been admitted pursuant to interim order passed by this court needs to be protected because the students on the basis of interim orders passed by this court pursued more than two years of courses - Showing indulgence at the stage will cause extreme hardship to such students apart from irrepable loss and injury and their entire careers will be at stake – Para 10 of order dated 10.1.2022 modified and the students who have already admitted to their respective courses by virtue of interim order dated 10.01.2022 are ordered to be protected - Application allowed and disposed of. (Paras 5, 13, 16 & 17) Title: Shimla College of Education vs. State of H.P. **(D.B.)** Page-767

Constitution of India, 1950 – Article 226 - Upon the exit of minorities shareholder the petitioner company became 100% subsidiary of JSTI Transformers Pvt. Ltd and accordingly applied for change for name to JSTI Transformers Private Limited which was approved by the Registrar of companies on 22.3.2018 and was entered in GSTIN on 5.9.2018, Importer - Exporter Code and Bank account on 08.09.2018 - Held -- In M/S Sozin Flora Pharma LLP supra similar dispute arose in context of conversion of petitioner from Partnership firm to limited liability Partnership -Petitioner approached the respondents for effecting the change of its name in the revenue record with regard to certain land but the respondents were granting permission to reflect such change, directed the petitioner to deposit the stamp duty and registration fee and the respondents are directed to enter the name of petitioners as M/s Sozin Flora Pharma LLP in revenue record within a period of 4 weeks - The present petition succeed and accordingly allowed in view of judgments of Hon'ble Apex Court.(Paras 15 & 16) Title: JSTI Transformers Pvt. Ltd. ss. State of H.P. & another **(D.B.)** Page-435

Constitution of India, 1950 – Article 226 service matter - Recovery of Rupees 2,08,520 /- (Rupees two lac eight thousand five hundred twenty only) was

effected from the retirement gratuity of the petitioner on the pretext of access payment of salary to the petitioner for the period 01.01.2013 to 28.02.2017 – Held -- Excess payment, if any, made to the petitioner by the employer was not the result of any misrepresentation or fraud on the part of the petitioner to the recovery made from petitioner is harsh and arbitrary - Petitioner was a class-III employee and his retrial benefits definitely meant a lot to him and this factor would far out way the equitable balance of the employers right to recover-Order of the respondents quashed and set aside and they are directed to release amount of retirement gratuity to the petitioner within 4 weeks from date of order along with interest at the rate of 6% per annum w.e.f 28.02.2017 - Petition disposed of. (Paras 9 and 10) Title: Devinder Kumar vs. State of H.P. Page-656

Constitution of India, 1950- Article 226 – **Indian Electricity Act, 2003**- Section 42(6)- Limitation Act, 1963- Section 5- Writ petition to set aside order passed by Electricity Regulatory Commission- Petitioner raised demand of Rs.9,09,284/- against the respondent-Company on account of a demand contract- Appeal of petitioner was dismissed on the ground of limitation- Held- No cogent reason as to why the appeal could not be filed within the period of limitation has been spelt out in the application under Section 5 of Limitation Act- Order of Appellate Authority not perverse- Petition dismissed. (Para 10, 11) Title: H.P. State Electricity Board & others vs. M/s Amar Roller Flour Mills & another Page-389

Constitution of India, 1950- Article 226- **H.P. Societies Registration Act, 2006**- Section 16- The petitioner who is founder member of Respondent No. 1 Society has sought for the quashing of orders passed by Secretary (Cooperation), H.P. in appeal and Registrar Cooperative Societies being not sustainable in law- Held- The findings which have been returned by the statutory authorities on the issues so raked up by the petitioner with regard to the increase of members of the Managing Committee from seven to eleven cannot be faulted with. (Para 18)

B. Findings which have been returned by the First Appellate Authority and Second Appellate Authority qua disqualification of the respondent in terms of Section 16 of the 2006 Act also call for no interference- Petition dismissed. (Para 22, 23) Title: Dr. Francina vs. The Bloom Education Society & others Page-7

Constitution of India, 1950- Article 226- **Indian Contract Act, 1872**- Section 137- Petitioner has sought writs in the nature of certiorari to quash memos and mandamus directing the respondents to release retiral benefits- Petitioner a Government employee stood guarantor of one Satya Prakash in respect of repayment of his loan to respondent Bank- Satya Parkash retired and loan remained unpaid and the same is being recovered from the retiral benefits of the petitioner- Held- The liability of the surety is co-extensive with that of principal debtor, unless it is otherwise provided by the contract- Petition dismissed. (Para 7, 8) Title: Chet Ram vs. Managing Director, HP State Cooperative Bank Ltd. & others **(D.B.)** Page-337

Constitution of India, 1950- Article 226- **Industrial Disputes Act, 1947**- Section 25F and 25G- Petitioner's prayer to refer the dispute to Labour Court-cum-Industrial Tribunal for adjudication came to be declined by the Deputy Labour Commissioner, on the ground of delay- Held- There is inordinate delay of 15 years and there is no explanation worth credence, ever came to be rendered on record by the petitioner qua such inordinate delay- No illegality and infirmity in the impugned order passed by the Deputy Labour Commissioner- Petition dismissed. (Para 5, 9, 10) Title: Lachhi Ram & others vs. The Deputy Labour Commissioner & others **(D.B.)** Page-81

Constitution of India, 1950- Article 226- Matters referred to the Full Bench in view of conflict of opinion between the Division Bench judgments- Held- Holding of common entrance test is not intended to ensure that all seats in the institutes are filled up but to ensure that excellence in standards of higher education is maintained and merit of the students is tested on certain parameters and this can never be cited as the reason for the seats remaining vacant- 2010 judgment of this Court in CWP No. 5728 of 2010, titled H.P. B.Ed College Association and ors. vs. State of H.P. & anr., supra does not lay down good law and later judgment of 2014 in CWP No. 7688 of 2013 titled HP Private Universities Management Association (H-PUMA) vs. State of Himachal Pradesh and others, supra, being in tune with the settled proposition of law on the subject, is correctly decided- Reference answered accordingly. (Para 24, 25) Title: Shimla College of Education & others vs. State of H.P. & others **(F.B.)** Page-276

Constitution of India, 1950- Article 226- **National Institute of Pharmaceutical Education Research Act, 1998**- Sections 7, 32- Question

raised as to whether M.S. Pharm Degree awarded by the National Institute of Pharmaceutical Education and Research (NIPER) is equivalent to the degree of M. Pharma issued by the other Universities-

a) Held- The State much less the Equivalence Committee constituted by the State cannot hold to the contrary as the Pharmacy Council of India like all other Councils like Bar Council, Medical Council etc. is the apex body and its directions and instructions are binding on all bodies, institutions etc. offering courses in pharmacy, irrespective whether it is a Bachelor Course or a Master Course. (Para 17)

b) Mere nomenclature of the Degree cannot by itself be a ground to hold the Degree of M. Pharma to be not equivalent to the Degree of M.S. Pharm. (Para 18)

Writ petition allowed. Title: Yash Pal Singh & others vs. State of H.P. & others **(D.B.)** Page-324

Constitution of India, 1950- Article 226- Petitioner asserts his claim to the post of Assistant Sub Inspector (Pharmacist) on the ground that the sole candidate in the merit list did not join the post in question, therefore, petitioner having been placed in the 'extended list' deserved to be offered appointment on the said post- Petitioner was duly informed by the respondent through instructions issued on his admit card that the candidates placed in the extended list do not stand in the merit list- There was nothing wrong on the part of the respondents in not offering appointment to the petitioner for the post in question- Petition dismissed. (Para 4) Title: Umesh Thakur vs. Union of India & others **(D.B.)** Page-30

Constitution of India, 1950- Article 226- Petitioner has challenged the transfer order on the ground that he has not completed the normal tenure of three years- Held- Transfer is an incidence of service- A government servant holding a transferable post, neither holds a fundamental nor legal right to remain posted at one place or the other- Petition dismissed. (Para 8, 11, 12) Title: Roop Chand vs. State of H.P. **(D.B.)** Page-341

Constitution of India, 1950- Article 226- Petitioner has challenged the judgment passed by the Ld. Single Judge on the ground that none of the private respondents were having their specialization in entomology and apiculture and Selection Committee had selected ineligible candidates- Held-

As per advertisement, “Entomology and Apiculture” without there being any further qualification, was the discipline/specialization. Ph. D thesis of private respondents in Toxicology, Nematology and Acarology were the different branches under one umbrella of the discipline/ specialization i.e. “Entomology and Apiculture”. Since there was no ambiguity in the advertisement, no added meaning could be attached to the terms “concerned subject” and “particular discipline/subject”- Thus, the contention of the petitioner that Screening Committee had made ineligible candidates eligible cannot be countenanced- No fault in the view taken by the Ld. Single Judge- Appeal dismissed. (Para 14, 15, 16, 23) Title: Ajay Sharma vs. Dr. Yashwant Singh Parmar University of Horticulture & Forestry & others **(D.B.)** Page-369

Constitution of India, 1950- Article 226- Petitioner has sought a writ in the nature of mandamus directing the respondent to grant seniority to the petitioner above respondent No. 3- Petitioner has sought benefit of services rendered by him in the Census Department for the purpose of seniority- Representation of petitioner in this regard rejected by the Government- Held- Petitioner joined respondent Department after respondent No. 3 and hence respondent No. 3 was rightly placed above petitioner in seniority- Petition dismissed. (Para 20, 21, 22) Title: M.R. Potan & others vs. State of H.P & others **(D.B.)** Page-352

Constitution of India, 1950- Article 226- Recruitment and appointment of Police Constables- Eligibility criteria- State has assailed the judgment passed by the Ld. Tribunal- Held- It is well settled that the eligibility of a candidate is to be adjudged as on the last date of receipt of application for the post in question in terms of relevant advertisement and the prevailing service rules- Judgment passed by the Ld. Tribunal is in accordance with law- Writ petitions are accordingly disposed of. [Para 5(v)] Title: State of H.P & Ors vs. Harish Kumar & others **(D.B.)** Page-310

Constitution of India, 1950- Article 226- **The Administrative Tribunals Act, 1985**- Section 21- Petitioner has approached the Court being aggrieved and dis-satisfied with the order passed by the Ld. Central Administrative Tribunal, Chandigarh (Circuit Bench at Shimla)- Held- Repeated representations would not extend the period of limitation- Petitioner chose to remain silent for more than 10 years of the rejection- No illegality and infirmity in the impugned order passed by the Ld. Central Administrative Tribunal-

Petition dismissed. (Para 5 and 7) Title: Jai Prakash vs. Union of India & others **(D.B.)** Page-345

Constitution of India, 1950- Article 226- Transfer- Quashing of transfer on the grounds of short span, D.O. Note and violation of the Comprehensive Guiding Principles-2013- Held- Transfer is an incidence of service- The employer has unfettered power to effect transfer of its employees save and except on the ground of malafide arbitrariness- No legal right is vested in petitioner to remain at a particular place of posting- Petition dismissed. (Para 6, 9, 12, 13) Title: Dr. Vijay Kalia vs. State of H.P. & others **(D.B.)** Page-270

Constitution of India, 1950 – Article 227 – **Code of Civil Procedure, 1908** - Order 26 Rule 9 - Application filed under Order 26 Rule 9 CPC for appointment of local Commissioner dismissed by the Ld. Trial Court – Held - Onus is upon the plaintiff to lead cogent evidence in order to prove interference by the respondent and prove his case because under the provisions of order 26 rule 9 the court is not to act as an agent of either of the parties in assisting the parties to create evidence in their favour - Filing of the application appears to be abuse of process of law as no cogent explanation has come as to why evidence was not led by the plaintiff on the dates fixed by the learned court and preferred to file application for appointment of Local Commissioner - Petition found without merits and dismissed in limine. (Paras 4, 5 & 7) Title: Chanchal Kumar vs. Prem Parkash & another Page-425

Constitution of India, 1950 – Article 227 - Hindu Marriage Act, 1955 - Section 24 – Maintenance @ 6500/- per month granted in favour of respondent / wife from the date of filing the application till disposal of main petition - Criteria for granting maintenance - Held - The total income of the petitioner reflected as Rupees 3,45,625/- in the income tax return filed for the year 2018-19, so, possibility of petitioner now intentionally reflecting his income on the lower side due to matrimonial discord cannot be ruled out, so, the order for paying maintenance in some of Rupees 6500/- per month cannot be said to be on higher side -- In view of income of the husband, applicant was at least entitled for maintenance of Rupees 8000/- per month and after deducting and amount of Rupees 1500/- which she was already getting under Protection of Women from Domestic Violence Act, Rupees 6500/- as maintenance is justified - The petition found devoid of merits – Petition dismissed. (Para 5) Title: Amit Kumar vs. Aditi Sareen Page-691

Constitution of India, 1950- Article 227- **Code of Civil Procedure, 1908**- Order VI Rule 17- Application dismissed by the Trial Court- Held- Ld. Trial Court has dismissed the application in a slipshod manner without any due application of mind- Petition allowed with the direction to Ld. Trial Court to rehear the application under Order VI Rule 17 of Code of Civil Procedure. (Para 5) Title: Gulsher & others vs. Najar Ali & others Page-1

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H.P. Urban Rent Control Act, 1987- Section 24(5)- Revision- Petitioner assailed the order of Ld. Rent Controller, Shimla on findings of preliminary issue qua maintainability- Held- Findings of Ld. Rent Controller is erroneous and violative to the language of Section 14(3)(d) of the 1987 Act- Revision petition allowed and petition held to be not maintainable. (Para 14, 15) Title: Ramesh Chhabra vs. Harminder Singh Page-379

H.P. Urban Rent Control Act, 1987—Revision - Section 24(5) - Section 14 (iii) (c) Eviction - Amended provision in the year 2012 -- Right of tenant to re-entry in premises in rebuilt building - Eviction order modified to the right of tenant to re-enter the premises subject to mutually settelling new terms of tenancy with landlord and the right of tenant to enter the premises equivalent to the portion over which he had possession prior to eviction -- Petition disposed of accordingly.(Para 23) Title: Mukhtiar Chand & others vs. Ram Dass Sharma & others Page-454

H.P. Urban Rent Control Act, 1987—Revision, Section 24(5) - Section 14 (iii) (c) -- Grounds of eviction of tenant - Bonafide requirement for rebuilding and reconstruction - Unfit and unsafe condition of building was pleaded as a ground for eviction distinct than the requirement for reconstruction and rebuilding – Held - The landlord has used word "and" for carving out distinction between the grounds of eviction - Both grounds of eviction were considered separately and distinctly by the Rent Controller - Landlord has proved that he has sufficient means for the construction of building, otherwise also the arrangements of finance for the purpose of reconstruction is not a big deal in the modern commercial world where banks are providing financial assistance - Eviction order rightly passed – Tenant raised new objections before this Court which even not raised in Appeal - Revision dismissed. (Paras 15, 16, 21 & 22) Title: Mukhtiar Chand & others vs. Ram Dass Sharma &

others Page-454

H.P. Urban Rent Control Act, 1987—Revision, Section 24(5) - Section 14 (iii) (c) -- Grounds of eviction of tenant - Bonafide requirement for rebuilding and reconstruction - Unfit and unsafe condition of building was pleaded as a ground for eviction distinct than the requirement for reconstruction and rebuilding – Held - The landlord has used word “and” for carving out distinction between the grounds of eviction - Both grounds of eviction were considered separately and distinctly by the Rent Controller - Landlord has proved that he has sufficient means for the construction of building, otherwise also the arrangements of finance for the purpose of reconstruction is not a big deal in the modern commercial world where banks are providing financial assistance - Eviction order rightly passed - Revision dismissed. (Paras 15, 16, 18 & 19) Title: Swaran Ram & another vs. Ram Dass Sharma & others Page-466

H.P. Urban Rent Control Act, 1987—Revision, Section 24(5) – Section 14 (iii) © Eviction – Amended provision in the year 2012 – Right of tenant to re-entry in premises in rebuilt building – Eviction order modified to the right of tenant to re-enter the premises subject to mutually settelling new terms of tenancy with landlord and the right of tenant to enter the premises equivalent to the portion over which he had possession prior to eviction – Petition disposed of accordingly. (Para 21) Title: Swaran Ram & another vs. Ram Dass Sharma & others Page-466

‘I’

Indian Evidence Act, 1872- Section 27- Discovery of weapon of offence at the instance of appellant which is relevant under Section 27 of the Evidence Act. (Para 16)

Scientific Evidence- DNA- Scientific evidence collected by the investigating agency proved that DNA profile from the incriminating material found on the katta (country made pistol) matched completely with the DNA profile obtained from the blood sample of deceased Veena Devi- Appeal dismissed. (Para 17, 20) Title: Lakhvir Singh @ Happy vs. State of H.P. **(D.B.)** Page-130

Indian Evidence Act, 1872 – Section 68 – Will – Examination of attesting witnesses – Suspicious circumstances in Will – Held – It was the specific case

of the plaintiff that he executed a will and not a gift deed then it was incumbent upon the defendant to examine the sole surviving witness who alone could have stated about fact as to whether plaintiff number 1 had executed a will or a gift deed – Stamps in the instant case were purchased on 3.8.2000 as is evident from stamp papers, but the so called gift deed was executed a week later on 10.08.2000 – There is no explanation forth coming from the side of the defendant as to why the so called gift deed was not executed at the time of purchasing the stamp paper i.e. on 03.08.2000 – Defendant was none other than the daughter of plaintiff number 1 and therefore was in position to dominate the will of a plaintiff – The findings of courts below are perverse and not legally sustainable – Appeal allowed and the judgments and decree of Courts below set aside.(Paras 32, 33, 37 & 39) Title: Masadi & another vs. Krishani Devi Page-743

'L'

Land Acquisition Act, 1894 - Sections 4, 6 Read With Order 41 Rule 27 of Civil Procedure Code, 1903 – Notification for acquisition of land - Determination of market value – Additional Evidence in form of sale deed - Held - The sale deed with the applicant intends to prove shall help the Court in arriving just conclusion about a settlement of market value subject to the proof of genuineness of sale deed including the contents thereof -- Applicant allowed to lead additional evidence - Application stands dispose of.(Paras 13 & 14) Title: Jai Gopal vs. Collector, Land Acquisition Page-477

Land Acquisition Act, 1894 - Sections 11 & 30- Ld. Additional District Judge-II, Kangra at Dharamshala, returned the reference Petition to respondent No.1 on account of failure of said respondent to supply the list of legal representative of deceased- Held- Reference has to be answered in accordance with law- Even if some of the parties had died, the Ld. Court was not precluded from deciding the rights in respect of surviving parties- Order quashed and set aside with direction to the Reference Court to answer the reference strictly in accordance with law. (Para 7, 9) Title: Rekesh Kumar vs. Land Acquisition Collector Page-125

Land Acquisition Act, 1894 – Section 54- Appeal – Award passed by the Ld. Additional District Judge, Fast Track, Kullu, whereby compensation amount has been enhanced- Delay of 5 years 10 months in filing the appeal- Held- Appeal allowed with the direction that appellant shall not be entitled to

interest for the period of 5 years and 10 months. Title: Bishan Dass vs. Collector Land Acquisition Page-418

'M'

Motor vehicle Act, 1988 – Section 166 – Claim for compensation -- Liability to pay compensation in case of gratuitous passenger – Held -- Merely for the reason that permissible sitting capacity of vehicle was not exhausted would not mean that question raised by the insurer did not need to be examined, more so in the facts of the case - Registration certificate did say that authorized capacity of total travelers in the vehicle was 5 - The insurance policy covered the risk of 4+1 persons including the driver - There is no escape from the conclusion that deceased was travelling as gratuitous passenger in the goods vehicle in violation of terms of its insurance policy -- The insurance company is not liable to suffer the liability on the strength of breach of insurance policy -- However, the insurance company after payment of the award dated 22.11.2018 passed by Ld. Motor Accident Claims Tribunal shall recover the same from the registered owner of the vehicle -- Appeal allowed. (Paras 3(c) & 5)Title: Shriram General Insurance Company vs. Nirmala Devi & others Page-676

Motor Vehicle Act, 1988 - Section 166 -- In the instant case, Ld. Motor Accident Claims Tribunal has determined the potential income of deceased at Rs. 15,000/- per month and the Honorable Apex Court in Arvind Mishra's case had determined the potential income of injured student at Rs. 5,000/- per month in the year of 2010 -- The victim in that case was undergoing course in prestigious institute and the accident in the instant case occurred in the year 2015 - There is no specific evidence on record regarding merit or future prospect of the deceased - Therefore considering all relevant factors and the material which have come on record, it will be appropriate to determine the potential income of deceased at Rs. 12,000/- per month - Award dated 24.12.2018 passed by the Motor Accident Claims Tribunal Una in M.A.C. petition number 126 of 2016 is modified and the appellant is held liable to pay 70% of total compensation amount of Rs. 18,84,400/-, i.e. Rs. 13,19,080/- along with interest @ 9% per annum – Appeal stands disposed of. [Paras 3 (ii)] Title: National Insurance Company Ltd. vs. Inder Kaur & others Page-670

Motor Vehicle Act, 1988- Section 166- Appeal- Motor Accident Claims Tribunal awarded compensation of Rs.68,93,496/- alongwith interest @ 9%

per annum on account of death of Shiresh Bhatt in a motor accident- Deceased was an employee of Electricity Department- Held- No where in the conditions of the policy occupants of the vehicle were insured- Therefore, plea of appellant that Insurance Policy was covering the risk related to occupants of the vehicle is contrary to the terms and conditions of the policy, hence this plea of appellant is not sustainable- There is nothing on record to controvert or doubt the proof of income of deceased- Compensation correctly calculated- Appeal dismissed. (Para 9, 10, 11) Title: Assistant Executive Engineer, Phs/Div. vs. Hemanti Bhatt & others Page-363

'S'

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 – Section 26E read with the Section 31 B of the Recovery of Debts and Bankruptcy Act, 1993 - Whether secured creditors shall have priority over all other debts and all revenue taxes cesses and other rates payable to Central or State Government or blue local authorities-Held- SARFAESI Act and RDB Act declare priority of secured creditors upon secured assets over all revenue, taxes, cesses and other rates payable to Central Government or State government or local authorities- Provisions contained in SARFAESI, Act 2002 will have an overriding effect on the provisions of Central Excise Act, 1944–Therefore, the provisions of SARFAESI Act shall have priority not over the State Excise Act but also over Central Excise Act. (Para 15 & 17) Title: Bhagwan Singh & another vs. State of H.P. & others Page-618

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 – Section 26E read with the Section 31 B of the Recovery of Debts and Bankruptcy Act, 1993- Priority to secured creditors – Property purchased in e-auction conducted by the bank – The petitioners are not permitted by revenue officials to execute the sale deed as charge recorded in revenue record in favour of outstanding bill of Electricity board and State Excise Department – held - SARFAESI Act and RDB Act shall have overriding effect to provisions of HP VAT Act - Respondents directed to permit petitioner to execute sale deed after removing entries made in revenue record and to attest the mutation of property – Petition allowed. (Para 20 &21) Title: Bhagwan Singh & another vs. State of H.P. & others Page-618

Specific Relief Act, 1963 - Section 16 (C) -- Specific performance of contract - Plaintiff claimed that he has performed his part of agreement by paying complete sale consideration of Rs. 60,000/- and is in possession of the suit land and further is ready and willing to perform his part of agreement for executives in his favor but the defendant is not ready and willing to execute regular sale deed in the office of Sub Registrar -- From the perusal of the evidence it stands proved on record that entire sale consideration was paid and possession of the plaintiff acknowledged by the defendant - Refusal to execute sale deed can easily be culled out from averment made in the written statement and deposition of the defendant – Plaintiff performed his part of agreement by paying complete consideration and his role to be performed is only to remain present in the office of Sub Registrar at the time of execution of sale deed by the defendant and for that the plaintiff is ready and willing to perform his part of agreement – Averments made in the plaint as a whole are demonstrating substantial compliance of provisions of section 16 (C) of the Act - Appeal dismissed. (Paras 20, 21 & 24) Title: Narain Singh vs. Dharma Sain Page-758

Specific Relief Act, 1963 – Suit for declaration – The respondent number 1 / plaintiff was held entitled for declaration that he is entitled for the post in special drive against the quota of Ex-serviceman and the defendant – Bank shall, after ascertaining quota of Ex-serviceman and the vacant roster points available on that day when the posts were advertised for other categories, if any vacant roster was available for Ex-serviceman consider the plaintiff for appointment against the post as per rules by giving him all consequential benefits with further directions to the defendant - Bank to carry out such exercise within two months from passing of judgment - Held - Despite availability of 200 Point Roster and availability of posts for Ex-serviceman, there was no provision made in the application form to enable Ex-serviceman sub staff employees to apply against post meant for Ex-serviceman in the 200 Point Roster and further that for filling up posts from amongst In-service candidates names were not to be sponsored by this special Ex-serviceman cell, but such posts were to be identified in the recruitment process and option to the Ex-servicemen in service candidates was to be provided to apply against such post -- There is no illegality or perversity in impugned judgment and decree warranting framing of substantial question of law as proposed -- The defendant bank is directed to complete the recruitment process on or before 30.06.2012 -- Appeal dismissed. (Paras 12 & 14) Title: The Kangra Central

Cooperative Bank Dharamsala Ltd vs. Subash Chand & another Page-736

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

Between:-

1. GULSHER, S/O SH. ABDUL WAHID, R/O VILLAGE GURUWALA, TEHSIL PAONTA SAHIB, DISTRICT SIRMAUR, HIMACHAL PRADESH.

2. ILTAF MOHD., S/O SH. ABDUL WAHID, R/O VILLAGE GURUWALA, TEHSIL PAONTA SAHIB, DISTRICT SIRMAUR, HIMACHAL PRADESH.

3. SHAMSHER ALI, S/O SH. ABDUL GANI, R/O VILLAGE GURUWALA, TEHSIL PAONTA SAHIB, DISTT. SIRMAUR, H.P.

4. BUNDU, S/O SH. ABDUL GANI, R/O VILLAGE GURUWALA, TEHSIL PAONTA SAHIB, DISTT. SIRMAUR, H.P.

5. IRFAN ALI, S/O SH. ABDUL GANI, R/O VILLAGE GURUWALA, TEHSIL PAONTA SAHIB, DISTT. SIRMAUR, H.P.

...PETITIONERS/PLAINTIFFS

(BY SHRI KARAN SINGH KANWAR, ADVOCATE)

AND

1. NAJAR ALI, S/O SH. NEEN ALI, R/O VILLAGE GURUWALA, TEHSIL

PAONTA SAHIB, DISTRICT SIRMAUR, H.P. (SINCE DECEASED) THROUGH HIS LEGAL REPRESENTATIVES:-

1(A) AFROZ BEGUM, WIFE
1(B) PARVEJ KHAN, SON
1(C) SAHIL KHAN, SON
1(D) ARBAZ KHAN, SON
1(E) RUKHSAR, DAUGHTER

OF SH. NAJAR ALI, S/O SH. NEEN ALI, R/O VILLAGE GURUWALA, TEHSIL PAONTA SAHIB, DISTRICT SIRMAUR, H.P.

2. JABAR ALI, S/O S/O SH. NEEN ALI, R/O VILLAGE GURUWALA, TEHSIL PAONTA SAHIB, DISTRICT SIRMAUR, H.P.

3. SABAR ALI, S/O SH. NEEN ALI, R/O VILLAGE GURUWALA, TEHSIL PAONTA SAHIB, DISTRICT SIRMAUR, H.P.

4. JOGA SNGH, S/O SH. TARAN SINGH, R/O VILLAGE AKLGARH, TEHSIL PAONTA SAHIB, DISTRICT SIRMAUR, H.P.

5. SMT. KANTA DEVI, W/O SH. HARI KUMAR, R/O VILLAGE MANPUR DEVRA, TEHSIL PAONTA SAHIB, DISTRICT SIRMAUR, H.P.

...RESPONDENTS/DEFENDANTS

6. ABDUL SATTAR, S/O SH. ABDUL GANI, R/O VILLAGE GURUWALA, TEHSIL PAONTA SAHIB, DISTRICT SIRMAUR, H.P.

...RESPONDENTS/PROFORMA DEFENDANT

(SHRI VINOD CHAUHAN, ADVOCATE, FOR R-1(A) TO R-1(C), R-1(E) AND R-2 & 3.
R-4 TO 6 *EX PARTE.*
SHRI AJAY SINGH KASHYAP, ADVOCATE, FOR R-5)

CIVIL MISC. PETITION MAIN (ORIGINAL)
No. 79 of 2019
Decided on: 18.04.2022

Constitution of India, 1950- Article 227- **Code of Civil Procedure, 1908**- Order VI Rule 17- Application dismissed by the Trial Court- Held- Ld. Trial Court has dismissed the application in a slipshod manner without any due application of mind- Petition allowed with the direction to Ld. Trial Court to rehear the application under Order VI Rule 17 of Code of Civil Procedure. (Para 5)

This petition coming on for orders this day, the Court passed the following:

J U D G M E N T

By way of this petition filed under Article 227 of the Constitution of India, the petitioners have assailed order dated 3rd October, 2018, passed by the Court of learned Senior Civil Judge, Paonta Sahib, Court No. 1, Paonta Sahib, H.P., vide which, an application filed under Order 6 Rule 17 of the Code of Civil Procedure by the petitioners/plaintiffs seeking amendment to the plaint as also adding a party thereto on account of subsequent developments, which took place during the pendency of the suit, has been dismissed.

2. Learned counsel for the petitioner has submitted that the petitioners/plaintiffs have filed a suit for declaration to the effect that they alongwith the proforma defendants are owners to the extent of ½ share each in the suit land and sale of part of the suit land which has been made by defendants No. 1 to 3 in favour of defendant No. 4 was bad in law and not sustainable in law. According to him, during the pendency of the suit, somewhere in the year, 2016, some more portion of the suit land was sold by defendant No. 1 in favour of one Smt. Vakila, which fact came into the notice of the plaintiffs in the month of June, 2017, when on the strength of the said sale deed, said Smt. Vakila started interfering with the suit land. These subsequent developments led to the filing of application under Order 6, Rule 17 of the Code of Civil Procedure, wherein, a prayer was made to amend the Civil Suit in terms of the proposed amendments narrated in para-3 thereof. He has submitted that rejection of this application by the learned Court below on the doctrine of *lispendens* and that the amendment cannot be allowed at the stage of final hearing of the suit, is totally perverse because what preempts the prayer of a party seeking amendment to the pleadings are the facts which are intended to be introduced by way of proposed amendment and as to weather there was due diligence on the part of the party in filing the application or not. He has submitted that these aspects of the matter have not been dealt with by the learned Trial Court at all and, therefore, the petition be allowed by setting aside the impugned order.

3. Defending the order passed by the learned Court below, learned counsel for the contesting respondents has argued that as the application praying for amendment of the suit was filed by the applicants at a highly belated stage, therefore, the same was rightly rejected by the learned Court below. He has argued that learned Court below has correctly held that as subsequent sale, if any, was hit by the principle of *lispendens*, therefore,

the amendment in the pleadings was not required. On these basis, he has prayed for dismissal of the petition and for upholding the order passed by the learned Court below.

4. I have heard learned counsel for the parties and also gone through the impugned order as well as the documents appended with the petition.

5. Order vide which the application filed by the petitioners praying for amendment in the Civil Suit has been dismissed, to say the least, is a completely cryptic order. Whenever, an application is filed by a party seeking amendment in the pleadings by way of Order 6 Rule 17 of the Code of Civil Procedure, the duty of the Court is to see as to whether the ingredients mentioned in Order 6, Rule 17 of the Code of Civil Procedure are satisfied and if yes, then whether due diligence has been exercised by the party seeking amendment. If the Court comes to the conclusion that the parameters which are contained in Order 6 Rule 17 as also the factum of due diligence has been satisfactorily answered by a party, then ordinarily amendment in the pleadings, be it in the plaint or in the written statement, is allowed by the Court. Other factors which the Court has to take into consideration are as to whether the amendment being sought is required necessarily for the adjudication of the *lis* or the same is just an endeavour being made by a party to fill up the *lacunae* in the pleadings. The Court has to see as to whether the facts which are being intended to be introduced, were existing at the time of filing of the suit and if yes, then what is the explanation as to why they were not introduced at the time of filing of the suit and if the pleadings which are intended to be introduced are on account of subsequent developments, then the Court has to see whether due diligence has been exercised by the party while coming to the Court seeking amendment in the pleadings. These findings are completely missing in the impugned order. Learned Trial Court has dismissed the application filed by the petitioners herein in a slipshod

manner without any due application of mind and as already observed by me hereinabove, in a completely cryptic manner. Neither the ingredients of order 6, Rule 17 have been discussed in the order nor any reasoning has been assigned while dismissing the application as to why the prayer being sought by the plaintiffs could not have been allowed. By simply observing that a preliminary objection stood taken by the respondents that at the time of final arguments, an amendment cannot be allowed or that the sale deed was hit by the principle of *lispendens*, the duty cast upon the Court while deciding the application under Order 6, Rule 17 of the Code of Civil Procedure is not discharged. Accordingly, as this Court is not satisfied with the mode and manner in which the application filed under Order 6, Rule 17 of the Code of Civil Procedure stood decided by the learned Court below, the present petition is allowed by setting impugned order dated 03.10.2018, passed in Civil Suit No. 127/1 of 16/10, titled as *Gulsher and others Vs. Najar Ali and others* and by directing the learned Court below to rehear the application so filed by the petitioners/plaintiffs under Order 6, Rule 17 of the Code of Civil Procedure and decide the same afresh after hearing both the parties by passing a reasoned and speaking order. It is clarified that this Court has not made any observation with regard to the merits of the application so filed by the petitioners/plaintiffs and the same shall be decided by the learned Court below on its own merit, being uninfluenced by any observations made by this Court in the present order.

6. Parties through learned counsel are directed to appear before the learned Court below on 23rd May, 2022, whereafter, a date shall be fixed by the learned Court below for fresh hearing of application so filed under Order 6, Rule 17 of the Code of Civil Procedure.

Petition stands disposed of, so also pending miscellaneous applications, if any.

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

Between:-

DR. FRANCINA, W/O SH. PRAVEEN KUMAR, PRINCIPAL BLOOMS COLLEGE OF EDUCATION AND FOUNDER MEMBER OF THE BLOOMS EDUCATION SOCIETY, KOT, TEHSIL BALH, DISTRICT MANDI, H.P.

...PETITIONER

(BY SHRI SHRAWAN DOGRA, SENIOR ADVOCATE, WITH M/S BHARAT THAKUR AND TEJASVI DOGRA, ADVOCATES)

AND

1. THE BLOOMS EDUCATION SOCIETY THROUGH ITS PRESIDENT, KOT, POST OFFICE CHUNAHAN, TEHSIL BALH, DISTRICT MANDI, H.P.

2. PRAVEEN KUMAR DHIMAN, S/O SH. SHIV KUMAR DHIMAN, H.NO. 176/11, PURANA BAZAAR, SUNDER NAGAR, DISTRICT MANDI, H.P.

3. SHIV KUMAR DHIMAN, H.NO. 176/11, PURANA BAZAAR, SUNDER NAGAR, DISTRICT MANDI, H.P.

4. JITENDER KUMAR, R/O PURANI MANDI, H.P., C/O MAHINDRA MOTORS BESIDES FORCE

MOTORS GUTKAR, DISTRICT MANDI, HIMACHAL PRADESH.

5. DEPUTY COMMISSIONER MANDI, DISTRICT MANDI, H.P.

6. S.D.M.-CUM-DEPUTY REGISTRAR OF SOCIETIES, BALH, MANDI, H.P.

7. RAJENDER THAKUR, TEHSILDAR BALH-CUM-ADMINISTRATOR, BLOOMS EDUCATION SOCIETY AT BALH, DISTRICT MANDI, H.P.

8. HARISH KUMAR (ADMINISTRATOR), SECTION OFFICER, DEPUTY DIRECTOR (HIGHER), MANDI, H.P.

9. MEERA DEVI (ADMINISTRATOR), INSPECTOR, CO-OPERATIVE SOCIETY, MANDI, H.P.

10. STATE OF HIMACHAL PRADESH THROUGH SECRETARY COOPERATION, HIMACHAL PRADESH, SHIMLA-171002.

....RESPONDENTS

(SHRI ANKUSH DASS SOOD, SENIOR ADVOCATE, WITH SHRI GAURAV CHAUDHARY, ADVOCATE, FOR R-1 & R-2.

MS. KIRAN, ADVOCATE, VICE MR. RAVINDER SHARMA, ADVOCATE, FOR R-3 AND R-4.

M/S SUMESH RAJ, DINESH THAKUR & SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS, WITH MR. SUNNY DHATWALIA, ASSISTANT ADVOCATE GENERAL, FOR R-5, R-6 AND R-10).

CIVIL WRIT PETITION
No. 2726 of 2020
Judgment Reserved On: 06.04.2022
Decided on: 13.04.2022

A. **Constitution of India, 1950-** Article 226- **H.P. Societies Registration Act, 2006**- Section 16- The petitioner who is founder member of Respondent No. 1 Society has sought for the quashing of orders passed by Secretary (Cooperation), H.P. in appeal and Registrar Cooperative Societies being not sustainable in law- Held- The findings which have been returned by the statutory authorities on the issues so raked up by the petitioner with regard to the increase of members of the Managing Committee from seven to eleven cannot be faulted with. (Para 18)

B. Findings which have been returned by the First Appellate Authority and Second Appellate Authority qua disqualification of the respondent in terms of Section 16 of the 2006 Act also call for no interference- Petition dismissed. (Para 22, 23)

This petition coming on for pronouncement of judgment this day, the Court passed the following:

J U D G M E N T

By way of this petition, the petitioner has primarily prayed for the following reliefs:-

> *"(a) Order dated 24.07.2020 (Annexure P-24) passed by Secretary (Cooperation) Himachal Pradesh in appeal No. 2 of 2020 may kindly be quashed and set aside in the interest of justice.*
>
> *(b) The orders dated 26.02.2020 (Annexure P-20) passed by respondent No. 6 and Annexure P-22,*

> *passed by Registrar Cooperative Societies, Himachal Pradesh may also be quashed and set aside."*

2. The case of the petitioner is that she is Founder Member of respondent No. 1-Society, which is a Society duly registered initially under The Societies Registration Act, 1860 before the Registrar of the Societies, Himachal Pradesh. The Society is sated to be running a School in the name and style of "St. Xavier's Residential School" and also a B. Ed. College in the name and style of "The Blooms College of Education". According to the petitioner, in terms of the copy of Memorandum of Association of the Society (Annexure P-2), the same was formed by subscription of only seven members and one of the said seven members, namely, Shri Pyare Lal is dead. Respondent No. 2 was initially elected as President of the Society for its preliminary formation and he continued as its President till the Society was superseded. He was also looking after the financial affairs of the Society. The petitioner was looking after the academic and administrative works of the educational institutions. The petitioner and respondent No. 2 are husband and wife and in the year 2014, matrimonial dispute arose between them. Thereafter, respondent No. 2 started interfering in the administrative and academic work of the respondent-Society. Complaints in this regard were received from the staff, however, respondent No. 2 promised in terms of agreement, dated 13.02.2017 (Annexure P-4) that he will not interfere in the administrative work of the academic institutions. As per the petitioner, respondent No. 2 had started collecting fee without receipts directly from the students. When petitioner came to know of this fact from the inspection of accounts, and she further discovered that one staff member was hand in glove with respondent No. 2, an FIR was lodged on 06.12.2017 against the accused for embezzlement of funds. As a counter blast, respondent No. 2 filed false and frivolous complaints against the petitioner. In this background, Sub-Divisional Officer, Balh, Mandi (respondent No. 6) was appointed as an Inquiry Officer. His

report was to the effect that no untoward activity could be established against the petitioner, but in order to ensure the smooth functioning of the Society, he concluded that a financial audit of the Society was required to be conducted. Thereafter, respondent No. 2 vide order dated 26.03.2019 (Annexure P-7) seized the records of the Society for the purpose of an independent inquiry. Vide office order dated 01.04.2019, a direction was issued to conduct special audit and inquiry of financial records of the Blooms Education Society through an Audit Committee. A special audit was conducted. As per report and balance sheet dated 31.03.2019 issued by the Special Audit Committee, an amount of Rs.24,18,806/- was recoverable from respondent No. 2 and an amount of Rs.5,66,316/- was recoverable from Ms. Julie in her personal capacity. Besides, an amount of Rs.11,90,750/- was also recoverable from the students through the petitioner attributable as 'less fee'.

3. Further, as per the petitioner, after registration of the Society, respondent No. 2 illegally and in a clandestine manner got attached frivolous and forged documents in the record of the Registrar of Societies showing number of Members of Governing Body of the Society to be eleven in place of seven. This also included the names of respondents No. 3 and 4. Respondent No. 3 was the father of respondent No. 2 and this illegality committed by respondent No. 2 was not in the knowledge of the petitioner, as affairs of the Society were being run smoothly.

4. Respondent No. 5 vide office order dated 03.04.2019 (Annexure P-10) removed the Governing Body of the Society and appointed respondents No. 7 to 9 as Administrators of the Society to manage its affairs till fresh elections of the Governing Body were conducted. The Administrators took over the functioning of the Society in the month of May, 2019. In the meanwhile, correspondence dated 03.06.2019 (Annexure P-12) intimating the date for holding of Annual General Meeting of the Society on 18.06.2019 was issued. As no prior notice of election was served upon the members of the Society, the

election of the General Body held on 18.06.2019 was patently illegal. Said illegal election of the Society was assailed by the petitioner before the Registrar of the Societies and the election dispute was allowed by the Registrar of Societies vide order dated 19.08.2019 (Annexure P-14). Elections held on 18.06.2019 were quashed and set aside and respondent No. 6 was directed to conduct fresh election of respondent No. 1-Society as per the provisions of the Himachal Pradesh Societies Registration Act, 2006 (hereinafter referred to as 'the 2006 Act'). Said respondent in utter violation of order passed by the Registrar of Societies, Himachal Pradesh, vide letter dated 13.11.2019, invited 11 persons for the Annual General meeting to conduct the election of General Body of the Society, which included four persons, whose names were introduced in the records of register by way of forged documents. In this background, the petitioner, filed CWP No. 3855/2019 before this Court praying i*nter alia* for the following reliefs:-

> *"(i) That the impugned notice dated 13.11.2019 (Annexure P-16) may kindly be declared illegal, unjustifiable, prejudicial in nature, manifestly bad in law, null and void, therefore the same may be quashed and set aside.*
> *(ii) That the official respondents No. 2 & 3 may kindly be directed not to implement the impugned notice dated 13.11.2019.*
> *(iii) That the official respondents No. 2 & 3 may be directed to decide the objections submitted by the petitioner qua the issue of disqualifications of the private respondents No. 8 to 10 in a time bound period and thereafter to conduct the free and fair election of respondent No. 7 Society.*
> *(iv) That the respondents may be directed to produce the entire record of the matter."*

This writ petition was disposed of by the Court vide judgment dated 28.11.2019 in the following terms:-

> *"6. Therefore, at this stage, there is no need to advert to all the facts pleaded in the writ petition and the law point raised and the writ petition can be disposed of with a direction to respondent No. 4 to conduct the election of the governing body of respondent No. 8-Society, strictly in accordance with the procedure prescribed under the Act. The objections raised by the petitioner and for that matter by someone else also, qua the eligibility of a particular member as voter, will first be decided before the election is conducted, either on the date already fixed or on some other date. In case, it is not possible to decide the objections, if any, raised and complete all the codal formalities by the date already fixed, the respondent No. 4 may postpone the date of election.*
>
> *The petition stands disposed of, so also, the pending application(s), if any."*

Thereafter, in addition to the representation already made by the petitioner vide Annexure P-17, she submitted another detailed representation dated 12.12.2019 to respondent No. 6 reiterating her objections with regard to the mode and manner of holding of elections. The objections of the petitioner were decided by respondent No. 6 vide order dated 26.02.2020 against the petitioner in derogation and violation of the judgment dated 28.11.2019, passed by this Court in CWP No. 3855 of 2019 (*supra*). Thereafter, respondent No. 6 issued notice for conducting the elections of the Society for 19.03.2020 vide communication dated 27.02.2020. Petitioner assailed order dated 26.02.2020 passed by respondent No. 6 before the Registrar, Co-operative Societies, Himachal Pradesh, however, the appeal so filed by the petitioner was dismissed by the Appellate Authority vide order dated 05.03.2020 (Annexure P-22). The order so passed by the Appellate Authority was further assailed by the petitioner before respondent No. 10 in terms of the provisions of Section 51 of the Himachal Pradesh Societies Registration Act, 2006. However, said appeal of the petitioner was also rejected by respondent No. 10 vide order dated 24.07.2020

(Annexure P-24). It is in this background that the petitioner has approached this Court by way of present petition praying for the reliefs already mentioned hereinabove.

5. Mr. Shrawan Dogra, learned Senior Counsel appearing for the petitioner argued that the orders which have been passed by the statutory authorities are no orders in the eyes of law for the reason that none of them have taken into consideration the mandate of the judgment which was passed by this Court in the earlier writ petition filed by the petitioner. He further argued that the issues which were raised by the petitioner in the objections against the holding of elections, were not decided by the authorities in the correct perspective, as they erred in not appreciating that in terms of Annexure P-1, there were only seven Members, who constituted the Society and the introduction of other four Members, which was a result of forgery with the documents, was not rightly appreciated by the said authorities. By referring to various documents appended with the petition, learned Senior Counsel submitted that the authorities erred in not deciding the issues raised by the petitioner with regard to unauthorized enhancement of the Members of the Society from seven to eleven and therefore also, the orders passed by the authorities are not sustainable in law. He accordingly prayed for setting aside of the impugned orders with further direction to the authorities concerned to decide the objections raised by the petitioner afresh in the spirit of the judgment passed by this Court in the earlier petition filed by the petitioner.

6. Opposing the writ petition, learned counsel appearing for the respondents argued that there was no infirmity with the decisions passed by the statutory authorities and the intent of the petitioner was just to linger on with the matter so as to avoid the holding of the elections of the Society, as the petitioner is aware that she shall be loosing the elections as the Members of the Society were not with her.

7. Shri Ankush Dass Sood, learned Senior Counsel appearing for respondents No. 1 and 2 strenuously argued that the petitioner herself being a Founder Member, was aware of the increase of membership of the Society by introducing four new members, which was done in a just and legal manner and this fact is apparent from the documents on record itself, wherein there are admissions on the part of the petitioner that the members of the Society were eleven and not seven. He also argued that elections of the Society were in the interest of every one and further the process of holding the elections should not be allowed in the mode and manner in which the petitioner desires, because once the process of holding of elections is initiated, then any objections etc. qua the mode and manner of holding the same are to be dealt by the authorities concerned strictly in terms of the statutory provisions and not as per the whims of the parties. Learned Senior Counsel pointed out that the judgment being relied upon by the petitioner of this Court was in fact passed without giving respondents No. 1 and 2 opportunity to file reply to the writ petition. He further argued that otherwise also, the issue which the petitioner is raking up in the writ petition cannot be permitted to be raked up by her on account of her own act and conduct and he has accordingly prayed for dismissal of the writ petition, so that the elections of the Society can be held at the earliest.

8. Shri Ravinder Sharma**,** learned counsel argued on behalf of respondents No. 3 and 4 and he also adopted the arguments of learned Senior Counsel appearing for respondents No. 1 and 2.

9. Learned Additional Advocate General submitted that the statutory authorities performed their duties strictly as per law and there was no infirmity in their act.

10. I have heard learned counsel for the parties and also gone through the pleadings as well as documents appended therewith.

11. Suffice it to say that in exercise of its power of judicial review, this Court would not like to traverse the ground of dispute between the parties,

especially the petitioner and respondent No. 2, which dispute is more personal in nature than anything else. In the present case, all that this Court will be deciding, would be the legality of the orders assailed.

12. During the course of hearing of this petition, this Court had directed the Registry of this Court to produce before the Court the record of CWP No. 3855 of 2019, titled as *Dr. Francina V. The State of Himachal Pradesh and others.* In compliance to the order so passed by the Court, the record of the said case was made available.

13. A perusal of the case file of CWP No. 3855 of 2019 demonstrates that the petitioner had challenged therein notice dated 13.11.2019, issued by Sub-Divisional Magistrate-Cum-Deputy Registrar, Co-operative Societies, Balh, District Mandi, H.P., which reads as under:-

> *"This is for the information of all the members (general body) of Blooms' Education Society Kot, PO Chnahan, Tehsil Balh, Distt. Mandi, H.P. that the Annual General Meeting (AGM) of Society is scheduled to be held on dated 30th November, 2019 at Society's office i.e. Kot at 11 AM. Therefore all the members of society are requested to make it convenient to attend the meeting on scheduled date, time and venue. The agenda for the meeting is as under:-*
>
> *1. Election of Governing Body of the Society."*

This writ petition was listed in the Court on 28.11.2019. Respondents No. 1 and 3 in the present writ petition were impleaded therein as respondents No. 8 and 9 and respondent Praveen Kumar Dhiman was on caveat. This writ petition was disposed by the Hon'ble Division Bench of this Court on the very first date of hearing in terms of paragraph No. 6 of the judgment, which already stands quoted by me hereinabove, however, it is relevant to quote paras-3 to 6 of the judgment also, which shall be having bearing on the adjudication of the present writ petition. The same read as under:-

"3. It is seen that the election of the Society, held on 18.6.2019 in its annual general meeting, was quashed and set aside by the Registrar of Societies, H.P. (respondent No.2), with a direction to the Sub Divisional Magistratecum- Deputy Registrar of the Societies, Balh Sub Division, District Mandi (respondent No.4) to conduct the same afresh, in accordance with the provisions contained under Section 41 of the Act by notifying the date of election amongst all the members of the Society, within one month from the receipt of the copy of order (Annexure P-14). Consequently, the impugned notice (Annexure P-20) came to be issued by respondent No.4, fixing 30.11.2019 as the date for holding elections of the Society at 11:00 a.m., in its Office at Kot, Tehsil Balh, District Mandi. 4. The complaint is that the objections (Annexure P-21), raised by the petitioner qua the eligibility of respondents No.9 and 10 to be the voters of the Society, has not been considered, nor yet decided and to the contrary the date for holding the election has been fixed. The apprehension of the petitioner is that the respondent No.4 may treat respondents No.9 and 10 as voters and allow them to participate in the election without deciding the objections (Annexure P-21). 5. The apprehension of the petitioner seems to be without any basis because it is expected from respondent No.4, the Returning Officer, an Officer in the cadre of Himachal Administrative Services to conduct the election, strictly in terms of the provisions contained under the Societies Registration Act and also the rules framed thereunder. The respondent No.4 is under an obligation to decide the objections so raised, not only qua the eligibility of respondents No.9 and 10 alone as voters, but also any other member of the Society well before conducting the election of the respondent No.8-Society. 6. Therefore, at this stage, there is no need to advert to all the facts pleaded in the writ petition and the law point raised

> *and the writ petition can be disposed of with a direction to respondent No.4 to conduct the election of the governing body of respondent No.8- Society, strictly in accordance with the procedure prescribed under the Act. The objections raised by the petitioner and for that matter by someone else also, qua the eligibility of a particular member as voter, will first be decided before the election is conducted, either on the date already fixed or on some other date. In case, it is not possible to decide the objections, if any, raised and complete all the codal formalities by the date already fixed, the respondent No.4 may postpone the date of election. The petition stands disposed of, so also, the pending application(s), if any."*

Thus, a perusal of the judgment passed by the Hon'ble Division Bench of this Court demonstrates that after taking note of the issues raised by the petitioner therein, Hon'ble Division Bench in paragraph No. 5 of the judgment held that the apprehension of the petitioner was without any basis, because it was expected from the Returning Officer to conduct the election strictly in terms of the provisions of the Societies Registration Act as also the Rules framed thereunder and the officer was under an obligation to decide the objections so raised, not only qua the eligibility of respondents No. 9 and 10 therein alone as voters, but also any other member of the Society well before conducting the election of the respondent-Society. It was in this background that further directions were issued in para-6 of the judgment. It is thereafter that order dated 26.02.2020 (Annexure P-20) was passed by the Sub-Divisional Magistrate-Cum-Deputy Registrar, Co-operative Society, Balh, District Mandi, H.P. upon an application filed under Section 16 of the 2006 Act for disqualification of members.

14. Section 16 of the Himachal Pradesh Societies Registration Act, 2006 deals with disqualifications of Members and the same reads as under:-

"16. Disqualifications.- A person shall be disqualified for being a member of the Governing body of a Society under this Act if, on the date of elections, he,-

(a) is disqualified for such appointment by an order of a Court or the Registrar for causing loss to the Society or retaining property of the Society or for any other reasons detrimental to the interest of the Society; or

(b) is in arrears of prescribed subscription fee and a period of 45 days is over after delivering notice to such members to such effect; or

(c) has been convicted of a cognizable offence and sentenced to a term exceeding 3 months; or

(d) has incurred any of the disqualifications, as may be prescribed."

A perusal of the statutory provisions demonstrates that this Section provides as to under what circumstances a person shall be disqualified for being a Member of the Governing Body of a Society under the Act as on the date of election.

15. In the present case, the objections which were filed by the petitioner before the Sub Divisional Magistrate, Balh, District Mandi, H.P. before conducting the elections of the Blooms' Education Society are on record as Annexure P-17, dated 26.09.2019. Paras- 1 to 4 of the objections are being quoted hereinbelow:-

"Respected Sir,

With due respect and on the subject cited above it is my kind submission that as per the order of the Ld. Registrar Co-operative Societies, Govt. of Himachal Pradesh under the provisions of Society Registration Act, 2006, it is directed to conduct the election of the Blooms

Education Society. In this connection, I would like to bring to your kind notice that some of the important issues:-

1. The General House of Blooms Education Society included 11 members at the time of registration in 2002.

2. Out of the 11 members 7 members were elected as member of Governing Body/Executive body.

3. Presently there are only six members in Governing body excluding one diseased member.

4. Out of the remaining four members in the General House one member has diseased and only three members are left. It is serious and matter of great concern that the detail of these members, such as their father's name, age, address, phone number etc. are not mentioned. However, only signature is procured in the record of the society registration document. Further the signature of Mr. Jaichand Sharma is different from the one in the original papers of society registration. Therefore it is my submission that such members whose identity is not established clearly should not be entertained to vote in the election."

This was followed by another communication, dated 12.12.2019 (Annexure P-19), sent to the said officer by the petitioner, in which, stand of the petitioner was that initially there were seven members, who had signed the Memorandum of Association of the petitioner-Society and another list including those seven members and additional four false persons was introduced in the record on the same day, i.e., 28.11.2001 by respondent No. 2-Praveen Kumar.

16. The objections of the petitioner stood decided by the officer concerned, i.e., respondent No. 6 vide Annexure P-20 in the following terms:-

"I have perused case record and gone through arguments made by both parties. On the bare perusal of case record it is revealed that the Society signed a memorandum of association by 11 members and constituted a managing committee of 7 members on 28.11.2001 and present appellant Dr. Francina was a

signatory to both these documents. This governing body elected Sh. Praveen Kumar as its president and Dr. Francina, W/o Sh. Praveen Kumar as General Secretary. Now, she is challenging membership of Sh. Jai Chand alleging documents were forged after a gap of approximately 18 years. Now, all this calls into question functioning of Society, i.e., Bloom's Education Society of which present appellant was General Secretary all these years. Report of Assistant Registrar Co-operative Societies, Mandi, District Mandi (H.P.) also points to this very fact that whereas AGM was to be held annually as per society registration Act, 2006 (Section 20), it was never held. Similarly no subsequent elections of management committee were held as mandated by Section 15(2) of H.P. Societies Registration Act.

Furthermore if one goes into allegation of financial misappropriation made by appellant and subsequent counter allegations made by respondent 1 and 2, it is revealed that it was made possible because society was running its affairs in gross violation of provisions of Society Registration Act, 2006 and control of Society was completely in hand of individuals. It is pertinent to mention here that present appellant i.e., Dr. Francina CJP was General Secretary all these years and as such has to take responsibility for such sorry state of affairs alongwith respondents.

Keeping in view of averments made here-in-above, I am of considered opinion that present mess has been created because of Gross violations of Society Registration Act, 2006 and present appellant and respondents are equally responsible for this situation. Only way out of this situation is having election of Governing body of Bloom's Education Society as early as possible. This fresh Governing body may recover amount due from members if they have misappropriated the amount. Therefore, in consonance with preceding discussion, I find no merit in this application for

disqualification of members and same is dismissed. File be consigned to record room after due completion."

17. The appeal which was preferred by the petitioner against the said order passed by respondent No. 6 was disposed of by the Appellate Authority-Registrar of Societies, Himachal Pradesh vide Annexure P-22 in the following terms:-

> *"...8. A plain reading of the Section 16(a) of the Act ibid makes it clear that the order for disqualification of members is required to be made by the Registrar or by a competent Court. In the present case, the respondent No. 6 has already passed the order on the application/objection of the Appellant herein vide order in question and subsequently, the Authority below has fixed the date of election of the governing body of respondent No. 1 Society for 19.03.2020.*
>
> *9. I have also perused the balance-sheet of audit note for the year 2018-2019 of the respondent No. 1 Society placed on record by the Ld. Senior Counsel for the respondent No. 2. As per balance sheet for the financial year 2018-19 of the respondent No. 1 Society, the amount to the tune of Rs.24,18,806 is recoverable from the private respondent No. 2 and a sum of Rs.1190750/- is also recoverable from Dr. Francina (the appellant herein). Thus, the contention of the appellant cannot be accepted that only respondent No. 2 is defaulter on the basis of audit note & not the appellant. However, merely on the basis of audit note, a member cannot be held liable for any recoverable amount unless & until an opportunity of being heard is afforded to the concerned by conducting enquiry under Sections 38 & 40 of the Act.*
>
> *10. The Authority below in his impugned order has also observed that the present appellant is General Secretary of the Society & is thus, custodian of the record.*

He also observed that all the financial mess is the society occurred during the incumbency of the present appellant as General Secretary of the Society. Furthermore, a huge amount also shown recoverable from the appellant in the audit note. Thus, for these reasons the audit cannot be construed to be the only basis to declare the respondent No. 2 as defaulter of the society until or unless proper procedure do declare him defaulter as per the scheme of the Act is adopted.

11. Admittedly, election of the governing body of the respondent No. 1 society has been fixed for 19.03.2020 and it is well settled proposition of law that once the election process commences, it should be completed to its logical end. The election process includes the preparation of electoral roll. In the present case election of the governing body has been scheduled to be held on 19.03.2020, which cannot be stayed at this stage.

12. Interestingly, the appellant and the private respondent No. 2 are the wife & husband, who are stated to have invested huge amounts to set up the College being run under the aegis of the respondent No. 1 Society. For last one or two years, both the appellant & the private respondent No. 2 are fighting to grab the property of the respondent No. 1 Society and thus, due to person tussle between the appellant as well as the private respondent No. 2, the rest of members as well as the Students of the College cannot be made sufferers. Undoubtedly, the respondent No. 1 Society was running th affairs in the sheer violation of the H.P. Societies Registration Act, 2006 as also observed by the Authority below in the order in question, for which the Appellant & the Private respondent No. 2 are equally responsible as they are the prominent office bearers of the Society.

13. The Appellant has failed to place on record any documents except a copy of audit note to declare the private respondent No. 2 as disqualified member, which has been discussed by the respondent No. 6 in the

impugned order at length. Accordingly, I do not find any illegality in the order dated 26.02.2020 of the respondent No. 6 which warrants the interference of the undersigned. The present appeal is devoid of merit and substance and thus, same is disposed of in above terms."

The subsequent appeal preferred by the petitioner against the order passed by the first Appellate Authority was further dismissed vide Annexure P-24 in the following terms:-

"13. Pursuant to above directions of the High Court dated 28.11.2019, Deputy Registrar-cum-SDM Balh decided the matter by rejecting the application qua objections made by the appellant herein vide his order dated 26.02.2020. In the last para of his order, he has observed that "the society signed a memorandum of association by 11 members and constituted a managing committee of 7 members on 28.11.2001 and present appellant Dr. Francina was a signatory to both these documents. This governing body elected Shri Praveen Kumar as its president and Dr. Francina W/o Shri Praveen Kumar as General Secretary. Now, she is challenging membership of Shri Jai Chand alleging documents were forged after a gap of approximately 18 years. Now, all this calls into question functioning of a society i.e. Bloom's Education Society of which present appellant was general secretary all these years. Report of Assistant Registrar, Cooperative Societies, Mandi, District Mandi also points to this very fact that whereas AGM was to be held annually as per Society Registration Act, 2006 (Section 20), it was never held. Similarly, no subsequent elections of management committee were held as mandated by Section 15(2) of the H.P. Societies Registration Act".

The reasons adduced by the Deputy Registrar-cum-SDM Balh are quite relevant to the controversy involved and have merit, with with I hav no hesitation to agree with.

14. It is an established fact that on 26.09.2019, the appellant herein wrote a letter to the respondent No. 7 wherein it was stated that the General House of Blooms Education Society included 11 members at the time of registration, out of which 7 members were elected as member of governing body/executive body. It is very strange that on the one hand the appellant admitted that there are 11 members at the time of registration of the society and on other hand she is questioning the whereabouts of four such members after 18 years.

15. I have also seen the record pertaining to the registration of the Blooms Education Society made available during the hearing by the representative of the respondent No. 6 & 7 and it was found that a list of 11 members namely: Mr. Parveen Kumar Dhiman, Dr. Francina P. Dhiman, Mr. Vijay Chandan, Dr. Anoop Rajput, Col. Tashi Dogra, Mr. K.R. Panchi, Mr. Pyare Lal, Dhiman, Mr. Virender Gupta, Mr. Shiv Kumar Dhiman, Mr. Jitender Modgil and Mr. Jai Chand Sharma is available. Out of these, the addresses of the 1st seven members are stated to be available on the record while addresses of 4 members (i.e. Mr. Virender Gupta, Mr. Shiv Kumar Dhiman, Mr. Jitender Modgil and Mr. Jai Chand Sharma) are ostensibly not complete. Only on this count, the genuineness of their membership cannot be questioned at this stage as alleged by the appellant. The appellant being General Secretary of the Society & Custodian of the record was duty bound to procure the addresses from the members and to to complete the record in all respect. Thus, no benefit of incomplete record can be granted to the appellant as it was her duty to complete the record. Further, it does not seem lawful & genuine on the part of the appellant i.e. the General Secretary of the Society to question the genuineness of the members after a period of 19 to 20 years.

16. Perusal of the impugned order dated 05.03.2020, of the respondent No. 1 i.e., Registrar

Cooperative Societies, shows that he has addressed the contention of the appellant on the issue of respondent Nos. 3 & 4 incurring disqualification in terms of Section 16 of the Act due to the retention of the property of the Society. Crux of the order of the respondent No. 1 i.e. Registrar Cooperative Societies, is reproduced as under for clarity:-

"….As per balance sheet for the financial year 2018-2019 of the respondent No. 1 Society, the amount to the tune of Rs.24,18,806 is recoverable from the private respondent No. 2 and a sum of Rs.11,90,750 is also recoverable from Dr. Francina (the Appellant herein). Thus, the contention of the appellant cannot be accepted that only respondent No. 2 is defaulter on the basis of audit note & not the appellant. However, merely on the basis of audit note, a member cannot be held liable for any recoverable amount unless & until an opportunity of being heard is afforded to the concerned by conducting enquiry under Sections 39 & 40 of the Act." (Para 9 of the order of Registrar, Cooperative Societies).

The reasons adduced by the Registrar Cooperative Societies, in his order dated 05.03.2020 cannot be disputed since an argument, true for Sh. Praveen Kumar Dhiman, respondent No. 3, would be equally true for the appellant, who too is stated to owe money to the Society."

18. The judgment which was passed by the Hon'ble Division Bench of this Court in CWP No. 3855/2019, in my considered view, was to the effect that if in the course of the process of elections of the Society, any objections were raised by someone, including the petitioner qua the eligibility of Members of the Society as voters, then respondent No. 4 therein was under obligation to decide the objections so raised. In other words, the mandate of the Court was not to the effect that respondent No. 4 therein was to go into the aspect of forgery etc. alleged by the petitioner with regard to the alleged increase of number of

Members of the Society from seven to eleven by the petitioner. This otherwise also, in my considered view, was beyond the domain of the Authority while deciding the objections which could have been raised in terms of Section 16 of the 2006 Act. The findings which have been returned by the statutory authorities on the issues so raked up by the petitioner with regard to the increase of Members of the Managing Committee from seven to eleven cannot be faulted with. In terms of the record, the petitioner indeed was a signatory to the relevant documents and there is no genuine explanation which has come forth as to why the alleged act of forgery was not challenged by the petitioner Society and she sat quite over the same for almost 18 years. By no stretch of imagination one can believe the version of the petitioner that she was not aware of the same. The petitioner herself has claimed to be one of the Founder Member of the Society and if that is so, it cannot be assumed that the number of Members were increased from seven to eleven at her back without her knowledge and that too by way of forgery etc. Though she has alleged forgery against respondent No. 2, but there is no material on record from which it can be inferred that any criminal proceedings were initiated by the petitioner against anyone including respondent No. 2 in this regard. Not only this, in the objections which were filed by the petitioner against the elections to be so held, in Annexure P-17, there is an admission on her part that General House of Blooms Education Society had eleven members at the time of registration in 2002. That being the case, it is but obvious that the plea of number of members having been illegally enhanced from seven to eleven, as is being raised by the petitioner, appears to be an after thought, as the petitioner indeed was a signatory to the documents, including the proceedings of the General Body meeting held on 28.11.2001, which stand appended with the petition, wherein in the list of eleven members, the name of the petitioner appears to be at Serial No. 2, against which her signatures have been duly appended. Accordingly, this

Court holds that the findings which have been returned by the authorities on this count, are correct findings and the same do not call for any interference.

19. Now, this Court will address the other aspect of the matter with regard to disqualification of the Members in terms of the provisions of Section 16 of the Act. A perusal of the order passed by respondent No. 6 demonstrates that the said authority observed that if one goes into the allegation of financial misappropriation made by appellant and subsequent counter allegations made by respondents No. 1 and 2 therein, it stood revealed that all this happened as the Society was running its affairs in gross violation of the statutory provisions and the petitioner also happened to be the General Secretary of the Society all these years and as such, she has to take the responsibility for the sorry state of affairs alongwith respondents therein.

20. Now, in continuity, when one peruses the order which has been passed in appeal by the Registrar of Societies, Himachal Pradesh vide Annexure P-22, said authority after going into the provisions of Section 16 of the 2006 Act held that the audit could not be construed to be the only basis to declare the respondent No. 2 to be the defaulter of the Society until and unless proper procedure to declare him defaulter as per the Scheme of the Act is adopted.

21. In the subsequent appeal, respondent No. 10 observed in this regard that the reasons adduced by the Registrar of Societies while adjudicating the issues could not be disputed since an argument true for Shri Praveen Kumar Dhiman would be equally true for the appellant therein, who too was stated to owe the money to the society.

22. This Court is of the considered view that whereas the issue of disqualification of Members in terms of the provisions of Section 16 of the 2006 was not happily decided by respondent No. 6, because the reasons assigned by the said Authority cannot be sustained in law, but the reasons which have been assigned on this count by the Registrar in his order, as upheld by respondent No. 10, are correct reasons. Registrar of Societies, Himachal Pradesh held in his

order that the Member cannot be held to be a defaulter of the Society until and unless proper procedure as per Scheme of the Act is adopted. Section 16 of the 2006 Act envisages four situations under which a person shall be disqualified for being a Member of the Governing Body of a Society, if on the date of elections, he:-

> *(a) is disqualified for such appointment by an order of a Court or the Registrar for causing loss to the Society or retaining property of the society; or*
> *(b) is in arrears of prescribed subscription fee and a period of 45 days is over after delivering notice to such members to such effect; or*
> *(c) has been convicted of a cognizable offence and sentenced to a term exceeding 3 months; or*
> *(d) has incurred any of the disqualifications, as may be prescribed."*

In the present case, there is nothing on record from which it can be inferred that the Members of the Society stand disqualified for such appointment by the order of the Court or the Registrar on the grounds contained in Section 16(a). Similarly, the conditions contained in Sections 16(b) to 16(d) have also not been demonstrated to be existing qua any of the respondents by the petitioner. That being the case, simply on the basis of audit report, it cannot be inferred that a Member is disqualified from being so as on the date of election, as has been rightly observed by the Registrar of Societies that no member can be construed to be a defaulter until and unless proper procedure to declare him defaulter as per the Scheme has been adopted. Therefore, this Court holds that the findings which have been returned by the First Appellate Authority and the Second Appellate Authority qua disqualification of the respondents in terms of Section 16 of the 2006 Act also call for no interference.

23. In view of what has been discussed hereinabove, this Court finds no merit in the present petition and the same is accordingly dismissed with the

observation that elections of the Society be held at the earliest in the larger interest of the society. Miscellaneous applications, if any, also stand disposed of. No order as to costs.

BEFORE HON'BLE MR.JUSTICE MOHAMMAD RAFIQ, C.J. AND HON'BLE MS.JUSTICE JYOTSNA REWAL DUA, J.

Between:-

UMESH THAKUR S/OSH.RAMPAL,
V.P.O.KHANI,TEHSIL BHARMOUR, DISTT. CHAMBA (HP) 196316

……PETITIONER

(BY MR.PANKAJ NEGI, ADVOCATE)

AND

1. UNION OF INDIA THROUGH ITS SECRETARY GOVT. OF INIDA,
MINISTRY OF HOME AFFAIRS, NEW DELHI-11011

2. THE DIRECTORATE GENERAL, ITBP, MHA, BLOCK NO.2,
CGO COMPLEX, LODHI ROAD, NEW DELHI-03

3. DIG (ESTT. & RECTT.), ITBP,MHA,BLOCK NO.2,
CGO COMPLEX,LODHI ROAD, NEW DELHI-03

……RESPONDENTS

(BY MR.BALRAM SHARMA,ASSISTANT SOLICITOR GENERAL OF INDIA)

CIVIL WRIT PETITION
No. 3252 of 2020
Reserved on:01.04.2022
Announced on:05.04.2022

Constitution of India, 1950- Article 226- Petitioner asserts his claim to the post of Assistant Sub Inspector (Pharmacist) on the ground that the sole candidate in the merit list did not join the post in question, therefore, petitioner having been placed in the 'extended list' deserved to be offered appointment on the said post- Petitioner was duly informed by the respondent through instructions issued on his admit card that the candidates placed in

the extended list do not stand in the merit list- There was nothing wrong on the part of the respondents in not offering appointment to the petitioner for the post in question- Petition dismissed. (Para 4)

This writ petition coming on for admission this day,

Hon'ble Ms. Justice Jyotsna Rewal Dua, passed the following:

ORDER

Petitioner asserts his claim to the post of Assistant Sub Inspector (Pharmacist) on the ground that the sole candidate in the merit list did not join the post in question, therefore, petitioner having been placed in the 'extended list' deserved to be offered appointment on the said post.

2. Facts:-

2(i) The petitioner participated in the selection process undertaken by the respondents for recruitment to the posts of Assistant Sub Inspector (hereinafter referred to as 'ASI') (Pharmacist). Total ten posts of ASI (Pharmacist) were advertised by the respondents in August, 2018. Out of which, two posts were meant for the candidates belonging to Scheduled Caste Category, one for Scheduled Tribe Category, two for Other Backward Class category and five for the candidates belonging to General Category.

The petitioner applied under the Scheduled Tribe Category (hereinafter referred to as ST category).He qualified the Physical Efficiency Test on 09.02.2019, written test on 10.03.2019 and skill test on 08.05.2019.He was declared unfit in the Detailed Medical Examination (in short DME) conducted by the respondents on 11.07.2019. A review medical examination of the petitioner was conducted on 24.09.2019 in which, he was declared medically fit.

2(ii) Name of the petitioner was kept at Sr. No.1 in the extended list prepared by the respondents for the post of ASI (Pharmacist) for ST Category. The sole candidate figuring in the merit list for the post in question under ST Category did not join.The petitioner represented to the respondents for selecting him as ASI (Pharmacist) on the ground that the selected candidate, figuring in the merit list, had not joined the post in question. The respondents rejected petitioner's' representation on 19.12.2019, giving following reasons:-

> *"In this regard, it is intimated that you were shortlisted for Detailed Medical Examination as extended candidate. As per instructions of Admit Card issued to you for Detailed Medical Examination, it was clearly mentioned that candidates who were placed in extended list did not find place in the main merit list and such candidates were given a chance for Detailed Medical Examination against the possibility of vacancy that may arise due to candidate of main list getting declared medically unfit (during Detailed Medical Examination and Re-Medical Examination) or remaining absent. According to advertised category wise vacancies for subject recruitment, Offers of Appointment to all 10 selected candidates were issued and no reserved list was kept for subject recruitment."*

2(iii) Aggrieved against the rejection of his representation by the respondents and also against action of the respondents in not offering him appointment against the single post advertised for ST Category, the petitioner has preferred the instant writ petition for the following substantive prayer: -

> *"(i) Civil writ petition under Articles 226/227 of the Constitution of India for issuance of writ order ordirection specially in the nature of certiorari quashing the impugned order dated 19.12.2019 (Annexure P-10) by which the petitioner has*

been declined the post of ASI (Pharmacist) in ST category being entitled to be offered the post remained vacant, by non-joining of appointed candidate pertaining to ST category namely Abhishek Rai on spurious grounds with ulterior motive in illegal, discriminatory, biased and arbitrary manner, contrary to principal of natural justice and violative of articles 14 and 16 of the Constitution of India, further issue a writ of mandamus directing the respondents to appoint the petitioner on the post of ASI (Pharmacist) in ST category being fully eligible and medically fit."

3. Contentions:-

3(i) Learned counsel for the petitioner submitted that the petitioner had qualified the physical efficiency test, the written test and the skill test.The petitioner had also been declared fit by the Review Medical Board on 24.09.2019.The petitioner had applied for the post of ASI (Pharmacist) under the ST Category. The post was not consumed by the candidate who was in the merit list. Therefore, the petitioner being the sole candidate, figuring in the extended listof ST Category, was required to be appointed to the post in question. Learned counsel for the petitioner emphasized that once the duly advertised post was not consumed by the selected candidate, then the candidate next in order, has to be invited for filling up the vacancy. That the claim of the petitioner was against the advertised post and not against the waiting list. Learned counsel also argued that in not offering appointment to the petitioner, the respondents had discriminated him inasmuch as a candidate belonging to SC Category and figuring in the extended list was given appointment against the general category post. On the same analogy, petitioner was also required to be offered appointment against the post of ASI (Pharmacist) in ST Category, as the candidate in the merit list did not join the said post.

3(ii) Learned Assistant Solicitor General of India submitted that against one advertised post falling to the share of ST Category, two candidates were shortlisted for DME. The petitioner was shortlisted as an extended list candidate. This was in terms of selection procedure laid down in the Standard Operative Procedure (SOP) framed by the respondents on 18.09.2017 for recruitment of Para Medical Staff. As per these instructions, 'candidates placed in extended list do not stand in the main merit list. They are given the chance for DME against the possibility of vacancy, they may arise due to candidates of main list getting declared medically unfit, including re-medical examination or remaining absent'. Learned ASGI further submitted that none of the eventualities mentioned in the SOP presented themselves in the selection process for the post of ASI (Pharmacist) in ST Category. Neither the selected candidate figuring in the merit list remained absent in the medical examination nor was he declared medically unfit. Therefore, there was no occasion for offering appointment to the petitioner whose name figured in the extended list. Explaining the difference in factual position, learned ASGI also refuted the allegations of discrimination.

4. **Observations:-**

We have given out thoughtful consideration to the facts of the case and the submissions advanced by the learned counsel for the parties.

4(a) The base facts are that the petitioner had applied against one post of ASI (Pharmacist) reserved for the candidates belonging to ST Category. He participated in the selection process. His name was not kept in the merit list, but in the extended list. This was in view of the SOP framed by the respondents on 18.09.2017 for recruitment of Paramedical Staff. Clause 12 of the SOP provides for recruitment procedure. Clause 'h' thereof reads as under:-

*“**12(h)** **<u>MERITLIST:</u>***

(i) *The merit list shall be drawn after adding the marks secured by the candidate in written test and practical test. The number of candidates will be considered for detailed medical examination equal to the category wise notified vacancies. This will be increased by 50% P extended list as per category wise merit. The candidates securing place in 50% extended list may be clearly informed while issuing admit cards for DME that they are nominated under extended list candidates and they do not stand in main merit list and their selection will depend upon the availability of unfilled vacancies arising due to unfitness of main list candidates after re-medical examination. This instruction may also be displayed on notice board at Recruitment Centre.*

(ii) *The category wise merit list for UR, SC, ST and OBC (NCL) will be prepared.*

(iii) *SC, ST & OBC candidates who have secured placed in the merit and have not availed any relaxed standard viz age, height, chest and written examination such candidates will be selected against the UR vacancy. SC, ST & OBC (NCL) candidates who are selected on their own merit without relaxed standards, along with candidates belonging to other communities, will not be adjusted against the reserve share of vacancies. Such SC, ST & OBC (NCL) candidates will be accommodated against the general/unreserved vacancies as per their position in the overall merit list. The reserved vacancies will be filled up separately from amongst the eligible SC, ST & OBC (NCL) candidates which will, thus, comprise of SC, ST & OBC candidates who are lower in merit than the last General candidate on merit list of unreserved category but otherwise found suitable for appointment even relaxed standard.*

(iv) *The final selection list will be prepared in order of*

merit, category wise after completion of review medical examination.

(v) Selection of candidates shall be made in order of merit in each category.

(vi) For Ex- servicemen separate merit list may be drawn under each category i.e. unreserved, SC, ST and OBC (NCL). In case of recruitment to the vacancy reserved for Ex- Servicemen, the reserved vacancy remained unfilied due to non-availability of eligible or qualified Ex-Servicemen candidates, the same shall be filled up from the non-Ex- Servicemen candidates as per merit list.

Resolution of Tie cases:

i) In case tie in marks, the candidates secured more marks in written examination get preference.

ii) If the tie still persists, the candidate solder in age get preference.

iii) If the tie still persists ,it is finally resolved by referring to the alphabetical order of names i.e. a candidates who name begins with alphabet which comes first in the alphabetical order gets preference."

4(b) Clause 12(h)(i) clearly gives out the concept of preparation of two lists by the respondents in the selection process:-

(i) First 'the merit list', which is to be drawn of the selected candidates after adding the marks secured in the written test and practical test. The number of candidates to be included in the merit list is to be considered for detailed DME equal to the category wise notified vacancies. In the instant case, there was only one post of ASI (Pharmacist) advertised for the candidates belonging to ST Category, therefore, only one candidate could figure in the merit list for the purpose of DME and depending upon the result of DME for his eventual appointment to the post in question.

(ii) Second, 'the extended list', which is arrived at by

increasing 50% as per category wise merit list. In the instant case, there being one post of ASI (Pharmacist) advertised for ST Category candidates, the merit list contained only one name, therefore, extended list also could consist only of one candidate. Name of the petitioner figured in the extended list. The respondent conducted medical examination of the petitioner in view of his name being there in the extended list.

As per SOP, the candidates securing place in the extended list were to be clearly informed while issuing admit cards for DME that they are nominated as extended list candidates and further that they do not stand in the main merit list. That their selection will depend upon the availability of unfilled vacancies arising due to unfitness of main list candidates after re-medical examination or their remain absent.

4(c) Clause 12(h)(i) of the SOP stipulated that placement of the names of the candidates in the extended list would only imply nomination of the candidates in the sense that they do not stand in the main merit list and that their selection will depend upon the availability of unfilled vacancies arising out of unfitness of main list candidates after medical examination or their remaining absent.

The laid down possible eventualities for offering appointment to the petitioner did not present themselves in the instant case. The candidate in the merit list presented himself in the medical examination and he was also declared fit for appointment. Under these circumstances, there was no occasion for giving appointment to the petitioner on the post in question, whose name only figured in the extended list.

4(d) The petitioner cannot even plead ignorance of the above referred condition for selection and appointment tothe post in question. He was made aware of this condition by the respondents in the admit card issued to him, wherein this condition figured at instruction No. vii as under:-

> ***"**Candidates placed in 'extended list' do not stand in the main merit list and they are being given a chance for Detailed Medical Examination against the possibility of vacancy that may arise due to candidate of main list getting declared medically unfit (including Re-medical Examination) or remaining absent."*

The petitioner, participated in the selection process fully aware of the terms and conditions of the selection & appointment to the post in question. He is now estopped from making out a grievance against the said terms and conditions. If he had any grievance about the terms and conditions/ SOP governing the selection process in question, he ought to have laid challenge to it before participating in the selection process.

4(e) The argument of discrimination advanced by the learned counsel for the petitioner is also misplaced. It was submitted on behalf of the petitioner that in the recruitment process in question, a candidate belonging to SC category was given appointment against a general category post. A condition was raised that if a candidate belonging to SC Category from the extended list can be appointed to the post that fell vacant subsequently in the general category, then on the same analogy, the petitioner should also be given similar treatment and should have been appointed on the post belonging to ST Category, which fell vacant because of non-joining of the candidate figuring in the merit list of ST Category. The respondents in their reply have explained the circumstances in which the candidate belonging to SC category was shifted to the General Category. According to the respondents, total three candidates were shortlisted in the SC Category for DME including one Sh. Anil Kumar, who was at Sr.No.1in the merit list of SC Category and as an extended list candidate shortlisted for DME in the general category. As per the result of DME, out of five candidates, who were shortlisted in the main merit list for DME in Un-

reserved Category, one was declared medically unfit. Due to unfit declaration of one candidate shortlisted in the main merit list in the Un-reserved/general category, Anil Kumar of SC Category who was shortlisted as extended-01 for DME in Un-reserved category, was selected against the vacancy of Un-reserved Category and issued offer of appointment. Accordingly, on arising of one vacancy in SC Category due to selection of Anil Kumar in unreserved category, Shri Rakesh Kumar who was shortlisted as extended-01in SC Category and found fit in DME was selected against the vacancy of SC Category and issued offer of appointment. The explanation given by the respondents in their reply is extracted here in after: -

> *"10.That the contents of para 10 of the writ petition are wrong and baseless, hence denied. It is informed that as per DOPT OM No.36012/13/88-Estt (SCT), dated the 22nd May, 1989 in cases of direct recruitment to vacancies, copy of DoPT OM dated 22.05.1989 is enclosed as Annexure R-10 for the kind perusal of this Hon'ble Court, the SC/ST candidates who are selected on their own merits without relaxed standards, along with candidates of other communities, will not be adjusted against the reserved share of vacancies. The reserved vacancies ad will be filled up separately from amongst the eligible SC/ST candidates who are lower in merit than the last candidate on the merit list but otherwise found suitable for appointment even by relaxed standards, if necessary. In terms of above instructions and on the basis of merit, one candidate namely Anil Kumar (Roll No.1916100666) of SC Category, who did not avail any relaxation being reserve category, was shortlisted as Extended- 01 for DME in Unreserved (UR) category and as Main-I in his own category.ie. SC category. It is also informed that against the advertised 05 vacancies in UR category for subject recruitment, 05 candidates. candidates as as Main and 03 Extended shortlisted for DME. Candidate namely Anil Kumar (Roll No. 1916100666) of SC Category was shortlisted as Extended in UR Category and*

> *as Main against the 02 vacancy of SC Category. Total 03 candidates (02-Main & 01 Extended) including Anil Kumar (RollNo.1916100666) were shortlisted in SC Category for OME. As per the result of DME, out of 05 candidates MEAS who were shortlisted as main for DME in UR Category, 01 candidate declared unfit in DME and he did not prefer appeal for RME. Due to declaration of unfit of 01 candidate shortlisted as Main in UR Category, Anil Kumar (Roll No. 1916100666)of SC category who shortlisted as extended-01 for DME in UR selected against the vacancy of UR category and issued Offer of Appointment. Accordingly, on arising of 01 vacancy in SC Category due to selection of Anil Kumar (Roll No.1916100666) in UR Category, Roll No. 1916100597 Rakesh who shortlisted as Extended I in SC Category and found fit in DME was selected against the vacancy in SC Category and issued Offer of Appointment."*

In view of the above discussion, it is evident that the petitioner was shortlisted for Detailed Medical Examination (DME) only as an extended list candidate against one vacancy of ST Category. He was duly informed by the respondents through instructions issued on his admit card that the candidates placed in the extended list do not stand in the merit list. The only benefit such candidates derive for being there in the extended list is that they get a chance under got heir Detailed Medical Examination. This is only to cover up possibility of any vacancy that may arise in future due to a candidate of the main merit list getting declared medically unfit or remaining absent. These eventualities did not materialize in the case in hand. Therefore, there was nothing wrong on the part of the respondents in not offering appointment to the petitioner for the post in question.

In views of the discussions, we find no merit in the present writ petition. The same is accordingly dismissed, so also the pending miscellaneous application(s), if any.

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

Between:

1. SH. KRISHAN KUMAR,

2. SH. JAG MOHAN, BOTH SONS OF LATE SH. NARAIN DASS, VILLAGE KHARAPATHAR, P.O. DEEM, TEHSIL JUBBAL, DISTRICT SHIMLA, H.P.

….APPELLANTS

(BY MR. TEK CHAND SHARMA, ADVOCATE)

AND

1. SMT. KALAWATI WIFE OF LATE SH. RAJINDER SINGH, R/O VILLAGE GURNU(KHARAPATHAR), P.O. DEEM, TEHSIL JUBBAL AND DISTRICT SHIMLA, H.P.

2. SH. DEVINDER SON OF SH. ROSHAN LAL, R/O MANAN (KHARAPATHAR), P.O. DEEM, TEHSIL JUBBAL AND DISTRICT SHIMLA, H.P.

3. UMA DEVI WIFE OF SH. HANS RAJ, R/O VILLAGE, BEJOHA, TEHSIL KOT-KHAI, DISTRICT SHIMLA, HIMACHAL PRADESH.

4. SMT. ASHA DEVI WIFE OF SH. MEHAR SINGH, R/O VILLAGE BEJOHA, TEHSIL KOT-KHAI, DISTRICT SHIMLA, H.P.

5. SMT. PRAKASHI WIFE OF SH. ISHWAR SINGH, R/O VILLAGE JHAGTAN, TEHSIL JUBBAL, DISTRICT SHIMLA, H.P.

6. SH. KUSHAL SINGH SON OF SH. RAMA NAND, R/O VILLAGE MAND DHAR (KHARAPATHAR) P.O.DEEM, TEHSIL JUBBAL AND DISTRICT SHIMLA, H.P.

7. SMT. RAMPATI WIFE OF LATE SH. RAMA NAND, R/O MAND DHAR(KHARAPATHAR) P.O. DEEM TEHSIL JUBBAL AND DISTRICT SHIMLA, H.P.

…. RESPONDENTS-DEFENDANTS.

8. SMT. KRISHNA DEVI WIFE OF SH. GULAB SINGH R/O VILLAGE GANGAPUR, P.O. SHEEL, TEHSIL ROHRU, DISTRICT SHIMLA, H.P.

9. SMT. SARLA W/O SH. TAMINDER JEET, R/O VILLAGE KHARAPATHAR, P.O. DEEM, TEHSIL JUBBAL AND DISTRICT SHIMLA, H.P.

10. SMT. DROPTI WIFE OF SH. GURDEEP R/O VILLAGE AND P.O. PIPRIA, TEHSIL PIPRIA, DISTRICT HOSHANGABAD, M.P.(DELETED).

11. SMT. CHANDER KANTA W/O SH. CHARANJEET SINGH, R/O PARUNGIA, P.O. MULAMPUR, TEHSIL AND DISTRICT ROPAR (PUNJAB)(DELETED).

PROFORMA-RESPONDENTS/PROFORMA DEFENDANTS.

(BY ROMESH VERMA, ADVOCATE)

REGULAR SECOND APPEAL
No. 309 of 2017
Decided on: 02.03.2022

Code of Civil Procedure, 1908- Section 100- Order 23- Regular Second Appeal- Petitioner challenged the judgment and decreed passed by Additional District Judge-I, Shimla (Camp at Rohru) affirming the judgment and decree passed by Ld. Civil Judge (Junior Division), Jubbal, whereby suit of the plaintiff for declaration and injunction came to be dismissed- Held - Careful perusal of Order 23 Rule 1(4)(b)CPC, clearly reveals that where the plaintiff withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim- Appeal dismissed. (Para 11, 12)

This Appeal coming on for admission this day, the Court passed the following:

J U D G M E N T

By way of instant appeal filed under Section 100 of CPC, challenge has been laid to judgment and decree dated 13.4.2017, passed by Additional District Judge-1, Shimla (camp at Rohru), District Shimla, H.P., in Civil Appeal No. 8-R/13 of 2016, affirming the judgment and decree dated 23.9.2014, passed by learned Civil Judge (Junior Division) Jubbal, District Shimla, H.P., in Civil Suit No.20-I of 2018, titled *Sh. Krishan Kumar versus Smt. Kalawati and another*, whereby suit for declaration and injunction having been filed by the appellants-plaintiffs(*hereinafter referred to as the plaintiffs),*

came to be dismissed on the ground of maintainability as well as on the point that the plaintiffs have failed to prove their adverse possession.

2. Precisely, the facts of the case as emerge from the record are that the plaintiffs filed a suit for declaration and injunction against the respondents-defendants *(hereinafter referred to as the defendants)* in respect of land comprised in Khata No.46/45, Khatauni No.65, Khasra Nos. 12, 13 and 14, area measuring 00-93-96 hectares, situate at Chak Kharapathar, Tehsil Jubbal, District Shimla, H.P., as per jamabandi for the year 2002-03 ***(hereinafter referred to as the suit land)***. Plaintiffs claimed that the suit land is in joint ownership of the parties, but in the column of possession, they have been shown in exclusive possession and as such, defendants have no legal right, title and interest upon the suit land as it has been coming in their peaceful possession.

3. Aforesaid claim put forth by the plaintiffs came to be resisted/ refuted by the defendants, who in their written statement specifically took objection with regard to maintainability of the suit. Defendants claimed before the court below that prior to filing of suit at hand, plaintiffs and proforma-defendants filed civil suit No.39-1-2007 on the same and similar cause of action and same was dismissed as withdrawn on 3.5.2007. Apart from above, defendants also contested the suit of the plaintiffs on merits claiming therein that in partition proceedings, Khasra No.2102/47/1, measuring 8 bighas 13 biswas and Khasra No.2102/47/1, measuring 4 bighas was allotted to Mohan Lal and others, who was father of the replying defendants and mutation was attested on 13.12.1979.

4. Learned trial Court on the basis of the pleadings adduced on record by the respective parties framed following issues:-

1. Whether the plaintiff alongwith proforma defendants No. 6 to 9 are absolute owners in possession of suit land, as claimed?.OPP.

2. Whether the entry showing defendants No.1 to 5 as co-owners of suit land are wrong, illegal and void and they have no legal right, title or interest upon the suit land, as alleged? OPP.

3. Whether plaintiff is entitled for permanent prohibitory injunction restraining defendants No. 1 to 5 from alienating, creating any charge and interfering in the possession of plaintiff in any manner whatsoever, if so, as to what result?.OPP.

4. Whether suit of plaintiff is barred by principle of res-judicata? OPD.

5. Whether the suit is not maintainable and liable to be rejected? OPD.

6. Whether the suit of plaintiff is hit by Order 2 Rule 2 of CPC, as alleged? OPD.

7. Whether plaintiff is estopped to file present suit by his acts, deeds, omissions, commissions, latches, as alleged? OPD.

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

9. Whether plaintiff has no locus-standi to file the present suit? OPD.

10. Whether plaintiff has no cause of action to file present suit? OPD.

11. Whether plaintiff has concealed material facts from the court and suit is bad for want of better particulars? OPD.

12. Whether suit of plaintiff is bad for non-joinder and mis-joinder of necessary parties? OPD.

13. Relief:-

5. Subsequently, vide judgment dated 23.9.2014, learned court below on the basis of the pleadings adduced on record by the respective parties, held the suit of the plaintiff to be not maintainable in terms of the provisions contained under Order 23 Rule 1(4)(b) CPC and on the ground that the plaintiffs have not been able to prove their adverse possession over the suit land.

6. Being aggrieved and dissatisfied with the aforesaid judgment passed by learned trial Court, plaintiffs filed appeal in the court of learned Additional District Judge-1 (camp at Rohru) District Shimla, H.P., which also came to be dismissed vide judgment and decree dated 13.4.2017. In the aforesaid background, plaintiffs have approached this Court in the instant proceedings, praying therein to decree their suit after setting aside the impugned judgments and decrees passed by learned courts below.

7. Today, afore appeal was taken up for admission, but after having perused the record of the courts below, this Court finds that prior to filing of the suit at hand, plaintiffs herein filed suit bearing No.39-1-2007 against the defendants on the same and similar cause of action, but before same could be decided on its own merit, plaintiffs filed an application under order 23 Rule 3 CPC, seeking therein permission to withdraw the suit with liberty to file fresh. On the basis of the statement made by counsel representing the plaintiffs in those proceedings, earlier suit was dismissed as withdrawn on 30.5.2008. Court while permitting the plaintiffs to withdraw the suit did not reserve any liberty, but yet plaintiffs filed fresh suit, which is subject matter of the instant appeal. Learned trial Court dismissed the suit on the ground that at the time of passing order dated 3.5.2008 passed in civil suit No.39-1-2007, Court had

not reserved any liberty to the plaintiffs to file fresh suit and as such, subsequent suit on the same and similar cause of action, is not maintainable. Though, aforesaid findings were laid challenge in appeal by the plaintiffs before learned Additional District Judge-1, (Camp at Rohru) District Shimla, H.P, but same was dismissed.

8. Impugned judgments and decrees passed by courts below further reveal that courts below besides dismissing the case of the plaintiffs on the ground of maintainability, also ruled that plaintiffs had not been able to prove their adverse possession.

9. Mr. Tek Chand Sharma, learned counsel for the plaintiffs while making this court to peruse the application filed under Order 23 Rule 3 CPC, vehemently argued that when there was specific prayer made in the application for withdrawal of the suit with liberty to file fresh and statement of counsel to that effect was recorded, court below ought to have dismissed the suit with liberty to file fresh. Mr. Sharma, further argued that otherwise also, there was no specific requirement, if any, for learned counsel for the plaintiffs to ask for liberty, especially when such prayer was made in written by way of an application filed under order 23 rule 3(1) CPC.

10. Though, after having perused the application filed under Order 23 Rule 3(1) CPC and statement of counsel representing the plaintiffs recorded by the court below before passing order dated 3.5.2008, this Court finds that specific prayer was made in the application for withdrawal of the suit with liberty to file fresh, but fact remains that such plea never came to be recorded in order dated 3.5.2008, whereby earlier suit of the plaintiffs was dismissed as withdrawn. Since Court below while passing order dated 3.5.2008 did not mention specifically with regard to liberty reserved to the plaintiffs to file suit, subsequent suit on the same and similar cause of action filed by the plaintiffs rightly came to be dismissed being not maintainable by the courts below. Once court below had failed to record prayer with regard to liberty to file fresh in an

order dated 3.5.2008, plaintiffs ought to have filed appropriate proceedings before that court only, praying therein for modification/review of the order. But once plaintiffs failed to do so and filed fresh suit on the same and similar cause of action, no illegality can be said to have been committed by the court below while passing impugned judgment, whereby suit having been filed by the plaintiff came to be dismissed being not maintainable in terms of order 23 Rule 1(4)(b) CPC, which reads as under:-

> "**1. Withdrawal of suit or abandonment of part of claim**:- (1) At any time after, the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:
>
> Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.
> (2). An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.
>
> (3) Where the Court is satisfied:-
>
> (a) that a suit must fail by reason of some formal defect, or
>
> (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim,
>
> If may on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim.

(4) Where the plaintiff:-

(a) abandons any suit or part of claim under sub-rule (1), or
(b) withdraws from a suit or part of a claim without the permission referred to in sub rule (3),

he shall be liable for such costs as the court may award ad shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim."

11. Careful perusal of Order 23 Rule 1(4)(b)CPC, clearly reveals that where the plaintiff withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim. It is not in dispute that subsequent suit having been filed by the plaintiffs is on the same and similar cause of action, on which earlier suit was dismissed.

12. Consequently, in view of the above, this Court finds no question of law muchless substantial required to be adjudicated in the instant proceedings and as such, present appeal fails and is dismissed accordingly. Needless to say, appellants-plaintiffs are always at liberty to file appropriate proceedings in appropriate court of law. Pending applications, if any, also stand disposed of.

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

Between:

SMT. VIPASA D/O LATE SH. GHANSHYAM DUTT ATTRI, R/O VILLAGE GARKHAL, TEHSIL KASAULI, DISTRICT SOLAN, H.P.

….PETITIONER

(BY SH. SUDHIR THAKUR, SENIOR ADVOCATE
WITH MR. VIJENDER KATOCH AND MR. KARUN NEGI,

ADVOCATES).

AND

STATE OF HIMACHAL PRADESH

....RESPONDENT

(BY MR. SUDHIR BHATNAGAR AND MR. ARVIND SHARMA, ADDITIONAL ADVOCATE GENERALS WITH MR. NARENDER THAKUR AND MR. GAURAV SHARMA, DEPUTY ADVOCATE GENERALS).

CRIMINAL REVISION NO.336 OF 2021
Decided on: 12.04.2022

Code of Criminal Procedure, 1973- Sections 397, 401 & 156(3)- Revision- Seeking direction to send the complaint filed under Section 156(3) Cr.P.C. for investigation- Ld. Judicial Magistrate First Class, Kasauli dismissed the complaint solely on the ground that FIR No. 60 of 2021 already stands registered against the persons named in the complaint lodged at first instance by the complainant- Held- Court with a view to ascertain the correctness and genuineness at the allegations leveled in the complaint, can either direct lodging of FIR or fresh investigation in the matter- Petition allowed with direction to Ld. Court below to decide complaint filed under Section 156 (3) Cr.P.C. afresh in accordance with law. (Para 21

Cases referred:

Sakiri Vasu Vs. State of Uttar Pradesh and others (2008) 2 SCC 409;
T.C. Thangaraj Vs. V. Engammal and others (2011) 12 SCC 328;

This petition coming on for orders this day, the Court passed the following:

O R D E R

Being aggrieved and dissatisfied with the order dated 25.11.2021, passed by learned Judicial Magistrate 1st Class, Kasauli, District Solan, Himachal Pradesh, whereby an application under Section 156(3) Cr.P.C, having been filed by the petitioner-complainant(hereinafter referred to as the complainant), came to be dismissed, complainant has approached this Court in the instant proceedings filed under Section 397 read with Section 401 of Cr.P.C, praying therein to quash and set-aside the aforesaid impugned order and direct the learned court below to send the complaint filed under Section 156(3)Cr.P.C for investigation.

2. Precisely, the facts of the case as emerge from the record are that the complainant was living with her Bua (spinster) at village Garkhal in a two storeyed house having three sets. Apart from her Bua, two tenants were also living in the building. Since after the death of her Bua, complainant started living permanently in the house of her Bua at village Garkhal, cousin of her late Bua namely Lalit Mohan objected to the same and made all out efforts to throw her out from the building. Since complainant was constantly harassed and threatened by the relatives of her late Bua, she filed a written complaint to the police at Garkhal on 6.10.2021, but the lady police official of the police post did not take the complaint and only provided her telephone number for assistance. On 8.10.2021, cousin of her late Bua namely Sh. Lalit Mohan alias Montu came to the house alongwith police official namely Sandeep and Montu started arguing with the complainant. Being terrified by the threats of Montu, complainant reported the matter to the police on 9.10.2021 in writing, which was again not accepted by the police and allegedly official namely Sandeep threatened her that he would arrest the complainant and frame a case under several sections. On the same day, complainant visited the police post and submitted a written complaint of her being threatened by person namely Lalit Mohan alias Montu. However, when she came back to her Bua's house person namely Montu alongwith several male and female persons in furtherance of

their common intention entered the house unauthorizedly and gave beatings to the complainant with hand, fist and danda etc. Allegedly, above persons also snatched purse and jewellary of the complainant and also threatened her that they would strip her naked, kill her and burn her alive. Complainant also alleged that while she was confined in the house, constable Sandeep informed the brother-in-law to rescue her as she was being beaten by her relatives. Though, FIR came to be lodged on the complaint of the complainant, but since police did not incorporate the penal sections like 120-B, 342, 354, 394 and 452 of IPC in the FIR against the accused named in the complaint, complainant filed complaint under Section 156(3) Cr.P.C in the court of learned Judicial Magistrate 1st Class, Kasauli, District Solan, H.P.(Annexure P-2). In the aforesaid complaint/application, complainant besides giving complete details with regard to alleged incident as well as names of accused, who constantly harassed and threatened her, requested the Court to order for fresh investigation in the case by some senior police official.

3. Learned Judicial Magistrate 1st Class, Kasauli, District Solan, H.P. having taken cognizance of the complaint called for the report of SHO Kasauli, who reported to the Court below that FIR No.60/2021, dated 10.10.2021, under Sections 448, 148, 509, 323, 427, 506 read with Section 149 and 147 of IPC stands registered at police Station Kasauli. SHO, Kasauli also informed the Court below that at present Dy. S.P., Parwanoo namely Sh. Yogesh Rolta is conducting the investigation in the case and further action shall follow as per law according to the facts of the case.

4. Complainant filed objections to the aforesaid status report filed by the SHO, Kasauli, wherein she again reiterated that investigation is not being conducted in fair and transparent manner, rather efforts are being made by the police to save the police official, who alongwith cousin of her late Bua not only extended threats to her but also gave beatings.

5. Learned Judicial Magistrate 1st Class, Kasauli on the basis of aforesaid reports submitted by the SHO, Kasauli, dismissed the complaint filed by the complainant under Section 156(3) Cr.P.C. In the aforesaid background, complainant has approached this Court in the instant proceedings, praying therein to set-aside the aforesaid order dismissing the application having been filed by the complaint under section 156(3) Cr.P.C.

6. Since at the time of issuance of notice in the case at hand, learned senior counsel representing the petitioner-complainant while making this Court to peruse the impugned order dated 25.11.2021 vehemently argued that at no point of time complaint under Section 156(3) Cr.P.C ever came to be forwarded to the Investigating Officer for investigation by learned Judicial Magistrate 1st Class, Kasauli, District Solan, H.P, this Court vide order dated 6.1.2022 directed the Deputy Superintendent of Police, Parwanoo to file an affidavit, specifically stating therein action/inquiry taken/conducted by him pursuant to the allegations leveled by the complainant under Section 156(3) of the Cr.P.C. Pursuant to aforesaid direction, Deputy Superintendent of Police., Parwanoo has filed his compliance affidavit, which is available at page 79 of the paper book, perusal whereof reveals that no investigation ever came to be conducted by Deputy Superintendent of Police on the complaint of the complainant under Section 156(3)Cr.P.C, rather complaint having been filed by the complainant came to be dismissed solely on the ground that FIR No.60 of 2021 already stands registered against the persons named in the complaint lodged at first instance by the complainant before the police Station, Kasauli, District Solan,H.P.

7. I have heard learned counsel representing the parties and have gone through the record carefully.

8. Precise grouse of the petitioner, as has been raised in the case at hand and has been further canvassed by learned counsel for the petitioner is that once complainant being dissatisfied with the investigation carried out by

the police on her complaint had approached competent court of law under Section 156(3) Cr.P.C for further investigation, court below ought to have forwarded the complaint filed by the complainant under Section 156(3) Cr.P.C to the investigating Officer for further investigation, but in the case at hand, impugned order itself reveals that learned Judicial Magistrate 1st Class, Kasauli though called for the report of the SHO after having received the complaint under Section 156(3)Cr.P.C from the complainant, but she after having been made aware of the facts that FIR already stands registered, dismissed the complaint under Section 156(3) Cr.P.C. in hot haste manner.

9. Mr. Sudhir Thakur, learned Senior Counsel representing the petitioner contended that learned Court below failed to take note of the fact that complaint under Section 156(3) Cr.P.C was filed by the complainant after lodging of the FIR No.60/2021, meaning thereby she had no grouse as far as lodging of the FIR is concerned, rather her specific grouse was that the allegation levelled by her while making complaint to police Station, Kasauli have been not investigated properly. While making this court to peruse the complaint lodged by the complainant at first instance before the SHO, Mr. Thakur, contended that serious allegations were levelled against the police official, who in connivance with cousin of late Bua of complainant not only extended threats to the complainant, but also gave beatings. Lastly, Mr. Thakur argued that bare perusal of complaint under Section 156(3)Cr.P.C itself reveals that had Investigating Officer taken cognizance of the complaint made by the complainant, he would have booked the accused named in the complaint under Sections 120-B, 342, 354, 394 and 452 of IPC and as such, Court below ought not have straightway dismissed the complaint filed by the complainant under Section 156(3)Cr.P.C on the basis of report submitted by the SHO, Kasauli,, rather it ought to have directed the investigating Officer to conduct the investigation on the basis of allegations levelled in the complaint under Section 156(3) Cr.P.C.

10. Mr. Sudhir Bhatnagar, learned Additional Advocate General, while refuting the aforesaid submission made on behalf of the learned senior counsel representing the petitioner, contended that there is no illegality and infirmity in the order impugned in the instant proceedings because bare perusal of the same clearly reveals that police has acted in fair manner. Mr. Bhatnagar, further submitted that once police having taken note of complaint lodged by the complainant at first instance at police Station, Kasauli, have investigated the matter, there was no occasion, if any, for the Court to order for fresh investigation as was prayed in the complaint under Section 156(3) Cr.P.C. having been filed by the complainant. Mr. Bhatnagar, further argued that bare perusal of impugned order itself reveals that all the allegations as have been levelled in the complaint under Section 156(3) Cr.P.C. were duly investigated by the Investigating Officer and as such, there is no occasion for this Court to accede to the request made at this juncture for directing the Investigating Officer to investigate the matter fresh.

11. There cannot be any quarrel with the fact that at first instance complaint lodged the complainant at police Station, Kasauli alleging therein that cousin of her late Bua namely Sh. Lalit Mohan alongwith police official HC Sandeep unauthorizedly entered her house and gave her beatings and also snatched some valuable items of her. Apart from above, complainant also alleged that lady constable available in the police did not lodge her report and only provided her telephone number for assistance. Though, police having taken note of the afore complaint, lodged the FIR No.60 of 2021 dated 10.10.2021 against some persons under Sections 448, 147, 148, 149, 509, 323, 427, 506 of IPC at police Station, Kasauli, but no action ever came to be taken against the police official HC Sandeep and one another person Dhananjay and as such, complainant was compelled to institute complaint under section 156(3) Cr.P.C. in the court of learned Judicial Magistrate 1st Class, Kasauli, District Solan, H.P. If the complaint filed under Section 156(3)

Cr.P.C is read in its entirety, it clearly reveals that the complainant levelled serious allegations against the police official with regard to their unauthorized entry in the house of the complainant and thereafter taking forcible possession of the house without there being any authority of law.

12. Learned Judicial Magistrate 1st Class, Kasauli taking cognizance of the complaint under Section 156(3) Cr.P.C. though called for the report of the SHO but without going into the correctness of the same vis-à-vis specific allegation levelled in the complaint under Section 156(3) Cr.P.C, proceeded to close the matter, whereas very purpose of filing complaint under Section 156(3) Cr.P.C on behalf of the complainant was to ensure proper and fair investigation. Since FIR on the complaint filed by the complainant stood already lodged prior to filing of the complaint under Section 156(3)Cr.P.C, there could not be any grouse of the petitioner on that account, rather her specific case before the Magistrate was that police has not acted in a fair and transparent manner and as such, case is required to be investigated afresh.

13. By now it is well settled that if a person has grievance that proper investigation has not been done on his/her complaint and FIR is being not registered against the accused, he/she can approach the Magistrate concerned under Section 156(3) Cr.P.C. On receipt of complaint under Section 156(3) Cr.P.C Magistrate can direct the FIR to be registered and also can direct a proper investigation to be made, in a case where, according to the aggrieved person, no proper investigation was made. The Magistrate can also under the same provision monitor the investigation to ensure a proper investigation. However, in the case at hand, learned Judicial Magistrate 1st Class, Kasauli taking note of the report filed by the SHO that FIR already stands registered, closed the proceedings initiated at the behest of the complainant under Section 156(3)Cr.P.C., whereas she with a view to ascertain the correctness of the allegation levelled by the complainant in her complaint under Section 156(3)

Cr.P.C ought to have forwarded the copy of the complaint to the Investigating Officer for further investigation.

14. Interestingly, in the case at hand complainant filed objections to the status report filed by the police, wherein she again reiterated that investigation has been not conducted in fair manner and efforts are being made by the police to save police official but yet learned Court below did not make any effort to ensure further investigation in the matter, so that no injustice was caused to the complainant. Careful perusal of provisions of Section 156(3) Cr.P.C clearly reveals that the same provide for a check by the Magistrate on the police performing their duties and where the Magistrate finds that the police have not done their duty or not investigated satisfactorily, she/he can direct the police to carry out the investigation properly, and can monitor the same.

15. In this regard, reliance is placed upon the judgment rendered by Hon'ble Apex Court in case titled **T.C. Thangaraj Vs. V. Engammal and others(2011) 12 SCC 328,** wherein it has been held as under:-

> ***"12. It should also be noted that Section 156(3) of the Code of Criminal Procedure provides for a check by the Magistrate on the police performing their duties and where the Magistrate finds that the police have not done their duty or not investigated satisfactorily, he can direct the Police to carry out the investigation properly, and can monitor the same. (see Sakiri Vasu v. State of U.P. (2008) 2 SCC 409)."***

16. Reliance is also placed upon the judgment rendered by Hon'ble Apex Court in **Sakiri Vasu Vs. State of Uttar Pradesh and others** (2008) 2 SCC 409, wherein it has been observed as under:

> "11. In this connection we would like to state that if a person has a grievance that the police station is not registering his FIR under Section

154 Cr.P.C, then he can approach the Superintendent of Police under Section 154(3) Cr.P.C by an application in writing. Even if that does not yield any satisfactory result in the sense that either the FIR is still not registered, or that even after registering it no proper investigation is held, it is open to the aggrieved person to file an application under Section 156(3) CrPC before the learned Magistrate concerned. If such an application under Section 156(3) is filed before the Magistrate, the Magistrate can direct the FIR to be registered and also can direct a proper investigation to be made, in a case where, according to the aggrieved person, no proper investigation was made. The Magistrate can also under the same provision monitor the investigation to ensure a proper investigation.

12. Thus in Mohd. Yousuf v. Afaq Jahan (2006) 1 SCC 627 this Court observed: (SCC p. 631, para 11)

"11. The clear position therefore is that any Judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer in charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complainant because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter."

13. The same view was taken by this Court in Dilawar Singh v. State of Delhi (2007) 12 SCC 641: JT (2007) 10 SC 585 (JT vide para 17). We

would further clarify that even if an FIR has been registered and even if the police has made the investigation, or is actually making the investigation, which the aggrieved person feels is not proper, such a person can approach the Magistrate under Section 156(3) CrPC, and if the Magistrate is satisfied he can order a proper investigation and take other suitable steps and pass such order(s) as he thinks necessary for ensuring a proper investigation. All these powers a Magistrate enjoys under Section 156(3) CrPC.

14. Section 156(3) states:

"156. (3) Any Magistrate empowered under Section 190 may order such an investigation as abovementioned."

The words "as abovementioned" obviously refer to Section 156(1), which contemplates investigation by the officer in charge of the police station.

15. Section 156(3) provides for a check by the Magistrate on the police performing its duties under Chapter XII CrPC. In cases where the Magistrate finds that the police has not done its duty of investigating the case at all, or has not done it satisfactorily, he can issue a direction to the police to do the investigation properly, and can monitor the same.

16. The power in the Magistrate to order further investigation under Section 156(3) is an independent power and does not affect the power of the investigating officer to further investigate the case even after submission of his report vide Section 173(8). Hence the Magistrate can order reopening of the investigation even after the police submits the final report, vide State of Bihar v. J.A.C. Saldanha (1980) 1 SCC 554 (SCC : AIR para 19).

17. In our opinion Section 156(3) CrPC is wide enough to include all such powers in a Magistrate which are necessary for ensuring a proper investigation, and it includes the power to order registration of an FIR and of ordering a proper investigation if the Magistrate is satisfied that a proper investigation has not been done, or is not being done by the

police. Section 156(3) CrPC, though briefly worded, in our opinion, is very wide and it will include all such incidental powers as are necessary for ensuring a proper investigation.

18. It is well settled that when a power is given to an authority to do something it includes such incidental or implied powers which would ensure the proper doing of that thing. In other words, when any power is expressly granted by the statute, there is mpliedly included in the grant, even without special mention, every power and every control the denial of which would render the grant itself ineffective. Thus where an Act confers jurisdiction it impliedly also grants the power of doing all such acts or employ such means as are essentially necessary for its execution."

17. Reliance is also placed upon judgment rendered by Hon'ble Apex Court in **Anandwardhan and another** versus **Pandurang and others, Criminal Appeal No.174-175 of 2005, Dated 24.01.2005**, wherein it has been held as under:-

"7. We do not wish to make any comments about the investigation of the case or the result of the investigation. The law provides that if the police fails to investigate a case arising from a first information report lodged before it disclosing commission of a cognizable offence, it is open to the informant/complainant to move the Magistrate concerned for appropriate order under section 156 Cr.P.C, or may file a complaint and obtained appropriate orders from him for issuance of process against the accused for trial. If the grievance of the respondent was that the police was not properly investigating his case, or that the report made by the police was wrong or based on no investigation whatsoever, it was open to him to move the Magistrate concerned. Having failed to do so, he found the novel device of moving the High Court under Article 227 of the Constitution. Such a writ petition should not have been entertained by the High Court when remedy is provided to the aggrieved party under the

> Code of Criminal Procedure in accordance with the procedure established by law.”

18. It is quite apparent from the aforesaid exposition of law that while considering the prayer, if any, made under S.156(3) Cr.P.C, court is not only to act upon the report submitted by the Police in those proceedings, rather, court with a view to ascertain the correctness and genuineness of the allegations levelled in the complaint, can either direct lodging of FIR or fresh investigation in the matter. As has been observed herein above, very purpose of provision of S.156 (3) Cr.P.C is to ensure check by the Magistrate on the police performing their duties and, as and when, Magistrate finds that the Police have done their duty in accordance with law, it can direct the Police to carry out the investigation properly.

19. In the case at hand, if allegation levelled in the complaint under S.156 (3) Cr.P.C are perused in their entirety, they compel this court to conclude that the Police have not acted in a fair and transparent manner, rather, efforts have been made to hush up the matter, especially against the police officials. Though, Deputy Superintendent of Police Parwanoo has been appointed as Investigating Officer but he has only investigated the matter only on the basis of initial complaint lodged at police Station. Kasauli.

20. Leaving everything aside, affidavit filed by the Deputy Superintendent of Police, Parwanoo in terms of order dated 6.1.2022, clearly reveals that he had no occasion, if any, to investigate the allegations as contained in the complaint under S.156 (3) Cr.P.C, filed by the complainant and as such, impugned order passed by Court below is not sustainable in the eye of law. Once the Magistrate had received the complaint under S.156 (3) Cr.P.C, containing serious allegations against the police official, he /she with a view to ascertain the correctness of the allegations ought to have forwarded the complaint to the police for investigation. After receipt of the report Magistrate could either close the proceedings on the pretext that FIR vis-à-vis

allegations contained in the complaint already stands registered or she could order for registration of case against the accused named in the complaint under appropriate provisions of law. However, in the instant case Magistrate without making an effort to ascertain the correctness of the allegations contained in the complaint, which otherwise could be ascertained by referring the same to the Investigating Officer proceeded to close the proceedings on the pretext that FIR already stands registered.

21. Consequently, in view of the detailed discussion made hereinabove as well law taken into consideration, the present petition is allowed and order dated 25.11.2021, passed by learned Judicial Magistrate First Class, Kasauli, District Solan, H.P., is quashed and set aside with a direction to learned court below to consider and decide complaint filed under Section 156(3)Cr.P.C on behalf of the complainant, afresh in accordance with law expeditiously, preferably within a period of four weeks.

22. Learned counsel representing the parties undertake to cause presence of their respective clients before learned Court below on **23.4.2022**, enabling it to do the needful well within the stipulated time.

23. Petition stands disposed of in the afore terms, alongwith all pending applications.

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

Between:

M/S SOHAN LAL VINOD KUMAR THROUGH ITS PROP. MR. LUCKY SON OF SH.SOHAN LAL, R/O VILLAGE PALSOTI, P.O. KOTHI, TEHSIL GHUMARWIN, DISTRICT BILASPUR, H.P.

….PETITIONER

(BY SH. VARUN CHANDEL, ADVOCATE)

AND

RAJ KUMAR SON OF SH. RAM PARKASH, PROP.
RAJ TRADING CO. VILLAGE KOHALWIN, P.O.
RAGHUNATHPURA, TEHSIL SADAR, DISTRICT
BILASPUR, HIMACHAL PRADESH

....RESPONDENT

(BY MR. AJEET SHARMA, ADVOCATE).

CRIMINAL MISC. PETITION (MAIN)
U/S 482 Cr.P.C No.518 OF 2021
Decided on: 17.03.2022

Code of Criminal Procedure, 1973- Section 482- **Negotiable Instruments Act, 1881**- Section 138- Ld. Court below found sufficient grounds to proceed against the accused for his having committed offence punishable under Section 138 of the Act- Revision before Ld. Additional Sessions Judge also dismissed on the ground that there is a triable issue that cannot be decided in the present proceedings- Held- No illegality and infirmity in the well reasoned order of Ld. Additional Sessions Judge- Petition dismissed. (Para 7, 9, 10)

Cases referred:

Ajeet Seeds Limited Vs. K. Gopala Krishnaiah' reported in (2014)12 SCC 685;

This petition coming on for orders this day, the Court passed the following:

O R D E R

By way of instant petition filed under Section 482 of the Code of Criminal Procedure, prayer has been made on behalf of the petitioner for quashing and setting aside the order dated 7.4.2021, passed by learned Additional Sessions Judge, Ghumarwin, District Bilaspur, H.P., in Criminal Revision No.31-10 of 2019, affirming the orders dated 16.4.2019 and 2.9.2019, passed by learned Judicial Magistrate 1st Class, Bilaspur, District Bilaspur, Himachal Pradesh, in case No.163-03 of 2017, whereby trial Court after having recorded the preliminary evidence of the respondent-complainant ***(hereinafter referred to as the complainant)*** arrived at a conclusion that

there is sufficient material to proceed against the accused for having committed the offence under Section 138 of the Negotiable Instruments Act ***(for short Act***) and accordingly summoned him to the Court for 24.08.2018 and thereafter vide order dated 2.9.2019 put notice of accusation to him, to which he pleaded not guilty and claimed trial.

2. Precisely, the facts of the case as emerge from the record are that the respondent-complainant instituted a complaint under Section 138 of the Act in the Court of learned Judicial Magistrate 1st Class, Bilaspur, District Bilaspur, H.P., alleging therein that petitioner-accused with a view to discharge his lawful liability issued cheque bearing No.627312, dated 17.07.2017 for sum of `1,33,300/- drawn at Punjab National Bank, Branch Officer Talyana, District Bilaspur, Himachal Pradesh in his favour. However, fact remains that aforesaid cheque on its presentation was dishonoured on account of insufficient fund. Since accused despite having received legal notice served upon him by the complaint failed to make the payment good, complainant instituted the complaint under Section 138 of the Act against the accused in the competent court of law.

3. Having taken cognizance of the complaint and after recording preliminary evidence, learned court below vide order dated 16.4.2018 found sufficient grounds to proceed against the accused for his having committed offence punishable under Section 138 of the Act and accordingly summoned him for 24.08.2018. On 2.9.2019, learned court below put notice of accusation to the accused of his having committed offence under section 138 of the Act, to which he pleaded not guilty and claimed trial.

4. Being aggrieved with the summoning order dated 16.4.2018 and thereafter notice of accusation put vide order dated 2.9.2019, accused preferred Criminal Revision Petition No.31-10 of 2019, in the court of Additional Sessions Judge, Ghumarwin, District Bilaspur, H.P on the ground that since respondent-complainant failed to issue notice within a period of 30

days from the date of receipt of return memo from the bank concerned, complaint having been filed by him ought to have rejected.

5. Precisely, the case of the petitioner-accused before the Additional Sessions Judge was that vide memo dated 19.7.2017 bank concerned had apprised the respondent-complainant with regard to dishonouring of cheque and as such, he ought to have served legal notice within 30 days from that date, but in the case at hand, legal notice was issued to the petitioner-accused on 19.8.2017 i.e. after expiry of 30 days. Learned Additional Sessions Judge in its order though found that cheque in question was returned vide memo dated 19.7.2017 issued by the Punjab National Bank to State Bank of India, but observed that it cannot be presumed that information with regard to same was given to the complainant on the same day by State Bank of India. He further observed in the order that though time limitation provided under the act is mandatory and non-compliance thereof is fatal, but the question whether return memo dated 19.7.2017 was received by the complainant on 19.7.2017 is a triable issue and cannot be decided in the instant proceedings. In the aforesaid background, petitioner-accused has approached this Court in the instant proceedings, praying therein to set-aside the aforesaid order dated 7.4.2021 passed by learned Additional Sessions Judge as well as orders dated 16.4.2018 and 2.9.2019 passed by learned Judicial Magistrate 1st Class, Bilaspur, District Bilaspur, H.P.

6. Having heard learned counsel representing the parties and perused the material available on record vis-à-vis reasoning assigned in the order passed by learned Additional Sessions Judge, Ghumarwin, District Bilaspur, H.P., this Court does not find any illegality and infirmity in the same and as such, no interference is called for.

7. Learned Additional Sessions Judge while passing order impugned in the instant proceedings has rightly observed that the question whether return memo dated 19.7.2017 was received by the complainant on

the same day is a question to be decided on the basis of evidence led on record by the respective parties and otherwise it being triable issue cannot be decided in the instant proceedings i.e. criminal revision. Hon'ble Apex Court in ***Ajeet Seeds Limited Vs. K. Gopala Krishnaiah' reported in (2014)12 SCC 685,*** has categorically held that notice was duly served on the respondent or otherwise is a triable issue and cannot be proceeded as indisputable position. It is profitable to reproduce para No.10 and 11 of the aforesaid judgment hereinbelow:-

> "10. It is thus clear that Section 114 of the Evidence Act enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. Section 27 of the GC Act gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. It is not necessary to aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business.
>
> 11. Applying the above conclusions to the facts of this case, it must be held that the High Court clearly erred in quashing the complaint on the ground that there was no recital in the complaint that the notice under Section 138 of the NI Act was served upon the accused. The High Court also erred in quashing the complaint on the ground that there was no proof either that the notice was served or it was returned unserved/unclaimed. That is a matter of evidence. We must mention that in C.C. Alavi Haji, this Court did not deviate from the view taken in Vinod Shivappa, but reiterated the view expressed therein with certain clarification. We have already quoted the relevant paragraphs from Vinod Shivappa where this Court has held that service of notice is a matter of evidence and proof and it would be premature at the stage of issuance of process to move the High Court for quashing of the proceeding under Section 482 of the Cr.P.C. These observations are

squarely attracted to the present case. The High Court's reliance on an order passed by a two-Judge Bench in Shakti Travel & Tours is (2002)9 SCC 415 misplaced. The order in Shakti Travel & Tours does not give any idea about the factual matrix of that case. It does not advert to rival submissions. It cannot be said therefore that it lays down any law. In any case in C.C. Alavi Haji (2007)6 SCC 555, to which we have made a reference, the three- Judge Bench has conclusively decided the issue. In our opinion, the judgment of the two-Judge Bench in Shakti Travel & Tours does not hold the field anymore."

8. Hon'ble Apex Court has again reiterated aforesaid view taken by Hon'ble Apex Court in latest judgment passed in Cr. Appeal No.1325 of 2019, titled as ***Kishore Sharma versus Sachin Dubey,*** decided on 3rd September, 2019, wherein it has been held as under:-

"1. Leave granted.

2. Despite successive notices served on the respondent, he has chosen not to appear. The last notice clearly mentioned that the matter will be finally disposed of at notice stage.

3. The present appeal arises from the judgment and order dated 15.11.2018 passed by the High Court of Madhya Pradesh, Indore Bench in M.Cr.C. No.17894 of 2018 whereby the High Court allowed the quashing petition filed by the respondent under Section 482 of Cr.P.C. on two counts. Firstly, that the legal notice has not been served on the respondent within the statutory period and secondly, because of the remark noted on the cheque return memo.

4. Both these facts would require the parties to produce evidence and are triable issues, as expounded by this Court in 'Ajeet Seeds Limited vs. K. Gopala Krishnaiah' reported in (2014) 12 SCC 685 and in 'Laxmi Dyechem vs. State of Gujarat and Others' reported in (2012) 13 SCC 375. As a result, even this appeal ought to succeed. The impugned judgment and order is accordingly set aside and the appeal is allowed".

9. Consequently, in view of the discussion made hereinabove as well as law laid down by the Hon'ble Apex Court, this Court finds no illegality and infirmity in the impugned judgment passed by learned Additional Sessions Judge, Ghumarwin, District Bilaspur, Himachal Pradesh and same is upheld.

10. The present petition fails and is dismissed accordingly. However, it is made clear that any observation made by learned Additional Sessions Judge with regard to merits of the case shall have no bearing on the case, which otherwise shall be decided by the Court below on the basis of the pleadings, evidence as well as law. Pending application(s), if any, also stands disposed of.

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

Between:

AJAY KUMAR @ KALA, SON OF SH. MANOHAR LAL,
R/O VILLAGE SEVKRA WARD NO.2, P.O., TEHSIL AND DISTRICT KANGRA, H.P.

….PETITIONER

(BY MR. ANUP RATTAN, ADVOCATE.)

AND

STATE OF HIMACHAL PRADESH

….RESPONDENT

(BY MR. SUDHIR BHATNAGAR AND MR. ARVIND SHARMA, ADDITIONAL ADVOCATES GENERALS WITH MR. NARENDER THAKUR AND MR. GAURAV SHARMA, DEPUTY ADVOCATE GENERALS).

CRIMINAL MISC.PETITION (MAIN) No. 593 of 2022

Between:

BIHARI LAL, SON OF SH. BALDEV RAJ, R/O VILLAGE SAVKRA WARD NO.3, P.O, TEHSIL AND DISTRICT KANGRA, H.P.

....PETITIONER

(BY MR. ANUP RATTAN, ADVOCATE.)

AND

STATE OF HIMACHAL PRADESH

....RESPONDENT

(BY MR. SUDHIR BHATNAGAR AND MR. ARVIND SHARMA, ADDITIONAL ADVOCATES GENERALS WITH MR. NARENDER THAKUR AND MR. GAURAV SHARMA, DEPUTY ADVOCATE GENERALS).

CRIMINAL MISC.PETITION (MAIN)
No. 592 of 2022
Decided on: 19.04.2022

Code of Criminal Procedure, 1973- Section 439- **Indian Penal Code, 1860**- 376(1), 376(D), 354, 120-B & 201 - **Protection of Children from Sexual Offences Act, 2012**- Sections 6 & 17 - **Scheduled Castes and Tribes (Prevention of Atrocities) Act, 1989**- Sections 3(i)(w)(i)(ii) 3(II)(va) – Held- Having read statements of the victim-prosecutrix recorded under Section 164 Cr.P.C. juxtaposing her statement recorded under Section 154 Cr.P.C., there appears to be force in the submission of learned counsel for the petitioners that version put forth by the victim-prosecutrix is totally contradictory and cannot be relied upon on its face value- Victim/ prosecutrix was in touch with all the accused for quite long and even in the past she has been meeting bail petitioners- No reason to curtail the freedom of the bail petitioners- Normal rule is bail and not jail- Bail granted subject to conditions. (Para 8, 15, 17)

Cases referred:

Prasanta Kumar Sarkar vs. Ashis Chatterjee and another (2010) 14 SCC 496;
Sanjay Chandra vs. Central Bureau of Investigation (2012)1 SCC 49;

This petition coming on for orders this day, the Court passed the following:

O R D E R

Bail petitioners, namely Ajay Kumar @ Kala and Bihari Lal, who are behind the bars since 30.9.2021 have approached this court in the instant proceedings filed under S. 439 Cr.P.C, for grant of regular bail in case FIR No. 75 of 2021, dated 18.9.2021, registered at Police Station Lambagaon, District Kanga, Himachal Pradesh under Ss. 376(1), 376(D), 354, 120-B, 201 of IPC, Ss. 6 and 17 of Protection of Children from Sexual Offences Act, Section 181 of Motor Vehicles Act and Sections 3(i)(w)(i)(ii) 3(II)(va) of SC and ST Act. Respondent State has filed status report and SI Kesar Singh has come present with record. Record perused and returned.

2. Careful perusal of the record /status report made available to this court reveals that on 18.9.2021, victim-prosecutrix, aged 17 years (name withheld) lodged a complaint at Police Station Lambagaon, District Kangra, Himachal Pradesh, alleging therein that on 3.9.2021, while she had gone to Balakrupi to attend birthday of granddaughter of her aunt (Tai),bail petitioners sexually assaulted her against her wishes. She further alleged that on 7th/8th 9.2021, when her aunt had gone to earn daily wages and uncle was sleeping under the influence of liquor, her sister-in-law sent two persons to her and they took her to *Bohar* (room in upper storey of the house) and sexually assaulted her against her wishes. She alleged that when one person was committing sexual assault upon her, another was making her video. She disclosed to the police that on 10.9.2021, she went to Palampur to meet her friend but on 11.9.2021, while she reached Palampur bus stand, she received telephonic call from some person that you reach Kangra, otherwise video made at the residence of her sister-in-law would be made viral. She alleged that after

having received aforesaid telephone call, she went to Kangra, from where two persons took her to Jwala Ji and sexually assaulted her against her wishes in a hotel and thereafter dropped her at Nadaun. On the basis of aforesaid complaint made by the victim/prosecutrix, FIR, as detailed hereinabove, came to be lodged against the present bail petitioners. Subsequently, victim-prosecutrix in her statement recorded under S. 164 Cr.P.C alleged that on 6.9.2021, two boys namely, Vivek Chaudhary and Savan came to her aunt's house and called her outside the window. She alleged that person namely Savan sexually assaulted her in a van and other person, Vivek Chaudhary was standing outside. She alleged that though Vivek Chaudhary did not commit any wrong with her, but hurled abuses and misbehaved with her. In her statement recorded under Section 164 Cr.P.C, she alleged that on 7.9.2021, at 3-4 PM, Kala alias Ajay Kumar alongwith other person came and sexually assaulted her in the *Bohar* (room in the upper storey of house). She further deposed before the Magistrate that she went to Kangra from where, Rahul took her to Jwalaji in Free India Bus and sexually assaulted her in a hotel. On the basis of aforesaid statement made by the victim/prosecutrix under section 164 Cr.P.C., persons namely Vivek Chaudhary, Savan and Rahul also came to be named in the FIR alongwith the present bail petitioners. All the above accused saves and except present bail petitioners named in the FIR already stands enlarged on bail. Since challan stands filed in the competent court of law and nothing remains to be recovered from the bail petitioners, they have approached this court in the instant proceedings for grant of regular bail.

3. While fairly admitting factum with regard to filing of the *Challan* in the competent court of law, Mr. Sudhir Bhatnagar, learned Additional Advocate General submits that though nothing remains to be recovered from the bail petitioners, but keeping in view the gravity of offence alleged to have been committed by them, they do not deserve leniency. Mr. Bhatnagar, further submits that there is overwhelming evidence available on

record suggestive of the fact that bail petitioners herein taking undue advantage of the innocence and minority of the victim-prosecutrix, sexually assaulted her against her wishes, but even otherwise consent, if any, of the victim-prosecutrix being minor is immaterial and, as such, prayer made on behalf of the bail petitioners for grant of bail deserves outright rejection.

4. Having heard learned counsel for the parties and perused material available on record, this court finds that this Court having taken note of the contradictory statement made by the victim/prosecutrix has already ordered for enlargement of other co-accused on bail during the pendency of the case. Initial statement of the victim-prosecutrix recorded under S.154 Cr.P.C, on the basis of which, FIR came to be registered, is totally contrary to her subsequent statement recorded before learned Magistrate under S. 164 Cr.P.C. While getting her statement recorded under S.154 Cr.P.C, victim/prosecutrix claimed that on 7/8.9.2021, her sister-in-law called two persons in her house and they sexually assaulted her against her wishes in the *Bohar,* but subsequently in her statement recorded under S. 164 Cr.P.C, she gave altogether different version by stating that two persons, namely Vivek Chaudhary and Savan came to the house of her aunt and called her outside the window and thereafter person namely Savan sexually assaulted her in a van, whereas, another person Vivek Chaudhary kept on standing outside. Though, in the initial statement recorded under Section 154 Cr.P.C., victim/prosecutrix claimed that present bail petitioners sexually assaulted her against her wishes on 6.9.2021, but in her subsequent statement recorded under Section 164 Cr.P.C, she nowhere alleged that on 6.9.2021 she was sexually assaulted against her wishes by the present bail petitioners in Bohar, rather claimed that person namely Savan and Vivek Chaudhary came to the house of her aunt and called her outside the window and thereafter person namely Savan sexually assaulted her in a van. Factum with regard to alleged incident of 6.9.2021, wherein victim/prosecutrix allegedly sexually assaulted

by the person namely Savan only came to be recorded in her statement recorded under S. 164 Cr.P.C before Magistrate, wherein victim/prosecutrix made no whisper/mention, if any, with regard to sexual assault, if any, made by bail petitioners on 6.9.2021. If the statement of the victim-prosecutrix recorded under S.164 CrPC is perused, it nowhere suggests that bail petitioners namely Ajay Kumar alias Kala and Bihari Lal had sexually assaulted the victim/prosecutrix against her wishes on 6.9.2021, rather as per statement co-accused namely Savan and Vivek Chaudhary called her outside the window on 6.9.2021 and thereafter person namely Savan sexually assaulted her in a van.

5. Victim-prosecutrix in her statement recorded under S. 154 CrPC, alleged that two persons, who had sexually assaulted her on 7/8.9.2021, in *Bohri*, had recorded her video but, such fact, if any, never came to be disclosed by her to the Magistrate while making her statement under S. 164 CrPC. Though, in the statement recorded under S.164 CrPC, victim-prosecutrix deposed that the person namely Ajay Kumar alias Kala alongwith other person Bihari Lal had come to her aunt's house, but she nowhere stated that one of the person, out of two, recorded a video of her. Similarly, version put forth by the victim-prosecutrix with regard to sexual assault committed upon her by the co-accused Rahul in her statement recorded under S.154 CrPC, is totally contrary to her subsequent statement made under S.164 CrPC. In her statement recorded under S. 154 CrPC, victim-prosecutrix stated that on 11.9.2021, while she was going to Palampur bus stand for boarding the bus to her native place, she received a telephonic call asking her to come to Kangra, lest her video recorded at her sister-in-law's house, shall be made viral. But such fact, if any, never came to be deposed before Magistrate, at the time of recording of her statement under S. 164 CrPC. Victim-prosecutrix in her statement recorded under S.164 CrPC, simply stated that on 11.9.2021, she went to Kangra, from where bail petitioner Rahul took

her to Jwala Ji in Free India Bus and thereafter committed sexual assault upon her in a Hotel.

6. Having read statements of the victim-prosecutrix recorded under S. 164 CrPC juxtaposing her statement recorded under Section 154 Cr.P.C., there appears to be force in the submission of learned counsel for the petitioners that version put forth by the victim-prosecutrix is totally contradictory and cannot be relied upon on its face value.

7. Perusal of record made available to this court, further reveals that apart from two statements, as have been discussed herein above, victim-prosecutrix narrated altogether a different story to the child counselor, whose report reveals that victim-prosecutrix disclosed to her that person namely Savan after having clicked her photographs made her sit in Free India Bus bound for Jwala Ji and sent the same to Rahul, who subsequently reached Jwalaji and sexually assaulted her in a hotel. Similarly, victim-prosecutrix disclosed to Councilor that person namely Kala alias Ajay Kumar i.e. present bail petitioner gave her Rs.1,000/-, out of which she paid Rs. 700/- to her aunt and kept Rs. 300/- for herself.

8. Interestingly, in the case at hand, victim-prosecutrix specifically alleged that her sister-in-law sent two persons to her but for some unknown reason, she has not been arrayed as an accused in the FIR. Similarly, it is not understood that how victim-prosecutrix could be raped by the persons named in her statement recorded under S.164 CrPC in a *Bohri* in the presence of other family members, especially when it has not been stated that at the time of alleged incident, none was present in the house. Call Detail Report collected on record by the Investigating Agency clearly reveals that the victim-prosecutrix had been talking to all the accused namely Vivek Chaudhary, Rahul, Savan and Ajay Kumar for quite long. Transcription of telephone conversation interse one of the bail petitioner and victim/prosecutrix made

available to this Court reveals that in past also victim/prosecutrix had been meeting bail petitioners and there is exchange of money also.

9. No doubt, age of the victim-prosecutrix at the time of alleged incident was 16 years, but having noticed her conduct, which can be well gauged from her contradictory statements given to the police, judicial Magistrate and counselor, this court finds it difficult to conclude that the victim-prosecutrix was incapable of understanding the consequences of her being in the company of the persons named by her in the FIR.

10. If version put forth by the victim-prosecutrix in both the statements recorded under Ss. 154 and 164 CrPC, are read in its entirety, it reveals that she had been joining the company of various persons including bail petitioners of her own volition, and her sister-in-law was aware of such fact. Moreover, there is another aspect of the matter that when on 6.9.2021, victim-prosecutrix was sexually assaulted against her wishes by co-accused Savan, it is not understood that why she again joined the company of another two persons namely, Ajay Kumar alias Kala and Bihari Lal i.e. present bail petitioners herein on 7.8.2021 that too in her own house, in the presence of her sister-in-law.

11. First incident allegedly happened on 6.9.2021 and thereafter second and third incident happened on 7th and 11th September, 2021 respectively. As per own case of the victim-prosecutrix, she had been travelling from Balakrupi to Palampur and Palampur to Kangra and Kangra to Jwala Ji between 6.9.2021 to 11.9.2021 but yet she did not find any chance/ place and time to lodge complaint against the persons, who allegedly sexually assaulted against her wishes.

12. Leaving everything aside, medical evidence adduced on record, does not support the prosecution story and as such, this court sees no reason to let the bail petitioners incarcerate in jail for an indefinite period during trial, especially when nothing remains to be recovered from them. Since alleged

incidents are of three different dates and in all the three incidents, persons are different, it is not understood how Section 376-D and 120-B of IPC could be invoked in
the case at hand. Though, case at hand is to be considered and decided by the learned trial Court on the basis of totality of evidence collected on record by the investigating agency, but keeping in view the aforesaid glaring aspect of the matter, there appears to be no reason to curtail the freedom of the bail petitioners for indefinite period during the trial. Apprehension expressed by learned Additional Advocate General that in the event of bail petitioners being enlarged on bail, they may flee from justice, can be best met by putting the bail petitioners to stringent conditions.

13. 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

14. 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."***

15. 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.

16. The Apex Court in **Prasanta Kumar Sarkar** versus **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;

2. reasonable apprehension of the witnesses being influenced; and

3. danger, of course, of justice being thwarted by grant of bail.

17. In view of above, bail petitioners have carved out a case for themselves. Consequently, present petitions are allowed and bail petitioners are ordered to be enlarged on bail, subject to their furnishing bail bonds in the sum of Rs.1,00,000/- with one local surety each in the like amount, to the satisfaction of the learned trial Court, besides the following conditions:

4. 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;

5. They shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever;

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

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

19. 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 these applications alone. The petitions stand accordingly disposed of.

20. The petitioners are 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 form the High Court website or otherwise.

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BEFORE HON'BLE MR. JUSTICE MOHAMMAD RAFIQ, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Between:

1. SH. LACHHI RAM, SON OF SH. PARAS RAM, AGE 39 YEARS, R/O VILLAGE KANDI, POST OFFICE ALSINDI, TEHSIL KARSOG, DISTRICT MANDI, HIMACHAL PRADESH.

2. SH. BIHARI LAL, SON OF SH. KUNDAN LAL, AGE 45 YEARS, R/O VILLAGE SHAMAND, POST OFFICE, SHORSHAN, TEHSIL KARSOG, DISTRICT MANDI, HIMACHAL PRADESH.

3. SH. VIR SINGH @ VIR CHAND, SON OF SH. SUBA RAM, AGE 46 YEARS, R/O VILLAGE SHAMAND, POST OFFICE, SHORSHAN, TEHSIL KARSOG, DISTRICT MANDI, HIMACHAL PRADESH.

4. SH. OM PARKASH SON OF SH. TULLA RAM, AGE 45 YEARS, R/O VILLAGE BAGRA-DHAR, POST OFFICE, SHORSAHAN, TEHSIL KARSOG, DISTRICT MANDI, HIMACHAL PRADESH.

5. SH. HUKAM CHAND, SON OF SH. MOHAN LAL, AGE 43 YEARS R/O VILLAGE RAJOGDA, POST OFFICE SHORSHAN, TEHSIL KARSOG, DISTRICT MANDI, HIMACHAL PRADESH.

6. SH. HET RAM SON OF SH. KEHAR SINGH, AGE 42 YEARS, R/O VILLAGE RAJOGDA, POST OFFICE SHORSHAN, TEHSIL KARSOG, DISTRICT MANDI, HIMACHAL PRADESH.

7. SH. JAI SINGH SON OF SH. MOHAN LAL, AGE 46 YEARS, R/O VILLAGE RAJOGDA, POST OFFICE SHORSHAN, TEHSIL KARSOG, DISTRICT MANDI, HIMACHAL PRADESH.

….PETITIONERS

(BY MR. C.N.SINGH, ADVOCATE).

AND

1. THE DEPUTY LABOUR COMMISSIONER, TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.

2. THE DIVISIONAL MANAGER, FOREST CORPORATION, FOREST WORKING

DIVISION, SUNDERNAGAR, DISTRICT MANDI, HIMACHAL PRADESH.

3. THE RANGE OFFICE FOREST CORPORATION, FOREST WORKING RANGE, PANGNA, DISTRICT MANDI, HIMACHAL PRADESH.

……RESPONDENTS.

(BY MR. ASHOK SHARMA, ADVOCATE GENEAL WITH MS. RITTA GOSWAMI, ADDITIONAL ADVOCATE GENERAL, FOR THE RESPONDENTS-STATE).

(MR. RAJESH VERMA, ADVOCATE FOR R-2 & 3)

CIVIL WRIT PETITION
NO. 1852 of 2022
Decided on: 18.04.2022

Constitution of India, 1950- Article 226- **Industrial Disputes Act, 1947**- Section 25F and 25G- Petitioner's prayer to refer the dispute to Labour Court-cum-Industrial Tribunal for adjudication came to be declined by the Deputy Labour Commissioner, on the ground of delay- Held- There is inordinate delay of 15 years and there is no explanation worth credence, ever came to be rendered on record by the petitioner qua such inordinate delay- No illegality and infirmity in the impugned order passed by the Deputy Labour Commissioner- Petition dismissed. (Para 5, 9, 10)

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*This petition coming on for admission before notice this day, **Hon'ble Justice Sandeep Sharma, passed the following:***

O R D E R

Being aggrieved and dissatisfied with order dated 16.1.2021, passed by Deputy Labour Commissioner, Himachal Pradesh, whereby prayer

made on behalf of the petitioners herein to refer the dispute to the Labour Court-cum Industrial Tribunal for adjudication, came to be declined on the ground of delay, petitioners have approached this Court in the instant proceedings filed under Article 226 of the Constitution of India, praying therein following main relief(s):-

> "(i). Issue a writ of certiorari or other appropriate writ, order or directions for quashing the impugned order dated 16.01.2021, 18.02.2021, 19.02.2021 and order dated 20.2.2021 (Annexure P-2 colly) for all intents and purposes.
>
> (ii) Issue a writ of mandamus or other appropriate writ or directions by directing the respondent No.1 to refer the dispute to Ld. Labour Court for adjudication as done in the other similar situated person's case".

2. Precisely, the facts of the case as emerge from the record are that the petitioners herein had been working as resin extractor with respondents No.2 and 3 w.e.f. dates, as detailed in para-2 of the petition. Allegedly, in March 2004, the services of the petitioners came to be terminated/ disengaged by the respondents in contravention of Section 25-F and 25-G of the Industrial Dispute Act, 1947. Though, petitioners approached the respondents for re-engagement, but since respondents failed to pay any heed to the request made on behalf of the petitioners, petitioners raised industrial dispute in the year, 2019, which was referred for conciliation proceedings. After failure of conciliation proceedings, matter was referred to Labour Commissioner for referring the dispute to Labour Court for adjudication. However, Deputy Labour Commissioner vide orders dated 16.1.2021, 18.2.2021, 19.2.2021 and 20.2.2021 refused to refer the dispute to Labour Court for adjudication on the ground that the dispute is not in existence on account of delay. In the aforesaid background, petitioners have

approached this Court in the instant proceedings, praying therein reliefs, as have been reproduced hereinabove.

3. Precise grouse of the petitioners as is highlighted in the petition and has been further canvassed by learned counsel representing the petitioners is that the Deputy Labour Commissioner, Himachal Pradesh had no occasion/ authority to decline the reference on the ground of delay and laches. Learned counsel representing the petitioners argued that the delay and laches by itself cannot be a ground for refusing to make a Reference. He argued that if a person is guilty of delay and laches, it may be a ground for the Labour Court either to refuse to grant relief or refuse to grant relief of back wages, but definitely Government cannot take up the role of adjudicating Authority while deciding the question as to whether a Reference should be made or not.

4. Ms. Ritta Goswami, learned Additional Advocate General, while inviting attention of this Court to the judgment dated 30th March, 2022 passed by Full Bench of this Court in CWP No.2190 of 2020 alongwith other connected matters titled as **Sh. Jai Singh and others** versus **State of Himachal Pradesh and others**, submitted that the issue sought to be raised in the case at hand is no more *res-integra*. She argued that as per aforesaid judgment, Government is well within its right to decline to refer the matter to Labour court/Industrial tribunal on the ground of delay and laches.

5. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that though in the case at hand, services of the petitioners herein were terminated/disengaged in March, 2004 but yet they chose to approach Labour Court with a request to refer the matter for adjudication to Labour Court/Industrial Tribunal in the year, 2019 i.e. after inordinate delay of 15 years. Since, there is no explanation, worth credence, ever came to be rendered on record by the

petitioners herein qua inordinate delay in approaching the competent authority, order impugned in the instant proceedings came to be passed.

6. The Division Bench of this Court in case titled **Smt. Bego Devi** versus **State of Himachal Pradesh and others,** decided on 26.10.2016, categorically held that if there is no explanation for the huge delay in raising the dispute, the appropriate Government would be justified in refusing to refer the dispute on the ground that the dispute has faded away with the efflux of time and there is no live dispute to be referred. Order impugned in the instant proceedings is based upon the aforesaid judgment rendered by Division Bench of this Court, which has otherwise attained finality.

7. Recently Full Bench of this Court having taken of divergent views expressed by different Division Benches had an occasion to deal with the issue sought to be raised in the instant proceedings at length and vide judgment dated 30.3.2022 Full Bench of this Court after relying upon various judgments passed by the Hon'ble Apex Court from time to time has categorically held that appropriate Government before taking a decision on the question of making reference of the industrial dispute has to form a definite opinion whether or not such dispute exists or is apprehended. It has been held in the aforesaid judgment that whether or not the industrial dispute exists or is apprehended in the meaning of Section 10(1) of the Act can be decided by the appropriate Government alone and not by any other authority including competent court of law. Full Bench of this Court has further held that the appropriate Government in discharging the administrative function of taking a decision to make or refuse to make, reference of the industrial dispute under Section 10(1) of the Act, has to apply its mind on relevant considerations and has not to act mechanically as a post office. That the delay by itself does not denude the appropriate Government of its power to examine advisability of making reference of the industrial dispute but the delay would certainly be relevant for deciding the basic question whether or not the

industrial dispute "exists" which also includes the decision to find out whether on account of delay the dispute has ceased to exist or has ceased to be alive or has become stale or has faded away.

8. Mr. C.N.Singh, learned counsel representing the petitioners while referring to aforesaid judgment rendered by Full Bench of this Court, argued that in case appropriate Government while examining the question of making a reference of industrial dispute arrives at a conclusion that question that on account of delay the dispute has ceased to exist or alive, would require elaborate examination of the evidence, it may while making a reference of the industrial dispute, additionally formulate question on this aspect to be decided as preliminary issue while simultaneously also making a reference on the industrial dispute to be decided as secondary issue.

9. There cannot be any quarrel with aforesaid proposition of law expounded by Full Bench of this Court while rendering judgment dated 30.3.2022, but same cannot be applied in the case of the petitioners, wherein no plausible explanation ever came to be rendered on record on behalf of the petitioners qua the delay of 15 years. Deputy Labour Commissioner after having conducting elaborate examination of the material available on record arrived at a specific conclusion that alleged dispute is stale, time barred and faded away with the passage of time. The relevant para No.28 of the aforesaid judgment is as under:-

> "28. Following principles of law can, therefore be culled out from series of the precedents discussed above, as to the effect of delay in demanding /making reference of the industrial dispute to the Labour Court/Industrial Tribunal under Section 10(1) of the Act:-
>
> i) That the function of the appropriate Government while dealing with question of making reference of industrial dispute under Section 10(1) of the Act, is an

administrative function and not a judicial or quasi judicial function.

ii) That the Government before taking a decision on the question of making reference of the industrial dispute has to form a definite opinion whether or not such dispute exits or is apprehended.

iii) That whether or not the industrial dispute exists or is apprehended in the meaning of Section 10(1) of the Act can be decided by the appropriate Government alone and not by any authority including by this Court.

iv) That the appropriate Government in discharging the administrative function of taking a decision to make or refuse to make, reference of the industrial dispute under Section 10(1) of the Act, has to apply its mind on relevant considerations and has not to act mechanically as a post office.

v) That while forming an opinion as to whether the industrial dispute exists or is apprehended, the appropriate Government is not entitled to adjudicate the dispute itself on merits.

vi) That the delay by itself does not denude the appropriate Government of its power to examine advisability of making reference of the industrial dispute but the delay would certainly be relevant for deciding the basic question whether or not the industrial dispute "exists" which also includes the decision to find out whether on account of delay the dispute has ceased to exist or has ceased to be alive or has become stale or has faded away.

vii) That whether or not a dispute is alive or has become stale or non-existent, would always depend on the facts of each case and no rule of universal application can be laid down for the same.

viii) That even if Section 10(1) of the Act empowers the appropriate Government to form an opinion "at any time" on the question whether any "industrial dispute" "exists or is apprehended", and there is no time limit prescribed for taking such a decision, yet such power has to be exercised by the appropriate Government within a reasonable time.

ix) That the period for making reference of industrial dispute is co-extensive with the existence of dispute because the factum of the "existence" or "apprehension of the dispute" is conditioned by the effect of the delay on the liveliness of the dispute.

x) That the appropriate Government in arriving at the decision to make a reference of industrial dispute or otherwise, in the context of delay, may examine whether the workman or the Union has been agitating the matter before the appropriate fora so as to keep the dispute alive, which however, does not necessarily mean that in a case where such action has not been initiated, the dispute has ceased to exist.

xi) That the appropriate Government can, as per Section 10(1) of the Act, take a decision on the question of making reference "at any time", thus implying that there is no limitation in taking such decision and the provisions of Article 137 of the Schedule to Limitation Act, 1963 are not applicable to such proceedings.

xii) That the appropriate Government while taking a decision on the question of making reference, need not provide an elaborate opportunity of hearing to the workman but it is under an obligation to consider his explanation for delay in making the demand.

xiii) That in cases where the appropriate Government while examining the question of making a reference of industrial dispute arrives at a decision that the question that on

account of delay the dispute has ceased to exist or alive, would require elaborate examination of the evidence, it may while making a reference of the industrial dispute, additionally formulate question on this aspect to be decided as preliminary issue while simultaneously also making a reference on the industrial dispute to be decided as secondary issue.

xiv) That even in a case where reference has been made to the Industrial Court after prolonged delay, such Court would be entitled to mould the relief by declining whole or part of the back wages.

xv) That even when a reference is made by appropriate Government in a case after huge and enormous unexplained delay, the industrial Court would be entitled to return the reference since such Court judiciously exercises its wide jurisdiction under Section 11-A of the Industrial Disputes Act and is under obligation to consider whether in such like situation any relief at all could be granted to the workman".

10. Consequently, in view of the detailed discussion made hereinabove as well as law taken into consideration, this Court finds no illegality and infirmity in the impugned order passed by Deputy Labour Commission, Himachal Pradesh and as such, same is upheld. The present petition is dismissed being devoid of any merit alongwith pending applications, if any.

BEFORE HON'BLE MR. JUSTICE MOHAMMAD RAFIQ, C.J.

Between:-

M/S GURNAM SINGH CONSTRUCTION
COMPANY, MOHALLA ATTARIWALA,
ANANDPUR SAHIB, TEHSIL
ANANDPUR SAHIB, DISTRICT
ROPAR, PUNJAB THROUGH ITS

SOLE PROPRIETOR GURNAM SINGH,
AGED 56 YEARS, SON OF SH. JASWANT
SINGH.

……PETITIONER

(BY SH. JAGMOHAN SINGH CHANDEL
ADVOCATE)

AND

SACRED HEART SEN. SEC. SCHOOL
DALHOUSIE, DISTRICT CHAMBA
HIMACHAL PRDESH 176304,
THROUGH ITS SENIOR SISTER/
MANAGER
(SR. STELLA)

……RESPONDENT

(BY SH. ANUP RATTAN, ADVOCATE)

ARBITRATION CASE
No. 32 of 2019
Decided on:01.04.2022

Arbitration and Conciliation Act, 1996- Sections 11 and 12- Appointment of independent Arbitrator to resolve the dispute between the parties- Held- Arbitrator has adjudicatory role to perform and, therefore, he must be independent to the parties as well as impartial- Application allowed. (Para 11, 15)

Cases referred:

Indian Oil Corpn. Ltd. vs. Raja Transport (P) Ltd. (2009) 8 SCC 520;
Perkins Eastman Architects DPC vs. HSCC (India) Pvt. Ltd. 2019 SCC OnLine SC 1517;
Quippo Construction Equitment Ltd. vs. Janardan Nirman Pvt. Ltd AIR 2020 SC 2038;
Voestapline Schienen GMBH vs. Delhi Metro Rail Corporation Ltd., (2017) 4 SCC 665;
Walter Bau Legal Successor of Original Contractor Dycker Hoff & Widmann AG vs. Municipal Corporation of Greater Mumbai & another, (2015) 3 SCC 800;

This petition coming on for hearing this day, the Court delivered the following:

J U D G M E N T

This is an application filed under Section 11 read with Section 12 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act' for short), praying for appointment of an independent Arbitrator to resolve the dispute between the petitioner and the respondents.

2. The petitioner is a proprietorship firm and Shri Gurnam Singh is its sole proprietor. The respondent with an intent to construct Sacred Heart Senior Secondary school, Junior Wing, Garden Villa, at Dalhousie, entered into an agreement with the petitioner on 6.4.2017. As per the terms and conditions of the agreement, the construction was to be raised strictly in accordance with the drawings and specifications to be provided by the respondent and has been elaborated in the schedule of the agreement. However, according to the petitioner, it was required to start the construction only after receipt of the drawings and specifications duly approved by the respondent which were provided by the respondent after a delay of about five months on 7.9.2017. The construction work was to be completed on or before 7.9.2018, failing which, the respondent had the right to impose the penalty of Rs.1500/- per day. According to the agreement, two separate buildings were required to be constructed, i.e., construction of one M.S. shed and another Garden Villa, school building. When the construction of the M.S. shed was at the final stage, its area was ordered to be extended from approximately 16250 sq. feet to more than 18000 sq. feet. Besides this extension, many other additions and alterations were ordered to be made to the shed, e.g, construction of new steps after dismantling the old steps for sitting arrangement and three staircases. According to the petitioner it had completed the construction within the stipulated time frame. However, the respondent made the payments quite belatedly and, that too, in parts inasmuch as no

payment against the dismantling of old steps, construction of new steps and for construction of staircases was made. However, for the alteration of the work, the petitioner had to divert his major resources, manpower and machinery for the construction of the shed, which has caused delay in the construction of Garden Villa School building. As per the agreement between the parties, the electricity and water was to be supplied uninterruptedly by the respondent. The electricity remained disconnected for a considerable long time for which no efforts were made by the respondent to get the same resumed. The petitioner had to incur additional costs for that on its own level. This has resulted in delay in construction and missing the deadline for the constriction owing to which the petitioner could not complete the work on 7.9.2018 and requested the respondent to extend the time period upto 31.10.2018. However, respondent agreed to extend the time only upto 15.10.2018. Even the respondent ordered various additions, alterations and modifications for the construction of Garden Villa, the respondent was required to make the payment approximately Rs.2,67,30,000/- however, the total payment made by the respondent till date against the said construction is only approximately Rs.2,27,70,000/-. No payment for additions, alternations and modifications has been made.

3. According to the petitioner, the respondent was obliged to pay 25% of the construction amount, being approximately Rs.83,23,000/- in advance as mobilization amount. However, the respondent paid only sum of Rs.60,00,000/- as mobilization advance and, that too, in many installments. According to Clause 19 of the agreement, window of 5-7 days against the running /final bills is provided, however, all the payments were made beyond 7 days. The petitioner in the month of November, 2018 served a legal notice for seeking the appointment of arbitrator for resolution of dispute. However, despite due service no reply was sent by the respondent. The respondent also issued legal notice dated 10.11.2018 claiming that the petitioner has not

completed the construction work within the stipulated time and that the construction should be resumed on or before 14.11.2018, failing which the agreement would be terminated. The petitioner thereafter served another legal notice dated 19.11.2018 whereby the agreement dated 6.4.2017 was arbitrarily terminated unilaterally and the security deposited with the respondent at the time of agreement was forfeited. The respondent further refused to make the balance payment. On the contrary, respondent served letter dated 26.2.2019, showing an amount of Rs.10,73,015/- as recoverable from the petitioner. As per Clause 23 of the agreement, respondent was required to refer the dispute for arbitration before termination of the contract. The respondent requested several times to the respondent to appoint some arbitrator so that dispute could be resolved amicably but of no avail, hence this application.

4. The respondent has contested the present application by filing reply alleging that the petitioner has already agreed for appointment of Engineer Naresh Mahajan as an Arbitrator in view of the Arbitration Clause and parties have also participated in the arbitration proceedings before the arbitrator which were held on 1.11.2018 and 23.12.2018. Earlier efforts were made to settle the dispute by mutual negotiations on 25.7.2018 and 9.9.2018. Since the petitioner has participated in the arbitral proceedings, it has waived off his right to object to such an appointment in terms of Section 4 of the Act. It is contended that the petitioner was duly informed by communication dated 12.11.2018 that Engineer Naresh Mahajan has already taken charge of arbitration proceedings and petitioner and his agent have already participated in the proceedings. As per the agreed procedure, the arbitrator in the presence of petitioner and his agent has carried out all the measurements to which the petitioner never objected. Parties agreed to appear before the arbitrator and tried to resolve the dispute amicably. 6.1.2018 was fixed as the date of final measurement of the building but the petitioner did not turn up on the spot on

that day. Parties have thus already acted upon the arbitration proceedings in view of the promise made by the respondent before Arbitrator and immediately made a payment of Rs.35,94,500/- alongwith GST amount of Rs.6,47,010 on 9.9.2018. Another agreement was entered into between the parties as per mutual consent on 10.11.2018. The delay in completion of the work was due to erroneous acts of the petitioner as he has failed to make the payment of wages to labour, hence the issue was taken up to labour inspector for conciliation by labourer. The petitioner carried out the work at snail speed. The respondent kept the schedule of payment as per Clause 18 of the agreement. Bills submitted by the petitioner were found incorrect. It is further submitted that except the expected area of Garden Villa was 6600 sq. ft. per floor whereas on actual measurement conducted on 23.12.2018, the same was found to be 6475 sq.ft. per floor. It is submitted that payments were made strictly in accordance with Clause 18 of the agreement. The bill of Rs.19,80,000/-, i.e., 25% of the ground floor work was paid to the petitioner as per the claimed bill dated 6.4.2017. Thereafter the petitioner paid another payment of Rs.20 lacs on 28.9.2017. Since, Engineer Naresh Mahajan has already been appointed as an arbitrator, the present application is liable to be dismissed.

5. The petitioner has filed rejoinder to the reply on 4.10.2019. Denying the assertion of the respondent that Engineer Naresh Mahajan was jointly appointed by the parties, it is asserted that the petitioner never agreed and consented for appointment of Engineer Naresh Mahajan as an arbitrator. In fact, Engineer Naresh Mahajan was acting merely a conciliator however, he never initiated any arbitration proceedings. He only tried to resolve the dispute between the parties through conciliation but his efforts could not yield any result due to adamant behaviour of the respondent. It is submitted that the petitioner never received letter dated 12.11.2018 conveying about the appointment of Engineer Naresh Mahajan. In fact, this document has been

subsequently created in order to justify their unlawful acts which is evident from the fact that the respondent has not annexed dispatch proof along with the notice which clearly proves that the notice was never dispatched. It is denied that arbitration proceedings have ever commenced. The petitioner further submitted that there is no mandate in favour of Engineer Naresh Mahajan because the petitioner never consented for his appointment. The respondent has taken contradictory stand. On one hand the respondent is claiming the benefit of Section 4 of the Act and on the other hand, it is being alleged that petitioner never consented to the appointment of arbitrator.

6. Shri Jagmohan Singh Chandel, learned counsel for the petitioner has argued that since the petitioner never agreed for appointment of Engineer Naresh Mahajan as sole arbitrator, there is no question of arbitration proceedings having commenced. He acted only a conciliator and as a conciliator he made efforts to conciliate the dispute between the parties but the same could yield any result much less any positive result. It is argued that even otherwise, respondent could not have unilaterally appointed the sole arbitrator without consent of the petitioner. Reliance in support of this argument is placed on ***Perkins Eastman Architects DPC vs. HSCC (India) Pvt. Ltd. 2019 SCC OnLine SC 1517.*** It is argued that the petitioner has categorically denied the assertion for appointment of Engineer Naresh Mahajan as the sole arbitrator. There is no rebuttal by the respondent in the reply. Therefore, a prayer has been made to appoint a sole arbitrator to resolve the dispute between the parties.

7. Mr. Anup Rattan, learned counsel for the respondent submitted that not only arbitrator was appointed but he has conducted the proceedings on 1.11.2018 and 23.12.2018. The petitioner also participated in the proceedings. Therefore, in view of Section 4 of the Act, the petitioner having once participated in the proceedings, the same would amount to waiving off his right to object to the appointment of the arbitrator which was made as per

Clause 23 of the Agreement. Learned counsel for the respondent in support of his argument relied on the judgment of the Supreme Court in ***Quippo Construction Equitment Ltd. vs. Janardan Nirman Pvt. Ltd*** reported in ***AIR 2020 SC 2038.***

8. I have given my anxious consideration to the rival submission and have gone through the entire material on record.

9. Having taken note of the submission made by the learned counsel for both sides in *extenso,* it is deemed appropriate to reproduce Clause 23 of the agreement between the parties, containing arbitration Clause, which reads as under:-

> *"In case of any dispute or if any difference arises between the parties during the progress of or after construction or abandonment of the work as to the meaning of construction of this contract or touching or relating either to the said building or works, or to any other matter or thing arising directly or indirectly under this contract, than and in such an event the same shall be referred to Arbitration and the final decision of single arbitrator to be mutually agreed between the parties who alone shall consider determine the same and whose certificate or award shall be binding and shall be conclusive upon both the said parties otherwise two arbitrators one to be appointed by each party-will act as umpires, at the commencement of proceedings and this clause shall be deemed as submissions within the meaning of Arbitration Act or Statutory modification or re-enactment*
>
> *In the event of any dispute arising or differences between the parties relating to or in connection with this agreement or any aspect of it, the same shall first be tried to resolve within a period of fifteen days from the date of dispute and is first brought to the notice of other party for such an amicable resolution, or the same*

shall be referred to mutually acceptable arbitrator whose award shall be final binding on both the parties. The arbitrator shall give a reasoned award. The venue of arbitration shall be decided by the owner. The cost of arbitration shall be shared equally be both the parties."

10. Respondent in reply to the application has alleged that Engineer Naresh Mahajan was already appointed as an arbitrator and that he has conducted arbitration proceedings on 1.11.2018, 23.12.2018 and the petitioner has also attended such proceedings but despite query of the Court, the learned counsel for the respondent could not show any such proceedings inasmuch as no proof in whatever form showing that the petitioner ever consented to the appointment of Engineer Naresh Mahajan, has been produced. Respondent has asserted that this information was sent to the petitioner vide communication dated 12.10.2020 but petitioner categorically denied that it ever consented to the appointment of Engineer Naresh Mahajan as the sole arbitrator and also denied having received any communication such as dated 12.11.2018. The petitioner has also simultaneously alleged that this document has been created by the respondent and it was never received by the petitioner. The respondent has not produced any proof of despatch or receipt alongwith the alleged notice. In fact, the petitioner has also alleged in the rejoinder that Engineer Naresh Mahajan was only a conciliator and that he held one meeting with the petitioner to conciliate the dispute but despite his efforts, no conciliation could take place. The rejoinder was filed as far as back on 4.10.2019 but no rebuttal has been filed by the respondent till date. The learned counsel for the respondent for that purpose prayed for time to further prepare the matter and file further affidavit. As per Section 11 (13) of the Act

now arbitration is required to be decided within 30 days. Curiously, the present application has been filed as far as
back on 2.4.2019 and a period of three years have elapsed since the filing of the application, there is no justification for granting any further adjournment.

11. In ***Indian Oil Corpn. Ltd. vs. Raja Transport (P) Ltd. (2009) 8 SCC 520,*** in para 48, it was held that if circumstances exist, giving rise to justifiable doubts as to the independence and impartiality of the person nominated, or if other circumstances warrant appointment of an independent arbitrator by ignoring the procedure prescribed, the Chief Justice or his designate may, for reasons to be recorded ignore the designated arbitrator and appoint someone else. The Supreme Court in ***Voestapline Schienen GMBH vs. Delhi Metro Rail Corporation Ltd., (2017) 4 SCC 665*** in which it was held that an independence and impartiality of the arbitrator are the hall marks of the arbitration proceedings. Rule against bias is one of the fundamental principle of natural justice which applied to all judicial and quasi judicial proceedings. After all, the arbitrator has adjudicatory role to perform and, therefore, he must be independent to parties as well as impartial. The Supreme Court in ***Walter Bau Legal Successor of Original Contractor Dycker Hoff & Widmann AG vs. Municipal Corporation of Greater Mumbai & another***, (***2015) 3 SCC 800*** held that unless the appointment of an arbitrator is *ex facie* valid and such appointment satisfies the Court exercising jurisdiction under Section 11 (6) of the Act, acceptance of such appointment as a *fait accompli* to debar the jurisdiction under Section 11 (6) of the Act cannot be countenanced.

12. The Delhi High Court in ***City Lifeline Travels Private Ltd. vs. Delhi Jal Board*** Arb. P. 4 of 2021 dated 27.1.2021 reported in ***2021 Law Suit(Del) 66,*** was dealing with a case wherein respondent Delhi Jal Board issued a Request for Proposal inviting competitive tenders from agencies for operating Stainless Steel (SS) Water Tanker Services on hire basis for the purposes of

supplying water through vehicle mounted water tankers in order to facilitate supply of potable drinking water to different areas in Delhi. Such services were to be provided in five different Zones on identical terms. The petitioner submitted its bid pursuant to the RFP. After negotiations, offer made by the petitioner was accepted and the DJB issued a Letter of Intent (LoI) dated 16.07.2012. Thereafter, the DJB issued a Work Order under the cover of its letter dated 21.08.2012 and on 27.08.2012, the parties entered into a formal agreement with respect to performance of the work. The petitioner claimed that it has been diligently performing the contract, however, the DJB has failed to make payments of the invoices raised by the petitioner. The petitioner also claimed that it had issued a notice calling upon the DJB to release the payments outstanding for the months of August, September and October, 2020 and had also made representations in this regard, however, the DJB failed to address the issues raised by it. In view of the disputes that arose between the parties, the petitioner issued a notice dated 20.11.2012 invoking the Arbitration Agreement as set out in Clause 8.1.2 of the Contract. It also suggested the name of a former Chief Justice of Delhi High Court for being appointed as an Arbitrator. The DJB proposed names of two persons, one being a former Chief Justice of the Patna High Court and the other being a former Judge of Delhi High Court to be appointed as Arbitrators. However, the same were not acceptable to the petitioner. In those facts, the petitioner had approached the Delhi High Court by filing Application under Section 11 (6) of the Act. The petitioner relied on the judgment of the Supreme Court in Perkin Eastman and argued that respondent could not unilaterally appoint the sole arbitrator. The stand of the respondent before the Delhi High court was that they maintain a panel of arbitrator for the purpose and arbitrator has to be appointed from such panel. The Delhi High Court observed that the maintenance of such panel of arbitrator was only an internal functioning of the Delhi Jal Board and directed the appointment of an independent arbitrator.

13. A three judge bench of the Supreme Court in ***Union of India vs. M/s Tantia Constructions Limited: SLP (C) 12670/2020 decided on 11.01.2021***, upheld the decision of the High Court to appoint an independent Arbitrator and had dismissed the Special Leave Petition. However, since reliance was placed by the petitioner on the decision in ***Central Organization for Railway Electrification vs. ECI*** (supra), the Supreme Court requested the Chief Justice of India to constitute a larger Bench to look into the correctness of the said decision. But in any case, the judgment of Central Organization for Railways was held by the Delhi High Court to be distinguishable on facts.

14. In ***M.K. Jain and others vs. Angle Infrastructure Pvt Ltd OMP (T) (COMM.) 86/2020 & I.A. 12304/2020*** dated 21.1.2021, there was somewhat similar arbitration clause between the parties which provided that if difference could not be resolved within 10 days of the notice then the dispute shall be referred to the arbitration. The dispute arose out of a Memorandum of Understanding (MOU) dated 16.8.2018 executed between the petitioners and the respondent. Under the said MOU, the petitioners invested Rs.8,38,91,000/- in the respondent company. As security against the said investment, the respondent allotted nine apartments to the petitioners in its Florence Estate Project Additionally, two apartments were allotted to the petitioners by M/s Venta Realtech Private Limited, as the confirming party to the agreement. The petitioners alleged that there was default, on the part of the respondent in fulfilling the obligations under the MOU, whereupon the petitioners sought to invoke the aforesaid security. At this stage, it is alleged that the petitioners came to learn that the security interest created by the respondent on the aforesaid nine apartments was illegal and void, as the respondent was bound to allot the said apartments only to Central Government employees. The petitioner, therefore, terminated the MOU and claimed refund of the invested amount. The respondent vide reply dated 6.9.2019 denied the allegation levelled by the petitioners and sought reference of the dispute that had thus arisen between the parties by

unilaterally suggesting the name of two arbitrators. Since respondents failed to receive any response from the petitioner therefore, on 19.11.2019, respondent went ahead and proceeded to appoint a learned retied Judge of the Delhi High Court as the sole arbitrator to arbitrate on the disputes. The Delhi High Court held that it was proceeding on the basis of statutory provisions and the law laid down by the Supreme Court in that regard and did not, in any manner, want to reflect on the impartiality or integrity of the learned arbitrator, who is respected retired Judge of the Delhi High Court. The Delhi High Court placed reliance on the Judgment of Perkins Eastman's case supra, while holding that the unilateral appointment of the arbitrator by the respondent to be unsustainable and appointed another retired Judge of that High Court to act as an arbitrator. The judgments cited by the learned counsel for the respondents are distinguishable on facts.

15. In view of above discussion, the present application is allowed and Hon'ble Mr. Justice K.C. Sood, Judge of this Court (Retd.) R/o Kingsley Estate, Sanjauli Shimla 171 006, is appointed as Arbitrator who shall enter into reference, and shall pass an award in accordance with law.

16. Copy of this order be forwarded to the learned counsel for the parties, as also to the Arbitrator. The Arbitrator so appointed shall be entitled to fee as per stipulation contained in 4th schedule appended to the Arbitration and Conciliation Act, 1996.

17. The arbitration case is disposed of accordingly.

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

Between:-

1. M/S CENTURY HEATREATS (P) LTD. 302, SHRI RAM BHAWAN, RANJEET NAGAR COMPLEX, NEW DELHI-110008 THROUGH SANJEEV MALHOTRA.

2. SANJEEV MALHOTRA
SON OF SHYAM PRAKASH DIRECTOR,
M/S CENTURY HEATREATS (P) LTD. 302,
SHRI RAM BHAWAN, RANJEET NAGAR COMPLEX, NEW DELHI-110008. ....PETITIONERS

(BY SH.SANJEEV BHUSHAN, SENIOR ADVOCATE, ALONGWITH SH.MAAN SINGH, ADVOCATE)

AND

PUNJAB NATIONAL BANK,
HEAD OFFICE NO.7,
BHIKAJI CAMA PLACE,
NEW DELHI,
THROUGH ITS SENIOR MANAGER. ....RESPONDENT

(BY SH.SUNIL KUMAR, ADVOCATE)

CIVIL MISC.PETITION MAIN (ORIGINAL)
NO.506 OF 2016
Reserved on:25.04.2022
Decided on: 27.04.2022

Code of Civil Procedure, 1908- Order 21 Rule 66, Rule 58, 29- Order 22, Rule 10- Section 47- Preliminary decree for recovery of Rs.3,56,989/- along with interest passed in favour of decree holder Bank with the condition to put the mortgaged property to sale in case of failure to pay the amount- Objection petition dismissed- Held- Executing Court cannot go beyond the decree except when the decree is nullity or is without jurisdiction as Executing Court has no jurisdiction to modify the decree, but it has to execute a decree as it is- Executing Court is not travelling beyond the decree or exceeding its jurisdiction- Petition disposed of with directions to executing Court. (Para 15, 27, 28, 30)

Cases referred:

Ashwani Kumar Abrol and another vs. S.B.I and another, 1988(2) Sim. L. C. 175;
Bachhaj Nahar vs. Nilima Mandal & others, AIR 2009 SC 1103;
Bank of Bihar vs. Damodar Prasad, AIR 1969 SC 297;
Deepa Bhargava and another vs. Mahesh Bhargava and others, (2009) 2 SCC 294;
Shivashankar Gurgar vs. Dilip, (2014) 2 SCC 465;
State Bank of India vs. Messrs. Indexport Registered and others, AIR 1992 SC 1740 : (1992) 3 SCC 159;
State of J. & K. & Another vs. Ajay Dogra, AIR 2011 SC 1830;
TCI Finance Ltd. Vs. Calcutta Medical Centre Ltd. and another, (2005) 8 SCC 41;
Union Bank of India vs. Manku Narayana, (1987) 2 SCC 335 : AIR 1987 SC 1078;

This petition coming on for pronouncement this day, the Court passed the following:

O R D E R

Petitioners herein are Judgment Debtors (hereinafter referred to as 'JDs'), who have suffered preliminary decree dated 26.06.2002 which was amended on 08.08.2002 and it was made final by passing final decree dated 26.06.2007 against petitioners-JDs alongwith another JD Janki Khanna (now deceased), and in favour of respondent-Decree Holder (hereinafter referred to as 'DH-Bank'), whereby a preliminary decree for recovery of the sum of `3,56,989/- with costs and interest @ 9% per annum from the date of filing of the suit till realization of the decretal amount has been passed with further condition that in case of failure on the part of JDs to pay the amount in question within 60 days from the date of passing of judgment, DH-Bank will also be at liberty to put the property to sale as described in para No.8 of the

plaint so as to realize the decretal amount in accordance with law. Description of mortgaged property has also been given in the Decree Sheet.

2. On failure of JDs to make payment of decretal amount, DH-Bank has initiated execution proceedings against the JDs by filing an application under Order 21 Rule 66 read with Section 151 Code of Civil Procedure (CPC) for proclamation of sale in execution of judgment and decree by giving details of mortgaged property therein which was mentioned in judgment and decree. At the time of filing this application, amount recoverable was calculated by the Bank, as on 31.01.2008, as `7,80,731/-. Suit was filed by DH-Bank originally against present petitioners and one Ram Lubhaya Khanna. In Execution Petition, petitioners herein are JD Nos.1 and 3 whereas, for death of Ram Lubhaya Khanna, his wife Janki Khanna, being his legal heir, was arrayed as defendant No.2 and thus was JD No.2. JD No.3 is one of the Directors of JD No.1. Mortgaged property belongs to JD No.2.

3. Objection petition filed by JDs was dismissed on 21.04.2010. Thereafter vide order dated 03.07.2010, sale warrant of mortgaged property was issued, but for want of filing of Jamabandi, the said warrant could not be issued till 28.04.2011. In the meanwhile, on 28.05.2011, it was informed that JD No.2 Janki Khanna had expired and this fact was brought in the notice of Executing Court on 28.05.2011. Whereupon, execution petition was adjourned for taking consequential steps for her death. On 30.11.2011, it was stated on behalf of DH-Bank that legal representative of JD No.2 was already on record being JD No.3 and, therefore, estate of deceased was duly represented by JD No.3. The said statement was made in presence of learned counsel representing JD Nos. 1 and 3.

4. Thereafter, JD Nos. 1 and 3 did not appear and were proceeded *ex-parte* vide order dated 07.01.2012. The case was listed for numerous dates and ultimately on 09.11.2012 property of JD No.3 Sanjeev Malhotra was ordered to be attached by issuing necessary warrants of attachment. Since

then, till 18.05.2015, no one had appeared on behalf of JDs and on 01.04.2015 name of JD No.2 Janki Khanna was ordered to be deleted on the basis of statement of learned counsel for DH-Bank, whereby it was reiterated that legal representative of JD No.2 was already on record as JD No.3. For that date, JD Nos. 1 and 3 were duly served, but no one had appeared for them and warrant of sale of property of JD No.3 was issued.

5. On 18.05.2015 JD No.3 had put in appearance in the Court alongwith counsel and had given statement on his behalf and also on behalf of JD No.1 that he will pay entire amount alongwith interest to satisfy judgment and decree within two months by depositing entire due amount in the Court. His statement to this effect was also recorded separately and was taken on record. Since JD Nos. 1 and 3 were ready to pay the amount of decree alongwith interest, warrant of sale was recalled unexecuted. On that date, application was also filed on behalf of JD No.3 under Order 21 Rules 58 and 59 CPC and case was adjourned for 25.05.2015. On 25.05.2015, case was adjourned on request of DH-Bank seeking time to file reply to the application and matter was adjourned for 24.06.2015, on which date, it was informed to the Court on behalf of JDs that JD No.3 was making arrangement to pay amount as per his statement dated 18.05.2015, whereupon, case was adjourned for 25.07.2015.

6. On 25.07.2015, instead of making payment as agreed, JD No.3 had filed two applications one under Section 151 CPC and another under Order 22 Rule 10 CPC, whereupon, case was adjourned for 07.08.2015 for filing reply to both applications. Ultimately, replies were filed on 27.08.2015 and case was adjourned for consideration on 01.09.2015.

7. After listing the execution petition on numerous occasions, on 05.12.2015, application filed under Order 22 Rule 10 CPC for bringing on record actual legal heir of deceased JD No.2 Janki Khanna, was rejected by the Executing Court on the ground that Janki Khanna had expired on

07.03.2011, whereas, application was filed on 22.07.2015 and further that JD No.3 despite undertaking to make payment of entire amount had not deposited any amount, but was lingering on the matter on one pretext or the other and on that date, it was informed by DH-Bank that JD No.3 had no property available for attachment. Therefore, learned counsel for DH-Bank was permitted by adjourning the case to file appropriate application for the arrest of JD No.3.

8. On 24.12.2015, DH-Bank filed an application for arresting and detaining JD No.3 in civil imprisonment. For non- payment of any amount despite giving undertaking before the Court on 18.05.2015, the Executing Court, with observation that recovery of decretal amount was not possible through ordinary process, allowed the application for arrest and detention of JD No.3 and on depositing necessary charges, warrant of arrest was ordered to be issued against JD Sanjeev Malhotra on 24.02.2016.

9. Petitioners (JDs No.1 and 3) had approached this Court by filing CMPMO Nos.66 and 67 of 2016 assailing orders dated 05.12.2015 and 24.02.2016. These CMPMOs were decided on 22.03.2016, whereby order passed by the Executing Court dismissing application filed by JD No.3 under Order 22 Rule 10 CPC was set aside and legal heirs of deceased JD No.2 Janki Khanna namely Sanjeev Seth and Archana Seth were directed to be impleaded in Execution Petition on filing formal application by DH-Bank in the Executing Court. However, order dated 24.02.2016, whereby warrant of arrest was issued against JD No.3 (petitioner No.2 herein) was not interfered and petition CMPMO No.67 of 2016 was dismissed.

10. Petitioners (JD Nos. 1 and 3) had also approached this High Court by filing a petition bearing CMPMO No.137 of 2016, titled as *M/s Century Heatreats (P) Ltd. & another vs. Punjab National Bank,* seeking direction to the Executing Court to decide their application filed under Order 21 Rules 58 and 59 CPC and another application preferred by them under

Section 151 CPC for sale of mortgaged property before proceeding further. The said petition was disposed of vide order dated 08.04.2016 directing the Executing Court to decide both these applications in accordance with law, as expeditiously as possible, but not later than 31.05.2016.

11. In first application filed under Order 21 Rules 58 and 59 CPC, it is claim of petitioners (JD Nos. 1 and 3) that property of JD No.3 subject matter of proclamation of sale in pursuant to order passed by the Executing Court was not free from encumbrances, but under the charge of Syndicate Bank and Bank of Baroda and, thus, could not have been legally attached and, therefore, a prayer has been made that property detailed in application under the charge of Syndicate Bank and in possession of Bank of Baroda may not be auctioned and auction order be recalled.

12. In second application filed under Section 151 CPC, a prayer has been made firstly, to recall the order dated 30.11.2011, whereby JD No.3 was considered to be legal representative of deceased JD No.2 and secondly, to recall all orders passed thereafter and thirdly, to order sale of mortgaged property belonging to JD No.2 in terms of decree under execution and fourthly, to keep order dated 18.05.2015 directing auction of property of JD No.3 in abeyance.

13. In the meanwhile, Syndicate Bank had also filed an application under Order 21 Rules 26, 29, 58 and 59(b) read with Sections 47 and 151 CPC, on the ground that one flat measuring 34.6 Sq.Mts. owned by JD No.3, attached in execution proceedings by the Executing Court, was under charge and in possession of the Bank since 21.04.2011 and the said Bank had already exercised its action under The Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (in short 'the SARFAESI Act'). The said application has been allowed and disposed of by the Executing Court vide order dated 27.04.2016 with observation that for

disposal of that application, other applications filed under Section 151 CPC, Sections 24 and 151 CPC had become infructuous and accordingly dismissed.

14. On 23. 06.2016, JD No.3 had also filed an application under Section 151 CPC before the Executing Court for passing order in compliance of order dated 22.03.2016 passed by this High Court in CMPMO NO.66 of 2016 and order dated 08.04.2016 in CMPMO NO.137 of 2016. It is also case of JD that he has referred one Ramesh Sharma to the DH-Bank who was a prospective buyer of mortgaged property, and had offered himself, in writing, to be a purchaser of the said property. JDs have sought direction to Executing Court to decide both applications as directed by this Court vide order dated 08.04.2016 passed in CMPMO No.137 of 2016; directing the Executing Court to execute the decree strictly in its terms and not to travel beyond the scope of decree and not to flout the same; and also direction to initiate independent inquiry against the Bank official making false statement to misguide the Executing Court particularly to avoid the sale of mortgaged property already available with the Bank and to ascertain the reason and consideration for such conduct of the bank officials.

15. In present petition, it is contended on behalf of the petitioner herein that DH-Bank cannot proceed to attach and sell the property of JD No.3 by taking steps for attachment of sale of property of JD No.3 without attaching the property of JD No.2, which is mortgaged with the Bank for realization of decretal amount. DH-Bank is adopting a path which is beyond the scope of decree and the Executing Court by allowing such prayer of DH-Bank is traveling beyond the decree. Whereas, Executing Court has no jurisdiction beyond the decree and further that in application filed under Order 21 Rule 66 CPC, DH-Bank has prayed for attachment and sale of mortgaged property only and the property belonging to petitioner has been ordered to be attached and sold by the Executing Court beyond the scope of pleadings and relief sought by the DH-Bank in its execution petition.

Whereas, Executing Court cannot go beyond the decree and has only to execute the decree granted by the competent Court either may be the Trial Court or the Appellate Court.

16. On this count, reliance has been placed by learned counsel for petitioners on ***Union Bank of India vs. Manku Narayana, (1987) 2 SCC 335 : AIR 1987 SC 1078; TCI Finance Ltd. Vs. Calcutta Medical Centre Ltd. and another, (2005) 8 SCC 41; Deepa Bhargava and another vs. Mahesh Bhargava and others, (2009) 2 SCC 294; Bachhaj Nahar vs. Nilima Mandal & others, AIR 2009 SC 1103; State of J. & K. & Another vs. Ajay Dogra, AIR 2011 SC 1830;*** and ***Shivashankar Gurgar vs. Dilip, (2014) 2 SCC 465.***

17. Reliance has also been placed on judgment of Division Bench of this Court dated 22.07.2015, passed in **LPA No.411 of 2012, titled as *Regional Provident Fund Commissioner Employee's Provident Fund Organization vs. R.C. Gupta and others*;** as well as **decision of Chattisgarh High Court passed in WP (227) No.691 of 2016, titled as *M/s Indusind Bank Limited vs. Sunil Kumar Sahu & another.***

18. It is also contended on behalf of the petitioner that despite passing of order dated 08.04.2016 in CMPMO No.137 of 2016, Executing Court has not passed any order in the applications preferred on behalf of JD No.3, but Executing Court has passed order only in application preferred by Syndicate Bank. Whereas, the said Court was duty bound to decide the applications filed by the petitioner within time stipulated in the order passed by this Court.

19. It is contended on behalf of DH-Bank that petitioner has not approached this Court with clean hands as he had made the statement on oath in the Executing Court on 18.05.2015 that he shall pay entire decretal amount alongwith interest by depositing the same in the Court within two months and on that basis, warrant of sale of property of JD No.3 was recalled

unexecuted and despite that petitioner had not paid any single penny to satisfy the decree and in order to delay the execution, he has been filing petitions in this Court and further that JD No.3 is main beneficiary of the loan amount and only for that reason he had agreed to pay entire decretal amount and further that bank had made an endeavour to sell the mortgaged property, but latest particulars of mortgaged property were not properly identifiable on the spot and, therefore, bank undertook exercise of attachment and sale of property of JD No.3 to recover decretal amount for which bank is entitled in accordance with law and there is no ulterior motive or extraneous reasons for switching over to attachment and sale of property of JD No.3 instead of mortgaged property and, therefore, prayer of JD No.3 seeking direction to attach and sell mortgaged property first is not tenable and liable to be rejected. It is also submitted on behalf of the DH-Bank that the statement by the counsel for DH-Bank before Executing Court that JD No.3 is legal representative of JD No.2 was not made under wrong impression, but bonafide belief for the reasons that to the best of knowledge of the bank official JD No.3 has also inherited property of deceased Janki Khanna. The fact stated to this effect in reply to para-8 has not been specifically denied by JD No.3 in its rejoinder. It is further submitted on behalf of DH-Bank that irrespective of the aforesaid facts, Bank has taken steps for impleadment of legal heirs of deceased Janki Khanna in execution proceedings and, therefore, grievance of the petitioner on this count does not survive.

20. Regarding right of the bank to proceed further against the guarantor or property of JD other than mortgaged property, reliance has been placed on ***State Bank of India vs. Messrs. Indexport Registered and others, AIR 1992 SC 1740 : (1992) 3 SCC 159;*** and ***Ashwani Kumar Abrol and another vs. S.B.I and another, 1988(2) Sim. L. C. 175.***

21. In ***Manku Narayana's case***, Division Bench of the Supreme Court had held that even if decree is a composite one against principal debtor,

mortgaged property and the guarantor, then Bank to recover decretal amount, must proceed first against the mortgaged property and then against the guarantor and, therefore, learned counsel for the petitioners-JDs is contending that in present case, action of the Bank and order passed by the Executing Court in pursuance thereto are beyond the scope of decree as well as pleadings and relief sought by the Bank as well as decree.

22. Learned Single Bench of this High Court in ***Ashwani Kumar Abrol's case,*** taking into consideration pronouncement of the Supreme Court in ***Manku Narayana's case***, had observed that proposition that a Decree Holder must exhaust, in the first instance, his remedy against principal debtor suffers from the vice of total vagueness, for the stage when such remedy would be deemed to have been exhausted will have to be necessarily spelt out and if not, such proposition would create almost in insurmountable difficulties in the way of Decree Holder and it was held that provisions of law cannot and should not be interpreted so as to deny to the Decree Holder the fruits of the decree. Referring ***Manku Narayana's case***, it was observed that in this judgment also it was held that if the Executing Court is satisfied about inadequacy of the mortgaged property to meet the decretal amount in full, the Decree Holder would be entitled to simultaneously pursue other remedies either against principal debtor or the surety for recovery of expected shortfall.

23. Supreme Court in ***Bank of Bihar vs. Damodar Prasad, AIR 1969 SC 297,*** has held as under:-

"It is the duty of the surety to pay the decretal amount. On such payment he will be subrogated to the rights of the creditor under Section 140 of the Indian Contract Act, and he may then recover the amount from the principal. The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety. In the present case the creditor is banking company. A guarantee is a collateral security usually taken by a banker. The surety will become useless if his rights against the surety can be so easily cut down."

24. It is noticeable that in ***Indexport's case,*** Three Judges' Bench of the Supreme Court taking into consideration pronouncement in ***Damodar Prasad's case,*** has overruled the verdict of the Division Bench of the Supreme Court pronounced in ***Manku Narayana's case.*** Following paragraphs would be relevant in this regard:-

> "10. … … …The question arises whether a decree which is framed as a composite decree, as a matter of law, must be executed against the mortgage property first or can a money decree, which covers whole or part of decretal amount covering mortgage decree can be executed earlier. There is nothing in law which provides such a composite decree to be first executed only against the property. It will be noticed that there is no preliminary mortgage decree either. It is a final mortgage decree for sale of shop after three months. The decree is not in the prescribed Form No.5 of Appendix 'D' to the Code of Civil Procedure.
>
> … … …
>
> 13. In the present case before us the decree does not postpone the execution. The decree is simultaneous and it is jointly and severally against all the defendants including the guarantor. It is the right of the decree-holder to proceed with it in a way he likes. Section 128 of the Indian Contract Act itself provides that "the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract".
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> 14. In *Pollock & Mulla on Indian Contract and Specific Relief Act,* Tenth Edition, at page 728 it is observed thus:
>
> "*Coextensive*-Surety's liability is coextensive with that of the principal debtor.
>
> A surety's liability to pay the debt is not removed by reason of the creditor's omission to sue the principal debtor. The creditor is not bound to exhaust his remedy against the principal before suing the surety, and a suit may be maintained against the surety though the principal has not been sued."
>
> 15. In *Chitty on Contracts,* 24th Edition, Volume 2 at page 1031 paragraph 4831 it is stated as under:

"*Conditions precedent to surety.*—Prima facie the surety may be proceeded against without demand against him, and without first proceeding against the principal debtor."

16. In *Halsbury's Laws of England,* Forth Edition paragraph 159 at page 87 it has been observed that "it is not necessary for the creditor, before proceeding against the surety, to request the principal debtor to pay, or to sue him, although solvent, unless this is expressly stipulated for."

17. In *Hukumchand Insurance Co. Ltd. v. The Bank of Baroda and others*, AIR 1977 Karnataka 204, a Division Bench of the High Court of Karnataka had an occasion to consider the question of liability of the surety vis-a-vis the principal debtor. Venkatachaliah, J. (as His Lordship then was) observed:

"The question as to the liability of the surety, its extent and the manner of its enforcement have to be decided on first principles as to the nature and incidents of suretyship. The liability of a principal debtor and the liability of a surety which is coextensive with that of the former are really separate liabilities, although arising out of the same transaction. Notwithstanding the fact that they may stem from the same transaction, the two liabilities are distinct. The liability of the surety does not also, in all cases, arise simultaneously."

18. It will be noticed that the guarantor alone could have been sued, without even suing the principal debtor, so long as the creditor satisfies the court that the principal debtor is in default.

… … …

22. The decree for money is a simple decree against the judgment debtors including the guarantor and in no way subject to the execution of the mortgage decree against the judgment debtor No. 2. If on principle a guarantor could be sued without even suing the principal debtor there is no reason, even if the decretal amount is covered by the mortgaged decree, to force the decree-holder to proceed against the mortgaged property first and then to proceed against the guarantor. It appears the above quoted observations in *Manku Narayana's case* are not based on any established principle of law and/or reasons, and in fact, are contrary to law. It, of course depends on the facts of each case how the composite decree is drawn up. But if the composite decree is a

decree which is both a personal decree as well as a mortgage decree, without any limitation on its execution, the decree-holder, in principle, cannot be forced to first exhaust the remedy by way of execution of the mortgage decree alone and told that only if the amount recovered is insufficient, he can be permitted to take recourse to the execution of the personal decree. For a simple mortgage decree as prescribed in Form No. 5 of Appendix 'D' of the Code of Civil Procedure it could be so because the decree provides like that. It is only when the sum realised on sale of the mortgaged property is insufficient then the judgment-debtor can be proceeded with personally. But the observations of the court in *Manku Narayana's case* that even if the two portions of the decree are severable and merely because a portion of the decretal amount is covered by the mortgage decree, the decree-holder per force has to proceed against the mortgaged property first are not based on any principle of law. With all due respect to the learned Judges, in the light of the observations made by us earlier, we are constrained to observe that *Manku Narayana's case* was not correctly decided.

… … …

32. The guarantor in the present suit never took any plea to the effect that his liability is only contingent if remedies against the principal debtor fail to satisfy the dues of the decree-holder. If such a plea had been taken and the court trying the suit had considered the plea and gave any finding in favour of the guarantor, then it would have been a different position. But in the present case, on the face of the decree, which has become final, the court cannot construe it otherwise than its tenor. No executing court can go beyond the decree. All such pleas as to the rights which the guarantor had, had to be taken during trial and not after the decree while execution is being levied.""

25. In view of settled exposition of law of the land, discussed supra, plea of the petitioners-JDs that before taking any action against JD NO.3, DH-Bank as well as Executing Court, should exhaust possibility of recovering the decretal amount from the mortgaged property or principal debtor, is not tenable.

26. It is also noticeable, in present case, that loan was taken in the name of JD No.1 Firm by Ram Lubhaya Khanna and JD No.3, who were Chairman and Director of JD No.1 Firm at that time. Therefore, real beneficiary of the loan were Ram Lubhaya Khanna and JD No.3. Both of them had extended guarantee for repayment of the loan. In addition, Ram Lubhaya Khanna had also mortgaged his property. Therefore, present case is not a case where principal debtor was someone else and guarantor is someone else. Principal debtor is juristic person, wherein JD No.3 is beneficiary being Director and is also liable to pay decretal amount as principal debtor on behalf of JD No.1.

27. In the pronouncements, referred by learned counsel for the petitioners-JDs, in ***TCI Finance Limited's, Deepa Bhargva's, Bachhaj Nahar's, Ajay Dogra's and Shivashankar Gurgar's cases (supra),*** the Supreme Court has held that cannot travel beyond the pleadings and relief sought and Court cannot make out a case not pleaded and grant relief not sought for. Further that Executing Court cannot go beyond the decree except when the decree is nullity or is without jurisdiction as Executing Court has no jurisdiction to modify the decree, but it has to execute a decree as it is.

28. In view of discussion hereinabove, especially pronouncements by Three Judges' Bench in ***Indexport's case,*** I find that Executing Court is not travelling beyond the decree or exceeding its jurisdiction.

29. It has come on record that DH-Bank has rectified mistake of its officials whereby it was informed to the Court that JD No.3 is legal heir of JD No.2 and now sons of JD No.2 are stated to have been impleaded as party in Execution Petition.

30. In the aforesaid facts and circumstances, prayer in present petition, is not sustainable except the prayer that before proceeding further Executing Court has to decide both applications (referred in Para-11 and 12 of

this Order) as directed by this Court vide order dated 08.04.2016, passed in CMPMO No.137 of 2016.

31. Accordingly, present petition is disposed of with direction to the Executing Court to decide both applications as directed by this Court vide order dated 08.04.2016 in CMPMO No.137 of 2016 first before proceeding further and it is also clarified that other prayers made in the petition, being devoid of any merit, are rejected.

Pending application(s) also stand disposed of.

BEFORE HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

Between:

SANGEETA, WIFE OF SH. ASHOK KUMAR, SON OF SH. PREM CHAND, SON OF SH. MOTI RAM, SON Of SH. MASADDI, RESIDENT OF VILLAGE BHAWARNA, SUB TEHSIL BHAWARNA, DISTRICT KANGRA, HIMACHAL PRADESH.

……..PETITIONER/DEFENDANT

(BY SHRI KARAN SINGH KANWAR, ADVOCATE)

AND

KALPANA SOOD, WIFE OF DR. PAWANINDRA LAL, DAUGHTER OF LATE SH. ISHWAR DASS, SON OF SH. MOTI RAM, SON OF SH. MASADDI, RESIDENT OF VILLAGE BHAWARNA, SUB TEHSIL BHAWARNA, DISTRICT KANGRA, HIMCAHAL PRADESH. PRESENTLY RESIDING AT B-90, SVASHTHYA VIHAR, DELHI 110092, PREET VIHAR, EAST DELHI.

……….RESPONDENTS/PLAINTIFF

(BY SHRI SUNIL MOHAN GOEL, ADVOCATE)

CIVIL MISCELLANEOUS PETITION MAIN (ORIGINAL)
No. 87/2021
RESERVED ON:25.03.2022
DECIDED ON:01.04.2022

Code of Civil Procedure, 1908- Order 39 Rule 1 & 2- Order of Ld. Additional District Judge-III, Kangra at Dharamshala, directing the parties to maintain status quo qua the nature and possession of the suit property has been assailed- Held- Once the title of the defendant is not questioned by seeking appropriate relief in accordance with law, plaintiff cannot be said to have right to seek injunction against the defendant- Prima facie case not be made out- Petition allowed- Order of Ld. Additional District Judge is set aside.

Cases referred:

Padhiyar Prahladji Chenaji (Deceased) through L.R.s Vs. Maniben Jagmalbhai (Deceased) Through L.R.s and Others, 2022 SCC online SC 258;

This petition coming on for orders this day, ***Hon'ble Mr. Justice Satyen Vaidya***, passed the following:

O R D E R

Petitioner (hereinafter referred to as the defendant), by way of instant petition, has assailed order dated 25.11.2020, passed by learned Additional District Judge-III, Kangra at Dharamshala, District Kangra, Himachal Pradesh, in Civil Miscellaneous Appeal No. 3-D/XIV2020, whereby order dated 23.11.2019 passed by learned Senior Civil Judge, Palampur, Distt. Kangra in CMA No. 598 of 2019 has been set aside and an order directing the parties to maintain *status quo* qua the nature and possession of the suit property has been passed.

2. Brief facts, relevant for the purpose of adjudication of this petition are that on 19.11.2019 respondent (hereinafter referred to as the 'plaintiff') instituted Civil Suit No. 325 of 2019 before the learned Senior Civil Judge,

Palampur against the defendant and her husband (now deceased) seeking following relief-

> *"It is, therefore, prayed that a decree for permanent injunction restraining the defendants from causing any sort of interferencein the peaceful possession, taking possession forcibly, changing the existing nature and character by way of raising any kind of new constructions, making any addition, alteration, modification, variation in the existing structure or in any other manner, changing the revenue entries by way of sale etc. of the existing building situated over the land measuring 00-01-00 sq mt, comprised in khewat no. 348 khatauni no. 568 bearing khasra no. 1545 as per Jamabandi for the year 2000-01 situated in Mohal Badaghwar, Sub Thesil Bhawarna, Distt. Kangra, HP may kindly be passed in favour of the plaintiff and the against the defendants with costs of litigation. In the alternative decree for possession through removal of super-structure in case the defendants succeed in causing any sort of interference or in taking forceful possession or in raising any kind of new construction over any part of the suit land during the pendency of the suit may kindly be passed in favour of the plaintiff and against the defendants with costs of litigation."*

3. In the plaint, it is averred that father of the plaintiff (Ishwar Dass) and father-in-law of the defendant (Prem Chand) were brothers. Ishwar Dass had purchased suit property in 1965-66 in an auction and since then had enjoyed its possession. Ishwar Dass was dependent on Prem Chand for management of his local affairs, therefore, Prem Chand had represented him in the auction. The entire consideration amount was paid by Ishwar Dass. The sale deed, however, was wrongly and fraudulently got executed by Prem Chand in his name. Prem Chand transferred the suit property in the name of his son (late

husband of defendant), who further sold the suit property to defendant for sale consideration of Rs. 14,00,000/-. Interference in possession of plaintiff over suit property by defendant was pleaded as the cause of action for filing the suit. Application for interim injunction also accompanied the plaint. Defendant is contesting the suit of the plaintiff by asserting ownership and possession of the suit property earlier with Prem Chand and thereafter with her husband (now deceased) and herself.

4. Learned Trial Court declined interim relief to the plaintiff, however, the Appellate Court passed the *status quo* order, as noticed above. Both the Courts, however, concurred to the effect that the defendant and her predecessor-in-interest were continuously and consistently recorded as owners in possession of suit property in revenue records. The Appellate Court additionally noticed that the electricity meter on the suit property was installed in the name of mother of plaintiff and the verification report in this respect was witnessed by husband of the defendant.

5. I have heard learned counsel for the parties and have gone through the records.

6. Ishwar Dass died in the year 1995 and his wife Basant Kumari Sood died in the year 2019. No dispute in respect of suit property was reported till the life time of Ishwar Dass and Basant Kumari Sood. The title of the suit property in the name of Prem Chand and later his son and finally in the name of defendant has continuously been reflected in the revenue records. To same effect remained the position qua possession thereof.

7. Plaintiff has not challenged the title of the defendant. No relief has been sought seeking declaration as to the invalidity of ownership vested in Prem Chand through sale certificate or the subsequent transfers made firstly in the name of husband of the defendant and thereafter in the name of defendant. The vestment of title in Prem Chand and subsequently his successors never came to be challenged even by predecessor-in-interest of the plaintiff.

8. Once the title of the defendant is not questioned by seeking appropriate relief in accordance with law, plaintiff cannot be said to have right to seek injunction against the defendant. Reliance can be placed on judgment in ***Padhiyar Prahladji Chenaji (Deceased) through L.R.s*** *Vs.* ***Maniben Jagmalbhai (Deceased) Through L.R.s and Others, 2022 SCC online SC 258,*** wherethe Hon'ble Supreme Court, in almost identical facts, formulated the question as under:-

> *"32 Therefore, the short question, which is posed for the consideration of this Court is, whether, in a case where the plaintiff has lost so far as the title is concerned and the defendant against whom the permanent injunction is sought is the true owner of the land, whether the plaintiff is entitled to a relief of permanent injunction against the true owner, more particularly, when the plaintiff has lost so far as the title is concerned and can thereafter the plaintiff be permitted to contend that despite the fact that the plaintiff has lost so far as the title is concerned, her possession be protected by way of injunction and that the true owner has to file a substantive suit claiming the possession."*

The Hon'ble Supreme Court, thereafter, proceeded to answer aforesaid as under:-[

> *"35. Applying the law laid down by this Court in the aforesaid decision to the facts of the case on hand, it is noted that the registered sale deed in favour of defendant No.1 is dated 17.06.1975 and thereafter immediately the name of defendant No.1–purchaser was mutated in the Revenue record, which continued till the filing of the suit and the name of defendant No.1 is shown as an owner and cultivator and even the crop grown is also shown and when the plaintiff claims that she is in possession and cultivating the land, she would have known the above facts, if she had exercised due diligence and therefore as observed by this*

Court, the plaintiff(s) can be said to have deemed knowledge of the title as well as possession of defendant No.1. It is to be noted that even in the registered sale deed, it was mentioned that the possession of the entire land in question has been handed over to defendant No.1 – purchaser. At this stage, it is required to be noted that the execution of the registered sale deed and the payment of full sale consideration mentioned in the registered sale deed has been believed and accepted by all the courts below. Therefore, there was no reason for the trial court not to believe the averments in the registered sale deed of handing over the possession to the defendant No.1 – purchaser. The relief of permanent injunction sought by the plaintiff as such was a consequential relief, which shall be discussed herein below.

36. Therefore, once the suit is held to be barred by limitation qua the declaratory relief and when the relief for permanent injunction was a consequential relief, the prayer for permanent injunction, which was a consequential relief can also be said to be barred by limitation. It is true that under normal circumstances, the relief of permanent injunction sought is a substantive relief and the period of limitation would commence from the date on which the possession is sought to be disturbed so long as the interference in possession continuous. However, in the case of a consequential relief, when the substantive relief of declaration is held to be barred by limitation, the said principle shall not be applicable.

37. Even otherwise on merits also, the Courts below have erred in passing the decree of permanent injunction restraining the

defendant No.1 from disturbing the alleged possession of the plaintiff. Assuming for the sake of argument that the plaintiff is found to be in possession, in that case also, once the plaintiff has lost so far as the relief of declaration and title is concerned and the defendant No.1 is held to be the true and absolute owner of the property in question, pursuant to the execution of the sale deed dated 17.06.1975 in his favour, the true owner cannot be restrained by way of an injunction against him. In a given case, the plaintiff may succeed in getting the injunction even by filing a simple suit for permanent injunction in a case where there is a cloud on the title. However, once the dispute with respect to title is settled and it is held against the plaintiff, in that case, the suit by the plaintiff for permanent injunction shall not be maintainable against the true owner. In such a situation, it will not be open for the plaintiff to contend that though he/she has lost the case so far as the title dispute is concerned, the defendant – the true owner still be restrained from disturbing his/her possession and his/her possession be protected. In the present case, as observed hereinabove and it is not in dispute that the suit filed by the plaintiff for cancellation of the registered sale deed and declaration has been dismissed and the registered sale deed in favour of the defendant No.1 has been believed and thereby defendant No.1 is held to be the true and absolute owner of the suit land in question. The judgment and decree passed by the trial court in so far as refusing to grant the relief for cancellation of the registered sale deed and declaration has attained finality. Despite the fact that the plaintiff has lost so far as the title is concerned, still the Courts below have granted relief of permanent injunction against the defendant No.1 – the absolute owner of the land in

question, which is unsustainable, both, on law as well as on facts. An injunction cannot be issued against a true owner or title holder and in favour of a trespasser or a person in unlawful possession."

9. Learned Appellate Court appears to have been swayed by only one fact that electricity connection on the suit property was in the name of mother of the plaintiff. The available facts have not been evaluated at the touch stone of well settled principles. Learned Appellate Court failed to consider, whether the plaintiff had made out any *prima-facie* case in her favour? For making out a *prima-facie* case, the plaintiff was required to atleast plead existence of any subsisting right in her favour with respect to the suit property. Admittedly title of the suit property is with defendant and the same is not under challenge. Such relief, in any case, would be hopelessly time barred. It is not the case of the plaintiff that she or her predecessor-in-interest were not aware about the existence of title of the suit property in the name of the defendant and her predecessor-in-interest. Plaint also does not disclose as to on what basis plaintiff was entitled to protect her alleged possession. In absence of existence of *prima-facie* case, learned Appellate Court was not right in setting aside the order passed by learned Trial Court. Merely because the electricity connection was in the name of mother of the plaintiff could not be a circumstance sufficient enough to rebut, even *prima-facie,* the presumption of truth attached to the possession entry recorded in favour of the defendant and her predecessor-in-interest in the revenue records.

10. In the given circumstances of the case, the impugned order, if sustained, will potentially cause irreparable loss and injury to defendant besides exposing her to multiplicity of litigation.

11. In light of the above discussion, the present petition is allowed. Order dated 25.11.2020, passed by learned Additional District Judge-III, Kangra at Dharamshala, District Kangra, Himachal Pradesh, in Civil Miscellaneous Appeal No. 3-D/XIV2020, is set-aside and application of the plaintiff for interim

injunction being C.M.A. No. 598 of 2019 in Civil Suit No. 325 of 2019, is ordered to be dismissed. No order as to costs.

Pending miscellaneous application(s), if any, shall also stand disposed of.

BEFORE HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

Between:-

REKESH KUMAR,
S/O SHRI PARKASH CHAND,
R/O VILLGE MOHIN TEHSIL
DEHRA, DISTRICT KANGRA, H.P.

....PETITIONER

(BY SH. ANUP RATTAN, ADVOCATE)

AND

LAND ACQUISITION COLLECTOR-
CUM-SUB DIVISION OFFICE
(CIVIL), DEHRA DISTRICT
KANGRA, H.P.

....RESPONDENT

(BY SH. P.K. BHATTI, DEPUTY ADVOCATE GENERAL, ADVOCATE)

CIVIL MISC. PETITION MAIN (ORIGINAL)
No. 301 OF 2021
Reserved on: 1.4.2022
Decided on: 8.4.2022

Land Acquisition Act, 1894- Sections 11 & 30- Ld. Additional District Judge-II, Kangra at Dharamshala, returned the reference Petition to respondent No.1 on account of failure of said respondent to supply the list of legal representative of deceased- Held- Reference has to be answered in accordance with law- Even if some of the parties had died, the Ld. Court was not precluded from deciding the rights in respect of surviving parties- Order quashed and set aside with direction to the Reference Court to answer the reference strictly in accordance with law. (Para 7, 9)

Cases referred:

Vengalla Koteswaramma vs. Malampti Suryamba & another 2021 (4) SCC 246;

This petition coming on for hearing this day, the Court passed the following:

O R D E R

By way of instant petition, petitioner has prayed for following reliefs:-

"i) That the impugned order Annexure P-3 dated 30.7.2018 may kindly be quashed and set aside and proceed further in the case.

ii) That respondent may kindly be directed to make inquires with respect to deceased respondents before Reference Court and submit reference for adjudication on merits in time bound manner".

2. The grievance of the petitioner is that the impugned order dated 30.7.2018, passed by learned Additional District Judge-II, Kangra at Dharmshala in Reference Petition No. 64 of 2007 is against the law and as a consequence thereof, a situation has arisen that the petitioner and similarly situated persons have been made to wait for the final outcome of the litigation till indefinite period.

3. Respondent passed an award under Section 11 of the Land Acquisition Act, 1894 (for short the 'Act') as Award No.1 of 2007 on 23.7.2007. As regards apportionment of compensation, it was held as under:-

"Apportionment of compensation

The holders of interest in the land will be paid amount of compensation according to their share recorded in the latest jamabandi and also in the column of ownership as per statement No.55 prepared understanding order of the Financial Commissioner. In case any dispute regarding title or interest is

> raised, the entire amount will be deposited in the Govt. Treasury or in the court as the case may be and will be paid as and when the dispute is settled amicably or decided by the order of the court. In consideration of their relative rights and keeping in view the principal of equity, the amount of compensation of land under tenancy will be paid in equal share to the tenants and the owners."

Subsequently, some dispute as regards to apportionment appears to have arisen and hence, respondent No.1 made reference to the Court under Section 30 of the Land Acquisition Act. The learned Additional District Judge-II, Kangra at Dharmshala vide impugned order dated 30.7.2018 returned the reference Petition to respondent No.1 on account of failure of said respondent to supply the list of legal representative of deceased respondents, despite several opportunities. Noticeably, the reference petition remained pending for almost eleven years before its return.

4. Despite repeated opportunities, respondent has failed to file reply. Since, this Court proposes to dispose of this petition on purely a legal ground, as to legality of the impugned order, the reply on factual side will not otherwise be of much relevance.

5. I have heard the learned counsel for the parties and have also gone through the records carefully.

6. The Collector under the Act has jurisdiction under Section 11 thereof to pass an award of compensation in respect of following factors:-

> "(i) the true area of the land;
> (ii) the compensation which in his opinion should be allowed for the land; and
> (iii) the apportionment of the said compensation among all the persons known or believed to be interested in the land, of whom, or of whose claims, he has information, whether or not they have respectively appeared before him".

7. The Collector, while passing Award No. 1 of 2007 dated 23.7.2007 apportioned the compensation in the manner, as noticed above. Be that as it may, the subsequent reference was made to the Court by Collector under Section 30 of the Act and its cognizance was duly taken. Once the reference was made to the Court, it was legally obliged to answer the same in accordance with law. The reference was in respect of the dispute as to apportionment of compensation. Even if some of the parties had died, the learned Court was not precluded from deciding the rights in respect of surviving parties. Adjudication on claims and disputes in respect of apportionment will not result in a joint and inseverable decree. The claim of respective parties as to apportionment could be separately adjudged and the reference could be answered accordingly.

8. In ***Vengalla Koteswaramma vs. Malampti Suryamba & another 2021 (4) SCC 246,*** the Hon'ble Supreme Court has held as under:-

> "44.6 Although the appeals were restored for reconsideration of the High Court but, in the process, the Constitution Bench surveyed the relevant case-law including the aforesaid decision in Nathu Ram's case and laid down the principles for dealing with such matters; and therein, also underscored the consideration about inconsistent decrees coming into operation in case of proceeding with the appeal even after its abatement qua one of the respondents. The enunciations of the Constitution Bench could be usefully noticed as follows:
>
> > "34. In the light of the above discussion, we hold:
> >
> > (1) Wherever the plaintiffs or appellants or petitioners are found to have distinct, separate and independent rights of their own and for the purpose of convenience or otherwise, joined together in a single litigation to vindicate their rights, the decree passed by the court thereon is to be viewed in substance as the combination of several decrees in favour of one or the other parties and not as a joint and inseverable decree. The same would be the position in the case of defendants

or respondents having similar rights contesting the claims against them.

(2) Whenever different and distinct claims of more than one are sought to be vindicated in one single proceedings, as the one now before us, under the Land Acquisition Act or in similar nature of proceedings and/or claims in assertion of individual rights of parties are clubbed, consolidated and dealt with together by the courts concerned and a single judgment or decree has been passed, it should be treated as a mere combination of several decrees in favour of or against one or more of the parties and not as joint and inseparable decrees.

(3) The mere fact that the claims or rights asserted or sought to be vindicated by more than one are similar or identical in nature or by joining together of more than one of such claimants of a particular nature, by itself would not be sufficient in law to treat them as joint claims, so as to render the judgment or decree passed thereon a joint and inseverable one.

(4) The question as to whether in a given case the decree is joint and inseverable or joint and severable or separable has to be decided, for the purposes of abatement or dismissal of the entire appeal as not being properly and duly constituted or rendered incompetent for being further proceeded with, requires to be determined only with reference to the fact as to whether the judgment/decree passed in the proceedings vis-à-vis the remaining parties would suffer the vice of contradictory or inconsistent decrees. For that reason, a decree can be said to be contradictory or inconsistent with another decree only when the two decrees are incapable of enforcement or would be mutually self-destructive and that the enforcement of one would negate or render impossible the enforcement of the other."

9. In light of above discussion, the impugned order dated 30.7.2018 (Annexure P-3) passed by learned Additional District Judge-II, Kangra at Dharmshala in Reference Petition No. 64 of 2007 is quashed and set aside

with direction to the Reference Court to answer the reference strictly in accordance with law, after recalling the records from the respondent. Since the matter has already been delayed inordinately, learned Reference Court shall make every endeavour to answer the reference expeditiously and in any case not later than 30.9.2022.

10. Any observation made herein above shall not be taken as an expression of opinion on the merits of the case and the Reference Court shall decide the matter uninfluenced by any observation made herein above.

BEFORE HON'BLE MS. JUSTICE SABINA, J. AND HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

Between: -

LAKHVIR SINGH @ HAPPY
SON OF SHRI RANJIT SINGH
RESIDENT OF VILLAGE RAKKAR PUTRIYAL
DISTRICT HAMIRPUR, HIMACHAL PRADESH
PRESENTLY CONFINED IN MODEL CENTRAL
JAIL, KANDA, DISTT. SHIMLA, H.P.

….APPELLANT

(BY MR. RAM MURTI BISHT, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH THROUGH
SECRETARY HOME GOVT OF HP AT SHIMLA.

..RESPONDENT

(MR. ASHWANI K. SHARMA, ADDITIONAL ADVOCATE GENERAL)

CRIMINAL APPEAL
No. 91 OF 2019
Decided on: 02.04.2022

Code of Criminal Procedure, 1973- Section 374- **Indian Penal Code, 1860**-

Sections 302, 323, 324- **Arms Act, 1959**- Sections 25 & 27- Appeal against conviction- Held- Defence of false implication not probable- Nothing on record to discredit the version of eye witness. (Para 15, 18)
Indian Evidence Act, 1872- Section 27- Discovery of weapon of offence at the instance of appellant which is relevant under Section 27 of the Evidence Act. (Para 16)
Scientific Evidence- DNA- Scientific evidence collected by the investigating agency proved that DNA profile from the incriminating material found on the katta (country made pistol) matched completely with the DNA profile obtained from the blood sample of deceased Veena Devi- Appeal dismissed. (Para 17, 20)

This appeal coming on for hearing this day, ***Hon'ble Mr. Justice Satyen Vaidya***, passed the following:-

J U D G M E N T

By way of instant appeal, the appellant has assailed judgment dated 26.09.2018 and sentence order dated 03.10.2018 passed by learned Additional Sessions Judge (I), Una, District Una, H.P., whereby the appellant has been convicted and sentenced as under:-

Sr. No.	Sections	Sentence imposed on the convict
1.	Under Section 302 of IPC	Rigorous imprisonment for life and fine of Rs.25,000/-
2.	Under Section 323 IPC	Rigorous imprisonment for one year and fine of Rs.1,000/- and in case of non-payment of fine to undergo rigorous imprisonment for three months.
3.	Under Section 324 IPC	Rigorous imprisonment for three year and fine of Rs.2,000/- and in case of non-payment of fine to undergo rigorous imprisonment for six months.
4.	Under Section 25 of the Arms Act	Rigorous imprisonment for three year and fine of Rs.5,000/- and in case of

	1959 for possession of firearm & ammunition.	non-payment of fine to undergo rigorous imprisonment for six months.
5.	Under Section 27 of the Arms Act 1959 for using the firearm.	Rigorous imprisonment for three year and fine of Rs.5,000/- and in case of non-payment of fine to undergo rigorous imprisonment for six months.

2.1 The prosecution case rested on the premise that on 21.10.2014, PW-21 Ravi Dutt, telephonically informed Police Station, Amb, District Una, H.P. that someone had caused grievous injuries to his mother and she had died as a result thereof. On such information, the police reached village Lamba Sail.

2.2 Police recorded the statement of PW-1 Rama Rani under Section 154 Cr.P.C to the effect that at about 7.30 PM on 21.10.2014, PW-1 was sitting with her mother Veena Devi in the 'Veranda' of their house. Her maternal uncle Lakhvir Singh (appellant) came and struck Veena Devi on her head with some rod like object made of iron. Veena Devi was dragged to a place where cattle used to be tethered and there also she was assaulted by the appellant. Appellant also inflicted blows on PW-1. In this assault, PW-1 and her mother had received injuries.

2.3 PW-1 called her brothers PW-21 Ravi Dutt and PW-2 Kharif Singh telephonically. Gurbachan Singh and Anjeev Singh also reached the spot on hearing the commotion.

2.4 The appellant was nurturing a grudge against the family of deceased as his wife had been residing in the house of deceased for some time.

2.5 On the basis of aforesaid complaint, FIR Ext.PW-23/A was registered at 11.50 p.m.

2.6 Appellant was arrested on 22.10.2014. He made a disclosure statement dated 24.10.2014 Ext.PW-4/A, disclosing therein that on 21.10.2014 he had

concealed a country made pistol under a pine tree near "Lamba Sail" School on a link road to "Maidi" and he could get the same recovered. PW-4 Tilak Raj and Ranjeet Singh (not examined) witnessed the recording of aforesaid disclosure statement.

2.7 In pursuance to disclosure statement Ext.PW-4/A, appellant lead the police party and aforesaid witnesses to place "Talliya-da-Tillo" and got recovered a country made pistol from bushes underneath a pine tree. The country made pistol was blood stained and some blood stained hair were also found stuck between the chamber. The fire pin and a cartridge appeared to be stuck in the barrel. Recovery memo Ext.PW-1/B was prepared. The sketch Ext.PW-4/C of recovered pistol was prepared on spot and the recovered weapon was seized.

3. On completion of investigation, police found sufficient evidence against the appellant and filed *"Challan"* accordingly. Appellant was charged for the commission of offences under Sections 302, 323, 324 IPC and Sections 25 and 27 of the Arms Act. Appellant pleaded not guilty and claimed trial.

4. Prosecution examined total 25 witnesses. Appellant was examined under Section 313 Cr.P.C. Appellant examined Dr. Indu Bhardwaj as DW-1 in his defence. On conclusion of trial, learned Additional Sessions Judge, Una(I), held the appellant guilty of commission of offences under Sections 302, 323, 324 IPC and Sections 25 and 27 of the Arms Act and sentenced him as noticed above.

5. We have heard Mr. Ram Murti Bisht, learned counsel for the appellant and Mr. Ashwani Sharma, learned Additional Advocate General for the respondent and have carefully gone through the record of the case.

6. Mr. Ram Murti Bisht, learned counsel for the appellant asserted with vehemence that the prosecution had failed to prove its case beyond all reasonable doubts and hence the conviction of appellant was unwarranted. He argued that the statement of PW-1 was not worth credence as she had made

material improvements from the version given by her in her statement recorded under Section 154 Cr.P.C Ext. PW-1/A.

7. To test the above noted contention raised on behalf of appellant, we have gone through the statement of PW-1.She recalled the incident and reiterated the facts by stating that she had two brothers. Their father had expired in the year 2011 and since then, they were residing with their mother Veena Devi (deceased). A few months prior to the incident, her maternal aunt (Mami) Madhu Bala had started living with them due to her estranged relations with her husband Lakhvir Singh (appellant) and for this reason, appellant fostered a grudge against the deceased. On 21.10.2014 at about 7.30 PM she along-with her mother was sitting in the 'veranda' of the house. Appellant appeared suddenly and started **hurling abuses on the deceased** asking her about the whereabouts of his wife and children. The appellant, thereafter, struck the deceased on her head with something which was in the shape of 'Katta' (country made pistol). The deceased was dragged by appellant towards cow shed, where also, she was assaulted on the head and other parts of body with 'Katta'. PW-1 rushed to rescue her mother, but she was also hit on head and right arm with 'Katta'. The deceased started bleeding and fell unconscious. Their dog leapt on the appellant and the appellant ran away. PW-1 also received injuries on her head and right arm, besides the deceased who had also received injuries on her head and right arm. PW-3 Anjeev Singh and Gurbachan Singh (not examined) had reached the spot. PW-1, thereafter, telephonically informed her brothers PW-2 Kharif Singh and PW-21 Ravi Dutt. After reaching the spot, PW-21 Ravi Dutt informed the police. Police reached the spot and recorded her statement Ext.PW-1/A. Spot photographs were clicked. Police recovered two cartridges, a knife and hood of jacket from the spot. The articles so recovered were seized and sealed. Police also obtained controlled sample of soil from the spot. On 24.10.2014 appellant while in custody of police and in presence of PW-4 Tilak Raj and Ranjeet Singh had got

recovered a country made pistol from the place named "Talliya-da-Tillo" from bushes underneath the pine tree. The 'Katta' had human hair entangled in its chamber and was also stained with blood. Sketch of the 'Katta' was prepared by the police. The recovered weapon was then seized and sealed. She had further identified the recovered 'Katta' to be the same with which appellant had caused injuries on the deceased and to PW-1. Appellant was having strained relations with his wife Madhu Bala. Madhu Bala had reported the matter to police against her husband and whenever she was harassed, she used to come and reside along-with her children with the family of deceased. However, Madhu Bala had left their house with her children and her whereabouts were not known. The appellant somehow assumed that the deceased had sent his wife somewhere. The appellant had been visiting deceased off and on to inquire about his wife and children. In cross-examination, PW-1 admitted certain facts as under:

(i) She was adopted daughter of deceased Veena Devi;

(ii) There were houses close to her house in the village;

(iii) Deceased Veena Devi used to follow supernatural practices and many people, even from the adjoining States used to visit her for finding solution to their problems.

(iv) People from Punjab etc. used to come and stay with them during 'Hola Mohalla' festival.

PW-1 however, denied that people visited her mother on account of practice of sorcery. She also denied that her mother used to visit Punjab in the company of such persons for 15-20 days. It was denied that for this reason the brothers of PW-1 were annoyed with deceased. It was further denied that even husband of deceased had attempted to commit suicide due to the aforesaid reasons. PW-1 specifically denied that neighbours in the village were not on talking terms with them and quarrel used to take place with

deceased on account of her habit of practicing sorcery. She also denied the suggestion that her mother was killed by some unknown persons from Punjab who were nurturing ill will against her.

8. On perusal of the statement of Rama Rani it could be noticed that defence confronted her with her previous statement Ext. PW-1/A on following points which were not found recorded therein:

(i) that appellant had hurled abuses at the deceased,

(ii) their pet dog had attacked the appellant and;

(iii) the appellant had run towards "*katcha"* road.

9. The facts not recorded in Ext.PW-1/A with which PW-1 was confronted were regarding hurling of abuses on the deceased by the appellant, the dog having attacked him and the appellant having run towards '*kutcha*' path. We do not find these improvements to be of much help to the case of the appellant. Admittedly, at the time of making statement under Section 154 Cr.P.C., the mental state of PW-1 would not be that subtle as at the time of recording of her statement before the Court by which time, she had recovered from the shock. The factum of appellant having abused the deceased, having been attacked by the dog or having run towards '*kutcha'* path after the incident would be easily omitted by a person, who had witnessed a ghastly attack on her mother and herself immediately before making the statement to the police. These facts otherwise were not very material for proving the allegations against appellant. Thus, the facts so stated before court and omitted in previous statement of PW-1, in our considered view, are not so material as to have effect on the outcome of the case.

10. Learned counsel for appellant made an effort to draw our attention towards another improvement made by PW-1 in her statement before the Court *viz* naming the weapon of offence as "*katta*" in place of object like iron rod, which according to learned counsel was a material fact for determination of charge against appellant. The contention so raised is without merit as the

previous statement of a witness can be used only for the purpose of contradiction and corroboration and the same cannot be achieved without confronting the witness with his/her previous statement, which in the case in hand is found missing. PW-1 was not confronted by defence on this count and hence no benefit can be derived by appellant.

11. Another contention raised on behalf of appellant was that PW-2 Ravi Dutt contradicted the version of Rama Rani in material particulars and thus demolished prosecution story.

12. PW-21 in his examination-in-chief stated that on 21.10.2014 at about 7.30 PM, he received a phone call from PW-1 Rama Rani disclosing assault being made on her by the appellant and that as a result thereof, she was lying unconscious. He reached home at about 8.00 PM. His uncle Gurbachan Singh and Panchayat Secretary Anjeev Singh, PW-3 were already present there. His brother Kharif Singh had also arrived. PW-1 Rama Rani narrated the entire story. The said narration was substantially the same as disclosed by PW-1 in her deposition before the court. PW-21 admitted having informed the police from his mobile phone. The knife and two cartridges were stated by him to be found lying near the dead body.

13. While being cross-examined PW-21 admitted that at the time of informing the police he had not named the appellant. As per this witness, police reached there and thereafter went to the house of his uncle Mohan Lal. He admitted that he had suspected his uncle Mohan Lal to have given beating to his mother and for this reason only, police has visited the house of Mohan Lal. Mohan Lal was not found and people had advised not to suspect Mohan Lal as he was not at home. It was also admitted that Mohan Lal and deceased had filed complaints against each other. He further admitted that after return from the house of Mohan Lal, police had again asked him about the suspect. On this, PW-21 had clarified that his sister PW-1 Rama Rani had disclosed the name of appellant to be the assailant.

14. The appellant again cannot draw any benefit from the above noted version of PW-21.What had been stated by this witness about suspecting Mohan Lal in the first instance, was his own impression. He had not stated that the same was the impression of all others including PW-1. He maintained that PW-1 had disclosed the appellant to be the assailant. The fact remains that PW-21 was not the eye witness to the incident. The incident was witnessed only by PW-1. There was no contradiction in the statements of PW-1 and PW-21 in respect of facts that PW-21 was telephonically informed by PW-1 regarding the assault having been made on their mother by the appellant and on his reaching home, he had informed the police. Merely because PW-21 had entertained some impression individually cannot be considered sufficient to doubt the eye witness count given by PW-1. Reference in this regard can be made to the statement of PW-2, another son of deceased, who supported the prosecution case and he was not confronted with the same story in respect of suspecting Mohan Lal as was done with PW-1. Noticeably, the different stances maintained by the appellant while cross-examining the prosecution witness speaks for itself.

15. It was also contended for appellant that the factum of non-association of any witness from the same village made the prosecution case highly doubtful. As per appellant, the best evidence was withheld. This argument also deserves to be rejected as there was nothing on record to discredit the version of PW-1 and no convincing material could be pointed out to attribute to her any strong motive for false implication of appellant.

16. Further, the version of PW-1 against the appellant found strong corroboration from the discovery of weapon of offence at the instance of appellant, which is relevant under section 27 of the Evidence Act. The discovery of said fact has been duly proved by PW-4 Tilak Ram. His version could not be impeached despite detailed cross- examination.

17. The scientific evidence collected by the investigating agency further proved that DNA profile from the incriminating material found on the katta (country made pistol) matched completely with the DNA profile obtained from the blood sample of deceased Veena Devi. No plausible explanation has come forward from the side of appellant on this material piece of evidence save and except that evidence was planted. In absence of any material to doubt the prosecution evidence, the broad argument as to planting of evidence cannot be sustained.

18. The appellant has also failed to discredit the prosecution version by probabilising his defence of false implication. No support could be drawn by the defence from the material on record. On the contrary, the fact that the appellant nurtured some grouse with his sister can also be seen as a double-edged weapon and his motive to kill his sister.

19. No other point has been raised before us on behalf of the appellant.

20. In view of the discussion made hereinabove, we do not find any merit in the appeal and the same is accordingly dismissed.

BEFORE HON'BLE MS. JUSTICE SABINA, J. AND HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

Between:

1.MUKESH ALIAS BITTU, SON OF SHRI RAM SWAROP, RESIDENT OF VILLAGE KASHMALI, P.O. SANAURA, TEHSIL AND P.S. RAJGARH DISTRICT SIRMOUR, H.P.

2.PARVEEN KUMAR ALIAS MITHUN, SON OF SHRI RAM SWAROP, RESIDENT OF VILLAGE KASHMALI, P.O. SANAURA, TEHSIL AND P.S. RAJGARH, DISTRICT SIRMOUR H.P.

(NAME AND ADDRESS HAS BEEN REPRODUCED FROM THE IMPUGNED JUDGMENT)

PRESENTLY UNDERGOING THEIR SENTENCES IN MODEL CENTRAL JAIL NAHAN, DISTRICT SIRMOUR, H.P.

……..APPELLANTS

(BY SMT. SHEETAL VYAS, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH, THROUGH ITS HOME SECRETARY.

……….RESPONDENT

(BY SHRI. KAMAL KANT, DEPUTY ADVOCATE GENERAL)

CRIMINAL APPEAL No. 281 of 2017

Between:

STATE OF HIMACHAL PRADESH

…………APPELLANT

(BY SHRI KAMAL KANT, DEPUTY ADVOCATE GENERAL)

AND

RAM SWAROOP, S/O SHRI MAST RAM AND OTHERS.

……….RESPONDENTS

(BY SMT. SHEETAL VYAS, ADVOCATE)

CRIMINAL APPEALS
No. 240 and 281 of 2017
RESERVED ON:21.04.2022

DECIDED ON :29.4.2022

Code of Criminal Procedure, 1973- Section 374- **Indian Penal Code, 1860**- Sections 447, 147, 506, 323, 325, 452, 302 read with Section 149- **Scheduled Castes and Scheduled Tribes Act, 1989**- Section 3 (1)(v)(x)- Appeal against conviction- Held-

C. Enmity- the enmity is always a double-edged weapon. It can be the motive of offence or can be the means to falsely implicate the enemy. (Para 11, 29)

D. Reasonable doubt- The very genesis of prosecution story is rendered doubtful and prosecution has failed to prove it's case beyond are reasonable doubts. (Para 12 to 28, 31)

Criminal Appeal No. 240 of 2017 is allowed and Criminal appeal No. 281 of 2917 is dismissed. (Para 32, 34)

These appeals coming on for pronouncement of judgment this day, ***Hon'ble Mr. Justice Satyen Vaidya****, delivered the following: -*

J U D G M E N T

Both these appeals are being decided by a common judgment as these arise out of the same judgment and involve identical questions of facts and law.

2. Learned Sessions Judge (Special Judge), Sirmour at Nahan tried the following persons for offences under Sections 447, 147, 506, 323, 325, 452 &302 read with Section 149 of Indian Penal Code and also Section 3 (1)(v)(x) of Scheduled Castes and Scheduled Tribes Act, 1989, in Sessions Trial No. 9-ST/7 of 2015.

1. Ram Swaroop, Son of Sh. Mast Ram, Resident of Village Kashmali, PO Sanaura, Tehsil and PS Rajgarh, District Sirmour, H.P.

2. Asha Devi, Wife of Sh. Ram Swaroop, Resident of Village Kashmali, POSanaura, Tehsil and PS Rajgarh, District Sirmour, H.P.

3. Mukesh@ Bittu, Son of Sh. Ram Swaroop, Resident of Village Kashmali, PO Sanaura, Tehsil and PS Rajgarh, District Sirmour, H.P.

4. Naveen Kumar @ Vipin, Son of Sh. Ram Swaroop, Resident of Village Kashmali, PO Sanaura, Tehsil and PS Rajgarh, District Sirmour, H.P.

5. Pravee Kumar @ Mithun, Son of Sh. Ram Swaroop, Resident of Village Kashmali, PO Sanaura, Tehsil and PS Rajgarh, District Sirmour, H.P.

6. Anju Kumari, Wife of Sh. Praveen Kumar @ Mithun, Resident of Village Kashmali, PO Sanaura, Tehsil and PS Rajgarh, District Sirmour, H.P.

7. Naveen Dhiman, Son of Sh. Ragwa Nand, Resident of Village Chandol, PO Drabla, Tehsil and PS Rajgarh, District Sirmour, H.P.

3. Vide Judgment dated 31.12.2016, Mukesh @ Bittu and Parveen Kumar@ Mithun, both sons of Ram Swaroop, were convicted for offences under Sections 323, 325 and 302 of IPC and sentenced as under: -

Sr. No	**Name of convict**	**Offence**	**Sentence**		
			Substantive sentence	**Fine**	**Default sentence**
1.	Mukesh @ Bittu	302 IPC	Rigorous imprisonment for life.	Rs.10,000/-	Simple imprisonment for one year.
		323 IPC		Rs. 1,000/-	
		325 IPC	Rigorous imprisonment for one year.	Rs. 5,000/-	Simple imprisonment for three months.
			Rigorous imprisonment for three		Simple imprisonment

			years		for six months
2.	Praveen Kumar @ Mithun	302 IPC	Rigorous imprisonment for life.	Rs.10,000/-	Simple imprisonment for one year.
		323 IPC		Rs. 1,000/-	
		325 IPC	Rigorous imprisonment for one year.	Rs. 5,000/-	Simple imprisonment for three months.
			Rigorous imprisonment for three years		Simple imprisonment for six months.

4. All other accused persons were acquitted of all the charges.

5. In Criminal Appeal No. 240 of 2017, convicts Mukesh @ Bittu and Praveen Kumar@ Mithun, have assailed their conviction ordered vide judgment dated 31.12.2016 and sentence order of the same date passed by the learned Special Judge, Sirmour at Nahan in Sessions Trial No. 9-ST/7 of 2015. In Criminal Appeal No. 281 of 2017, State has assailed the aforesaid judgment insofar as it recorded the acquittal of other accused persons.

6. The case as set up by the prosecution was that on 16.10.2014, a written complaint No.197/RGH, dated 16.10.2014 scribed by Mohan Singh (PW-1) was received at Police Station Rajgarh through Neeta Ram (PW-18). ASI Ram Swaroop accompanied by H.C. Ramesh Chand No. 501 and C. Ajay Kumar No. 403 and PW-18 Neeta Ram reached Ram Nagar in relation with aforesaid complaint, where PW-1, Mohan Singh got recorded his statement under Section 154 Cr.P.C (Ext. PW1/A) alleging *inter alia;*6.1. That in the year 2012 he along with his younger brother Neeta Ram had purchased the lqand comprised in Khasra No.**859/737** measuring 5 bighas 2 Biswas (*Ghasni*) at village Kashmali Salogni from Vidya Sagar (PW-2) and other residents of Ram Nagar. Their ancestral land measuring 9 bighas 17 Biswas

(*Ghasni*) was also adjacent to land purchased from Vidya Sagar.The land of Ram Swaroop, resident of village Kashmali was below their Ghasni. Since the time of purchase of land by PW-1 and PW-18 from PW-2, Vidya Sagar, Ram Swaroop and his family members were keeping grudge with them by proclaiming that land belonged to them.

6.2 On 15.10.2014, PW-1 along with his younger brother Neeta Ram (PW-18), wife Kamla Devi, Sumitra Devi (PW-17) wife of Neeta Ram and nephew Surinder Kumar (PW-3) were in their purchased land for cutting the grass and had already cut 60/70 bundles of grass.The accused persons named Ram Swaroop, his wife Asha Devi and son Mukesh came their and started altercation by saying that the land belonged to them, on which they left for their house out of fear.

6.3 On 16.10.2015, PW-1, Mohan Singh again visited their land for the purpose of cutting grass accompanied by his wife Kamla Devi, younger brother Neeta Ram, PW-18, Sumitra DeviPW-17 and nephew Surinder Kumar, PW-3 and found the grass cut by them on previous day missing which had been stolen by Mohan Singh, Asha Devi, Mukesh, Vipin and Mithun during the previous night. PW-1, Mohan Singh had sent a written complaint addressed to In-charge, Police Station Rajgarh through his younger brother Neeta Ram, PW-18.

6.4 PW-1 along with Sumitra Devi, PW-17 and nephew Surinder Kumar, PW-3 started cutting grass in their ancestral Ghasni. At about 4:45 pm, Ram Swaroop and his wife Asha Devi, sons Mukesh Kumar, Vipin and Mithun, Anju wife of Mithun and Naveen Dhiman, son of Raghwa Nand, residents of village Chandol came together in the *Ghasni*, where PW-1 and others were cutting grass, with sticks in their hands and abruptly started abusing them. They were called by the name of their caste. All of them chased PW-1, his wife Sumitra Devi, PW-17 and Surinder Kumar, PW-3. Mukesh. Vipin and Mithun assaulted PW-1 with sticks. Kamla Devi was assaulted by

Asha and Anju with sticks. Sumitra Devi was assaulted by Ram Swaroop and Naveen. Surinder Kumar. PW-3 tried to mediate but he was also assaulted with slaps and fists.

6.5 They could escape from the spot with difficulty and reached the house of Vidya Sagar, PW-2. All the accused personschased them and reached house of Vidya Sagar. Father of PW-1 was sitting in the shop of Vidya Sagar. He was also named by caste by accused persons and was threatened of life. Mukesh and Vipin dragged the father of PW-1 out of shop, Mithun dragged Vidya Sagar out of shop and Asha Devi with Anju dragged wife of Vidya Sagar out of the room. The father of PW-1 was assaulted by Mukesh on his arm and he fell down on the ground. Thereafter, Vipin and Mithun along with Mukesh repeatedly hit Mastia (father of PW-1) all over his body with sticks. Whereas, Ram Swaroop, Asha Devi and Anju gave beatings to Vidya Sagar and his wife. Mastia was grievously injured. All the accused persons left the spot with sticks in their hands. At that stage also, accused persons hurled abuses and life threats.

6.6 Narender, PW-5 and Rahul PW-6, who were standing near "Ration Depot" were also given beatings by accused persons and threatened that they would take care of residents of village Shaya.

6.7 Injuries were also received by PW-1, his wife Kamla Devi, Sumitra Devi, PW-17, Surinder Kumar PW-3, Vidya Sagar, PW-2 and his wife besides Mastia.

6.8 PW-1 telephonically requisitioned ambulance. Mastia wastaken in the ambulance by PW-18 Neeta Ram for treatment but on the way he died.

6.9 During the altercation, golden earrings of PW-17, Sumitra, were also lost.

7. On the basis of aforesaid statement, FIR Ext. PW27/A was recorded. Initial investigation was carried by PW-27, ASI Ram Swaroop and later by PW-30, Dy. S.P. Bhopinder Singh as the offences under the provisions

of Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989, were also attracted.

7.1 On 17.10.2014, spot was inspected, site plans were prepared. Dried blood was collected from the spot where deceasedMastia had fallen on ground. Injured persons were got medically examined.

7.2 On 21.10.2014 accused persons suffered statements under Section 27 of Evidence Act and also got recovered hidden sticks, which were taken into possession by the police. Statements of witnesses were recorded. The disputed land was got demarcated. The challan was prepared and presented in the Court.

8. Learned Special Judge, Sirmour at Nahan after conclusion of trial convicted and sentenced Mukesh Kumar @ Bittu and Praveen Kumar @ Mithun and acquitted all other accused persons, as noticed above.

9. We have heard learned counsel for the appellants and also learned Deputy Advocate General for the respondent.

10. Prosecution has relied upon the version put forth by eye witnesses. The motive ofoffence ascribed to accused persons is existing enmity between the families of accused persons on one hand and family of complainant on the other. Additionally, the facts discovered in pursuance to statements under Section 27 of Evidence Act, suffered by accused persons have also been pressed into service.

11. The enmity is always adouble-edged weapon. It can be themotive of offence or can be the means to falsely implicate the enemy.

12. We have minutely gonethrough thestatements ofwitnesses as well as the documents relied upon by the prosecution and have come to the conclusion, for the reasons detailed hereinafter, that prosecution has failed to prove its case beyond all reasonable doubts.

13. The very genesis of prosecution story is rendered doubtful from the material available on record. In his statement under Section 154 Cr.P.C

(Ext. PW-1/A) complainant mentioned the time of assault as 4.45 PM.Witnesses PW-3 and PW-17 have also been in unison in stating that the assailants had attacked them in '*Ghasni*' at about 4:30 PM on 16.10.2014.However, the contents of the complaint Ext. PW1/B, which was sent through Neeta Ram to police by the complainant on 16.10.2014 makes out a different case. It was explicitly mentioned in the said complaint that on 16.10.2014, accused persons had started cutting grass in the morning. On objection being raised by the complainant party, the accused persons had chased them with sticks and complainant party could save their lives by running from the spot. In his examination-in-chief also the complainant as PW-1 stated as under:

> *"On the next day, on 16.10.2014, when I went to cut the grass in my Malkiati land around 10 A.M. alongwith my wife Kamla Devi, younger brother Neeta Ram, his wife Sumitra and cousin Surinder Kumar, then all the accused persons namely Ram Swaroop, Asha Devi, Mithun, Mukesh, Vipin, Vipin Dhiman and daughter in law Anju Devi came there and started assaulting us with dandas and abused us"*

Thus, two different versions have emerged about the timing of assault. If the version given by complainant in complaint Ext PW-1/B coupled with his examination-in-chief is believed then the fact mentioning assault on deceased Mastia in the evening is falsified. On the other hand, in case the version with respect to assault at 4.30 P.M. is believed then the contents of complaint Ext. PW-1/B are falsified. Neeta Ram PW-18 in his deposition did not utter even a single word regarding the assault having been committed by the accused persons in *Ghasni.*

14. As per prosecution case, complaint Ext. PW-1/B was received at Police Station Rajgarh and was diarized at No.197/ RGH. It was for inquiring into the allegations of this complaint (Ext. PW1/B) that the police party headed by ASI Ram Swaroop (PW-27) had left the Police Station Rajgarh at

4:15 PM on 16.10.2014 and DDR No.18, Ext. PW19/A, was recorded to this effect. That being so, the incident narrated in Ext. PW1/B definitely could not be the same incident as reported vide statement Ext. PW1/A, which allegedly took place at 4:30 pm.

15. It was also the case of complainant that on the previous day i.e. 15.10.2014, the accused party had deterred the complainant party from cutting the grass from their own land.The grass already cut by them had been stolen during the intervening night of 15/16.10.2014. Statement of PW-1 has been to this effect, whereas PW-17 Sumitra has given a different version and stated that the grass cut by them on 15.10.2014had been brought home.

16. One of the police officials accompanying ASI Ram Swaroop to inquire into complaint Ext. PW1/B was C. Ajay Sharma No. 403 (PW-16). As per thiswitness police party had reached Ram Nagar at 7:30 pm and before their arrival, ambulance had already left the place with injured Mastia. According to this witness, they had crossed the ambulance about one kilometer short of Ram Nagar. In contrast to this version this witness, ASI Ram Swaroop (PW-27) has stated on oath that Mastia was still on spot, when the police party reached. As per this witness, ambulance reached later in time and Mastia was removed in the ambulance and was accompanied by none else than the doctor and PW-18 Neeta Ram. He stated that the ambulance left the spot at about 6:15 pm. He further stated that at about 8:00 pm, PW-1 Mohan Singh received telephonic message from PW-18 Neeta Ram that Mastia had died. PW-27 Ram Swaroop categorically stated that he recorded the statement of PW-1 under Section 154 Cr.P.C between 8:30 pm to 9:20 pm and left the spot along with injured persons at 9:40 pm. Again a very sharp contrast is seen in narration of the factual position by PW-16 C. Ajay Kumar No. 403. According to him, he left the spot with *"Rukka"*to police station in some vehicle (not being official vehicle) and reached back at 4:00 am. He further stated that

PW-27, ASI Ram Swaroop was continuing his investigation on spot even at the time when PW-16 reached spot at 4:00 am.

17. The time of recording of FIR Ext. PW7/A is 11:30 pm on 16.10.2014. The contents of FIR reveal that the same was recorded on the basis of *"Rukka"*received inthe police station through PW-16 C. Ajay Kumar No. 403. The statement Ext. PW1/A carries an endorsement scribed by ASI Ram Swaroop, PW-27, according to which, the said statement was recorded at place Ram Nagar at 9:20 pm, on 16.10.2014, which was at a distance of 42 kilometers from the Police Station. The statement of PW-1, however, disclosed a totally different version. According to this witness after the incident, he called ambulance. The police arrived the spot before the arrival of ambulance. He further stated that PW-27 Neeta Ram and PW-7 Narinder Kumar accompanied deceasedMastia in the ambulance. The information about death of Mastia on the way to Solan was received by him telephonically from PW-18 Neeta Ram. In the meantime, police had reached the spot and removed him, his wife, Rahul, Narinder Kumar and Sumitra Devi to Rajgarh. Thereafter, his statement Ext. PW1/A was recorded by SHO. This witness does not state about recording of the statement at Ram Nagar. In fact, according to him, his statement Ext. PW1/A was recorded after his medical examination.

18. The perusal of Medico Legal Certificates of injured persons including that of PW-1 reveal that the time of arrival of injured persons at Civil Hospital, Rajgarh, has been recorded as 1:30 am on 17.10.2014. Prosecution has also placed on record documents Ext. PW25/A, which was an application moved by the police to the Medical Officer for conducting medical examination of the injured persons. This application bears the signatures of PW-27 ASI Ram Swaroop and with date superscribed as 16.10.2014. It is decipherable even by naked eye that the figure 6 has been superscribed on figure 7. This fact is being noticed in the background that PW-30 Dy. S.P. Bhopinder Singh has his own version to tender. According to this witness, he received the

information about the incident on the evening of 16.10.2014 at about 9/9:30 PM, at Nahan.He left for Rajgarh on 17.10.2014 around 12:00 o'clock. The injured were medicallyexamined after he reached Rajgarh. The application for conducting medical examination of the injured persons were written on his dictation. He specifically denied the suggestion that he had returned to Rajgarh during the intervening night between 16/17.10.2014. If the injured were present before the Medical Officer at 1:30 am, obviously, application Ext. PW25/A would precede such timing. In case, PW-30, had left Nahan for Rajgarh at 12:00 o' clock on 17.10.2014, it is beyond imagination, as to how, he could dictate application Ext. PW15/A and how the injured were examined thereafter.

19. In statement Ex.PW1/A, the complainant PW-1 has specifically stated that on 16.10.2014, he along with his wife, younger brother Neeta Ram PW-18, Sumitra Devi PW-17, nephew Surinder Kumar PW-3 had visited their ancestral *Ghasni* for the purposes of cutting of grass and found the grass cut by them on the previous date missing from the spot, which had been stolen by accused persons. In his examination-in-chief also PW-1 has admitted the presence of Neeta Ram PW-18 in the *Ghasni* on 16.10.2014. He specifically mentioned that on 16.10.2014, when he along with others including Neeta Ram went to cut the grass in the land owned by them at around 10:00 am, then all the accused persons came there and started assaulting them with sticks and also abused them. However, in cross-examination on behalf of the defence, PW-1 stated that Neeta Ram was with them on 15.10.2014 and not on 16.10.2014. PW-18, Neeta Ram in his statement before the Court did not state that he was accompanying his brother, wife etc. to the *Ghasni* on 16.10.2014. There is no explanation on record to have reconciliation between the facts contrarily stated, as noticed above. On one hand, in the examination-in-chief of PW-1 and also as per contents of Ext.PW1/B, the complainant party was allegedly assaulted by the accused persons in the morning hours of

16.10.2014, whereas the time of incident as per Ext.PW1/A and the version coming from the statements of PW1, PW3 and PW17 is 4:30/4:35 pm on 16.10.2014.

20. In order to evaluate the veracity of version of the witnesses, who had seen the altercation in the *Ghasni*, reference can be made to the statements of witnesses PW-1, PW-3 and PW-17. Witness PW-1 in his examination-in-chief makes a mention only of the fact that at 10:00 am, on 16.10.2014, he alongwith his wife Kamla Devi, brother Neeta Ram, Sumitra and Surinder Kumar reached their Ghasni to cut the grass or the accused persons came there and started assaulting them with sticks and abused. This made them to flee from the spot. In his cross-examination, PW-1 detailed that he was assaulted by Mukesh with sticks (Danda) and accused Mithun had caught hold of him from wrist and backside of the collar. He further stated that Sumitra Devi was assaulted by Ram Swaroop and his wife. PW3-Surinder Kumar stated that on 16.10.2014, at around 4:30 pm, all the accused persons came on spot in *Ghasni* and they cordoned them off. All the accused persons **were** in the possession of sticks. Accused persons assaulted them and they fled away from the scene. This witness does not provide the details as to which of the accused inflicted injuries on whom. PW-17 Sumitra Devi also stated that at about 4:30 pm, on 16.10.2014, when they were cutting grass in their *Ghasni*, all the accused persons came armed with sticks and "Kainths". As per her, accused Mithun dealt a blow of stick on her head and other parts of the body including all the other accused. She along with her sister-in-law Kamla Devi were assaulted and were thrown in bushes. She further stated that she kept lying in bushes for half an hour.

21. The case of the prosecution is that after the complainant party was assaulted by the accused persons in *Ghasni*, all the persons forming complainant party had fled from the scene. As per PW-1 and PW-17, all the persons from complainant party had fled towards the house of PW-2 Vidya

Sagar but PW-3 Surinder Kumar categorically stated that he did not run towards the house of Vidya Sagar but he ran towards another side i.e. towards Dhamla road.

22. Coming to the analysis of the evidence brought on record to prove the assault on deceased Mastia, the relevant witnesses are PW-1, PW-2, PW-3, PW-5, PW-6 and PW-17. According to PW-1, accused Mithun and Mukesh started assaulting Mastia with sticks. Asha, Anju, Vipin, Vipin Dhiman came there and they assaulted Mastia with kicks and sticks. As per PW-2, it was Mukesh and Mithun only who assaulted Mastia with sticks. Ram Swaroop, Asha Devi and Anju were standing in the courtyard with sticks in their hands. In cross-examination, this witness categorically stated that no other accused assaulted Mastia in his presence. PW-3, PW-5, PW-6 and PW-17, however, attributed the assault on Mastia to all the accused persons. At this stage, it will not be irrelevant to evaluate the truthfulness of these witnesses. Undisputedly, PW-1, PW-3 and PW-17 are close relations. PW-5 and PW-6 are the persons who belong to the same village and same community to which complainant party belonged. PW-5 is son of PW-4. This witness had reached the spot immediately on receiving information about the scuffle. He remained associated in the investigation. The sticks were allegedly got recovered by the accused persons in his presence. It is noticeable that village Shaya, to which the complainant party as well as PW-4 were belonging, is at a distance of about 3 ½ kilometers from the village Ram Nagar, where Mastia was allegedly beaten. The immediate arrival of PW-4 from a distance on hearing about the scuffle and then to remain associated in investigation even a few days thereafter clearly shows that he was close to the complainant party. Similar would be the situation of PW-5, his son. PW-6 also belongs to the same village and same community. Both PW-5 and PW-6 have stated that though they had come to fetch ration and were standing on the road, the accused party had also assaulted them while crossing the road. It is not a case

that Ram Nagar was a secluded place where none other than the persons belonging to village Shaya were available at the time of incidence. It has come in the statement of prosecution witnesses that the house of Banu Ram immediately adjoins the house of PW-2 Vidya Sagar. PW-4 had also admitted that 2-3 families reside in village Ram Nagar, besides government offices located there. PW-6 has admitted that there were other persons at the ration depot but he could not name them. It being so, the question arises, as to why, only persons from a particular village and a particular community were made the witnesses and none other from the village Ram Nagar had come forward to narrate about the incident.

23. The incident had taken place in the verandah of house of PW-2, Vidya Sagar,who is stated to be an eye witness, but the version of PW-2 does not match the version of other witnesses who allegedly had watched the happening of incident. Insofar as PW-5 and PW-6 are concerned, they were standing on the road and it has come in the evidence that the courtyard/verandah of the house of Vidya Sagar was not visible from road due to higher elevation. In such event, how the said witnesses could see the actual happening is a question mark. Thus, it is clearly inferable from the records that the eye witnesses of the incident projected by prosecution were interested witnesses and their statements were to be seen with circumspection.

24. PW-2 Vidya Sagar is the person from whom the complainant party had purchased the disputed *Ghasni* and therefore, his interest with the side of complainant party cannot be ruled out. The clear variance in the statements of Vidya Sagar on one hand and other witnesses makes the prosecution case highly doubtful. PW-1, PW-3 and PW-17 have stated that after having reached the house of Vidya Sagar or near to it, they all had hidden themselves and had seen such a serious assault on Mastia without intervening. This conduct of these witnesses is highly doubtful. The complainant party was armed with sickles and there could not be any reason

to believe that a son and daughter-in-law kept watching their old age father being mercilessly beaten as stated by them. Similarly, PW-3Surinder Kumar a young man, in view of his having close relation with the deceased, also did not intervene and allowed the old man to be beaten mercilessly.

25. Presence of PW-3 Surinder Kumar also becomes doubtful from the fact that according to him, PW-1 Mohan Singh and PW-18 Neeta Ram had accompanied Mastia in the ambulance, whereas it is nobody's case that Mohan Singh had accompanied Mastia in the ambulance. Even Mohan Singh does not say so. On the contrary, the prosecution case was that it was PW-7 Narender Kumar who had accompanied Mastia along with Neeta Ram. Even this witness i.e. PW-7 Narender Kumar appears to have made an incorrect statement in the Court, which shows his interestedness with the complainant and success of the prosecution case. PW-7 categorically deposed that while on the way in the ambulance, Mastia had told him that Mastia was assaulted by family of Ram Swaroop and Naveen from village Chandol with sticks, fists and kick blows. This statement is clearly falsified by PW-8, Pushp Lata, who was Emergency Medical Technician deputed on the Ambulance. According to her, the patient remained unconscious when he was being taken in the ambulance to Solan. He was put on oxygen. Near place Sanaura, the patient had died at about 9:30 pm. She was very categoric in stating that the patient had not talked to any person during the journey from Noori to Sanaura before he died. No motive can be attributed to PW-8 to make incorrect statement. PW-27 who was the Investigating Officer of the case, had made a totally different version that no one was sent in the ambulance and only doctor was there. He further stated that Neeta Ram was in the ambulance. Thus, he also does not state that PW7-Narender Kumar was in the ambulance.

26. PW-1 in his statement clearly mentioned that when the accused persons confronted the complainant party with the intention to assault, the complainant party was sitting having tea in their Ghasni. PW-17 on the other

hand, did not support PW-1 on this aspect and rather made a different version that they were cutting grass at a distance of 3-4 feet from each other when the accused persons launched attack on them.

27. It is not understandable, in case Mastia died at about 9:30 pm as deposed by PW-8, Pushpa Lata, how the Investigating Officer could be believed when he says that he started writing statement of PW-1, under Section 154 Cr.P.C., at 9:00 pm and continued till 9:45 pm. The entire matter appears to be mopped up and padded. The suppression of true facts and also declaration of incorrect facts not only by the complainant party but also by the official witnesses casts a serious doubt on the entire prosecution story.

28. On the other hand, if the defence raised by the accused persons is juxtaposed against the prosecution case, it appears to have been probabelised. As per defence version, the complainant party was the aggressor and they were cutting the grass from *Ghasni* of accused persons and on being confronted, they ran from the spot. The topography of the area where *Ghasni* is situate is hilly terrain with slopes having *nullah* on one side. Strata is stated to be stony and the path leading to *Ghasni* is also said to have stony patches. These facts have been admitted by almost all the witnesses. PW-28 Dr. Piyush Kapila has categorically opined that the injuries found on the person of Mastia were unlikely to be result of assault with sticks. He further stated that there was no specific pattern of injury as would be in the case of assault with sticks. On the other hand, such injuries can be result of fall as were found on one side of the body. Fractures were found on right humerous, right radius &ulna and right tibia. All these injuries had exposed contusions. In addition, some ribs of Mastia were fractured, which according to PW-28 could be caused by fist and kick blows. Neither PW-1 in his statement Ext.PW1/A had made mention about inflictions of kicks and fist blows nor PW-2 Vidya Sagar had said so. Thus, the entire hypothesis of the prosecution story becomes doubtful as none of the injures on the person of Mastia were found to have been

inflicted with sticks. As far as the injuries on the persons of PW-1, PW-5, PW-6 and PW-17 are concerned, these injuries were simple in nature and there was no specific medical opinion that the injuries found on the persons of aforesaid witnesses could be caused only with the sticks. Rather, the Medical Officer PW-26 had deposed that such injuries could be caused due to fall.

29. The strained relations and enmity between both the groups i.e. complainant party and accused persons are established. It is proved on record that they had civil litigation with respect to disputed *Ghasni*. The suit filed by Ram Swaroop against Mastia and his sons in respect of the disputed *Ghasni* was decreed. In 2013, a complaint was lodged against Mastia, PW-1 Mohan Singh and PW-18 Neeta Ram at the instance of accused persons regarding trespass into their *Ghasni* as a result of which all three were arrested and were bailed out after about three days. This fact has been admitted by PW-18 Neeta Ram. In view of the existing strained relations between the parties, the complainant party appears to have distorted the facts to take undue advantage of the situation and to implicate the accused persons in commission of serious offence.

30. The prosecution relied upon the discovery of sticks from the hidden places at the instance of accused persons in consonance of disclosure statements suffered by them under Section 27 of Evidence Act. PW-9 Ramesh Chand is one of the witnesses to have witnessed the making of disclosure statements by the accused persons. However, in his deposition before the Court, he has stated that Dy S.P. Bhopinder Singh had already disclosed to them that the accused persons were to make statements regarding recovery of sticks and they should wait. This witness was in the police station with PW-18 Neeta Ram, which again casts a doubt on his independence as also the statement under Section 27 of the Evidence Act. The witness PW-18 Neeta Ram had gone to the extent of saying that when they reached police station Dy.S.P. had already recorded the statements of the accused persons. Though,

he later qualified that statement of Ram Swaroop only had been recorded before their arrival and rest were recorded thereafter. This is sufficient to infer the mode and manner in which the investigation was carried and a big question mark is raised on its fairness. It has also come on record that after recovery of sticks from the bushes, the same were brought to the house of PW-2, Vidya Sagar and sealing procedure was undertaken. In any case, the recovery of sticks will not have any effect on merits of the case as the injuries on the person of deceased were not connected with the sticks and the injuries on other injured persons were not necessarily the result of beatings given by sticks.

31. From the above referred material, we are convinced that prosecution has failed to prove its case beyond reasonable doubt. The conviction of appellants in Criminal Appeal No. 240 of 2017, is unjustified. The learned Special Judge has failed to appreciate the evidence in right perspective and has erred by ignoring material aspects emerging from the facts of the case.

32. Criminal Appeal No.240 of 2017, is accordingly, allowed. The conviction and sentence imposed upon the appellants in Criminal Appeal No. 240 of 2017, vide judgment dated 31.12.2016 and sentence order of the same date passed by learned Special Judge, Sirmour at Nahan, in Sessions Trial No. 9-ST/7 of 2015, are set aside. The appellants are ordered to be released from custody forthwith, if not required in any other case.

33. In view of the provisions of Section 437 of Code of Criminal Procedure, 1973, appellants Mukesh alias Bittu and Parveen Kumar alias Mithun, both sons of Sh. Ram Swarop, are directed to furnish their respective personal bonds in the sum of Rs.25,000/- with one surety in the like amount each, before the learned Registrar (Judicial) of this Court, which shall be effective for the period of six months with stipulation that in the event of Special Leave Petition being filed against this judgment, or on grant of leave,

the appellants aforesaid, on receipt of notice thereof, shall appear before the Supreme Court.

34. Criminal Appeal No. 281 of 2017, is accordingly dismissed. All the accused persons are acquitted of all the charges framed against them.

Accordingly, both the appeals are disposed of, so also the pending miscellaneous application(s), if any.

BEFORE HON'BLE MS. JUSTICE SABINA, J. AND HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

Between:-

SHRI ASHOK KUMAR,
SON OF SHRI NAND LAL,
RESIDENT OF VILLAGE AND
POST OFFICE DALASH, TEHSIL
ANNI, DISTRICT KULLU, H.P.

....APPELLANT

(BY SH. N. S. CHANDEL, SR. ADVOCATE WITH SH. VINOD K. GUPTA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

.... RESPONDENT

(SH. VIKRANT CHANDEL, DEPUTY ADVOCATE GENERAL)

1. CRIMINAL APPEAL NO. 23 OF 2009

Between:-

RAMESH CHAND,
S/O SH. RANJU RAM @ LANJU RAM,
R/O VPO KANDA GHAI, TEH. AND PS
AANI, DISTT. KULLU, HP.

....APPELLANT

(BY SH. MANOJ PATHAK, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

.... RESPONDENT

(SH. VIKRANT CHANDEL, DEPUTY ADVOCATE GENERAL)

2. CRIMINAL APPEAL NO. 86 OF 2009

Between:-
STATE OF H.P.

....APPELLANT

(SH. VIKRANT CHANDEL, DEPUTY ADVOCATE GENERAL)

AND

1. RAMESH CHAND,
S/O SH. RANJU RAM ALIAS
LANJU RAM, R/O V&PO KANDA
GHAHI, TEHSIL AND PS AANI,
DISTT. KULLU, HP

2. ASHOK KUMAR,
S/O SH. NAND LAL,
R/O V&PO DALASH TEHSIL
AANI, DISTT. KULLU, H.P.

....RESPONDENTS

(SH. TARUN PATHAK, ADVOCATE, FOR R-1).

(BY SH. N. S. CHANDEL, SR. ADVOCATE WITH SH. VINOD K. GUPTA, ADVOCATE)

CRIMINAL APPEAL

Nos. 15, 23 & 86 of 2009
Reserved on:29.3.2022
Date of decision:7.4.2022

Code of Criminal Procedure, 1973- Section 374- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 20, 52-A- Appeal against conviction- 4Kg 200 gm of charas- Two samples of 25 gm each were taken out- Held- Investigating Officer had not chosen to comply with Section 52A of the Act- Sample was not representative of entire bulk as such appellants can be held to be in conscious possession of 25 gms of charas which as per the Act is small quantity- Appeals disposed of accordingly- Sentence already undergone. (para 15, 28, 29)

Cases referred:

Gaunter Edwin Kircher vs. State of Goa, Secretariat Panji, Goa AIR 1993 SC 1456;
Noor Aga v. State of Punjab (2008) 16 SCC 417;
Union of India (UOI) v. Mohanlal and Ors. (2016) 3 SCC 379;

These appeals coming on for hearing this day, **Hon'ble Mr. Justice Satyen Vaidya**, delivered the following:

J U D G M E N T

All these appeals are being disposed of together, as they arise from the single judgment and sentence dated 31.12.2008/ 17.01.2009 and also involve identical questions of facts and law.

2. Ashok Kumar and Ramesh Chand were jointly tried for commission of offence under Section 20 of the NDPS Act in Sessions Trial No. 13-S/7 of 2008 by learned Special Judge II, Solan. Both were convicted for said offence and were sentenced to undergo imprisonment for two years each with fine of Rs. 40,000/- each and in default of payment of fine to further undergo imprisonment for six months each. While passing the aforesaid sentence learned Special Judge has recorded reasons as under:

> "The contraband recovered was 4 Kg 200 Grams. On the test in the FSL resin which is an active ingredient of Charas and falls within offending item was found to be 12.90% w/w which if

> calculated out of 4 Kg 200 grams will not be more than 500.08 grams which is more than small quantity but less than commercial quantity, thereby this matter is covered under section 20 (1) (b) of the Act."

3. Whereas, in Cr. Appeals No. 15 of 2009 and 23 of 2009 appellants Ashok Kumar and Ramesh Chand have assailed their respective conviction and sentence, State has filed appeal No. 86 of 2009 seeking enhancement of their sentence.

4.1 The case as set up by prosecution was that on 8.5.2008, a police party consisting of Insp/SHO Ramesh Chand (PW-9), ASI Prithvi Chand (PW-10), HC Kanwar Singh (PW-1), HC Nand Lal (PW-2), C. Gurbax Singh (PW-3) and C. Desh Raj (not examined) left Police Station, Parwanoo, District Solan, H.P., at 9.10 PM for patrolling and crime detection vide DDR No. 41(A) Ext. PW-7/D. They laid check Naka on NH-22, Sector-6, Parwanoo.

4.2 At about 10.00 PM a vehicle (Trax) No. HP-02A-0289 came from the side of Solan and was stopped for checking. The said vehicle was being driven by appellant Ashok Kumar (Criminal Appeal No. 15 of 2009) and appellant Ramesh (Criminal Appeal No. 23 of 2009) was found sitting on front seat as passenger. Ramesh Chand was holding a bag on his lap. The bag was checked and a carton was found inside. Black coloured substance in the shape of balls and cakes, wrapped in polythene sheets were found in the carton. The recovered substance was found to be charas from its smell and identification memo Ext PW-1/A was prepared.

4.3 The recovered substance was weighed and found 4 Kg 200 grams. Two separate samples weighing 25 grams each were taken. The samples as well as balance bulk contraband were sealed in separate cloth parcels with six seals each having impression "W". Facsimile of seal impression was separately preserved on piece of cloth Ext PW-1/B. NCB form Ext.PW-1/C was filled. Seizure memo of bulk contraband and samples Ext. PW-1/D was prepared.

4.4 PW-9 Insp./SHO Ramesh Chand prepared "RUKKA" Ext. PW-3/A and sent the same to Police Station for registration of FIR through PW-3 C. Gurbax Singh. PW-8 ASI Prem Singh made endorsement Ext PW-8/A thereon. FIR No. 84/08 Ext. PW-7/A was registered.

4.5 PW-9 Insp./SHO Ramesh Chand handed over further investigation to PW-10 ASI Prithvi Chand vide memo Ext PW-1/E. Appellants were stated to have been formally arrested.

4.6 The recovered contraband and samples were handed over to PW-7 HC Hem Raj (MHC) and report Ext PW-7/B was made to this effect in Malkhana Register. On 9.5.2008 one sealed sample Ext P-5 was sent to FSL Junga for chemical examination through PW-4 C. Krishan Kumar. On the same day i.e. 9.5.2008 special report PW-5/A under section 57 of the Act was prepared and sent to superior officer. On 20.6.2008 the SFSL report along with sample were received back at Police Station through C. Vijay Kumar (not examined). The SFSL, Junga reported the samples sent to it to be the charas.

5. On completion of investigation, challan was presented and appellants were accordingly charged. They pleaded not guilty. On conclusion of trial, the appellants were held guilty for commission of offence under Section 20 of the NDPS Act and were convicted and sentenced as notice above.

6. We have heard learned counsel for the parties and have also gone through the record carefully.

7. PW-1 HC Kanwar Singh, PW-2 HC Nand Lal, PW-3 C Gurbax Singh No. 725, PW-9, Inspector Ramesh Chand and PW-10 ASI Prithvi Chand were examined by the prosecution as spot witnesses. Their statements are relevant for assessing the allegation of recovery of 4 Kg 200 Grams of charas from appellants and also its mode and manner.

8. All the above noted spot witnesses have been in unison in narration of the sequence of events, those took place at spot. It is stated by them that on 8.5.2008 Trax No. HP-02A-0289 was checked. Appellants were

found occupying the vehicle. Ashok Kumar was the driver and Ramesh Chand was the passenger. A bag was found on the lap of appellant Ramesh Chand. The bag was checked and was found containing a carton taped with adhesive tape. Charas weighing 4 Kg 200 Grams was found in the carton. Two samples of 25 gms. each were drawn. Samples as well as bulk contraband were separately sealed.

9. As per PW-1, PW-9 and PW-10, the vehicle (Trax) was stopped by police party at about 10.00 p.m., whereas according to PW-2, the time of interception of vehicle was 10.30 p.m. Spot witnesses described the nature of contraband recovered from appellants as under: -

Sr. No.	Witness	Description
1.	PW-1 HC Kanwar Singh	Ball shape and cake shape object wrapped in polythene.
2.	PW-2 HC Nand Lal	In shape of sticks wrapped in polythene, which was round and chapti.
3.	PW-3 constable Gurbax Singh	Brown coloured round shape object wrapped in polythene.
4.	PW-9 Inspector Ramesh Chand	Some cake type and ball shape object in brownish coloured found in thin polythene.
5.	PW-10 ASI Prithvi Chand	Containing cake shape and ball shape object wrapped in thin polythene.

10. The case property was opened in the Court in presence of learned Special Judge during examination of PW-1 HC Kanwar Singh and it was recorded as under: -

> "Inside the bag a carton box found containing cake like and ball shape object covered with polythene".

11. All the spot witnesses have further unanimously stated that two samples of 25 gms each were taken out. However, the details of procedure

adopted for sampling has not been narrated by any of them. PW-9 Inspector Ramesh Chand was the Investigating Officer. He simply stated as under: -

> "Two samples of 25 gms. each were taken out. Both the samples as well as remaining bulk of charas were wrapped separately in cloth parcels and the parcels were sealed with seal impression 'W' at six points each."

12. Admittedly, only one sample weighing 25 gms. was sent for chemical examination to SFSL, Junga. As per examination report Ext. PW-10/B, the sample weighing 24.722 gms. was received in the Laboratory.

13. The question, in the given facts and circumstances of the case, now arises whether the entire quantity of substance recovered from appellants by the police was "Charas" or not? As noticed above, the entire quantity of 4 Kg 200 Grams was not a single mass. All the spot witnesses have stated that it was in the shape of balls, cakes or chapti and were wrapped in thin polythene. This fact is corroborated from the proceedings recorded by the learned Special Judge, when it was recorded, during the examination of PW-1, that sealed packet on opening was found to contain cake like and ball shaped object. Further perusal of seizure memo Ext. PW-1/D, Rukka Ext. PW-3/A and special report Ext. PW-5/A, reveals that the recovered substance was described as cake and balls shaped substance. It will be relevant to reproduce the exact Hindi vernacular version recording nature of recovered substance in memos PW-1/D, PW-3/A and special report PW-5/A as under:

> "टिक्की नुमा प्लास्टिक की पन्नियो में लिपटी व गोली नुमा भूरे रंग का पदार्थ पाया गया"

From the entirety of aforesaid material, there remains no doubt that the substance was not a single mass and rather was having plurality of masses. Whether the different shaped masses of substance were made homogenous or the sample contained material from all masses is in the realm of suspense.

None of the prosecution witnesses have uttered even a single word in this regard. The prosecution carried a heavy onus to prove its case beyond all reasonable doubts. To hold the entire bulk substance to be Charas there had to be some scientific evidence declaring so. In the case in hand the entire bulk was being branded as charas on the basis of SFSL report Ext PW-10/B, where as its scrutiny reveals laboratory examination of less than 25 gms. of substance. To hold the sampled substance Ext P-5 to be representative of entire bulk it had to be proved by prosecution that the sample examined, in fact, was the true representative sample of the entire bulk. This evidence, in our considered view is clearly missing in the case in hand.

14. NDPS Act was amended in the year 1989 and Section 52A was incorporated, which read as under:

> **"52A. Disposal of seized narcotic drugs and psychotropic substances.**
>
> (1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may from time to time, determine after following the procedure hereinafter specified.
>
> (2) Where any 4 [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer-in-charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such 4 [narcotic

drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the 4 [narcotic drugs, psychotropic substances, controlled substances or conveyances] or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the 4 [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of—

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such magistrate, photographs of 5 [such drugs, substances or conveyances] and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1972) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence.”

15. Evidently, the aforesaid provision was incorporated for safe custody and disposal of narcotic and psychotropic substances, so as to avoid their misuse. In the case in hand, the Investigating Officer had not chosen to comply with Section 52A of the Act, rather he had chosen to draw the samples on spot. The aforesaid provision was amended in 2014, nevertheless the contemporaneous provision contained in Section 52A on 8.5.2008 i.e. at the time of commission of offence, substantially carried the same mandate as amended Section 52A.

16. The Central Government in exercise of powers vested under sub-section (i) of Section 52 (A) of the Act, has issued standing order No.1 of 1989, prescribing the procedure to be followed while conducting seizure of the contraband. This standing order succeeds the provision of standing order No. 1 of 1988. Section 2 of the standing order No.1 of 1989 provides for general procedure of sampling and storage etc. as under: -

> STANDING ORDER No. 1/89 SECTION II - GENERAL PROCEDURE FOR SAMPLING, STORAGE, ETC.
>
> 2.1. All drugs shall be properly classified, carefully weighed and sampled on the spot of seizure.
>
> 2.2. All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (Panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchanama drawn on the spot.
>
> 2.3. The quantity to be drawn in each sample for chemical test shall not be less than 5 grams in respect of all narcotic drugs and psychotropic substances save in the cases of opium, ganja and charas (hashish) where a quantity of 24 grams in each case

is required for chemical test. The same quantities shall be taken for the duplicate sample also. **The seized drugs in the packages/containers shall be well mixed to make it homogeneous and representative before the sample (in duplicate) is drawn**.

2.4. In the case of seizure of a single package/container, one sample in duplicate shall be drawn. Normally, it is advisable to draw one sample (in duplicate) from each package/container in case of seizure of more than one package/container.

2.5. However, when the packages/containers seized together are of identical size and weight, bearing identical markings, and the contents of each package given identical results on colour test by the drug identification kit, conclusively indicating that the packages are identical in all respects, the packages/containers may be carefully bunched in lots of ten packages/containers except in the case of ganja and hashish (charas), where it may be bunched in lots of 40 such packages/containers. For each such lot of packages/containers, one sample (i n duplicate) may be drawn.

2.6. Where after making such lots, in the case of hashish and ganja, less than 20 packages/containers remain and, in the case of other drugs, less than 5 packages/containers remain, no bunching would be necessary and no samples need be drawn.

2.7. If such remainder is 5 or more in the case of other drugs and substances and 20 or more in the case of ganja and hashish, one more sample (in duplicate) may be drawn for such remainder package/container.

2.8. While drawing one sample (in duplicate) from a particular lot , it must be ensured that representative samples in equal quantity are taken from each package/container of that lot and mixed together to make a composite whole from which the samples are drawn for that lot.

2.9. The sample in duplicate should be kept in heat-sealed plastic bags as it is convenient and safe. The plastic bag container should be kept in a paper envelope which may be sealed properly. Such sealed envelope may be marked as original and duplicate. Both the envelopes should also bear the No. of the package(s)/container(s) from which the sample has been drawn. The duplicate envelope containing the sample will also have a reference of the test memo. The seals should be legible. This envelope along with test memos should be kept in another envelope which should also be sealed and marked "Secret - Drug sample/Test memo", to be sent to the chemical laboratory concerned.

3. The seizing officers of the Central Government Departments, viz., Customs, Central Excise, Central Bureau of Narcotics, Narcotic s Control Bureau, Directorate of Revenue Intelligence, etc. should despatch samples of the seized drugs to one of the laboratories of the Central Revenues Control Laboratory nearest to their offices depending upon the availability of test facilities . The other central agencies like BSF, CBI and other central police organizations may send such samples to the Director, Central Forensic Laboratory, New Delhi. All State enforcement agencies may send samples of seized drugs to the Director/Deputy Director/ Assistant Director of their respective State Forensic Science Laboratory.

3.1. After sampling, a detailed inventory of such packages/containers shall be prepared for enclosure with the Panchama. Original wrappers shall also be preserved for evidentiary purposes.

17. The sanctity of the Standing Order 1/89 came for consideration before the Supreme Court in ***Noor Aga*** v. ***State of Punjab (2008) 16 SCC 417***, wherein it was held as under:-

“89. Guidelines issued should not only be substantially complied, but also in a case involving penal proceedings, vis-a-

vis a departmental proceeding, rigours of such guidelines may be insisted upon. Another important factor which must be borne in mind is as to whether such directions have been issued in terms of the provisions of the statute or not. When directions are issued by an authority having the legal sanction granted therefor, it becomes obligatory on the part of the subordinate authorities to comply therewith.

90. Recently, this Court in State of Kerala & Ors. v. Kurian Abraham (P) Ltd. & Anr. [(2008) 3 SCC 582], following the earlier decision of this Court in Union of India v. Azadi Bachao Andolan [(2004) 10 SCC 1] held that statutory instructions are mandatory in nature.

"91. Logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been no substantial compliance of these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the effect that had such evidence been produced, the same would have gone against the prosecution."

18. If one goes through the Standing Order 1/89 and Section 52A (2) (c) of the NDPS Act, an apparent conflict arises as the former provides for sampling at the spot of seizure and sending the same to laboratory within 72 hours whereas the latter provides for sampling before a Magistrate. The said conflict has been dealt with by the Hon'ble Supreme Court elaborately in **Union of India (UOI) v. Mohanlal and Ors**. (2016) 3 SCC 379. The relevant paragraphs of the said Judgment of the Hon'ble Apex Court are reproduced hereunder:

"Seizure and sampling

12. Section 52-A(1) of the NDPS Act, 1985 empowers the Central Government to prescribe by a notification the procedure to be followed for seizure, storage and disposal of drugs and psychotropic substances. The Central Government has in exercise of that power issued Standing Order No. 1 of 1989 which prescribes the procedure to be followed while conducting seizure of the contraband. Two subsequent standing orders one dated 10-5-2007 and the other dated 16-1-2015 deal with disposal and destruction of seized contraband and do not alter or add to the earlier standing order that prescribes the procedure for conducting seizures. Para 2.2 of Standing Order No. 1 of 1989 states that samples must be taken from the seized contraband on the spot at the time of recovery itself. It reads:

"2.2. All the packages/containers shall be serially numbered and kept in lots for sampling. Samples from the narcotic drugs and psychotropic substances seized, shall be drawn on the spot of recovery, in duplicate, in the presence of search witnesses (panchas) and the person from whose possession the drug is recovered, and a mention to this effect should invariably be made in the panchnama drawn on the spot."

13. Most of the States, however, claim that no samples are drawn at the time of seizure. Directorate of Revenue Intelligence is by far the only agency which claims that samples are drawn at the time of seizure, while Narcotics Control Bureau asserts that it does not do so. There is thus no uniform practice or procedure being followed by the states or the central agencies in the matter of drawing sample. This is, therefore, an area that needs to be suitably addressed in the light of statutory provisions which ought to be strictly observed given the seriousness of the offences under the Act and the punishment prescribed by law in case the same are proved. We propose to deal with the issue no matter briefly in an attempt to remove the confusion that prevails regards drawing of sample.

14. Section 52-A as amended by Act 16 of 2014, deals with disposal of seized drugs and psychotropic substances. It reads:

"52-A.Disposal of seized narcotic drugs and psychotropic substances.—(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may, from time to time, determine after following the procedure hereinafter specified.

(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer in charge of the nearest police station or to the officer empowered under Section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of—

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such Magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.

(3) When an application is made under sub-section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs, psychotropic substances, controlled substances or conveyances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence."

15. It is manifest from Section 52-A(2)(c) (supra) that upon seizure of the contraband the same has to be forwarded either to the officer-in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory as stipulated in the said provision and make an application to the Magistrate for purposes of

(a) certifying the correctness of the inventory,

(b) certifying photographs of such drugs or substances taken before the Magistrate as true, and

(c) to draw representative samples in the presence of the Magistrate and certifying the correctness of the list of samples so drawn.

17. The question of drawing of samples at the time of seizure which, more often than not, takes place in the absence of the Magistrate does not in the above scheme of things arise. This is so especially when according to Section 52-A(4) of the Act, samples drawn and certified by the Magistrate in compliance with sub-sections (2) and (3) of Section 52-A above constitute primary evidence for the purpose of the trial. Suffice it to say that there is no provision in the Act that mandates taking of samples at the time of seizure. That is perhaps why none of the States claim to be taking samples at the time of seizure.

18. Be that as it may, a conflict between the statutory provision governing taking of samples and the Standing Order issued by the Central Government is evident when the two are

placed in juxtaposition. There is no gainsaid that such a conflict shall have to be resolved in favour of the statute on first principles of interpretation but the continuance of the statutory notification in its present form is bound to create confusion in the minds of the authorities concerned instead of helping them in the discharge of their duties. The Central Government, therefore, will do well to re-examine the matter and take suitable steps in above direction."

19. There is nothing in the prosecution evidence that any of these procedures were followed while drawing samples. There is not even any semblance of any procedure having been adopted for drawing a representative sample. This creates a serious doubt on the very legitimacy of the case of prosecution. To have credence, the sample had to be representative sample, of entire 4 Kg 200 Grams of substance, failing which it can be a case of recovery of only 25 gms. of charas of at the most 50 grams by including weight of second sample, having entirely legal consequences.

20. In **AIR 1993 SC 1456**, titled **Gaunter Edwin Kircher vs. State of Goa, Secretariat Panji, Goa**, it has been held as under:-

"5. The next and most important submission of Shri Lalit Chari, the leaned senior counsel appearing for the appellant is that both the courts below have erred in holding that the accused was found in possession of 12 gins. of Charas. According to the learned counsel, only a small quantity i.e. less than 5 gms. has been sent for analysis and the evidence of P.W.1, the Junior Scientific Officer would at the most establish that only that much of quantity which was less than 5 gms. of Charas is alleged to have been found with the accused. The remaining part of the substance which has not been sent for analysis cannot be held to be also Charas in the absence of any expert evidence and the same could be any other material like tobacco or other

intoxicating type which are not covered by the Act. Therefore the submission of the learned counsel is that the quantity proved to have been in the possession of the accused would be small quantity as provided under Section 27 of the Act and the accused should have been given the benefit of that Section. Shri Wad, learned senior counsel appearing for the State submitted that the other piece of 7 gms. also was recovered from the possession of the accused and there was no need to send the entire quantity for chemical analysis and the fact that one of the pieces which was sent for analysis has been found to contain Charas, the necessary inference would be that the other piece also contained Charas and that at any rate since the accused has totally denied, he cannot get the benefit of Section 27 as he has not discharged the necessary burden as required under the said Section. Before examining the scope of this provision, we shall first consider whether the prosecution has established beyond all reasonable doubt that the accused had in his possession two pieces of Charas weighing 7 gms. and 5 gms. respectively. As already mentioned only one piece was sent for chemical analysis and P.W.1, the Junior Scientific Officer who examined the same found it to contain Charas but it was less than 5 gms. From this report alone it cannot be presumed or inferred that the substance in the other piece weighing 7 gms. also contained Charas. It has to be borne in mind that the Act applies to certain narcotic drugs and psychotropic substances and not to all other kinds of intoxicating substances. In any event in the absence of positive proof that both the pieces recovered from the accused contained Charas only, it is not safe to hold that 12 gms. of Charas was recovered from the accused.

> In view of the evidence of P.W.1 it must be held that the prosecution has proved positively that Charas weighing about 4.570 gms. was recovered from the accused. The failure to send the other piece has given rise to this inference. We have to observe that to obviate this difficulty, the concerned authorities would do better if they send the entire quantity seized for chemical analysis so that there may not be any dispute of this nature regarding the quantity seized. If it is not practicable, in a given case, to send the entire quantity then sufficient quantity by way of samples from each of the packets or pieces recovered should be sent for chemical examination under a regular panchnama and as per the provisions of law.

21. In above view of the matter, we propose to examine it from another angle. Though the non-association of independent witnesses is always not fatal to the prosecution case, yet, this aspect gains relevance and importance in case where other available material on record creates suspicion. The time of recovery is somewhere between 10.00 to 10.30 p.m. and the date is 8.5.2008. Place of recovery is NH-22, Sector-6, Parwanoo which is a busy highway. It is highly improbable that in peak summer month no traffic would be available between 10.00 to 10.30 p.m. on the spot of recovery. It is also not the case that no habitation was available in the near vicinity. That being so, independent witnesses could be associated at least to provide some semblance of fairness in the sampling procedure. We are aware that in chance recovery unless the witnesses are already available before recovery, subsequent inclusion will not be material, however to attach fairness to sampling being done on spot the requirement of independent witnesses cannot be undermined, especially in the facts of the present case.

22. Doubt is also created from the fact that the parcels containing samples did not bear the signatures of appellant Ramesh Kumar, which according to us is not a simple lapse or omission, which can be ignored.

23. We consider it appropriate to reproduce hereunder the observations and conclusions rendered by different Division Benches of this Court while dealing with identical or akin proposition from time to time.

24. In ***Khek Ram*** Vs ***NVB*** Criminal Appeal No. 450 of 2016 decided on 29.12.2017, paras 78 to 80 read as under:

> "78. Additionally and more importantly, we notice that the entire bulk of the alleged contraband was not sent for analysis and only four samples of 25 grams each were, in fact, sent for analysis. Thus, taking the prosecution case at best what is proved on record is the recovery of only 100 grams of charas from the possession of the accused. Admittedly, the alleged contraband was in different shapes and sizes in the form of biscuits and flat pieces.
>
> 79. Therefore, in this background, the question arise as to whether the entire bulk of 19.780 Kgs as was recovered, in absence of there being chemical examination of whole quantity, can be held to be charas.
>
> 80. This question need not detain us any longer in view of the authoritative pronouncement by the Hon'ble Supreme Court in Gaunter Edwin Kircher vs. State of Goa (1993) 3 SCC 145, wherein the Court was dealing with the alleged recovery of two cylindrical pieces of Charas weighing 7 grams and 5 grams each. However, only one piece weighing 5 grams was sent for chemical analysis and was established to be that of Charas. The learned trial Court convicted the accused by taking the total quantity to be 12 grams and such finding was affirmed by Hon'ble Supreme Court, however, reversing such findings.

25. In ***State*** Vs ***Naresh Kumar*** Criminal Appeal No. 782 of 2008 decided on 28.6.2019, paras 23 to 25 read as under:

"23. As quantum of recovery is concerned, as per prosecution case, 1 Kg. 500 grams charas was recovered from the respondent and after taking out two samples of 25 grams each, the remaining contraband was sealed in parcel and samples were also sealed in two different parcels. Bulk of charas claimed to be recovered from the respondent is Ext.P2 but during investigation and thereafter also, only one sample of 25 grams of charas was sent to CFSL Chandigarh for chemical analysis and as per chemical analyst report Ext. PX the sample was found to be of charas.

24. As per ratio laid down by the Apex Court in Gaunter Edwin Kircher vs. State of Goa, reported in (1993)3 SCC 145 the amount of contraband, recovered from the respondent, cannot be held more than that which was sent to the Chemical Analyst and was affirmed by the Forensic Science Laboratory as a contraband. The failure to send the entire mass for chemical analysis would result to draw inference that said contraband has not been analyzed and identified by CFSL as the charas.

25. Learned Single Judge of this Court in Dhan Bahadur vs. State of H.P. reported in 2009(2) Shim.L.C. 203, after relying upon the judgment in Gaunter Edwin Kircher's case supra, has held that only analyzed quantity of contraband can be said to have been recovered from the respondent. Applying the ratio of law laid down by the Apex Court and followed by learned Single Judge of this Court, we find that in the present case quantity of recovered contraband is to be taken as 25 grams only and therefore, respondent can be convicted for recovery of 25 grams charas from his conscious possession for which punishment has been provided under Section 20(b)(ii)(A) for a term which may extend the six months or with fine which may extend to Rs.10,000/- or/with both.

26. In ***State of HP*** Vs ***Sultan Singh and Others*** Criminal Appeal No. 324 of 2008, decided on 22.4.2016 para 16 reads as under:

> "16. Charas was recovered from three different packets. PW-8 Constable Bhupinder Singh has categorically admitted in his cross-examination that IO did not mix up contents of the packets Ext. P2 to P4. PW-10 ASI Ghanshayam himself has admitted in his cross-examination that he did not mix up the contents of three polythene packets. IO should not have continued with the preparing of documents till the police official, who was sent to get independent witnesses, came back. IO should have made entire contraband homogenous for the purpose of chemical examination."

27. In ***State of Himachal Pradesh*** Vs ***Sohan Singh*** Criminal Appeal No. 259 of 2009 decided, on 23.12.2015 para 16 reads as under:

> "16. We have not understood why IO has sent PW-2 Hitender Kumar to an area which was not thickly populated instead of sending towards an area which was thickly populated to call independent witnesses. Case of the prosecution is that accused was given option to be searched before a gazetted officer or a Magistrate. He opted to be searched by the police. Consent memo is Ext. PW-1/A. According to the prosecution case, PW-2 Hitender Kumar was present on the spot and he was the person who has taken Rukka to Police Station. However, in his cross-examination he has denied that Ext. PW-1/A was prepared in his presence. He has also admitted that Ext. PW1/E was also not prepared in his presence. Thus, the presence of PW-2 Hitender Kumar at the spot is doubtful. Rukka was prepared at 11.30 pm by IO PW-12 Kishan Chand but was sent at 12.30 pm. According to HHC Padam Singh, samples were not taken homogenously. Few sticks were taken. According to PW12 Kishan Chand from all the four packets, samples were drawn. There is variance in the statements of PW-1 Padam Singh, PW-2 Hitender Kumar and PW-12 Kishan Chand whether sample was prepared homogenously or not entire contraband was required to be mixed homogenously for preparing samples to be sent for chemical examination to SFL."

28. Thus, from the entirety of evidence available on record we are not convinced that the sample of 25 grams Ext P-5 was representative of entire bulk and hence appellants in appeals Nos. 15 of 2019 and 23 of 2019 can be held to be in conscious possession of 25 grams of Charas or at the most 50 gms. by including the weight of other sample, which as per the Act is small quantity.

29. Prior to amended Act 16 of 2014, the punishment involving small quantity of charas under Section 20(b)(ii)(A) was rigorous imprisonment for a term extending upto six months or with fine extending upto Rs. 10,000/- or with both. Appellant Ashok Kumar in Criminal Appeal No. 15 of 2009 was arrested on 9.5.2008 and was released on bail on 27.7.2008. Appellant Ramesh Chand was arrested on 9.5.2008 and remained in custody during entire trial. The appellant Ramesh Chand thus has remained in custody for period exceeding the period of sentence prescribed for the commission of offence 20(b)(ii)(A). In our considered opinion, the appellants have already undergone the agony of facing hanging-sword on their heads since 9.5.2008 i.e. for a period of almost 14 years. The interest of justice will adequately be served in case the appellants are sentenced to imprisonment already undergone by them during the trial and to pay fine of Rs. 10,000/- each. The appellant Ramesh Chand having remained in custody for the period in excess of period of sentence cannot be reversed. Both the appellants had deposited the fine amount of Rs. 40,000/- each in compliance to orders passed by this Court suspending their respective substantive sentence, therefore, the balance amount be refunded to the appellants after deducting the amount of fine imposed hereby. Criminal Appeal No. 15 of 2009 and Criminal Appeal No. 23 of 2009 are accordingly disposed of and as necessary consequence thereof, State appeal bearing Criminal Appeal No. 86 of 2009 is dismissed. Records of learned Court below be sent back forthwith.

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

Between:-

JOGINDER @ ABHISHEK
S/O SH. CHARANJI LAL,
AGED 24, VILLAGE TAPROG,
P.O. KHUNI, TEHSIL NANKHARI,
DISTT. SHIMLA, H.P.

.....PETITIONER

(BY SH.SATIVE CHAUHAN, ADVOCATE)

AND

STATE OF H.P.

.....RESPONDENT

(BY SH.HEMANT VAID, ADDITIONAL ADVOCATE GENERAL)

CRIMINAL MISC. PETITION (MAIN)
NO. 2504 Of 2021
Reserved on:29.03.2022
Decided on:19.04.2022

Code of Criminal Procedure, 1973- Section 439- **Indian Penal Code, 1860**- Sections 376, 363 and 506- **Protection of Children from Sexual Offences Act, 2012**- Sections 6 and 12- Petitioner has approached the Court for seeking regular bail on the ground that statement of the victim has already been recorded in trial- Held- Plea of implied consent of victim not tenable- A Coordinate Bench of this Court had rejected the bail petition of the petitioner and thereafter Ld. Special Judge has also rejected the bail application of petitioner- No changed circumstance to reconsider the bail made out- Petition dismissed. (Para 11, 29)

This petition coming on for pronouncement this day, the Court passed the following:

O R D E R

Petitioner has approached this Court, invoking provisions of Section 439 of Cr.P.C., seeking regular bail in case FIR No. 54 of 2020, dated 14.10.2020, registered in Police Station Nankhari, District Shimla, H.P., under Sections 363, 376 and 506 of the Indian Penal Code (in short 'IPC') and Sections 6 and 12 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act').

2. Status report stands filed and record was also made available.

3. Prosecution case, in brief, is that on 14.10.2020 complainant, alongwith her husband and minor daughter (victim), had submitted a complaint in Police Station Nankhari, stating therein that in their family there are two children and their elder daughter (victim) whose date of birth is 18.04.2006 and who is studying in 10th Class in Government High School. Whereas, their 11 years younger child (son) is studying in 8th Class and since 9-10 years, the family is residing in a secondary house situated in their Orchard. On 13.10.2020, her husband and she were not at home during day time and in the evening, when she reached home, her son informed her that their daughter who had gone to Kholighat to give lunch to her father, did not return thereafter. Whereupon, complainant informed her husband about it on his mobile. Their daughter was not having phone. Her husband went in search of their daughter up to Kholighat, but he did not find her. One Sarjeevna told her that her daughter was seen at Kholighat alongwith Sushma. Thereafter, family members and relatives searched victim at Dophagarh, Kholighat, Narkanda etc., but she was not found anywhere. On 14.10.2020, when they were searching their daughter at Nagadhar, she received a call of Dropdi informing that victim had reached home. Thereafter, their daughter was brought to Nagadhar and inquired about her whereabouts during previous night. Whereupon, victim disclosed that petitioner had taken her from Kholighat to Tikkar on foot and thereafter in a small vehicle from

Tikkar to Narkanda and during night he took her to some hotel at Narkanda and violated her person during night for four times and in the morning he dropped her at Kholighat, wherefrom she went home.

4. On the basis of aforesaid statement, FIR was registered. Statement of victim was recorded under Section 161 Cr.P.C. and she was subjected to medical examination and as per preliminary opinion of the Medical Officer, possibility of forceful sexual assault could not be ruled out.

5. On finding complicity of petitioner in commission of offence, he was arrested on 14.10.2020 at 9.15 p.m. On interrogation during his custody, place of occurrence was identified by the petitioner as well as minor victim. On disclosure under Section 27 of the Indian Evidence Act, condoms used by the petitioner at the time committing offence were taken in possession. Clothes of victim, condoms, vaginal swabs of victim, urethral swabs, and penile swab of petitioner alongwith his clothes and hair lifted from the spot were sent for chemical analysis to State Forensic Science Laboratory (SFSL) Junga. Human semen was detected on the underwear of petitioner, condoms, blanket of the Hotel and on DNA analysis of condoms, an autosmal STR DNA profile pertaining to a male individual was obtained from the inner surface of the condom, which matched completely with DNA profile obtained from the blood sample on FTA card of the petitioner. An autosmal STR DNA profile pertaining to a female individual was obtained from the outer surface of condoms, which completely matched with DNA profile obtained from blood sample of victim. On the basis of aforesaid chemical analysis final opinion was given by the Medical Officer stating that possibility of forceful sexual assault could not be ruled out.

6. After arrest on 14.10.2020, petitioner remained in police custody for three days and thereafter, he was sent in Judicial custody and since then he is behind the bars.

7. As per record, age of victim at the time of commission of offence, has been confirmed as 14 years 5 months.

8. Petitioner had approached this High Court earlier also by filing Cr.M.P.(M) No.758 of 2021, which was dismissed by a Coordinate Bench on 05.05.2021. Thereafter, petitioner had approached learned Special Judge, Kinnaur Sessions Division at Rampur Bushahr, on 07.10.2021, by filing Bail Application No.130 of 2021, which was dismissed on 17.11.2021.

9. Statement of victim was also recorded under Section 164 Cr.P.C. on 17.10.2020. In respect to the said statement, the Coordinate Bench, in Cr.M.P.(M) No.758 of 2021, after taking note of statements of victim, including statement recorded under Section 164 Cr.P.C., and also other material on record has dismissed the said petition. Facts emerging from statement recorded under Section 164 Cr.P.C. are as under:-

(i) "On 13.10.2020 at 11:15 a.m., she had gone to give food to her father, who was working on a machine (apple grading). After handing over the food, when she was returning home, her friend Sushma met her. Sushma asked her to accompany to bring a note book from one Sahil. After that they went to the place of Sahil where they called out him loudly, but Sahil did not respond.

(ii) When they proceeded towards the home, then Abhishek, bail petitioner herein, met them and he asked Sushma to leave the hand of victim. However, Sushma refused to leave the same saying that she was not afraid of him. Thereafter, Sushma went to her room and victim started walking towards bazaar.

(iii) When victim was walking towards bazaar, Abhishek also started following her. After purchasing goods, when she was returning home, then, Abhishek started walking pace to pace with her. She asked him not to walk with her by saying that the people are watching them. When they reached near to their house, she took rest because she was tired. Abhishek also stayed there. After taking rest for

some time, she started walking again and Abhishek also started walking with her again. She told to Abhishek that she was not going to her home because her brother and uncle would ask her the reasons for getting late and she started proceeding towards the house of her grandparents.

(iv) On this, Abhishek told her to accompany him. On hearing this, because she was afraid, she started walking with him. They walked from Kholighat to Tikkar, where a vehicle stopped and Abhishek told her that they can get lift in the said vehicle. On boarding the vehicle, Abhishek called his friend and told that he was coming to Narkanda with someone and asked his friend to meet him there. On reaching Narkanda, he told his friend that he would be withdrawing money from the ATM. He also asked his friend Vijay to hand over keys of his room and said that they would be staying there for some time.

(v) On reaching Narkanda, they went to the room of Vijay. Around 6:30 p.m. Abhishek told his friend Vijay that they had to stay in a Hotel and asked for phone number of Kapil. Vijay was not having the number but he arranged and informed petitioner with advice to talk directly. After that Kapil called Abhishek near Temple to see the room and hand over keys of the room. On reaching there, they went to the said room and Kapil told that he had to go to Rampur and then he left. The victim and the accused took dinner in a hotel at Narkanda and thereafter went back to the room, Abhishek started forcing himself upon her. Despite repeatedly saying no, Abhishek did numerous sexual assaults with her. The victim said that she could do nothing. After doing sex, Abhishek told her not to take any tension, nothing would happen.

(vi) In the morning, a friend of Abhishek came to the room and informed Abhishek that his mother was looking for him and was saying that he had brought some girl but was not telling this. After some time Abhishek also received a phone of his mother and his mother asked him that if he had brought a girl with him, then tell the truth.

> Then a phone of her (victim) uncle (chachu) also came to Abhishek and subsequent to that, Abhishek and his friend Vijay threatened the victim not to reveal this incident to anyone. Thereafter, she returned to her home in the vehicle of friend of Abhishek."

10. It has been canvassed on behalf of the petitioner that statements of victim reflect that petitioner did not use any force or compel the victim forcibly to accompany him, rather victim accompanied him voluntarily and stayed in the Hotel on her own volition and at the time of commission of offence she did not raise any alarm or hue and cry. She did not complain any person including Manager of the Hotel about forcible violation alleged by her, rather she went home quietly after staying with the petitioner in the Hotel, which according to the learned counsel for the petitioner substantiates the fact that petitioner and victim were liking each other and in furtherance thereto victim had accompanied petitioner and stayed with him in the room for indulging in sexual activity. It has also been contended on behalf of the petitioner that victim has also been examined in the Court in September 2021 and, therefore, there is no possibility of influencing the victim by the petitioner, and further that her statement in the Court is also fortifying version of the petitioner.

11. Learned Additional Advocate General has submitted that victim is minor of age of 14 years 5 months, and though there was no consent of the victim for violating her person, but even if it is construed for any reason that victim was consenting party, even then, keeping in view her age her consent is immaterial. It has been submitted that in her deposition, under Sections 161 Cr.P.C. and 164 Cr.P.C. as well as deposition on oath in the Court, victim has categorically stated that she was violated by the petitioner forcibly despite her refusal to indulge in such activity. It has further been submitted that being a girl of tender age conduct of the victim cannot be taken as a party consenting

to the act of sexual intercourse and that in such tender age, a child is not expected to respond as a matured person to raise alarm or to report the matter to others. There is always possibility of hiding such wrong incident from the strangers. Further that, however, the victim in present case had disclosed the fact to her mother at the first instance immediately when she met her mother for the first time on 14.10.2020, which clearly indicates that victim was not consenting party to the forcible violation of her person by the petitioner.

12. Petitioner is 23 years old young person. Whereas, victim is 14 years 5 months old adolescent. It is a unique stage of human development. It is a transitional stage of physical and psychological development occurring during puberty to adulthood. There is nothing on record before me to depict that petitioner and victim were having any love affair or having intensive relationship with each other. Rather, it has been stated by victim that petitioner used to meet her when she used to go to School and he used to bring Chocolates etc. to her, but she did not take the same at any point of time. Victim had accompanied petitioner on foot as well as in vehicle and had dinner with him and thereafter, stayed in a Hotel. Even if all this is considered to be a consented activity on the part of the adolescent victim out of curiosity or otherwise, then also, it cannot be construed that she had consented for violation of her person as in every recorded statement of victim, she has categorically stated that petitioner had violated her person forcibly despite her refusal. Consent to accompany, wander or to have dinner and to stay in a room does not, in all eventuality, amount that there is consent of a girl or woman to have sexual intercourse. Therefore, plea of the petitioner that consent of the victim for accompanying the petitioner was implied consent for sexual intercourse is not acceptable.

13. Learned counsel for the petitioner has referred various pronouncements of different Courts. These judgments/orders are of no help to the petitioner. These pronouncements are being discussed hereinafter.

14. In judgment/order dated 17.12.2018, passed by the Coordinate Bench of this Court in Cr.M.P.(M) No.1271 of 2018, titled as *Gaurav vs. State of H.P.,* victim and her mother had resiled from their previous statements recorded by the Investigating Officer as well as before the Magistrate. But it is not so in present matter.

15. In Cr.M.P.(M) No.968 of 2019, titled as *Simple Kumar vs. State of Himachal Pradesh,* decided on 12.06.2019 by Coordinate Bench of this Court, from the material available on record it was found by the Court that though at the time of alleged incident, prosecutrix was less than 12 years of age, but report of DNA placed on record had indicated that child in the womb of the prosecutrix was not of the bail petitioner, whereas, claim of the prosecutrix was that she became pregnant after having been raped by the bail petitioner and the statement of victim was not corroborated by medical evidence placed on record by the Investigating Agency. Facts in present case are otherwise. Therefore, this judgment is of no help to the petitioner.

16. Judgments in Cr.M.P.(M) No.1789 of 2019, titled as *Pankaj Kumar vs. State of Himachal Pradesh;* decided on 21.10.2019; and Cr.M.P.(M) No.2128 of 2019, titled as *Tota Ram vs. State of Himachal Pradesh,* decided on 25.11.2019, have been passed by a Coordinate Bench of this Court, wherein petitioners-accused were enlarged on bail in cases registered under POCSO Act for peculiar circumstances of those cases which are not applicable in present case as the same Bench has considered the facts in present case and rejected bail application of the petitioner vide order dated 05.05.2021, passed in Cr.M.P.(M) No.758 of 2021, by passing a detailed order as referred supra.

17. In Cr.M.P.(M) No.1062 of 2020, titled as *Kalu @ Rustam vs. State of Himachal Pradesh,* decided on 05.08.2020 by a Coordinate Bench of this Court, it was observed that prior to the date of alleged incident victim was in constant touch with the bail petitioner and in her statement recorded under Section 164 Cr.P.C. she had clearly stated that she and bail petitioner used to

like each other and wanted to solemnize marriage which is contrary to the material on record in present case.

18. Judgment in Cr.Appeal No.97 of 2019, titled as *Sanjeev Kumar vs. State of H.P.,* decided on 03.03.2021, passed by a Coordinate Bench of this Court, is a judgment passed in Criminal Appeal, but not in a bail application. Whereas, in present case parameters necessary to be considered for bail application are required to be considered. Otherwise also in that case, it has been observed by the Coordinate Bench that none of the prosecution witnesses including victim had supported case of the prosecution that accused had raped victim/prosecutrix on the date of alleged incident and, therefore, DNA Report in that case was not considered as a conclusive proof of guilt of the accused. It is not essence of the judgment under reference that DNA profiling is not even a corroborative evidence.

19. In Cr.M.P.(M) No.404 of 2021, titled as *Veer Bhadur @ Vishal vs. State of Himachal Pradesh,* decided on 24.03.2021, victim in her own statement had stated that she went alongwith bail petitioner on 22.02.2019 and remained in his company till 24.02.2019 and after her alleged recovery from the room of the bail petitioner, no report was lodged against the bail petitioner and victim had refused to undergo medical examination, rather at that time she disclosed to the police that bail petitioner did not commit any wrong act with her but after 36 days of the alleged incident, statement of the victim was recorded under Section 154 Cr.P.C.

20. In Criminal Misc. Petition (Main) No.2463 of 2021, titled as *Sunil Kumar vs. State of Himachal Pradesh*, decided on 31.12.2021, in her statement victim/prosecutrix had stated that it was she who pressurized the bail petitioner to go to Manali and compelled him to solemnize marriage.

21. Similarly facts in Cr.M.P.(M) No.1160 of 2021, titled as *Prakash Singh vs. State of Himachal Pradesh*, decided on 16.07.2021; and in Cr.M.P.(M)

No.698 of 2019, titled as *Sonu Lal @ Rinku vs. State of Himachal Pradesh,* decided on 02.05.2019, are not similar to the facts in present case.

22. In Judgment dated 01.02.2022 passed by a Coordinate Bench of this Court in Criminal Misc. Petition (Main) No.37 of 2022, titled as *Amar @ Rounie vs. State of Himachal Pradesh,* also the facts were not like present case and, therefore, same is not applicable in present case.

23. Judgment passed by the Delhi High Court in Bail Aplication No.1559 of 2020, titled as *Dharmander Singh @ Saheb vs. The State (Govt. of NCT, Delhi),* decided on 22.09.2020, is not applicable in present case as in that case it was considered by the Court that age difference between victim and the accused was about 4-5 years and both were not fully matured persons and the victim appeared to have returned to the accused time and again and lived with him for periods of time at his house alongwith his mother indicating approval in fact, if not consent in law, on her part for the alleged act and further that due to circumstances prevailing at the time of considering that bail, for spread of Corona Virus pandemic it was found unlikely by the Court that trial would be completed any time soon.

24. Order dated 29.01.2021, passed by High Court of Delhi in CRL.A.267/2020, CRL.M.(Bail)7718/2020 & CRL.M.A. 130/2020, titled as *Salman vs. The State Govt. of NCT Delhi,* is of no help to the petitioner as in the said case it has been held that there was no infirmity in the impugned judgment of conviction of the appellant therein and sentencing him for commission of offence punishable under Section 6 read with Section 5(m) of POCSO Act and Section 325 of IPC.

25. Vide order dated 04.02.2021, passed by High Court of Judicature at Bombay, in Cr.Appeal No.332 of 2020, titled as *Arhant Janardan Sunatkari vs. The State of Maharashatra*, sentence was suspended on the basis of statement of victim observing that victim had said in the trial,

that her statement to the police and narrative in statement under Section 164 Cr.P.C., was at the instance of Class Teacher.

26. In Bail Application No.2380 of 2021, titled as *Praduman vs. The State (Govt. of NCT of Delhi),* decided on 05.10.2021 by Single Bench of High Court of Delhi, it was found by the Court that prosecutrix had given her different statements at three different times and in the MLC conducted prior to registration of FIR she did not name the petitioner and MLC was conducted because she was below the age of 18 years and was found to be pregnant and FIR was registered on next day when she named petitioner, but in statement recorded under Section 164 Cr.P.C., she did not name the petitioner and during proceedings of bail, prosecutrix had stated that she had no objection for grant of bail. In that case, prosecutrix and petitioner were more or less of the same age and were found in a relationship.

27. In Bail Application No.3259 of 2021, titled as Ram *Sevak vs. State,* decided on 03.12.2021, by High Court of Delhi, it was observed by the Court that Court was *prima facie* satisfied that petitioner and victim were happily cohabiting with each other and raising their family as petitioner had married victim with blessings of his family and statement of the victim was recorded before the Magistrate indicating that she had been peacefully living with the petitioner and their two children, and that she was not kidnapped by the petitioner, but she ran away on her own accord.

28. In given facts and circumstnaces, aforesaid case law referred by learned counsel for the petitioner, is not relevant in present case.

29. A Coordinate Bench of this Court, after considering the material on record, had rejected the bail petition of the petitioner on 05.05.2021 by passing a detailed order. After recording statement of victim in the Court, learned Special Judge has also rejected bail application of the petitioner on 17.11.2021. I do not find any changed circumstance to reconsider the bail of the petitioner otherwise.

30. Without commenting upon merits of the case, but taking into consideration material placed before me and rival contentions of parties and also taking into consideration factors and parameters required to be considered for adjudication of bail application, I find that petitioner has failed to make out a case for grant of bail. Therefore, petition is dismissed being devoid of any merit.

31. Needless to say that observation made hereinabove, shall not affect the merits of the trial and shall not be taken into consideration for any other purpose.

BEFORE HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

Between:-

VIPIN KUMAR, AGED 46 YEARS,
SON OF SHRI ROSHAN LAL,
RESIDENT OF VILLAGE LATWALA,
POST OFFICE BAGORA TEHSIL PALAMPUR,
DISTRICT KANGRA (H.P.)

….PETITIONER

(BY MR. Y.P. SOOD, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH,
THROUGH SECRETARY (HOME),
GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA-171002 (H.P.)

2. JURME TENZIN
S/O SHRI PURA,
RESIDENT OF HOUSE NO. 98,
TIBETIAN COLONY, NANGCHEN DIVISION,
POST OFFICE, CHOUNTRA, TEHSIL
JOGINDERNAGAR, DISTRICT MANDI, (H.P.)

..RESPONDENTS

(MR. DESH RAJ THAKUR, ADDL. A.G. WITH MR. GAURAV SHARMA, DY. A.G.)

CRIMINAL REVISION NO. 131 OF 2015

Between:-

VIPIN KUMAR,
SON OF SHRI ROSHAN LAL,
RESIDENT OF VILLAGE LATWALA,
POST OFFICE BAGORA TEHSIL PALAMPUR,
DISTRICT KANGRA (H.P.)

....PETITIONER

(BY MR. Y.P. SOOD, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

..RESPONDENT

(MR. DESH RAJ THAKUR, ADDL. A.G. WITH MR. GAURAV SHARMA, DY. A.G.)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No. 738 of 2019
AND CONNECTED MATTER
Decided on: 27.04.2022

Code of Criminal Procedure, 1973- Section 482- **Indian Penal Code, 1860**- Sections 279, 337 & 338- Held- The offence involved in the case does not involved moral turpitude and as such have no harmful effect on the society or its moral fabric- Petition allowed. (Para 9, 10)

These petitions coming on for orders this day, the Court passed the following:-

O R D E R

By way of instant petition, a prayer has been made to dispose of the Criminal Revision No. 131 of 2015 titled as Vipin Kumar vs. State of H.P. on the basis of compromise between the parties. The compromise deed has been placed on record.

2. FIR No. 25 of 2010 dated 15.02.2010 came to be registered under Sections 279, 337 and 338 of the Indian Penal Code at Police Station, Baijnath, District Kangra, H.P. at the instance of respondent No.2 alleging *inter-alia* that petitioner while driving bus No. HP-68-1502, rashly and negligently, hit the motorcycle ridden by respondent No.2 and thereby caused grievous injuries to him.

3. After investigation, challan was presented. Petitioner was tried and convicted for the offences under Sections 279, 337 and 338 IPC and sentenced as under:-

Sr. No.	Offence	Substantive sentence	Fine
1.	279	S.I. three months.	500/-
2.	337	S.I. three months	500/-
3.	338	Six months	500/-

4. The appeal preferred by the petitioner was also dismissed, hence, the petitioner has assailed his above said conviction and sentence in Criminal Revision No. 131 of 2015 before this Court.

5. It is averred that petitioner and respondent No.2 are known to each other. Petitioner helped respondent No.2 in getting the medical treatment immediately after the accident, attended upon him and provided all possible assistance in his treatment. Petitioner has shown sincere remorse for his fault. Petitioner is a Government servant and is Driver by profession. The

conviction standing against him shall bring his entire family on roads as he is sole bread earner.

6. On the aforesaid considerations, the matter is stated to have been amicably settled between the parties. A deed of compromise has also been placed on record.

7. Statements of parties were recorded on 25.04.2022. The parties endorsed the contents of compromise deed to be correct and recorded on the basis of their free volition. Respondent No.2 has specifically stated that the factor which led to compromise between the parties was sincere remorse shown by the petitioner as also the help rendered by him to respondent No.2 during the period of his suffering on account of accident in question.

8. The compromise between the parties does not appear to be unlawful. It is stated to have been effected on the basis of sincere remorse shown by the petitioner towards respondent No.2 and also the help rendered by him to respondent No.2 during the period of his medical treatment. The administration of criminal justice system, though, require the guilty to be punished but such system, above all, need to serve the interest of justice. The end goal of every system administering justice is to secure peace and harmony in the society, modes may be different. In ***Criminal Appeal No. 1489 of 2012*** titled as ***Ramgopal & Another*** vs. ***The State of Madhya Pradesh***, decided on 29.09.2021, the Hon'ble Apex Court has held as under:-

> *"12. The High Court, therefore, having regard to the nature of the offence and the fact that parties have amicably settled their dispute and the victim has willingly consented to the nullification of criminal proceedings, can quash such proceedings in exercise of its inherent powers under Section 482 Cr.P.C., even if the offences are non compoundable. The High Court can indubitably evaluate the consequential effects of the offence beyond the body of an individual and thereafter adopt a pragmatic approach, to ensure that the felony, even if goes unpunished, does not tinker with or*

paralyze the very object of the administration of criminal justice system.

13. It appears to us that criminal proceedings involving non-heinous offences or where the offences are predominantly of a private nature, can be annulled irrespective of the fact that trial has already been concluded or appeal stands dismissed against conviction. Handing out punishment is not the sole form of delivering justice. Societal method of applying laws evenly is always subject to lawful exceptions. It goes without saying, that the cases where compromise is struck post conviction, the High Court ought to exercise such discretion with rectitude, keeping in view the circumstances surrounding the incident, the fashion in which the compromise has been arrived at, and with due regard to the nature and seriousness of the offence, besides the conduct of the accused, before and after the incidence. The touchstone for exercising the extraordinary power under Section 482 Cr.P.C. would be to secure the ends of justice. There can be no hard and fast line constricting the power of the High Court to do substantial justice. A restrictive construction of inherent powers under Section 482 Cr.P.C. may lead to rigid or specious justice, which in the given facts and circumstances of a case, may rather lead to grave injustice. On the other hand, in cases where heinous offences have been proved against perpetrators, no such benefit ought to be extended, as cautiously observed by this Court in Narinder Singh & Ors. vs. State of Punjab & Ors.3 and Laxmi Narayan (Supra).

14. In other words, grave or serious offences or offences which involve moral turpitude or have a harmful effect on the social and moral fabric of the society or involve matters concerning public policy, cannot be construed betwixt two individuals or groups only, for such offences have the potential to impact the society at large. Effacing abominable offences through quashing process would not only send a wrong signal to the community but may also accord an undue benefit to unscrupulous habitual or professional offenders, who can secure a 'settlement' through duress, threats, social boycotts, bribes or other dubious means. It is well said that "let no guilty man escape, if it can be avoided."

9. Keeping in view the aforesaid exposition of law, the conviction of petitioner by learned trial Court and dismissal of his appeal by the Appellate Court will not be an impediment in exercise of jurisdiction under Section 482 of the Code of Criminal Procedure by this Court. The offences involved in the case are non-heinous. The incident involved two vehicles one being driven by the petitioner and another by respondent No.2. The conduct of petitioner, after the accident, was remorseful as admitted by respondent No.2. The petitioner did his best to provide assistance and help to respondent No.2 during the period of his medical treatment. Respondent No.2 has specifically stated on oath that the factor which prompted him to enter into a compromise with petitioner was his sincere remorseful conduct and help rendered by him during the hour of need. The offences involved in the case does not involved moral turpitude and as such have no harmful effect on the society or its moral fabric.

10. Keeping in view the facts and circumstances of the case, this Court finds this to be a fit case for exercise of jurisdiction under Section 482 Cr.P.C. All proceedings emanating from FIR No. 25 of 2010, dated 15.02.2010 under Sections 279, 337 and 338 IPC registered at Police Station, Baijnath, District Kangra, H.P. are ordered to be quashed. Consequently, the Revision Petition No. 131 of 2015 titled as Vipin Kumar vs. State of H.P. is also disposed of accordingly.

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

Between:-

1. CRMMO NO. 262 OF 2019

NIKHIL S. NAYAK, SON OF SHRI SHANTI
LAL NAYAK, RESIDENT OF 1002,
HARSHAIL HORIZON, GOKHALE ROAD,
VILE PARLE (EAST), MUMBAI-400057

....PETITIONER

(BY SHRI NARESH KUMAR SOOD SR. ADVOCATE WITH MR.AMAN SOOD, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH
THROUGH LABOUR INSPECTOR, BADDI
CIRCLE, BADDI, DISTRICT SOLAN HP

...RESPONDENT

(SHRI DINESH THAKUR, ADDITIONAL ADVOCATE GENERAL)

2. CRMMO NO. 263 OF 2019

NIKHIL S. NAYAK, SON OF SHRI
SHANTI LAL NAYAK, RESIDENT
OF 1002, HARSHAIL HORIZON,
GOKHALE ROAD, VILE PARLE
(EAST), MUMBAI-400057 .....PETITIONER

(BY SHRI NARESH KUMAR SOOD, SR. ADVOCATE WITH MR.AMAN SOOD, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH
THROUGH LABOUR INSPECTOR,
BADDI CIRCLE, BADDI, DISTRICT
SOLAN HP .....RESPONDENT

(SHRI DINESH THAKUR, ADDITIONAL ADVOCATE GENERAL)

CRIMINAL MISC.PETITION (MAIN)
U/S 482 CRPC NOs. 262 and 263 OF 2019
JUDGMENT RESERVED ON: 07.03.2022
DATE OF DECISION: 21.04.2022

Code of Criminal Procedure, 1973- Section 482- **Contract Labour (Regulation and Abolition) Act, 1970**- Sections 28(3), 29(1), 35(2)- Held- Labour Inspector has considered the petitioner as a contractor without any material on record, as such, petitioner cannot be said to be a contractor- No action has been taken against the contractor but against a person who was

not liable to be prosecuted in his individual capacity- No material to prosecute petitioner- Petition allowed. (Para 13, 14, 18)

This petition coming on for order this day, the Court passed the following:

ORDER

These two petitions being identical in nature, involving identical questions of facts and law, are being decided by this common order.

2 Petitioner, an accused in cases Nos. 21/3 of 2018 and 61/3 of 2018, both titled as State of HP vs. Nikhil Nayak filed by Labour Inspector under Sections 28(3), 29(1), 35(2)(n) of the Contract Labour (Regulation and Abolition) Act, 1970 (hereinafter 'the Act') and Rules 75, 78(2), (a), (e), (d), 80(4) and 82(1) of the Contract Labour (Regulation and Abolition) Rules, 1978 (in short "the Rules") pending adjudication in the Court of learned Judicial Magistrate First Class, Nalagarh, District Solan, has approached this Court for quashing the complaints and consequential trials arising thereto, mainly on the ground that he had never been a Contractor or Sub Contractor under the Act for supplying contract labour for any work of establishment namely M/s Mondelez India Foods Private Limited (in short 'MIFPL'), (former Cadbury India Limited), at any point of time and, therefore, for any lapse in supplying the labour or maintaining the record related thereto under the Act or Rules framed thereunder, petitioner is not liable to be prosecuted and punished, rather for such default Contractor (Service Provider) namely Mahindra Logistics Ltd (in short MLL), a Registered Company under the Companies Act for execution of service agreement dated 24th March, 2017 executed between MIFPL and MLL, is answerable for such default, whereas, petitioner had been an employee of MLL w.e.f. 21.10.2009 to 31.8.2018 and his last designation was Chief Financial Officer and he had signed the agreement dated 24th March, 2017 as an employee of MLL which never permits the Labour Inspector

or MIFPL to substitute the petitioner in place of Contractor (Service Provider) MLL for prosecuting him instead of MLL for liability under the Act and Rules framed thereunder.

3 Petitioner has placed on record copies of Registration Certificate of Incorporation of MLL issued by Assistant Registrar of Companies Maharashtra; Relieving Letter indicating relieving of petitioner from MLL on 31.8.2018; a Certificate certifying the employment of petitioner with MLL w.e.f. 21.10.2009 to 31.8.2018 with last designation as Chief Financial Officer; and Services Agreement between MIFPL and MLL to substantiate his version. Copy of complaint(s) dated 31.10.2017, communication dated 11.10.2017 issued by Labour Inspector to petitioner on the address of MLL and impugned order dated 15.3.2019 have also been placed on record along with other orders.

4 In response to petition, stand of respondent is that on inspection of two units of MIFPL on 9.10.2017, lapses were found with respect to labour supplied by contractor and the establishment i.e. MIFPL had informed the name of petitioner as contractor and, therefore, notice was issued to petitioner to produce the relevant record for which the contractor was responsible to maintain under the Act and Rules framed thereunder, but petitioner had failed to comply with the provisions of Act and Rules and, therefore, complaint has rightly been filed against the petitioner leading to initiation of criminal proceedings against him before the concerned Magistrate.

5 Some documents i.e. requests made by MIFPL for amending their Registration Certificate with respect to details of contractor have been placed on record wherein petitioner Nikhil Nayak has been reflected as contractor for providing contract labour for the purpose of loading/unloading. During hearing complete record was produced and photocopies of similar requests of

MIFPL indicating the petitioner Nikhil Nayak as contractor w.e.f. 1.4.2017 to 31.3.2020 have been placed on record.

6 In response to query by Court, it was informed that list of contractors supplied by MIFPL was never verified by Labour Inspector and information supplied in Annexure-1 with the requests made by MIFPL for amendment of Certificate of Registration under Rule 18(i) of Rules along with Form-I was considered to be true and correct and therefore, petitioner Nikhil Nayak was considered as contractor.

7 There is no rebuttal to Services Agreement, executed between MIFPL and MLL, placed on record. The only reason for prosecuting the petitioner is that his name was found mentioned as contractor in information supplied by MIFPL with Form-1 under Rule 18(i) of the Rules. It is also an admitted fact that petitioner has signed the Services Agreement as a Chief Financial Officer, but this agreement has also been signed by Chief Executive Officer of MLL. Both of them have signed it for MLL.

8 Section 2(1) (c), (e), and (g) of the Act defines "Contractors" "Establishment" and "principle employer", which reads as under:-

> "2………
>
> 1(a)……….
>
> (b)………..
>
> (c) "contractor" in relation to an establishment, means a person who undertakes to produce a given result for the establishment, other than a mere supply of goods or articles of manufacture to such establishment, through contract labour or who supplies contract labour for any work of the establishment and includes a sub-contractor;
>
> (d)……

(e) “establishment means-

(i) any office or department of the Government or a local authority, or

(ii) any place where any industry, trade, business, manufacture or occupation is carried on;

(f)……

(g) “principal employer” means-

(i) in relation to any office or department of the Government or a local authority, the head of that office or department or such other officer as the Government or the local authority, as the case may be, may specify in this behalf,

(ii) in a factory, the owner or occupier of the factory and where a person has been named as the manager of the factory under the Factories Act, 1948 (63 of 1948), the person so named,

(iii) in a mine, the owner or agent of the mine and where a person has been named as the manager of the mine, the person so named,

(iv) in any other establishment, any person responsible for the supervision and control of the establishment……”

9 From the aforesaid definitions, in the given facts placed before me, petitioner cannot be termed as “contractor”, rather, it is MLL which is contractor under the Act and MIFPL is an “establishment” and Manager thereof is “principle employer” for the purpose of Act.

10 Section 7 of the Act mandates registration of certain establishments to which the Act applies. Rule 17(1) of the Rules provides that

establishment or its principle employer has to submit an application in Form-I to Registering Officer of the area in which the establishment, sought to be registered, is located. In Form-I in Column No.6 establishment or its principle employer has to disclose the particulars of contractors and contract labour by giving following information:-

(a) names and addresses of contractors;

(b) nature of work in which contract labour is employed or is to be employed;

(c) maximum number of contract labour to be employed on any day through each contractor;

(d) estimated date of termination of employment of contract labour under each contractor.

11 In view of above, it was duty of establishment i.e. MIFPL to disclose the particulars of contractors and contract labour. Services Agreement was executed between MIFPL and MLL but in Form-I, placed on record, name of contractor has been reflected as Nikhil Nayak, which is factually incorrect. It was also duty of concerned authority to verify the facts by making inquiry from the person/Institution whose name has been reflected as contractor in Form-I submitted by or on behalf of establishment, or by asking the establishment to supply the documents to substantiate the information submitted in Form-I under Rule 17(1). The Certificate of Registration is granted under Rule 18(1) of Rules on the basis of information supplied under Rule 17(1). The concerned Labour Officer and Labour Inspector have failed to perform their duty with due diligence in present case.

12 Petitioner was employed as Chief Financial Officer and he stood relieved on 31.8.2018 whereas he has been reflected as contractor till 31.3.2020 and instead of giving his permanent address, in the information

supplied by establishment MIFPL, his address has been given as that of M/s MLL Mahindra Towers, P.K. Kurne Chowk, Worli Mumbai-400018 despite the fact that petitioner was neither Chief Executive Officer nor Managing Director or Director or Officer liable for vicarious liability on behalf of MLL. In any case, it is not a case where MLL has been reflected as contractor and petitioner has been sued as a responsible/authorized officer of MLL but it is a case where by establishment MLL has not been reflected as contractor but petitioner has been shown as contractor who has been prosecuted by Labour Inspector as a contractor but not as an officer of MLL, the contractor (Service Provider). In communication dated 11.10.2017, issued by Labour Inspector, petitioner has been shown as contractor, may be on the basis of wrong information supplied by establishment, which was never verified by Labour Inspector or Labour Officer.

13 A person shown as contractor by establishment, without his knowledge and consent, does not acquire the status of contractor in absence of any document to substantiate his status as contractor. There is nothing on record to establish that petitioner was ever engaged as contractor under the Act for supplying the contract labour to establishment MIFPL. The Labour Inspector has considered the petitioner as a contractor without any material on record to establish the same. Therefore, petitioner cannot be said to be a contractor within the meaning of Section 2(1) (c) of Act at any stretch of imagination.

14 For lapse of any kind or violation in compliance of provisions of Act and Rules framed thereunder, Contractor was liable to be prosecuted and punished, but for laxity on the part of concerned Officer, no action has been taken against the contractor but against a person who was not liable to be prosecuted in his individual capacity.

15 Perusal of Sections 28(3), 29(1), 35(2)(n) of the Act and Rules 75, 78(2), (a), (e), (d), 80(4) and 82(1) of the Rules reveals that in all these provisions, the contractor had to perform/comply with certain conditions with respect to maintaining registers and records with particulars of contract labour employed, nature of work performed by contract labour, rates of wages paid to contract labour and other particulars; to submit the returns in Forms in which, to the authorities to which, such returns are to be submitted as prescribed under the Rules and Forms given therein and also to produce the documents and things and peculiar information required by an Inspector during inspection or after inspection and the contractor is legally bound to do so within the meaning of Sections 175 and 176 of Indian Penal Code.

16 Rule 75 provides that every Contractor shall maintain, in respect of each registered Establishment where he employs the contract labour, a Register in Form-XIII. Rule 78(1) (a), (c) and (d) provides that every Contractor shall maintain a Muster Roll and a Register of Wages in Form XVI and XVII respectively with signatures or thumb impression of every worker on the Register of Wages or Wages-cum-Muster Roll Register authenticated by initials of contractor or his representative and duly certified by authorized representative of Principle Employer (Establishment) as required under Rule 73 and also to maintain Registers of deduction for damages or loss, Register of fines and Register of advances in Forms XX, XXI and XXII. Rule 82(1) casts duty on every Contractor to send half yearly return on Form XXIV to Licensing Officer within 30 days from the close of half year. In all these Rules, for which petitioner has been charged, Contractor had to perform certain acts and to ensure compliance as provided under these Rules.

17 There is nothing on record that petitioner, as a contractor, has ever filed any return either in individual capacity or on behalf of MLL. Reply of

respondents and documents supplied by respondents are completely silent in this regard.

18 In the aforesaid facts and circumstances, I find that there is no material, much less sufficient material, to prosecute petitioner Nikhil Nayak as a contractor under the Act and Rules framed thereunder in his individual capacity and, therefore, order dated 31.10.2017 along with consequential trial in case Nos. 21 of 2003 and 61 of 2007 of 2018 both titled as State of HP vs. Nikhil Nayak in the Court of learned Judicial Magistrate First Class, are quashed.

19 Before parting with case, it would be apt to record here that MIFPL has failed to supply the correct particulars of contractor and concerned Labour Inspector as well as Labour Officer have also failed to perform their duty with due diligence and care resulting into no action against real culprit and prosecution of a wrong person. Therefore, appropriate action is required to be taken against MIFPL and concerned Officers are required to be called for explanation in accordance with law and Rules as applicable. Therefore, Labour Commissioner, Himachal Pradesh, Shimla is directed to ensure appropriate action in the light of observations made herein-above within one month and file compliance affidavit on or before ***30th May, 2022*** in the Registry of this Court.

Petitions are disposed of in aforesaid terms.

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

Between:

SH. ASHISH KUMAR,
S/O SH. NARENDER KUMAR,
R/O VILLAGE BALYANA,
P.O. BROTIWALA,

TEHSIL BADDI,
DISTRICT SOLAN, HIMCHAL PRADESH,
AGED ABOUT 22 YEARS,
OCCUPATION UNEMPLOYED

….PETITIONER

(BY MR. SANGRAM SINGH
CHANDEL, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH

2. SH. GURMUKH SINGH,
S/O LATE SH. SEWA SINGH,
R/O VPO DABHOTA,
TEHSIL NALAGARH,
DISTRICT SOLAN, H.P.

3. SMT. LUBNA ANSARI,
W/O SH. ABDUL GAFFAR,
R/O HOUSE NO.43,
WARD NO.1, NALAGARH,
P.S. NALAGARH, DISTRICT SOLAN,
H.P., WORKING AS A INSTRUCTOR
IN ITI NALAGARH, DISTRICT SOLAN, H.P.

4. SH. RAKESH KUMAR,
S/O SH. MILKHI RAM,
R/O VILLAGE SALAN,
P.O. RAIPUR, P.S. BHAWARAN,
TEHSIL PALAMPUR, DISTRICT KANGRA,
HIMACHA PRADESH PRESENTLY
WORKING AS INSTRUCTOR IN ITI NALAGARH,
DISTRICT SOLAN, H.P.

….RESPONDENTS

(BY MR. SHIVPAL MANHANS,
ADDITIONAL ADVOCATE GENERAL
WITH MR. BHUPINDER THAKUR
AND MR. YUDHBIR SINGH THAKUR,
DEPUTY ADVOCATES GENERAL, FOR
THE STATE)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No. 728 of 2021
Reserved on: 17.3.2022
Decided on:31.03.2022

Code of Criminal Procedure, 1973- Section 482- **Indian Penal Code, 1860**- Section 306 read with Section 34- Petition to quash the proceedings in the court of Ld. Additional Sessions Judge, Nalagarh, on the ground that no case is made out against the petitioner- Suicide note nowhere specifically discloses the name of the petitioner- Element of abatement is absolutely missing- Petition allowed- FIR and consequent proceedings in the Court of Additional Sessions Judge, Nalagarh are quashed and set aside.

Cases referred:

Anand Kumar Mohatta and Anr. v. State (Government of NCT of Delhi) Departmetn of Home and Anr, AIR 2019 SC 210;
Geo Varghese v. STte of Rajasthan and Anr, 2021 (4) RCR (Criminal) 361;
M. Arjunan Vs. State, Represented by its Inspector of Police (2019) 3 SCC 315;
Pramod Suryabhan Pawar v. The State of Maharashtra and Anr, (2019) 9 SCC 608;
Prashant Bharti v. State (NCT of Delhi), (2013) 9 SCC 293;
Rajiv Thapar and Ors v. Madan Lal Kapoor, (2013) 3 SCC 330;
Ramesh Kumar Vs. State of Chhattisgarh 2001 9 SCC 618;
S.S.Cheena Vs. Vijay Kumar Mahajan and Anr. (2010) 12 SCC 190;
State of Haryana and others vs. Bhajan Lal and others, 1992 Supp (1) SCC 335;
State of Karnataka vs. L. Muniswamy and others, 1977 (2) SCC 699;
Ude Singh & Ors. Vs. State of Haryana, 2019 17 SCC 301;

This petition coming on for hearing this day, the Court passed the following:

<u>O R D E R</u>

By way of instant petition filed under Section 482 Cr.PC, prayer has been made by the petitioner for quashing of FIR No. 215 of 2019, dated 18.7.2019, registered at PS Nalagarh, under Section 306 read with Section 34 of IPC, as well as consequent proceedings, pending in the court of learned Additional Sessions Judge, Nalagarh, District Solan, H.P.

2. Precisely, the facts of the case, which led to filing of the FIR sought to be quashed in the instant proceedings, are that on 18.7.2019, complainant Gurmukh Singh lodged a complaint at Police Station Dabota, Nalagarh, alleging therein that his daughter namely Asha Rani, a student of Electrician Trade in ITI, Nalagarh, committed suicide on 11.7.2019, after having jumped in a canal near Bharatgarh, Punjab. He alleged that police recovered one suicide note from the bag of his daughter, wherein she has alleged that she has committed suicide after being harassed and tortured by the ITI administration. On the basis of the aforesaid complaint, police registered case against the present petitioner as well as few employees of ITI Nalagarh, District Solan, H.P. During investigation, police recorded the statement of person namely Dilpreet, who had seen the deceased Asha Rani jumping in the canal on 11.7.2019. On 24.7.2019, dead body of the deceased Asha Rani was recovered near Bulsunda canal ramp RDO 38, Tehsil Chamkaur Sahib, District Ropar, Punjab. Police got the post mortem of the dead body conducted in IGMC Shimla, wherein forensic expert opined that *"in the absence of diatom test, negative chemical examiners report and body being in a state of advanced decomposition, the cause of death in all probability is asphyxia secondary ante mortem wet drowning."* Assistant Director, SFSL Junga, after having examined the viscera reported that no poison was detected in the parcels P/1, P/2, P/3 and P/4. On 30.7.2019, Ms. Navneet Kaur, principal ITI (Women) Nalagarh, got her statement recorded under Section 161 Cr.PC, stating therein that on 11.7.2019, Ms. Lubna Ansari, trainer, ITI (W)

had reported her that students namely Alka Sharma and Asha Rani left the college and accordingly, she had instructed the aforesaid trainer to apprise the parents of both the girls. On 31.7.2019, Ms. Lubna Ansari disclosed to the police that on account of dispute *inter-se* students of the ITI, direction was issued to all the students to submit their complaints in writing, but students namely Alka Sharma and Asha Rani went out of the class and when both the students did not come back, information was given to the principal and HCM Ms. Sharda Devi, who thereafter asked her to send information through telephone to the parents of the above named students. On 2.8.2019, police recorded the statements of the students of junior class ITI. While matter was being investigated, father of Ms. Asha Rani informed the police through mobile phone that some of friends of his daughter Asha Rani had come to his house and they have disclosed that while their statements were recorded on 7.8.2019, they missed to state few facts and as such, police again recorded the statements of friends of deceased Asha Rani namely Anchal, Minakshi, Rajni Bala and Nisha Devi. On 8.8.2019, police apart from recording the statement of Ms. Alka under Section 161 also got her statement recorded under Section 164 Cr.PC in the court of learned ACJM Nalagarh, wherein she alleged that after their having left the college, Rakesh Sir (trainer ITI) told the student that in case they all support him, he would fail Ms. Asha Rani & Ms. Alka and Madam Ms. Lubna Ansari would also lower their grades. On 11.8.2019, police collected progress cards and answer books of the deceased Asha Rani and her friend Alka Sharma from the ITI for women, Nalgarh. During investigation, it transpired that there were nine students in junior class and 21 students in senior class and out of them, 13 students were of electrician trade. On 11.7.2018, at about 12:00 PM, deceased Asha Rani and her friend Alka were seen kissing and hugging each other intimately in work shop by the students. When other students stopped Alka and deceased Asha Rani from doing such activity in college premises, some altercation took place *inter-se* above named

girls and other students present in the work shop. Students of senior class namely Praveen and Priyanka reported the matter to Madam Ms. Lubna Ansari, who alongwith Rakesh trainer ITI asked all the students to come in the workshop and thereafter, inquired the matter with regard to the deceased Asha Rani and Alka Sharma. Students namely Ashish, Harish, Ravi, Irshad and Nitesh etc., allegedly stated to the trainers named herein above that both the students Alka Sharma and Asha Rani have spoiled the atmosphere of the college and as such, they may be rusticated. Though deceased Asha Rani did not react, but her friend Alka Sharma and student namely Ashish Kumar (present petitioner) started arguing with each other. Since Ashish made some uncalled comments against the behavior of Asha Rani, her friend Alka Sharma, slapped Ashish, who thereafter, also slapped Alka. When trainer Ms. Ms. Lubna Ansari and Rakesh kumar asked the students to give their complaint in writing, deceased Asha Rani alongwith her friend Alka Sharma, went out of the class but when both the above named students did not come back, Ms. Lubna Ansari informed the Principal and HCM, who told Ms. Lubna Ansari to apprise the parents of the Alka Sharma and Asha Rani. Ms. Alka Sharma went to her house, whereas deceased Asha Rani jumped in a canal near Baharatgarh, District Ropar, Punjab. One suicide note was recovered from the bag of the deceased Asha Rani, wherein she had written that since she was thrown out of the ITI college for no fault of her and for no reason the students of electrician trade said wrong things about her as well as her friend, she is committing suicide. On 12.7.2019, Ms. Alka Sharma, gave a separate complaint against Ashish i.e. petitioner herein in the police station. As per investigation, CCTV Footage discloses that Alka Sharma and Asha Rani were kissing each other on 2-3 occasions. Though deceased Asha Rani was sitting on her seat, whereas her friend Ms. Alka Sharma was seen arguing and quarreling with other students. As per students available in the college, deceased Asha Rani and Alka Sharma used to behave indecently while sitting

in the workshop and as such, they had raised their objection. After completion of investigation police presented challan in the competent court of law at Nalagarh, District Solan, under Section 306 read with Section 34 of IPC against the petitioner Ashish and other staff. Since no specific allegation, if any, with regard to abetment of suicide ever came to be alleged against the petitioner at the behest of the deceased Asha Rani, he has approached this Court in the instant proceedings for quashing of FIR.

3. Reply to the petition stands filed by the respondent-State, wherein it has been stated that during investigation it was found that complaint was made by all the students jointly, but the major controversy was between petitioner Ashish and deceased Asha Ran. It is also stated in the reply that abusive words were exchanged inter-se petitioner and Alka Sharma. Respondent-state has stated in the reply that since respondents No. 3 and 4 Ms. Ms. Lubna Ansari and Rakesh Kumar, trainers of ITI, remained negligent in performing their duties, being responsible employees of the institution, they have been rightly held responsible for instigating and abeting the deceased Asha Rani to commit suicide.

4. Sh. Sangram Singh Chandel, learned counsel representing the petitioner while making this Court to peruse the FIR as well as final report presented under Section 173 of Cr.PC in the competent court of law vehemently argued that no case much less under Section 306 read with Section 34 of IPC is made out against the petitioner and as such, case registered against him under Section 306 read with Section 34 IPC deserves to be quashed and set-aside. He further argued that otherwise bare perusal of FIR nowhere discloses offence, if any, punishable under Section 306 of IPC. As per investigation conducted by the police, no altercation, if any ever took place inter-se the petitioner Ashish and deceased Asha Rani, rather all the students of electrician trade made collective complaint to the teachers with regard to indecent behavior of the deceased Asha Rani and her friend Alka

Sharma, who after being scolded by the teachers left the ITI of their own. Learned counsel for the petitioner also argued that bare perusal of the suicide note nowhere reveals specific allegation of abetment and instigation, if any, against the petitioner, rather bald and vague allegation has been leveled against the administration of ITI for women, Nalagarh. Learned counsel for the petitioner further argued that even if allegations as contained in the FIR as well as final report filed under Section 173 are taken to be correct on their face value and accepted in their entirety, they do not prima-facie reveal any offence against the petitioner and as such, prayer made by the petitioner for quashing of FIR deserves to be accepted.

5. Sh. Shivpal Manhans, learned Additional Advocate General, while supporting the action of the respondent-State in filing case against the petitioner under Section 306 read with Section 34 IPC, argued that there is ample material available on record suggestive of the fact that deceased Asha Rani committed suicide after being humiliated and harassed by some of the students of ITI for Woman Nalagarh. He submitted that since it has specifically come in the investigation that petitioner herein not only raised question about the character of the deceased Asha Rani, but also gave beatings to her friend Alka Sharma, who otherwise also filed separate complaint against the petitioner, prayer made on behalf of the petitioner deserves to be rejected.

6. I have heard the learned counsel for the parties and perused the record.

7. Before ascertaining the genuineness and correctness of the submissions and counter submissions having been made by the learned counsel for the parties vis-à-vis prayer made in the instant petition, this Court deems it necessary to discuss/elaborate the scope and competence of this Court to quash the criminal proceedings while exercising power under Section 482 of Cr.PC.

8. A three-Judge Bench of the Hon'ble Apex Court in case titled **State of Karnataka vs. L. Muniswamy and others, 1977 (2) SCC 699**, held that High Court while exercising power under Section 482 Cr.PC is entitled to quash the proceedings, if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed.

9. Subsequently, in case titled **State of Haryana and others vs. Bhajan Lal and others, 1992 Supp (1) SCC 335**, the Hon'ble Apex Court while elaborately discussing the scope and competence of High Court to quash criminal proceedings under Section 482 Cr.PC laid down certain principles governing the jurisdiction of High Court to exercise its power. After passing of aforesaid judgment, issue with regard to exercise of power under Section 482 Cr.PC, again came to be considered by the Hon'ble Apex Court in case bearing Criminal Appeal No.577 of 2017 (arising out of SLP (CrL.) No. 287 of 2017) titled ***Vineet Kumar and Ors. v. State of U.P. and Anr***., wherein it has been held that saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose i.e. court proceedings ought not to be permitted to degenerate into a weapon of harassment or persecution.

10. The Hon'ble Apex Court in ***Prashant Bharti v. State (NCT of Delhi), (2013) 9 SCC 293***, relying upon its earlier judgment titled as ***Rajiv Thapar and Ors v. Madan Lal Kapoor, (2013) 3 SCC 330***, reiterated that High Court has inherent powers under Section 482 Cr.PC., to quash the proceedings against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charge, but such power must always be used with caution, care and circumspection. In the aforesaid judgment, the Hon'ble Apex Court concluded that while exercising its inherent jurisdiction under Section 482 of the Cr.PC, Court exercising such power must be fully satisfied that the material produced by the accused is such, that

would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts and the material adduced on record itself overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. Besides above, the Hon'ble Apex Court further held that material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 of the Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice. In the aforesaid judgment titled as ***Prashant Bharti v. State (NCT of Delhi)***, (2013) 9 SCC 293, the Hon'ble Apex Court has held as under:-

> "22. The proposition of law, pertaining to quashing of criminal proceedings, initiated against an accused by a High Court under Section 482 of the Code of Criminal Procedure (hereinafter referred to as "the Cr.P.C.") has been dealt with by this Court in Rajiv Thapar & Ors. vs. Madan Lal Kapoor wherein this Court inter alia held as under: (2013) 3 SCC 330, paras 29-30)
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> > 29. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 of the Cr.P.C., if it chooses to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 of the Cr.P.C., at the stages referred to hereinabove, would have far reaching consequences, inasmuch as, it would negate the prosecution's/complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section 482 of the

Cr.P.C. the High Court has to be fully satisfied, that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such, as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such, as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 of the Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.

30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashing, raised by an accused by invoking the power vested in the High Court under Section 482 of the Cr.P.C.:-

> 30.1 Step one, whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?
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> 30.2 Step two, whether the material relied upon by the accused, would rule out the assertions contained in the

> charges levelled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e., the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false.
> 30.3 Step three, whether the material relied upon by the accused, has not been refuted by the prosecution/complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/complainant?
> 30.4 Step four, whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?
> 30.5 If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal - proceedings, in exercise of power vested in it under Section 482 of the Cr.P.C. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as, proceedings arising therefrom) specially when, it is clear that the same would not conclude in the conviction of the accused."

11. It is quite apparent from the bare perusal of aforesaid judgments passed by the Hon'ble Apex Court from time to time that where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him/her due to private and personal grudge, High Court while exercising power under Section 482 Cr.PC can proceed to quash the proceedings.

12. Sh. Shivpal Manhans, learned Additional Advocate General, contended that since investigating agency after having completed investigation has already filed challan under Section 173 Cr.PC., in the competent court of law, prayer made on behalf of the petitioners for quashing FIR cannot be accepted at this stage. However, this Court is not inclined to accept the aforesaid submission made by the learned Additional Advocate General for the reason that High Court while exercising jurisdiction under Section 482 Cr.PC can even proceed to quash charge, if it is satisfied that evidentiary material adduced on record would not reasonably connect the accused with the crime and if trial in such situations is allowed to continue, person arraigned as an accused would be unnecessarily put to ordeals of protracted trial on the basis of flippant and vague evidence.

13. Recently, the Hon'ble Apex Court in case tilted ***Anand Kumar Mohatta and Anr. v. State (Government of NCT of Delhi) Departmetn of Home and Anr, AIR 2019 SC 210***, has held that abuse of process caused by FIR stands aggravated if the FIR has taken the form of a charge sheet after investigation and as such, the abuse of law or miscarriage of justice can be rectified by the court while exercising power under Section 482 Cr.PC. The relevant paras of the judgment are as under:

> ***16. Even otherwise it must be remembered that the*** provision invoked by the accused before the High Court is Section 482 Cr. P.C and that this Court is hearing an appeal from an order under Section 482 of Cr.P.C. Section 482 of Cr.P.C reads as follows: -
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> > "482. Saving of inherent power of the High Court.- Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

> 17. There is nothing in the words of this Section which restricts the exercise of the power of the Court to prevent the abuse of process of court or miscarriage of justice only to the stage of the FIR. It is settled principle of law that the High court can exercise jurisdiction under Section 482 of Cr.P.C even when the discharge application is pending with the trial court (G. Sagar Suri and Anr. V. State of U.P. and Others, (2000) 2 SCC 636 (para 7), Umesh Kumar v. State of Andhra Pradesh and Anr. (2013) 10 SCC 591 (para 20). Indeed, it would be a travesty to hold that proceedings initiated against a person can be interfered with at the stage of FIR but not if it has advanced, and the allegations have materialized into a charge sheet. On the contrary it could be said that the abuse of process caused by FIR stands aggravated if the FIR has taken the form of a charge sheet after investigation. The power is undoubtedly conferred to prevent abuse of process of power of any court."

14. Recently, the Hon'ble Apex Court in case titled ***Pramod Suryabhan Pawar v. The State of Maharashtra and Anr, (2019) 9 SCC 608,*** has elaborated the scope of exercise of power under Section 482 Cr.PC, the relevant para whereof reads as under:-

> "7. Section 482 is an overriding section which saves the inherent powers of the court to advance the cause of justice. Under Section 482 the inherent jurisdiction of the court can be exercised (i) to give effect to an order under the CrPC; (ii) to prevent the abuse of the process of the court; and (iii) to otherwise secure the ends of justice. The powers of the court under Section 482 are wide and the court is vested with a significant amount of discretion to decide whether or not to exercise them. The court should be guarded in the use of its extraordinary jurisdiction to quash an FIR or criminal proceeding as it denies the prosecution the opportunity to establish its case through investigation and evidence. These principles have been consistently followed and re-iterated by this Court. In Inder Mohan Goswami v State of Uttaranchal5, this Court observed.
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>> "23. This Court in a number of cases has laid down the scope and ambit of courts' powers under Section 482 CrPC. Every High Court has inherent powers to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the

court. Inherent power under Section 482 CrPC can be exercised:

(i) to give effect to an order under the Code;
(ii) to prevent abuse of the process of the court, and
(iii) to otherwise secure the ends of justice.

24. Inherent powers under Section 482 CrPC though wide have to be exercised sparingly, carefully and with great caution and only when exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the statute."

8. Given the varied nature of cases that come before the High Courts, any strict test as to when the court's extraordinary powers can be exercised is likely to tie the court's hands in the face of future injustices. This Court in State of Haryana v Bhajan Lal6 conducted a detailed study of the situations where the court may exercise its extraordinary jurisdiction and laid down a list of illustrative examples of where quashing may be appropriate. It is not necessary to discuss all the examples, but a few bear relevance to the present case. The court in Bhajan Lal noted that quashing may be appropriate where, (2007) 12 SCC 1 1992 Supp (1) SCC 335

"102. (1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2).

....

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

In deciding whether to exercise its jurisdiction under Section 482, the Court does not adjudicate upon the veracity of the facts alleged or enter into an appreciation of competing evidence presented. The limited question is whether on the face of the FIR, the allegations constitute a cognizable offence. As this Court noted in Dhruvaram Murlidhar Sonar v State of Maharashtra, 2018 SCCOnLine SC3100 ("Dhruvaram Sonar") :

"13. It is clear that for quashing proceedings, meticulous analysis of factum of taking cognizance of an offence by the Magistrate is not called for. Appreciation of evidence is also not permissible in exercise of inherent powers. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken, it is open to the High Court to quash the same in exercise of its inherent powers."

15. Now being guided by the aforesaid proposition of law laid down by the Hon'ble Apex Court, this Court would make an endeavor to examine and consider the prayer made in the instant petition vis-à-vis factual matrix of the case. Careful perusal of FIR sought to be quashed as well as final challan filed in the competent court of law under Section 173 Cr.PC, if read in its entirety, reveals that initially complainant Gurmukh Singh i.e. father of the deceased Asha Rani, got his statement recorded under Section 154 Cr.PC, that his daughter committed suicide on 11.7.2019, after being harassed and tortured by the ITI Administration. However, subsequently, in the month of August, 2019, he telephonically informed the police that friends of his deceased daughter, who had got their statement recorded on 2.8.2019, disclosed to him that they missed to state few facts at the time of recording their statement and as such, want to record their statement again. As per

investigation, on 2nd and 5th August, students of junior class ITI disclosed to the Investigating Officer that on 11.7.2018, deceased Asha Rani and her friend Alka Sharma were seen kissing and hugging each other in the workshop and on being objected, they started hurling abuses and arguing with the students. As per contents contained in the FIR, Ms. Lubna Ansari and Rakesh, trainers of the ITI Nalagarh, after having received complaint from the students, asked all the students to gather at the work shop. Few students namely Harish, Ravi, Irshad and present petitioner, allegedly told the aforesaid trainers that deceased Asha Rani and Alka Sharma have spoiled the atmosphere of the college and as such, they may be rusticated. Thereafter, some altercation took place inter-se Alka Sharma and petitioner Ashish. Alka Sharma slapped the petitioner, who also slapped Alka Sharma. Students categorically disclosed to the police that Alka Sharma and Asha Rani used to behave indecently while sitting in the workshop and as such, matter was reported to the administration. While matter was being investigated by the trainers from the students, both Asha Rani and Alka Sharma went out of the lab/class room. When students named herein above left the class/workshop and they did not come back, the administration informed their parents through mobile. As per investigation, Ms. Alka Sharma went to her house, whereas Asha Rani committed suicide by jumping in a canal. In suicide note recovered from her bag, she categoricaly alleged that she has been thrown out of the college for no fault of her and for no reason boys of electrician trade said wrong things about them. On 12.7.2019, Alka Sharma, friend of deceased Asha Rani also gave a complaint against the present bail petitioner. CCTV footage collected by the police clearly reveals that on the date of the alleged incident, deceased Asha Rani and her friend Alka Sharma were kissing and hugging each other on 2-3 occasions. In the CCTV footage, though deceased Asha Rani can be seen sitting on her seat, whereas her friend Alka Sharma, can be seen arguing and fighting with her fellow friends. Having carefully perused the contents of the

FIR as well as final report filed under Section 173 Cr.PC, this Court finds substantial force in the submissions made by the learned counsel for the petitioner that no case much less under Section 306 read with Section 34 IPC is made out against the petitioner Ashish. If the suicide note written by the deceased Asha Rani is perused in its entirety, it nowhere specifically discloses the name of the present petitioner Ashish, rather deceased Asha Rani in her suicide note has leveled allegation against the ITI Administration and all the boys of the electrician trade. She has not leveled specific allegation, if any, of harassment against the present petitioner Ashish, who otherwise as per investigation, came to the workshop after being asked by the trainers namely Ms. Lubna Ansari and Rakesh alongwith other students. It is not only the present petitioner Ashish, who said something with regard to indecent behavior and conduct of the deceased Asha Rani and her friend Alka Sharma, rather all the students gathered in the work shop complained that deceased Asha Rani and her friend Alka Sharma have spoiled the atmosphere of the ITI and as such, they be rusticated. It has also come in the investigation that Ms. Alka Sharma, friend of the deceased Asha Rani, after being agitated on account of allegation of indecent behavior made against her, slapped the petitioner Ashish, who in turn, also slapped Ms. Alka Sharma. As per statements made by the students of ITI, deceased Asha Rani and her friend Alka Sharma used to behave indecently while sitting in the workshop/class room and as such, matter was being investigated on the request of other students of the college. As per investigation conducted by the police, person namely Ashish, Harish, Ravi, Irshad and Nitesh, had asked the trainers namely Ms. Lubna Ansari and Rakesh to rusticate the deceased Asha Rani and her friend Alka Sharma, but such request having been made by them to above named trainers cannot be construed to be instigation/abetment, if any, by them to Ms. Asha Rani for committing suicide, who otherwise in her suicide note has nowhere leveled specific allegation, if any, against the petitioner,

rather allegation made in the suicide note is against the administration of ITI and the boys of the electrician trade. Otherwise also, bare perusal of final report under Section 173 Cr.PC, nowhere discloses evidence if any, collected on record against the petitioner for his having instigated and abetted the deceased Asha Rani to commit suicide, rather evidence available on record reveals that deceased Asha Rani after being exposed on account of her indecent behavior in the college premises, left the college alongwith her friend Alka Sharma and committed suicide. As per own case of the prosecution, no direct altercation, if any, took place *inter-se* petitioner and the deceased Asha Rani, rather altercation, if any, took place inter-se him and Ms. Alka Sharma, friend of the deceased Asha Rani. On 12.7.2019, Alka Sharma lodged a complaint against the petitioner Ashish, but that cannot be said to have any connection with the FIR sought to be quashed in the instant proceedings. There is no specific evidence of instigation and abetment collected on record by the investigating agency, rather an attempt has been made to rope in the petitioner in the case on the ground that while trainers namely Ms. Lubna Ansari and Rakesh had asked the students to gather in the workshop, petitioner Ashish said some objectionable things about the character of the deceased Asha Rani and her friend Alka Sharma. As has been discussed herein above, it was not the petitioner Ashish, but other number of students who had raised the objection with regard to indecent behavior of the deceased Asha Rani and Alka Sharma, who were found hugging and kissing each other in the lab. Though altercation took place inter-se Ms. Alka Sharma and the petitioner Ashish, but as per investigation, it was not only the present petitioner, who demanded the rustication of the Asha Rani and Alka Sharma, rather other students namely Harish, Ravi, Irshad and Nitish also demanded their rustication. Investigation further reveals that trainers namely Ms. Lubna Ansari and Rakesh did not ask the students to come in the lab on the complaint made by the petitioner Ashish, rather students were asked to come

in the lab on the objection raised by number of the students regarding the indecent behavior of Ms. Alka Sharma and Asha Rani. Ms. Lubna Ansari and Rakesh had asked the students to give their complaint in writing, but while matter was being investigated, deceased Asha Rani and Alka Sharma left the premises and when they did not return, ITI administration reported the matter to their parents. Otherwise also, allegation leveled by the students against Ms. Asha Rani and Alka Sharma have some merit and truth in the same as is evident from the recording of CCTV footage, wherein deceased Asha Rani and Ms. Alka Sharma, can be seen behaving indecently in the lab, where apart from above named two students, other students were also working/sitting at that relevant time.

16. Leaving everything aside, contents of the suicide note left behind by Ms. Asha Rani, if tested/analyzed in light of other material available/collected on record by the investigating agency, especially, statement made by the students of college, case of the prosecution is bound to fail and hence, no fruitful purpose would be served by allowing such proceedings to continue. To the contrary, petitioner would suffer irreparable loss, harassment and mental agony, if criminal proceeding in the present case, which is manifestly attended with malafide and has been maliciously instituted with an ulterior motive to settle personal scores, is allowed to continue.

17. Recently, the Hon'ble Apex Court in a case (***Geo Varghese v. STte of Rajasthan and Anr, 2021 (4) RCR (Criminal) 361***) where student committed suicide after being reprimanded by the teacher/administration categorically held that reprimanding student would not amount to investigation to commit suicide. Relevant para of the aforesaid judgment reads as under:

> *27. It is a solemn duty of a teacher to instil discipline in the students. It is not uncommon that teachers reprimand a*

student for not being attentive or not being upto the mark in studies or for bunking classes or not attending the school. The disciplinary measures adopted by a teacher or other authorities of a school, reprimanding a student for his indiscipline, in our considered opinion, would not tantamount to provoking a student to commit suicide, unless there are repeated specific allegations of harassment and insult deliberately without any justifiable cause or reason. A simple act of reprimand of a student for his behaviour or indiscipline by a teacher, who is under moral obligations to inculcate the good qualities of a human being in a student would definitely not amount to instigation or intentionally aid to the commission of a suicide by a student.

28. 'Spare the rod and spoil the child' an old saying may have lost its relevance in present days and Corporal punishment to the child is not recognised by law but that does not mean that a teacher or school authorities have to shut their eyes to any indiscipline act of a student. It is not only a moral duty of a teacher but one of the legally assigned duty under Section 24 (e) of the Right of Children to Free and Compulsory Education Act, 2009 to hold regular meetings with the parents and guardians and apprise them about the regularity in attendance, ability to learn, progress made in learning and any other act or relevant information about the child.

………………………

32. Considering the facts that the appellant holds a post of a teacher and any act done in discharge of his moral or legal duty without their being any circumstances to even remotely indicate that there was any intention on his part to abet the commission of suicide by one of his own pupil, no mens rea can be attributed. Thus, the very element of abetment is conspicuously missing from the allegations levelled in the FIR. In the absence of the element of abetment missing from the allegations, the essential ingredients of offence under section 306 IPC do not exist.

………………………………….

40. In the absence of any material on record even, prima-facie, in the FIR or statement of the complainant, pointing out any such circumstances showing any such act or intention that he

> *intended to bring about the suicide of his student, it would be absurd to even think that the appellant had any intention to place the deceased in such circumstances that there was no option available to him except to commit suicide.*

In the aforesaid judgment, the Hon'ble Apex Court has categorically held that simple act of reprimand of a student for his behaviour or indiscipline by a teacher, who is under moral obligations to inculcate the good qualities of a human being in a student would definitely not amount to instigation or intentional aid to the commission of a suicide by a student. In the absence of the element of abetment missing from the allegations, the essential ingredients of offence under Section 306 IPC do not exist. Apart from above, the Hon'ble apex Court has held that victim committed suicide allegedly for being reprimanded for repeatedly bunking classes. Reading of victims suicide note shows that same was penned by immature and hypersensitive mind, thus act of accused being teacher would not ordinarily induce a circumstances to a student to commit suicide. In the case at hand, petitioner herein being fellow student only made complaint to the teacher with regard to indecent behavior of the deceased Asha Rani and her friend Alka Rani, but such act of him by no stretch of imagination can be said to be instigation or abetment to constitute an offence if any, punishable under Section 306 of IPC. Since, there is no element of abetment, case under Section 306 of IPC made against the petitioner is otherwise bound to fail. At this juncture, it would be apt to take note of Section 306 IPC

> *"306. Abetment of suicide.—If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."*

18. Abetment is defined under Section 107 of IPC, which reads as under :-

"107. Abetment of a thing - A person abets the doing of a thing, who—

First.—Instigates any person to do that thing; or

Secondly.—Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or Thirdly.—Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1.—A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Explanation 2.—Whoever either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act."

19. Similarly, the dictionary meaning of the word 'instigate' is to bring about or initiate, incite someone to do something. The Hon'ble Apex Court in the case of ***Ramesh Kumar Vs. State of Chhattisgarh 2001 9 SCC 618*** has defined the word 'instigate' as *"instigation is to goad, urge forward, provoke, incite or encourage to do an act."*

20. Hon'ble Apex Court in case of ***S.S.Cheena Vs. Vijay Kumar Mahajan and Anr. (2010) 12 SCC 190*** has dealt with scope and ambit of Section 107 IPC and its co-relation with Section 306 IPC. Relevant pars of the aforesaid judgment read as under:

"Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. The

intention of the legislature and the ratio of the cases decided by the Supreme Court is clear that in order to convict a person under Section 306 IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and that act must have been intended to push the deceased into such a position that he committed suicide."

21. In the case of ***M. Arjunan Vs. State, Represented by its Inspector of Police (2019) 3 SCC 315***, the Hon'lbe Apex Court has held as under:

"The essential ingredients of the offence under Section 306 I.P.C. are: (i) the abetment; (ii) the intention of the accused to aid or instigate or abet the deceased to commit suicide. The act of the accused, however, insulting the deceased by using abusive language will not, by itself, constitute the abetment of suicide. There should be evidence capable of suggesting that the accused intended by such act to instigate the deceased to commit suicide. Unless the ingredients of instigation/abetment to commit suicide are satisfied, accused cannot be convicted under Section 306 I.P.C."

22. The Hon'ble Apex Court in ***Ude Singh & Ors. Vs. State of Haryana, 2019 17 SCC 301***, has held that in cases of alleged abetment of suicide, there must be a proof of direct or indirect act/s of incitement to the commission of suicide. It could hardly be disputed that the question of cause of a suicide, particularly in the context of an offence of abetment of suicide, remains a vexed one, involving multifaceted and complex attributes of human behavior and responses/reactions. In the case of accusation for abetment of suicide, the Court would be looking for cogent and convincing proof of the act/s of incitement to the commission of suicide. In the case of suicide, mere allegation of harassment of the deceased by another person would not

suffice unless there be such action on the part of the accused which compels the person to commit suicide and such an offending action ought to be proximate to the time of occurrence. Whether a person has abetted in the commission of suicide by another or not, could only be gathered from the facts and circumstances of each case.

23. It is quite apparent from the aforesaid judgment rendered by the Hon'ble Apex Court that act of the accused, however, insulting the deceased by using abusive language will not, by itself, constitute the abetment of suicide, rather there should be evidence suggestive of the fact that the accused intended by such act to instigate the deceased to commit suicide. However, in the case at hand, as has been discussed herein above, there is no evidence at all available against the petitioner that he insulted the deceased by using abusive language that too with an intention to instigate her to commit suicide and as such, no case, if any, under Section 306 IPC is otherwise made out against him. Contents of FIR and final report filed under Section 173, if taken to be correct on their face value, do not prima facie constitute the offence against the accused. Apart from above, neither FIR nor final challan under Section 173 Cr.PC disclose offence, if any, punishable under Section 306 of IPC against the petitioner. Leaving everything aside, there is no sufficient evidence available on record to connect the petitioner with the offence alleged to have been committed by him.

24. Having carefully perused material evidence available on record, this Court has no hesitation to conclude that evidentiary material on record, if accepted would not reasonably connect the petitioner with the crime. Neither there is sufficient evidence to

conclude that on the date of the alleged incident, petitioner used abusive language with an intention to instigate the deceased Asha Rani to commit suicide, nor there is any material available on record that disciplinary action , if any, came to be taken by the administration of the college/ITI on the solitary complaint of the petitioner, rather majority of the students of electrician trade objected to the indecent behavior of the deceased Asha Rani and Alka Sharma, and demanded their rustication. It is also not in dispute that before action, if any, by the administration with regard to indecent behavior of the deceased, Asha Rani and Alka Sharma, could be taken by the college administration, deceased Asha Rani and Alka Rani left the college premises and thereafter deceased Asha Rani committed the suicide. This Court having perused material available on record finds that chances of conviction, if any, of the petitioner are very remote and bleak and in case, FIR sought to be quashed in the instant proceedings as well as consequent proceedings pending in the competent court of law are allowed to sustain, petitioner would unnecessarily be put to ordeals of protracted trial, which ultimately may lead to acquittal of the accused.

25. Consequently, in view of the detailed discussion made herein above as well as law laid down by the Hon'ble Apex Court, present petition is allowed and FIR No. 215 of 2019, dated 18.7.2019, registered at PS Nalagarh, under Section 306 read with Section 34 of IPC, as well as consequent proceedings, pending in the court of learned Additional Sessions Judge, Nalagarh, District Solan, H.P are quashed

and set-aside. Accordingly, present petition is disposed of, so also pending applications, if any.

BEFORE HON'BLE MS. JUSTICE SABINA, J. AND HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

Between:

SH. LAL CHAND, S/O SH. KATKU RAM, R/O VILLAGE GHALYANA, POST OFFICE BHALYANI, TEHSIL AND DISTRICT KULLU, AGED 45 YEARS, H.P. (PRESENTLY IN THE JUDICIAL CUSTODY)

……….APPELLANT

(BY SHRI C.S. THAKUR, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

……….RESPONDENT

(BY SHRI ASHWANI K. SHARMA, ADDITIONAL ADVOCATE GENERAL)

CRIMINAL APPEAL
No. 137 of 2018
Decided on: 30.03.2022

Code of Criminal Procedure, 1973- Section 374- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Section 20- Appeal against conviction- Charas weighing 1 kg 600 gms- Held- Statements of spot witness are worth credence and recovery of charas has duly been proved from exclusive and conscious possession of appellant- Non association of independent witness is not fatal- Appeal dismissed. (Para 11, 12, 13)

Cases referred:

Hanif Khan @ Annu Khan Vs. Central Bureau of Narcotics (2020) 16 SCC 709;

Raveen Kumar Vs. State of Himachal Pradesh 2020 (12) Scale 138;

This appeal coming on for hearing this day, ***Hon'ble Mr. Justice Satyen Vaidya***, delivered the following:-

J U D G M E N T

Appellant, is in appeal against the judgment dated 09.10.2017, passed by learned Special Judge-II, Kullu, H.P. in Sessions Trial No. 18/2016, whereby the appellant has been convicted for commission of offence punishable under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short 'ND&PS' Act) and has been sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 1,00,000/- and in default of payment of fine to undergo further simple imprisonment for one year.

2. The facts, on which prosecution based its case are as under:

(i) On 22.01.2016, a police party lead by PW-11 ASI Swarn Singh, PW-10 HC Sheesh Ram, PW-9 HHC Man Chand and HHG Saran pat was on routine patrol duty.

(ii) At about 9:00 PM, at place known as Zero-point Dhaugi, appellant was noticed by police party, who got perplexed and was seen throwing a bag out of his pocket.

(iii) Appellant was apprehended. Police party entertained suspicion. Despite efforts no independent witness could be found. PW-9 HHC Man Chand and PW-10 HHC Sheesh Ram were associated as witnesses. The bag thrown by appellant was checked and charas weighing 1 kg 600 grams was found.

(iv) The recovered charas was placed inside the same carry bag from which it was found and the said carry bag was placed inside a cloth parcel, which was sealed with eight seals of seal impressions "T". NCB form Ext. PW5/A

was filled in triplicate by PW-11 ASI Swarn Singh. Seizure memo Ext. PW9/B was prepared. *"Rukka"* Ext. PW8/A was prepared and sent to Police Station Banjar through PW-9 HHC Man Chand for registration of FIR.

(v) FIR Ext. PW8/B was registered. Appellant was formally arrested vide arrest memo Ext. PW-10/F. Spot map Ext. PW-11/A was prepared. Photographs were clicked on the spot and were later developed as Ext. PW-10/A to PW-10/E. Personal search of the appellant was conducted vide memo Ext. PW-10/G.

(vi) The case property along with appellant were taken to Police Station Banjar and handed over to PW-8, SHO ASI Anant Ram, who resealed the cloth parcel containing contraband with four seals having impression "N". Columns 9 to 11 of NCB form were filled. The case property was handed over to PW-5, MHC Alam Gir, to be kept in *"Malkhana"*.

(vii) On 26.01.2016, the case property was sent by PW-5 MHC Alam Gir to SFSL Junga for chemical examination through PW-7 C. Sonu Ram.

(viii) On 19.02.2016, PW-1, HHC Bahadur Singh brought the contraband along with SFSL report to the police station and handed over the same to PW-5 MHC Alam Gir for safe custody.

(ix) On 23.01.2016, special report Ext. PW3/A was sent to Additional Superintendent of Police, Kullu, H.P., who after making his endorsement handed over the same to PW-3 HC Nirat Singh for record. Necessary entry was made in the relevant register Ext. PW3/B. On chemical examination, substance recovered from the appellant was found to be Charas/Cannabis. On completion of investigation, the challan was filed.

3. Learned Special Judge-II, Kullu, charged the appellant for commission of offence punishable under Section 20 of ND&PS Act. Appellant pleaded not guilty and claimed trial.

4. Prosecution examined eleven witnesses. Appellant was examined under Section 313 of Cr.P.C. Appellant did not lead any defence evidence. On

completion of trial, learned Special Judge convicted and sentenced the appellant as noticed above.

5. Along with memorandum and grounds of appeal, the appellant has also preferred an application under Section 391 of the Code of Criminal Procedure read with Section 137 of the Indian Evidence Act, for the following relief:-

> *"It is, therefore, respectfully prayed that the present application may kindly be allowed for the just decision of the case and the appellant/convict be allowed to produce additional evidence in defense and also may kindly be allowed to re-examine/cross-examine three witnesses for the just decision of the case and for this kindness the appellant shall every pray."*

6. Keeping in view the prayer made in aforesaid application an appraisal of the entire material on record will be required, therefore, we propose to dispose of the main appeal as well as the application by this common judgment.

7. We have heard Mr. C.S. Thakur, learned counsel for the appellant as well as Mr. Ashwani K. Sharma, learned Additional Advocate General and perused the record.

8. PW-9 HHC Man Chand, PW-10 HHC Sheesh Ram and PW-11 ASI Swarn Singh are the spot witnesses. These witnesses have deposed in unison regarding the sequence of events those had taken place on spot. As per them, they alongwith HHG Saran Pat left police post Sainj at about 7:30 PM in relation with patrol and detection. DDR No. 17, Ext. PW2/A was recorded in this behalf. At about 9:00 PM, when they reached at place Zero point Dhaugi, appellant was noticed coming from the side of Sainj. He got perplexed and immediately took out some article from his jacket and threw it on the road and started walking back briskly. Appellant was apprehended. He could not explain his conduct

satisfactorily. PW-9 HHC Man Chand was sent towards Sainj to look for independent witnesses but he remained unsuccessful. During this period, no vehicle crossed the spot. The bag thrown by the appellant on the road was checked. It contained black coloured substance which on smell was found to be charas. On weighing the weight of the recovered charas was found to be 1kg 600grams. The charas was placed inside the same bag from which it was recovered and the said bag was further placed in a cloth parcel, which was sealed with eight seals having impression "T". NCB form Ext. PW5/A was filled. Facsimile of seal of impression "T" was preserved on a separate cloth Ext.PW9/A. Seizure memo Ext. PW9/B was prepared. *"Rukka"* Ext. PW8/A was prepared and sent to police station for the purposes of registration of FIR through PW-9 HHC Man Chand. FIR Ext. PW8/B was registered. Spot map Ext. PW11/A was prepared. Appellant was formally arrested vide arrest memo Ext. PW10/F. Recovered contraband along with accused were forwarded to SHO ASI Anant Ram at Police Station Banjar. Resealing proceedings were conducted. The contraband was handed over to PW-5, MHC Alam Bir for safe custody in *"Malkhana".*

9. All the spot witnesses were cross-examined on behalf of the appellant at length. However, nothing could be elicited from them to discredit their versions. PW-9 to PW-11 successfully withstood the test of cross-examination. No material contradictions can be noticed from their depositions.

10. We are not oblivious to the mandate of law specifying duty of the Court to minutely scan the prosecution evidence in cases attracting stringent punishment. Reference can be made to the judgment passed by Hon'ble Supreme Court in ***Hanif Khan @ Annu Khan*** *Vs.* ***Central Bureau of Narcotics (2020) 16 SCC 709***, it has been held as under: -

> *" Because there is a reverse burden of proof, the prosecution shall be put to a stricter test for compliance with statutory provisions. If at any stage, the accused is able to create a reasonable doubt, as a*

part of his defence, to rebut the presumption of his guilt, the benefit will naturally have to go to him."

11. Keeping in view the aforesaid mandate, we have examined the statements of spot witnesses with absolute care and caution and have found these witnesses worth credence. The recovery of 1kg 600grams of charas has duly been proved from exclusive and conscious possession of the appellant.

12. It has been contended on behalf of the appellant that non association of the independent witnesses was a mere pretense. Be that as it may, in our considered view, non-association of the independent witnesses will not affect the outcome of the case for the reason that the recovery of contraband from the appellant has duly been proved. Additionally, the entire link evidence also provides corroboration to the hypothesis in favour of the prosecution case.

13. Further, it is trite law that non association of independent witnesses is always not fatal to the prosecution case. In ***Raveen Kumar*** *Vs.* ***State of Himachal Pradesh 2020 (12) Scale 138***, it has been held as under:-

> *"19. It would be gainsaid that lack of independent witnesses are not fatal to the prosecution case. However, such omissions cast an added duty on Courts to adopt a greater degree of care while scrutinizing the testimonies of the police officers, which if found reliable can form the basis of a successful conviction."*

Thus, since there is nothing on record to discredit the version of prosecution witnesses, non-association of independent witnesses will not help the cause of the appellant.

14. There is nothing on record to suggest that the case property was tampered with. PW-5, HC Alam Gir was the MHC at Police Station Banjar. As per his deposition, the contraband remained in safe custody in the *"Malkhana"*. PW-

7 C. Sonu Ram also proved the safe custody of contraband during its transit from Police Station Banjar to SFSL Junga. Similarly, the safe custody of the case property during its transit from SFSL Junga to Police Station Banjar on 19.02.2016 has also been proved by PW-1 HHC Bahadur Singh. The special report Ext. PW3/A was prepared and sent by PW-11, ASI Swarn Singh on 23.01.2016 to the Additional Superintendent of Police, Kullu. Its receipt has duly been proved by PW-3 HC Nirat Singh. Document Ext. PW3/B is the extract of concerned register which evidenced the receipt of special report Ext. PW3/A.

15. The due execution of NCB form Ext. PW5/A has been proved by PW-11, ASI Swarn Singh and PW-8, ASI Anant Ram. The preparation and receipt etc. of *"Rukka"* Ext. PW8/A has also been proved. Taking wholesome view of the entire evidence, we find no infirmity in the findings recorded by the learned Special Judge and the same are affirmed.

<u>Cr.MP No. 321 of 2018</u>

Appellant has made a prayer to lead additional evidence to prove the defence of the appellant to the effect that he was apprehended by the police at Sainj instead of Zero point Dhaugi and contraband found unattended on the road was planted against the appellant. It is contended that the appellant could not lead defence evidence as he was in custody and could not communicate with his counsel. The wife of the appellant, who was taking care of the appellant's case, was not so conversantwithintricacies**.** As per appellant, the tower location of the appellant at the relevant time as well as that of the police personnel will clinch the issue. A prayer for further cross-examination of the spot witnesses i.e. PW-9 to PW-11 has also been made. The claim of the appellant has been contested by respondent-State.

2. Perusal of cross-examination of PW-9 to PW-11 (spot witnesses) reveal that specific questions were put to them to the effect that the appellant was apprehended by police at Sainj at 9:00 PM on 22.01.2016 and the

contraband found unattended on the road was planted against him. In his statement under Section 313 of Cr.P.C., appellant has also stated as under in answer to question No. 25:-

> *"Ans:-I am innocent. I was on the bus stand Sainj where I was waiting for the bus and one abandoned bag was lying there and the police made the false case of this bag on me."*

Thus, the plea of appellant that he had not instructed his counsel with respect to the aforesaid defence is falsified. Appellant had omitted to lead defence evidence at his option. It is not understandable, in case there was lack of communication between appellant and his counsel, how the prosecution witnesses could be cross-examined in the manner as aforesaid. Appellant cannot be allowed to fill-up the lacunae at this stage. Therefore, we find no merit in this application and the same is dismissed.

16. In light of above discussion, the appeal is dismissed. Conviction of appellant under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 and sentence as imposed by the learned Special Judge-II, Kullu, H.P. against the appellant, is affirmed. Pending miscellaneous application(s), if any, shall also stand disposed of.

BEFORE HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

Between:-

SHRI MOHAR SINGH
SON OF SHRI DEVI RAM,
RESIDENT OF VILLAGE TALPINI
PO KASLADI, TEHSIL BHUNTAR,
DISTT KULLU HP PRESENTLY
LODGED AT DISTRICT JAIL,
KULLU, HP AGE 51 YEAR.

....PETITIONER

(BY SH. B. L. SONI, ADVOCATE)

AND

NARCOTICS CONTROL BUREAU,
SUB ZONE, MANDI, HOUSE NO. 307/12
RAMNAGAR, MANDI, DISTT MANDI HP
THROUGH ITS INTELLIGENCE OFFICER.

....RESPONDENT

(BY SH. ASHWANI PATHAK, SR. ADVOCATE WITH MS TAMANNA, ADVOCATE)

CRIMINAL REVISION PETITION
NO. 209 OF 2020
Reserved on:25.4.2022
Date of decision:29.4.2022

Code of Criminal Procedure, 1973- Sections 397, 227, 228**- Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 8, 20, 29- Quashing of charges- Held- Complaint against the petitioner is filed without prior express permission of the Court and as such, it cannot be held to be maintainable- Power to file supplementary complaint is subject to prior permission of the Court and power to file supplementary complaint is akin and drawable from the power enshrined in Section 173 (8) Cr.P.C.- Petition allowed- Complaint and proceedings quashed and set aside. (Para 13, 18, 20, 21)

Cases referred:

Bhawna Bai vs. Ghanshyam & others, 2020 (2) SCC 217;
Khekh Ram vs. Narcotics Central Bureau & another, 2018 (1) Shimla Law Cases 219;
Tofan Singh vs. State of Tamil Nadu, 2021 (4) SCC 1;
Vinubhai haribhaj Malaviya & others vs. State of Gujarat & another, 2019 (17) SCC 1;

This petition coming on for order this day, the Court passed the following:

O R D E R

By way of instant petition, petitioner has sought quashing of charges framed against him by learned Special Judge-II, Kullu, under Sections 8, 20 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, the NDPS Act).

2. The record reveals that petitioner has been charged by learned Special Judge-II, Kullu, on 30.8.2019 in case titled NCB vs. Amar Nath & another for offences under Sections 8, 20 and 29 of the NDPS Act.

3. The petition, as filed before this Court, initially was under Section 401 read with Section 482 Cr.P.C. with prayer to quash the proceedings pending before learned Special Judge-II, Kullu, in addition to quashing of charges framed against him. On 27.8.2020, the following order came to be passed by this Court:-

> "Learned counsel for the petitioner submits that this petition may be treated as a Criminal Revision Petition filed under Section 397 of the Code of Criminal Procedure. Prayer so made is allowed. Learned counsel for the petitioner is permitted to make necessary alterations/ amendments in the petition in the Court itself today. Registry is directed to make necessary entries in the register by treating this petition as a Criminal Revision Petition."

As a consequence of aforesaid conduct of petitioner, the left out limited prayer sought by petitioner is to quash charges dated 30.8.2019, framed against him by learned Special Judge-II, Kullu.

4. The revisional power of this Court emanates from Section 397 of Cr.P.C., whereunder this Court is empowered to call for and examine the records of any proceeding before any inferior Criminal Court, situate within its local jurisdiction for the purpose of satisfying itself, as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed and as to the regularity of any proceeding of such inferior court.

5. Petitioner in the instant petition has sought quashing of the charges framed against him on 30.8.2019. The procedure of framing of

charges was preceded by an order passed by learned Special Judge-II, Kullu on 30.8.2019. The framing of charges was a consequence of the aforesaid order. However, there is no prayer made in the petition for setting aside said order. Assumingly, the prayer to quash charges framed against petitioner on 30.8.2019 includes prayer to quash order dated 30.8.2019, the ground of challenge raised on behalf of the petitioner at the time of hearing is twofold. Firstly, that from the contents of complaint itself, no case is made out against the petitioner. Special reference has been made to contents of para-55 of the complaint, which reads as under: -

> "55. That from the above facts forming part of the Complaint it is clear that the accused persons are liable to be tried, convicted & punished for offences punishable under section 8, 20 & 29 of NDPS Act 1985. The guilt of the accused persons Amar nath @ Amri s/o Rup Chand and Mohar Singh @ Pujari s/o Devi Ram would be established by their confessional statement recorded u/s 67 of NDPS Act."

Secondly, it is submitted that the complaint filed against the petitioner on behalf of the respondent is not maintainable in light of law laid down by a Division Bench of this Court in ***Khekh Ram vs. Narcotics Central Bureau & another, 2018 (1) Shimla Law Cases 219***. It is alleged that the complaint has been filed without prior express permission of the Court and secondly,

6. While exercising the revisional jurisdiction, this Court will confine itself to adjudge whether the order impugned in the instant petition is correct, legal and proper?

7. Sections 227 and 228 of the Cr.P.C. empower the Sessions Judge to either discharge the accused or frame charges against him after consideration of the records of the case, documents submitted therewith and hearing the submissions of the accused and prosecution in this behalf. Perusal of order dated 30.8.2019, which finds place at page No.9 of the paper

book, reveals that the same has been passed by learned Special Judge-II, Kullu, after having complied with the aforesaid provisions. The order records that the contentions of learned special prosecutor and also the learned defence counsel were heard. The records were perused with care and thereafter the opinion was formed to frame charges against the petitioner. In this view of the matter, the order dated 30.8.2019 satisfies the requirements of sections 227 and 228 of Cr.P.C.

8. Learned counsel for petitioner has further submitted that there was no material on record which could be converted to legal evidence to secure the conviction of petitioner. It is contended that confessional statements relied upon by NCB were neither relevant nor admissible as evidence. This court finds merit in the contention so raised to the extent that the confessional statement allegedly made by the petitioner and other co-accused, were neither relevant nor admissible, in view of law laid down in ***Tofan Singh vs. State of Tamil Nadu***, ***2021 (4) SCC 1*** in which it has been held as under:-

> "158. We answer the reference by stating:
>
> 158.1. That the officers who are invested with powers under Section 53 of the NDPS Act are "police officers" within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS act.
>
> 158.2. That a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act."

9. However, it is not a case where apart from reliance on confessional statements no other material was relied upon by the NCB. It has also been alleged in the complaint that the NCB during investigation found from analysis of mobile phone call records that petitioner was probable suspect behind arranging the consignment of charas for Neelmani. The

Consumer Application forms (CAF) of mobile number of Petitioner and those of Neelmani and Khekh Ram have also been relied upon. It is alleged that petitioner used mobile No. 98167-11354. Such allegations are subject to proof during trial and as such, the impugned order dated 30.8.2019, cannot be faulted.

10. The Hon'ble Supreme Court in ***Bhawna Bai vs. Ghanshyam & others, 2020 (2) SCC 217***, has held as under:-

> "14. Chapter XVIII Cr.P.C. deals with "Trial before a Court of Session". As per Section 226 Cr.P.C., the public prosecutor is required to open the case before the Sessions Court by describing the charge brought against the accused and stating by what evidence, he proposes to prove the guilt of the accused. Section 227 Cr.P.C. deals with discharge and it reads as under:-
>
> > "227. Discharge.—If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."
>
> 15. Considering the scope of Sections 227 and 228 Cr.P.C., in Amit Kapoor v. Ramesh Chander the Supreme Court held as under:-
>
> > "17. Framing of a charge is an exercise of jurisdiction by the trial court in terms of Section 228 of the Code, unless the accused is discharged under Section 227 of the Code. Under both these provisions, the court is required to consider the "record of the case" and documents submitted therewith and, after hearing the parties, may either discharge the accused or where it appears to the court and in its opinion there is ground for presuming that the accused has committed an offence, it shall frame the charge. Once the facts and ingredients of the section exists, then the court would be right in presuming that

there is ground to proceed against the accused and frame the charge accordingly. This presumption is not a presumption of law as such. The satisfaction of the court in relation to the existence of constituents of an offence and the facts leading to that offence is a sine qua non for exercise of such jurisdiction. It may even be weaker than a prima facie case. There is a fine distinction between the language of Sections 227 and 228 of the Code. Section 227 is the expression of a definite opinion and judgment of the Court while Section 228 is tentative. Thus, to say that at the stage of framing of charge, the Court should form an opinion that the accused is certainly guilty of committing an offence, is an approach which is impermissible in terms of Section 228 of the Code.

19. At the initial stage of framing of a charge, the court is concerned not with proof but with a strong suspicion that the accused has committed an offence, which, if put to trial, could prove him guilty. All that the court has to see is that the material on record and the facts would be compatible with the innocence of the accused or not. The final test of guilt is not to be applied at that stage. We may refer to the well-settled law laid down by this Court in State of Bihar v. Ramesh Singh:

> "4. Under Section 226 of the Code while opening the case for the prosecution the Prosecutor has got to describe the charge against the accused and state by what evidence he proposes to prove the guilt of the accused. Thereafter comes at the initial stage the duty of the court to consider the record of the case and the documents submitted therewith and to hear the submissions of the accused and the prosecution in that behalf. The Judge has to pass thereafter an order either under Section 227 or Section 228 of the Code. If 'the Judge considers that there is no sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing', as

enjoined by Section 227. If, on the other hand, 'the Judge is of opinion that there is ground for presuming that the accused has committed an offence which — … (b) is exclusively triable by the court, he shall frame in writing a charge against the accused', as provided in Section 228. Reading the two provisions together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the Prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under Section 227 or Section 228 of the Code. At that stage the court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction. Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the court to think that there is ground for presuming that the accused has committed an offence then it is not open to the court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of

> criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the court should proceed with the trial or not. If the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. An exhaustive list of the circumstances to indicate as to what will lead to one conclusion or the other is neither possible nor advisable. We may just illustrate the difference of the law by one more example. If the scales of pan as to the guilt or innocence of the accused are something like even at the conclusion of the trial, then, on the theory of benefit of doubt the case is to end in his acquittal. But if, on the other hand, it is so at the initial stage of making an order under Section 227 or Section 228, then in such a situation ordinarily and generally the order which will have to be made will be one under Section 228 and not under Section 227."

11. Now the question arises that after having adjudicated upon the matter, as far as prayer made therein is concerned, should this court indulge in deciding the other question regarding maintainability of complaint itself without there being any challenge to the filing of complaint or cognizance taken thereon by learned Special Judge?

12. A Division Bench of this Court allowed the Criminal appeal No. 450 of 2016 of Khekh Ram vide judgment dated 29.12.2017, reported in **2018(1) Shimla Law Cases 219**, by holding as under:-

> "34. From the conspectus of the aforesaid discussion, we have no hesitation to conclude even though there exists no specific provision in the Code of Criminal Procedure to file supplementary complaint in a complaint case, however, if on further investigation and with the express leave of the court, the culpability and the complicity of any other person is established the supplementary complaint be filed.
> 35. Indubitably, in this case the NCB has not obtained any further permission for further investigation or even placing on record the supplementary complaint. Therefore, the trial on the basis of such supplementary stands vitiated against the Khekh Ram and once the complaint itself held to be not maintainable, then obviously any conviction and sentence based on such complaint has essentially to be set aside.
> 36. Accordingly, Appeal No. 450 of 2016 is allowed and the impugned judgment of conviction and sentence passed by the learned Special Judge-I, Kullu on 26.09.2016, is set aside. The appellant is acquitted of the charges framed against him. He is ordered to be released forthwith if not required in any other case. Registry is directed to prepare release warrants immediately."

It is also not in dispute that NCB has filed the complaint against petitioner without prior express permission from the Court.

13. In light of the judgment passed by a Division Bench of this Court in Khekh Ram's case (supra) coupled with admitted position that complaint against petitioner is without prior express permission of the Court, this Court finds it unable to sit as a silent spectator merely for want of appropriate prayer in the petition. This is a fit case where the inherent jurisdiction saved in this Court under Section 482 Cr.P.C. need to be exercised to serve cause of justice.

14. The respondent contends that the facts in Khekh Ram's case (supra) were different, as Khekh Ram was the named accused initially with the principal accused Neelmani, whereas, the petitioner is on different footing.

15. To adjudge the rival contentions, this Court considers it appropriate to gainfully reproduce the necessary facts in the case of Khekh Ram, as also the facts culminating in filing of complaint against petitioner.

16. On 20.10.2014, a team of NCB, during routine surveillance received secret information that a person named Neelmani @ Neelu was to receive about 15-20 kg of charas through a span at a place about ½ to one km ahead of a village Shaat towards Manikaran. The information was recorded in writing and was communicated to superior officer in compliance of Section 42 of NDPS Act. The raiding party was formed and eventually Neelmani was apprehended immediately after receipt of a packet by him through span at the nominated place. The packet was checked and found to contain 19.780 k.g. of charas. During investigation, NCB further found complicity of Khekh Ram. However, Khekh Ram absconded and did not join investigation. Proceedings for declaring Khekh Ram as proclaimed offender was initiated. It was during such proceedings that Khekh Ram surrendered on 2.6.2015. Khekh Ram was also tried by filing a supplementary complaint against him.

17. Both Neelmani and Khekh Ram were convicted by Learned Special Judge. Khekh Ram assailed his conviction and sentence before a Division Bench of this Court in Criminal Appeal No. 450 of 2016 and Neelmani assailed his conviction and sentence in Criminal Appeal No. 38 of 2017. One of the grounds of challenge raised on behalf of Khekh Ram was that the supplementary complaint filed against him was not maintainable, as there was no provision either in Cr.P.C or in NDPS Act for filing supplementary complaint. Criminal Appeal No. 38 of 2017 of Neelmani was also allowed vide same judgment and Neelmani was also acquitted of the charges framed against him.

18. Sh. Ashwani Pathak, learned Senior Advocate representing the NCB has submitted that the aforesaid judgment, acquitting Khekh Ram and Neelmani has not attained finality as the NCB has already assailed the said

judgment by way of separate SLPs (Criminal) before the Hon'ble Supreme Court. The learned counsel for the NCB has not been able to point out the exact status of the SLPs, so filed. From the downloaded copies from the website of Hon'ble Supreme Court of India, it has transpired that the leave to appeal has already been granted by the Hon'ble Supreme Court in Khekh Ram as well as Neelmani's cases. Accordingly, Criminal Appeal No. 497 of 2019 has been registered in the case of Khekh Ram. However, the judgment passed by a Division Bench of this Court in Criminal Appeal No. 450 of 2016 does not appear to have been stayed till date. That being so, the judgment passed by a Division Bench of this Court in Criminal Appeal No. 450 of 2016 is binding on this Court and in light of the law laid down in the aforesaid judgment, the complaint filed against petitioner without express permission of the Court cannot be held to be maintainable.

19. The distinction sought to be drawn on behalf of NCB in the case of petitioner Khekh Ram, as noticed above, in considered view of this Court has no basis. The fact of the matter is that the petitioner, as per contents of complaint filed against him, was at the radar of NCB immediately after apprehension of Neelmani. Para-34 of the complaint reads as under:-

> "That on dated 10.07.2015 and 15.07.2015 due to the suspected involvement of Mohar Singh and Amar Nath @ Amri, they were issued notices u/s 67 of NDPS Act and their statement were recorded, in which they denied their involvement. At that time there was no sufficient evidence found against them and they were allowed to go."

Even otherwise, all the accused involved in aforesaid case were to be tried/charged jointly in light of Section 223 (a) (b) (d) of Cr.P.C., which reads as under:-

> "**223. What persons may be charged jointly.-** The following persons may be charged and tried together, namely:-

"(a) persons accused of the same offence committed in the course of the same transaction;

(b) Persons accused of an offence and persons accused of abetment of, or attempt to commit, such offence;

(d) persons accused of different offences committed in the course of the same transaction."

The terms "may" used in Section 223 Cr.P.C. cannot be said to vest absolute discretion to charge and try separately on fulfillment of any of the condition prescribed under said section as the said event shall not only cause prejudice to the vested rights of accused persons, but shall also strike at the very basis of criminal justice system adopted in the country.

20. Under Section 190 Cr.P.C. the Magistrate can take cognizance of any offence either on a complaint or on police report or on his own information. Under Section 36A (i) (d), a Special Court constituted under the NDPS Act is empowered to take cognizance of offence under the said Act either upon complaint made by an officer of the Central Government or a State Government, authorized in this behalf or on perusal of police report. Thus, the power to take cognizance on complaint is akin to power to take cognizance under Section 190 Cr.P.C. Neither there is any provision in Cr.P.C. nor in NDPS Act that provides for filing of more than one police report or filing of more than one complaint in a single case. The only provision is section 173 (8) Cr.P.C. that empowers the investigating agency to carry out further investigation even after submission of report under sub-section (2) of Section 173 and to file supplementary challan. In ***Vinubhai haribhaj Malaviya & others vs. State of Gujarat & another, 2019 (17) SCC 1,*** a three Judges Bench of Hon'ble Supreme Court has held that power to further investigation of an offence would be available at all stages of the progress of criminal case

before the trial actually commence. In paragraph-49 of the judgment, it has been held as under:-

> "49. Immediately after this judgment, Parliament enacted sub-sections (5) and (6). Despite the enactment of these provisions, this Court in Vijaysinh Chandubha Jadeja (supra) specifically held as follows:
>
> > "24. Although the Constitution Bench in Baldev Singh case did not decide in absolute terms the question whether or not Section 50 of the NDPS Act was directory or mandatory yet it was held that provisions of sub-section (1) of Section 50 make it imperative for the empowered officer to "inform" the person concerned (suspect) about the existence of his right that if he so requires, he shall be searched before a gazetted officer or a Magistrate; failure to "inform" the suspect about the existence of his said right would cause prejudice to him, and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from the person during a search conducted in violation of the provisions of Section 50 of the NDPS Act. The Court also noted that it was not necessary that the information required to be given under Section 50 should be in a prescribed form or in writing but it was mandatory that the suspect was made aware of the existence of his right to be searched before a gazetted officer or a Magistrate, if so required by him. We respectfully concur with these conclusions. Any other interpretation of the provision would make the valuable right conferred on the suspect illusory and a farce.
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> > xxx xxx xxx
> >
> > 27. It can, thus, be seen that apart from the fact that in Karnail Singh, the issue was regarding the scope and applicability of Section 42 of the NDPS Act in the matter of

conducting search, seizure and arrest without warrant or authorisation, the said decision does not depart from the dictum laid down in Baldev Singh case insofar as the obligation of the empowered officer to inform the suspect of his right enshrined in sub-section (1) of Section 50 of the NDPS Act is concerned. It is also plain from the said paragraph that the flexibility in procedural requirements in terms of the two newly inserted sub-sections can be resorted to only in emergent and urgent situations, contemplated in the provision, and not as a matter of course. Additionally, sub-section (6) of Section 50 of the NDPS Act makes it imperative and obligatory on the authorised officer to send a copy of the reasons recorded by him for his belief in terms of sub-section (5), to his immediate superior officer, within the stipulated time, which exercise would again be subjected to judicial scrutiny during the course of trial.

xxx xxx xxx

29. In view of the foregoing discussion, we are of the firm opinion that the object with which the right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that insofar as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect

> may or may not choose to exercise the right provided to him under the said provision.
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> xxx xxx xxx
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> 31. We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said section in Joseph Fernandez and Prabha Shankar Dubey is neither borne out from the language of sub-section (1) of Section 50 nor is it in consonance with the dictum laid down in Baldev Singh case. Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf."

Thus, the power under Section 173 (8) Cr.P.C. has been circumscribed and limited till the stage the trial actually commences. The Division Bench of this Court in Khekh Ram (supra) has further held that power to file supplementary complaint is subject to prior permission of the Court. It may be noticed that power to file supplementary complaint is akin and drawable from the power enshrined in Section 173 (8) Cr.P.C.

21. Thus, in the peculiar facts of this case, continuation of complaint against petitioner before learned Special Judge would be abuse of process of court. In order to secure the ends of justice, the complaint filed against the petitioner by the respondent NCB, pending adjudication before learned Special Judge-II, Kullu and proceedings under the NDPS Act in case No. 79 of 2019, titled NCB vs. Amar Nath and Another is quashed and set aside being not maintainable.

22. In view of the aforesaid observations, the present petition is disposed of. Pending applications, if any, also stand disposed of. Records be sent back forthwith.

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

Between:
SATPAL CHAUHAN, SON OF LATE SH. NIKA RAM, R/O VILLAGE SARA, P.O. KANAHAR, TEHSIL KUMARSAIN, DISTRICT SHIMLA, H.P.

....PETITIONER

(BY SH. SATIVE CHAUHAN, ADVOCATE)

AND

SH. SURENDER MOHAN SIRKECK, S/O LATE SH. SHANKAR DASS SIRKECK, R/O VILLAGE DALAN, P.O.SHAMATHLA, TEHSIL KUMARSAIN, DISTRICT SHIMLA,H.P.

....RESPONDENT

(BY SH. B.R.SHARMA, ADVOCATE)

CRIMINAL REVISION
No.240 OF 2021
Decided on:23.12.2021

Code of Criminal Procedure, 1973- Section 397- Appeal dismissed in default- Held- Litigant cannot be allowed to suffer on account of absence of his Counsel, rather in such like situation Court is bound to decide the appeal on merits- Petition allowed with the direction to Ld. Sessions Judge to decide the appeal afresh in accordance with law. (Para 4, 6)

Cases referred:
Bani Singh and others versus State of U.P.(1996)STPL 7163 SC;

This petition coming on for orders this day, the Court passed the following:

O R D E R

Instant Criminal Revision petition filed under Section 397 read with Section 401 of the Code of Criminal Procedure, lays challenge to order

dated 22.3.2021, passed by learned Sessions Judge, Kinnaur, Sessions Division at Rampur Bushahr, Himachal Pradesh, whereby appeal bearing No. 60 of 2015, having been filed by the petitioner-accused ***(hereinafter referred to as the accused***), laying therein challenge to judgment of conviction dated 28.5.2015 and order of sentence dated 29.5.2015, passed by Additional Chief Judicial Magistrate, Rampur Bushahr, District Shimla,H.P., came to be dismissed in default.

2. Mr. B.R.Sharma, learned counsel representing the respondent fairly states that prayer made in the instant petition deserves to be allowed for the reason that criminal appeal having been filed by the accused could not be dismissed by court below in default.

3. By now, it is well settled that appellate court while exercising appellate power is under obligation to decide the appeal on its merit and definitely cannot dismiss the appeal in default. Reliance in this regard is placed upon the judgment rendered by Three Judges Bench of Hon'ble Apex Court in ***Bani Singh and others versus State of U.P.(1996)STPL 7163 SC,*** wherein it has been held as under:-

> "9.The question is, where the accused is the appellant and is represented by a pleader, and the latter fails to appear when the appeal is called on for hearing, is the Appellate Court empowered to dispose of the appeal after perusing the record on its own or, must it adjourn the appeal to a future date and intimate the accused to be present on the next date of hearing?
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> 10. In Shyam Deo's case, this Court ruled that the Appellate Court must peruse the record before disposing of the appeal; the appeal has to be disposed of on merits even if it is being disposed of in the absence of the appellant or his pleader. Interpreting Section 423 of the Old Code (the corresponding provisions are Sections 385-386 of the present Code), this Court in paragraph 19 of the judgment held as under:
> The consideration of the appeal on merits at the stage of final hearing and to arrive at a decision on merits and to pass final

orders will not be possible unless the reasoning and findings recorded in the judgment under appeal are tested in the light of the record of the case. After the records are before the court and the appeal is set down for hearing, it is essential that the Appellate Court should (a) peruse such record, (b) hear the appellant or his pleader, if he appears, and (c) hear the public prosecutor, if he appears. After complying with these requirements, the Appellate Court has full power to pass any of the orders mentioned in the section. It is to be noted that if the appellant or his pleader is not present or if the public prosecutor is not present, it is not obligatory on the Appellate Court to postpone the hearing of the appeal. If the appellant or his counsel or the public prosecutor, or both, are not present, the Appellate Court has jurisdiction to proceed with the disposal of the Appeal; but that disposal must he after the Appellate Court has considered the appeal on merits. It is clear that the appeal must be considered and disposed of on merits irrespective of the fact whether tne appellant or his counsel or the public prosecutor is present or not. Even if the appeal is disposed of in their absence, the decision must be after consideration on merits."

11. In our view, the above-stated position is in consonance with the spirit and language of Section 386 and, being a correct interpretation of the law, must be followed.

12. In Ram Naresh Yadav's case, this Court, without making a specific reference to Section 386 or any other provision of the Code and without noticing the ratio of Shyam Deo's case concluded thus:

"It is an admitted position that neither the appellants nor counsel for the appellants in support of the appeal challenging the order of conviction and sentence, were heard. It is no doubt true that if conunsel do not appear when criminal appeals are called out it would hamper the working of the court and create a serious problem for the court. And if this happens often the working of the court would become well nigh impossible. We are fully conscious of this dimension of the matter but in

criminal matters the convicts must be heard before their matters are decided on merits. The court can dismiss the appeal for non prosecution and enforce discipline or refer the matter to the Bar Council with this end in view. But the matter can be disposed of on merits only after hearing the appellant or his counsel. The court might as well appoint a counsel at State cost to argue on behalf of the appellants."

13. (Emphasis added) What then is the area of conftict between the two decisions of this Court? In Shyam Deo's case, this Court ruled that once the Appellate Court has admitted the appeal to be heard on merits, it cannot dismiss the appeal for non- prosecution for non-appearance of the appellant or his counsel, but must dispose of the appeal on merits after examining the record of the case. It next held that if the appellant or his counsel is absent, the Appellate Court is not bound to adjourn the appeal but it can dispose it of on merits after perusing the record. In Ram Naresh Yadav's case, the Court did not analyse the relevant provisions of the Code nor did it notice the view taken in Shyam Deo's case but held that if the appellant's counsel is absent, the proper course would be to dismiss the appeal for nonprosecution but not on merits; it can be disposed of on merits only after hearing the appellant or his counsel or after appointing another counsel at State cost to argue the case on behalf of the accused.

14. We have carefully considered the view expressed in the said two decisions of this Court and, we may state that the view taken in Shyam Deo's case appears to be sound except for a minor clarification which we consider necessary to mention. The plain language of Section 385 makes it clear that if the Appellate Court does not consider the appeal fit for summary dismissal, it 'must' call for the record and Section 386 mandates that after the record is received, the Appellate Court may dispose of the appeal after hearing the accused or his counsel. Therefore, the plain language of Sections 385-386 does not contemplate dismissal of the appeal for non-prosecution simplicitor. On the contrary, the Code envisages disposal of the appeal on merits after perusal and scrutiny of the record. The law clearly expects the Appellate Court to dispose of the appeal on merits, not merely by perusing the reasoning of the trial court in the judgment, but by cross-

checking the reasoning with the evidence on record with a view to satisfyiny itself that the reasoning and findings recorded by the trial court are consistent with the material on record. The law, therefore, does not envisage the dismissal of the appeal for default or non-prosecution but only contemplates disposal on merits after perusal of the record. Therefore, with respect, we find it difficult to agree with the suggestion in Ram Naresh Yadav's case that if the appellant or his pleader is not present, the proper course would be to dismiss an appeal for non-prosecution.

15. Secondly, the law expects the Appellate Court to give a hearing to the appellant or his counsel, if he is present, and to the public prosecutor, if he is present, before disposal of the appeal on merits. Section 385 posits that if the appeal is not dismissed summarily, the Appellate Court shall cause notice of the time and place at which the appeal will be heard to be given to the appellant or his pleader. Section 386 then provides that the Appellate Court shall, after perusing the record, hear the appellant or his pleader, if he appears. It will be noticed that Section 385 provides for a notice of the time and place of hearing of the appeal to be given to either the appellant or his pleader and not to both presumably because notice to the pleader was also considered sufficient since he was representing the appellant. So also Section 386 provides for a hearing to be given to the appellant or his lawyer, if he is present, and both need not be heard. It is the duty of the appellant and his lawyer to remain present on the appointed day, time and place when the appeal is posted for hearing. This is the requirement of the Code on a plain reading of Sections 385-386 of the Code. The law does not enjoin that the Court shall adjourn the case if both the appellant and his lawyer are absent. If the Court does so as a matter of prudence or indulgence, it is a different matter, but it is not bound to adjourn the matter. It can dispose of the appeal after perusing the record and the judgment of the trial court. We would, however, hasten to add that if the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the accused/appellant if his lawyer is not present. If the lawyer is absent, and the court deems it appropriate to appoint a lawyer at State expense to assist it, there is nothing in the law to preclude it from doing so. We are, therefore, of the opinion and

> we say so with respect, that the Division Bench which decided Ram Naresh Yadav's case did not apply the provisions of Sections 385-386 of the Code correctly when it indicated that the Appellate Court was under an obligation to adjourn the case to another date if the appellant or his lawyer remained absent.
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> 16. Such a view can bring about a stalemate situation. The appellant and his lawyer can remain absent with impunity, not once but again and again till the Court issues a warrant for the appellant's presence. A complaint to the Bar Council against the lawyer for non-appearance cannot result in the progress of the appeal. If another lawyer is appointed at State cost, he too would need the presence of the appellant for instructions and that would place the Court in the same situation. Such a procedure can, therefore, prove cumbersome and can promote indiscipline. Even if a case is decided on merits in the absence of the appellant, the highrer court can remedy the situation is there has been a failure of justice. This would apply equally if the accused is the respondent for the obvious reason that if the appeal cannot be disposed of without hearing the respondent or his lawyer, the progress of the appeal would be halted."

4. In the case at hand, order dismissing the appeal in default itself reveals that on 22.3.2021, neither appellant came present nor his counsel and as such, court below instead of adjourning the matter to some other date dismissed the appeal in default. Hon'ble Apex Court in the aforesaid judgment, as taken note hereinabove, has categorically held that litigation cannot be allowed to suffer on account of absence of his counsel, rather in such like situation, court after having taken note of the entire material placed before it, is bound to decide the appeal on merits. In the absence of counsel representing the appellant, court has wide power to appoint legal aid counsel on behalf of the accused. Since consequence of dismissal may be grave in nature, parties especially appellant is required to be afforded due opportunity of being heard before disposal of the appeal, but if he/she does not appear for some reason it is boundant duty of the court to peruse the entire record i.e. pleadings and evidence before delivery of judgment on merits.

5. Since in the case at hand, court below has proceeded to dismiss the appeal in default on account of absence of appellant and his counsel, prayer made in the instant petition deserves to be allowed.

6. Consequently, in view of the above, the present petition is allowed and impugned order dated 22.3.2021, passed by learned Sessions Judge, Kinnaur Sessions Division at Rampur Bushahr, Himachal Pradesh, is quashed and set-aside and case is remanded back to the learned Sessions Judge, Kinnaur Sessions Division at Rampur Bushahr, Himachal Pradesh with the direction to decide the appeal afresh in accordance with law.

7. Learned counsel representing the parties undertake to cause presence of their respective clients before the Court below on **5.1.2022,** enabling it to decide the appeal afresh expeditiously, preferably within a period of six months.

8. Registry is directed to apprise the learned Court below with regard to passing of the instant order, enabling it to do the needful well within stipulated time. Pending applications, if any, also stand disposed of.

BEFORE HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

Between:

DHARMA DEVI, W/O SH. MOTI LAL, R/O VILL. MALANA, PO JAIRI, TEHSIL BHUNTAR, DISTT. KULLU, H.P. AED 30 YEARS. PRESENTLY LODGED IN DISTRICT AND OPEN AIR JAIL BILASPUR, H.P.

……..PETITIONER

(BY SMT. SHIKHA CHAUHAN, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

..........RESPONDENT

(BY SHRI. P.K. BHATTI, ADDITIONAL ADVOCATE GENERAL)

S.I. HARPAL SINGH, P.S. SWARGHAT, DISTRICT
BILASPUR IN PERSON.

CRIMINAL MISCELLANEOUS PETITION (MAIN)
NO. 612 of 2022
RESERVED ON:01.04.2022
DECIDED ON:04.04.2022

Code of Criminal Procedure, 1973- Section 439- Bail application- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 20 and 29- Charas weighing 1 Kg 790 gm- Held- Pre-trial incarceration of the petitioner is not going to serve any fruitful purpose- Complicity of the petitioner in the alleged crime is not prima facie made out- Bail allowed subject to conditions. (Para 11, 12, 13)

Cases referred:

Bharat Chaudhary Vs. Union of India, Special Leave to Appeal (Crl.) No. 5703 of 2021;

This petition coming on for orders this day, the Court passed the following:

O R D E R

Petitioner is an accused in case FIR No. 16/2021, dated 24.02.2021, under Sections 20 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "ND&PS Act"), registered at Police Station Swarghat, District Bilaspur, Himachal Pradesh.

2. On 24.02.2021, police party had laid '*Nakka*' near 'Thakur Bhojnalaya', Baner, District Bilaspur, HP. A car with registration No. HP-49-2697 (i-20) approached from Bilaspur side, which was stopped for checking. The driver of the car got perplexed on noticing police party. Tek Ram was the driver of the car and another person named Bobby Sharma was sitting besides him on

the front seat. Independent witnesses were associated. Car was checked and charas weighing 1 kg 790 grams was recovered. During interrogation, accused Tek Ram and Bobby Sharma disclosed that they were carrying the contraband on the asking of Vikas @ Vicky and Hitesh, who had engaged them to transport the same beyond the Borders of Himachal Pradesh, in lieu of Rs. 20,000/-. It was also disclosed that both these persons (Vikas @ Vicky and Hitesh) had travelled in advance in their vehicle No. DL-8CNA-7974 and were scheduled to meet them near Toll Plaza beyond place known as Garamoura. On this information, Vikas @ Vicky and Hitesh alongwith vehicle No.DL-8CNA-7974, were apprehended near Garamoura, Toll Barrier. All the said accused persons were formally arrested after completion of preliminary investigation.

3. The case of respondent-State further is that during investigation accused person apprehended by the police, disclosed the complicity of the petitioner in crime. As per respondent-State, the contraband recovered by the police was infact sold by the petitioner.

4. Petitioner has approached this Court for the grant of bail under Section 439 of the Code of Criminal Procedure in the above noted case, on the grounds that she is innocent and has nothing to do with the case. Petitioner is in custody since 15.06.2021. It is contended that there is no legal evidence against the petitioner to connect her with the alleged offence. Though, the case was registered on 16.03.2022, but the petitioner was implicated after about three months thereafter. The petitioner has been made scapegoat.

5. Petitioner is permanent resident of Village Malana, PO Jairi, Tehsil Bhuntar, District Kullu HP and there is no apprehension of her fleeing from the course of justice. Petitioner has minor children and there is no one to lookafter them. No fruitful purpose will be served by keeping the petitioner in custody. Her husband is also of unsound mind. The entire family is dependent upon her for livelihood. Petitioner is ready and willing to abide by all the conditions as may be imposed against her.

6. On notice, the bail petition is opposed on the ground that the petitioner is involved in the case as disclosed by other co-accused. Petitioner had been intouch with co-accused Manoj through mobile. It is the petitioner who has sold the contraband to her co-accused. As per respondent, petitioner earlier also had been convicted in a case under ND&PS Act and has already undergone the sentence of 10 years.

7. I have heard learned counsel for the petitioner and also learned Additional Advocate General for the respondent/State and have also gone through the contents of the status report as well as the record of the investigation.

8. The contraband recovered in the case is of commercial quantity, therefore, rigors of Section 37 of NDPS Act are applicable. However, at this stage, this Court is not precluded from looking into the material placed before it in order to have *prima facie* assessment of the nature and gravity of allegations against the petitioner and the material collected by the investigating agency to substantiate the same.

9. Save and accept the allegation that petitioner had sold the contraband to the co-accused in the case, no tangible material to support such contention appears to be available on record. The disclosure by co-accused cannot be taken as a legal evidence at this stage against the petitioner. Similarly, having telephonic conversation with co-accused Manoj Kumar again will not help the case of the respondent as firstly the said Manoj Kumar has already been granted bail in this case by this Court vide order dated 16.03.2022 and secondly, the allegations regarding telephonic conversation so made are the subject matter of trial especially when the SIM allegedly used by petitioner is not in her name. Such material can not be used as evidence as is held by Hon'ble Supreme Court in ***Tofan Singh** Vs. **State of Madras, 2021 (4) SCC 1.*** Confessional statement of an accused, during the investigation under NDPS Act has been held to be inadmissible. In

Bharat Chaudhary *Vs.* ***Union of India, Special Leave to Appeal (Crl.) No. 5703 of 2021,*** the three Judges Bench of Hon'ble Supreme Court in almost identical situation has held asunder:-

> "11. In the absence of any psychotropic substance found in the conscious possession of A-4, we are of the opinion that mere reliance on the statement made by A-1 to A-3 under Section 67 of the NDPS Act is too tenuous a ground to sustain the impugned order dated 15th July, 2021. This is all the more so when such a reliance runs contrary to the ruling of Tofan Singh (supra). The impugned order qua A-4 is, accordingly, quashed and set aside and the order dated 2nd November, 2020passed by the learned Special Judge, EC & NDPS Cases, is restored. As for Raja Chandrasekharan (A-1), since the charge sheet has already been filed and by now the said accused has remained for over a period of two years, it is deemed appropriate to release him on bail, subject to the satisfaction of the trial Court."

10. Merely because the petitioner was earlier a convict in a case under ND&PS Act, cannot be a ground to deny her bail in the present case unless the respondent is able to connect the petitioner with the help of legal evidence.The Constitutional guarantee of personal liberty of an individual can not be curtailed on vague and indefinite allegations.

11. Thus, in the facts and circumstances of the case, this Court is satisfied that the complicity of the petitioner in the alleged crime is not *prima facie* made out.

12. In the given facts and circumstances of the case, pre trial incarceration of the petitioner is not going to serve any fruitful purpose. Petitioner is permanent resident of Village Malana, PO Jairi, Tehsil Bhuntar, District Kullu, HP. The apprehension of the respondent that petitioner, if enlarged on bail, may influence the witnesses again does not appears to be reasonable as no material has been placed on record to substantiate such apprehension.

13. In the peculiar facts and circumstances of the case, the instant petition is allowed and the petitioner is ordered to be released on bail in case FIR No. 16/2021, dated 24.02.2021, under Sections 20 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985, registered at Police Station Swarghat, District Bilaspur, Himachal Pradesh, on her furnishing personal bond in the sum of Rs. 2 lacs/- with one surety in the like amount, who necessarily will be of a person belonging to the State of Himachal Pradesh, to the satisfaction of the learned Trial Court. This order is subject to following conditions :-

i) Petitioner shall regularly attend the trial of the case, before learned Trial Court and shall not cause any delay in its conclusion.

ii) Petitioner shall not tamper with the prosecution evidence in any manner, whatsoever and shall not dissuade any person from speaking the truth in relation to the facts of the case in hand.

iii) Petitioner shall be liable for cancellation of bail in the instant case in the event of petitioner violating the conditions of this order.

(iv) Petitioner shall not leave India without permission of learned trial Court till completion of trial.

14. Any expression of opinion herein-above shall have no bearing on the merits of the case and shall be deemed only for the purpose of disposal of this petition.

BEFORE HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

<u>BETWEEN</u>:

BHAJAN SINGH, S/O SH. PURNI RAM, AGE ABOUT 21 YEARS, R/O VILLAGE AND PO SHOLI, TEHSIL RAMPUR

BUSHAHR, DISTRICT SHIMLA, H.P. THROUGH HIS FATHER AND NATURAL GUARDIAN SH. PURNI RAM S/O LATE SH. KARMU RAM, AGE 47 YEARS, R/O VILLAGE AND PO SHOLI, TEHSIL RAMPUR, BUSHAHR, DISTRICT SHIMLA, H.P.

........PETITIONER

(BY SHRI RAJ KUMAR NEGI, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH THROUGH PRINCIPAL SECRETARY(HOME) TO THE GOVERNMENT OF HIMACHAL PRADESH,SHIMLA-2.

.........RESPONDENT

(BY MR. P.K. BHATTI AND MR. BHARAT BHUSHAN, ADDITIONAL ADVOCATE GENERALS;

H.C. DIWAN CHAND NO. 106 OF P.S. NANKHARI IN PERSON)

CRIMINAL MISCELLANEOUS PETITION (MAIN)
No. 633 of 2022
Reserved on: 01.04.2022
Decided on: 04.04.2022

Code of Criminal Procedure, 1973- Section 439- **Indian Penal Code, 1860**- Section 376- **Protection of Children from Sexual Offences Act, 2012**- Sections 4 & 6- Bail application- Held- Pre-trial incarceration of the petitioner is not going to serve any fruitful purpose- Bail allowed subject to conditions. (Para 8 & 10)

This petition coming on for orders this day**,** the Court passed the following :-

<u>O R D E R</u>

Petitioner is an accused in case FIR No. 5/2022, dated 16.01.2022, under Section 376 of the Indian Penal Code (for short 'IPC') and Section 4 & 6 of Prevention of Children from Sexual Offences Act (for short 'POCSO Act'),registered at Police Station Nankhari, Tehsil Nankhari, Distt. Shimla, H.P.

2. The victim was on visit to Shimla since 07.01.2022 and was staying with her Aunt (Massi). Since 11.01.2022, the victim was not feeling well. On 15.01.2022, the victim was advised certain tests by the Medical Officer in Deen Dayal Upadhay (D.D.U.) Hospital, Shimla and from such tests it was discovered that victim was carrying pregnancy. Thereafter victim disclosed to her mother that she was subjected to forcible sexual assault by the bail petitioner firstly on 04.11.2021 and thereafter on 10.12.2021. She disclosed that on 04.11.2021, she was assaulted at village Sholi (Karalta) when she had gone to participate in a fair and on 10.12.2021, the bail petitioner visited her house at 1:30 in the night and had committed offence. The father of the victim, with aforesaid allegations, approached police on 16.01.2022, on the basis of which, the above noted case came to be registered.

3. Petitioner has approached this Court for grant of bail under Section 439 of the Code of Criminal Procedure in the above noted case, on the ground that he is innocent and has been falsely implicated in the case. The investigation is complete and challan has been filed in the Court. It is contended on behalf of the petitioner that he is young person of 21 years of age and belongs to a respectable family. There is no likelihood of his absconding from the course of justice. He has no criminal background. He has undertaken to abide by all the conditions, as may be imposed against him. He has further undertaken not to tamper with the prosecution evidence.

4. Learned Additional Advocate General has opposed the bail petition. It is contended that petitioner is accused of serious offence.The investigating agency has been able to collect sufficient evidence including scientific evidence i.e. DNA profiling against the petitioner.

5. I have heard learned counsel for the petitioner as well as learned Additional Advocate General and have also gone through the status report.

6. It is more than settled that the Court while deciding the bail petition will not scan the evidence collected by investigating agency minutely. However, the Court is not precluded from looking into the available material in order to assess the gravity and seriousness of the allegations.

7. The victim at the time of alleged offence is stated to be 17 years 8 months old. In the nature of allegations, the conduct of the victim in not reporting the offence immediately speaks for itself. Though, the victim was to attain the age of majority in next about four months, but she definitely had attained the age of discretion. It is not the case that victim is of weak intellect.

8. The allegations, if proved, shall attract their legal consequences. Pre-trial incarceration cannot be ordered as a rule. The facts of each case have to be evaluated on their own merits. It is not the case of the respondent that the release of the petitioner on bail shall be prejudicial to the fate of the trial.Such apprehension can otherwise be taken care of by imposing appropriate conditions. In the given facts of the case, no fruitful purpose shall be served by keeping the petitioner in custody for indefinite period as the trial will take some time before its conclusion.

9. The petitioner is a permanent resident of Village & P.O. Sholi, Tehsil Rampur Bushahr, District Shimla, H.P. and there is no likelihood of his absconding from the course of justice. It is also not the case of the respondent that petitioner has potential to tamper with the prosecution evidence. Petitioner is a young person and his prolonged incarceration before conclusion of trial may mar his career.

10. In the peculiar facts and circumstances of the case, the petition is allowed and the petitioner is ordered to be released on bail in case FIR No. 5/2022, dated 16.01.2022, under Section 376 of the IPC and Section 4 & 6 of POCSO Act, registered at Police Station Nankhari, Tehsil Nankhari, Distt.

Shimla, H.P., on his furnishing personal bond in the sum of Rs. 50,000/- with one surety in the like amount to the satisfaction of learned trial court. This order shall, however, be subject to the following conditions:-

i) Petitioner shall regularly attend the trial of the case before learned Trial Court and shall not cause any delay in its conclusion.

ii) Petitioner shall not tamper with the prosecution evidence, in any manner, whatsoever and shall not dissuade any person from speaking the truth in relation to the facts of the case in hand.

iii) Petitioner shall be liable for immediate arrest in the instant case in the event of petitioner violating the conditions of this bail.

(iv) Petitioner shall not leave India without permission of learned trial Court till completion of trial.

11. Any expression of opinion herein-above shall have no bearing on the merits of the case and shall be deemed only for the purpose of disposal of this petition.

BEFORE HON'BLE MS. JUSTICE SABINA, J. AND HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

Between:-

DR. VIJAY KALIA
S/O PARKASH CHAND
RESIDENT OF S-8/2115 GALI NO.3
GREEN AVENUE SAILI ROAD
PATHANKOT PUNJAB.

....PETITIONER

(BY MR. ANUP RATTAN, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH SECRETARY(HEALTH)
TO THE GOVERNMENT OF HIMACHAL
PRADESH, SHIMLA-2.

2. DR. ANMOLSHREE
FATHER'S NAME NOT KNOWN TO PETITIONER
PRESENTLY POSTED AT DR. RPGMC&H TANDA
TEHSIL KANGRA DISTRICT KANGRA, H.P.

3. SH. RITA DHIMAN
WIFE OF NOT KNOWN TO PETITIONER
RESIDENT OF JAWAHAR SADAN
KANEDY CHOWK SHIMLA-2.
(DELTED VIDE ORDER DT. 13.07.2021)

..RESPONDENTS

(MR. AJAY VAIDYA, SENIOR ADDITIONAL ADVOCATE GENERAL FOR R-1 AND MR. AJAY SHANDIL, ADVOCATE FOR R-2)

CIVIL WRIT PETITION
No. 3792 OF 2021
Decided on:13.04.2022

Constitution of India, 1950- Article 226- Transfer- Quashing of transfer on the grounds of short span, D.O. Note and violation of the Comprehensive Guiding Principles-2013- Held- Transfer is an incidence of service- The employer has unfettered power to effect transfer of its employees save and except on the ground of malafide arbitrariness- No legal right is vested in petitioner to remain at a particular place of posting- Petition dismissed. (Para 6, 9, 12, 13)

Cases referred:
Mohd. Masood Ahmad vs. State of U.P. & Others, (2008)1 SCC 180;

This petition coming on for orders this day, ***Hon'ble Mr. Justice Satyen Vaidya***, passed the following:-

<u>O R D E R</u>

By way of instant petition, petitioner has prayed for the following substantive relief:-

"i "That transfer orders dated 7.7.2021 (Annexure P-2) may kindly be quashed and set aside in the interest of justice and fair play."

2. The grievance of the petitioner is that impugned transfer order dated 7.7.2021, whereby the petitioner has been transferred from Civil Hospital, Indora, District Kangra, H.P. to Dr. RPGMC&H, Tanda, District Kangra, H.P is vitiated on the grounds firstly that petitioner was transferred within a short span of less than five months, secondly, the transfer was on the basis of D.O. Note, thirdly, the impugned order was in violation of the "Comprehensive Guiding Principles-2013" inasmuch as respondent No.2 being a contract employee could not have been transferred before completion of three years and lastly, that transfer was effected during ban period.

3. Respondent No.1 has contested the claim of petitioner on the ground that petitioner was a Class-I officer and as such, normal tenure prescribed for an employee vide comprehensive Guiding Principles 2013 was not applicable. It has also been contended that the impugned transfer order was effected with prior approval of competent authority, in relaxation of ban on transfer/contract policy.

4. Respondent No.2 also filed a separate reply and pointed out that petitioner himself was a recipient of a D.O. Note in the past. Petitioner was transferred from Community Health Centre, Gangath to Civil Hospital, Indora on the basis of D.O. Note and in that case also, a contractual employee was transferred vice petitioner.

5. We have heard learned counsel for the parties and have also gone through the record carefully.

6. There is no gainsaying that the transfer is an incidence of service. The employer has unfettered power to effect transfer of its employees save and except on the ground of *malafide* or arbitrariness. A government servant holding a transferable post, neither holds a fundamental nor legal right to remain posted at one place or the other.

7. In ***S.K. Nausad Rahaman and others*** vs. ***Union of India and others, Civil Appeal No. 1243 of 2022***, decided on 10th March, 2022, the Hon'ble Supreme Court has held as under: -

> *"24. While analyzing the rival submissions, certain basic precepts of service jurisprudence must be borne in mind.*
> *25. First and foremost, transfer in an All India Service is an incident of service. Whether, and if so where, an employee should be posted are matters which are governed by the exigencies of service. An employee has no fundamental right or, for that matter, a vested right to claim a transfer or posting of their choice.*
> *26. Second, executive instructions and administrative directions concerning transfers and postings do not confer an indefeasible right to claim a transfer or posting. Individual convenience of persons who are employed in the service is subject to the overarching needs of the administration."*

8. In ***Mohd. Masood Ahmad*** vs. ***State of U.P. & Others, (2008)1 SCC 180***, the Hon'ble Supreme Court has held as under: -

> *"7. The scope of judicial review of transfer under Article 226 of the Constitution of India has been settled by the Supreme Court in Rajendra Rao vs. Union of India (1993) 1 SCC 148; (AIR 1939 SC 1236), National Hydroelectric Power Corporation Ltd. vs. Shri Bhagwan (2001) 8 SCC 574; (AIR 2001 SC 3309), State Bank of India vs. Anjan Sanyal (2001) 5 SCC 508; (AIR 2001 SC 1748). Following the aforesaid principles laid down by the Supreme Court, the Allahabad High Court in Vijay Pal Singh vs. State of U.P. (1997) 3 ESC 1668; (1998) All LJ 70) and Onkarnath Tiwari vs. The Chief Engineer, Minor Irrigation Department, U.P. Lucknow (1997) 3 ESC 1866; (1998 All LJ 245), has held that the principle of law laid down in the aforesaid decisions is that an order of transfer is a part of the service*

conditions of an employee which should not be interfered with ordinarily by a Court of law in exercise of its discretionary jurisdiction under Article 226 unless the Court finds that either the order is mala fide or that the service rules prohibit such transfer, or that the authorities who issued the orders, were not competent to pass the orders."

9. A writ of mandamus can be issued, provided that there exist a legal right in applicant and corresponding legal duty in the respondent. As noticed above, no legal right is vested in petitioner to remain at a particular place of posting. The category of Class-I Officers has been exempted from the prescription of a normal tenure of posting, therefore, again the petitioner is precluded from asserting his right, if any, to remain posted at a particular place for a specific term.

10. Petitioner has not refuted the contention raised by respondent No.2 regarding the petitioner also being beneficiary of D.O. Note in the past. That being so, the petitioner is not entitled to any relief. A Co-ordinate Bench of this Court in ***CWP No. 3195 of 2021*** titled as ***Bhup Singh*** vs. ***State of H.P and another***, decided on 30.06.2021 has held as under:-

> *"2. The main grievance of the petitioner is that his transfer has been effected on the basis of D.O. note. The record, which has been produced pursuant to our directions, reveals that the petitioner himself is the beneficiary of the D.O. note, therefore, in such circumstances, he is not entitled to any relief in terms of the repeated judgments rendered by this Court.*
>
> *3. Reference in this regard can conveniently be made to the judgment rendered by this Court in CWP No. 1387 of 2021, titled as Parveen Kumar vs. State of H. P. and Ors., decided on 31.03.2021, wherein it was observed as under:-*
>
> > *"13. Indeed, transfer is an incidence of service and government employees are supposed to be transferred and posted anywhere in the State . The transfers of the petitioner and that of respondent No. 4 are effected after the approval of the competent authority. The petitioner, earlier managed his posting at GSSS Nabahi, Mandi, and now he has been*

transferred from Nabahi, after completion of his normal tenure, so he has no right to say that transfer of respondent No. 4, effected on the basis of D.O. Note, is illegal and bad in the eyes of law. In fact, transfer of the petitioner has no tinge of malafides, neither without public interest nor vitiated, being against the settled Transfer Policy, as transfer is an incidence of service. Moreover in Sanjeev Sood vs. State of Himachal Pradesh and others, CWP No. 4208 of 2020, decided on 22.12.2020, this Court has held as under:

> *"9. This Court in CWP No. 4063 of 2019, titled Smt. Anita Rana and Anr vs. State of Himachal Pradesh and others, decided on 31.12.2019, has specifically held that a recipient /beneficiary of DO note cannot approach this Court ventilating the grievance that he /she has been transferred on the basis of DO Note. It would be apposite to refer to the relevant observations made by a Coordinate Bench in order dated 31.12.2019, which reads as under:-*
>
> > *"We have heard this matter for some time and also perused the record produced by the office of respondent No. 2. It is seen from the record that on the D.O. Note, the transfer of petitioner No. 1 has been proposed to be cancelled. Meaning thereby that she is also recipient of D.O. Note, hence not justified in ventilating the grievances that she has been transferred on the basis of D.O. note. Therefore, the writ petition qua her deserves to be dismissed and is accordingly dismissed leaving it open to her to make a representation either for cancellation of her transfer or adjustment at some suitable place, if so advised."*
>
> *10. Since it is apparent that the petitioner, on earlier occasions, got himself posted at stations of choice on the basis of UO Notes, petition praying therein for quashment of impugned order is not maintainable at all. However, having taken note of the fact that both, petitioner and respondent No.3, have been repeatedly exerting political pressure to get themselves posted at stations of their choice, we dispose of this petition by directing respondents to transfer both,*

> *petitioner and respondent No.3, to some other places in the State, especially where both of them have not served till date, within two weeks."*

11. Petitioner, in support of his case, has placed reliance on a judgment passed by the Principal Division Bench of this Court in ***CWP No. 3437 of 2010*** titled ***Anuradha Garg*** vs. ***State of H.P and others***, decided on 28.06.2010. On perusal of this judgment, we are of the considered view, that same will not help the cause of the petitioner as the same was passed in its peculiar facts. In *Anuradha Garg's* case (supra), the right of contract employee to make a request for transfer by transferring a regular employee was considered. In the instant case, the facts do not reveal as to whether respondent No.2 had made any request for her transfer or not. Even otherwise, since the petitioner himself had got his transfer from CHC, Gangath to CH, Indora in the recent past, on a D.O. Note, that too against a contract employee, petitioner is clearly estopped from raising such plea.

12. No tangible material has been placed on record by the petitioner to prove any *malafide* against respondent No.1. In fact, petitioner has deleted the name of respondent No.3 from the array of respondents vide order dated 13.07.2021.

13. In the light of the above discussion, we do not find any merit in the petition and the same is accordingly dismissed. Pending applications, if any, also stand disposed of.

BEFORE HON'BLE MR. JUSTICE MOHAMMAD RAFIQ, C.J., HON'BLE MR. JUSTICE SANDEEP SHARMA, J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Between:

1. SHIMLA COLLEGE OF EDUCATION,
   SHEETAL KUNJ, KAMLA NAGAR,

SANJAULI, SHIMLA THROUGH ITS
CHAIRMAN DR. R K SHANDIL.

2. RAMESHWARI TEACHER TRAINING
INSTITUTE, SARABAI, KULLU,
DISTT. KULLU, THROUGH ITS
CHAIRPERSON DR. USHA SHARMA.

3. TRISHA COLLEGE OF EDUCATION,
THAIN (JOL SAPPAR),
DISTT. HAMIRPUR, THROUGH ITS
CHAIRMAN MR. RAJIV SHARMA.

4. ABHILASHI D.EL.ED. TRAINING
INSTITUTE, NER CHOWK,
DISTT. MANDI THROUGH ITS
SECRETARY MR. NARENDER KUMAR.

5. KRISHMA EDUCATION CENTRE,
NER CHOWK, DISTT. MANDI,
THROUGH ITS SECRETARY
MR. LALIT PATHAK.

6. SVN COLLEGE OF EDUCATION,
TARKWARI (BHORANJ),
DISTT. HAMIRPUR, THROUGH
ITS CHAIRMAN SH. N K SHARMA.

7. HAMIRPUR COLLEGE OF
EDUCATION, RAM NAGAR,
HAMIRPUR DISTT. HAMIRPUR
THROUGH ITS CHAIRMAN
SH. KARNAL JAI CHAND.

8. VAID SHANKAR LAL MEMORIAL
COLLEGE OF EDUCATION,
CHANDI, DISTT. SOLAN
THROUGH ITS CHAIRMAN
MR. CHANDER MOHAN.

9. JAI BHARTI COLLEGE OF
EDUCATION, LOHARIN, DISTT.
HAMIRPUR, THROUGH ITS

CHAIRMAN MR. J. K. CHAUHAN.

10. JAGRITI TEACHER TRAINING
COLLEGE DEODHAR, MANDI,
DISTT MANDI THROUGH ITS
CHAIRMAN DR. VEENA RAJU.

11. VIJAY MEMORIAL COLLEGE
OF EDUCATION BHANGROTU,
DISTT. MANDI, THROUGH ITS
CHAIRMAN MR. GAURAV MARWAH.

12. RAJ RAJESHWARI COLLEGE OF
EDUCATION, CHORAB (BHOTA)
HAMIRPU2. R, THROUGH ITS
CHAIRMAN SH. MANJEET DOGRA.

13. KSHATRIYA COLLEGE OF EDUCATION,
KATHGARH ROAD, CHANOUR,
INDORA, DISTT. KANGRA THROUGH
ITS CHAIRMAN SH. SHATRUJEET.

14. KLB DAV COLLEGE FOR GIRLS,
PALAMPUR, DISTT. KANGRA,
THROUGH ITS DIRECTOR
DR. N. D. SHARMA.

15. KULLU COLLEGE OF EDUCATION,
VILLAGE BOHGANA P.O.
GARSA, DISTT. KULLU,
THROUGH ITS CHAIRMAN
MR. SURENDER SOOD.

16. R. C. COLLEGE OF EDUCATION,
DHANOTE, P.O. ADHWANI
(DEHRA) DISTT. KANGRA
THROUGH ITS CHAIRMAN
MR. JEEVAN.

17. SHIKSHA BHARTI INSTITUTE OF
EDUCATION, TRAINING &
RESEARCH, SAMOOR KHURD
(UNA) THROUGH ITS CHAIRMAN

MR. NIRMAL.

18. SHANTI COLLEGE OF EDUCATION,
KAILASH NAGAR, NAKROH
(UNA) THROUGH ITS CHAIRMAN
SH. VED PRAKASH.

...PETITIONERS

(BY SH. SHRAWAN DOGRA,
SENIOR ADVOCATE WITH
MR. TEJASVI DOGRA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH ITS PRINCIPAL
SECRETARY (EDUCATION)
TO THE GOVERNMENT OF
HIMACHAL PRADESH,
SHIMLA-171002, H.P.

2. DIRECTOR, ELEMENTARY
EDUCATION, GOVERNMENT
OF HIMACHAL PRADESH,
SHIMLA – 171 001, H.P.

3. H.P. BOARD OF SCHOOL
EDUCATION, DHARAMSHALA,
DISTRICT KANGRA, H.P.
THROUGH ITS SECRETARY.

...RESPONDENTS

(SMT. RITTA GOSWAMI, ADDITIONAL
ADVOCATE GENERAL FOR R-1 & 2,
SH. VIR BAHADUR VERMA,
ADVOCATE, FOR R-3)

2. CWP No. 2930 of 2018

Between:
JAI BHARTI EDUCATION
TRUST, JAI BHARTI COMPLEX,
LOHARIN, P.O. KHIAH,
TEHSIL AND DISTT. HAMIRPUR
(H.P.) THROUGH ITS SECRETARY
SH. UPENDER K. CHAUHAN.

....PETITIONER

(BY MS. SUMAN THAKUR,
ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH,
THROUGH ITS PRINCIPAL
SECRETARY (EDUCATION)
HIMACHAL PRADESH).

2. THE DIRECTOR,
DIRECTORATE OF
ELEMENTARY EDUCATION,
HIMACHAL PRADESH,
SHIMLA -1 (H.P.)

3. HIMACHAL PRADESH BOARD
OF SCHOOL EDUCATION,
THROUGH ITS SECRETARY,
DHARAMSHALA,
DISTT. KANGRA (H.P.)

4. THE STATE PROJECT
DIRECTOR (SSA/RMSA)
DIRECTORATE OF EDUCATION.

...RESPONDENTS

(SMT. RITTA GOSWAMI,
ADDITIONAL ADVOCATE
GENERAL, FOR R-1, 2 & 4,
SH. VIR BAHADUR VERMA,
ADVOCATE, FOR R-3)

CIVIL WRIT PETITION
No. 4113 of 2019
A/W CIVIL WRIT PETITION
No. 2930 of 2018
RESERVED ON:25.03.2022
PRONOUNCED ON:06.04.2022

Constitution of India, 1950- Article 226- Matters referred to the Full Bench in view of conflict of opinion between the Division Bench judgments- Held- Holding of common entrance test is not intended to ensure that all seats in the institutes are filled up but to ensure that excellence in standards of higher education is maintained and merit of the students is tested on certain parameters and this can never be cited as the reason for the seats remaining vacant- 2010 judgment of this Court in CWP No. 5728 of 2010, titled H.P. B.Ed College Association and ors. vs. State of H.P. & anr., supra does not lay down good law and later judgment of 2014 in CWP No. 7688 of 2013 titled HP Private Universities Management Association (H-PUMA) vs. State of Himachal Pradesh and others, supra, being in tune with the settled proposition of law on the subject, is correctly decided- Reference answered accordingly. (Para 24, 25)

Cases referred:

A.P.J. Abdul Kalam Technological University and another vs. Jai Bharath College of Management and Engineering Technology and others (2021) 2 SCC 564;

Christian Medical College, Vellore and others vs. Union of India and others (2014) 2 SCC 305;

Dr. Preeti Srivastava and another vs. State of M.P. and others (1999) 7 SCC 120;

Mahatma Gandhi University and another vs. Jikku Paul and others (2011) 15 SCC 242;

Modern Dental College and Research Centre and others vs. State of Madhya Pradesh and others (2016) 7 SCC 353;

P.A Inamdar and others vs. State of Maharashtra and others (2005) 6 SCC 537;

State of HP and others vs. Himachal Institute of Engg. and Technology, Shimla (1998) 8 SCC 501.;
State of T.N. and another vs. S.V. Bratheep (Minor) and others (2004) 4 SCC 513;
T.M.A. Pai Foundation and others vs. State of Karnataka and others (2002) 8 SCC 481;
Veterinary Council of India vs. Indian Council of Agricultural Research (2000) 1 SCC 750;
Visveswaraya Technological University & anr vs. Krishnendu Halder & ors (2011) 4 SCC 606;

These Civil Writ Petitions coming on for pronouncement of judgment this day, ***Hon'ble Mr. Justice Mohammad Rafiq,*** *passed the following:*

O R D E R

These matters have been referred to the Full Bench by order of the Division Bench dated 10.1.2020, in view of the conflict of opinion between the Division Bench judgment of this Court dated 20.9.2010 in *CWP No. 5728 of 2010,* titled *H.P. B.Ed College Association and ors. vs. State of H.P. & anr.,* and another Division Bench judgment dated 23.7.2014 in *CWP No. 7688 of 2013* titled *HP Private Universities Management Association (H-PUMA) vs. State of Himachal Pradesh and others* and *CWP No. 840 of 2014* titled *Private Technical Institution's Association Himachal Pradesh and others vs. State of Himachal Pradesh and others.*

2. The case as set up in the writ petition by the petitioners herein is that the Petitioners-Teachers Training Institutes are running diploma course in D.El.Ed., recognized by National Council of Teacher Training (NCTE), which is an Apex Regulatory Body created under NCTE Act. NCTE has framed Regulations 'National Council for Teachers Education (Recognition, Norms and procedure) Regulations, 2009' pertaining to the norms and standards for Diploma in Elementary Teacher Education Programme leading

to Diploma in Elementary Education (D.El.Ed)'. Clause 3 (1) of the said Regulations pertains to Intake, Eligibility and Admission Procedure while Clause 3 (2), as originally framed, provides that the candidates with at least 50% marks in the senior secondary (+2) or its equivalent examination are eligible for admission. Clause 3 (2) (b) provides that the reservation for SC/ST/OBC and other categories shall be as per the rules of the Central Government/State Government whichever is applicable and there shall be relaxation of 5% marks in favour of SC/ST/OBC and other categories of candidates. Clause 3 (3) provides that the admission shall be made on merit on the basis of marks obtained in the qualifying examination and/or in the entrance examination or any other selection process as per the policy of the State Government/UT Administration. The Regulations of 2009 were amended in 2018. Clause 3.2 and Clause 3.3 as amended in 2018, which pertain to eligibility and admission procedure, provide as under:-

> *"3.2 Eligibility:*
> *(a) Candidates with formal education from a 'School' as defined in clause (n) of section 2 of the Right to Education Act, 2009, with at least fifty percent marks in Senior Secondary or plus two examination or its equivalent, are eligible for admission.*
> *(b) The relaxation in percentage of marks in the Senior Secondary or plus two examination or its equivalent examination and in the reservation for Scheduled Caste or Scheduled Tribe or Other Backward Class or Persons With Disabilities and other categories* Apex *shall be as per the rules of the Central Government or State Government Territory Administration, whichever is applicable.*
>
> *3.3 Admission Procedure:*
> *(a) Admission shall be made on merit basis, considering marks obtained at Senior Secondary or plus two level or equivalent examination or in an entrance examination, or any other selection process as per the policy of the University or State Government or Union Territory Administration.*

(b) At the time of admission to the programme, the candidate must indicate the subject in which he or she proposes to take the B.A. or B.Sc. Degree. Admissions shall be on the basis of order of merit and availability of seats. Any change in the choice of subjects shall be made within ED TO one month from the date of commencement of the programme,"

3. The case of the Petitioner-Institutes is that they are running D.El.Ed. course as per the norms and standards prescribed by the NCTE for the last many years. All the Petitioner-Institutes are unaided and they are required to meet the requirements of infrastructure and faculty as per the norms set by NCTE and for the said purpose, the source of their income is directly dependent upon number of seats allowed to each institute keeping in view the available infrastructure and the fee chargeable for each seat as approved and authorized by the concerned fee regulating agency in the State. Though the norms and standards, as prescribed by NCTE, provide for the minimum eligibility qualification required for admission to D.El.Ed. course, yet the State Government in its wisdom has also decided to hold Common Entrance Test, which is conducted by respondent No. 3- H.P. Board of School Education, Dharamshala (hereinafter referred to as 'the Respondent-Board' for short). Such test was conducted on 4.8.2019 and its result was declared on 27.8.2019. The purpose of conducting entrance test is to short-list the large number of candidates applying for admission to the said course, so that a reasonable number of candidates are required to be called for three rounds of counselling. In the first round of counselling, the seats in all the Institutes imparting D.El. Ed. Courses are available and offered, including the Government Institutes and unaided private Institutes. In second round of counselling, the process is repeated out of the remaining persons in the list based on the above referred screening test and available unfilled seats in

different Institutions after first counselling are offered for admission. Similarly, the same course is repeated for the third round of counselling.

4. According to the Petitioner-Institutes, almost all the seats in the Government Institutes are filled at the end of the first counselling itself except a few seats reserved for particular category/sub-category for which no candidate is available in the merit list. The Common Entrance Test for all sanctioned seats, approximately 2450 seats (900 government institutes and 1550 in private Institutes), was successfully conducted by respondent No.3-Board. The first round and second round of counselling for admission to the course were conducted by Respondent-Board and even then also, all seats in all the Petitioner-Institutes could not be filled up. Respondent-Board had to conduct a third round of counselling to fill the seats that remained vacant after the first two rounds of counselling. At this stage, a decision was taken on 22.10.2019 in a meeting held under the Chairmanship of Education Minister, adversely affecting interest of the private unaided Institutions, including the Petitioner-Institutes. This meeting was held in purported compliance of the judgment rendered by this Court in *CWP No. 2648 of 2018* titled *Abhilashi JBT Training Institute and others vs. State of H.P.* While Agenda No. 1 in the meeting pertained to implementation of the judgment. Agenda Item No. 2 was regarding conversion of D. El. Ed. seats from reserved categories to General category and lowering of cut off marks whereunder it was decided that although seats from sub-category to main category could be allowed, e.g., Scheduled Caste-Ex-Servicemen to Scheduled Caste, but conversion from one main category to another main category should not be allowed; for example from Scheduled caste category to General category. The demand of lowering the cut off marks was not allowed. Agenda Item No. 3 of the meeting was for providing management quota seats to privately owned and managed unaided institutions. It was decided that the management quota may be allowed upto the extent of 10% but the same may be allowed to

be filled up from amongst the candidates who qualify the Common Entrance Test (CET) in order to maintain the quality and merit.

5. Shri Shrawan Dogra, the learned Senior Counsel for the petitioners has invited attention of this Court towards the table given in para 12 of the writ petition containing details of total sanctioned seats for D.El.Ed. course against the total number of seats filled after two rounds of counselling for the current academic session, showing that substantial number of seats are still remaining vacant. For the sake facility and reference, we deem it appropriate to reproduce the aforesaid table hereunder:-

Sr. No.	*Name of College*	*No. of Seats*	*Seats allotted by HPBOSE (R-3)*	*Vacant seats after second round counselling*
1.	*Shimla College of Education*	*100*	*66*	*34*
2.	*Rameshwari Teacher Training Institute*	*100*	*64*	*36*
3.	*Trisha College of Education*	*50*	*28*	*22*
4.	*Abhilashi D.EL.ED. Training Institute*	*50*	*38*	*12*
5.	*Krishma Education Centre*	*50*	*34*	*16*
6.	*SVN College of Education*	*50*	*24*	*26*
7.	*Hamirpur College of Education*	*50*	*28*	*22*
8.	*Vaid Shankar Lal Memorial College of Education*	*50*	*32*	*18*
9.	*Jai Bharti College of Education*	*50*	*30*	*20*
10.	*Jagriti Teacher Training College*	*50*	*32*	*18*
11.	*Vijay Memorial College of*	*50*	*33*	*17*

	Education			
12.	*Raj Rajeshwari College of Education*	*50*	*35*	*15*
13.	*Kshatriya College of Education*	*50*	*28*	*22*
14.	*KLB DAV College for Girls*	*50*	*34*	*16*
15.	*Kullu College of Education*	*50*	*28*	*22*
16.	*R.C. College of Education*	*50*	*26*	*24*
17.	*Shiksha Bharti Institute of Education Training & Research*	*50*	*28*	*22*
18.	*Shanti College of Education*	*50*	*31*	*19*

6. This Court in *CWP No. 5728 of 2010* titled *H.P. B.Ed. College Association vs. State* taking note of the fact that even though the University was authorized to conduct the counselling and allocate students to B.Ed. Colleges if the seats remain vacant and candidates are available otherwise than by counselling, observed that there is no point in putting any rigor or restriction in the matter of admission. This does not mean that the institutions should not comply with the statutory requirements in terms of the minimum qualification and age. However, the admission process was ordered to be completed on or before 8.10.2010 to ensure that the students complete the required number of teaching days prior to their examination. The learned Senior Counsel also placed reliance on the judgment rendered by this Court in *CWP No. 1992 of 2017* decided on 12.1.2018 titled *Archana Thakur vs. State of H.P. and others*. In that case, the Court taking note of the fact that seats available in various academic courses in colleges and universities are far below the number of applicants ordered that all efforts should be made to ensure that as far as possible, the seats are not wasted. Counselling was allowed with the direction to the respondents to impart

necessary instructions to the effect that vacant reserved seats meant for SC and ST categories in educational institutes including Schools, Colleges and Universities, which remain unfilled after exhausting the list of available and eligible SC and ST candidates, should be offered and filled from amongst eligible candidates from open category on the basis of merit. The Court took note of the clarification that in case any cut off limit has been fixed, then only those candidates of open category should be admitted against the vacant seats who have gained marks at par with the cut off limit.

7. Shri Shrawan Dogra, learned Senior Counsel for the petitioners argued that according to Entry 66 of List-1 (Union List) to the Constitution, it is the responsibility of the Apex Body like NCTE to ensure compliance regarding standards of education. No doubt, the State Government can exercise power vide Entry 25 of List-III (Concurrent List) of the Seventh Schedule to the Constitution to introduce additional and higher requirement, over and above the standards provided by NCTE, so as to achieve the standard of education. But in the facts of the case, decision of the State Government to hold the entrance examination in terms of its power recognized by Clause 3.3 of the Regulations of 2009 cannot be taken as introducing additional and higher standard of education because the Respondent-Board despite convening three rounds of counselling was unable to provide sufficient number of candidates and large number of seats from the approved intake of all the Petitioner-Institutes remained vacant. There is no reason not to allow the Petitioner-Institutes to fill up unfilled seats subject to candidates securing minimum marks of 50% in senior secondary and 10+2 examination or its equivalent, as envisaged in Clause 3 (3) and Clause 3 (2) of Regulations of 2009 with relaxation of 5% in favour of SC, ST/OBC candidates or persons with disability and other analogous categories. In the facts of the case, when the Respondent-Board has failed to provide sufficient number of candidates despite holding three successive counsellings, the entrance examination by

itself cannot be taken to introduce any additional and higher standards of education.

8. The learned Senior Counsel has argued that the reference Court has wrongly relied on the judgment passed in *HP Private Universities Management Association vs. State (CWP No. 7688 of 2013)* decided on 23.7.2014, wherein the dispute involved was entirely different. In that case, the Association of the private Universities, who are imparting technical education, approached this Court with a grievance that despite the H.P. University, holding several rounds of counselling on the basis of common entrance test conducted by it, it has failed to make sufficient number of candidates available for admission, resultantly a large number of seats remained vacant. The argument of the petitioners in that case before this Court was that the requirement of holding CET violates their right of occupation under Article 19 (1) (g) of the Constitution of India and this amounts to unreasonable restriction. Data was made available that large number of seats in government institutions as well as private IITs and NITS as also the government aided private Educational Colleges and private universities and technical institutions remained vacant despite holding a common entrance test. It was argued that right to admit students is guaranteed under Article 19 (1) (g) of the Constitution of India so far as private self financed unaided institutions are concerned and the restriction of taking students only on the basis of CET violates the freedom as despite empty seats, these institutions are unable to admit students. It was argued that right to establish includes the right to administer the institutions which broadly compromises the right to admit students, the right to set up a reasonable fee structure etc. The freedom of occupation to run an institution is rendered nugatory when the members of the institutions are not able to determine their own admissions policies and carry out their business in a manner they deem fit, of course, so long as the educational objectives of the

institution are not compromised. By mandating admissions through the CET, this freedom is violated when the institutions cannot choose their admissions policies and at the same time, the seats also remain vacant. Learned Senior Counsel therefore argued that there is in fact no difference of opinion between the judgment rendered in 2010 and another judgment in 2014, supra, as both turned out of their own peculiar facts. There was therefore no justification for the learned Division Bench for making reference to the Full Bench and there is no occasion for this Full Bench to answer the Reference. It is argued that 2010 judgment of this Court would squarely apply to the present matter and the law declared in 2014 judgment would not be applicable. The matter may, therefore, be sent back to the regular Bench for being decided accordingly.

9. Per contra, Ms. Ritta Goswami, learned Additional Advocate General argued that the very purpose of holding the entrance examination is to ensure that the merit in the matter of admission is not compromised at any stage of the process and that the power of the State Government on making admission only on the basis of entrance examination envisaged in Clause 3 (3) of the Regulation of 2009, cannot be questioned. It cannot be held that merely because in first, second and third rounds of counselling held by the Respondent-Board certain seats remained vacant, then the petitioners can be allowed to take students from the open market only on the basis of their securing; 50% in the general category and 45% marks in reserved category; obtained at Senior Secondary or plus two level or its equivalent examination. It is argued that by this method, even those candidates who might have appeared in the entrance examination but failed to secure minimum pass marks would be able to secure admission by indirect method solely on the basis of their securing 50% or 45% marks, as the case may be, in the senior secondary or plus two examination or its equivalent examination.

10. The learned Additional Advocate General argued that the judgment of this Court in *HP B. Ed. College Association vs. state (CWP*

5728/2010) was passed in a peculiar fact situation and it cannot be considered as a precedent to be followed in the present case. Relying on the judgment of this Court in CWP No. 7688 of 2013, titled *HP Private Universities Management Association vs. State,* learned Additional Advocate General argued that this Court therein held that:

> "*The equity and excellence in academic institutions have to be maintained and what better way can it be maintained than by ensuring that each students competes in the same examination i.e. CET so as to ensure that in terms of the access to education (equity) and merit of students (excellence) a common platform is that for admissions into professional colleges.*"

11. The learned Additional Advocate General also relied on the judgment of the supreme Court in ***Mahatma Gandhi University and another vs. Tikku Paul and others*** reported in ***(2021) 2 SCC 564*** and argued that despite many rounds of counsellings, seats remaining vacant, cannot provide a justification for doing away with the requirement of qualifying such entrance test for the purpose of admission and grant of admission merely on the basis of pass marks in the eligibility examination. Relying on the judgment of the Supreme Court in ***Visveswaraya Technological University & anr vs. Krishnendu Halder & ors*** reported in ***(2011) 4 SCC 606*** the learned Additional Advocate argued that the State cannot be faulted for such unfilled seats nor can quality of education be compromised by admitting the students even though they may not have either appeared or not qualified the entrance examination, only in order to fill up such vacant seats.

12. We have bestowed our anxious consideration to rival submissions and perused the material on record.

13. In *CWP No. 5728 of 2010,* titled *H.P. B.Ed College Association and ors. vs. State of H.P. & anr.,*the petitioners approached this Court with the

prayer that they may be permitted to fill up the seats left unfilled after last date of counseling held on 30.8.2010 of their own from any source, without insisting for participation in counseling held by respondent-University, for the sessions 2010-2011, on the basis of academic merit without compromising with the NCTE Norms. The University conducting centralized counseling for admitting the students had issued second advertisement for spot admission on 30.8.2009, permitting the students to apply afresh even if they had not applied earlier. Still there was no response. The case of the petitioners before this Court was that as far as the vacant seats are concerned against which candidates could not be provided by the University despite its best efforts, there is no restrictions for the petitioner to fill up the vacancies by not compromising with the minimum academic merit required for admission. This prayer was opposed by the University. Division Bench of this Court held that once admission has been closed in terms of the prospectus and since the efforts taken by the University itself for filling-up the vacant seats has not yielded any fruits and still seats remained vacant, there is no point in putting any rigor or restriction in the matter of admission. This does not mean that Institutions should not comply with statutory requirements in terms of the qualification and age. Hence, it will be open, in the above circumstances, for them to make admission against vacant seats subject to the fulfillment of the statutory condition regarding qualification and age.

14. The view contrary to the above was taken by another Division Bench of this Court in *HP Private Universities Management Association (H-PUMA) vs. State of Himachal Pradesh and others, supra.* Therein the petitioner approached this Court seeking mandamus to the respondent to allow the petitioner-institutions to fill up the seats which remained vacant after all rounds of counseling in various technical courses being offered by them after admitting the candidates provided by respondent No.2-University by initiating process in this regard simultaneously with the process of admission to be

initiated by the respondent No.2-University for making admissions to various technical courses in the institutions affiliated with it. Reference was made to Section 19 (1) of the AICTE Act which provides that one of the functions of the AICTE is to lay down norms and standards for courses, curricula, physical and instructional facilities staff pattern, staff qualifications, quality instructions, assessment and examinations. A Notification was issued by the respondent for admission to B. Tech. (direct entry/lateral entry), B-Pharma (direct entry/lateral entry), MCA, MBA, M. Tech and M-Pharma in the Government or private affiliating institutions of Himachal Pradesh Technical University, Hamirpur for the Session 2014-15. For admission to B.Tech. first year direct entry course, the criteria was merit of rank score obtained in JEE (Main)-2014 and the aspirant candidates were to apply only through JEE Main, 2014 online between 15.11.2013 to 26.12.2013 for appearing in the Joint Entrance Examination, 2014 to be conducted by JEE Apex Board. For the purpose of admission to B.Tech first year direct entry, the admission criteria was merit of score/marks obtained in a Common Entrance Test to be conducted by the respondent No.2-University. The desirous candidates were to apply on the prescribed application form available in the prospectus to be issued by the University in due course of time for appearing in the Common Entrance Test. For admission to MBA course, the criteria of admission was merit of rank/score obtained by the candidate in CMAT, 2014 to be conducted by AICTE, New Delhi. It was specifically stated that the university will not conduct any separate test for MBA, however, the candidates appearing in CMAT, 2014 will have to apply separately on the prescribed application form available in the prospectus to be issued by the University in due course of time for seeking admission in affiliated institutions of the University on the basis of marks of rank/score obtained in CMAT, 2014. For the purpose of admission to M.Tech Course, the admission was to be made on the basis of rank obtained by a candidates in GATE, 2014 to be conducted by IIT

Kharagpur. Similarly for the purpose of admission to M. Pharmacy, course, criteria for admission as mentioned in the aforesaid Notification was marks of rank/score obtained in GPAT, 2014 to be conducted by AICTE. For admission to MCA course, the criteria of admission was merit obtained in a Common Entrance Test to be conducted by HP University, Shimla.

15. The argument of the petitioner before this Court in the aforementioned case was that the condition of admitting the students in different technical courses on the basis of merits obtained in different entrance tests has not successfully worked on the ground as due to restriction on admitting students only through the merit list prepared consequent to CET, several seats remained vacant in the various courses for grant of CET qualified students. The members of the Association cannot admit students either on their own or through any other agency in view of the norms laid down by the respondents. Reliance was placed on the judgment of the Supreme Court in ***State of HP and others vs. Himachal Institute of Engg. and Technology, Shimla (1998) 8 SCC 501***. While taking note of the similar problem, the Supreme Court in that case required the learned counsel for the State to seek response of the State Government and place the same before it. Reliance was also placed on the judgment in ***T.M.A. Pai Foundation and others vs. State of Karnataka and others (2002) 8 SCC 481, P.A Inamdar and others vs. State of Maharashtra and others (2005) 6 SCC 537*** and ***Christian Medical College, Vellore and others vs. Union of India and others (2014) 2 SCC 305,*** to argue that it is well established that the right to admit students in different educational and medical institutions is an integral part of the right to administer and cannot be interfered with except in cases of maladministration and lack of transparency.

16. The Division Bench of this Court however, repelling all the aforestated arguments, and relying on the judgments of the Supreme Court in

Visveswaraiah Technological University and another vs. Krishnendu Halder and others (2011) 4 SCC 606 and ***Mahatma Gandhi University and another vs. Jikku Paul and others (2011) 15 SCC 242,*** in paras 20 and 23, held as under:

> *"20. In view of the various pronouncements of the Hon'ble Supreme Court, it can safely be concluded that in a right to establish an institution, inherent is the right to administer the same which is protected as part of the freedom of occupation under Article 19 (1) (g). Equally, at the same time, it has to be remembered that this right is not a business or a trade, given solely for the profit making since the establishment of educational institutions bears a clear charitable purpose. The establishment of these institutions has a direct relation with the public interest in creating such institutions because this relationship between the public interest and private freedom determines the nature of public controls which can be permitted to be "permissible". Even the petitioners concede that they have established the institutions to ensure good quality education and would not permit the standard of excellence to fall below the standard as may be prescribed by the State Government. The petitioners also conceded that the State makes it mandatory for them to maintain the standard of excellence in professional institutions. Thus, ensuring that admissions policies are based on merit, it is crucial for the State to act as a regulator. No doubt, this may have some effect on the autonomy of the private unaided institution but that would not mean that their freedom under Article 19 (1) (g) has in any manner been violated. The freedom contemplated under Article 19 (1) (g) does not imply or even suggest that the State cannot regulate educational institutions in the larger public interest nor it be suggested that under Article 19 (1) (g), only insignificant and trivial matters can be regulated by the State. Therefore, what clearly emerges is that the autonomy granted to private unaided institutions cannot restrict the State's authority and duty to regulate academic standards. On the other hand, it must be taken to be equally settled that the State's authority cannot obliterate or unduly compromise these institutions'*

> *autonomy. In fact it is in matters of ensuring academic standards that the balance necessarily tilts in favour of the State taking into consideration the public interest and the responsibility of the State to ensure the maintenance of higher standards of education.*
> *21 & 22. xxxx xxxx xxxxx xxxxxxx*
> *23. The State has power to regulate academic excellence particularly in matters of admissions to the institutions and, therefore, is competent to prescribe merit based admission processes for creating uniform admission process through CET. Any prayer for seeking dilution or even questioning the authority of the State to act an regulator is totally ill-founded in view of the various judicial pronouncements, particularly in Visveswaraiah Technological University (supra)and reiterated in Mahatma Gandhi University (supra)"*

17. The Supreme Court in ***Union of India vs Federation of Self-Financed Ayurvedic Colleges Punjab and others*** relying on its earlier judgment in ***Veterinary Council of India vs. Indian Council of Agricultural Research (2000) 1 SCC 750*** upheld the judgment of the Punjab and Haryana High Court. The petitioners therein had questioned validity of the Notification dated 7.12.2018 amending the Indian Medicine Central Council (Minimum Standard of Education in Indian Medicine) Regulations, 1986 whereby Clause 2 (d) was inserted providing for a uniform entrance examination for all the medical institutions at the undergraduate level, namely, the National Eligibility and Entrance Test (NEET) on the ground that it was beyond the rule making power conferred by the parent Act of 1970. The High Court vide its judgment dated 18.12.2019 not only dismissed the writ petition but also directed that the admissions granted to large number of students pursuant to its interim order, without clearing the NEET, subject to final outcome of the writ petition, are not liable to be saved as such the admission did not confer any right or equity in their favour. The Supreme Court relied on its judgment in ***Veterinary Council's case,*** which had upheld

the validity of similar regulations made by the Veterinary Council providing for admission on the basis of Common Entrance Examination and held that Veterinary Council was authorized to frame such regulations to prescribe standard of education and such powers includes power to make regulations relating to grant of admissions and veterinary qualifications. Upholding judgment of Punjab and Haryana High Court it was held that 2018 Regulations cannot be said to be *ultra vires* the Act. Argument was also made before the Supreme Court that large number of seats remained vacant and therefore, the insistence on minimum qualifying marks in the NEET would result in all such seats going waste. While repelling the argument, the Supreme Court saved the admission granted pursuant to interim order as one time measure. Following observation in para 12 of the judgment is worth quoting and we quote:

> *"12.Prescribing a minimum percentile for admission to the Under Graduate courses for the year 2019-2020 was vehemently defended by the Central Council and the Union of India by submitting that the minimum standards cannot be lowered even for AYUSH courses. We agree. Doctors who are qualified in Ayurvedic, Unani and Homeopathy streams also treat patients and the lack of minimum standards of education would result in half-baked doctors being turned out of professional colleges. Non-availability of eligible candidates for admission to AYUSH Under Graduate courses cannot be a reason to lower the standards prescribed by the Central Council for admission. However, in view of admission of a large number of students to the AYUSH Under Graduate courses for the year 2019-2020 on the strength of interim orders passed by the High Courts, we direct that the students may be permitted to continue provided that they were admitted prior to the last date of admission, i.e., 15th October, 2019. The said direction is also applicable to students admitted to Post Graduate courses before 31st October, 2019. This is a one-time exercise which is permitted in view of the peculiar circumstances. Therefore, this order shall not be treated as a precedent."*

18. The Constitution Bench of the Supreme Court in ***Dr. Preeti Srivastava and another vs. State of M.P. and others*** reported in ***(1999) 7 SCC 120*** while holding that the State was competent under List III Entry 25 of Seventh Schedule to control or regulate higher education subject to the standards so laid down by the Union of India, in the context of Post Graduate Medical Education under List-I Entry 66, of Seventh Schedule, held that State has competence to prescribe rules for admission to postgraduate medical courses so long as they are not inconsistent with or do not adversely affect the standards laid down by the Union of India or its delegate. Fixing of minimum qualifying marks for passing the entrance test for admission to postgraduate courses is concerned with the standard of postgraduate medical education. Once minimum standards are laid down, states are competent to prescribe any further qualifications for selecting better students as that would not adversely affect the standards so laid down It is for the Medical Council of India to determine reservation of seats, if any, to be made for SCs/STs/OBCs, the extent thereof and lowering of qualifying marks in their favour, on the basis of proper balancing of public interests. But the States are fully competent to control admission of postgraduate medical courses, provide for reservation of seats, and lay down criteria for shortlisting of eligible candidates for postgraduate courses under List III Entry 25 of Seventh Schedule in the absence of any Central Legislation on these aspects. Following observations of the Supreme in paras 35 and 36 are pertinent to quote:

> *"35. xxxx xxxx xxxxxx Both the Union as well as the States have the power to legislate on education including medical education, subject, inter alia, to Entry 66 of List-I which deals with laying down standards in institutions for higher education or research and scientific and technical institutions as also co-ordination of such standards. A State has, therefore, the right to control education*

including medical education so long as the field is not occupied by any Union Legislation. Secondly, the State cannot, while controlling education in the State, impinge on standards in institutions for higher education. Because this is exclusively within the purview of the Union Government. Therefore, while prescribing the criteria for admission to the institutions for higher education including higher medical education, the State cannot adversely affect the standards laid down by the Union of India under Entry 66 of List-I. Secondly, while considering the cases on the subject it is also necessary to remember that from 1977 education including, inter alia, medical and university education, is now in the Concurrent List so that the Union can legislate on admission criteria also. If it does so, the State will not be able to legislate in this field, except as provided in Article 254.

36. It would not be correct to say that the norms for admission have no connection with the standard of education, or that the rules for admission are covered only by Entry 25 of List III. Norms of admission can have a direct impact on the standards of education. Of course, there can be rules for admission which are consistent with or do not affect adversely the standards of education prescribed by the Union in exercise of powers under Entry 66 of List-I. For example, a State may, for admission to the post-graduate medical courses, lay down qualifications in addition to those prescribed under Entry 66 of List-I. This would be consistent with promoting higher standards for admission to the higher educational courses. But any lowering of the norms laid down can, and do have an adverse effect on the standards of education in the institutes of higher education. Standards of education in an institution or college depend on various factors. xxxx xxxxxxx"

19. The Constitution Bench of the Supreme Court in ***Modern Dental College and Research Centre and others vs. State of Madhya Pradesh and others (2016) 7 SCC 353*** considering the arguments advanced on behalf of the Private Educational Institution with regard to their right to freedom of occupation and autonomy, held as under:

"101. To our mind, Entry 66 in List I is a specific Entry having a very specific and limited scope. It deals with co-ordination and determination of standards in institution of higher education or research as well as scientific and technical institutions. The words 'co-ordination and determination of standards' would mean laying down the said standards. Thus, when it comes to prescribing the standards for such institutions of higher learning, exclusive domain is given to the Union. However, that would not include conducting of examination, etc. and admission of students to such institutions or prescribing the fee in these institutions of higher education, etc. In fact, such co-ordination and determination of standards, insofar as medical education is concerned, is achieved by Parliamentary legislation in the form of Medical Council of India Act, 1956 and by creating the statutory body like Medical Council of India (for short, 'MCI') therein. The functions that are assigned to MCI include within its sweep determination of standards in a medical institution as well as co-ordination of standards and that of educational institutions. When it comes to regulating 'education' as such, which includes even medical education as well as universities (which are imparting higher education), that is prescribed in Entry 25 of List III, thereby giving concurrent powers to both Union as well as States. It is significant to note that earlier education, including universities, was the subject matter of Entry 11 in List II 5 . Thus, power to this extent was given to the State Legislatures. However, this Entry was omitted by the Constitution (Forty-Second Amendment) Act, 1976 with effect from July 03, 1977 and at the same time Entry 25 in List II was amended 6 . Education, including university education, was thus transferred to Concurrent List and in the process technical and medical education was also added. Thus, if the argument of the appellants is accepted, it may render Entry 25 completely otiose. When two Entries relating to education, one in the Union List and the other in the Concurrent List, co-exist, they have to be read harmoniously. Reading in this manner, it would become manifest that when it comes to co-ordination and laying down of standards in the higher education or research and scientific and technical institutions, power rests with the Union/Parliament to the exclusion of the State Legislatures. However, other facets of education,

including technical and medical education, as well as governance of universities is concerned, even State Legislatures are given power by virtue of Entry 25. The field covered by Entry 25 of List III is wide enough and as circumscribed to the limited extent of it being subject to List I Entries 63, 64, 65 and 66.

102. Most educational activities, including admissions, have two aspects: The first deals with the adoption and setting up the minimum standards of education. The objective in prescribing minimum standards is to provide a benchmark of the caliber and quality of education being imparted by various educational institutions in the entire country. Additionally, the coordination of the standards of education determined nationwide is ancillary to the very determination of standards. Realising the vast diversity of the nation wherein levels of education fluctuated from lack of even basic primary education, to institutions of high excellence, it was though desirable to determine and prescribe basic minimum standards of education at various levels, particularly at the level of research institutions, higher education and technical education institutions. As such, while balancing the needs of States to impart education as per the needs and requirements of local and regional levels, it was essential to lay down a uniform minimum standard for the nation. Consequently, the Constitution makers provided for Entry 66 in List I with the objective of maintaining uniform standards of education in fields of research, higher education and technical education.

103 to 105 xxxxxxxxx xxxxx xxxxxx

106.In view of the above, there was no violation of right of autonomy of the educational institutions in the CET being conducted by the State or an agency nominated by the State or in fixing fee. The right of a State to do so is subject to a central law. Once the notifications under the Central statutes for conducting the CET called 'NEET' become operative, it will be a matter between the States and the Union, which will have to be sorted out on the touchstone of Article 254 of the Constitution. We need not dilate on this aspect any further."

21.In ***State of T.N. and another vs. S.V. Bratheep (Minor) and others (2004) 4 SCC 513*** the Supreme Court held that the standards

prescribed by the State Government should not be adverse to or lower than those prescribed by the AICTE but the State Government can prescribe standards higher or additional to those prescribed by the AICTE. The State Government can prescribe certain percentage of marks in related subjects higher than the minimum in the qualifying examination prescribed by AICTE, as eligibility criterion for appearing in common entrance test. Following observations in paras 9, 10 and 12 are relevant and we quote:

> *"9. Entry 25 of List III and Entry 66 of List I have to be read together and it cannot be read in such a manner as to form an exclusivity in the matter of admission but if certain prescription of standards have been made pursuant to Entry 66 of List I, then those standards will prevail over the standards fixed by the State in exercise of powers under Entry 25 of List III insofar as they adversely affect the standards laid down by the Union of India or any other authority functioning under it. Therefore, what is to be seen in the present case is whether the prescription of the standards made by the State Government is in any way adverse to, or lower than, the standards fixed by the AICTE. It is no doubt true that the AICTE prescribed two modes of admission - One is merely dependent on the qualifying examination and the other dependent upon the marks obtained at the Common Entrance Test. The appellant in the present case prescribed the qualification of having secured certain percentage of marks in the related subjects which is higher than the minimum in the qualifying examination in order to be eligible for admission. If higher minimum is prescribed by the State Government than what had been prescribed by the AICTE, can it be said that it is in any manner adverse to the standards fixed by the AICTE or reduces the standard fixed by it? In our opinion, it does not. On the other hand, if we proceed on the basis that the norms fixed by the AICTE would allow admission only on the basis of the marks obtained in the qualifying examination the additional test made applicable is the common entrance test by the State Government. If we proceed to take the standard fixed by the AICTE to be the common entrance*

test then the prescription made by the State Government of having obtained certain marks higher than the minimum in the qualifying examination in order to be eligible to participate in the common entrance test is in addition to the common entrance test. In either event, the streams proposed by the AICTE are not belittled in any manner. The manner in which the High Court has proceeded is that what has been prescribed by the AICTE is inexorable and that that minimum alone should be taken into consideration and no other standard could be fixed even the higher as stated by this Court in Dr. Preeti Srivastava's case. It is no doubt true as noticed by this Court in Adhiyaman's case that there may be situations when a large number of seats may fall vacant on account of the higher standards fixed. The standards fixed should always be realistic which are attainable and are within the reach of the candidates. It cannot be said that the prescriptions by the State Government in addition to those of AICTE in the present case are such which are not attainable or which are not within the reach of the candidates who seek admission for engineering colleges. It is not very high percentage of marks that has been prescribed as minimum of 60% downwards, but definitely higher than the mere pass marks. Excellence in higher education is always insisted upon by series of decisions of this Court including Dr. Preeti Srivastava's case. If higher minimum marks have been prescribed, it would certainly add to the excellence in the matter of admission of the students in higher education.

10.Argument advanced on behalf of the respondents is that the purpose of fixing norms by the AICTE is to ensure uniformity with extended access of educational opportunity and such norms should not be tinkered with by the State in any manner. We are afraid, this argument ignores the view taken by this Court in several decisions including Dr. Preeti Srivastava's case that the State can always fix a further qualification or additional qualification to what has been prescribed by the AICTE and that proposition is indisputable. The mere fact that there are vacancies in the colleges would not be a matter, which would go into the question of fixing the standard of education. Therefore, it is difficult to subscribe to the view that once they are qualified under the criteria fixed by the AICTE they should

be admitted even if they fall short of the criteria prescribed by the State. The scope of the relative entries in the Seventh Schedule to the Constitution have to be understood in the manner as stated in the Dr. Preeti Srivastava's case and, therefore, we need not further elaborate in this case or consider arguments to the contrary such as application of occupied theory no power could be exercised under Entry 25 of List III as they would not arise for consideration.

11. xxxx xxxxxxxx

12. One other argument is further advanced before us that the criteria fixed by the AICTE was to be adopted by the respective colleges and once such prescription had been made it was not open to the Government to prescribe further standards particularly when they had established the institutions in exercise of their fundamental rights guaranteed under Article 19 of the Constitution. However, we do not think this argument can be sustained in any manner. Prescription of standards in education is always accepted to be an appropriate exercise of power by the bodies recognising the colleges or granting affiliation, like AICTE or the University. If in exercise of such power the prescription had been made, it cannot be said that the whole matter has been foreclosed."

21. The Supreme Court in A***.P.J. Abdul Kalam Technological University and another vs. Jai Bharath College of Management and Engineering Technology and others (2021) 2 SCC 564*** held that the State will provide standards in institutions for higher education or research and scientific and technical institutions, having regard to Entry 66 of List I, and it would be struck down as unconstitutional only if the same is found to be so heavy or devastating as to wipe out or appreciably abridge Central field and not otherwise. When State Act is in aid of parliamentary Act, the same would not entrench upon latter. Thus University/State Government concerned certainly has the power to fix higher eligibility criteria than the minimum prescribed by Central Governing Body/AICTE, to achieve excellence in education. Though the Universities cannot dilute standards prescribed by

AICTE, but power of universities to prescribe enhanced norms and standards cannot be doubted.

22. In ***Visveswaraiah Technological University's*** case supra, the Supreme Court was dealing with the similar issue and held that the very fact that there are unfilled seat in a particular year, does not mean that in that year, the eligibility criteria fixed by the State/University would cease to apply or that the minimum eligibility criteria suggested by AICTE alone would apply. Unless and until the State or the University chooses to modify the eligibility criteria fixed by them, they will continue to apply in spite of the fact there are vacancies or unfilled seats in any year. The main object of prescribing eligibility criteria is not to ensure that all seats in colleges are filled, but to ensure that excellence in standards of higher education is maintained. Fixing higher standards, marginally higher than the minimum, is seldom the reason for seats in some colleges remaining vacant or unfilled during a particular year. The primary reason for seats remaining vacant in a State is the mushrooming of private institutions in higher education. This is so in several States in regard to teachers training institutions, dental colleges or engineering colleges. The second reason is that certain disciplines are going out of favour with students because they are considered to be no longer promising or attractive for future career prospects. The third reason is the bad reputation acquired by some institutions due to lack of infrastructure, bad faculty and indifferent teaching. Paras 13 to 15 of the judgment are apt in the facts of the present case to quote:-

> *"13. The object of the State or University fixing eligibility criteria higher than those fixed by AICTE, is two fold. The first and foremost is to maintain excellence in higher education and ensure that there is no deterioration in the quality of candidates participating in professional Engineering courses. The second is to enable the State to shortlist the applicants for admission in an effective manner,*

when there are more applicants than available seats. Once the power of the State and the Examining Body, to fix higher qualifications is recognized, the rules and regulations made by them prescribing qualifications higher than the minimum suggested by AICTE, will be binding and will be applicable in the respective state, unless the AICTE itself subsequently modifies its norms by increasing the eligibility criteria beyond those fixed by the University and the State. It should be noted that the eligibility criteria fixed by the State and the University increased the standards only marginally, that is 5% over the percentage fixed by AICTE. It cannot be said that the higher standards fixed by the State or University are abnormally high or unattainable by normal students, so as to require a downward revision, when there are unfilled seats. During the hearing it was mentioned that AICTE itself has revised the eligibility criteria. Be that as it may.

14. The respondents (colleges and the students) submitted that in that particular year (2007-2008) nearly 5000 engineering seats remained unfilled. They contended that whenever a large number of seats remained unfilled, on account of non-availability of adequate candidates, para 41(v) and (vi) of Adhiyaman would come into play and automatically the lower minimum standards prescribed by AICTE alone would apply. This contention is liable to be rejected in view of the principles laid down in the Constitution Bench decision in Dr. Preeti Srivastava and the decision of the larger Bench in S.V. Bratheep which explains the observations in Adhiyaman in the correct perspective. We summarise below the position, emerging from these decisions :

> *(i) While prescribing the eligibility criteria for admission to institutions of higher education, the State/University cannot adversely affect the standards laid down by the Central Body/AICTE. The term 'adversely affect the standards' refers to lowering of the norms laid down by Central Body/AICTE. Prescribing higher standards for admission by laying down qualifications in addition to or higher than those prescribed by AICTE, consistent with the object of promoting higher standards and excellence in higher education, will not be considered as*

adversely affecting the standards laid down by the Central Body/AICTE.

(ii) The observation in para 41(vi) of Adhiyaman to the effect that where seats remain unfilled, the state authorities cannot deny admission to any student satisfying the minimum standards laid down by AICTE, even though he is not qualified according to its standards, is not good law.

(iii) The fact that there are unfilled seats in a particular year, does not mean that in that year, the eligibility criteria fixed by the State/University would cease to apply or that the minimum eligibility criteria suggested by AICTE alone would apply. Unless and until the State or the University chooses to modify the eligibility criteria fixed by them, they will continue to apply in spite of the fact that there are vacancies or unfilled seats in any year. The main object of prescribing eligibility criteria is not to ensure that all seats are in colleges are filled, but to ensure that excellence in standards of higher education is maintained.

(iv) The State/University (as also AICTE) should periodically (at such intervals as they deem fit) review the prescription of eligibility criteria for admissions, keeping in balance, the need to maintain excellence and high standard in higher education on the one hand, and the need to maintain a healthy ratio between the total number of seats available in the state and the number of students seeking admission, on the other. If necessary, they may revise the eligibility criteria so as to continue excellence in education and at the same time being realistic about the attainable standards of marks in the qualifying examinations.

15. The primary reason for seats remaining vacant in a state, is the mushrooming of private institutions in higher education. This is so in several states in regard to teachers training institutions, dental colleges or engineering colleges. The second reason is certain disciplines going out of favour with students because they are considered to be no longer promising or attractive for future career prospects. The third reason is the bad reputation acquired by some institutions due to lack of infrastructure, bad faculty and indifferent teaching. Fixing of higher standards, marginally higher than the

minimum, is seldom the reason for seats in some colleges remaining vacant or unfilled during a particular year. Therefore, a student whose marks fall short of the eligibility criteria fixed by the State/University, or any college which admits such students directly under the management quota, cannot contend that the admission of students found qualified under the criteria fixed by AICTE, should be approved even if they do not fulfil the higher eligibility criteria fixed by the State/University.

23. In view of the afore-discussed law on the subject, we are not inclined to countenance the argument that inability of the Respondent-Board to provide sufficient number of students for admission to the D.El.Ed course to the Petitioner-Institutes despite three rounds of counseling, Common Entrance Test in facts like these cannot be taken as introducing additional, further and higher norms for maintaining the standards of education. The power of the State in introducing such norms by means of holding common entrance test to admit the students in the above mentioned course, over and above the norms provided by the NCTE, can be traced to Entry 25 List III of the Seventh Schedule to the Constitution. Holding of common entrance test is not intended to ensure that all seats in the institutes are filled up but to ensure that excellence in standards of higher education is maintained and merit of the students is tested on certain parameters. This can never be cited as the reason for the seats remaining vacant. Merely because certain seats have remained vacant with the Petitioner-Institutes does not justify allowing them to admit students by adhering to only minimum eligibility criteria prescribed by the NCTE. In our considered view, the introduction of the common entrance test by the State, as has also been envisaged even in Clause 3.3 (a) of the Regulation of 2009, is certainly intended to introduce additional, further and higher standards of education. If what the Petitioner-Institutes are arguing is accepted, that would mean that the candidates who secure 50% or 45% marks in Senior Secondary or Plus 2 examination, as the case may be, should be straightaway permitted to be admitted to D.EL.Ed. course even

though either they did not choose to appear or if appeared, failed to qualify the common entrance test. In either eventuality, such candidates do not deserve to be admitted as both situations would be attributable to them. No fault for that reason can be found with the policy of the State in insisting on their qualifying the common entrance test for admission. It is upto the State to decide whether or not to do away the requirement of holding common entrance test and if so, whether the factum of seats against the approved intake of the Petitioner-Institutes remaining unfilled, should be taken as a relevant criteria for arriving at that decision. Primary reason of the seats remaining vacant in all these Institutes is mushrooming growth of such private institutions and because degrees or diplomas they award are going out of favour with the students as they are no longer considered promising or attractive for future career prospects and also because of the fact that some of these institutions enjoy bad reputation due to lack of infrastructure, bad faculty and indifferent teachings. We, in taking this view, are fortified from the judgment of the Supreme Court in ***Visveswaraiah Technological University's*** case, supra.

25. In view of the position of law, as discussed above, we are inclined to hold that the 2010 judgment of this Court in *CWP No. 5728 of 2010,* titled *H.P. B.Ed College Association and ors. vs. State of H.P. & anr.,supra* does not lay down good law and later judgment of 2014 in *CWP No. 7688 of 2013* titled *HP Private Universities Management Association (H-PUMA) vs. State of Himachal Pradesh and others, supra,* being in tune with the settled proposition of law on the subject, is correctly decided.

26. The question referred to the Full Bench is answered accordingly. Let these matters be laid before the appropriate Division Bench for further proceedings.

BEFORE HON'BLE MR. JUSTICE MOHAMMAD RAFIQ, C.J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Between:-

(1) CWP NO. 1306 OF 2021

1. STATE OF HIMACHAL PRADESH
THROUGH SECRETARY (HOME) TO THE
GOVT. OF HIMACHAL PRADESH, SHIMLA, H.P.

2. THE DIRECTOR GENERAL OF POLICE,
SHIMLA-2, H.P.

3. THE SUPERINTENDENT OF POLICE,
DISTRICT SHIMLA, H.P.

......PETITIONERS

(BY SH. VIKAS RATHORE, ADDITIONAL ADVOCATE GENERAL)

AND

1. HARISH KUMAR S/O SHRI PURAN CHAND,
RESIDENT OF VILLAGE SINVI,
POST OFFICE KANGAL, TEHSIL KUMARSAIN,
DISTRICT SHIMLA, H.P.

.....RESPONDENT

(BY SH. SURENDER SHARMA, ADVOCATE)

2. SHRI JITENDER VERMA S/O SHRI OM PRAKASH VERMA,
ROLL NO. 964164, CHEST NO. 6429.

3. SHRI RAKESH SHARMA S/O SH. BHARAT RAM,
ROLL NO. 961825, CHEST NO. 2309.

4. SHRI NARENDER KUMAR S/O SHRI YATTAN CHAND,
ROLL NO. 965648, CHEST NO. 9145.

(ALL C/O SUPERINTENDENT OF POLICE,
DISTRICT SHIMLA, H.P.)

.....PROFORMA RESPONDENTS

(NEMO)

(2) CWP NO. 1536 OF 2021

1. STATE OF HIMACHAL PRADESH
THROUGH SECRETARY (HOME) TO THE
GOVT. OF HIMACHAL PRADESH, SHIMLA, H.P.

2. THE DIRECTOR GENERAL OF POLICE,
SHIMLA-2, H.P.

3. THE SUPERINTENDENT OF POLICE,
DISTRICT SHIMLA, H.P.

......PETITIONERS

(BY SH. VIKAS RATHORE, ADDITIONAL ADVOCATE GENERAL)

AND

1. LAXMI KANT S/O SHRI LEELA DASS
AGED 28 YEARS RESIDENT OF VILLAGE HALOT
POST OFFICE GHAINI, TEHSIL SUNI,
DISTRICT SHIMLA, H.P.

.....RESPONDENT

(BY SH. SURENDER SHARMA, ADVOCATE)

2. SHRI JITENDER VERMA S/O SHRI OM PRAKASH VERMA,
ROLL NO. 964164, RESIDENT OF VILLAGE SHILRI,
POST OFFICE MEHLI, TEHSIL AND DISTRICT SHIMLA.

3. SHRI KAILASH SHARMA S/O SHRI LEELA DUTT,
ROLL NO. 964446, RESIDENT OF VILLAGE KHEEL,

POST OFFICE JUNGA, THANA DHALI,
DISTRICT SHIMLA.

4. SHRI RAKESH SHARMA S/O SH. BHARAT RAM,
ROLL NO. 961825, RESIDENT OF VILLAGE MAJHOUR,
POST OFFICE TIYALI, TEHSIL THEOG,
DISTRICT SHIMLA.

5. SHRI NARENDER KUMAR S/O SHRI YATTAN CHAND,
ROLL NO. 965648, RESIDENT OF PHANU,
POST OFFICE KANGAL, TEHSIL KUMARSAIN,
DISTRICT SHIMLA.

(ALL C/O SUPERINTENDENT OF POLICE,
DISTRICT SHIMLA, H.P.)

.....PROFORMA RESPONDENTS

(NEMO)

(3) CWP NO. 1537 OF 2021

1. STATE OF HIMACHAL PRADESH
THROUGH SECRETARY (HOME) TO THE
GOVT. OF HIMACHAL PRADESH, SHIMLA, H.P.

2. THE DIRECTOR GENERAL OF POLICE,
SHIMLA-2, H.P.

3. THE SUPERINTENDENT OF POLICE,
DISTRICT SHIMLA, H.P.

......PETITIONERS

(BY SH. VIKAS RATHORE, ADDITIONAL ADVOCATE GENERAL)

AND

1. PARVEEN SAGAR SON OF SHRI GIAN CHAND
RESIDENT OF VILLAGE DAMARI,
POST OFFICE KUMARSAIN, TEHSIL KUMARSAIN,

DISTRICT SHIMLA, H.P.

.....RESPONDENT

(BY SH. SURENDER SHARMA, ADVOCATE)

2. SHRI DAULAT RAM, S/O SHRI CHET RAM,
ROLL NO. 962176, CHEST NO. 3094.

3. SHRI RAVINDER KUMAR,S/O SHRI MED RAM,
ROLL NO. 964326, CHEST NO. 6631.

4. SHRI HARISH BANDHU, S/O SHRI DEEN BANDHU,
ROLL NO. 962375, CHEST NO. 3338.

5. SHRI VIRENDER KUMAR, S/O SHRI KAILASH CHAND,
ROLL NO. 964373 CHEST NO. 6691.

6. SHRI DEEPAK KUMAR, S/O SHRI RAMESH CHAND,
ROLL NO. 965741 CHEST NO. 9275.

(ALL C/O SUPERINTENDENT OF POLICE,
DISTRICT SHIMLA, H.P.)

.....PROFORMA RESPONDENTS

(NEMO)

(4) COPCT NO. 366 OF 2020

LAXMI KANT S/O SHRI LEELA DASS
AGED 28 YEARS RESIDENT OF VILLAGE HALOT
POST OFFICE GHAINI, TEHSIL SUNI,
DISTRICT SHIMLA, H.P.

......PETITIONER

(BY SH. SURENDER SHARMA, ADVOCATE)

AND

1. SH. PRABODH SAXENA,

PRINCIPAL SECRETARY (HOME) TO THE
GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA-2.

2. SH. SITA RAM MARDI,
DIRECTOR GENERAL OF POLICE,
HIMACHAL PRADESH, SHIMLA-2.

3. SH. OMAPATI JAMWAL,
SUPERINTENDENT OF POLICE, SHIMLA,
DISTRICT SHIMLA, HIMACHAL PRADESH.

4. SH. MANOJ KUMAR,
PRINCIPAL SECRETARY (HOME)
TO THE GOVT. OF H.P.

5. SH. SANJAY KUNDU,
DIRECTOR GENERAL OF POLICE,
H.P. SHIMLA-2.

6. SH. MOHIT CHAWLA,
SUPERINTENDENT OF POLICE,
SHIMLA, H.P.

.....RESPONDENTS/CONTEMNORS

(BY SHRI VIKAS RATHORE, ADDITIONAL
ADVOCATE GENERAL)

(5) COPCT NO. 392 OF 2020

HARISH KUMAR S/O SH. PURAN CHAND,
RESIDENT OF VILLAGE SINVI,
POST OFFICE KANGAL, TEHSIL KUMARSAIN,
DISTRICT SHIMLA, HIMACHAL PRADESH.

......PETITIONER

(BY SH. SURENDER SHARMA, ADVOCATE)

AND

1. SH. PRABODH SAXENA,
PRINCIPAL SECRETARY (HOME) TO THE
GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA-2.

2. SH. SITA RAM MARDI,
DIRECTOR GENERAL OF POLICE,
HIMACHAL PRADESH, SHIMLA-2.

3. SH. OMAPATI JAMWAL,
SUPERINTENDENT OF POLICE, SHIMLA,
DISTRICT SHIMLA, HIMACHAL PRADESH.

4. SH. MANOJ KUMAR,
PRINCIPAL SECRETARY (HOME)
TO THE GOVERNMENT OF
HIMACHAL PRADESH,SHIMLA-2.

5. SH. SANJAY KUNDU,
DIRECTOR GENERAL OF POLICE,
HIMACHAL PRADESH, SHIMLA-2.

6. SH. MOHIT CHAWLA,
SUPERINTENDENT OF POLICE,
SHIMLA, DISTT. SHIMLA, HIMACHAL PRADESH.

.....RESPONDENTS/CONTEMNORS

(BY SHRI VIKAS RATHORE, ADDITIONAL
ADVOCATE GENERAL)

(6) <u>COPCT NO. 397 OF 2020</u>

PARVEEN SAGAR S/O SHRI GIAN CHAND
RESIDENT OF VILLAGE DAMARI,
POST OFFICE KUMARSAIN, TEHSIL KUMARSAIN,
DISTRICT SHIMLA, H.P.

......PETITIONER

(BY SH. SURENDER SHARMA, ADVOCATE)

AND

1. SH. PRABODH SAXENA,
PRINCIPAL SECRETARY (HOME) TO THE
GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA-2.

2. SH. SITA RAM MARDI,
DIRECTOR GENERAL OF POLICE,
HIMACHAL PRADESH, SHIMLA-2.

3. SH. OMAPATI JAMWAL,
SUPERINTENDENT OF POLICE, SHIMLA,
DISTRICT SHIMLA, HIMACHAL PRADESH.

4. SH. MANOJ KUMAR,
PRINCIPAL SECRETARY (HOME)
TO THE GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA-2.

5. SH. SANJAY KUNDU,
DIRECTOR GENERAL OF POLICE,
HIMACHAL PRADESH, SHIMLA-2.

6. SH. MOHIT CHAWLA,
SUPERINTENDENT OF POLICE,
SHIMLA, DISTT. SHIMLA, HIMACHAL PRADESH.

.....RESPONDENTS/CONTEMNORS

(BY SHRI VIKAS RATHORE, ADDITIONAL
ADVOCATE GENERAL)

CIVIL WRIT PETITION
NO. 1306 of 2021 a/w
CWP NOS. 1536 & 1537 OF 2021,
COPCT NOS. 366, 392 AND 397 OF 2020
RESERVED ON:23.03.2022
DELIVERED ON:02.04.2022

Constitution of India, 1950- Article 226- Recruitment and appointment of Police Constables- Eligibility criteria- State has assailed the judgment passed

by the Ld. Tribunal- Held- It is well settled that the eligibility of a candidate is to be adjudged as on the last date of receipt of application for the post in question in terms of relevant advertisement and the prevailing service rules- Judgment passed by the Ld. Tribunal is in accordance with law- Writ petitions are accordingly disposed of. [Para 5(v)]

Cases referred:

High Court of Hyderabad and Another vs P. Murali Mohana Reddy and Others (2019) 3 SCC 672;

Suman Devi and Others vs. State of Uttarakhand and Others (2021) 6 SCC 163;

This petition coming on for pronouncement of judgment this day, ***Hon'ble Ms. Justice Jyotsna Rewal Dua,*** *passed the following:*

O R D E R

CWP Nos. 1306, 1536 & 1537 of 2021

Common questions of law and facts are involved in these petitions, therefore, they are taken up together for disposal.

For convenience, facts of CWP No. 1306 of 2021 are being considered hereinafter.

2. Vide order dated 27.11.2017 passed in O.A. No. 3226 of 2016 and other connected matters, learned erstwhile H.P. State Administrative Tribunal allowed the petition filed by respondent No. 1 holding that cut-off date mentioned in the advertisement for determining the eligibility of candidates applying against Home Guards Volunteers quota, could not be subsequently altered by the State. Direction was issued to the competent authority to consider the respective cases of three original applicants (respondents No. 1 in all the three writ petitions) for appointment as Police Constables in their respective categories against each of the post ordered to be kept vacant vide interim orders passed in the petitions. Aggrieved, the State has assailed the order passed by the Tribunal.

3. **Facts** may be briefly noted hereinafter:-

3(i) A recruitment notice for filling-up various posts of Police Constables was issued by the State on 10.2.2016. As per the recruitment notice, the applications on the prescribed format could be submitted by the eligible candidates on or before 15.3.2016. In district Shimla, around which the present three petitions revolve, total 142 posts of Police Constables (Male) were to be filled-up on the basis of this recruitment notice. Out of 142 posts of Constables (Male), 22 posts were reserved for Home Guard Volunteers having rendered two years continuous service as Home Guard Volunteers as on 15.3.2016. Further, out of 22 posts reserved for Home Guard Volunteers, 12 were meant for General, 5 for Scheduled Castes, 1 for Scheduled Tribes and 4 for Other Backward Class categories. The recruitment notice also mentioned that there will be no carryover of the vacancies meant for Home Guards if eligible and suitable candidates are not available in any recruitment year. It was stipulated that in such a case the vacancies will be filled from the candidates of respective main categories.

3(ii) Respondent No. 1 was recruited in Himachal Pradesh Home Guards on 3.11.2011. He fulfilled the requisite criteria of having rendered two years service in the Home Guards as on 15.3.2016 i.e. the cut-off date given in the recruitment notice. Being eligible and qualified for the post in question, respondent No. 1 applied for the post of Home Guard General category in district Shimla.

3(iii) Respondent No. 1 qualified the Physical Efficiency Test on 21.4.2016. He was also successful in the written examination. He appeared for personality test-cum-interview on 23.6.2016. Private respondents No. 4 to 6 (as impleaded in the original application) also appeared in the interview. On coming to know that the private respondents were the persons who had not completed two years service as Home Guard Voluneteer by 15.3.2016, the cut-off date prescribed in the recruitment notice, respondent No. 1 sent an SMS to the Superintendent of Police, Shimla on 16.6.2016. In response to the SMS

sent by respondent No. 1, a return message was received by him from the S.P. Shimla that his SMS had been further forwarded for inquiry.

3(iv) Categorywise list of provisionally selected candidates for the post of Police Constables (Male) was notified on 24.6.2016 wherein names of private respondents figured as provisionally selected candidates. Respondent No. 1's name was not there in this list. After the issuance of provisional select list of the candidates, respondent No. 1 came to know that the criteria of having rendered two years Home Guard Volunteers service as on 15.3.2016 was modified by the department by way of notification dated 14.3.2016. As per this notification, the cut-off date for counting two years service for Home Guard Volunteers was modified from earlier existing 15.3.2016 to 1.7.2016.

Aggrieved against selection of private respondents No. 4 to 6 and also aggrieved against change of cut-off date for counting two years service of Home Guard Volunteers/change of eligibility criteria for Home Guard Volunteers, respondent No. 1 filed Original Application No. 3226 of 2016 before the erstwhile H.P. State Administrative Tribunal. This original application alongwith other two connected matters [(i) O.A. No. 3262 of 2016, titled Praveen Sagar vs. State of H.P. & others, (ii) O.A. No. 3307 of 2016, titled Laxmi Kant vs. State of H.P. & others] were allowed by the Tribunal on 27.11.2017. The competent authority was directed to consider the cases of the three original applicants for appointment as Police Constables (Male) in their respective categories against the posts kept vacant for them vide interim orders passed in their respective petitions by taking into consideration only those candidates who had fulfilled all the eligibility conditions including the qualifying service as on 15.3.2016 in terms of recruitment notice dated 10.2.2016.

Feeling aggrieved, the State has assailed the judgment passed by the learned Tribunal.

4. Learned Additional Advocate General appearing for the petitioner submitted that the cut-off date for satisfying the qualifying service criteria laid down in the recruitment notice for candidates applying as Home Guard Volunteers, was changed to have a wider choice of selection in public interest. Respondent No. 1 had participated in the selection process subsequent to the alteration in the change of cut-off date. After participating in the selection process without challenging the variations in the notification and the selection process, it was not open for the respondent to challenge the same. It was further submitted that the Selection Committee after evaluation of the record and performance of the candidates in the interview had selected the candidates for the post of Police Constables purely on merit basis.

Learned counsel for respondent No. 1 submitted that as per the prescribed eligibility criteria, the condition of having rendered two years of service as Home Guard Volunteers was to be seen as on last date for submission of application forms i.e. 15.3.2016. Respondents No. 1 had participated in the selection process on the basis of the criteria laid down in the recruitment notice dated 10.2.2016. On becoming aware of participation of private respondents, who did not have requisite two years service as Home Guard Volunteers, either on the last date of submission of the application forms or even on the date of interviews, the respondent No. 1 raised this issue by sending SMS (enclosed alongwith the original application) to the Superintendent of Police, Shimla on 16.6.2016. Respondent No. 1 also received a return message from the Superintendent of Police, Shimla (enclosed with the original application) to the effect that his SMS had been sent to the concerned quarters for inquiry. Despite this, no concrete action was taken for redressal of his grievances compelling him to file the original application in the learned Tribunal. Learned counsel argued that it was not open to the State to change the selection criteria midway the selection process. Learned counsel prayed for dismissal of all the three writ petitions.

5. We have heard learned counsel for the parties and gone through the record.

5(i) It is not in dispute that the recruitment notice for the posts in question was issued on 10.2.2016. As per the recruitment notice, the applications were to be submitted by the eligible candidates on or before 15.3.2016. Out of total 142 posts of Police Constables (Male) to be filled in district Shimla, 22 posts were meant for Home Guard Volunteers. According to the prescribed eligibility criteria, the candidates applying under the Home Guard Volunteers quota were required to fulfill the condition of having rendered two years of service as such. The fulfillment of this condition was to be seen as on the last date of submission of application forms i.e. 15.3.2016. It was by way of a communication dated 14.3.2016 that the State modified the cut-off date for counting two years continuous service of Home Guard Volunteers from 15.3.2016 to 1.7.2016.

5(ii) Respondent No. 1 participated in the selection process in terms of the recruitment notice dated 10.2.2016. His contention that he became aware of the change in the cut-off date for determining the eligibility criteria for candidates applying under Home Guard Volunteers quota only a few day prior to participating in the personality test-cum-interview appears to be a bonafide submission. This is for the fact that as per the pleadings made in the original application, respondent No. 1 on becoming of aware of participation in the selection process of certain candidates (impleaded as private respondents in the original application), who did not have the requisite two years service as Home Guard Volunteers in terms of recruitment notice dated 10.2.2016, had sent an SMS to the Superintendent of Police, Shimla on 16.6.2016. In response, he received a return message from the S.P. Shimla that his message had been further forwarded for inquiry. Text of these messages has been placed on record. Interviews were conducted by the respondent much later i.e. on 23.6.2016. Therefore, the contention of the State that respondent No. 1

having participated in the selection process without any demur, cannot assail the same, is not sustainable. Respondent No. 1 had lodged his protest against change of cut off date for determining the qualifying service of candidates applying under Home Guards Volunteers quota.

5(iii) The earlier prescribed cut off date for determining qualifying service was changed from 15.3.2016 to 1.7.2016 on 14.3.2016. There is nothing on record even to indicate as to whether this communication dated 14.3.2016 altering the cut off date for determining the qualifying service of candidates applying under Home Guards quota was even given due publicity or not.

5(iv) Changing the cut-off date from 15.3.2016 to 1.7.2016 for the purposes of counting two years continuous service of Home Guard Volunteers actually amounts to change in the eligibility/selection criteria. No justification whatsoever has been accorded by the State for changing the selection criteria. It is not even the case of the State that it did not receive adequate number of applications against the Home Guard Volunteers quota. The cut off date for applying under the recruitment notice has remained 15.3.2016 for all the candidates including the candidates applying under Home Guard Volunteers quota. Satisfaction of eligibility criteria was required to be determined as on 15.3.2016 i.e. the last date for applying. It could not have been altered only for candidates applying under Home Guards Volunteers quota. The cut off date for applying had not changed. The assigned reasons of expanding the zone of consideration for changing the selection criteria is not palatable. Prejudice has been caused to respondent No. 1 by expansion of zone of consideration by changing the selection criteria for one category of the applicants.

5(v) It is well settled that the eligibility of a candidate is to be adjudged as on the last date of receipt of application for the post in question in terms of relevant advertisement and the prevailing service rules. A person

who acquires prescribed qualification subsequent to the prescribed date cannot be considered. An advertisement issued 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. [Refer:(***2021) 6 SCC 163***, titled ***Suman Devi and Others*** vs. ***State of Uttarakhand and Others***].

Appointments are to be made in terms of stipulations contained in the advertisement. Though such terms can be changed but that has to be done in terms of the statutory rules. [Refer: ***(2019) 3 SCC 672,*** titled ***High Court of Hyderabad and Another*** vs ***P. Murali Mohana Reddy and Others***].

In the instant case, recruitment notice was issued on 10.2.2016. As per this notice, last date for applying for posts of Constable for different categories was 15.3.2016. There was no change in this cut off date for any of the categories including the category of Home Guards Volunteers. Possession of requisite qualifying service for candidates applying under Home Guards Volunteers quota was to be seen as on last date for applying i.e. 15.3.2016. Determination of eligibility criteria as on 1.7.2016 when last date of applying was 15.3.2016, defies logic. We have otherwise also held that the change in the date of determination of eligibility criteria for the candidates belonging to Home Guards quota was not in consonance with law.

In view of above discussion, the judgment passed by the learned Tribunal directing the State to consider the respective cases of respondent No. 1 in all the three petitions for appointment as Police Constables in their respective categories against each of the post ordered to be kept vacant vide interim orders passed in these petitions, by taking into consideration only those who had fulfilled the eligibility conditions as on 15.3.2016 is in accordance with law. State is directed to complete this exercise within a period of two months from today. We also do not find any reason to interfere

with factual finding of learned Tribunal regarding eligibility of one of the private respondents i.e. Sh. Ravinder Kumar. However, considering the fact that the other private respondents impleaded in these three petitions though were selected and appointed as Police Constables on the basis of altered selection criteria, but have now been serving on the posts in question for the last six years, they, therefore, shall not be disturbed. We also clarify that in the peculiar facts and circumstances, the benefit of this judgment shall remain confined only to the three original applicants who had timely approached the erstwhile learned H.P. State Administrative Tribunal by filing original applications.

The writ petitions are accordingly disposed of, so also the pending miscellaneous application(s), if any.

COPCT Nos. 366, 392 & 397 of 2020

In view of the observations made in the writ petitions, these contempt petitions are ordered to be closed and notices issued to the respondents are dropped at this stage.

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

Between:-

1. SH. YASH PAL SINGH S/O SHRI OM PRAKASH,
R/O SAMNOS (197), DISTT. MANDI, H.P. PIN
175039 AGED ABOUT 29 YEARS.
QUALIFICATION M.S. PHARMA (MEDICINAL
CHEMISTRY), PURSUING PhD OCCUPATION-NIL.

2. SH. DINESH KUMAR S/O SH. PIARE LAL, R/O
DOHAN JAJWIN, TEHSIL JHANDUTTA, DISTT.
BILASPUR, H.P. PIN 174017 AGED ABOUT
33 YEARS. QUALIFICATION M.S. PHARMA

(PHARMACOLOGY AND TOXICOLOGY),
PhD.

3. SH. AMIT KUMAR S/O SH. RAM DASS, R/O
VPO UTPUR, TEHSIL AND DISTT. HAMIRPUR,
H.P. PIN 177022 AGED ABOUT 28 YEARS.
QUALIFICATION M.S. PHARMA (MEDICINAL
CHEMISTRY).

4. SH. PANKAJ JINNTA S/O SH. KAMAL SINGH,
R/O VILLAGE KANDA, ARHAL (74/1) DISTT.
SHIMLA, H.P. PIN 171223 AGED ABOUT
26 YEARS. QUALIFICATION M.S. PHARMA
(NATURAL PRODUCTS)

5. SH. LACHHMAN SINGH S/O SH. CHET RAM
R/O BARA (14) DISTT. MANDI, HIMACHAL
PRADESH PIN 175025 AGED ABOUT 29 YEARS,
(MEDICINAL CHEMISTRY), PURSUING PhD.

6. MS. CHETNA JHAGTA W/O SH. KUWANT SINGH,
R/O VILLAGE AND POST OFFICE GILTARI, TEHSIL
JUBBAL, DISTT. SHIMLA, H.P. AGED ABOUT 29
YEARS. QUALIFICATION M.S. PHARMA (MEDICINAL
CHEMISTRY).

……PETITIONERS.

(BY SH. RAJESH KUMAR PARMAR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH
PRINCIPAL SECRETARY DEPARTMENT OF
(VOCATIONAL EDUCATION), H.P. SECRETARIAT,
SHIMLA 171002 (H.P.)

2. HIMACHAL PRADESH PUBLIC SERVICE COMMISSION,
NIGAM VIHAR, SHIMLA, H.P. PIN 171001 THROUGH

ITS SECRETARY.

3. THE DIRECTOR (TECHNICAL EDUCATION), DIRECTORATE OF TECHNICAL EDUCATION, VOCATIONAL & INDUSTRIAL TRAINING HIMACHAL PRADESH, SUNDERNAGAR, DISTT. MANDI, HIMACHAL PRADESH-175018.

4. THE UNION OF INDIA, THROUGH PRINCIPAL SECRETARY, MINISTRY OF EDUCATION.

5. NATIONAL INSTITUTE OF PHARMACEUTICAL EDUCATION AND RESEARCH (NIPER) S.A.S NAGAR SECTOR 67, S.A.S NAGAR (MOHALI)-160062, PUNJAB (INDIA), PHONE: +91-172-2214682-87, FAX:+ 91-172-2214692.

6. THE CHAIRMAN, UNIVERSITY GRANTS COMMISSION (UGC) BAHADUR SHAH ZAFAR MARG, NEW DELHI-110002. 011-23604446, 011-23604200 EMAIL-WEBMASTER.UGC.HELP@ GMAIL.COM

7. THE PHARMACY COUNCIL OF INDIA, THROUGH ITS REGISTRAR CUM SECRETARY, NBCC CENTRE, 3RD FLOOR PLOT NO.2, COMMUNITY CENTRE, MAA ANANDAMAI MARG, OKHLA PHASE-1, NEW DELHI-110020.

8. THE DIRECTOR, All INDIA COUNCIL FOR TECHNICAL EDUCATION, NELSON MANDELA MARG, VASANT KUNJ, NEW DELHI-110 070 PH. NO.: 011-29581000, WEBSITE: WWW.AICTE-INDIA.ORG.

……RESPONDENTS.

(SH.ASHOK SHARMA, ADVOCATE GENERAL WITH SH. RAJINDER DOGRA, SENIOR

ADDITIONAL ADVOCATE GENERAL, MR.
VINOD THAKUR, MR. SHIV PAL MANHANS,
ADDITIONAL ADVOCATE GENERALS,
MR. YUDHBIR SINGH THAKUR AND
MR. BHUPINDER THAKUR, DEPUTY ADVOCATE
GENERALS, FOR THE RESPONDENTS-STATE).

(SH. VIKRANT THAKUR, ADVOCATE, FOR
RESPONDENT-2).

(SH. BALRAM SHRMA, ASGI, FOR RESPONDENTS-4
AND 7)

(SH. B.C.NEGI, SENIOR ADVOCATE WITH
SH. NITIN THAKUR, ADVOCATE, FOR RESPONDENT-5)

(SH. PRASHANT SHARMA, ADVOCATE,
FOR RESPONDENT-6).

(SH. VIJAY K. ARORA, ADVOCATE, FOR
RESPONDENT-8)

CIVIL WRIT PETITION
No.1691 of 2021
Reserved on :19.04.2022
Decided on: 23.04.2022

Constitution of India, 1950- Article 226- **National Institute of Pharmaceutical Education Research Act, 1998**- Sections 7, 32- Question raised as to whether M.S. Pharm Degree awarded by the National Institute of Pharmaceutical Education and Research (NIPER) is equivalent to the degree of M. Pharma issued by the other Universities-

a) Held- The State much less the Equivalence Committee constituted by the State cannot hold to the contrary as the Pharmacy Council of India like all other Councils like Bar Council, Medical Council etc. is the apex body and its directions and instructions are binding on all bodies, institutions etc. offering courses in pharmacy, irrespective whether it is a Bachelor Course or a Master Course. (Para 17)

b) Mere nomenclature of the Degree cannot by itself be a ground to hold the Degree of M. Pharma to be not equivalent to the Degree of M.S. Pharm. (Para 18)
Writ petition allowed.

This petition coming on for admission after notice this day, ***Hon'ble Mr. Justice Tarlok Singh Chauhan,*** *passed the following:*

O R D E R

The moot question raised in this petition is whether M.S. Pharm Degree awarded by the National Institute of Pharmaceutical Education and Research (NIPER) is equivalent to the degree of M. Pharma issued by the other Universities?

2. The petitioners are Post Graduate in the Pharmacy i.e. M.S. Pharm/Master of Science in Pharmacy from the NIPER.

3. The respondent No.2. i.e. Himachal Pradesh Public Service Commission issued an advertisement No. 3 of 2020 inviting online applications to various posts including Assistant Professor (Pharmacy)(in Item No. II). The essential qualification for the posts of Assistant Professor (Pharmacy) was mentioned as Bachelor and Master's Degrees in Pharmacy. The petitioners applied for the post of Assistant Professor (Pharmacy), but 2nd respondent did not consider the case only because of the nomenclature of their Degree i.e. M.S. (Pharm) instead of M. Pharma.

4. Earlier also, on 12.07.2017, the respondents had issued similar advertisement with the same qualification and there also the candidature of some of the candidates possessing M.S. (Pharm) was rejected only because they were not having M.Pharma Degree. Those candidates approached the Himachal Pradesh State Administrative Tribunal by filing various petitions and the Tribunal vide interim order directed the respondents to allow the petitioners to appear in the recruitment process.

5. Being aggrieved by the advertisement, the petitioners approached this Court by filing CWP No. 1001/2020. However, it was found that the petition was pre-mature because at that relevant time the candidature of the petitioners had not been rejected. However, it was in March, 2021 that the petitioners learnt that the final rejection list had been prepared by 2nd respondent whereby it had rejected the candidature of the petitioners making it clear that M.S. (Pharm) Degree granted by the NIPER was not equivalent to the M. Pharma Degree.

6. Aggrieved by the rejection of the candidature, the petitioners have now approached this Court by filing the instant petition for grant of the following substantive reliefs:-

> "(i) (a) by way of writ of certiorari, order or directions the rejection list issued by the respondent No.2 may very kindly be quashed and set aside.
>
> (b) by way of writ of certiorari, order or directions the Letter No. EDN(TE) E(1)9/2020 dated 15 February 2021 issued by the respondent No.3, wherein held that, M.S. Pharm degree awarded by the NIPER is not equivalent to the M. Pharma, may very kindly be quashed and set aside.
>
> (c) by way of the writ of Mandamus, order or directions, respondents may be directed to consider the M.S. Pharm Degree by the NIPER equivalent to the M. Pharma degree and allow petitioners to appear in the Recruitment Process for the posts of Assistant Professor (Pharmacy) and join the job thereafter;
>
> (d) Respondent State may very kindly be directed to amend Advertisement (**Annexure P-1)** by adding M.S. Pharma as one of the Essential Qualification like M. Pharma for the recruitment of the post of Assistant Professor (Pharmacy) within short stipulated time;
>
> (e) by way of the writ, order or directions, Respondent No.2 may be directed to add M.S. Pharma as one of he option in the online application/website in future."

7. The Department of Vocational Education and Director, Technical Education were arrayed as respondents No.1 and 3 and they have filed a joint reply wherein it is contended that the NIPER is an institute of national importance for pharmacy education, especially research work and offers a variety of courses of Pharmacy education as listed below:-

1. M.S. Pharm.
2. M.Tech (Pharma).
3. M.Pharm.
4. MBA (Pharma Management)

8. It is averred that the petitioners by way of present petition want to equate the M. Pharma with M.S. Pharm, whereas, both are separate courses run at the institute from where the petitioners have done M.S. Pharm i.e. NIPER and as these are separate courses in a institute, there cannot be any equation between the courses. The petitioners are trying to mislead the Court, whereas, it was in the full knowledge of the petitioners that the M.Pharma is not equivalent with M.S. Pharm.

9. It is further averred that in compliance to the orders passed by this Court earlier on 18.03.2021 in CWP No. 1691 of 2021 whereby they had been directed to consider the case of equivalence of the petitioners, the whole case had been placed by the Secretary, Himachal Pradesh Public Service Commission i.e. respondent No.2 to the Government. Thereafter, the Director, Technical Education, took up the matter with the Equivalence Committee and accordingly the matter was re-examined. After a careful examination of the whole issue by the Committee, it came to the conclusion that the M. Pharma and M.S. Pharm Courses cannot be considered equivalent for the post of Assistant Professor(Pharmacy). Similar, is the stand taken by 2nd respondent.

10. Even though, AICTE has filed a short counter-affidavit, however, the same is not relevant for our purpose.

11. The NIPER has been arrayed as respondent No.5 and has filed its separate reply and it is necessary to reproduce paras-10 and 11 of the reply which read as under:-

> "10-11. That the contents of this para in so far as it relates to the provisions of the NIPER Act are concerned, the same are matter of record. However, it is respectfully submitted that the answering respondent i.e. National Institute of Pharmaceutical Education & Research (NIPER), SAS Nagar is the first National Level Institute in Pharmaceutical Sciences with a proclaimed objective of becoming a centre of excellence for advanced studies and research in pharmaceutical sciences. The Government of India has declared the answering respondent as an 'Institute of National Importance'. It is an autonomous body set up under the aegis of Department of Pharmaceuticals, Ministry of Chemicals and Fertilizers, Government of India. The Institute is conceived to provide leadership in pharmaceutical sciences and related areas not only within the country,, but also to the countries in South East Asia, South Asia and Africa. The answering respondent is a member of Association of Indian Universities and Association of Commonwealth Universities. As per the NIPER ACT, 1998, NIPER can award Masters' and Doctoral degree. NIPER (Degree of Masters' and Doctor of Philosophy) Ordinances, 2005 published in the official gazette of India provides details of Masters' and Ph.D. programmes offered by the answering respondent.

It is further respectfully submitted that the M.Pharm. and M.S. Pharm. are equivalent degrees as clear from the following:-

4. M.Pharm. and M.S. (Pharm.) are post graduate degrees. Both are two yearprogramme (one year course work and one year dissertation (research project).

5. For both of them, the B. Pharm. Degree is essential qualification. NIPER admits students for their masters' program who qualify both Graduate Pharmacy Aptitude Test (GPAT) and NIPER–JEE entrance based on merit.

6. In both the cases, advanced learning in pharmaceutical sciences are included.

7. The syllabus in both cases is quite comparable. Minor differences arise only due to the specialization, but not due to the overall contents.

8. The equivalence between M.Pharm. and M.S. (Pharm.)has been recognized by Pharmacy Council of India (PCI).

9. The equivalence between M.Pharm. and M.S. (Pharm) has been recognized by the AICTE (All India Council of Technical Education).

10. NIPERs are offering M.Tech (Pharm.), M. Pharm., M.S. (Pharm.) degrees. This is only to distinguish that these three degrees are offered by various departments with research focus on pharmaceutical technology, pharmacy service and pharmaceutical science respectively.

11. The advertisement from the Himachal Pradesh Public Service Commission is referring to 'Bachelor and Masters' degree in Pharmacy is essential. Indeed the M.S. (Pharm.) degree being offered by NIPERs is a Master's degree in Pharmaceutical Sciences.

12. It is essential to consider the term 'M.S. (Pharm.)' as one unit rather than considering the term 'MS' independent of '(Pharm.)' separately."

12. The Pharmacy Council of India has filed a short-affidavit-cum-reply, the relevant portion whereof reads as under:-

"It is respectfully submitted that

c) NIPER vide letter dated 05.05.2014 approached the PCI to approve the MS qualification.

d) 256th EC (June, 2014 under Item No. 83) and 97th CC (20th and 21st June, 2015 under Item No. 290) has clarified that only following qualifications acquired from an institution approved by PCI u/s 12 of the Pharmacy Act are approved for the purpose of registration as a pharmacist under the Pharmacy Act-

E. D.Pharm.

F. B.Pharm.

G. Pharm. D.

In view of it , the said MS Programmes are not approved by the PCI either for the purpose of registration as a pharmacist under the Pharmacy Act to practice the profession OR any other purpose like teaching in approved pharmacy institutions.

*except academic programmes offered by NIPER under the NIPER Act, 1998 where admission qualification/eligibility criteria to such academic programmes is Bachelor of Pharmacy (B. Pharm) from an institution approved by PCI u/s 12 of the Pharmacy Act, 1948."

13. We have heard the learned counsel for the parties and have gone through the records of the case.

14. At the outset, we need to notice that NIPER as per its Constitution is an institute of national importance established by the National Institute of Pharmaceutical Education and Research Act, 1998 (13 of 1998) passed by the Parliament with the goal to promote quality and excellence in Pharmacy Education and Research. Sections 7(i) to (iii) and 32 of the NIPER Act read as under:-

"**Section 7: The functions of the Institute shall be-**

1. To nurture and promote quality and excellence in Pharmaceutical education and research.
2. To concentrate on courses leading to master's degree, doctoral and post doctoral courses and research in Pharmaceutical education.
3. To hold examinations and grant degree.

Section32: "Notwithstanding anything contained in the University Grants Commission Act, 1956 or in any other law for the time being in force, the Institute shall have power to grant degrees and other academic distinctions and titles under this Act."

15. It is not in dispute that the Pharmacy Council of India is a statutory body constituted under the Pharmacy Act, 1948, with an objective of regulating the education and practice of profession of pharmacy in the country in order to ensure that only qualified and skilled manpower takes care of the health of the society. It is in order to fulfill the objectives of Pharmacy Act that Pharmacy Council of India has been vested with certain powers and responsibilities, some of which are enumerated below:-

> "i. To prescribe minimum standard of education required for qualifying as a pharmacist i.e. framing of Education Regulations prescribing the conditions to be fulfilled by the institutions seeking approval of the PCI for imparting education in pharmacy. (Ref.: Section 10 of the Pharmacy Act).
>
> ii. To ensure uniform implementation of the educational standards through out the country. (Ref.: Section 10 of the Pharmacy Act)
>
> iii. To approve the courses of study and examination for pharmacists i.e. approval of the academic training institutions providing pharmacy courses (Ref.: Section 12 of the Pharmacy Act).
>
> iv) To withdraw approval , if the approved course of study or an approved examination does not continue to be in conformity with the educational standards prescribed by the PCI. (Ref.: Section 13 of the Pharmacy Act)
>
> v) To approve qualifications granted outside the territories to which the Pharmacy Act extends i.e. the approval of foreign qualifications (Ref.: Section 14 of the Pharmacy Act).
>
> vi). To maintain Central Register of Pharmacists (Ref.: Section 15 A of the Pharmacy Act).
>
> The Pharmacy Act empowers the PCI to regulate the pharmacy education to qualify for registration as a pharmacist by way of section 10 of the Pharmacy Act which empowers the PCI to frame Education Regulations prescribing minimum standards of education required for qualification as a

pharmacist. The PCI frames Education Regulations which are revised from time to time depending upon the need of the profession. Presently, the following Education Regulations are in vogue:

(i) Education Regulations, 1991.
(ii) Pharm. D. Regulations, 2008.
(iii) The master of Pharmacy (M. Pharm) Course Regulations, 2014.

(iv) The Bachelor of Pharmacy (B. Pharm) Course Regulations, 2014.

(v) The Bachelor of Pharmacy (practice) Regulations, 2014.

(vi) The Pharmacy Practice Regulations, 2015.
(vii) The Minimum Qualification for Teachers in Pharmacy Institutions Regulations, 2014.

In exercise of the powers conferred by Sections 10 and 18 of the Pharmacy Act, 1948 (8 of 1948), the Pharmacy Council of India, with the approval of the Central Government framed the "Minimum Qualification for Teachers in Pharmacy Institutions Regulations, 2014" which prescribe the minimum qualifications and experience for appointment as a teacher for teaching various courses in pharmacy i.e. Diploma in Pharmacy (D.Pharm), Bachelor of Pharmacy (B.Pharm), Master of Pharmacy (M.Pharm) and Doctor of Pharmacy (Pharm. D). After framing of the above regulations the minimum qualification of teachers in pharmacy is now governed by "Minimum Qualification for Teachers in Pharmacy Institutions Regulations, 2014". The objective of "Minimum Qualification for Teachers in Pharmacy Institutions Regulations, 2014" as laid down under regulation 2 is to ensure appointment of pharmacy teachers with prescribed qualifications and experience in various departments of a pharmacy institution imparting diploma, graduate and post-graduate education to maintain the minimum standard of teaching. Accordingly, these regulations

prescribe the following as statutory requirements in respect of various courses-

-name of the post.

-academic qualification.

-teaching/research/industry experience."

16. As per the reply filed by the Pharmacy Council of India, the relevant portion whereof stands extracted above, the academic programmes offered by the NIPER under the NIPER Act, 1998, are duly recognized by Pharmacy Council of India.

17. Once that be so, obviously, the State much less the Equivalence Committee constituted by the State cannot hold to the contrary as the Pharmacy Council of India like all other Councils like Bar Council, Medical Council etc. is the apex body and its directions and instructions are binding on all bodies, institutions etc. offering courses in pharmacy, irrespective whether it is a Bachelor Course or a Master Course. The Pharmacy Council of India, as observed above, is the apex body to consider and provide for recognition of the pharmacy qualifications granted by Pharmacy Colleges/Institutes etc. Similarly, it is a parent body and only a competent body for the purpose of pursuing pharmacy education at all levels. Once, that be so, obviously, the last say, in matters of recognition and equivalence of degrees offered by the various institutes is the Pharmacy Council of India.

18. In addition thereto, the mere nomenclature of the Degree cannot by itself be a ground to hold the Degree of M.Pharma to be not equivalent to the Degree of M.S. Pharm.

19. In view of the aforesaid discussion, the writ petition is allowed and the Letter No. EDN(TE) E(1)9/2020 dated 15.2.2021 is quashed and set

aside. The parties are left to bear their own costs. Pending applications, if any, also stand disposed of.

BEFORE HON'BLE MS. JUSTICE SABINA, J. AND HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

<u>Between:-</u>

SHRI CHET RAM (AGED ABOUT 58 YEARS) SON OF LATE SHRI KANWAL RAM, PRESENTLY WORKING AS CLERK IN THE OFFICE OF SUB DIVISIONAL MAGISTRATE (SDM), RAMPUR BUSHAHR, DISTRICT SHIMLA, H.P. PERMANENT RESIDENT OF VILLAGE NEHRA, POST OFFICE BHALI, TEHSIL RAMPUR BUSHAHR, DISTRICT SHIMLA, H.P.

....PETITIONER.

(BY MR. BRAHAMA NAND SHARMA, ADVOCATE)

AND

1. MANAGING DIRECTOR, H.P. STATE COOPERATIVE BANK LIMITED, THE MALL, SHIMLA;

2. COLLECTOR (RECOVERY), H.P. STATE COOPERATIVE BANK LIMITED, KASUMPTI, SHIMLA-9;

3. H.P. STATE COOPERATIVE BANK LIMITED, THROUGH ITS DULY AUTHORISED BRANCH MANAGER, RAMPUR BUSHAHR, P.O. AND TEHSIL RAMPUR BUSHAHR, DISTRICT SHIMLA, H.P.

4. THE SUB DIVISIONAL MAGISTRATE (CIVIL), SUB DIVISION-RAMPUR BUSHAHR, DISTRICT SHIMLA, H.P.

5. SHRI SATYA PRAKASH SON OF SHRI LATE GANGA RAM, RESIDENT OF VILLAGE AND POST OFFICE BATARI, TEHSIL KUMARSAIN, DISTRICT SHIMLA, H.P.

....RESPONDENTS.

(MR. SUSHANT VIR SINGH, ADVOCATE, FOR RESPONDENTS NO.1 TO 3.

MR. RANJAN SHARAMA, ADDITIONAL ADVOCATE GENERAL FOR RESPONDENT NO.4.)

CIVIL WRIT PETITION
No. 1596 of 2022
Decided on: 06.04.2022

Constitution of India, 1950- Article 226- **Indian Contract Act, 1872**- Section 137- Petitioner has sought writs in the nature of certiorari to quash memos and mandamus directing the respondents to release retiral benefits- Petitioner a Government employee stood guarantor of one Satya Prakash in respect of repayment of his loan to respondent Bank- Satya Parkash retired and loan remained unpaid and the same is being recovered from the retiral benefits of the petitioner- Held- The liability of the surety is co-extensive with that of principal debtor, unless it is otherwise provided by the contract- Petition dismissed. (Para 7, 8)

This petition coming on for admission before notice this day, ***Hon'ble Mr. Justice Satyen Vaidya,*** *passed the following:-*

ORDER

Heard.

2. By way of instant petition, the petitioner has prayed for following reliefs:-

> *"i) That a writ in the nature of certiorari may kindly be issued quashing letter/Memo dated 10.03.2022 (Annexure P-2) and Memo dated 14.03.2022 (Annexure P-3) and respondents may kindly be directed to recover*

the amount from the pension of the petitioner or by way of other mode.
ii) That a writ in the nature of mandamus may kindly be issued directing the respondents to release all retiral benefits of the petitioner and pension without any delay and in case any delay caused to release or pay the pension, the defaulting official/officer may kindly be dealt with in accordance with law."

3. Petitioner is a government servant and is due to retire on 30th April, 2022. In 2009, petitioner stood guarantee for one Satya Prakash in respect of repayment of his loan of Rs.2,00,000/- to respondent No.3-bank. Satya Prakash retired in the year 2014 and the loan obtained by Satya Prakash remained unpaid.

4. Respondent No. 2, *vide* communication dated 10.3.2022 made request to respondent No.4 to recover the unpaid loan amount of Satya Prakash from the retiral and terminal benefits payable to petitioner on retirement in execution of loan case No.6/ 2017. In sequel, petitioner received a communication dated 14.3.2022 from respondent No. 4 seeking

his reply. Though, petitioner submitted his reply, but nothing further has been heard from respondent No.4 and, therefore, the petitioner apprehends the recovery of aforesaid loan amount from his retiral benefits.

5. Petitioner has approached this Court on the grounds that the principal borrower, Satya Prakash, retired in the year 2014 and no recovery was effected from his retiral benefits. He was also drawing monthly pension of Rs.35,000/-, but respondent No.3-bank, without recovering its dues from principal borrower is wrongly and illegally trying to recover the same from petitioner. It has been stressed upon that the creditor i.e. respondent No.3-bank is duty bound to recover the amount from principal borrower as per law.

Another contention raised on behalf of the petitioner is that respondent No.3 has already initiated proceedings under Section 138 of the Negotiable Instruments Act against principal borrower and thus the recovery now sought to be made amounts to double jeopardy.

6. Petitioner has not denied that he had sought guarantee for principal borrower Satya Prakash. There is no assertion that the impugned action of respondents is in violation of the terms of the guarantee. Petitioner has not laid any challenge to the process initiated by respondent No.2 for recovery of loan amount.

7. The predominant challenge of the petitioner is on account of petitioner being chosen for the recovery by respondent No.3 in preference to the principal borrower, which in our considered view, deserves to be rejected for the simple reason that the plea raised by petitioner is against law. The liability of a surety is co-extensive with that of principal debtor, unless it is otherwise provided by the contract. As per section 137 of the Indian Contract Act, 1872, mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

8. In view of the aforesaid legal position, petitioner has no right to evade his liability under contract of guarantee by simply pleading forbearance on the part of the creditor to sue the principal borrower in the first instance.

9. The contention of the petitioner that he will be put to double jeopardy also deserves to be rejected with equal force. The proceedings under the Negotiable Instruments Act are not against the petitioner. Even otherwise, the said proceedings are not the substitute for recovery but are in the realm of

penal proceedings filed against a person, whose cheque remains unpaid on presentation.

10. In the light of the above discussion, we find no merit in this petition. Petition is accordingly dismissed. No order as to costs. The pending applications, if any, shall also stand disposed of.

BEFORE HON'BLE MS. JUSTICE SABINA, J. AND HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

Between:

ROOP CHAND S/O SHRI JODHU RAM RESIDENT OF VILLAGE BANAIN, P.O. JALPEHAR, TEHSIL JOGINDER NAGAR, DISTT. MANDI H.P. PRESENTLY WORKING AS ASSISTANT ENGINEER, HPPWD SUB DIVISION, BIR, DIVISION BAIJNATH, DISTRICT KANGRA, H.P.

……PETITIONER

(BY SH. VISHWA BHUSHAN, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH THE PRINCIPAL SECRETARY (HPPWD) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-2.

2. ARVIND SHARMA, ASSISTANT ENGINEER S/O NOT KNOWN TO PETITIONER O/O JOINED AS ASSISTANT ENGINEER, HPPWD SUB DIVISION, BIR, DIVISION BAIJNATH, DISTT. KANGRA, H.P.

…..RESPONDENTS.

(BY SH. ANIL JASWAL, ADDITIONAL ADVOCATE GENERAL)

CIVIL WRIT PETITION
NO. 2138 OF 2022
Decided on: 07.04.2022

Constitution of India, 1950- Article 226- Petitioner has challenged the transfer order on the ground that he has not completed the normal tenure of three years- Held- Transfer is an incidence of service- A government servant holding a transferable post, neither holds a fundamental nor legal right to remain posted at one place or the other- Petition dismissed. (Para 8, 11, 12)

Cases referred:

Mohd. Masood Ahmad vs. State of U.P. & Others, (2008)1 SCC 180;

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*This petition coming on for admission before notice this day, **Hon'ble Mr. Justice Satyen Vaidya,** passed the following:*

ORDER

Heard.

2. By way of instant petition, petitioner has prayed for the grant of following relief:-

> *"i. That the notification dated 24.03.2022 (Annexure P/1) issued by the respondent No.1, being unconstitutional, discriminatory, arbitrary, unreasonable, unjustified and contrary to the transfer policy, may kindly be quashed and the respondents may please be directed to allow the petitioner to work as Assistant Engineer at HPPWD Sub Division, Bir, Kangra, H.P."*

3. Petitioner has challenged transfer order dated 24.03.2022 (Annexure P-1) on the grounds that he has not completed the normal tenure of three years at his present place of posting and that his transfer has been ordered just to accommodate respondent No.2 in whose favour a D.O. Note was issued. Petitioner has already completed a tenure of two years eight months at HPPWD Sub Division, Bir.

4. As per Clause-10 of "Comprehensive Guiding Principles-2013" prescribed normal tenure/stay of an officer/official at one station is three

years, however, the Officers of IAS/HPAS/HPPS/HPFS and other allied Services of all Class-I & II Officers have been expressly excluded. Petitioner is Assistant Engineer and holding Class-I post, therefore, he has not been vested with any right to remain posted at a particular place for three years.

5. Though, the petitioner has alleged that his transfer has been effect on a D.O. Note, but neither the petitioner has provided any details of the author of D.O. Note nor any *malafide* has been alleged. Needless to say that the petitioner has not even chosen to implead the author of D.O. Note as a party.

6. A Division bench of this Court in ***CWP No. 2624 of 2020, titled as Shabnam vs. State of Himachal Pradesh and others***, decided on 18th September, 2020 has held as under:-

> *"2. We have heard learned counsel for the parties. It remains undisputed that prior to the present transfer, petitioner had served in the previous station for more than three years i.e. w.e.f. 9.2.2017. The Transfer Policy also provides that a normal tenure at a station would be three years. The grievance of the petitioner is that she has been transferred on a D.O. Note issued by the fourth respondent, who is a MLA. Once, the employee has completed her normal tenure, it is none of her concern that on what basis the transfer order came into effect."*

7. Petitioner, as noted above, has completed almost three years in HPPWD, Sub Division, Bir, Division Baijnath, District Kangra, H.P. Further, no normal tenure is prescribed for Officers of the Government of Himachal Pradesh holding Class I or Class-II posts.

8. There is no gainsaying that the transfer is an incidence of service. The employer has unfettered power to effect transfer save and except for extraneous reasons. A government servant holding a transferable post,

neither holds a fundamental nor legal right to remain posted at one place or the other.

9. In ***S.K. Nausad Rahaman and others vs. Union of India and others, Civil Appeal No. 1243 of 2022***, decided on 10th March, 2022, the Hon'ble Supreme Court has held as under: -

> *"24. While analyzing the rival submissions, certain basic precepts of service jurisprudence must be borne in mind.*
> *25. First and foremost, transfer in an All India Service is an incident of service. Whether, and if so where, an employee should be posted are matters which are governed by the exigencies of service. An employee has no fundamental right or, for that matter, a vested right to claim a transfer or posting of their choice.*
> *26. Second, executive instructions and administrative directions concerning transfers and postings do not confer an indefeasible right to claim a transfer or posting. Individual convenience of persons who are employed in the service is subject to the overarching needs of the administration."*

10. In ***Mohd. Masood Ahmad*** *vs*. ***State of U.P. & Others, (2008)1 SCC 180***, the Hon'ble Supreme Court has held as under: -

> *"**7**. The scope of judicial review of transfer under Article 226 of the Constitution of India has been settled by the Supreme Court in Rajendra Rao vs. Union of India (1993) 1 SCC 148; (AIR 1939 SC 1236), National Hydroelectric Power Corporation Ltd. vs. Shri Bhagwan (2001) 8 SCC 574; (AIR 2001 SC 3309), State Bank of India vs. Anjan Sanyal (2001) 5 SCC 508; (AIR 2001 SC 1748). Following the aforesaid principles laid down by the Supreme Court, the Allahabad High Court in Vijay Pal Singh vs. State of U.P. (1997) 3 ESC 1668; (1998) All LJ 70) and Onkarnath Tiwari vs. The Chief Engineer, Minor Irrigation Department, U.P. Lucknow (1997) 3 ESC 1866; (1998 All LJ 245), has held that the principle of law laid down in the aforesaid decisions is that an order of transfer is a part of the service conditions of an employee which should not be interfered with ordinarily by a Court of law in exercise of its discretionary jurisdiction under Article 226 unless*

the Court finds that either the order is mala fide or that the service rules prohibit such transfer, or that the authorities who issued the orders, were not competent to pass the orders."

11. The petitioner, in the light of above discussion, has not been able to make out a case for interference, with the impugned order, in exercise of power under Article 226 of the Constitution of India.

12. Thus, we find no merit in this petition and the same is dismissed. No order as to the costs. All pending applications, if any, shall also stand disposed of.

BEFORE HON'BLE MR. JUSTICE MOHAMMAD RAFIQ, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Between:

JAI PRAKASH,
S/O LATE SH. BHIKHAM RAM,
R/O V&PO BARDHAN,
TEHSIL PADHAR,
DISTRICT MANDI, H.P.

….PETITIONER

(BY MS. VANDANA MISRA,
ADVOCATE)

AND

1. UNION OF INDIA,
THROUGH ITS SECRETARY (POST)
DEPTT. OF POSTS, DAK BHAWAN,
SANSAD MARG, NEW DELHI

2. THE CHIEF POST MASTER GENERAL,
SDA COMPLEX KASUMPTI, SHIMLA-9

3. THE SUPERINTENDENT OF POST OFFICES, MANDI, DISTRICT MANDI, H.P.

....RESPONDENTS

(BY MR. BALRAM SHARMA, ASGI)

CIVIL WRIT PETITION
NO.1597 OF 2017
Decided on: 18.04.2022

Constitution of India, 1950- Article 226- **The Administrative Tribunals Act, 1985**- Section 21- Petitioner has approached the Court being aggrieved and dis-satisfied with the order passed by the Ld. Central Administrative Tribunal, Chandigarh (Circuit Bench at Shimla)- Held- Repeated representations would not extend the period of limitation- Petitioner chose to remain silent for more than 10 years of the rejection- No illegality and infirmity in the impugned order passed by the Ld. Central Administrative Tribunal- Petition dismissed. (Para 5 and 7)

Cases referred:

Government of India and Anr v. P. Venekatesh, (2019) 15 SCC 613;

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*This petition coming on for order before order this day, Hon'ble **Mr. Justice Sandeep Sharma,** passed the following:*

O R D E R

Being aggrieved and dis-satisfied with order dated 2.12.2016, passed by the learned Central Administrative Tribunal (in short *"CAT"),* Chandigarh (Circuit Bench at Shimla) in OA No. 063/00113/2016, titled *Jai Parkash v. Union of India and Ors*, whereby aforesaid Original Application came to be dismissed on the ground of limitation, petitioner has approached

this Court in the instant proceedings filed under Article 226 of the Constitution of India, praying therein to set-aside the aforesaid impugned order as well as communications dated 1.6.2006 (Annexure P-3) and 10.3.2016 (Annexure P-6), passed by the Department of Posts.

2. For having bird's eye view, certain undisputed facts, which led to the filing of the instant writ petition, are that father of the petitioner while working as GDBMP Bardhan w.e.f. 26.2.1981 suffered from brain tumor and as such, was declared disabled to the tune of 75% by the medical board. On account of aforesaid disablement, father of the petitioner was retired in the year, 2005, at the age of 54 years. On 26.5.2006, petitioner being son of the retired employee as detailed herein above, submitted an application for appointment on compassionate grounds, but same was rejected vide order dated 1.6.2006 (Annexure P-3). Despite there being aforesaid rejection, petitioner kept on filing representations, praying therein for his appointment on compassionate grounds. However, he was informed on 4.2.2011 that since his father had retired on medical grounds, he is not entitled to be appointed on compassionate grounds.

3. On 13.8.2015, petitioner again filed representation making therein similar prayer, but same was replied to on 10.3.2016, by the department, informing that his case for compassionate appointment has already been rejected on 1.6.2006. After an inordinate delay of more than 10 years, petitioner being dissatisfied with the rejection of his case communicated to him vide communication dated 10.3.2016, approached the learned CAT by way of Original Application as detailed herein above, but same was dismissed vide order dated 2.12.2016. After six months of passing of order dated 2.12.2016, petitioner approached this court in the instant proceedings, praying therein to set-aside aforesaid impugned order passed by the CAT. Reply to the petition stands filed by the respondents, wherein prayer has been made for dismissal of the petition at hand on the ground of delay and laches.

4. Having heard learned counsel for the parties and perused material available on record vis-à-vis reasoning assigned by the learned CAT in the impugned order dated 2.12.2016, this court finds no illegality and infirmity in the same and as such, no interference is called for. Though Ms Vandana Misra, learned counsel appearing for the petitioner argued that intimation with regard to rejection of the representation dated 13.8.2015, was given to the petitioner by the Department of Posts on 10.3.2016, and as such, limitation would start from that day, but aforesaid plea of her deserves to be rejected outrightly being devoid of any merits. True it is that petitioner had filed representation on 13.8.2015, which was replied to by the department on10.3.2016 (Annexure P-6), but bare perusal of the aforesaid communication clearly reveals that petitioner was informed that his case for compassionate appointment stands already rejected on 1.6.2006. Since respondent-department vide order dated 1.6.2006, had already rejected the request made by the petitioner for compassionate appointment, petitioner, if aggrieved, ought to have approached the competent court of law at that juncture only, but in the instant case, petitioner kept on filing the representations with similar outcome. No doubt, representation dated 13.8.2015, filed by the petitioner was replied to by the department on 10.3.2016, but as has been taken note herein above in the aforesaid communication, petitioner was only reminded of the decision already taken by the department on 1.6.2006, whereby admittedly case of the petitioner for compassionate appointment was rejected.

5. By now it is well settled that repeated representations would not extend the period of limitation. Section 21 of the Administrative Tribunals Act, 1985 prescribes the period of limitation of one year from the date of cause of action, which can be further extended by six months. In the case at hand, factum with regard to rejection of the representation of the petitioner for

compassionate appointment had come to the notice of the petitioner with the issuance of order dated 1.6.2006 (Annexure P-3), but yet he kept on filing the representations. Limitation in the case at hand would start w.e.f. 1.6.2006, when petitioner was apprised of the decision of the respondent-department that he is not entitled to be appointed on compassionate grounds. Mere issuance of communication dated 10.3.2016, wherein department again reiterated its stand, will not give any limitation and as such, no illegality and infirmity can be said to have been committed by the learned CAT while passing order impugned in the instant proceedings.

6. Compassionate appointment is given to family of the deceased employee to tide over the crisis, which was caused as a result of the death of an employee while in harness. Since in the case at hand, petitioner chose to remain silent for more than 10 years after rejection of this request made vide order dated 1.6.2006, it can be safely inferred/presumed that there was no immediate crisis in the family. The Hon'ble Apex Court in case titled ***Government of India and Anr v. P. Venekatesh***, ***(2019) 15 SCC 613***, has held that staleness of the claim takes away the very basis of providing compassionate appointment. Relevant paras of the aforesaid judgment read as under:

> *"8. The primary difficulty in accepting the line of submissions, which weighed with the High Court, and were reiterated on behalf of the respondent in these proceedings, is simply this: Compassionate appointment, it is well-settled, is intended to enable the family of a deceased employee to tide over the crisis which is caused as a result of the death of an employee, while in harness. The essence of the claim lies in the immediacy of the need. If the facts of the present case are seen, it is evident that even the first recourse to the Central Administrative Tribunal was in 2007, nearly eleven years after the death of the employee. In the meantime, the first set of representations had been rejected on 3 January*

1997. The Tribunal, unfortunately, passed a succession of orders calling upon the appellants to consider and then re-consider the representations for compassionate appointment. After the Union Ministry of Information and Broadcasting rejected the representation on 13 November 2007, it was only in 2010 that the Tribunal was moved again, with the same result. These successive orders of Tribunal for re-consideration of the representation cannot obliterate the effect of the initial delay in moving the Tribunal for compassionate appointment over a decade after the death of the deceased employee. This 'dispose of the representation' mantra is increasingly permeating the judicial process in the High Courts and the Tribunals. Such orders may make for a quick or easy disposal of cases in overburdened adjudicatory institutions. But, they do no service to the cause of justice. The litigant is back again before the Court, as this case shows, having incurred attendant costs and suffered delays of the legal process. This would have been obviated by calling for a counter in the first instance, thereby resulting in finality to the dispute. By the time, the High Court issued its direction on 9 August 2016, nearly twenty one years had elapsed since the date of the death of the employee.

9. In Umesh Kumar Nagpal Vs. State of Haryana5, this Court held thus:

> *"2...The whole object of granting compassionate employment is thus to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, 5 (1994) 4 SCC 138 mere death of an employee in harness does not entitle his family to such source of livelihood.The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest posts in non- manual and*

manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency."

10. Bearing in mind the above principles, this Court held:

"6. For these very reasons, the compassionate employment cannot be granted after a lapse of a reasonable period which must be specified in the rules. The consideration for such employment is not a vested right which can be exercised at any time in future. The object being to enable the family to get over the financial crisis which it faces at the time of the death of the sole breadwinner, the compassionate employment cannot be claimed and offered whatever the lapse of time and after the crisis is over."

11. The recourse to the Tribunal suffered from a delay of over a decade in the first instance. This staleness of the claim took away the very basis of providing companssionate appointment. The claim was liable to be rejected on that ground and ought to have been so rejected. The judgment of the High Court is unsustainable.

12. We accordingly allow the appeal and set aside the impugned judgment and order of the High Court. In consequence, we affirm the judgment of the Tribunal dismissing the Original Application. There shall be no order as to costs."

7. Consequently, in view of the detailed discussion made herein above as well as law taken into consideration, this court finds no illegality and infirmity in the impugned order passed by the learned CAT and as such, same is upheld. As a consequence of which, present petition fails and dismissed being devoid of any merits. Pending applications, if any, also stand disposed of accordingly.

BEFORE HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

Between:-

MR. M.R. POTAN SINCE DECEASED
THROUGH HIS LRs:

1. SUNITA POTAN
WD/O M.R. POTAN
R/O TYPE IV, BLOCK-03, SET NO.1.
NEW FOREST COLONY, MINST CHAMBER,
KHALINI, SHIMLA, H.P.

2. DEEPIKA BHANDARI (DAUGHTER)

3. MONICA VISHU SINGHAL (DAUGHTER)

....PETITIONER

(BY MR. SANJEEV BHUSHAN, SENIOR ADVOCATE
WITH MR. RAKESH CHAUHAN, ADVOCATE)

AND

1. STATE OF HP THROUGH ADDITIONAL
CHIEF SECRETARY (FORESTS), GOVERNMENT
OF HP, SHIMLA-2.

2. PRINCIPAL CHIEF CONSERVATOR OF FORESTS,
TALLAND, SHIMLA.

3. TRILOK CHAND,
PRESENTLY SERVING AS PERSONAL ASSISTANT
IN THE DEPARTMENT OF WILD LIFE,
TALLAND, SHIMLA.

..RESPONDENTS

(MR. DESH RAJ THAKUR, ADDL. A.G. WITH MR.
GAURAV SHARMA, DY. A.G. FOR R-1 AND R-2

MR. DILIP SHARMA, SR. ADVOCATE WITH MR. MANISH SHARMA, ADVOCATE FOR R-3)

CIVIL WRIT PETITON (ORIGINAL APPLICATION)
No. 402 of 2019
Reserved on:25.04.2022
Decided on: 29.04.2022

Constitution of India, 1950- Article 226- Petitioner has sought a writ in the nature of mandamus directing the respondent to grant seniority to the petitioner above respondent No. 3- Petitioner has sought benefit of services rendered by him in the Census Department for the purpose of seniority- Representation of petitioner in this regard rejected by the Government- Held- Petitioner joined respondent Department after respondent No. 3 and hence respondent No. 3 was rightly placed above petitioner in seniority- Petition dismissed. (Para 20, 21, 22)

Cases referred:
Union of India and others vs. C. Girija and others, (2019) 15 SCC 633;

This petition coming on for orders this day, the Court passed the following:-

O R D E R

By way of instant petition, petitioner has prayed for the following substantive reliefs:-

"i "That a writ in the nature of certiorari may be issued and the impugned order Annexure P-9 dated 28.10.2009 may kindly be quashed and set aside

ii) That a writ in the nature of mandamus may be issued directing respondents to grant seniority to the petitioner above respondent no.3 and thereby annexure P-7 may also be quashed and set aside with further directions to the respondents to hold the DPC after rectifying the seniority."

2. The case of the petitioner is that initially he was appointed as Clerk (LDC) in the Department of Census and had joined as such on

18.10.1979. As per policy decision of the State Government, staff of Census Department was absorbed in various Department of the State of Himachal Pradesh. Petitioner was ordered to be appointed as Clerk in the office of Chief Conservator of Forests. He was relieved from the Census Department on 17th March, 1982 and joined as Clerk in the office of respondent No.2 on 18th March, 1982.

3. Petitioner qualified competitive examination and was resultantly promoted/appointed as Steno-Typist on 9.1.1986. Petitioner was further promoted as Senior Scale Stenographer through a competitive examination vide letter dated 1988 w.e.f. 28.07.1987, as there were no Recruitment and Promotion Rules in place for said post at any stage.

4. Respondent No.3 had also worked with the Census Department as daily wager. He had been retrenched in February, 1982. However, taking advantage of Government policy, he was also absorbed in the Department of Forest, Himachal Pradesh and had joined as Clerk on 17.03.1982. Since for promotion to the post of Senior Scale Stenographer, there were no Recruitment and Promotion Rules, respondent No.3 was also considered from the category of senior Clerks and was promoted as Senior Scale Stenographer along with petitioner.

5. In 1999, the cadre of Stenographers and ministerial staff was bifurcated in the respondent Department, the post of Personal Assistants were to be filled up from the post of Senior Scale Stenographers.

6. It is averred on behalf of the petitioner that respondent No.3, as per aforesaid Rules, was not eligible for Senior Scale Stenographer as he was not qualified to be Stenographer, petitioner had become Junior Scale Stenographer/Steno-Typist in 1986 after qualifying the requisite test, whereas respondent No.3 had never held such post. Petitioner, therefore, claimed seniority over respondent No.3 in the cadre of Stenographers on the basis of Recruitment and Promotion Rules in force in the year 1999.

7. Petitioner and respondent No.3 on 25.10.2000 were promoted as Personal Assistants. Respondent No.3, at that stage, was required to be placed below petitioner in seniority on the premise that he was not qualified to be Junior Scale Stenographer/Steno-Typist which as per 1999 Rules was feeder category for the promotional post of Senior Scale Stenographers.

8. In August, 2009, respondents No.1 and 2 circulated letter for making promotions to the post of Private Secretary (Gazetted Class-I) and at that stage, petitioner acquired knowledge that respondent No.3 was shown senior to him. Petitioner immediately represented to the respondents explaining all the facts. The representation of the petitioner was rejected by respondent No.2 on 28.10.2009 and thereafter petitioner immediately approached this Court by way of present petition.

9. In response, stand of the official respondents is that petitioner had joined service in the Forest Department on 18.03.1982, whereas respondent No.3 had joined on 17.03.1982, as such, respondent No.3 was senior to petitioner. Petitioner had claimed benefit of services rendered by him in the Census Department for the purposes of seniority, but his representation was rejected and conveyed to him vide letter dated 25.06.1983. The seniority list of Clerks was prepared by the Forest Department and was circulated on 10.04.1986, wherein petitioner was below respondent No.3. Petitioner did not assail or challenge the seniority list of Clerks at any point of time. Further, it is contended that petitioner was given temporary appointment as Steno-Typist along-with two other persons with clear stipulation that such temporary appointment would not confer them any right in the matter of seniority. There was a clear caveat that the seniority would be maintained as in the lower cadre of Clerks. The seniority to further promotional post was to be maintained accordingly on the basis of seniority in the lower post of Clerk. Petitioner and respondent No.3 were promoted as Senior Scale Stenographers w.e.f. 27.08.1987. Their further promotion as Personal Assistants in the year

2000 was made in accordance with 1999 Rules. It is submitted that respondent No.3 was rightly ranked senior to petitioner as Personal Assistant and this position came to be reflected in subsequent list of Personal Assistants. Petitioner cannot be allowed to unsettle the settled position of seniority as Personal Assistants after a period of nine years. The allegation of the petitioner that he was not aware about the seniority position has specifically been denied.

10. Respondent No.3 has also contested the claim of petitioner by filing a separate reply. It has been submitted that respondent No.3 was shown senior to petitioner as Clerk. Petitioner had submitted representation dated 18.01.1983 claiming seniority by counting services rendered by him in the Census Department. His representation was rejected by the Government on 25.06.1983. Such rejection was not assailed by the petitioner. Petitioner never laid any challenge to the seniority position after 1983 save and except by belated representation dated 10.09.2009, which was recommended to be rejected vide letter dated 28.10.2009. Seniority list of Senior Scale Stenographers in the respondent Department as on 01.04.1988 was circulated on 13.02.1989. In such seniority list also, petitioner was below respondent No.3 and the petitioner did not make representation against said seniority list. In all subsequent seniority lists of Senior Scale Stenographers as it stood on 1.11.1992, 1.3.1994, 31.12.1998 and 31.12.1999, respondent No.3 was shown above petitioner. It is further submitted that in 1987, the Recruitment and Promotion Rules for the post of Senior Scale Stenographers framed in the year 1974 were applicable and as per these Rules, the feeder category was Clerk/Senior Clerk/Steno-Typist with three years regular service and passing of Stenography test with 100 words speed in English and 60 words speed in Hindi. Petitioner as well as respondent No.3 both being eligible and having passed above referred Stenography test were considered for promotion to the post of Senior Scale Stenographers w.e.f. 27.8.1987.

11. Petitioner and respondent No.3 both were promoted as Personal Assistants vide office order dated 25.10.2000 in which also, name of respondent No.3 was shown at Serial No.3 in the promotion list, whereas name of petitioner was shown at Serial No.4. Subsequently, in the provisional list of Personal Assistants as it stood on 31.12.2001, respondent No.3 was shown at Serial No.3 and petitioner was shown at Serial No.4. Petitioner never raised any objection against such seniority.

12. I have heard learned counsel for the parties and have also gone through the record carefully.

13. The facts as emerge from the pleadings as well as documents placed on record by the parties undisputedly reveal that respondent No.3 joined the Department of Forest on 17.03.1982 and the petitioner joined a day later on 18.03.1982 as Clerk. The benefit of past service of petitioner with the Department of Census was clearly denied to him right from inception. The representation of petitioner for grant of benefit of his past service with the Census Department was rejected by the Government vide letter dated 25.06.1983, the contents of which read as under:-

> *"I am directed to refer to your letter No.Ft.426-419/82(E-II), dated the 28th March, 1983, on the above subject, and to say that the representation of Shri M.R. Potan, Clerk, has been considered and it has been decided that the benefit of the service rendered by him in the Census Department cannot be given as he has been absorbed as a new entrant in the Forest Department after having been declared as surplus in the Census Department."*

Thus, there was no reason for the petitioner to have entertained any belief regarding conferment of benefit of his past service with the Department of Census by respondents No. 1 and 2. It was categorically mentioned in the letter dated 25.06.1983 that petitioner was absorbed as a

new entrant in the Forest Department after having been declared as surplus in the Census Department.

14. In view of aforesaid factual position, respondent No.3 was rightly placed above the petitioner in the seniority list of Clerks. Petitioner did not challenge the seniority list of Clerks as on 01.01.1986 circulated by the respondent Department on 10.04.1986.

15. Petitioner remained silent till 2009 when he made representation to respondent No.1 on 10.09.2009. The subject of such representation was mentioned as under:-

> ***"Representation against the wrong seniority list of PAs as stood on 31.12.2001, prepared by the Principle Chief Conservator of Forests, Shimla."***

16. In representation dated 10.09.2009, petitioner did not aver even a single word that he was not aware about the seniority position of respondent No.3 above him till 2009. Rather, it was mentioned that higher placement of respondent No.3 in promotion order dated 25.10.2000 to the post of Personal Assistants above petitioner was without any basis.

17. It is evident from the records that the respondent Department had neither represented nor promised to the petitioner that he was considered senior to respondent No.3 at any stage of his career. In the promotion order of petitioner and respondent No.3 to the post of Stenographers dated 20.09.1988, it was clearly mentioned that the seniority of the officials would be regulated from the date of appointment as Clerk in the Department.

18. Thus, it is clearly inferable from the records that throughout his career, petitioner was aware that respondent No.3 was senior to him and it was only on 10.09.2009 that petitioner made a representation for the first time. The question, therefore, arises as to whether such a belated claim of the petitioner in respect of seniority vis-à-vis respondent No.3 can be entertained?

19. In ***Union of India and others*** vs. ***C. Girija and others, (2019) 15 SCC 633***, the legal position has been summarized as under:-

> *"16. This Court had occasion to consider the question of cause of action in reference to grievances pertaining to service matters. This Court in C.Jacob Vs. Director of Geology and Mining and Another, (2008) 10 SCC 115 had occasion to consider the case where an employee was terminated and after decades, he filed a representation, which was decided. After decision of the representation, he filed an O.A. in the Tribunal, which was entertained and order was passed. In the above context, in paragraph No.9, following has been held:-*
>
>> *"9. The courts/tribunals proceed on the assumption, that every citizen deserves a reply to his representation. Secondly, they assume that a mere direction to consider and dispose of the representation does not involve any "decision" on rights and obligations of parties. Little do they realise the consequences of such a direction to "consider". If the representation is considered and accepted, the ex-employee gets a relief, which he would not have got on account of the long delay, all by reason of the direction to "consider". If the representation is considered and rejected, the ex-employee files an application/writ petition, not with reference to the original cause of action of 1982, but by treating the rejection of the representation given in 2000, as the cause of action. A prayer is made for quashing the rejection of representation and for grant of the relief claimed in the representation. The tribunals/High Courts routinely entertain such applications/petitions ignoring the huge delay preceding the representation, and proceed to examine the claim on merits and grant relief. In this manner, the bar of limitation or the laches gets obliterated or ignored."*
>
> *17. This Court again in the case of Union of India and Others Vs. M.K. Sarkar, (2010) 2 SCC 59 on belated representation laid down following, which is extracted below:-*

> *"15. When a belated representation in regard to a "stale" or "dead" issue/dispute is considered and decided, in compliance with a direction by the court/tribunal to do so, the date of such decision cannot be considered as furnishing a fresh cause of action for reviving the "dead" issue or time-barred dispute. The issue of limitation or delay and laches should be considered with reference to the original cause of action and not with reference to the date on which an order is passed in compliance with a court's direction. Neither a court's direction to consider a representation issued without examining the merits, nor a decision given in compliance with such direction, will extend the limitation, or erase the delay and laches."*

18. Again, this Court in State of Uttaranchal and Another Vs. Shiv Charan Singh Bhandari and Others, (2013) 12 SCC 179 had occasion to consider question of delay in challenging the promotion. The Court further held that representations relating to a stale claim or dead grievance does not give rise to a fresh following was laid down:-

> *"19. From the aforesaid authorities it is clear as crystal that even if the court or tribunal directs for consideration of representations relating to a stale claim or dead grievance it does not give rise to a fresh cause of action. The dead cause of action cannot rise like a phoenix. Similarly, a mere submission of representation to the competent authority does not arrest time. 23. <u>In State of T.N. v. Seshachalam</u>, (2007) 10 SCC 137, this Court, testing the equality clause on the bedrock of delay and laches pertaining to grant of service benefit, has ruled thus:*
>
> > *"16. … filing of representations alone would not save the period of limitation. Delay or laches is a relevant factor for a court of law to determine the question as to whether the claim made by an applicant deserves consideration. Delay and/or laches on the part of a government servant may deprive him of the benefit which had been given to*

others. Article 14 of the Constitution of India would not, in a situation of that nature, be attracted as it is well known that law leans in favour of those who are alert and vigilant."

19. This Court referring to an earlier judgment in P.S. Sadasivaswamy Vs. State of Tamil Nadu, (1975) 1 SCC 152 noticed that a person aggrieved by an order of promoting a junior over his head should approach the Court at least within six months or at the most a year of such promotion. In Paragraph No. 26 and 28, following was laid down:-

"26. Presently, sitting in a time machine, we may refer to a two-Judge Bench decision in P.S. Sadasivaswamy v. State of T.N., (1975) 1 SCC 152, wherein it has been laid down that: (SCC p. 154, para 2)

"2. … A person aggrieved by an order of promoting a junior over his head should approach the Court at least within six months or at the most a year of such promotion. It is not that there is any period of limitation for the courts to exercise their powers under Article 226 nor is it that there can never be a case where the courts cannot interfere in a matter after the passage of a certain length of time. But it would be a sound and wise exercise of discretion for the courts to refuse to exercise their extraordinary powers under Article 226 in the case of persons who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the Court to put forward stale claims and try to unsettle settled matters."

28. Remaining oblivious to the factum of delay and laches and granting relief is contrary to all settled principles and even would not remotely attract the concept of discretion. We may hasten to add that the same may not be applicable in all circumstances where certain categories of fundamental rights are infringed. But, a stale claim of getting promotional

> *benefits definitely should not have been entertained by the Tribunal and accepted by the High Court."*

> *20. On the preposition as noticed above, it is clear that the claim of the applicant for inclusion of her name in the panel, which was issued on 09.01.2001 and for the first time was raked up by her, by filing representation on 25.09.2007, i.e., after more than 06 and half years. The claim of inclusion in the panel had become stale by that time and filing of representation will not give any fresh cause of action. Thus, mere fact that representation was replied by Railways on 27.12.2007, a stale claim shall not become a live claim. Both Tribunal and High Court did not advert to this important aspect of the matter. It is further to be noted from the material on record that after declaration of panel on 09.01.2001, there were further selection under 30% promotion by LDCE quota, in which the applicant participated. In selection held in 2005 she participated and was declared unsuccessful. With regard to her non-inclusion in panel in 2005 selection, she also filed O.A. No. 629 of 2006 before the Tribunal, which was dismissed. After participating in subsequent selections under 30% quota and being declared unsuccessful, by mere filing representation on 27.09.2007 with regard to selection made in 2001, the delay and laches shall not be wiped out."*

20. In view of the aforesaid exposition of law, the claim of the petitioner as regards his seniority is clearly not maintainable. Even otherwise, petitioner has failed to make out any case on merits. Petitioner joined respondent Department after respondent No.3 and hence respondent No.3 was rightly placed above petitioner in seniority in the initial grade of Clerk and thereafter on every promotional post. The claim made by the petitioner on the basis of Recruitment and Promotion Rules framed in the year 1999 is also without any merit. The promotions made prior to enforcement of such Rules were not to be affected by 1999 Rules as such Rules were to operate prospectively and not retrospectively.

21. Learned counsel for the petitioner has tried to persuade this Court by referring to certain inter-office correspondence of respondent Department entertained in the year 2014, whereby some recommendations were made to grant benefit of past service of petitioner with the Department of Census for the purposes of pension and leave etc. In the considered view of this Court, petitioner cannot succeed even on such basis as finally the recommendations so made were not accepted by the competent authority. Even otherwise, there is marked distinction between grant of benefit of past service for the purposes of pension and leave etc. and the grant of such benefit for the purposes of seniority.

22. In the light of the discussion made above, there is no merit in the petition and the same is accordingly dismissed. Pending applications, if any, also stand disposed of.

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

Between:-

ASSISTANT EXECUTIVE ENGINEER,
PHS/DIV. NO. III, BHAWANAGAR, TEHSIL
NICHAR, DISTRICT KINNAUR, H.P. …APPELLANT

(BY SH.TARA SINGH CHAUHAN
AND SH.SHAURYA SHARMA, ADVOCATES.)

AND

1. HEMANTI BHATT WIFE OF SH. HEMANT KUMAR BHATT.

2. HEMANT KUMAR BHATT SON OF LATE SH. S.D. BHATT.

3. ANNESH BHATT SON OF SH. HEMANT

KUMAR BHATT.
ALL RESIDENT OF BHATT COTTAGE,
UPPER KAITHU, SHIMLA, H.P.

4. NATIONAL INSURANCE COMPANY LTD.
REGISTERED OFFICE 30, MIDDLETION
STREET POST BOX NO. 9229, KOLKATA-
700071, HAVING ITS BRANCH OFFICE
AT RAMPUR BUSHAR, DISTRICT SHIMLA,
H.P. THROUGH ITS BRANCH MANAGER. ...RESPONDENTS

(BY SH.PRASHANT SHARMA, ADVOCATE, VICE
MR.LAKSHAY PARIHAR, ADVOCATE, FOR
RESPONDENTS NO. 1 TO 3.)

(BY SH. Deepak Bhasin, ADVOCATE
FOR RESPONDENT NO. 4.)

FIRST APPEAL FROM ORDER
NO. 71 OF 2022
Decided on: 21.04.2022

Motor Vehicle Act, 1988- Section 166- Appeal- Motor Accident Claims Tribunal awarded compensation of Rs.68,93,496/- alongwith interest @ 9% per annum on account of death of Shiresh Bhatt in a motor accident- Deceased was an employee of Electricity Department- Held- No where in the conditions of the policy occupants of the vehicle were insured- Therefore, plea of appellant that Insurance Policy was covering the risk related to occupants of the vehicle is contrary to the terms and conditions of the policy, hence this plea of appellant is not sustainable- There is nothing on record to controvert or doubt the proof of income of deceased- Compensation correctly calculated- Appeal dismissed. (Para 9, 10, 11)

Cases referred:

NIC Vs. Pranay Sethi and others (2017) 16 SCC 680=AIR 2017 SC 5157;
Sarla Verma & others Vs. Delhi Transport Corporation, AIR 2009 SC 3104=(2009)6 SCC 121;

This petition coming on for orders this day, the Court delivered the following:

JUDGMENT

This appeal has been preferred against award dated 7.9.2018 passed by Motor Accidents Claims Tribunal-II, Shimla (for short 'MACT') in MAC Petition No. 29-S/2 of 2015, titled Hemanti Bhatt & others Vs. The Assistant Executive Engineer & another, whereby compensation of Rs.68,93,496/- alongwith interest @ 9% per annum from the date of filing of petition till the payment, has been awarded in favour of respondents No. 1 to 3 (claimants), on account of death of deceased Shireesh Bhatt in a motor accident dated 24.2.2015, while deceased was traveling in Jeepsy No. HP26-0131, owned and possessed by appellant, being driven by deceased Varun Chauhan,

2. For request and consent of parties, this appeal has been heard finally today and being decided as such.

3. Vehicle of appellant was ensured with respondent No. 4-National Insurance Company. Learned MACT has fastened liability upon appellant to pay the entire completion as apportioned in the award i.e. 80%:15%:5% amongst mother, father and brother respectively.

4. Appeal has been preferred mainly on the ground that occupants of vehicle were also covered under the Insurance Policy and, therefore, claim, if any payable, is to be indemnified by respondent No.4-Insurance Company; that as the accident in question had taken place due to mechanical defect involving no human error in the accident and, therefore, appellant was not liable to pay the compensation; that quantum of compensation has been determined on the basis of wrong calculation of monthly income of deceased; that the accident did not take place due to rash and negligent driving of an employee of appellant; that deceased person driving the vehicle was under the

influence of alcohol and accident had taken place on account of his rash and negligent act and thus appellant is not liable to pay the compensation.

5. It is undisputed that vehicle was insured with respondent No. 4-Insruance Company vide Insurance Policy, Ex. PW-2/A, which is a Policy covering the risk of 'liability only' of a private car. 'Liability only' policy conditions have been placed on record as RW-2/B, wherein relevant liability clause reads as under:-

> *"1. Subject to the limit of liability as laid down in the schedule hereto the Company will indemnify the insured in the event of accident caused by or arising out of the use of the Motor Vehicle anywhere in India against all sums including claimant's costs and expenses which the insured shall become legally liable to pay in respect of-*
>
> *(i) death of or bodily injury to any person so far as it is necessary to met the requirements of the Motor Vehicles Act.*
>
> *(ii) Damage to property other than property belonging to the insured or held in trust or in the custody or control of the insured up to the limit specified in the schedule."*

6. This Policy also covers personal accident for owner-driver, which reads as under:-

> *"Subject otherwise to the terms exceptions condition and limitations of this Policy, the company undertakes to pay compensation as per the following scale for bodily injury/death sustained by the owner-driver of the vehicle in direct connection with the vehicle insured or whilst mounting into/dismounting from or traveling in the insured vehicle as a co-driver, caused by violent accidental external and visible means which independently of any other cause shall within six calendar months of such injury result in-*
>
> *Scale of compensation*
>
> *(i) Death 100%*
>
> *(ii) Loss of two limbs or sight of 100%*

	two eyes or one limb and sight of one eye.	
(iii)	*Loss of one Limb or sight of one eye.*	*50%*
(iv)	*Permanent total disablement from injuries other than named above."*	*100%*

7. In general exceptions clause 4 is also relevant for this purpose, which reads as under:-

> *"4. Except so far as is necessary to meet the requirements of the Motor Vehicles Act, the Company shall not be liable in respect of death of bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract or employment) being carried in or upon or entering or mounting or alighting from the Motor Vehicle at the time of the occurrence of the event out of which any claim arises."*

8. The legal terms of the policy reproduced by the MACT in impugned award, which reads as under:-

> *"Limits of Liability Clause: Under section II 1 (i) of the policy-Death or bodily injury. Such amount as is necessary to meet the requirements of the motor vehicle act 1988. Under section II 1 (ii) of the policy-Damage to third party property is `750000/- PA Cover under section 3 for owner-driver is `1.0 lakhs."*

9. No where in the conditions of the policy occupants of the vehicle were insured. Therefore, plea of appellant that Insurance Policy was covering the risk related to occupants of the vehicle is contrary to the terms and conditions of the policy, hence this plea of appellant is not sustainable.

10. On one hand appellant is claiming that accident did not take place on account of rash and negligent driving of its employee, but because of mechanical defect and on the other hand in the same breadth it is contended on behalf of appellant that accident had taken place due to rash and negligent act of driver, who was under influence of alcohol. It is an admitted fact that the driver was none else, but the employee of Electricity Board and nothing has been placed on record to establish that he was occupying the vehicle unauthorizedly or he was not authorized to drive the vehicle. Though, vehicle was registered in the name of Assistant Executive Engineer, but vehicle is actually owned by H.P. State Electricity Board and there is no legal evidence proved on record that driver of Jeepsy was under the influence of liquor at the time of accident and further that accident had taken place due to drunken driving. To the contrary it is also plea of the appellant that accident took place due to mechanical fault in the vehicle, but not for rash and negligent driving of anyone, therefore, these contrary grounds are also not sustainable to interfere in the award.

11. Proof of income of deceased placed on record stands duly proved. There is nothing on record to controvert or doubt the proof of income of deceased. Learned MACT has determined the quantum of compensation by taking into consideration pronouncements of the Supreme Court in ***Sarla Verma & others Vs. Delhi Transport Corporation, AIR 2009 SC 3104=(2009)6 SCC 121 and NIC Vs. Pranay Sethi and others (2017) 16 SCC 680=AIR 2017 SC 5157.*** Nothing has been pointed out how and in what manner MACT has calculated the income as well as quantum of compensation wrongly.

12. In aforesaid facts and circumstances, I do not find any reason to interfere in the impugned award and accordingly appeal is dismissed being devoid of merits.

BEFORE HON'BLE MS. JUSTICE SABINA, J. AND HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

Between:-

AJAY SHARMA, SON OF LATE
SHRI K. C. SHARMA, RESIDENT OF
VILLAGE CHADHYARA, POST OFFICE
GUTKAR, TEHSIL SADAR, DISTRICT
MANDI, H.P. PRESENTLY WORKING AS
RESEARCH ASSOCIATE, DEPARTMENT
OF ENTOMOLOGY, DR. YASHWANT
SINGH PARMAR UNIVERSITY OF
HORTICULTURE & FORESTRY,
NAUNI, POST OFFICE NAUNI,
TEHSIL & DISTRICT SOLAN, H.P.

....APPELLANT

(MS. SHALINI THAKUR,ADVOCATE)

AND

1. DR. YASHWANT SINGH PARMAR
UNIVERSITY OF HORTICULTURE&
FORESTRY, NAUNI, POST OFFICE
NAUNI, TEHSIL & DISTRICT SOLAN, H.P.
THROUGH ITS REGISTRAR.

2. THE SELECTION COMMITTEE
THROUGH ITS CHAIRMAN
(VICE CHANCELLOR), DR. YASHWANT
SINGH PARMAR UNIVERSITY OF
HORTICULTURE & FORESTRY,
NAUNI, POST OFFICE NAUNI,
TEHSIL & DISTRICT SOLAN, H.P.

3. DR. (MRS.) SAPNA MAHAJAN, D/O

LATE SHRI DINA NATH MAHAJAN,
ASSISTANT PROFESSOR, DEPARTMENT
OF ENTOMOLOGY AND APICULTURE,
DR. YASHWANT SINGH PARMAR
UNIVERSITY OF HORTICULTURE &
FORESTRY, NAUNI, POST OFFICE NAUNI,
TEHSIL & DISTRICT SOLAN, H.P.

4. DR. SUNIL KUMAR, SON OF LATE
SHRI KANWAR SINGH, ASSISTANT
PROFESSOR, REGIONAL HORTICULTURE
RESEARCH STATION, BHOTA/NERI,
DISTRICT HAMIRPUR, H.P.

5. DR. (MRS.) MEENA DEVI THAKUR,
PARENTAGE NOT KNOWN TO
PETITIONER/APPELLANT,
ASSISTANT PROFESSOR, DEPARTMENT
ENVIRONMENT SCIENCE, DR. YASHWANT
SINGH PARMAR UNIVERSITY OF
HORTICULTURE & FORESTRY,
NAUNI, POST OFFICE NAUNI,
TEHSIL & DISTRICT SOLAN, H.P.

....RESPONDENTS

(SH. AVINASH JARYAL, ADVOCATE, FOR R-1& 2).

(SH. DILIP SHARMA, SR. ADVOCATE WITH SH. MANISH SHRMA, ADVOCATE, FOR R-3 TO R-5).

LETTERS PATENT APPEAL
No. 124 OF 2014
Reserved on:25.3.2022
Date of decision: 2.4.2022

Constitution of India, 1950- Article 226- Petitioner has challenged the judgment passed by the Ld. Single Judge on the ground that none of the

private respondents were having their specialization in entomology and apiculture and Selection Committee had selected ineligible candidates- Held- As per advertisement, "Entomology and Apiculture" without there being any further qualification, was the discipline/specialization. Ph. D thesis of private respondents in Toxicology, Nematology and Acarology were the different branches under one umbrella of the discipline/ specialization i.e. "Entomology and Apiculture". Since there was no ambiguity in the advertisement, no added meaning could be attached to the terms "concerned subject" and "particular discipline/subject"- Thus, the contention of the petitioner that Screening Committee had made ineligible candidates eligible cannot be countenanced- No fault in the view taken by the Ld. Single Judge- Appeal dismissed. (Para 14, 15, 16, 23)

Cases referred:

Avtar Singh vs. Chaudhary Charan Singh University, 2002 (10) SCC 2012;
T.A. Chidambaram vs. The University of Madras (1989)1 MLJ 302;

This appeal coming on for orders this day, ***Hon'ble Mr. Justice Satyen Vaidya*** *passed the following*:

J U D G M E N T

Dr. Yashwant Singh Parmar University of Horticulture &Forestry, Nauni, District Solan, H.P. (for short the University), issued advertisement No.07 of 2008 dated 6.8.2008, (for short, "advertisement"), inviting applications for 46 posts of Assistant Scientist/Assistant Professor/Assistant Extension Specialist/ Equivalent in the UGC Scale of 8000-13500 in various disciplines, including Entomology and Apiculture. The subject matter of present *lis* pertains only to two posts advertised in the Department of Entomology and Apiculture and one post in Forest Plant ProtectionUnit (hereafter referred to as posts in question).

2. Qualifications for the post of Assistant Scientist/Assistant Professor/Assistant Extension Specialist/ Equivalent were prescribed as under: -

> "for the post of Assistant Scientist/Assistant Professor/Assistant Extension Specialist/ Equivalent

(i) *Ph.D. Degree in the concerned subject, relaxable to Master's Degree with consistently good academic record i.e. 55% marks at Master's level*.

(ii) A relaxation of 5% from 55% of marks at Master's level shall be provided to SC/ST categories.

(iii) A relaxation of 5% will be provided from 55% of marks to the Ph.D. degree holders, who have passed their masters degree prior to September, 1991.

(iv) *Candidates should have qualified National Eligibility Test (in the particular discipline/ subject) conducted by the UGC, CSIR or similar test accredited by the UGC/ICAR*.

(v) B in the 7 point scale with letter grades, O, A, B, C, D, E & F shall be regarded as equivalent to 55% wherever the grading system is followed".

3. The appellant (hereinafter referred to as petitioner) along with others submitted their respective applications for the posts in question. Screening Committee constituted by the University prepared the lists of eligible candidates on the basis of prescribed objective criteria. 39 candidates including petitioner were found eligible for two posts in the Department of Entomology and Apiculture and total 19 candidates were found eligible for one post in the discipline of Entomology in Forest Plant Protection Unit. Petitioner's name found place in both the above said lists. The selection committees interviewed all the eligible candidates. Respondents no. 3 and 4 were selected in the department of Entomology and Apiculture and respondent No.5 was selected in Forest Plant Protection Unit.

4. Aggrieved against the afore said selections, petitioner preferred CWP No. 2103 of 2011, *inter-alia*praying for following reliefs: -

"a) This Hon'ble Court may kindly be pleased to quash appointment of respondents 3 to 5 as Assistant Professors in Entomology and Apiculture made vide orders dated

5.4.2010 appended with the petition as Annexure P-22, 23 & 24 by way of issuance of a Writ of Certiorari;

b) That this Hon'ble Court may be pleased to issue a writ of Mandamus directing respondents No. 1 & 2 to re-assess the merit of the candidates interviewed by them and also grant to the petitioner marks to which he is entitled to and thereafter offer appointment to the petitioner against the post of Assistant Professor in the Department of Entomology or Forest Protection Unit w.e.f.4.5.2010 i.e. the date on which respondents No. 3 to 5 were appointed against the said posts, with all consequential benefits."

5. The grievance of the petitioner was that respondents No. 3 to 5 lacked prescribed essential qualifications. Neither their degrees in Ph.D nor National Eligibility Test (for short,"NET") were in the concerned discipline/subject. According to the petitioner, he was the only candidate, who had done his M.Sc and Ph.D thesis in Forest Entomology. It was contended by the petitioner that respondents No. 3 and 4 had their Ph.D thesis in Toxicology and Nematology respectively and respondent No. 5 was Ph.D in Acarology, which were un-related to the discipline/subject of Entomology and Apiculture.

6. Learned Single Judge dismissed the petition of the petitioner vide judgment dated 28.4.2014 by holding that Entomology and Apiculture was the major subject with seven fields of specialization i.e. Fruit Entomology, Vegetable and Floriculture Entomology, Biological Control, Forest Entomology, Toxicology, Nematology and Apiculture. Thus, the contention of petitioner regarding ineligibility of respondents No. 3 to 5 on this count was rejected. It was specifically held that the Ph. D degrees of petitioner and private respondents were in Entomology and Apiculture and they all had qualified their NET in the concerned subject, conducted by ASRB (ICAR).

7. Learned Single Judge by placing reliance on various judicial precedents came to the conclusion that judicial re-assessment of comparative merits of candidates was not permissible and such assessment was the domain of expert body. The Screening Committee was held to be duly constituted and the Selection Committee comprised of the nominees of Chancellor and Vice-Chancellor of the University, ICAR, Dean College of Horticulture, Professor and Head of Department of EAP and Vice Chancellor was found to be duly constituted.

8. Further, learned Single Judge applied principle of estoppels against the petitioner on the ground that the petitioner ought to have challenged the recommendations of the Screening Committee before the date of interview. It also weighed with learned Single Judge that there was no allegation much less proof of *malafide* against the Screening Committee or Selection Committee, therefore, also the claim of petitioner was without merit.

9. Petitioner has assailed the judgment passed by the learned Single Judge, by way of instant appeal, *inter-alia* on the grounds, as under: -

i) The discipline/specialization is determined by the university on the basis of the subject of thesis. The discipline/specialization of respondent No.3 was in Toxicology, respondent No.4 was in Nematology and respondent No.5 was in Acarology. Thus, as per petitioner, none of the private respondents were having their discipline/specialization in Entomology and Apiculture or Entomology.

ii) The name of department i.e. Entomology and Apiculture mentioned against the major subject in respect of Ph.D degrees of private respondents was not indicative of their respective discipline/ specialization.

iii) The post in Forest Plant Protection Unit was specifically meant for Entomology discipline and petitioner was the only eligible candidate, as he had studied course in Forest Entomology and Forestry.

iv) The private respondents were eligible for appointment only against the posts of their specialization. The posts in Toxicology and Acarology were available in the University. The Screening Committee as well as Selection Committee had selected ineligible candidates. The Selection Committee had deliberately mentioned the specialization of all the candidates as Entomology and Apiculture, whereas the petitioner and private respondents in their respective application form had clearly mentioned their specialization as Toxicology, Nematology and Entomology and Forest Entomology.

10. We have heard learned counsel for the parties and have also gone through the records.

11. The core question, which fell for determination of learned Single Judge was whether respondents No. 3 to 5 were eligible in terms of prescribed qualifications? As noticed above, a candidate to be eligible for the post of Assistant Scientist/Assistant Professor/Assistant Extension Specialist/ Equivalent was required to be holding of Ph.D degree in the **"concerned subject"** relaxable to Master's degree with consistently good academic record i.e. 55% marks at Master's level and qualified NET (in the **"particular discipline/subject"**), conducted by the UGC, CSIR or similar test accredited by the UGC/ICAR.

12. The terms "concerned subject" and "particular discipline/subject" used while prescribing qualifications in the advertisement, have to be read in conjunction with other requirements of the advertisement,in which "Entomology and Apiculture" had been mentioned in colomn-2 of the tabulated information against discipline(s)/specialization(s) of the post. Relevant extract of such tabulated information is reproduced as under for clarity and better understanding: -

Sr. No.	**Discipline(s) /**	Department/Research	Reservation	Total

	specialization(s) of the post	Station/Centre						
5.	**Entomology & Apiculture**	E.A.P 02	General	SC	ST	OBC	PWD	04
		Forest Plant Protection Unit 01	03				01	
		RHRS Sharboo 01						

13. Thus, it does not remain in realm of doubt as to what was required by the university and how the Screening Committee or/and Selection Committee considered the same.

14. As per advertisement, “Entomology and Apiculture” without there being any further qualification, was the discipline/specialization. Ph. D thesis of private respondents in Toxicology, Nematology and Acarology were the different branches under one umbrellaof the discipline/specialization i.e. “Entomology and Apiculture”. Since there was no ambiguity in the advertisement, no added meaning could be attached to the terms “concerned subject” and “particular discipline/subject”

15. Thus, the contention of the petitioner that Screening Committee had made ineligible candidates eligible cannot be countenanced. Nothing could be pointed out from the records to show that the Screening Committee and/or Selection Committee had any specific reference *vis-à-vis* assessment of the discipline/specialization of candidates and such committees had over-reached their jurisdiction. In absence of any material to that effect, no fault

can be found in the decision-making process undertaken by the Screening as well as Selection Committees.

16. We also do not find any fault in the view taken by the learned Single Judge which, in our considered view, also is the only plausible view borne from the material on record. The contention of petitioner that only those candidates, who had specialization in Entomology, could be held eligible by the Screening Committee appears to be self-assumed.

17. The petitioner has also not been able to show any rule or regulation adopted by the University to provide credence to the contention that "discipline/specialization" mentioned in the advertisement had to be considered only in respect of the particular specialized subject and not the discipline of Entomology and Apiculture.

18. Petitioner was fully aware or otherwise should have been vigilant enough to appreciate the respective subjects in which private respondents had their Ph.D degrees. That being so, petitioner should have challenged the proceedings of Selection Committee before participating in further process of selection. Petitioner seemingly participated in the entire selection process and then turned around to challenge the same. Such conduct of petitioner cannot be approved.

19. Learned counsel for petitioner has also laid challenge to the findings returned by learned single judge to the effect that Court could not revisit the competitive merit of candidates in view of involvement of experts inthe selection process. As per petitioner,selection processwas purely an administrative matter and the presence of academicians (experts) could not change its complexion.Reliance, in that regard, has been placed on the judgment passed by a division Bench ofHon'ble Andhra Pradesh High Court in ***Writ Appeal No. 233 of 2013***, titled ***Gowda Rajender & others*** vs. ***Dr. M. Radha Krishna & others.*** Such reliance, in our considered view, is clearly mis-placed for the reasons that in the instant case, petitioner had raised a

dispute as to the eligibility of private respondents *vis-à-vis* his own on the basis of specialized subjects of their respective Ph.D degrees, whereas no such question was involved before the Hon'ble High Court of Andhra Pradesh. Otherwise also, the technical distinction sought to be drawn by petitioner could be better resolved by the experts.

20. Further, learned counsel for the petitioner has made an attempt to persuade us by inviting our attention to the definition of discipline, as contained in *"Rules for Recruitment and promotion of Scientists Grade-IV in CSIR"*. According to her, discipline means the specialization in which the scientists are assessed for promotion and hence discipline has direct relation with specialization. We do not find any substance in such contention of the petitioner as the definition of term "discipline" referred to above has its application in specific rules adopted by CSIR and cannot have universal application.

21. Reliance has also been placed on the judgment passed by the Hon'ble Supreme Court in ***Avtar Singh*** vs. ***Chaudhary Charan Singh University, 2002 (10) SCC 2012.*** This judgment again will not help the cause of petitioner as their Lordships were dealing with a fact situation where the candidate was found lacking in requisite five years experience. So far as qualification of the candidate was concerned, Hon'ble Supreme Court did not concur with the findings of High Court in holding that eligibility qualification was lacking.

22. Learned counsel for the appellant has made another unsuccessful attempt to persuade us by placing reliance on para-30 of a judgment passed by Hon'ble Madras High Court in ***T.A. Chidambaram*** vs. ***The University of Madras (1989)1 MLJ 302***, which reads as under:-

> "Since the third respondent does not possess a Ph. D. in the subject, since he does not possess teaching and research experience in the subject and since he does not possess the specialization in the delinquency at the doctoral level, the

> appointment of the third respondent is in violation of the qualification prescribed under the Ordinance of the University and as advertised by it. His appointment, therefore, is quashed."

Again, the judgment rendered by the Hon'ble Madras High Court was in its own facts situation where the candidate was not found to possess Ph.D. degree in the subject coupled with other disqualifications as dealt in para-30 of the judgment *(supra)*, which became the basis for quashing of appointment.

23. In light of the above discussion, we find no merit in the instant appeal and the same is accordingly dismissed. Pending applications, if any, also stand disposed of.

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

Between:-

RAMESH CHHABRA S/O LATE SH. KESAR MUL CHHABRA RESIDENT OF FIRST FLOOR, 105-A, KRISHNA NAGAR, SHIMLA, H.P.

……….PETITIONER

(BY MR. R.K. BAWA, SENIOR ADVOCATE WITH MR. AJAY KUMAR SHARMA, ADVOCATE)

AND

SH. HARMINDER SINGH S/O LATE SH. CHAMAN SINGH RESIDENT OF 105-A, KRISHAN NAGAAR, SHIMLA, H.P. THROUGH HIS SPA MANVINDER KAUR W/O SH. HARMINDER SINGH, RESIDENT OF 105-A, KRISHAN NAGAR, SHIMLA, H.P.

……..RESPONDENT

(MR. ARUN KUMAR, ADVOCATE)

CIVIL REVISION No. 221 OF 2018
Decided on:31.03.2022

H.P. Urban Rent Control Act, 1987- Section 24(5)- Revision- Petitioner assailed the order of Ld. Rent Controller, Shimla on findings of preliminary issue qua maintainability- Held- Findings of Ld. Rent Controller is erroneous and violative to the language of Section 14(3)(d) of the 1987 Act- Revision petition allowed and petition held to be not maintainable. (Para 14, 15)

This petition coming on for orders this day, the Court passed the following:-

J U D G E M E N T

By way of this civil revision petition filed under Section 24(5) of the Himachal Pradesh Urban Rent Control Act, 1987, the petitioner herein has assailed order dated 25th September, 2018, passed by the Court of learned Rent Controller, Shimla, at Shimla, in Rent Petition No. 6-2 of 2018/14, vide which, prilimnary Issue No. 1 framed by learned Rent Controller as to 'whether the rent petition was maintainable or not' stands decided against the present petitioner, i.e. tenant and in favour of the respondent herein, i.e. landlord.

2. Brief facts necessary for the adjudication of the present petition are that an application for eviction of the present petitioner (hereinafter to be referred as the 'tenant') was filed by the respondent herein under Section 14 of the Himachal Pradesh Urban Rent Control Act, 1987 (hereinafter to be referred to as '1987 Act'). The ground on which the eviction has been sought, as contained in para 18(a) of the rent petition, are reproduced herein below:-

18(a)	Grounds on which the eviction is sought.	(1) The petitioner bonafidely required the premises in occupation of the tenant for the purpose of godown-cum-office. In fact the petitioner is running a shoe business since

		1960 in the name and style of M/s Jai Hind Shoes situated at 31, Lower Bazaar, Shimla, H.P. The business is both type i.e. wholesaler as well as retailer. The petitioner has a warehouse for the aforesaid business at Godown 105, Krishna Nagar, Shimla, H.P. This godown is on the roof of the building, having tin structure and is not in good condition. All the manufactured material which the petitioner purchased from various companies, kept in this godown. As the business of petitioner is expanding, this godown is falling short for the material and nowadays the petitioner has to keep his manufactured material at veranda of the first floor of his building. As mentioned supra, the godown is having tin structure, therefore a person cannot sit in this godown. Because the business of petitioner is expending, therefore, he bonafidely requires the premises in occupation of the tenant for the purpose of godown-cum-office so that a person can permanently sit there and watch, how much material is coming and how much material is supplied to other and also maintain accounts of the stock. It is further submitted that it is the only largest space available with the petitioner. (2) The petitioner is not occupying any other residential and non-residential building owned by him in the Urban Area nor he has vacated any such building without sufficient cause within five years of the filing of the application.

3. By way of the reply which was filed to the rent petition, various preliminary objections were taken with regard to the maintainability of the rent petition, which included preliminary objection No. 1, which reads as under:-

> *"1. That the petition, as framed, is not at all maintainable. There is no provision in the HP Urban Rent Control Act, 1987 as amended upto date, for personal use of residential premises for non-residential (i.e. Godown-cum-office) purpose."*

4. During the pendency of the matter before the learned Rent Controller, Court No. 3, Shimla, on 25th July, 2018, the following order was passed:-

> *"Inadvertently the preliminary issues on the last date of hearing could not be framed and the case was listed for the evidence straightway. Therefore, the following issues require consideration before other issues are taking.*
>
> *1. Whether the petition is not maintainable as there is no provision in the H.P. Rent Control Act for personal use of residential premises for non-residential purpose i.e. godown cum office, alleged?OPP*
>
> *2. Whether the petition is bad for non-joinder of LR of Lt Sh. Kesarmall the tenant, as alleged? OPP*
>
> *3. Relief.*
>
> *Let the consideration on both the issues be conducted on the next date of hearing by both the parties on 18.08.2018."*

5. Upon consideration, learned Rent Controller not being satisfied with the objections so raised by the tenant, passed order dated 25.09.2018, rejecting preliminary issues. Feeling aggrieved, the tenant has preferred the present revision petition.

6. Mr. R.K. Bawa, learned Senior Counsel appearing for the petitioner/tenant has argued that the impugned order passed by learned Rent Controller, especially with regard to preliminary Issue No. 1, is not sustainable in the eyes of law for the reason that while passing the impugned order, learned Rent Controller has erred in not appreciating the statutory provisions

of Section 14(3)(d) of the Act, perusal whereof makes it evident that eviction of a tenant from residential premises cannot be sought for use thereof for non-residential purposes, except for purposes specifically contained in Section 14(3) (d). Learned Senior Counsel has submitted that as requirement specified in the rent petition by the landlord was not in terms of what is provided in Section 14(3)(d) of the 1987 Act, the preliminary objection No. 1 taken by the petitioner before the Rent Controller, could not have been dismissed by the said Court and dismissal of the same is an act of perversity which requires to be set aside by this Court by invoking its powers of revision. Learned Senior Counsel has also argued that otherwise also the impugned order is not sustainable in the eyes of law as the learned Rent Controller has erred in not appreciating that in terms of the provisions of Section 12 of the 1987 Act, residential premises cannot be permitted to be used for non-residential purpose, except with the written permission of the Collector and the present landlord was not having any such permission. It is primarily on these bases that the impugned order stands assailed by the petitioner.

7. Defending the order passed by learned Rent Controller, Mr. Arun Kumar, learned Counsel for the respondent-landlord has argued that there is no bar in Section 14(3)(d) of the Act that the owner of the residential premises cannot pray for eviction of a tenant on the ground that he wants to use the residential premises for non-residential purposes. Learned Counsel has argued that language of Clause (d) of Section 14(3) itself is self speaking that in case, landlord requires the residential premises for use as an office etc. then, he can do so and in the present case, the requirement, as was put forth by the landlord, was for the use of the demised premises as "**godown-cum-office"**, and in this background, the order under challenge cannot be faulted with and the present revision being devoid of merit deserves to be dismissed. Learned Counsel has also taken an objection with regard to the maintainability of the revision petition on the ground that the revision which

has been preferred against the order impugned by the petitioner is not maintainable in view of remedy of appeal available to him. He has argued that as the order impugned rejects the prayer of the tenant for dismissal of the rent petition on the ground of same being not maintainable, then against said order, an appeal lyes and not a revision petition.

8. Controverting the argument so addressed by learned Counsel for the respondent, learned Senior Counsel appearing for the petitioner-tenant has drawn the attention of the Court to the three Judge judgment passed by this Court in Cr. No. 136 of 2010, titled as Shri Vinod alias Raja vs. Smt. Joginder Kaur, decided on 5th July, 2012, and on the strength of the findings returned in the said judgment, learned Senior Counsel has argued that the law as it stands is that at the behest of any person aggrieved by an order which finally decides his fate in the case, for which appellate authority is not provided in the notification issued by the government under Section 24(1) of the Himachal Pradesh Urban Rent Control Act, 1987, an appeal is maintainable as per the scheme of the Civil Procedure Code, until otherwise specified by the government by way of an appropriate notification, and in all other cases, the aggrieved party has to file the revision petition. As per him, as in the present case, the order passed by learned Rent Controller rejected the preliminary issues, therefore, as no right of appeal is available against such an order, the revision petition was rightly filed by the petitioner-tenant.

9. I have heard learned Counsel for the parties and have gone through the order impugned as well as the documents appended with the petition.

10. In the present case, the order under challenge is one, which has rejected the preliminary objection raised by the tenant with regard to non maintainability of the rent petition. Though, this Court is aware that the provisions of the Code of Civil Procedure are *stricto senso* not applicable as far as rent proceedings are concerned but taking a cue from what is contained

under Section 115 of the Civil Procedure Code, this Court has no hesitation in holding that against an order vide which a preliminary objection has been rejected by the learned Rent Controller, a revision would be maintainable and not an appeal. This Court places reliance upon the judgment which has been passed by Hon'ble Coordinate Bench of this Court in C.R. No. 3 of 2011, titled as **Rajesh @ Raju** vs **Shri Dayawant Singh and another**, decided on 26.11.2018, in which in paras 11 and 12 thereof, Hon'ble Coordinate Bench has been pleased to hold as under:-

> *11. An order passed under the provisions of Order IX Rule 8 CPC decides the fate of the person aggrieved finally. Since in the notification, as discussed hereinabove, there exists no provisions to challenge an order of this nature and as the impugned order has decided the fate of the rent petition finally, therefore, in view of the law laid down by the Full Bench of this Court in Vinod's case cited supra, learned Appellate Authority has not committed any illegality or irregularity in entertaining the appeal. The contentions to the contrary brought to this Court in the present petition are not legally sustainable.*
>
> *12. It is worth mentioning that the rules of procedure being hand made are meant for advancement of justice and not to thwart it. When by way of notification the forum to challenge an order dismissing the rent petition in default has not been provided by the legislature, therefore, the petitioner-landlord has rightly preferred the appeal under the Scheme of the Civil Procedure Code as per the law laid down by the Full Court in Vinod's case cited supra."*

In this case, as the order impugned did not finally decide the fate of the rent petition, therefore, but natural, the same could have been assailed by way of a revision petition, as has been done by the tenant.

11. This Court is further placing reliance upon judgment passed by Hon'ble Full Bench of this Court in Vinod alias Raja vs. Smt. Joginder Kaur (supra) , in which, the issue of 'which order can be appealed and which order

can be revised' has been thoroughly discussed by Hon'ble Full Bench and the conclusions arrived at therein are as under:-

> *"30. Wherever a right is provided by a statute, a remedy though not expressly provided for, may necessarily be implied. Whenever there is a right, there should also be an action for its enforcement and the legal procedure should be sufficiently elastic and comprehensive to afford the requisite means for the protection of the rights which the law has recognized, as held by the apex Court in Constitution Bench decision in Makhan Singh Tarsikka versus The State of Punjab, reported in AIR 1964 SC 381.*
>
> *31. Guided thus by the salutary and first principles in the matter as above, we hold that any person aggrieved by an order which finally decides his fate in the case for which appellate authority is not otherwise provided in the notification issued by the government under Section 24(1) of the Himachal Pradesh Urban Rent Control Act, 1987, an appeal is maintainable as per the scheme of the Civil Procedure Code, until otherwise specified by the government by way the government by way of an appropriate notification."*

12. In this view of the matter, this Court holds that there is no merit in the objection taken by learned Counsel for the respondent that proceedings initiated against impugned order by way of revision petition are not maintainable.

13. Now coming to the merits of the case. I have already quoted the contents of para 18(a) of the rent petition hereinabove, perusal of which demonstrates that the possession of the demised premises was sought by the respondent herein for the purpose of using the same as a godown-cum-office. The contention of the landlord, as is borne out from the averments made out in the rent petition, was to the effect that the landlord was running a shoe business since 1960, both as a wholesaler and as a retailer and he had a warehouse for the aforesaid business, which now no more was in good

condition and as the business of the petitioner was expanding and godown in issue was falling short, therefore, the demised premises were required by the landlord for the purpose of using the same as 'godown-cum-office. While dismissing the preliminary objection taken by the tenant qua the maintainability of the rent petition, learned Rent Controller held that Section 14(3)(d) of the 1987 Act clearly states that any residential property can be used for the purpose of office, consulting room for starting practice as a Lawyer and such like profession and if the petitioner has not acquired any other building for the use as an office, then, starting up a business or any other profession and using any building as an office was duly covered under the provisions of the Act and make out a ground of eviction by law. It is by assigning these findings that the preliminary objection has been dismissed.

14. In terms of the provisions of Section 14(3)(d) of the 1987 Act, a landlord may apply to the controller for an order directing the tenant to put the landlord in possession in the case of any residential or non-residential building, if he requires it for use as an office or consulting room by his son who intends to start practice as a Lawyer, an architect, a dentist, an engineer, a veterinary surgeon or a medical practitioner, including a practitioner of Ayurvedic Unani or Homeopathic System of Medicine or for the residence of his son who is married. This of course is subject to the subsequent statutory provisions contained therein. A bare reading of the said statutory clause demonstrates that a residential or for that purpose even a non-residential building can be got vacated by a landlord if he requires the same for use as an office, architect, dentist etc. as stands explicitly spelled out in this particular clause. Incidentally, the purposes which have been spelled out in this particular clause are the only purposes for which the premises can be got vacated. It is not as if the purposes are only illustrative. In view of this, in terms of Section 14(3)(d), a residential premises or may be a non-residential

premises, if they are required to be vacated under this particular clause can be got vacated only for the purposes which are specified therein. Now if we compare the content of the provisions of Section 14(3)(d) either with the grounds mentioned in para 18(a) of the rent petition preferred by the landlord or the reasons which have been assigned by the Rent Controller while dismissing the preliminary objections, one finds that the learned Rent Controller has erred in not appreciating that the provisons of Section 14(3)(d) of the 1987 Act could not have been invoked by a landlord for getting a residential premises vacated for using the same as a godown. Simply by mentioning that the same was required for "**office-cum-godown**", the intent of the landlord that the premises in fact was needed to be used as a godown could not have been ignored. Not only this, there is further a perversity in the findings which have been returned by learned Rent Controller and the same is that the conclusion drawn by the learned Rent Controller that in terms of provisions of Section 14(3)(d) of the 1987 Act, the demised premises can be got vacated for starting up a business or any profession is completely erroneous. In fact, these findings do violence to the language of Section 14(3)(d) of the 1987 Act, which specifically culls out the purposes for which the premises can be got vacated by invoking the provisions of the 14(3)(d) of the 1987 Act.

15. Accordingly, in view of what has been held hereinabove, the present petition is allowed by setting aside order dated 25.09.2018, passed by learned Rent Controller, Court No. 3, Shimla, and the preliminary objection No. 1 is upheld by holding that the rent petition filed by the petitioner seeking eviction of the tenant for personal use of residential premises for non-residential purpose, i.e. godown-cum-office, is not maintainable.

Pending miscellaneous application(s), if any, also stand disposed of accordingly.

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

Between:-

1. HIMACHAL PRADESH STATE ELECTRICITY BOARD, KUMAR HOUSE, SHIMLA-171004, THOUGH ITS SECRETARY.
2. THE SUPERINTENDING ENGINEER (OPERATION) CIRCLE, H.P.S.E.B. SOLAN.
3. THE ADDL. SUPERINTENDING ENGINEER, ELECTRICAL DIVISION, PARWANOO, DISTRICT SOLAN.
4. THE EXECUTIVE ENGINEER, ELECTRICAL SUB DIVISION, PARWANOO, DISTRICT SOLAN.

……….PETITIONERS

(BY MR. VIKRANT THAKUR, ADVOCATE)

AND

1. M/S AMAR ROLLER FLOUR MILLS, 30, INDUSTRIAL AREA SECTOR-1, PARWANOO, DISTRICT SOLAN, H.P. THROUGH ITS DIRECTOR AND AUTHORIZED REPRESENTATIVE SHRI DHARAM PAL KUTHIALA.

……….RESPONDENT

2. H.P. STATE ELECTRICITY REGULATORY COMMISSION, KEONTHAL COMMERCIAL COMPLEX, SHIMLA-4 THROUGH ITS SECRETARY.

……….PROFORMA RESPONDENT

(BY MR. RAHUL MAHAJAN, ADVOCATE FOR R-1;

MR. N. K. SOOD, SR. ADVOCATE WITH MR. AMAN SOOD, ADVOCATE FOR PR-2.)

CIVIL WRIT PETITION
No. 704 of 2008
Decided on: 28.02.2022

Constitution of India, 1950- Article 226 – **Indian Electricity Act, 2003**- Section 42(6)- Limitation Act, 1963- Section 5- Writ petition to set aside order passed by Electricity Regulatory Commission- Petitioner raised demand of Rs.9,09,284/- against the respondent-Company on account of a demand contract- Appeal of petitioner was dismissed on the ground of limitation- Held- No cogent reason as to why the appeal could not be filed within the period of limitation has been spelt out in the application under Section 5 of Limitation Act- Order of Appellate Authority not perverse- Petition dismissed. (Para 10, 11)

This petition coming on for hearing this day, the Court passed the following:-

O R D E R

By way of this writ petition, the petitioner has prayed for the following substantive reliefs:-

" It is therefore respectfully prayed that this writ petition may kindly be allowed and the impugned order Annexure P-1 dated 26.6.2006 passed by the learned Forum, order dated 7.4.2007 Annexure P-5 passed by the Electricity Ombudsman and order dated 17-11-2007 Annexure P-5 passed by learned Electricity Regulatory Commission may be quashed and set aside and the matter may be ordered to be heard and decided on merits, in the interest of justice, such other or further orders as may be deemed just and proper in the facts and circumstances of the case may also be passed while allowing this writ petition and justice be done to the parties."

2. Brief facts necessary for the adjudication of the present petition are as under:-

Against a demand raised by the petitioner-Board against the respondent-Company qua an amount of `9,09,284/- purportedly payable on account of a demand contract entered into between the parties, respondent No. 1 preferred a complaint before the Forum for the redressal of the Consumers of H.P.S.E.B., i.e. complainant No.1421305004, which complaint was allowed by the Forum vide order dated 26.06.2006, Annexure P-1 in the following terms:-

> *"The account of the Complainant Company be overhauled from 1.11.2001 to February 2003 (upto PDCO) by taking Contract Demand as 300 KVA for the billing month of November, 2001 & December 2001, and 352 KVA from billing month of January 2005 onwards upto the date of disconnection. i.e. February 2003. Based upon above, the amount due to the Respondent Board/Company be worked out and recovery/ refunded as per law, within a period of two months from the date of issue of this order."*

3. Feeling aggrieved, appeal was preferred under Section 42(6) of the Indian Electricity Act, 2003, by the petitioners herein before the Himachal Pradesh Electricity Ombudsman at Shimla. This appeal was accompanied with an application under Section 5 of the Limitation Act for *condonation* of delay in filing the appeal. The Appellate Authority vide order dated 7th April, 2007, dismissed the appeal of the petitioner herein as well as application seeking condonation of delay in filing the appeal by holding that the appellants therein had failed to justify delay in filing the appeal as the reasons provided in the application filed for *condonation* of delay were vague and not convincing and they did not satisfy the test of diligence. The order so passed by the Appellate Authority was challenged before the Himachal Pradesh Electricity Regulatory Commission by the present petitioners by way of Appeal No.149 of 2007.

4. Vide order dated 17.11.2007, the appeal was dismissed by the said authority in the following terms:-

> *"The Electricity Act, 2003 is a special law. Sub-section (2) of section 29 of Limitation Act, 1963 provides that where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 5 of the Limitation Act shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law. In a case the Punjab State Electricity Board Versus Radha Steel Rolling Mills Mandi (AIR 2000 P&A 94 at page 97) it has been concluded that a preposition of law which emerges from the lecisions is that provisions of the Limitation Act, 1963 apply to the proceedings in the Courts not to the appeals, applications etc., filed before tribunals and! quasi judicial authorities notwithstanding the fact that such tribunals and authorities may be vested with certain powers under the Code of Civil Procedure or the Code of Criminal Procedure and their proceedings may be akin those of the Courts. Therefore, it hardly makes any difference whether the application has been moved under section 5 of the Limitation Act, 1963 or under proviso to regulation 13 of the Regulations (ibid). To obtain the extension, in time by invoking the said provisions, the party seeking the extension has to satisfy the Court (the authority) that it had sufficient cause for not filing appeal within the prescribed period. There is no denying in that the court is required to take a broad view in the matter of condonation of limitation so as to advance the cause of justice. However, the very enactment of laws relating to limitations postulates that the parties concerned are supposed to follow their matters with due diligence. Organizations which are commercial entities should be more vigilant in prosecuting their claims/causes. The Apex Court in its verdict given in the West Bengal Versuss*

Administrator Howrah Municipality AIR 1972 SC 749, have also laid that the word "sufficient cause" should receive a liberal constructions as to advance substantial justice when no negligence or inaction or want of bonafide is imputable to the party. In the present case the element of negligence or inaction on the part of the authorities of the Board is not ruled out at all. Thus on the plea of the liberal interpretation, the law of limitation cannot be set at naught. In a recent case S.R.Batra V/s Tarunia Batra, ARR 2007 SC 1118, the Hon'be Supreme Court, have reiterated that it is well settled that any interpretation which leads to absurdity should not be accepted. While disposing of the similar issue in appeal case No. 91/07, HPPSEB: V/s M/S Super Plateck Pvt. Ltd. decided on 26.5.2007 this Commission has already declined to condone the delay.

Conclusion

In the light of the above it can be safely concluded that the learned Electricity Ombudsmann has not committed any error which could be said to be in exercise of the jurisdiction, illegality or with material irregularities. Hence the Commission finds no reasons to interfere with the impugned order dated 7th April, 2007 and dismisses the appeal."

5. Feeling aggrieved, the Electricity-Board has filed the present writ petition.

6. I have heard learned Counsel for the parties and gone through the pleadings as well as documents appended therewith.

7. At the very threshold, it is relevant to take note of the fact that, as has been fairly spelled out by learned Counsel appearing for the respondent-Board that the order, which has been passed by the Forum for redressal of the grievances of the Consumers of the Electricity Board, stood implemented by the petitioner-Board.

8. Respondent No. 1 herein, feeling aggrieved by a demand being raised by the petitioner filed a complaint before the statutory authority which was a fact finding authority, which authority vide Annexure P-1, after taking into consideration the respective contentions of the parties, on the peculiar

facts of the case, came to the conclusion that there was merit in the complaint filed before it. It is a matter of record that the order so passed by the said authority was not assailed before the Appellate Authority within the period of limitation as has been prescribed. The application so filed for *condonation* of delay was dismissed by the authority concerned, i.e. first Appellate Authority by returning the findings that the appellants therein had failed to justify by way of giving cogent reasons, as to why there was a delay in approaching the Appellate Authority. A perusal of the application which was filed under Section 5 of the Limitation Act before the said Authority, a copy whereof is available on record demonstrates that there is no perversity in the findings which have been so returned by the Appellate Authority. The reasons which stand assigned in the application filed under Section 5 of the Limitation Act are no good reasons. To put in differently, the reasons stated for delay were movement of the file from one table to another and from one official/officer to other. The findings so returned by the first Appellate Authority have been further upheld in appeal by the Himachal Pradesh Electricity Regulatory Commission and relevant portion of the order has already been quoted by me herein above.

9. During the course of arguments, it could not be pointed out that the findings so returned by either of the two authorities on the issue of delay were perverse findings and not borne out from the record of the case. The law of limitation governs the field of limitation. In case a party has a grievance or is aggrieved by any order or judgment passed by an authority or a Court of law, then the party concerned has to seek legal redressal against the same within the period of limitation as prescribed under the Act. If a party fails to do so, then, a right accrues upon the other party, which cannot be taken away by the Court, until and unless, in an application filed under Section 5 of the Limitation Act, the applicant/appellant is able to convince the Court that there were cogent reasons on account of which it could not approach the

Court within the period of limitation. With the lapse of period of limitation, the principle of "right remains remedy goes" comes into play and this right, which stands accrued upon the other party, as already observed herein above, cannot be taken away lightly by the Court by allowing the application filed for *condonation* of delay until and unless the Court is indeed satisfied that the delay in filing was justifiable.

10. As mentioned herein above, the application which was filed under Section 5 of the Limitation Act praying for *condonation* of delay in filing the first appeal did not spell out any cogent reasons as to why the appeal could not be filed within the period of limitation. The file being moved from one table to another and from one officer/official to other is no ground to take away a right conferred upon other party with the expiry of the limitation. Thus, this Court does not finds any perversity in the findings, which have been so returned by the authorities while denying *condonation* of delay in filing the appeal. Otherwise also, during the course of arguments, it could not be pointed out that the order which was passed on merit by the first Forum, was passed either without following the procedure or without hearing the parties.

11. In exercise of power which so stands conferred upon this Court under Article 226 of the Constitution of India, this Court is not to act as an Appellate Court and if the procedure has been followed by the authorities below, then, interference by this Court is to be minimal, save and except, if the findings returned on merit, shock the judicial conscious of the Court. In this case, the findings which have been returned by the first Forum are cogent findings based on the material before it and based on the respective stands which the parties took before it and it is not as if these findings are perverse or are not borne out from the record of the case.

In view of what has been held herein above, as the Court does not find any merit in the present petition, the same is accordingly dismissed.

Pending miscellaneous application(s), if any, also stand disposed of. No order as to costs.

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

Between:-

1) BOEHRINGER INGELHEIM INTERNATIONAL GMBH & CO. KG, D-55216, INGELHEIM AM RHEIN GERMANY THROUGH ITS POWER OF ATTORNEY HOLDER
2. BOEHRINDER INGELHEIM (INDIA) PVT. LTD. UNIT NO. 202 AND PART OF UNIT NO. 201, SECOND FLOOR, GODREJ 2, PIROJSHA NAGAR, EASTERN EXPRESS HIGHWAY, VIKHROLI (E), MUMBAI-400079, THROUGH ITS POWER OF ATTORTNEY HOLDER

..PLAINTIFFS/APPLICANTS

(BY M/S ASHOK AGGARWAL AND VINAY KUTHIALA, SENIOR ADVOCATES WITH M/S ATUL JHINGAN, SHILPA SOOD, SANJAY KUMAR, ARPITA SAWHNEY AND PRIYANKA SHARMA, ADVOCATES)

AND

MACLEODS PHARMACEUTICALS LIMITED KHARUNI LODHIMAJRA ROAD, PO LODHIMJRA, BADDI, TEHDA SOLAN, HIMACHAL PRADESH 174101 THROUGH ITS MANAGING DIRECTOR.
ALSO AT
304, ATLANTA ARCADE, MAROL CHURCH ROAD, ANDHERI (EAST) MUMBAI 400059
THROGH ITS MANAGING DIRECTOR.

........DEFENDANT/RESPONDENT

(BY MR. BIPIN CHANDER NEGI, SENIOR ADVOCATE WITH M/S JAI SAI DEEPAK, GURUSWAMY NATRAJAN, SHRADHA KAROL, & ANKUR VYAS, ADVOCATES FOR THE DEFENDANT)

OMPS NO. 53 AND 79 OF 2022
IN COMS No. 03 of 2022
Reserved on: 17.03.2022/29.03.2022
Decided on:21.04.2022

A. **Code of Civil Procedure, 1908**- order 39 Rule 1 and 2- **The Patents Act 1970**- Section 13(4) – Suit of the plaintiff for permanent injunction for restraining the defendant infringing the patent rights of the plaintiff- Held- Patent in issue i.e. 'IN301' was granted in favour of the plaintiff- Prima facie case and balance of convenience in favour of the plaintiff- Ad-interim protection made absolute. (Para 16, 17, 23)

B. **Code of Civil Procedure, 1908**- order VII Rule XI- **The Patents Act 1970**- Section 53(4)- Held- Court does not concur with the contentions of defendant that plaint is liable to be rejected being barred by law- Appeal dismissed. (Para 31, 32)

Cases referred:

Columbia Pictures Industries, Inc. and others Versus Siti Cable Network Ltd., 2001 (60) DRJ 11 (DB);

Dalpat Kumar and Another vs. Prahlad Singh and Others, (1992) 1 SCC 719;

M/s Bishwanath Prasad Radhey Shyam vs. Hindustan Metal Industries, (1979) 2 SCC 511;

Ten XC Wireless Inc and Others vs. Mobi Antenna Technologies (Shenzhen) Co. Ltd., 2011 SCC Online Delhi 4648;

These applications coming on for pronouncement of order this day, Hon'ble Mr. Ajay Mohan Goel, passed the following:-

O R D E R

This order shall dispose of OMP No. 53 of 2022, preferred under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure by the applicants/plaintiffs, praying for interim directions during the pendency of the

suit as also OMP No. 79 of 2022, which has been filed under Order VII, Rule XI of the Code of Civil Procedure, on behalf of the applicant/defendant, praying for rejection of the plaint.

OMP No. 53 OF 2022

2. The suit of the plaintiff is for passing of a decree of restraint and permanent injunction against the defendant by its or through its directors, partners licenses, stockiest and distributors, agents etc. from infringing the patent rights of plaintiff No.1 under Indian Patent No. 243301 by advertising, launching, making, using, offering for sale, selling, importing and/or exporting the medicinal product Linagliptin in any from whatsoever including Linagliptin API, Linagliptin formulation, "Linagliptin Tablet" and/or "Linagliptin + Metformin Hydrochloride Tablets", or any "generic version" thereof or any product sold under the trade marks/brand names "LINAMAC" and "LINAONE", or any other trade mark(s)/name(s), whatsoever, or any other product covered by the subject patent granted by the Controller of Patents on October 05, 2010, in favour of plaintiff No 1. In addition, the plaintiffs are also praying for a decree of damages to the tune of Rs.One Crore. According to the plaintiffs, plaintiff No. 1 is a company incorporated under the laws of Germany and plaintiff No. 2 is a company registered under the Companies Act. Plaintiff No. 1 is the owner of plethora of patents worldwide, including Indian Patent No. 243301 (hereinafter to be referred as 'subject patent or IN 301' for short). The subject patent was granted in favour of plaintiff No. 1 on 05.10.2010 as per Section 43 of the Indian Patents Act 1970, under 'IN 301' for pharmaceuticals product titled "8 (3-AMINOPIPERDIN-1YL)-XANTHINE COMPOUNDS", for a term of 20 years from the date of filing.

3. When this application was listed before this Court on 25.02.2022, ad-interim protection was granted by the Court to the applicants/plaintiffs and relevant portion of the said order is being quoted herein below:-

"Till the next date of hearing, respondent/defendant is restrained from manufacturing and selling medicinal product 'Linagliptin' in any form, as for the grant of ad-interim injunction, this Court is satisfied that the applicants have a prima-facie case. This order is being passed taking into consideration the un-rebutted facts, at least till this stage, that there exists an Indian Patent 243301 in favour of the applicants, which is to expire on 18th August, 2023 and the respondent, without any valid patent or authorization/licence from the applicant, has started manufacturing and selling the infringing product under the brand name of LINAMAC and LINAONE.

It is clarified that this order shall remain in force till next date of hearing only, subject to any further order that may be passed by the Court in this regard."

4. The arguments on behalf of the plaintiffs were advanced by Mr. Ashok Aggarwal, learned Senior Counsel and Mr. Vinay Kuthiala, learned Senior Counsel. Arguments on behalf of the defendants were advanced by Mr. Bipin Chander Negi, learned Senior Counsel and M/s Jai Sai Deepak and Guru Natarajan, learned Counsel.

5. Learned Senior Counsel appearing for the plaintiffs argued that for the purpose of grant of interim relief, three primary ingredients, i.e. *prima facie* case, balance of convenience and irreparable loss are all in favour of the plaintiffs. In addition, they argued that as the defendant has not been able to lay any credible challenge to the 'subject patent' , therefore, this application be disposed of by confirming ad-interim order dated 25.02.2022.

6. On the other hand, learned Counsel for the defendant have submitted that as the defendant has laid a credible challenge to the 'subject patent' therefore, ad-interim injunction granted on 25.02.2022 be vacated and the application filed under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure be dismissed. 7. To substantiate their contention that all

ingredients exist in favour of the plaintiffs for the continuation of interim order, learned Senior Counsel argued that in the present case, the patent in issue, i.e. Indian Patent No. 243301 (hereinafter to be referred as 'IN 301') was granted to the applicants on 5th October, 2010, and as its international date of filing was 18th August, 2003, the term of the patent being 20 years, the patent is still alive and is to expire on 18th October, 2023. As per learned Counsel, the patent was granted to the applicants after following the procedure prescribed in the Patents Act, 1970, as amended from time to time and the Rules framed there under. There was no opposition to the grant of patent at any stage after the application was filed for the grant of the patent and after the patent was granted on 5th October, 2010, by anyone, including the respondents in terms of statutory provisions of the Patent Act, 1970. The patent in issue is a commercially successful patent. The medicinal product "Linagliptin Tablet and Lenagliptin + Metformin Hydrochloride Tablets" covered by the said patent were introduced and launched in the Indian market under the brand name "Trajenta/Trajenta Duo" on 27.05.2012 and 21.06.2014, respectively. Learned Senior Counsel stressed that no party, including the respondent has filed any pre-grant opposition, post-grant opposition or a revocation petition against the subject patent especially against the quality and strength of the subject patent. They have further submitted that the respondent-Company is an Indian Pharmaceutical Company and it had recently come within the knowledge of the applicants that the respondent-Company had made preparation to launch and thereafter had launched infringing product Linagliptin 5 mg tablets under the brand names "LINAMAC" and "LINAONE". As per learned Senior Counsel, the product Linagliptin 5 mg tablets now being offered for sale and being sold under the brand names "LINAMAC" and "LINAONE" by the respondent-Company, are covered by the subject patent and manufacturing of the said product by the respondent-Company is an act of infringement of the exclusive rights of the subject patent of applicant No. 1.

They further argued that as admittedly the respondent-Company neither has any patent nor it has got a licence to manufacture and sell the products covered by the subject patent from the applicant nor the respondents have applied for or have been granted compulsory licence to manufacture and sell the product, therefore, during the pendency of the suit, the respondent be restrained from manufacturing and selling the product in issue which are covered by the subject patent. According to the plaintiffs, the following points demonstrate that there exists a good case in their favour for confirmation of the interim order:

(a) 'subject patent' is old and well established;

(b) 'subject patent' is commercially highly successful and extensively useful;

(c) admittedly, no party, including the defendant, raised any pre-grant opposition, post-grant opposition, including against the quality and strength of the 'subject patent';

(d) the patent was granted in favour of the plaintiffs after following the substantive provisions of the The Patents Act, 1970;

(e) the patent has had a successful commercial run in India for more than eleven years, without any challenge, including that from the defendant;

(f) the Central Government has not filed any revocation for the 'subject patent' in terms of Section 64 of the Patents Act, 1970;

(g) the Central Government has not made any declaration for revocation of the 'subject patent' in public interest in terms of Section 67 of the Patents Act;

(h) none, including the defendant, applied under Section 84 of the Patents Act for grant of compulsory licence of the 'subject patent' on the grounds as mentioned therein;

(i) no challenge was ever put forth by the defendants to the 'subject patent' except immediately before the commercial launch of its infringing product in the month of February 2022, when a revocation petition was filed by the defendants under Section 64 of the Patents Act.

8. It was argued that above facts clearly and categorically demonstrate that there exists a *prima facie* case in favour of the plaintiffs and balance of convenience is also in their favour and in this backdrop, in case, ad-interim order is not confirmed and the defendant is permitted to infringe the 'subject patent' of the plaintiffs, then, the plaintiffs shall suffer irreparable loss, which cannot be compensated monetarily as all the hard work that has gone into the invention of the product in issue and getting it patented would be washed away. Learned Senior Counsel further stressed that admittedly the defendant neither has any patent in its name nor did it lay any challenge at the time when the plaintiffs had applied for the 'subject patent' or even after the patent was granted in favour of the plaintiffs. They also submitted that the filing of revocation petition by the defendant, in close proximity with the launch of the infringing product was nothing but an afterthought to hold out that in lieu of its having filed a revocation petition, it has laid a credible challenge to the 'subject patent'.

9. Opposing the application, learned Counsel for the respondent Sh. Bipin Chander Negi, Senior Advocate and M/s Sai Deepak and Guru Natrajan, Advocates, argued that the applicants, in fact, have not approached the Court with clean hands as fact of the matter is that the applicants had obtained two patents, i.e. Patent No. 227719 (hereinafter to be referred as 'IN 719') for the "Markush" formula being the 'genus' patent, which expired on 21st February, 2022 and subject patent IN 301, which is a 'species' patent and both patents were granted for the same invention as it is nowhere disclosed either in the plaint or in the application as to what was the inventive step

capable of industrial application, which distinguished patent IN301 from IN719. The Court was apprised by them that the respondent had filed a revocation petition against the patent in issue under Section 64 of the Patents Act, 1970 in the High Court of Delhi, in which, notices to the present applicants have been issued. It was argued that respondent has rightly challenged the 'species' after the 'genius' has expired and as the plaint is conspicuously silent with regard to the difference between the 'genius' patent and the 'species' patent, therefore, the applicants are not entitled for any relief. It was argued that as a credible challenge stood made to the patent in issue by the respondent, therefore, no interim relief be granted. As per them, it is settled law that mere grant of patent does not lend a presumption of validity to the patent. The scheme of the Patents Act is to provide multi-layer challenges, which are available to a non-patentee to challenge and question the validity of a patent at any time and such validity has to be tested on the anvil of the provisions of the The Patents Act, 1970. It was argued that the provisions of Section 13(4) of the The Patents Act expressly set out the absence of any presumption of validity due to mere grant. It was also argued that in the case of pharmaceutical patents, which have been recognized as a specific species of patent infringement litigation, the overwhelming factor is that of public interest-namely the need to provide for affordable and accessible healthcare products. It was argued that in addition to the settled principles of *prima facie* case, balance of convenience and irreparable loss, the plaintiffs also have to satisfy that there is no **credible challenge** to the 'subject patent' which in the present case, the plaintiffs have not been able to demonstrate and in this view of the matter, the ad-interim injunction granted in favour of the plaintiffs was liable to be vacated and the prayer of the plaintiffs for interim injunction is liable to be dismissed. Learned Counsel have submitted that the genus patent 'IN719' has expired on 21st February, 2022 whereas the specie patent 'IN301'is to expire on 18th August, 2023. According to them, it is

apparent and evident from the record that the plaintiffs themselves have held out on more than one occasion that the genus patent and specie patent are the same. Learned Counsel drew the attention of the Court to the order passed by Hon'ble High Court of Delhi in Civil Suit (Comm.) No. 239 of 2019 with I.A. No. 6797 and I.A. No. 6798/2019, titled as Boehringer Ingelheim Phara GMBH & Co. KG vs. Vee Excel Drugs and Pharmaceuticals Private Ltd. & Ors., dated 10.05.2019 and by referring to para 10 thereof, they have argued that the plaintiffs cannot wriggle out from the admissions which have been made by them, as are borne out from the said order that the plaintiffs themselves have claimed to be owners of two patents, the first patent being IN719 and the second patent being IN301 and it stood submitted on behalf of the plaintiffs before the said Court that these two patents both cover Linagliptin and all its forms. It was argued that in the entire plaint, the plaintiffs have very conveniently concealed this fact that except a vague and short reference somewhere in between has been made that the plaintiffs were also holding patent ÍN719', which as per defendants in fact was for the same product for which subsequently the plaintiffs obtained patent ÍN301'. The difference between has not at all been explained by the plaintiffs in the plaint. Learned Counsel for the defendant also submitted that the defendant is not infringing the suit patent as the product of the defendant is based on the teaching of 'IN719'after the expiry of the term of said patent and therefore, its act does not amounts to an act of infringement. They have also argued that the contents of the cease and desist notice which was issued by the plaintiffs to the defendant, which stand placed on record as Annexure-G in the list of documents filed by the defendant dated 01.11.2021 and another communication in continuation thereof dated 16th December, 2021, demonstrate that the plaintiffs had referred the patents IN719 and Patent IN301 in the same breath and in the same context while calling upon the defendant to cease and desist from launching their product on the ground that

the same amounted to infringement of intellectual property rights of the plaintiffs which stood conferred upon them under IN719 and IN301. This according to the defendant, was a clear cut admission on the behalf of the plaintiffs that IN719 was the genus and IN301 was specie as term of genus had expired, the plaintiffs in fact were not having any case at all for grant of interim prayer being sought by them. Further as per them, in terms of the provisions of Section 146(2) of the Patents Act, 1970, read with Rule 131 of the Patents Rules 2003, the plaintiffs have filled in Form 27, perusal whereof would demonstrate that the same product was being reflected in the said statutory form under both genus patent and specie patent. Thus, they prayed that the ad-interim order be not confirmed and same be vacated in the larger public interest.

10. In rejoinder to the arguments so advanced by learned Counsel for the respondent, learned Senior Counsel appearing for the applicants have submitted that the presumption of validity, though rebutable, which is attached to a patent, which has been running successfully commercially without any challenge, cannot be belittled down by a company like the respondent who blatantly infringe the patent of the applicants on the strength of the respondents simply having filed a revocation petition, that too, in close proximity to the launching of the infringed product. It was further argued that the contents of cease and desist notice as also the order passed by the Hon'ble High Court of Delhi were being misconstrued and misread by the defendant and further the contents of Form 27 at this particular stage cannot be made a ground to non-suit the plaintiffs from the grant of interim relief for the reason that what is contained in the said Form is explainable and shall be explained in due course of the trial. Therefore, they prayed that ad-interim order be confirmed in favour of the applicants/plaintiffs.

11. I have heard learned Counsel for the parties and have also gone through the relevant pleadings and documents appended therewith.

12. In **M/s Bishwanath Prasad Radhey Shyam** vs. **Hindustan Metal Industries**, (1979) 2 Supreme Court Cases 511, Hon'ble Supreme Court has been pleased to hold that grant and sealing of the patent, or the decision rendered by the Controller in the case of opposition, does not guarantee the validity of the patent, which can be challenged before the High Court on various grounds in revocation or infringement proceedings. Hon'ble Supreme Court further held that the 'validity of a patent is not guaranteed by the grant', was also expressly provided in Section 13(4) of the Patents Act, 1970.

13. Hon'ble Supreme Court of India in **Dalpat Kumar and Another** vs. **Prahlad Singh and Others**, (1992) 1 Supreme Court Cases 719 has held that it is settled law that the grant of injunction is a discretionary relief and exercise thereof is subject to the Court satisfying that (1) there is a serious disputed questions to be tried in the suit and that an act, on the facts before the Court, there is probability of his being entitled to the relief asked for by the plaintiff/defendant; (2) the Court's interference is necessary to protect the party from the species of injury. In other words, irreparable injury or damage would ensue before the legal right would be established at trial' and (3) that the comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that would be likely to arise from granting it. In para-5 of the judgment, Hon'ble Apex Court has been further pleased to hold as under:-

> *"5. Therefore, the burden is on the plaintiff by evidence aliunde by affidavit or otherwise that there is "a prima facie case" in his favour which needs adjudication at the trial. The existence of the prima facie right and infraction of the enjoyment of his property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established, on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that*

there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition also is that "the balance of convenience" must be in favour of granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject-matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit."

14. In ***Ten XC Wireless Inc and Others*** *vs.* ***Mobi Antenna Technologies (Shenzhen) Co. Ltd.***, *2011 SCC Online Delhi 4648,* Hon'ble Delhi High Court has summarized the principles in general being followed for the grant of interim injunction in patent matters and the same are as under:-

(i) The registration of a patent per se does not entitle the plaintiffs to an injunction. The certificate does not establish a conclusive right.

(ii) There is no presumption of validity of a patent, which is evident from the reading of Section 13(4) as well as Sections 64 and 107 of the Patents Act.

(iii) The claimed invention has to be tested and tried in the laboratory of Courts.

(iv) The Courts lean against monopolies. The purpose of the legal regime in the area is to ensure that the inventions should benefit the public at large.

(v) The plaintiff is not entitled to an injunction if the defendant raises a credible challenge to the patent. Credible challenge means a serious question to be tried. The defendant need not make out a case of actual invalidity. Vulnerability is the issue at the preliminary injunction stage whereas the validity is the issue at trial. The showing of a substantial question as to invalidity thus requires less proof than the clear and convincing showing necessary to establish invalidity itself.

(vi) At this stage, the Court is not expected to examine the challenge in detail and arrive at a definite finding on the question of validity of the patent. That will have to await at the time of trial. However, the Court has to be satisfied that a substantial, tenable and credible challenge has been made.

(vii) The plaintiff is not entitled to an injunction, if the patent is recent, its validity has not been established and there is a serious controversy about the validity of the patent.

15. In the case in hand, the patent in issue, i.e. 'IN301' was granted in favour of the plaintiffs in India on 5th October, 2010 and the terms of the patent is 20 years, which is to expire on 5th October, 2023 as the international filing date of the patent application in the present case is August 18, 2003.

16. On the other hand, admittedly, the defendant does not has any patent qua the infringing product and no challenge, either to the application filed by the plaintiffs for grant of patent was laid by the defendant nor any post patent challenge was laid by it. Of course, in light of law laid down by Hon'ble Supreme Court in M/s Bishwanath Prasad Radhey Shyam (supra), grant of

patent does not guarantee the validity of a patent, which can be challenged before the High Court on various grounds in revocation or infringement proceedings, but the factum of a patent being there in favour of the plaintiffs and the factum of no pre or post grant challenge to the same by anyone, including the defendant, except recently by way of a revocation petition which was filed in close proximity to the launch of the infringing product, does creates a *prima facie* case and balance of convenience in favour of the plaintiffs. The Court is observing so for the reason that as per the plaintiffs, since the patent was granted on 5th October, 2010, the same has had a successful commercial run till date which continues and there is no serious dispute qua the same. The patent is an old patent and it has not been granted recently to the plaintiffs. Therefore, these facts do create *prima facie* case and balance of convenience in favour of the plaintiffs vis-a-vis the defendant, who admittedly does not has any patent qua the infringing product.

17. In the light of what has been discussed hereinabove, if an infringer is not restrained from infringing the patent of patent holder, then, but of course, the patent holder will suffer from irreparable loss and it cannot be said that the infringer stands on the same pedestal on which the patent holder is. Of course, the patent of the plaintiffs is vulnerable. It is open to challenge and now it has also been challenged by the defendant by way of a revocation petition. But mere filing of revocation proceedings cannot be treated to be a "credible challenge" to the old and successful patent of the plaintiffs. As far as the element of public interest is concerned, it may be observed that in the present case, the Central Government has not invoked the provisions of Section 66 of the Patents Act and after following the procedure referred to therein, made a declaration in the Official Gazette to the effect that the patent of the plaintiffs stand revoked in public interest. Not only this, the defendant has not approached the competent authority under Section 84 of the Patents

Act after the expiry of three years from the grant of the patent for grant of compulsory licence of patent on the conditions enumerated therein.

18. At this stage, it is relevant to refer to Section 48 of the Patents Act as it stood prior to the amendment and also post amendment, which amendment was carried out in the said section w.e.f. 20.05.2003.

19. Section 48 of the Patents Act, which deals with rights of the patentees, before amendment provided as under:

Section 48. Rights of patentees

(1) Subject to the other provisions contained in this Act, a patent granted before the commencement of this Act, shall confer on the patentee the exclusive right by himself, his agents or licensees to make, use, exercise, sell or distribute the invention in India.

2) Subject to the other provisions contained in this Act and the conditions specified in Section 47, a patent granted after the commencement this Act shall confer upon the patentee---

(a) where the patent is for an article or substance, the exclusive right by himself, his agents or licensees to make, use, exercise, sell or distribute such article or substance in India;

(b) where a patent is for a method or process of manufacturing an article or substance, the exclusive right by himself, his agents or licensees to use or exercise the method or process in India."

20. After amendment, said Section now reads as under:-

Section 48: Rights of patentees.

Subject to the other provisions contained in this Act and the conditions specified in Section 47, a patent granted under this Act shall confer upon the patentee--

(a) where the subject-matter of the patent is a product, the exclusive right to prevent third parties, who do not have his consent, from the act of making, using, offering for sale, selling or importing for those purposes that product in India;

(b) where the subject-matter of the patent is a process, the exclusive right to prevent third parties, who do not have his consent, from the act of using that process, and from the act of using, offering for sale, selling or importing for those purposes the product obtained directly by that process in India:

21. It is evident that though subject to other provisions contained in the Patents Act, including Section 47 thereof, a patent granted under the Patents Act does confers upon the patentee, where the subject matter of the patent is a product, the exclusive right to prevent a third party, who do not have his consent, from the act of making, using, offering for sale etc. of that product in India. Thus, a statutory right, which has been conferred upon the patentee, clothes the patentee with an umbrella of safety qua the infringement of its patent by a third party.

22. Further, it may be observed that the premise of the defendant that there is "credible challenge" to the subject patent of the plaintiffs is that the subject matter of the subject patent 'IN 301' granted to the plaintiffs was covered by subject matter of another Indian Patent, i.e. Patent Number 'IN 719' against granted to the plaintiffs which had expired in February, 2022. According to the defendant, IN301 is nothing but Evergreening of IN719. This Court is of the considered view that at this stage when the Court has to primarily see as to whether the plaintiffs have made out

a case for the grant of interim relief as prayed for, this Court cannot make any observation as to whether IN301 is Evergreening of IN719 because this is an issue which shall be decided by the Court in the light of the defence that may be taken by the defendant coupled with the evidence which may be led by the parties in support of their respective contentions. The effect of holding out of the plaintiffs as referred to by the defendants before various Courts or in the cease and desist notice etc. as well as in Form 27 can also be gone into at that stage only. Therefore, on this count, it cannot be said that at this stage, the defendant has rendered the patent of the plaintiffs to be vulnerable so as to lay a credible challenge to it for the purpose of declining interim protection. These observations have been made by this Court only to demonstrate its *prima facie* satisfaction on the point urged and this Court is refraining from making any further observation on merit in view of observations made by Hon'ble Supreme Court of India in Special Leave to Appeal C No. 18892/2017, titled as ***Az Tech (India) & Anr. Vs. Intex Technologies (India) Ltd. & Anr***., on 16.08.2017, in which Hon'ble Apex Court has been pleased to observe as under:-

> *"3. In the present Special Leave Petition (No.18892 of 2017) on 31st July, 2017, this Court passed the following order: Having read the order of the High Court of Delhi dated 10th March, 2017 passed in FAO(OS) No.1/2017 we find that it is virtually a decision on merits of the suit. We wonder if the High Court has thought it proper to write such an exhaustive judgment only because of acceptance of the fact that the interim orders in Intellectual Property Rights (IPR) matters in the Delhi High Court would govern the parties for a long duration of time and disposal of the main suit is a far cry.*
>
> *This is a disturbing trend which we need to address in the first instance before delving into the respective rights of the parties raised in the present case. We, therefore, direct the Registrar General of the Delhi*

> *High Court to report to the Court about the total number of pending IPR suits, divided into different categories, in the Delhi High Court; stage of each suit; and also the period for which injunction/interim orders held/holding the field in each of the such suits.*
>
> *The Registrar General of the Delhi High Court will also indicate to the Court what, according to the High Court, would be a reasonable way of ensuring the speedy disposal of the suits involving intellectual property rights which are presently pending.*
>
> *We will expect the Registrar General of the Delhi High Court to report to the Court within two weeks from today, latest by 14th August, 2017."*

23. Accordingly, in light of the observations made hereinabove, the ad-interim protection granted to the plaintiffs, vide order dated 25.02.2022, is made absolute during the pendency of the civil suit, of course, subject to any further order(s) which may be passed by this Court. No order as to costs. The application stands disposed of in above terms.

OMP No. 79 of 2022

24. This is an application filed under Order VII, Rules 11 read with Section 151 of the Code of Civil Procedure, on behalf of applicant/defendant, *inter alia*, on the grounds that the suit is barred in law in terms of the provisions of Section 53 (4) of the Patents Act, 1970 and the suit is improperly filed in as much as the person signing as 'constituted attorney' of the plaintiffs is barred by law from representing the plaintiffs.

25. Learned counsel for the applicant/ defendant argued that Section 53(4) of the Patents Act, 1970 (hereinafter referred to as the '1970 Act') provides that notwithstanding anything contained in any other law for the time being in force, on cessation of the patent right due to non-payment of renewal fee or on expiry of the term of patent, the subject matter covered by the said patent shall not be entitled to any protection. They submitted

that in the case in hand, the Indian Patent 'IN' 301 is an Evergreening of another Indian Patent 'IN' 719, both of which patents were registered in the name of the non-applicants/plaintiffs. 'IN' 719 being the genus patents, it specifically covered the commercial embodiments being marketed by patent 'IN' 301, which is the subject matter of the suit in hand. As per the applicant, in view of the specific provisions of Section 53 (4) of the 1970 Act and in view of the admissions made on behalf of the plaintiffs, as was evident from the holding out made by them before various Courts as also from the notices of cease and desist which were issued by the plaintiffs to the defendant, the suit in hand is not maintainable, being hit by the provisions of Section 53 (4) of the 1970 Act, which renders the suit to be rejected in terms of the provisions of Order VII, Rule 11 (d) of the Civil Procedure Code as the plaint is evidently barred by law.

26. With regard to the ground of the suit being improperly filed, learned counsel argued that the present being a commercial suit, the pleadings are signed and verified by a person who is not entitled in law to do so, which also calls for rejection of the plaint at the threshold under Order VII, Rule 11 being barred by law. They argued that the tactic of litigant compelling their counsels to sign and verify the pleadings stands bewailed by the Hon'ble Apex Court as well as other constitutional Courts across the country and the plaint in hand having been verified by one Shri Sujit Kumar, who claims to the constituted attorney of plaintiff No.2, renders the suit liable to be rejected under Order VII, Rule 11 of the Civil Procedure Code.

27. On the other hand, learned Senior Counsel for the non-applicants/plaintiffs have argued that the application filed under Order VII, Rule 11 of the Civil Procedure Code is without any merit for the reason that by no stretch of imagination it can be said that the plaint in hand is liable to be rejected in terms of the provisions of Order VII, Rule 11 of the Civil Procedure Code. It has been submitted on their behalf that the provisions of

Section 53(4) of the 1970 Act are being read totally out of context by the applicant/defendant, as said provision nowhere expressly or impliedly bars the filing of the suit and further the suit has been filed by the authorized signatory who is the constituted attorney of the plaintiffs and the ground as taken by the applicant/defendant of the suit being improperly filed having been signed by the constituted attorney being barred by law is also not sustainable. Learned Senior Counsel have relied upon the judgment of Hon'ble Division Bench of High Court of Delhi in ***Columbia Pictures Industries, Inc. and others*** Versus ***Siti Cable Network Ltd.***, ***2001 (60) DRJ 11 (DB)***, in which the Hon'ble High Court has held that there is no legal bar to an advocate being appointed as a constituted attorney by a party for the purposes of the case, however, if said constituted attorney was himself/herself to act and plead as an advocate, then his/her conduct could be said to be questionable.

28. I have heard learned counsel for the parties and have gone through the relevant pleadings.

29. The suit filed by the plaintiffs herein is to the effect that plaintiff No.1 is the owner of number of worldwide Patents, including Indian Patent No.243301 (hereinafter referred to as 'the subject patent') and on the strength of the said patent, pharmaceutical products as mentioned in the plaint were being manufactured by it, which patent was to expire on 18.08.2023. Said patent is being infringed by the defendant by selling the products referred to in the plaint which products stood manufactured by the defendant without any implied or express consent of the plaintiffs.

30. Order VII, Rule 11 of the Civil Procedure Code, *inter alia*, envisages that the plaint shall be rejected where it does not discloses a cause of action or where the suit appears from the statement in the plaint to be barred by any law.

31. In the present case, as it is not the case of the applicant that the plaint is liable to be rejected as it does not discloses a cause of action, this Court is not going to dwell on the said aspect of the matter. The contention of the applicant is that the plaint is liable to be rejected as the suit appears from the statement in the plaint to be barred by law. According to the applicant, the suit is barred by law in terms of the provisions of Section 53 (4) of the 1970 Act. Section 53 of the 1970 Act provides as under:-

> *"53. **Term of patent-** [(1) Subject to the provisions of this Act, the term of every patent granted, after the commencement of the Patents (Amendment) Act, 2002, and the term of every patent which has not expired and has not ceased to have effect, on the date of such commencement, under this Act, shall be twenty years from the date of filing of the application for the patent.]*
> *[Explanation- For the purpose of this sub-section, the term of patent in case of International applications filed under the Patent Cooperation Treaty designating India, shall be twenty years from the international filing date accorded under the Patent Cooperation Treaty.]*
> *(2) A patent shall cease to have effect notwithstanding anything therein or in this Act on the expiration of the period prescribed for the payment of any renewal fee, if that fee is not paid within the prescribed period [or within such extended period as may be prescribed].*
> *3[***]*
> *(4) Notwithstanding anything contained in any other law for the time being in force, on cessation of the patent right due to non-payment of renewal fee or on expiry of the term of patent, the subject matter covered by the said patent shall not be entitled to any protection.*]

32. Having perused the contents of Section 53 of the 1970 Act in general and sub-Section (4) thereof in particular, this Court has no hesitation in holding that the contention of the applicant that the suit in hand is liable to be rejected being barred by law in terms of Section 53 (4) of

the 1970 Act is totally misconceived. Sub-section (4) of Section 53 of the 1970 Act only provides that notwithstanding anything contained in any law for the time being in force, on cessation of the patent right, *inter alia*, on expiry of the term of the patent, the subject matter covered by the said patent shall not be entitled to any protection. In other words, as per this particular statutory provision, the protection which is available to a patent holder during the term of patent ceases after the expiry of the term.

33. In the present case, it is no one's case that the term of the subject patent has expired. Whether or not, the plaint has to be rejected in terms of the provision of Order VII, Rule 11 (d) of the Civil Procedure Code, this has to be decided by the Court on the basis of the statement in the plaint. However, in terms of the averments contained in the application, the applicant has indirectly introduced its defence and the same, but obvious, cannot be taken into consideration by the Court at the stage of deciding an application filed under Order VII, Rule 11 (d) of the Civil Procedure Code.

34. Whether or not, the plaintiffs are entitled for the relief being prayed for can very well be contested by the defendant on the strength of the provisions of Section 53 (4) of the 1970 Act and the defendant may ultimately succeed on the strength of said statutory provisions. However, by no stretch of imagination, it can be said that in the light of the language of Section 53 (4) of the 1970 Act, the plaint in hand is liable to be rejected being barred by law. Section 53 (4) of the 1970 Act nowhere bars the plaintiffs or a party similarly situated as the plaintiffs, on the strength of the averments as are contained in the plaint from filing the suit. The words "barred by any law' have to be construed strictly by the Court and the same cannot be confused by a plaintiff ultimately not being entitled to the relief being prayed for by it on account of certain statutory provisions.

35. In this backdrop, this Court does not concurs with the contention of the applicant/ defendant that the plaint is liable to be rejected

being barred by law in terms of the provisions of Section 53 (4) of the 1970 Act.

36. Coming to the second objection which has been taken with regard to the suit not having been filed by a duly authorized person, this Court is of the considered view that whether the suit, as it has been filed, is maintainable or not is an issue which cannot be decided by this Court under the provisions of Order VII, Rule 11 (d) of the Civil Procedure Code.

37. Assuming that the suit has not been filed through a duly authorized person, then but of course, this objection has to be taken by the defendant in the written statement and an issue in this regard shall be struck by the Court, which will be subsequently adjudicated upon on merit.

38. Though, it was argued on behalf of the plaintiffs that otherwise also, the defect being pointed out by the defendant was a curable defect, however, this Court is not making any observation on the said point for the simple reason that this Court is of the considered view that this is not the stage when any observation in this regard can be made by this Court more so in an application filed under Order VII, Rule 11(d) of the Civil Procedure Code.

Accordingly, in view of what has been discussed hereinabove, present application being devoid of any merit is dismissed.

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

<u>Between:</u>
BISHAN DASS SON OF SH. BHOLA RAM SON OF DAITU,
R/O VILLAGE MODEL TOWN MANALI, TEHSIL MANALI,
DISTRICT KULLU, H.P.

….APPELLANT

(BY SH. SUNIL MOHAN GOEL, ADVOCATE)

AND

1. COLLECTOR LAND ACQUISITION, NHPC, PHEP AT LARJI SUB TEHSIL SAINJ, DISTRICT KULLU, H.P.

2. COLLECTOR DISTRICT KULLU, H.P.

....RESPONDENTS

(BY MS. SHREYA CHAUHAN, ADVOCATE FOR R-1).

(BY MR. SUDHIR BHATNAGAR, ADDITIONAL ADVOCATE GENERAL WITH MR. NARENDER THAKUR, MR. KAMAL KISHORE SHARMA AND MR. GAURAV SHARMA, DEPUTY ADVOCATE GENERALS, FOR R-2)

REGULAR FIRST APPEAL
NO.350 OF 2017
Decided on: 14.12.2021

Land Acquisition Act, 1894- Section 54- Appeal – Award passed by the Ld. Additional District Judge, Fast Track, Kullu, whereby compensation amount has been enhanced- Delay of 5 years 10 months in filing the appeal- Held- Appeal allowed with the direction that appellant shall not be entitled to interest for the period of 5 years and 10 months.

This appeal coming on for orders this day, the Court passed the following:

J U D G M E N T

Instant appeal filed under Section 54 of the Land Acquisition Act, 1894 *(hereinafter referred to as the Act),* lays challenge to award dated 5.6.2010, passed by learned Additional District Judge, Fast Track, Kullu, District Kullu, H.P., in Reference Petition No.139 of 2007, titled as ***Bhola Ram son of Daitu,***

since deceased, now through LRs versus Collector Land Acquisition and another, whereby Court below enhanced the amount of compensation awarded by Land Acquisition Collector.

2. Precisely, the facts of the case as emerge from the record are that land of the appellant came to be acquired for the purpose of construction of NHPC, Parvati Hydro Electric Project, Larji, District Kullu, HP and for that purpose, Notification under Section 4 of the Act was issued vide notification No.Vidyut Chh(5)19/2002, dated 22.3.2003. After completion of necessary codal formalities, Land Acquisition Collector vide award No.20, dated 6.1.2005 awarded the compensation amount.

3. Being aggrieved and dissatisfied with the quantum of compensation awarded by Land Acquisition Collector, appellant herein preferred reference petition under Section 18 of the Act in the Court of learned Additional District Judge, Fast Track, Kullu, Himachal Pradesh, who vide award dated 5.6.2010 enhanced the amount awarded by Land Acquisition Collector. Since, award amount awarded by reference court in the cases of other similar situate persons came to be further enhanced by this Court in the Regular First Appeals having been filed by the claimants in those cases, appellant herein has approached this Court in the instant proceedings for enhancement of compensation amount.

4. During the proceedings of the case, learned counsel representing the appellant while inviting attention of this Court to the judgment dated 22nd October, 2016, passed by Co-ordinate Bench of this Court in RFA No.282 of 2010 alongwith other connected matters, claimed that case at hand is squarely covered with the aforesaid judgment.

5. Vide order dated 4.10.2021, this Court directed respondent No.1 to verify aforesaid fact. Ms. Shreya Chauhan, learned counsel representing respondent No.1, while fairly admitting that the case at hand is squarely covered by the aforesaid judgment rendered by Co-ordinate Bench of this Court,

contends that since appellant herein has approached this Court after inordinate delay of 5 years 10 months, prayer made in the instant appeal for enhancement deserves to be rejected outrightly.

6. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that vide order dated 1.12.2017 delay in filing the appeal at hand was condoned, but in the said order, it was specifically observed that in case the appeal is preferred beyond the period of limitation, equities can be balanced by denying the claimants interest for the period when they did not approach this Court. Since, it is not in dispute interse parties that similarly situate persons, whose land was also acquired for the purpose of construction of Parvati Hydro Electric Project, Larji, District Kullu, H.P., by same notification and vide same award No.20, dated 6.1.2005 have been given enhanced amount of compensation in terms of the judgment dated 22nd October, 2010 passed by Co-ordinate Bench of this Court, prayer made in the instant appeal also deserves to be considered and decided in the light of aforesaid judgment. However, having taken note of the fact that appellant herein has approached this Court after inordinate delay of five years 10 months, he cannot be held entitled to interest for the period of five years 10 months.

7. In similar facts and circumstances, this Court vide judgment dated 7.8.2019, passed in RFA No.248 of 2019, titled ***Shri Dine Ram versus The Collector Land Acquisition and another***, has condoned the delay, but denied the interest qua the period of delay. At this stage, it would be profitable to reproduce paras No.2 to 7 of the aforesaid judgment hereinbelow:-

> "2. Hon'ble Apex Court in ***Dhiraj Singh (Dead) through Legal Representatives and Others vs. State of Haryana and Others***, (2014)14 SCC 127, while dealing with the land acquisition matters, has categorically held that approach of the Court, while condoning the delay in filing the appeal, should be pragmatic and not pedantic. Court has

further held that the equities can be balanced by denying the interest to the appellants for the period for which they did not approach the Court. The substantive rights of the appellant should not be allowed to be defeated on technical grounds by taking hyper technical view of self-imposed limitation. The Hon'ble Apex Court has held as under:-

"16. The principles regarding condonation of delay particularly in land acquisition matters, have been enunciated in Collector (LA) v. Katiji, (1987)2 SCC 107, wherein it is stated in para 3 as under: (SCC p.108)

"(3). The legislature has conferred the power to condone delay by enacting Section 5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice-- that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:-

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

(emphasis in original)

17. The aforesaid judgment was followed by this Court in DDA vs. Bhola Nath Sharma, (2011)2 SCC 54, which was also a matter concerning land acquisition.

18. We, accordingly, allow these appeals. Impugned orders of the High Court are set aside. Delay in filing the LPAs is condoned. It is held that the appellants shall be entitled to enhanced compensation @ Rs.200 per square yard. However, for the period of delay in approaching the High Court by way of LPAs, in all these cases, no interest should be paid to them. Compensation shall be worked out accordingly and paid to the appellants within a period of three months from today."

3. In the aforesaid judgment Hon'ble Apex Court has reiterated that when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the

other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

4. The aforesaid view has further been reiterated by the Hon'ble Apex Court in K. Subbaraydu and Others vs. Special Deputy Collector (Land Acquisition), (2017)12 SCC 840.

5. In the case at hand, applicant-appellant has fairly stated that he was unable to file the appeal well within time on account of his old age, ill-health, forgetfulness, not aware of the legal intricacies and non-availability of funds for engaging counsel etc., but subsequently, factum with regard to enhancement of compensation to the similar situate persons came to his knowledge and, as such, he arranged money and filed appeal without any further delay.

6. In the case at hand, if delay is not condoned, great prejudice would be caused to the applicant. Applicant has certainly not gained anything by not filing the appeal within prescribed period of limitation, rather, in the event of dismissal of his appeal on the ground of delay, he would loose opportunity to get the compensation enhanced by approaching this Court in the appropriate proceedings, laying therein challenge to the award passed by the reference Court.

7. Consequently, in view of aforesaid law laid down by the Hon'ble Apex Court as well as explanation rendered in the application, this Court is convinced and satisfied that delay in maintaining the accompanying appeal deserves to be condoned. This application is accordingly allowed. The delay of 2 years 9 months and 27 days in maintaining the appeal, which has sufficiently been explained, is condoned in the interest of justice. The application is disposed of. "

8. Consequently, in view of the detailed discussion made hereinabove, the present appeal is allowed and it is ordered that directions contained in

judgment dated 22nd October, 2016, passed by Co-ordinate Bench of this Court in ***Suresh Kumar and others versus Collector Land Acquisition, NHPC and another alongwith other connection matters,*** shall *mutatis mutandis* apply in the present appeal also. However, appellant shall not be entitled to interest for the period of five years 10 months.

Pending application(s), if any, also stand disposed of.

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

Between:-

CHANCHAL KUMAR, S/O SH. BHAG CHAND, MINOR, AGED 14 YEARS, THROUGH HIS FATHER SH. BHAG CHAND, S/O SH. GIRU RAM, R/O VILLAGE & PO SEOBAG, TEHSIL & DISTRICT KULLU, H.P., AGED 55 YEARS.

...PETITIONER

(BY SHRI NAVEEN K. BHARDWAJ, ADVOCATE)

AND

1. PREM PARKASH, SON OF LATE SH. KARAM CHAND.

2. DEEP LAL, SON OF LATE SH. KARAM CHAND.

BOTH RESIDENTS OF VILLAGE & POST OFFICE SEOBAG, TEHSIL & DISTT. KULLU, H.P.

...RESPONDENTS

(NEMO)

CIVIL MISC. PETITION MAIN (ORIGINAL)
No.188 of 2022
Decided on: 30.05.2022

Constitution of India, 1950 – Article 227 – **Code of Civil Procedure, 1908** - Order 26 Rule 9 - Application filed under Order 26 Rule 9 CPC for appointment of local Commissioner dismissed by the Ld. Trial Court – Held -

Onus is upon the plaintiff to lead cogent evidence in order to prove interference by the respondent and prove his case because under the provisions of order 26 rule 9 the court is not to act as an agent of either of the parties in assisting the parties to create evidence in their favour - Filing of the application appears to be abuse of process of law as no cogent explanation has come as to why evidence was not led by the plaintiff on the dates fixed by the learned court and preferred to file application for appointment of Local Commissioner - Petition found without merits and dismissed in limine. (Paras 4, 5 & 7)

This petition coming on for admission before notice this day, the Court passed the following:

J U D G M E N T

By way of this petition filed under Article 227 of the Constitution of India, the petitioner has assailed order dated 20.04.2022, passed by the Court of learned Senior Civil Judge, Kullu, District Kullu, H.P., in terms whereof, an application filed under Order 26 Rule 9 of the Code of Civil Procedure by the petitioner/plaintiff for appointment of Assistant Collector, 1st Grade as a Local Commissioner for local investigation of the suit land and to report about the factual position of motorable path existing on Khasra No. 482, situated in Up-Mohal Seobag, Phati and Kothi Kais, Tehsil and District Kullu, H.P. has been dismissed.

2. Mr. Naveen K. Bhardwaj, learned counsel for the petitioner submits that the impugned order is not sustainable in the eyes of law for the reason that the learned Court below has erred in not appreciating that as the petitioner/plaintiff is facing undue hardship on account of unauthorized acts of the respondents/defendants, therefore, it was necessary that the application ought to have been allowed so that it could have been ascertained as to what exactly were the dimensions and nature of Khasra No. 482, as the same would have had facilitated the adjudication of the suit.

3. Having heard Mr. Naveen K. Bhardwaj, learned counsel for the petitioner and having carefully gone through the averments made in the petition as well as the documents appended therewith, this Court is of the considered view that the present petition deserves to be dismissed. The application filed under Order 26 Rule 9 of the Code of Civil Procedure is on record as Annexure P-2. Relevant contents thereof as well as the prayer made therein are quoted hereinbelow:-

> *"4. That respondents are threatening to raise or have partly succeeded in raising construction over Khasra No. 482 which is motorable path and has also stacked woods, sand and aggregates over middle of the said motorable path/road thereby the respondents are not allowing applicant/plaintiff to use the aforesaid motorable path.*
>
> *5. That in order to bring the factual position of the spot before Commissioner/Tehsildar may be appointed with a direction to find out the exact position of the motorable path over Khasra No. 482.*
>
> *It is, therefore, prayed that the application may kindly be allowed and the local commissioner not below the rank of A.C. 1st Grade/Tehsildar may kindly be appointed to visit the spot to find out the exact position of the motorable path passing through Khasra No. 482, situated in UP-Muhal Seobag, Phati and Kothi Kais, Tehsil and Distt. Kullu, H.P. and submit the report before the Ld. Court, in the interest of justice."*

4. Learned Court below has rejected the application by assigning the reasons that the issues stood framed in the suit on 08.05.2018 and thereafter more than three opportunities were granted to the plaintiff/petitioner to lead evidence, which was not done. Thereafter, the application was filed under Order 26, Rule 9 of the Code of Civil Procedure with the intent of delaying the disposal of the suit. Learned Court also held that the issues raised by the applicant/plaintiff were matter of evidence and the same were yet to be proved by the plaintiff by adducing necessary

evidence in this regard. Learned Court also held that the evidence sought to be collected by the plaintiff through Local Commissioner could be easily garnered by him otherwise also. Learned Court also held that the onus was upon the plaintiff to sustain the pleadings made in the plaint by leading cogent evidence in this regard and by avoiding to do so, the application filed under Order 26, Rule 9 of the Code of Civil Procedure was pre-mature because may be after completion of evidence of parties, in case the plaintiff was able to make out a case for local investigation of the suit land, in that eventuality, the plaintiff can approach by way of an application under Order 26, Rule 9 of the Code of Civil Procedure. In fact, learned Trial Court has given the liberty to the petitioner/plaintiff to do so by observing that after completion of the evidence of the parties, the plaintiff may file an application under Order 26, Rule 9 of the Code of Civil Procedure, if so advised and if he is able to make out a case in this regard, then the order passed by the Court shall not come in his way.

5. The reasons which have been given by the learned Court below while rejecting the application filed by the petitioner/plaintiff are cogent and the same call for no interference. It is a settled principle of law that he who alleges, has to prove. As it is the case of the plaintiff that defendants/respondents are interfering in his possession vis-a-vis Khasra No. 482 of the suit land, therefore, onus is upon the plaintiff to lead cogent evidence in this regard and prove his case, because under the provisions of Order 26, Rule 9 of the Code of Civil Procedure, the Court is not to act as an agent of either of the parties in assisting the parties to create evidence in their favour. In fact, this is neither the intent nor the spirit of the provisions of Order 26, Rule 9 of the Code of Civil Procedure. Onus squarely is upon the plaintiff to prove his case and this onus cannot be done away with by it by preferring an application under Order 26, Rule 9 of the Code of Civil Procedure, as has been done in the present case.

6. During the course of arguments, it could not be disputed that despite more that three opportunities having been granted by the Court to lead evidence, no evidence was led and rather an application under Order 26, Rule 9 of the Code of Civil Procedure was filed. This conduct of the plaintiff/petitioner demonstrates that the observation made by the learned Court below that filing of the application was delaying tactic was the correct observation. Filing of the application appears to be abuse of the process of law, as no cogent explanation has come as to why evidence was not led by the plaintiff on the dates fixed by the learned Court below.

7. In view of what has been observed hereinabove, as this Court finds no merit in the present petition, the same is dismissed in *limine*. It is observed that in case more than three opportunities have already been granted by the learned Court below to the plaintiff to lead evidence, then as to whether or not any further indulgence in this regard to be shown, should be cautiously gauged by the learned Trial Court and opportunity to lead evidence should not be given as a matter of routine. Miscellaneous applications, if any, also stand disposed of.

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

Between:-

RATTAN LAL (RTD. A.C. OPERATOR) S/O SH. TULSI RAM, R/O VILLAGE & POST OFFICE AUHAR, TEHSIL GHUMARWIN, DISTRICT BILSPUR, H.P.

...PETITIONER

(BY SHRI H.S. RANGRA, ADVOCATE)

AND

1. STATE OF H.P. THROUGH THE SECRETARY (I & P H), GOVT. OF

HIMACHAL PRADESH, SHIMLA, H.P.

2. THE SUPERINTENDING ENGINEER, I & P.H. CIRCLE, SUNDER NAGAR, DISTRICT MANDI, H.P.

3. THE EXECUTIVE ENGINEER, I. & P. H. DIVISION BAGGI, DISTT. MANDI, H.P.

4. THE SR. ACCOUNTANT GENERAL, A.G. OFFICE, SHIMLA-3, H.P.

….RESPONDENTS

(M/S SUMESH RAJ & DINESH THAKUR & SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS, WITH MR. J.S. BAGGA, ASSISTANT ADVOCATE GENERAL, FOR R-1 TO R-3.

MR. LOKENDER THAKUR, SENIOR PANEL COUNSEL, FOR R-4).

CIVIL WRIT PETITION
No. 4109 of 2019
Decided on: 04.5.2022

Constitution of India, 1950 – Article 226 - Service matter - Petitioner aggrieved from the act of the respondents, as they after his superannuation vide office order dated 19.05.2018 arbitrarily deducted an amount of Rs. 2,35,972/- from retirement gratuity without following any process – Held - Petitioner was not apprised by the department at any stage that certain excess payments stood made to him on account of wrong fixation of his pay and in Rafiq Masih's case Honorable Supreme Court has held that recoveries by employer would not be permissible in law from the employees belonging to class III and class IV service and from retired employees or employees who are due to retire within one year of order of recovery - Office order dated

19.05.2018 is held to be bad to the extent amount of Rs. 2,35,972/- has been deducted on account of excess payment from the retirement gratuity of petitioner and the same is quashed – Respondents are directed to make good the said amount with in a period of 90 days from today - Petition allowed. (Paras 7 & 10)

This petition coming on for hearing this day, the Court passed the following:

J U D G M E N T

By way of this writ petition, the petitioner has, *inter alia*, prayed for the following relief:-

> *"(a) That respondents be directed to release an amount of Rs.2,35,972/- alongwith the interest @ 9% from 1.3.2018 to till its realization as per the latest law of Apex Court held in State of Punjab Vrs. Rafiq Mohd."*

2. The case of the petitioner is that he superannuated from service of the respondent-Department on 28.02.2018 from the post of A.C. Operator (Technical Grade-I), which is a Class-III post. His grievance is that after his superannuation, vide office order dated 19.05.2018 (Annexure P-3), an amount of Rs.2,35,972/- has been arbitrarily deducted by the respondent-Department from the retirement gratuity of the petitioner without any process having been initiated in this regard before his superannuation on the alleged ground that the deduction was being made for excess pay released to the petitioner w.e.f. 01.05.2010 up to 28.02.2018.

3. Mr. H.S. Rangra, learned counsel for the petitioner has argued that while in service, at no stage, any show cause notice was given to the petitioner by the respondent-Department that as from 01.05.2010 onwards, he had been made excess payments on account of wrong fixation of pay and as the impugned order was issued by the respondent-Department after superannuation of the

petitioner, the same *per se* is not sustainable in the eyes of law in view of the law laid laid down by the Hon'ble Supreme Court in *State of Punjab and others Vs. Rafiq Masih (White Washer) and others,* (2015) 4 Supreme Court Cases 334. On this count, learned counsel for the petitioner has prayed that the petition be allowed and office order dated 19.05.2018, to the extent that an amount of Rs.2,35,972/- has been ordered to be deducted from the retirement gratuity payable to the petitioner, be quashed and set aside, with a direction to the respondents to pay to the petitioner the amount which has been illegally deducted from the retirement gratuity of the petitioner.

4. The petition is opposed by the State, *inter alia*, on the ground that office order dated 19.05.2018 suffered from no infirmity for the reason that it was only after the superannuation of the petitioner that it was discovered that on account of excess pay released in favour of the petitioner in between 01.05.2010 up to 28.02.2018, an amount of Rs.2,35,972/- stood paid to the petitioner and immediately thereafter, steps were taken by the Department to recover the said amount from the petitioner by way of deduction thereof from the amount of retirement gratuity.

5. Learned Additional Advocate General has argued that it is not as if in all cases, after superannuation of an incumbent, no recovery can be effected from him and by placing reliance on the judgment of the Supreme Court in *High Court of Punjab and Haryana and others Vs. Jagdev Singh,* (2016) 14 Supreme Court Cases 267, he has submitted that even in matters where a person has superannuated, the employer can effect recoveries.

6. I have heard learned counsel for the parties and also gone through the pleadings as well as the documents appended therewith and also the judgments relied upon by learned counsel for the parties.

7. It is not in dispute that the petitioner superannuated from the post of A.C. Operator (Technical Grade-I), which is a Class-III post. It is also not in dispute that before the issuance of Annexure P-3, dated 19.05.2018, which

admittedly was issued after superannuation of the petitioner, at no stage, the petitioner was apprised by the Department, more so, while the petitioner was in service that certain excess payments stood made to him on account of wrong fixation of his pay etc. That being the case, this Court concurs with the submission made by learned counsel for the petitioner that the present case is squarely covered by the judgment of the Hon'ble Supreme Court in *Rafiq Masih's case (supra)* in para-18 whereof, the Hon'ble Supreme Court has been pleased to hold that recoveries by employer would be impermissible in law from the employees belonging to Class-III and Class-IV service and from retired employees or employees who are due to retire within one year of the order of recovery. The Court again emphasizes that in the present case, the recovery has been effected after the superannuation of the petitioner, who happens to be a Class-III employee.

8. As far as the judgment being relied upon by learned Additional Advocate General is concerned, the Hon'ble Supreme Court in paras-9 to 11 thereof was pleased to hold as under:-

> *"9. The submission of the Respondent, which found favour with the High Court, was that a payment which has been made in excess cannot be recovered from an employee who has retired from the service of the state. This, in our view, will have no application to a situation such as the present where an undertaking was specifically furnished by the officer at the time when his pay was initially revised accepting that any payment found to have been made in excess would be liable to be adjusted. While opting for the benefit of the revised pay scale, the Respondent was clearly on notice of the fact that a future re-fixation or revision may warrant an adjustment of the excess payment, if any, made.*
>
> *10. In State of Punjab & Ors etc. vs. Rafiq Masih (White Washer) etc1. this Court held that while it is not possible to postulate all situations of hardship where payments have mistakenly been made by an employer, in the*

following situations, a recovery by the employer would be impermissible in law:

"(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover." (emphasis supplied).

11. The principle enunciated in proposition (ii) above cannot apply to a situation such as in the present case. In the present case, the officer to whom the payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would be required to be refunded. The officer furnished an undertaking while opting for the revised pay scale. He is bound by the undertaking."

9. This Court is of the considered view that the law laid down in the said case is not applicable in the facts of the present case for the reason that it is not the case of the respondents herein that the petitioner was clearly placed on notice before his superannuation at any stage that any payment found to have been made in excess, would be required to be refunded. Thus, as the facts of the present case are totally different from the facts as were there in the matter which was before the Hon'ble Supreme Court in *Jagdev Singh's case (supra),* while fully respecting the law laid down by the Hon'ble Supreme Court in the

said judgment, this Court holds that on facts, said judgment does not covers the present case and the same is squarely covered by the earlier judgment of Hon'ble Supreme Court in *Rafiq Masih's case (supra).*

10. Accordingly, this writ petition is allowed. Office order dated 19.05.2018 (Annexure P-3) to the extent that the amount of Rs.2,35,972/- has been deducted on account of excess payment w.e.f. 01.05.2010 up to 28.02.2018 from the retirement gratuity of the petitioner is held to be bad in law and the same is quashed and set aside and the respondents are directed to make good the said amount within a period of 90 days from today, failing which, the same shall entail simple interest @ 6% per annum as from the date of judgment till actual payment. Petition stands disposed of, so also pending miscellaneous applications, if any.

BEFORE HON'BLE MR. JUSTICE MOHAMMAD RAFIQ, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

<u>Between:</u>

JSTI TRANSFORMERS PVT. LTD.
H.B. NO. 214, BHATAULI KALAN,
PARGANA DHARAMPUR
TEHSIL NALAGARH, DISTT. SOLAN HP
THRUGH ITS EXECUTIVE DIRECTOR

....PETITIONER

(BY MR. ATUL JHINGAN, ADVOCATE).

AND

4. THE STATE OF HIMACHAL PRADESH THROUGH ITS PRINCIPAL SECRETARY-CUM-FINANCIAL CONTROLLER (REVENUE), GOVERNMENT OF HIMACHAL PRADESH, GOVERNMENT SECRETARIAT, SHIMLA

5. DEPUTY COMMISSIONER, SOLAN, DISTRICT, BAJORAL KHURD, SOLAN, HIMACHAL PRADESH 173 212.

RESPONDENTS.

(BY MR. ASHOK SHARMA, ADVOCATE GENEAL WITH MR. VIKAS RATHORE, ADDITIONAL ADVOCATE GENERAL).

CIVIL WRIT PETITION
NO. 4394 of 2021
Decided on: 20.04.2022

Constitution of India, 1950 – Article 226 - Upon the exit of minorities shareholder the petitioner company became 100% subsidiary of JSTI Transformers Pvt. Ltd and accordingly applied for change for name to JSTI Transformers Private Limited which was approved by the Registrar of companies on 22.3.2018 and was entered in GSTIN on 5.9.2018, Importer - Exporter Code and Bank account on 08.09.2018 - Held -- In M/S Sozin Flora Pharma LLP supra similar dispute arose in context of conversion of petitioner from Partnership firm to limited liability Partnership -Petitioner approached the respondents for effecting the change of its name in the revenue record with regard to certain land but the respondents were granting permission to reflect such change, directed the petitioner to deposit the stamp duty and registration fee and the respondents are directed to enter the name of petitioners as M/s Sozin Flora Pharma LLP in revenue record within a period of 4 weeks - The present petition succeed and accordingly allowed in view of judgments of Hon'ble Apex Court.(Paras 15 & 16)

Cases referred:

Commissioner of Income-Tax vs. Texspin Engg. & Mfg., (2003) 180 CTR Bom. 497;

Jai Narain Parasrampuria (Dead) and others vs. Pushpa Devi Saraf and others, (2006) 7 SCC 756;

Vali Pattabhirama Rao and another vs Sri Ramanuja Ginning and Rice Factory (P.) Ltd. and others, AIR 1984 AP 176;

This petition coming on for orders before notice this day, ***Hon'ble Mr. Justice Mohammad Rafiq, passed the following:***

O R D E R

This writ petition has been preferred by JSTI Transformers Pvt. Ltd, a private limited company, duly registered under the Companies Act, 1956, having its Works and Registered office at HB 214, Hilltop Industrial Area-I, Bhatauli Kalan, Jharmajri, Tehsil Baddi, District Solan, Himachal Pradesh. The petitioner company was established in the year 2009 by two shareholders namely M/s Stesalit Ltd. (with 30% shareholding) and JST Tansformateurs (with 70% shareholding). Petitioner-company was granted permission by the Government of Himachal Pradesh under Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 to purchase land in Nalagarh area of District Solan, Himachal Pradesh on 12.6.2009. A sale deed was registered in the name of the petitioner-company on 20.2.2010. According to the petitioner, at the time of registration of sale deed, requisite stamp duty amounting to Rs. 20,27,800/- was duly paid by the Company. The Company started running into losses in the year 2015, on account of low capacity utilization. In these circumstances, the major shareholder i.e. JST Transformateurs requested M/s Stesalit Limited to contribute to the losses but the same was denied and there arose a dispute between the shareholders, which culminated into litigation before the Company Law Board as well as Arbitration in Singapore, as per shareholders agreement. During the pendency of the lis at different levels, minority shareholder i.e. M/s Stesalit Limited decided to sell its shares to JSTT on 27.5.2017 and move out of the joint venture. A settlement agreement was entered into between them on 27.5.2017 to this effect.

2. Case of the petitioner is that upon the exit of the minority shareholder, the petitioner-company became 100% subsidiary of JSTT and accordingly applied for change of name to JSTI Transformers Pvt Ltd., which was duly approved by the Registrar of Companies on 22.3.2018. The change of name of the company was entered in GSTIN on 5.9.2018, Importer-Exporter Code (IEC) and Bank account on 8.9.2018. The Industries Department also issued an NOC on 4.12.2018 and 7.2.2019 for approving change of name. The petitioner duly submitted an application in the office of Deputy Commissioner, Solan on 20.2.2019 for effecting such changes in the revenue record. The office of the Deputy Commissioner, Solan, recommended the case of the petitioner on 16.8.2019. The Revenue Department raised a query on 27.9.2019, which was duly replied to by the petitioner on 22.10.2019. A request letter was sent to the Revenue Secretary by the petitioner-Company, on 2.12.2019. The Revenue Secretary issued an order on 4.3.2020 for reviewing the case. The office of Deputy Commissioner, Solan, made the final recommendation on 2.6.2020. Accordingly, request letters were sent to the Chief Minister's office, Revenue Secretary and Deputy Commissioner, Solan on 7.7.2020. The final order was issued by the Revenue Secretary on 18.12.2020, but, surprisingly, while granting permission for effecting change in the name of the Company in the revenue record, a condition was imposed that the petitioner would be required to pay the stamp duty and registration fee on the value of assets of the petitioner, upon change of name. Hence the writ petition.

3. Mr. Atul Jhingan, learned counsel appearing for the petitioner submitted that no sale transaction took place and there was no conveyance between two parties and that the only effect of minority shareholder moving out of Company was that the total shareholding now came to be vested in the petitioner. The property therefore, did not change hands.

4. Learned counsel representing the petitioner has relied on the instructions issued by the Revenue Department, Government of Himachal

Pradesh on 16.2.2012, in para-3 of which, it is stated that where merely the name of the company is changed with the approval of the Registrar of Companies in terms of Sections 21 and 23 of the Companies Act, no transaction/sale of property takes place and only change in the name of the company is sought to be recorded in the Revenue Record and therefore, no stamp duty is chargeable. Learned counsel for the petitioner argued that this issue is no more *res integra* and has been decided against the respondent-State by a catena of decisions of this Court. Reliance is placed upon the judgments of this court in **M/s Fresenius Kabi Oncology Limited** v. **H.P. State Industrial Development Corporation Limited**, CWP No. 1788 of 2010, decided on 2.8.2018, **Reckitt Benckiser (India) Private Limited** v. **State of H.P. and another**, CWP No. 1293 of 2019, decided on 29.2.2020 and **M/s Sozin Flora Pharma LLP** v. **State of Himachal Pradesh and another**, decided on 7.1.2021.

5. On the other hand, while opposing the writ petition, Mr. Vikas Rathore, learned Additional Advocate General, submitted that the respondents have rightly ordered to charge the stamp duty and registration fee, as present case is not a case of mere change of name of the company. Originally, the purchase of land was made by M/s JSTI Transformers Pvt. Ltd, which was a joint venture of France based JST Transformers Private Limited and Stesalit Limited, a company incorporated under the Indian Companies Act. Purchase of the land was made on the basis of permission granted by the Government vide order dated 20.1.2010 and at that time, stamp duty amounting to Rs. 20,27,800/- was also paid by the vendee. It is argued that the procedure as prescribed under Rule 29 of the Company (Incorporation) Rules, 2014 for alteration of Memorandum by change of name requires submission of application/information on Form No. INC.24, which majorly includes reasons for change of name and detail of special resolution passed for the change of name of the company. Therefore, the certificate of incorporation pursuant to

change of the name does not imply that no stamp duty and registration fee is chargeable on account of mere issuance of this certificate by the Registrar of Companies. After exit of the minority shareholder M/s Stesalit Limited, the logos of both, JST and Stesalit companies shall accompany the name of the company i.e. JST Stesalit Transformers Private Limited. Respondents have therefore rightly, while granting approval of change of name in the revenue record, imposed the condition of payment of stamp duty and registration fee.

6. We have given our anxious consideration to rival submissions and perused the material on record.

7. Before examining the arguments of the parties and analyzing the case law, we deem it appropriate to reproduce the instructions dated 16.2.2012 issued by the Revenue Department of the State, which read as under:

> "I am directed to say that the matter with regard to registration of a transaction for mutation of land in revenue records pursuant to change in the name of Company has been under consideration of the department for quite some time.
>
> 2. Section 394 of the Companies Act, 1956 deals with the provision for facilitation and amalgamation of two or more Companies. The amalgamation scheme, which is an agreement between the two of more Companies, is presented before the Court, which passes appropriate order sanctioning the compromise or arrangement. Under the scheme of amalgamation the whole or any part of the undertaking, the property or liability of any Company concerned in the scheme is to be transferred to the other Company The amalgamation scheme, sanctioned by the Court, would be an instrument and Stamp Duty is chargeable on such instrument unless the Hon'ble Court, while sanctioning a scheme, has directed under Section 394(2) of the Companies Act, 1956 that on transfer of property on sanction of scheme of amalgamation under

Section 391 to 394 no stamp duty shall be payable. Where no such direction has been given by the Court while sanctioning scheme of amalgamation then on such instrument, stamp duty shall be chargeable.

3. In cases where merely the name of the Company is changed with the approval of the Registrar of Companies in terms of Sections 21 and 23 of the Companies Act,1956, no transaction/sale of property takes place and only change in name of the Company is sought to be recorded in the revenue record, no stamp duty is chargeable.

4. For the purpose of this clarification, the change of name of a company will mean that an existing company with name "A" changes its name to "B" which is not the name of a pre-existing company and name "A" ceases to exist consequent to this change. It is also clarified that in case assets are proposed to be transferred to a company or an existing company proposes to change its name to a pre-existing company, the it will constitute transfer/merger and will normally constitute a transaction and will required registration after obtaining permission under the provisions of Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972

5. In cases, where the name change as per example given in para 4 above is approve by the Registrar of Companies and the change in name has also been given effect to by the Director, Industries, The District Collector concerned will order to effect change in name in revenue record as per procedure laid down in Chapter 8.52(ii) of "The Himachal Pradesh Land Records Manual" and an entry in remarks column of revenue record i.e. Jamabandi, shall be made with red ink giving therein the old name of Company and reference of order in compliance to which the name is changed."

8. This Court in M/s **Fresenius Kabi Oncology Limited** (supra) was dealing with a case, where consequent upon request made by the petitioner to incorporate by way of change of its name in the record, respondent-State Authorities demanded a sum of Rs.1,04,21,508/- towards unearned increase /transfer charges on account of alleged violation of Clause 2(xi) of conveyance deed, where Pharma business of the Company, "Dabur India Limited" by way of merger, merged into the new entity, "Dabur Pharma Limited". The respondent-Corporation changed the name of the allottee company i.e. "Dabur India Limited" to "Dabur Pharma Limited", vide order dated 28.11.2003. Later on, petitioner-Company incorporated under the laws of Singapore, acquired 90.89% of total equity share capital of Dabur Pharma Limited on 11.8.2008. The management and control of Dabur Pharma Limited, therefore, came to be changed and its Board reconstituted with the nominee of the petitioner-company. The management of the Company i.e. Dabur Pharma Limited later on, decided to change its name from "Dabur Pharma Limited" to "Fresenius Kabi Oncology Limited" on 9.1.2009. The Registrar of Companies, NCT of Delhi allowed the change of name of the company from "Dabur Pharma Limited" to "Fresenius Kabi Oncology Limited" on 9.1.2009. It was against this backdrop that on 18.2.2009, petitioner submitted an application to the respondent-Corporation with a request to change the name of the allottee in respect of the plot in question and record its name in place of Allottee Company. The respondent-Corporation instead of making change in the name of the Company, raised a demand for Rs. 1,04,21,508/-, vide letter dated 17.6.2009 towards the unearned increase /transfer charges and called upon the petitioner to remit the said amount to the Corporation within 30 days, so that the supplementary transfer deed qua the plot is executed in favour of the petitioner. This Court held that mere acquiring of equity share capital of 'Dabur Pharma Limited' by the petitioner Company does not amount to transfer, assignment or parting with the possession or any other rights of the

allottee Company, neither with the plot in question nor structure in existence thereon. The acquiring of equity share capital of the allottee Company by the petitioner also does not contravene the conditions contained in Clause 2(xi) of the conveyance deed. In such circumstances, how a right to claim unearned increase/transfer charges would have arisen in favour of the respondent is not understandable, held this Court.

9. The High Court of Calcutta in a similar dispute pertaining to petitioner herein itself, in Writ Petition No. 24788 (W) of 2010, titled **M/s Fresenius Kabi Oncology Limited** v. **The State of West Bengal and others and its connected matter** Writ Petition No. 26049(W) of 2014 titled **M/s Fresenius Kabi Oncology Limited and another** v. **The State of West Bengal and another,** held as under:

> "8. Main case of the petitioners, however, is that change of the name of a company does not constitute transfer of leasehold right or any assets of the company. In this regard, Mr. Basu has relied on a judgment of the Supreme Court in the case of Bacha F. Guzdar Vs. Commissioner of Income Tax, Bombay (AIR 1955 SC 74), Kalipada Sinha Vs. Mahalaxmi Bank Ltd. (AIR 1966 Cal 585), W.H. Targett (India) Limited Vs. S. Ashraf reported in [2008(3) Cal LT 362] and an unreported judgment of this Court in W.P. No. 18668(W) of 2012 M/S. Din Chemicals and Coatings Pvt. Ltd & Anr. Vs. The State of West Bengal and Ors delivered on 5th October, 2012.
>
> 9. Mr. Susobhan Sengupta, learned counsel appeared on behalf of the State in this matter. His submission is that on change of equity shareholding pattern, bringing a new set of shareholders in the controlling position of the company in substance has resulted in transfer of ownership and control of the company, and such change should be treated to have resulted in transfer of assets of the company. According to him, the leasehold right was shifting from one entity to another, and for this reason transfer fee was payable. His submission is that this is a case where there is simultaneous transfer of assets including leasehold right from one entity to another along with

change of name and in this regard he relied on a judgment of this Court delivered on 8th February 2012 in the case of in Re:- Emami Biotech Ltd. & Anr. [(2012)3 CHN 102] which is also a decision of an Hon'ble Single Judge of this Court.

10. In the case of Bacha F. Guzdar (supra), it has been held by the Hon'ble Supreme Court:-

> " That a shareholder acquires a right to participate in the profits of the company may be readily conceded but it is not possible to accept the contention that the shareholder acquires any interest in the assets of the company. The use of the word 'assets' in the passage quoted above cannot be exploited to warrant the inference that a shareholder, on investing money in the purchase of shares, becomes entitled to the assets of the company and has any share in the property of the company. A shareholder has got no interest in the property of the company though he has undoubtedly a right to participate in the profits if and when the company decides to divide them. The interest of a shareholder vis-a-vis the company was explained in the case of Chiranjitlal Chowdhuri v. The Union of India and Others [1950] S.C.R. 869, 904.). That judgment negatives the position taken up on behalf of the appellant that a shareholder has got a right in the property of the company. It is true that the shareholders of the company have the sole determining voice in administering the affairs of the company and are entitled, as provided by the Articles of Association to declare that dividends should be distributed out of the profits of the company to the shareholders but the interest of the shareholder either individually or collectively does not amount to more than a right to participate in the profits of the company. The company is a juristic person and is distinct from the shareholders. It is the company which owns the property and not the shareholders. The dividend is a share of the profits declared by the company as liable to be distributed among the shareholders. Reliance is placed on behalf of the appellant on a passage in

> Buckley's Companies Act, 12th Ed., page 894, where the etymological meaning of dividend is given as dividendum, the total divisible sum but in its ordinary sense it means the sum paid and received as the quotient forming the share of the divisible sum payable to the recipient. This statement does not justify the contention that shareholders are owners of a divisible sum or that they are owners of the property of the company"

11. The same principle was followed in the case of Din Chemicals & Coatings Pvt. Ltd. (supra), and it has been held in this decisions:-

> "Let me now consider as to how far the principle laid down in the said decision of the Hon'ble Supreme Court is applicable to the facts of the instant case. I have already indicated above that the case which was before the Hon'ble Supreme Court was a case of amalgamation of the two companies which is not the case before this Court. In case of amalgamation of two companies the transferor company losses its existence and all the property, rights, powers of every description including all leases and tenancy right, industrial, import and all other licences, of the transferor company without any further act or deed are transferred and vested or deemed to be transferred or vested in favour of the transferee company. Thus, in case of amalgamation no doubt the lease-hold interest of the transferor company stands transferred in favour of transferee company but the such transfer is not contemplated in case of transfer of share by the shareholder of the company to the stranger purchasers of such shares, as it was held in Mrs. Bacha F. Guzdar, Bombay vs. Commissioner of Income Tad, Bombay (supra) by the Hon'ble Supreme Court that a shareholder who buys share does not buy any interest in the property of the company which is a juristic person entirely distinct from shareholders. It was further held therein that the true position of a shareholder in a company is that on

buying shares he becomes entitled to participate in the profit of the company as and when the company declares, subject to articles of association, that the profits or any portion thereof would be distributed by way of dividends amongst the shareholders. It was further held therein that he has further a right to participate in the assets of the company which would be left over after winding up but not in the assets as a whole. In the present case, it is nobody's case that the company was wound up and the assets of the wound up company which were left over after winding up of the said company was transferred by the promoter shareholder in favour of the stranger purchaser. As such, by following the aforesaid decision of the Hon'ble Supreme Court as well as of this Hon'ble Court, this Court has no hesitation to hold that with the transfer of the share by the promoter shareholder to the present shareholder, namely the transferees of such share, the lease hold interest of the company was not transferred from the promoter shareholder to the present shareholder of the said company. The petitioner-company which obtained the said lease from the Government, still remains the lessee of the said plot of land and its leasehold interest in the said plot of land remains unaffected by transfer of share by the promoter shareholders to the present holders. As such, this Court holds that the restrictive clause regarding transfer of the lease hold interest of the lessee in favour of a stranger, sub-lessee or assignee, does not attract in the present case and as a result, the demand for transfer fees for recognizing the alleged transfer of leasehold interest from the erstwhile shareholders of the said company to the present shareholder, is absolutely illegal and unlawful and as such, that part of such demand, which was made by the concerned authority in the impugned order and/or letter as aforesaid, stands quashed."

> 15. So far as these two petitions are concerned, Dabur Pharma Limited became lessee of the land in question through arrangement approved by this Court. Leasehold right of Dabur Pharma Limited has been recognized by the State authorities. On 11th August, 2008 the majority holding of Dabur Pharma Limited was transferred to the parent company of the petitioner. Whatever transfer had taken place was at that point of time between the two entities. The consequential act of change of corporate name of the company is sought to be treated as transfer of leasehold right of the company, and transfer fee is sought to be charged on that incident or event. This, in my opinion is not permissible. To borrow the terminology from the fiscal jurisprudence, what is being subjected to transfer fee is the incidence of change of name of the company. Such a situation cannot come within the ambit of the expression "transfer of leasehold right", as stipulated in the notification of 18th December, 2007. The ratio of the judgment of this Court in the case of Emami Biotech Ltd. is not applicable in the facts of this case, as transfer fee is not being charged on any instrument of transfer, but on the basis of request for recordal of change of corporate name. It has not been argued by the State that the very act of transfer of equity-holding of the promoter group gives rise to the obligation of the company to pay transfer fee."

10. Similar issue again arose before this Court in **Reckitt Benckiser (India) Private Limited** (supra).In that case, petitioner was initially incorporated as a public limited company by the name of M/s Reckitt & Colman of India on 5.7.1951. Subsequently, it got its name changed to Reckitt Benckiser (India) Limited on 18.12.2000. Thereafter, the name of the petitioner-company was again changed to Reckitt Benckiser (India) Private Limited on 13.5.2015, vide certificate of incorporation issued by the Registrar of Companies, NCT of Delhi and NCT of Haryana. This lastly named company, which was a public limited company, had acquired a piece of land i.e. industrial plot measuring 7-14 bigha entered in Khewat/Khatauni Nos. 39

min/64 min, bearing Khasra No. 449/2, situated in village Nandpur, BH No. 170, Pargana Dharampur, Tehsil Nalagarh, District Solan, Himachal Pradesh together with the factory building measuring 46000 square feet vide sale deed dated 24.2.2006. The respondent-State approved the sale of the land and building, while granting permission in favour of the petitioner under Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 vide letter dated 7.12.2005. The change of the name was carried out consequent upon conversion of the petitioner from a public limited company to a private limited company in accordance with the provisions of Section 13 of the Companies Act. Accordingly, the petitioner made an application to the respondents for change of name of the petitioner from "Reckitt Benckiser (India) Limited to "Reckitt Benckiser (India) Private Limited" in the revenue record pertaining to the land in question. The respondents recommended the case of the petitioner for permission to transfer the land alongwith assets in the name of M/s Reckitt Benckiser (India) Private Limited, however, subject to payment of stamp duty and registration fee on its value merely on account of addition of words, "Private" in its name. This Court held that the change in the name of the company was made with the approval of the Registrar of the Companies though even such approval was also not required as per the proviso to Section 13(2) of the Act, where the only change in the name of the company is either deletion therefrom or addition thereto the word 'private', consequent upon conversion of any one class of Companies to another class in accordance with the provisions contained under the Act. Section 13(3) provides that as and when there is any change in the name of the company under sub-Section 3, the Registrar shall enter the new name in the Register of the Company and issue fresh certificate of registration with new name. Section 13(2) made it crystal clear that no new company was ever created as a result of the change of its name and it is the case of mere addition of word 'private' to its name. Relying upon aforesaid instructions/clarification dated 16.2.2012 issued by

the respondent-State, this Court held that respondents erroneously concluded that there is transfer of assets and property by the Company.

11. Bombay High Court in **Commissioner of Income-Tax** vs. **Texspin Engg. & Mfg.,** (2003) 180 CTR Bom. 497, while dealing with a case where partnership firm was being treated as a company under the statutory provisions of the Companies Act, held that when a firm is treated as a company, there is no conveyance of the property executable in favour of the Limited Company. The vesting of property of firm in the Limited Company was not incidental to a transfer, but statutory. Therefore, there was no question of capital gain. It would be profitable to reproduce para-6 of the aforesaid judgment hereinbelow.

> "6. …………………… Now, in the present case, it is argued on behalf of the department before the Tribunal, for the first time, that in this case, on vesting of the properties of the erstwhile Firm in the Limited Company, there was a transfer of capital assets and, therefore, it was chargeable to income-tax under the head "Capital gains" as, on such vesting, there was extinguishment of all right, title and interest in the capital assets qua the Firm. We do not find any merit in this argument. In the present case, we are concerned with a Partnership Firm being treated as a company under the statutory provisions of Part IX of the Companies Act. In such cases, the Company succeeds the Firm. Generally, in the case of a transfer of a capital asset, two important ingredients are : existence of a party and a counterparty and, secondly, incoming consideration qua the transferor. In our view, when a Firm is treated as a Company, the said two conditions are not attracted. There is no conveyance of the property executable in favour of the Limited Company. It is no doubt true that all properties of the Firm vests in the Limited Company on the Firm being treated as a Company under Part IX of the Companies Act, but that vesting is not consequent or incidental to a transfer. It is a statutory vesting of properties in the Company as the Firm is treated as a Limited Company. On vesting of all the properties statutorily in the Company, the cloak

> given to the Firm is replaced by a different cloak and the same Firm is now treated as a Company, after a given date. In the circumstances, in our view, there is no transfer of a capital asset as contemplated by Section 45(1) of the Act. Even assuming for the sake of argument that there is a transfer of a capital asset under Section 45(1) because of the definition of the word "transfer" in Section 2(47)(iii), even then we are of the view that liability to pay capital gains would not arise because Section 45(1) is required to be read with Section 48, which provides for mode of computation…………………………."

12. Similar issue came up before Andhra Pradesh High Court in **Vali Pattabhirama Rao and another** Versus **Sri Ramanuja Ginning and Rice Factory (P.) Ltd. and others,** AIR 1984 AP 176, wherein the Court was considering a situation where a previous firm was converted into company under the provisions of Companies Act. The Court held that there was statutory vesting of title of all the property of the previous firm in the newly incorporated company, therefore, there was no need for any separate conveyance. It was held that a partnership which was treated as a company for the purposes of the Companies Act can be registered under Part 8 of the previous Act (Part 9 of the present Act) and the vesting is provided by Section 263 of the 1913 Act (Section 575 of the present Act). The provision is mandatory and there will be statutory vesting in the corporation so incorporated under the provisions of the Companies Act. The Registrar is bound to give a certificate of registration under Section 262 (present Section 574) which is a conclusive proof of incorporation, vide Section 35 of the present Act that corresponds to Section 24 of the previous Act. Hence, it is clear that no conveyance is necessary when a partnership is converted and registered as a company. However, it is not possible to acquire such title statutorily under this section if the previous firm purports to convey title to the company in which event a separate deed of conveyance is necessary. The

Court therefore held that if the constitution of the partnership firm is changed into that of a company by registering it under Part 9 of the present Act (Part 8 of the previous Act), there shall be statutory vesting of title of all the property of the previous firm in the newly incorporated company without any need for a separate conveyance.

13. The above judgment was quoted with approval by the Supreme Court in **Jai Narain Parasrampuria (Dead) and others** Versus **Pushpa Devi Saraf and others**, (2006) 7 SCC 756, in following manner:-

> "26. The said decision has been followed by a Division Bench of the Andhra Pradesh High Court in Vali Pattabhirama Rao v. Sri Ramanuja Ginning & Rice Factory (P) Ltd. wherein it was held: (AIR pp. 184-85)
>
> "Thus we hold that if the constitution of the partnership firm is changed into that of a company by registering it under Part 9 of present Act (Part 8 of previous Act), there shall be statutory vesting of title of all the property of the previous firm in the newly incorporated company without any need for a separate conveyance."

14. The Supreme Court while considering the effect of conversion of partnership firm into a company under Part IX of the Companies Act in Commissioner of Income Tax, Udaipur Versus M/s. Chetak Enterprises Pvt. Ltd., AIR 2020 SC 4305, held that on statutory vesting all properties of the firm, in law, vest in the company and the firm is succeeded by the company. Para 7 of the judgment reads as under:-

> "7. The question is: what is the effect of conversion of partnership firm into a company under Part IX of the Companies Act? That can be discerned from Section 575 of the Companies Act, which reads thus:

> "575. Vesting of property on registration. All property, movable and immovable (including actionable claims), belonging to or vested in a company at the date of its registration in pursuance of this Part, shall, on such registration, pass to and vest in the company as incorporated under this Act for all the estate and interest of the company therein."
>
> It is manifest that all properties, movable and immovable (including actionable claims) belonging to or vested in a company at the date of its registration would vest in the company as incorporated under the Act. In other words, the property acquired by a promoter can be claimed by the company after its incorporation without any need for conveyance on account of statutory vesting. On such statutory vesting, all the properties of the firm, in law, vest in the company and the firm is succeeded by the company. The firm ceases to exist and assumes the status of a company after its registration as a company."

15. In **M/s Sozin Flora Pharma LLP** (supra), similar dispute arose in context of conversion of petitioner from 'Partnership Firm' to 'Limited Liability Partnership'. Petitioner approached the respondents for effecting the change of its name in the revenue record with regard to certain land but the respondents, while granting permission to reflect such change, directed the petitioner to deposit the stamp duty and registration fee. This court relying upon the aforesaid instructions dated 16.2.2012, in para-5 held as under:

> "5. Conclusion:-
> From the above discussion, following conclusions are drawn:-
> 5(a). Upon conversion of a registered partnership firm to an LLP under the provisions of the Limited Liability Partnership Act, all movable and

immovable properties of erstwhile registered partnership firm, automatically vest in the converted LLP by operation of Section 58(4)(b) of the Limited Liability Partnership Act.

5(b). The transfer of assets of firm to the LLP is by operation of law. Being statutory transfer, no separate conveyance/instrument is required to be executed for transfer of assets.

5(c). Since there is no instrument of transfer of assets of the erstwhile partnership firm to the limited liability partnership, the question of payment of stamp duty and registration charges does not arise as these are chargeable only on the instruments indicated in Section 3 of the Indian Stamp Act and Section 17 of the Indian Registration Act.

5(d). Partnership firm's legal entity after conversion to limited liability partnership does not change. Only the identity of the firm as a legal entity changes. Such conversion or change in the name does not amount to change in the constitution of partnership firm.

5(e). Stamp duty and registration fee cannot be levied upon conversion of a partnership firm to LLP. Therefore, permission under Section 118 of the H.P. Tenancy and Land Reforms Act for recording such change of name in the revenue documents, i.e. M/s Sozin Flora Pharma to M/s Sozin Flora Pharma LLP cannot be made dependent upon deposit of stamp duty and registration fee.

For the foregoing discussion, we allow the instant writ petition. The impugned Annexures P-8, dated 28.08.2017 and P-10 dated 23.08.2019, insofar they direct the petitioner to deposit the stamp duty and registration fee consequent upon change of its name from M/s Sozin Flora Pharma to M/s Sozin Flora Pharma LLP, are quashed and set aside. The respondents are directed to enter the name of the petitioner as 'M/s Sozin Flora Pharma LLP' in the revenue record within a period of four weeks from today."

16. In view of the discussion made herein above, the present petition deserves to succeed and it is accordingly allowed. Impugned order dated 18.12.2020, Annexure P-3, is quashed and set aside. Consequences to follow.

All pending applications stand disposed of.

BEFORE HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

Between:-

MUKHTIAR CHAND (DECEASED) THROUGH LRS.

I (a) JUGGAL KISHORE,
S/O LATE SH. MUKHTIAR CHAND

I (b) ASHOK KUMAR,
S/O LATE SH. MUKHTIAR CHAND,

BOTH RESIDENTS OF VILLAGE AND
P.O. UNA (OPPOSITE BDO OFFICE)
NANGAL ROAD, UNA, TEHSIL AND
DISTRICT UNA (HP)- 174303.

2. SHRI RAJ KUMAR, SON OF SHRI BABU RAM,
RESIDENT OF VILLAGE AND
P.O. UNA (OPPOSITE BDO OFFICE)
NANGAL ROAD, UNA, TEHSIL AND
DISTRICT UNA (HP)- 174303.

....PETITIONERS

(BY SH. BHUPENDER GUPTA SENIOR ADVOCATE WITH MS RINKI KASHMIRI, ADVOCATE)

AND

1. SHRI RAM DASS SHARMA (DECEASED)

2. SMT. SUDHA SHARMA (SINCE DECEASED)

3. SHRI SATISH KUMAR SON OF
SHRI ISHWAR DASS,
RESIDENT OF VILLAGE AND P.O.
TAKARLA, TEHSIL AND DISTRICT
UNA, (HP).

4. SHRI ANUJ KUMAR, SON OF
SHRI DHARAM DUTT, RESIDENT
OF VILLAGE KANJIAN, TEHSIL
BHORANJ, DISTRICT HAMIRPUR (HP).

....RESPONDENTS

(SH. R. K. GAUTAM, SENIOR ADVOCATE WITH SH. RISHABH, ADVOCARE, FOR R-3 & 4.

CIVIL REVISION
No. 119 of 2004
Reserved on:13.5.2022
Date of decision: 20.5.2022.

HP Urban Rent Control Act, 1987—Revision, Section 24(5) - Section 14 (iii) (c) -- Grounds of eviction of tenant - Bonafide requirement for rebuilding and reconstruction - Unfit and unsafe condition of building was pleaded as a ground for eviction distinct than the requirement for reconstruction and rebuilding – Held - The landlord has used word “and” for carving out distinction between the grounds of eviction - Both grounds of eviction were considered separately and distinctly by the Rent Controller - Landlord has proved that he has sufficient means for the construction of building, otherwise also the arrangements of finance for the purpose of reconstruction is not a big deal in the modern commercial world where banks are providing financial assistance - Eviction order rightly passed – Tenant raised new objections before this Court which even not raised in Appeal - Revision dismissed. (Paras 15, 16, 21 & 22)

HP Urban Rent Control Act, 1987—Revision - Section 24(5) - Section 14 (iii) (c) Eviction - Amended provision in the year 2012 -- Right of tenant to re-entry

in premises in rebuilt building - Eviction order modified to the right of tenant to re-enter the premises subject to mutually settelling new terms of tenancy with landlord and the right of tenant to enter the premises equivalent to the portion over which he had possession prior to eviction -- Petition disposed of accordingly.(Para 23)

Cases referred:

Kewal Krishan Sehgal & others vs. Rajeshwar Kumar & another, 2019 (1) SLC, 323;

This petition coming on for hearing this day, **Hon'ble Mr. Justice Satyen Vaidya**, passed the following:

O R D E R

By way of instant revision petition petitioner/tenant has assailed judgment dated 11.6.2004 passed by learned Appellate Authority, Una in Civil Miscellaneous Appeal No. 6 of 2003 whereby order dated 30.8.2003 passed by learned Rent Controller-I, Una in RRA No. 3 of 1998 was affirmed.

2. The parties hereinafter shall be referred to as landlord and tenant for clarity and convenience.

3. Tenant has suffered eviction order on the grounds of arrears of rent and bonafide requirement of landlord for re-building and re-construction of the building. Learned Rent Controller-I, Una, passed the aforesaid eviction order on 30.8.2003, in exercise of jurisdiction under Section 14 of the H.P. Urban Rent Control Act, 1987, (for short 'the Act'). Tenant preferred an appeal to the Appellate Authority under Section 24 of the Act but remained unsuccessful, hence the instant petition.

4. Brief facts of the case are that landlord filed petition for eviction of tenant under Section 14 of the Act, on following grounds:-

i) Arrears of rent;

ii) Sub-letting,

iii) Building having been rendered unsafe and unfit for human habitation;

iv) Bonafide requirement of landlord for the purpose of re-building and re-construction.

5. Learned Rent Controller allowed the petition on the grounds of arrears of rent and bonafide requirement of landlord for re-building and re-construction of the building. The grounds of sub-letting and the building having become unfit and unsafe for human habitation were held not proved. The findings returned by learned Rent Controller were affirmed by learned Appellate Authority.

6. By way of instant petition, tenant has raised contention that the impugned order passed by learned Appellate Authority, affirming the order of learned Rent Controller, is not sustainable on the grounds, firstly that both the authorities below had carved out a new case in favour of landlord, whereas, there were no pleadings in support of the bonafide requirement of landlord for re-building and re-construction; secondly the impugned orders were vitiated, as the satisfaction as to existence of bonafides of landlord recorded by both the authorities below, was merely on subjective consideration and lastly, the authorities below had erred in not rejecting the claim of landlord on the principle of *res-judicata*. 7. It has further been contended on behalf of tenant that during the pendency of instant petition an amendment has been carried out in Section 14 (3) (c) of the Act, whereby a proviso has been added, vesting tenant with a right of re-entry on new terms of tenancy on the basis of mutual agreement between landlord and tenant, in the re-built building equivalent in area to the original premises and the tenant in the instant case has also become entitled to the benefit of such provision.

8. I have heard Mr. Bhupender Gupta, learned Senior Counsel for the landlord as well as Mr. R. K. Gautam, learned Senior Counsel for the tenant and have also gone through the record carefully.

9. This Court derives revisional powers from sub-Section (5) of Section 24 of the Act, which reads as under:-

> *"(5) The High Court may, at any time, on the application of any aggrieved party or on its own motion call for and examine the records relating to any order passed or proceedings taken under this Act for the purpose of satisfying itself as to the legality or propriety of such order or proceedings and may pass such order in relation thereto as it may deem fit."*

9. It is more than settled that in exercise of revisional powers under sub-section (5) of Section 24 of the Act, this Court will not sit as the Court of appeal. The scope of revisional powers, so conferred on this Court is restrictive. A Coordinate Bench of this Court in ***Kewal Krishan Sehgal & others*** vs. ***Rajeshwar Kumar & another***, ***2019 (1) Shimla Law Cases, 323*** has expounded the scope of revisional powers of this Court under the Act as under:-

> *"8. At the outset, the scope of revisional jurisdiction which Court can exercise must borne in mind, as the Constitution Bench of the Hon'ble Supreme Court in Hindustan Petroleum Corporation Limited vs. Dilbahar Singh (2014) 9 SCC 78 laid down certain broad principles for exercise of revisional jurisdiction which can be summarized as under:*
>
> *(i) The term 'propriety' would imply something which is legal and proper.*
>
> *(ii) The power of the High Court even though wider than the one provided under Section 115 of the Code of Civil Procedure is not wide enough to that of the appellate Authority.*
>
> *(iii) Such power cannot be exercised as the cloak of an appeal in disguise.*

(iv) *Issues raised in the original proceedings cannot be permitted to be reheard as a appellate Authority.*

(v) *The expression "revision" is meant to convey the idea of much narrower expression than the one expressed by the expression "appeal". The revisional power under the Rent Control Act may not be as narrow as the revisional power under Section 115 of the CPC but certainly it is not wide enough to make the High Court a second court of first appeal. While holding so the Court reiterated the view taken in Dattonpant Gopalvarao Devakate vs. Vithalrao Maruthirao Janagawal, (1975) 2 SCC 246.*

(vi) *The meaning of the expression "legality and propriety" so explained in Ram Dass vs. Ishwar Chander, (1988) 3 SCC 131 was only to the extent that exercise of the power is not confined to jurisdictional error alone and has to be "according to law". (vii) Whether or not the finding of fact is according to law or not is required to be seen on the touch stone, as to whether such finding of fact is based on some legal evidence or it suffers from any illegality like misreading of the evidence; overlooking; ignoring the material evidence all together; suffers from perversity; illegality; or such finding has resulted into gross miscarriage of justice. Court clarified that the ratio of Ram Dass (supra) does not exposit that the revisional power conferred upon the High Court is as wide as an appellate power to reappraise or reassess the evidence for coming to a finding contrary to the findings returned by the authority below.*

(vii) *In exercise of its revisional jurisdiction High Court shall not reverse findings of fact merely because on reappreciation of the evidence it may have a different view thereupon.*

(viii) *The exercise of such power to examine record and facts must be understood in the context of the*

purpose that such findings are based on firm legal basis and not on a wrong premise of law.

(ix) Pure findings of fact are not to be interfered with. Reconsideration of all questions of fact is impermissible as Court cannot function as a Court of appeal.

(x) Even while considering the propriety and legality, high Court cannot reappreciate the evidence only for the purposes of arriving at a different conclusion. Consideration of the evidence is confined only to adjudge the legality, regularity and propriety of the order.

(xi) Incorrect finding of fact must be understood in the context of such findings being perverse, based on no evidence; and misreading of evidence."

9. In the aforesaid decision, the Hon'ble Supreme Court was dealing with the provisions of the Kerala Buildings (Lease and Rent Control) Act, 1965, T. N. Buildings (Lease and Rent Control) Act, 1960 and Haryana Urban (Control of Rent and Eviction) Act, 1973. The incongruity in the decisions rendered by the Hon'ble Supreme Court in Rukmini Amma Saradamma vs. Kallyani Sulochana, (1993) 1 SCC 499 and Ram Dass (supra) was the backdrop in which the Constitution Bench was called upon to decide the scope of the revisional jurisdiction and the expression "legality and propriety" provided in the relevant statues. The essential question being as to whether in exercise of such powers, the revisional authority could reappreciate the evidence or not. Finally the Hon'ble Supreme Court answered the reference by making the following observations:-

"43. We hold, as we must, that none of the above Rent Control Acts entitles the High Court to interfere with the findings of fact recorded by the first appellate court/first appellate authority because on reappreciation of the evidence, its view is different from the court/authority below. The consideration or examination of the evidence by the High Court in revisional jurisdiction under these Acts is confined to find out that finding of facts recorded by the

> *court/authority below is according to law and does not suffer from any error of law. A finding of fact recorded by court/authority below, if perverse or has been arrived at without consideration of the material evidence or such finding is based on no evidence or misreading of the evidence or is grossly erroneous that, if allowed to stand, it would result in gross miscarriage of justice, is open to correction because it is not treated as a finding according to law. In that event, the High Court in exercise of its revisional jurisdiction under the above Rent Control Acts shall be entitled to set aside the impugned order as being not legal or proper. The High Court is entitled to satisfy itself as to the correctness or legality or propriety of any decision or order impugned before it as indicated above. However, to satisfy itself to the regularity, correctness, legality or propriety of the impugned decision or the order, the High Court shall not exercise its power as an appellate power to reappreciate or reassess the evidence for coming to a different finding on facts. Revisional power is not and cannot be equated with the power of reconsideration of all questions of fact as a court of first appeal. Where the High Court is required to be satisfied that the decision is according to law, it may examine whether the order impugned before it suffers."*

10. The contention raised on behalf of the tenant, as noticed above, needs to be considered in the backdrop of aforesaid exposition of law,

11. The landlord vide paragraph 18 (a) (iv) of the petition averred as under:-

> *"That the construction is totally outlived and is in dilapidated condition with no pucca roof and walls and the shop is required by the petitioner for the purpose of re-building, which cannot be carried out without premises being vacated by the tenant."*

12. It is on the strength of aforesaid pleadings that a contention has been raised by tenant that requisite pleadings and proof as to bonafide

requirement of landlord for re-building was not available and the authorities below had carved out a new case for the landlord.

13. Section 14 (3) (c) of the Act reads as under:-

> *"(c) in the case of any building or rented land, if he requires it to carry out any building work at the instance of the Government or local authority or any Improvement Trust under some improvement or development scheme or if it has become unsafe or unfit for human habitation or is required bonafide by him for carrying out repairs which cannot be carded out without the building or rented land being vacated or that the building or rented land is required bona-fide by him for the purpose of building or re-building or making thereto any substantial additions or alterations and that such building or re-building or addition or alternation cannot be carried out without the building or rented land being vacated;*
>
> *[Provided that the tenant evicted under this clause shall have the right to re-entry on new terms of tenancy, on the basis of mutual agreement between the landlord and the tenant, to the premises in the re-built building equivalent in area to the original premises for which he was a tenant:*
>
> *Provided further that in case of non-residential premises, the landlord shall not compel the tenant for a change of business under the new terms of tenancy.]"*

14. Perusal of above noted provision clearly reveals that it includes more than one ground on which landlord can seek eviction of the tenant. Each ground, so included in Section 14 (3) (c) of the Act is independent of the other. Thus, the ground that building has become unsafe and unfit of human habitation is distinct than the ground that building is bonafide required by landlord for the purpose of re-construction and re-building, which cannot be carried without the building being vacated by the tenant.

15. Though, the landlord pleaded both the grounds by not making separate heads but that does not lead to an inference that the landlord did not intend to seek the eviction of tenant on both the grounds separately. Plain

reading of paragraph-18 (a)(iv) of the petition reveals that unfit and unsafe condition of the building was pleaded as a ground distinct than the requirement for re-construction and re-building. The landlord has used the word "and" for carving out distinction between the pleaded grounds of eviction. It was not the case of landlord that re-building or re-construction was required only because the building had become unfit and unsafe for human habitation.

16. Perusal of reply submitted by tenant before learned Rent Controller to the petition filed by the landlord also does not show that the tenant had any misgiving or misconception as to the grounds raised by the landlord. It is evident from the issues framed by learned Rent Controller that both the grounds of eviction were considered separately and distinctly by the parties and, therefore, issues No. 3 and 4 were framed as under:-

> "3 Whether the disputed premises is un-sage and unfit for human habilitation? OPP
>
> 4. Whether the premises in dispute is required for re-building and which cannot be carried out without the building being vacated? OPP"

17. Thus, the objection raised by tenant before this Court for the first time is not tenable. Tenant had not raised such a ground even before learned Appellate Authority.

18. As regards objection as to non-dismissal of eviction petition being barred by *res-judicata*, this Court after having gone through the relevant material is of considered view that the findings recorded by learned Rent Controller on issue No.6 and affirmed by learned Appellate Authority cannot be faulted with. Section 18 of the Act empowers the Rent Controller to summarily reject an application under sub-section (2) or sub-section (3) of Section 14 of the Act, which raises substantial issues as have been finally decided in a former proceeding under the Act. Tenant has placed reliance

upon an order dated 22.12.1992, passed by learned Rent Controller, Court No-II, Una, in Case No. 42 of 1988, in which, the predecessor-in-interest of the landlord had sought eviction of the tenant on the grounds that building had become unsafe and unfit for human habitation and that the building was bonafide required by landlord for re-construction of building. While deciding issue No.2, in the said petition, learned Rent Controller had returned specific findings that since the building was not held to be unsafe and unfit for human habitation, therefore, the requirement of landlord for re-construction could not be said to be bonafide. Further, the landlord was also not held to be possessing of sufficient means for re-construction and also that the landlord had failed to explain as to why he required to reconstruct the building.

19. Learned Rent Controller while dealing with issue No.6 has held that the cause of action, under the Act, to seek eviction on the ground of bonafide requirement for re-building and re-construction is recurring. Such findings of learned Rent Controller can also not be faulted with. In order to succeed in eviction petition on the ground of requirement for re-building and re-construction, the landlord has to prove his bonafides. There cannot be a uniform and strait jacket formula for proving the bonafides. Sub-section (4) of Section 14 of the Act reads as under:

> *"(4) The controller shall, if he is satisfied that the claim of the landlord is bonafide, make an order directing the tenant to put the landlord in possession of the building or rented land on such date as may be specified by the Controller and if the Controller is not so satisfied he shall make an order rejecting the application:*
>
> *Provided that the Controller may give the tenant a reasonable time for putting the landlord in possession of the building or rented land and may extend such time not exceeding three months in the aggregate."*

20. To satisfy the conscience of Rent Controller as to existence of the bonafides of landlord, the prevalent circumstances and context relevant at the

time of filing of petition are material. Thus, Section 18 of the Act has to be interpreted pragmatically. In view of changed circumstances, the new issues will always arise and such new issues cannot be said to have been substantially raised in earlier proceedings. . The term "substantial issue" used in Section 18 of the Act does not imply the issues as framed under Order 14 of the CPC, rather it means the facts as pleaded by the landlord for seeking eviction of tenant under the Act and relevant to the period at the time when the eviction proceedings are initiated.

21. It has further been contended on behalf of the tenant that the landlord had failed to prove his bonafide as neither the approval of plan by Municipal Corporation nor the financial means of landlord to enable him to re-construct the building have been proved. Keeping in view the restrictive revisional jurisdiction of this Court, this court will not re-appreciate the evidence as no perversity in the findings recorded by both the learned authorities has been pointed out. Learned Rent Controller has rightly concluded that the eviction of a tenant will not always be readily available to the landlord. The legal recourse takes considerable time. In the instant case, the eviction proceedings were instituted on 30.8.2003. More than 19 years have elapsed the landlord has not been able to secure finality to the fate of his claim. In such circumstances, mere fact that landlord had not obtained the permission from Local Authorities to re-construct the building cannot be considered a factor to doubt the bonafide of landlord. Learned Rent Controller has further held that landlord has sufficient means to re-construct the building. Even otherwise, the arrangement of finance for the purpose of re-construction is not a big deal in modern commercial world, where the facility of financial assistance by the banks or banking institutions is available without much difficulty.

22. In view of above discussion, there is no merit in the revision petition. No ground has been made out by the tenant for interference with the

order passed by the learned Appellate Authority affirming the order of learned Rent Controller.

23. The Act has been amended in the year 2012 i.e. during the pendency of this petition and a proviso as noticed above has been appended to Section 14 (iii) (c) of the Act, which vests the tenant with a right of re-entry in the premises in re-built building having equivalent area to the original premises subject, however, to new terms of tenancy to be mutually decided between the landlord and tenant.

24. Keeping in view such amendment, the tenant in the instant case has also earned a right in terms of aforesaid amended provision. Therefore, the eviction order passed by learned Rent Controller against tenant on the ground of bonafide requirement of landlord to re-build and re-construct the building and affirmed by learned Appellate Authority is modified only to the extent that such order of eviction will be subject to the right of tenant to re-enter the premises equivalent to what he had prior to eviction in the re-built building, subject to mutually settling new terms of tenancy with the landlord.

25. The petition is accordingly disposed of. Pending applications, if any, also stand disposed of. Records be sent back forthwith.

BEFORE HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

Between:-

1. SHRI SWARAN RAM, SON OF SHRI RANIA RAM,

2. SHRI SUBHASH CHAND, SON OF SHRI RANIA RAM,

BOTH RESIDENTS OF VILLAGE AND
P.O. UNA (OPPOSITE B.D.O OFFICE)
NANGAL ROAD, UNA TEHSIL AND
DISTRICT UNA (HP)-174303.

....PETITIONERS

(BY SH. BHUPENDER GUPTA SENIOR ADVOCATE WITH MS RINKI KASHMIRI, ADVOCATE)

AND

1. SHRI RAM DASS SHARMA (DECEASED)

2. SMT. SUDHA SHARMA (DECEASED)

3. SHRI SATISH KUMAR SON OF
SHRI ISHWAR DASS,
RESIDENT OF VILLAGE AND P.O.
TAKARLA, TEHSIL AND DISTRICT
UNA, (HP).

4. SHRI ANUJ KUMAR, SON OF
SHRI DHARAM DUTT, RESIDENT
OF VILLAGE KANJIAN, TEHSIL
BHORANJ, DISTRICT HAMIRPUR (HP).
....RESPONDENTS

(SH. R. K. GAUTAM, SENIOR ADVOCATE WITH SH. RISHABH, ADVOCARE, FOR R-3 & 4).

(SH. R. K. GAUTAM, SENIOR ADVOCATE WITH SH. RISHABH, ADVOCARE, FOR R-3 & 4.

CIVIL REVISION
No. 122 of 2004
Reserved on:13.5.2022
Date of decision: 20.5.2022

HP Urban Rent Control Act, 1987—Revision, Section 24(5) - Section 14 (iii) (c) -- Grounds of eviction of tenant - Bonafide requirement for rebuilding and reconstruction - Unfit and unsafe condition of building was pleaded as a ground for eviction distinct than the requirement for reconstruction and rebuilding – Held - The landlord has used word “and” for carving out

distinction between the grounds of eviction - Both grounds of eviction were considered separately and distinctly by the Rent Controller - Landlord has proved that he has sufficient means for the construction of building, otherwise also the arrangements of finance for the purpose of reconstruction is not a big deal in the modern commercial world where banks are providing financial assistance - Eviction order rightly passed - Revision dismissed. (Paras 15, 16, 18 & 19)

HP Urban Rent Control Act, 1987—Revision, Section 24(5) - Section 14 (iii) (c) Eviction - Amended provision in the year 2012 -- Right of tenant to re-entry in premises in rebuilt building - Eviction order modified to the right of tenant to re-enter the premises subject to mutually settelling new terms of tenancy with landlord and the right of tenant to enter the premises equivalent to the portion over which he had possession prior to eviction -- Petition disposed of accordingly. (Para 21)

Cases referred:

Kewal Krishan Sehgal & others vs. Rajeshwar Kumar & another, 2019 (1) SLC, 323;

This petition coming on for hearing this day, **Hon'ble Mr. Justice Satyen Vaidya**, passed the following:

O R D E R

By way of instant revision petition petitioner/tenant has assailed judgment dated 11.6.2004 passed by learned Appellate Authority, Una in Civil Miscellaneous Appeal No. 5 of 2003 whereby order dated 30.8.2003 passed by learned Rent Controller-I, Una in RRA No. 4 of 1998 was affirmed.

2. The parties hereinafter shall be referred to as landlord and tenant for clarity and convenience.

3. Tenant has suffered eviction order on the grounds of arrears of rent and bonafide requirement of landlord for re-building and re-construction of the building. Learned Rent Controller-I, Una, passed the aforesaid eviction order on 30.8.2003, in exercise of jurisdiction under Section 14 of the H.P.

Urban Rent Control Act, 1987, (for short 'the Act'). Tenant preferred an appeal to the Appellate Authority under Section 24 of the Act but remained unsuccessful, hence the instant petition.

4. Brief facts of the case are that landlord filed petition for eviction of tenant under Section 14 of the Act, on following grounds:-

i) Arrears of rent;

ii) Sub-letting,

iii) Building having been rendered unsafe and unfit for human habitation;

iv) Bonafide requirement of landlord for the purpose of re-building and re-construction.

5. Learned Rent Controller allowed the petition on the grounds of arrears of rent and bonafide requirement of landlord for re-building and re-construction of the building. The grounds of sub-letting and the building having become unfit and unsafe for human habitation were held not proved. The findings returned by learned Rent Controller were affirmed by learned Appellate Authority.

6. By way of instant petition, tenant has raised contention that the impugned order passed by learned Appellate Authority, affirming the order of learned Rent Controller, is not sustainable on the grounds, firstly that both the authorities below had carved out a new case in favour of landlord, whereas, there were no pleadings in support of the bonafide requirement of landlord for re-building and re-construction; and secondly the impugned orders were vitiated, as the satisfaction as to existence of bonafides of landlord recorded by both the authorities below, was merely on subjective consideration.

7. It has further been contended on behalf of tenant that during the pendency of instant petition an amendment has been carried out in Section 14

(3) (c) of the Act, whereby a proviso has been added, vesting tenant with a right of re-entry on new terms of tenancy on the basis of mutual agreement between landlord and tenant, in the re-built building equivalent in area to the original premises and the tenant in the instant case has also become entitled to the benefit of such provision.

8. I have heard Mr. Bhupender Gupta, learned Senior Counsel for the landlord as well as Mr. R. K. Gautam, learned Senior Counsel for the tenant and have also gone through the record carefully.

9. This Court derives revisional powers from sub-Section (5) of Section 24 of the Act, which reads as under:-

> *"(5) The High Court may, at any time, on the application of any aggrieved party or on its own motion call for and examine the records relating to any order passed or proceedings taken under this Act for the purpose of satisfying itself as to the legality or propriety of such order or proceedings and may pass such order in relation thereto as it may deem fit."*

9. It is more than settled that in exercise of revisional powers under sub-section (5) of Section 24 of the Act, this Court will not sit as the Court of appeal. The scope of revisional powers, so conferred on this Court is restrictive. A Coordinate Bench of this Court in ***Kewal Krishan Sehgal & others*** vs. ***Rajeshwar Kumar & another***, ***2019 (1) Shimla Law Cases, 323*** has expounded the scope of revisional powers of this Court under the Act as under:-

> *"8. At the outset, the scope of revisional jurisdiction which Court can exercise must borne in mind, as the Constitution Bench of the Hon'ble Supreme Court in Hindustan Petroleum Corporation Limited vs. Dilbahar Singh (2014) 9 SCC 78 laid down certain broad principles for exercise of revisional jurisdiction which can be summarized as under:*

(i) *The term 'propriety' would imply something which is legal and proper.*

(ii) *The power of the High Court even though wider than the one provided under Section 115 of the Code of Civil Procedure is not wide enough to that of the appellate Authority.*

(iii) *Such power cannot be exercised as the cloak of an appeal in disguise.*

(iv) *Issues raised in the original proceedings cannot be permitted to be reheard as a appellate Authority.*

(v) *The expression "revision" is meant to convey the idea of much narrower expression than the one expressed by the expression "appeal". The revisional power under the Rent Control Act may not be as narrow as the revisional power under Section 115 of the CPC but certainly it is not wide enough to make the High Court a second court of first appeal. While holding so the Court reiterated the view taken in Dattonpant Gopalvarao Devakate vs. Vithalrao Maruthirao Janagawal, (1975) 2 SCC 246.*

(vi) *The meaning of the expression "legality and propriety" so explained in Ram Dass vs. Ishwar Chander, (1988) 3 SCC 131 was only to the extent that exercise of the power is not confined to jurisdictional error alone and has to be "according to law". (vii) Whether or not the finding of fact is according to law or not is required to be seen on the touch stone, as to whether such finding of fact is based on some legal evidence or it suffers from any illegality like misreading of the evidence; overlooking; ignoring the material evidence all together; suffers from perversity; illegality; or such finding has resulted into gross miscarriage of justice. Court clarified that the ratio of Ram Dass (supra) does not exposit that the revisional power conferred upon the High Court is as wide as an appellate power to reappraise or reassess the evidence for coming to a*

finding contrary to the findings returned by the authority below.

(vii) In exercise of its revisional jurisdiction High Court shall not reverse findings of fact merely because on reappreciation of the evidence it may have a different view thereupon.

(viii) The exercise of such power to examine record and facts must be understood in the context of the purpose that such findings are based on firm legal basis and not on a wrong premise of law.

(ix) Pure findings of fact are not to be interfered with. Reconsideration of all questions of fact is impermissible as Court cannot function as a Court of appeal.

(x) Even while considering the propriety and legality, high Court cannot reappreciate the evidence only for the purposes of arriving at a different conclusion. Consideration of the evidence is confined only to adjudge the legality, regularity and propriety of the order.

(xi) Incorrect finding of fact must be understood in the context of such findings being perverse, based on no evidence; and misreading of evidence."

9. In the aforesaid decision, the Hon'ble Supreme Court was dealing with the provisions of the Kerala Buildings (Lease and Rent Control) Act, 1965, T. N. Buildings (Lease and Rent Control) Act, 1960 and Haryana Urban (Control of Rent and Eviction) Act, 1973. The incongruity in the decisions rendered by the Hon'ble Supreme Court in Rukmini Amma Saradamma vs. Kallyani Sulochana, (1993) 1 SCC 499 and Ram Dass (supra) was the backdrop in which the Constitution Bench was called upon to decide the scope of the revisional jurisdiction and the expression "legality and propriety" provided in the relevant statues. The essential question being as to whether in exercise of such powers, the revisional authority could reappreciate the evidence or not. Finally the Hon'ble Supreme Court answered the reference by making the following observations:-

> *"43. We hold, as we must, that none of the above Rent Control Acts entitles the High Court to interfere with the findings of fact recorded by the first appellate court/first appellate authority because on reappreciation of the evidence, its view is different from the court/authority below. The consideration or examination of the evidence by the High Court in revisional jurisdiction under these Acts is confined to find out that finding of facts recorded by the court/authority below is according to law and does not suffer from any error of law. A finding of fact recorded by court/authority below, if perverse or has been arrived at without consideration of the material evidence or such finding is based on no evidence or misreading of the evidence or is grossly erroneous that, if allowed to stand, it would result in gross miscarriage of justice, is open to correction because it is not treated as a finding according to law. In that event, the High Court in exercise of its revisional jurisdiction under the above Rent Control Acts shall be entitled to set aside the impugned order as being not legal or proper. The High Court is entitled to satisfy itself as to the correctness or legality or propriety of any decision or order impugned before it as indicated above. However, to satisfy itself to the regularity, correctness, legality or propriety of the impugned decision or the order, the High Court shall not exercise its power as an appellate power to reappreciate or reassess the evidence for coming to a different finding on facts. Revisional power is not and cannot be equated with the power of reconsideration of all questions of fact as a court of first appeal. Where the High Court is required to be satisfied that the decision is according to law, it may examine whether the order impugned before it suffers."*

10. The contention raised on behalf of the tenant, as noticed above, needs to be considered in the backdrop of aforesaid exposition of law,

11. The landlord vide paragraph 18 (a) (iv) of the petition averred as under:-

> *"That the construction is totally outlived and is in dilapidated condition with no pucca roof and walls and the shop is required by the petitioner for the purpose of re-building, which cannot be carried out without premises being vacated by the tenant."*

12. It is on the strength of aforesaid pleadings that a contention has been raised by tenant that requisite pleadings and proof as to bonafide requirement of landlord for re-building was not available and the authorities below had carved out a new case for the landlord.

13. Section 14 (3) (c) of the Act reads as under:-

> *"(c) in the case of any building or rented land, if he requires it to carry out any building work at the instance of the Government or local authority or any Improvement Trust under some improvement or development scheme or if it has become unsafe or unfit for human habitation or is required bonafide by him for carrying out repairs which cannot be carded out without the building or rented land being vacated or that the building or rented land is required bona-fide by him for the purpose of building or re-building or making thereto any substantial additions or alterations and that such building or re-building or addition or alternation cannot be carried out without the building or rented land being vacated;*
>
> *[Provided that the tenant evicted under this clause shall have the right to re-entry on new terms of tenancy, on the basis of mutual agreement between the landlord and the tenant, to the premises in the re-built building equivalent in area to the original premises for which he was a tenant:*
>
> *Provided further that in case of non-residential premises, the landlord shall not compel the tenant for a change of business under the new terms of tenancy.]"*

14. Perusal of above noted provision clearly reveals that it includes more than one ground on which landlord can seek eviction of the tenant. Each ground, so included in Section 14 (3) (c) of the Act is independent of the other. Thus, the ground that building has become unsafe and unfit of human habitation is distinct than the ground that building is bonafide required by

landlord for the purpose of re-construction and re-building, which cannot be carried without the building being vacated by the tenant.

15. Though, the landlord pleaded both the grounds by not making separate heads but that does not lead to an inference that the landlord did not intend to seek the eviction of tenant on both the grounds separately. Plain reading of paragraph-18 (a)(iv) of the petition reveals that unfit and unsafe condition of the building was pleaded as a ground distinct than the requirement for re-construction and re-building. The landlord has used the word “and” for carving out distinction between the pleaded grounds of eviction. It was not the case of landlord that re-building or re-construction was required only because the building had become unfit and unsafe for human habitation.

16. Perusal of reply submitted by tenant before learned Rent Controller to the petition filed by the landlord also does not show that the tenant had any misgiving or misconception as to the grounds raised by the landlord. It is evident from the issues framed by learned Rent Controller that both the grounds of eviction were considered separately and distinctly by the parties and, therefore, issues No. 3 and 4 were framed as under:-

> “3 Whether the disputed premises is un-sage and unfit for human habilitation? OPP
>
> 4. Whether the premises in dispute is required for re-building and which cannot be carried out without the building being vacated? OPP”

17. Thus, the objection raised by tenant before this Court for the first time is not tenable. Tenant had not raised such a ground even before learned Appellate Authority.

18. It has further been contended on behalf of the tenant that the landlord had failed to prove his bonafide as neither the approval of plan by Municipal Corporation nor the financial means of landlord to enable him to re-

construct the building have been proved. Keeping in view the restrictive revisional jurisdiction of this Court, this court will not re-appreciate the evidence as no perversity in the findings recorded by both the learned authorities has been pointed out. Learned Rent Controller has rightly concluded that the eviction of a tenant will not always be readily available to the landlord. The legal recourse takes considerable time. In the instant case, the eviction proceedings were instituted on 30.8.2003. More than 19 years have elapsed the landlord has not been able to secure finality to the fate of his claim. In such circumstances, mere fact that landlord had not obtained the permission from Local Authorities to re-construct the building cannot be considered a factor to doubt the bonafide of landlord. Learned Rent Controller has further held that landlord has sufficient means to re-construct the building. Even otherwise, the arrangement of finance for the purpose of re-construction is not a big deal in modern commercial world, where the facility of financial assistance by the banks or banking institutions is available without much difficulty.

19. In view of above discussion, there is no merit in the revision petition. No ground has been made out by the tenant for interference with the order passed by the learned Appellate Authority affirming the order of learned Rent Controller.

20. The Act has been amended in the year 2012 i.e. during the pendency of this petition and a proviso as noticed above has been appended to Section 14 (iii) (c) of the Act, which vests the tenant with a right of re-entry in the premises in re-built building having equivalent area to the original premises subject, however, to new terms of tenancy to be mutually decided between the landlord and tenant.

21. Keeping in view such amendment, the tenant in the instant case has also earned a right in terms of aforesaid amended provision. Therefore, the eviction order passed by learned Rent Controller against tenant on the

ground of bonafide requirement of landlord to re-build and re-construct the building and affirmed by learned Appellate Authority is modified only to the extent that such order of eviction will be subject to the right of tenant to re-enter the premises equivalent to what he had prior to eviction in the re-built building, subject to mutually settling new terms of tenancy with the landlord.

22. The petition is accordingly disposed of. Pending applications, if any, also stand disposed of. Records be sent back forthwith.

BEFORE HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

Between:-

SHRI JAI GOPAL SON OF SHRI DHANI RAM, RESIDENT OF VILLAGE MEHRA, TEHSIL SUNDER NAGAR, DISTRICT MANDI, HP.

...APPLICANT/APPELLANT.

(BY MR. VIRENDER THAKUR, ADVOCATE)

AND

COLLECTOR, LAND ACQUISITION, HPSEB MANDI, DISTRICT MANDI, H.P.

.....RESPONDENT/NON-APPLICANT.

(BY MR. T.S. CHAUHAN, ADVOCATE)

CIVIL MISC. PETITION NO. 13093 OF 2013 ALONG WITH CIVIL MISC. PETITION NO. 7580 OF 2021 IN REGULAR FIRST APPEAL NO. 857 OF 2012

RESERVED ON: 13TH MAY, 2022
DECIDED ON: 20th MAY, 2022

Land Acquisition Act, 1894 - Sections 4, 6 Read With Order 41 Rule 27 of Civil Procedure Code, 1903 – Notification for acquisition of land - Determination of market value – Additional Evidence in form of sale deed - Held - The sale deed with the applicant intends to prove shall help the Court in arriving just conclusion about a settlement of market value subject to the proof of genuineness of sale deed including the contents thereof -- Applicant allowed to lead additional evidence - Application stands dispose of.(Paras 13 & 14)

Cases referred:
Sanjay Kumar Singh vs State of Jharkhand, 2022 SCC OnLine SC 292;

Both the aforesaid civil misc. petitions *coming on for orders this day, the Court passed the following:-*

O R D E R

By way of CMP No. 13093 of 2013, applicant/appellant has made prayer to allow him to produce copies of two sale deeds dated 22.06.2021 and 24.09.2021 respectively, by way of additional evidence and also to prove such sale deeds in accordance with law. Respondent did not choose to file any reply to this application.

2. By way of CMP No. 7580 of 2021, applicant/appellant has made prayer to place on record copies of sale deeds sought to be proved by way of additional evidence as per prayer made in CMP No. 13093 of 2013. Respondent filed reply to this application.

3. The land of applicant/appellant was acquired for constructions of a tower for transmission of electricity. Notification under Section 4 of the Land Acquisition Act (for short " the Act") was issued on 26.12.2001 and was published on 26.01.2002. Respondent assessed market value of acquired land at following rates:-

i) Barani Aval Rs.12,000/- per biswa

ii) Barani Doem Rs.10,000/- per biswa

iii) Kharyater Rs.9,000/- per biswa

4. Dissatisfying with the compensation awarded by respondent, applicant/appellant preferred reference petition under Section 18 of the Act. The matter was referred to the learned District Judge, Mandi (Reference Court) and was registered as Reference No. 7 of 2006. Learned Reference Court enhanced compensation amount to Rs. 14,025/- per biswa by taking into consideration exemplar sale deeds Ex.PW6/A and Ex.PW6/C, dated 16.12.1999.

5. Applicant/appellant has assailed impugned award dated 31.10.2011 before this Court on the ground that the market value of the acquire land at the time of issuance of notification under Section 4 of the Act was not less than Rs.50,000/- per biswa. Learned Reference Court while assessing the market value at Rs.14,025/- per biswa, had relied upon two sale deeds dated 16.12.1999, which had been executed about two years prior to the issuance of notification under Section 4 of the Act.

6. The applicant/appellant has placed on record two sale deeds bearing No. 334 dated 22.06.2001 for sale of land situated in Mohal Puhang, Tehsil Sundernagar, District Mandi, H.P., and sale deed No. 522 dated 24.09.2001 for sale of land situated in Mohal Bhojpur, Tehsil Sundernagar, District Mandi, H.P., and has further sought relief to prove such sale deeds by way of additional evidence. It has been submitted that both the sale deeds, as noticed above, were executed within six months prior to the issuance of notification under Section 4 of the Act and hence were the best exemplar sale deeds. Through sale deed No.334, dated 22.06.2001, land measuring 232 sq. meters (approximately 4 biswa) was sold for Rs.2,50,000/- and vide sale deed No. 522, dated 24.09.2001, land measuring 16 sq. meters was sold for Rs.4,43,000/-. Both these sale transactions have been stated to be bonafide. It is further contended on behalf of the applicant/appellant that in case the

applicant/appellant is allowed to prove the aforesaid sale transactions, in accordance with law, the same shall further the cause of justice as it will help the Court in arriving at the correct and true market value of the acquired land.

7. The respondent has opposed the prayer of the applicant/appellant on the ground that the evidence now sought to be brought on record was available to the applicant/appellant even during the pendency of reference petition. Applicant/appellant cannot be allowed to lead additional evidence at this belated stage without satisfying the requirements of Rule 27 of Order 41 of the Code of Civil Procedure.

8. I have heard the learned counsel appearing for the the parties and have also gone through the records.

9. By way of appeal under Section 54 of the Act, applicant/appellant has assailed the award dated 31.10.2011 passed by the learned Reference Court in Reference Petition No. 7 of 2006. The main platform of challenge is the inadequate market value assessed by the learned Reference Court on the basis of sale deeds dated 16.12.1999, which were about two years' older than the date of issuance of notification under Section 4 of the Act.

10. Sale deed No. 334 dated 22.06.2001 and sale deed No. 522, dated 24.09.2001, no doubt are much closure in proximity to the date of issuance of notification under Section 4 of the Act. Notification was issued on 26.12.2001 and the sale deeds, noticed above, had been executed within a period of six months prior to issuance of notification under Section 4 of the Act. In reference under Section 18 of the Act, the learned Reference Court was to determine the market value of the acquired land by applying parameters established by law. Four sale deeds were placed before the learned reference Court with following details:-

Sr. No.	Exhibit of sale deed	Date/year of sale deed
1.	Ex.PW6/B	16.12.1999

2.	Ex.PW6/C	16.12.1999
3.	Ex.PW2/A	31.12.2002
4.	Ex.PW8/D	2004.

Learned Reference Court did not rely upon the sale deeds Ex.PW2/A and Ex.PW8/D, having been executed much after the issuance of notification under Section 4 of the Act. Sale deeds Ex.PW6/B and Ex.PW6/C, relied upon by learned reference Court, were executed more than two years prior to the issuance of notification under Section 4 of the Act.

11. Rule 27 of Order 41 of the Code of Civil Procedure vests the Appellate Court with jurisdiction to allow production of additional evidence in appellate Court on satisfaction of either of the grounds detailed therein. Ground (b) as detailed in sub-rule (1) of Rule 27 of Order 41 of the Code of Civil Procedure reads as under:-

> ***"O.41, R. 27(1)(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."*

The applicant/appellant has sought to produce sale deeds which are executed in close proximity to the date of issuance of notification under Section 4 of the Act and such sale deeds *prima facie* discloses the market value of the land sold thereby to be substantially higher than the market value of acquired land assessed by the learned Reference Court. It is trite law that substantive rights of the parties cannot be allowed to be jeopardized by strict application of procedural law which is just handmaid of justice.

12. In ***Sanjay Kumar Singh versus State of Jharkhand, Civil Appeal No. 1760 of 2022,*** decided on 10th March, 2022, (***2022 SCC OnLine SC 292***) while dealing with almost identical fact situation, the Hon'ble Supreme Court has held as under:-

"6.At the outset, it is required to be noted that before the Reference Court as well as before the High Court, the only evidence produced on record was the sale deed dated 29.12.1987 which was rejected from being considered. Hence, as such, there was no other evidence/material on record to arrive at a fair market value for the acquired land. Therefore, before the High Court, the appellant filed an application under Order 41 Rule 27 CPC for additional evidence to bring on record the sale deeds and certified copy of the judgment and award passed by the Reference Court which, according to the appellant, would have a direct bearing on the determination of the fair market value of the acquired land. The High Court has rejected the said application by observing that the application does not satisfy the requirement of Order 41 Rule 27 read with Section 96 of the CPC. The High Court has also observed that the appellant has failed to establish that notwithstanding exercise of due diligence, such additional evidence was not within his knowledge and could not after exercise of due diligence be produced before the courts below. However, the High Court while considering the application for additional evidence has not appreciated the fact that the documents which were sought to be produced as additional evidence might have a bearing on determination of the fair market value of the acquired land. It is to be noted that except the sale deed dated 29.12.1987, which was rejected by the courts below, no further evidence was on record to determine the fair market value of the acquired land. It was a case of awarding of fair compensation to the land owner whose land has been acquired for public purpose. It cannot be disputed that the claimant whose land is acquired is entitled to the fair market value of his land.

7. It is true that the general principle is that the appellate court should not travel outside the record of the lower court and cannot take any evidence in appeal. However, as an exception, Order 41 Rule 27 CPC enables

the appellate court to take additional evidence in exceptional circumstances. It may also be true that the appellate court may permit additional evidence if the conditions laid down in this Rule are found to exist and the parties are not entitled, as of right, to the admission of such evidence. However, at the same time, where the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record, such application may be allowed. Even, one of the circumstances in which the production of additional evidence under Order 41 Rule 27 CPC by the appellate court is to be considered is, whether or not the appellate court requires the additional evidence so as to enable it to pronouncement judgment or for any other substantial cause of like nature. As observed and held by this Court in the case of A. Andisamy Chettiar v. A. Subburaj Chettiar, reported in (2015) 17 SCC 713, the admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the appellate court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. It is further observed that the true test, therefore is, whether the appellate court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced."

13. Analysing the facts of instant case, in the backdrop of above noticed exposition of law, this Court is satisfied that the sale deeds sought to be proved by applicant/appellant shall help the Court in arriving at just decision, therefore, CMP No. 13093 of 2013 and CMP No. 7580 of 2021 are allowed. However, the applicant/appellant has to prove the

existence/authenticity and genuineness of the sale deeds including contents thereof, in accordance with law.

14. In view of the fact that the applicant/appellant has been allowed to lead additional evidence as prayed for by him by way of CMP No.13093 of 2013, the matter is remitted to the learned Reference Court for the purpose of taking additional evidence so allowed, in accordance with law and thereafter to send back the matter for further disposal to this Court. Needless to say that the allowance of additional evidence at the instance of applicant/appellant shall also entail the evidence in rebuttal, if any, required to be led by the respondent. The entire proceedings be completed expeditiously and not later than 31st August, 2022. The parties are directed to appear through their counsel before the learned Reference Court on 1st June, 2022. Records be sent back forthwith.

15. CMP No. 13093 of 2013 and CMP No. 7580 of 2021 are disposed of accordingly.

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

Between:-

RAJ KUMAR,
S/O SHRI MUNSHI RAM,
AGED 64 YEARS,
RESIDENT OF VILLAGE BASSI,
P.O. BHORANJ, TEHSIL BHORANJ,
DISTRICT HAMIRPUR, H.P.

.....PETITIONER

(BY SH. AJAY SHARMA, SR. ADVOCATE
WITH MR. ATHARV SHARMA, ADVOCATE)

AND

SHRI RAKESH KUMAR,
S/O SHRI GIAN CHAND, RESIDENT OF VILLAGE BASSI,
P.O. BHORANJ, TEHSIL BHORANJ, DISTRICT HAMRIPUR,
H.P.

.....RESPONDENT

(BY SH. ROMESH VERMA & SH. TARUN SHARMA,
ADVOCATES)

CIVIL MISC. PETITION MAIN (ORIGINAL)
No. 14 OF 2022
Decided on: 10.05.2022

Code of Civil Procedure, 1908 – Order 39 Rule 1 and 2 - Grant of injunction - Scope of interference - Held - Plea has been taken that prejudice being caused to the petitioner by raising of construction by the defendant /respondent cannot be accepted at the stage when both the learned Courts below observed that the construction was started by the respondent/ defendant in the year 2015 and at that time the construction was not objected to by the plaintiff - No advantage can be taken by the petitioner from the report of local Commissioner at the stage as the report is yet to be proved in accordance with law - The contentions put forth by the learned Counsel for the petitioner are to be proved during trial in accordance with law - The petition found without merits - Petition dismissed. [Paras 5(c) and 5 (d)]

Cases referred:
Ashok Kapoor Vs. Murtu Devi (2016)1 Shim. L.C. 207;
Bachhaj Nahar Vs. Nilima Mandal and another (2008) 17 SCC 491;
Garmet Craft Vs Prakash Chand Goel, (2022) 4 SCC 181;
Payar Singh Vs. Narayan Dass and others (2010) 3 Shimla L.C. 205;
Piar Chand & Ors Vs Sandhya Devi & Ors. HLJ 2017 (HP) 606;
Shiv Ram Vs. Nuratta and Ors. 2006 (1) SLC 97;

This petition coming on for admission this day, the Court passed the following:

O R D E R

Learned trial court dismissed plaintiff's application filed under Order 39 Rule 1 & 2 of the Code of Civil Procedure vide order dated 25.11.2021. This order was not interfered with by the First Appellate Court in its judgment dated 31.12.2021. Aggrieved, plaintiff has invoked the jurisdiction under Article 227 of the constitution of India by means of present petition.

2. **Facts in brief**:-

2(a) A civil suit for permanent prohibitory as well as mandatory injunction was instituted by the petitioner/plaintiff against the respondent/defendant. The civil suit was in respect of land comprised in Khata No.6 min Khtauni No.6 min Khasra No.60 measuring 5 Kanals 04 Marlas, situated in Mohal Bassi P.O. Bhoranj, Tehsil Bhoranj, District Hamirpur H.P. By relying upon the jamabandi for the year 2007-08, the petitioner/plaintiff pleaded that he was co-owner in possession over the suit land. The land was not partitioned. That the respondent was one of the co-owners and had started to collect construction material intending to raise construction over the best portion of the suit land by grabbing more land than his share. That the respondent was threatening to dispossess the petitioner from the suit land forcibly and illegally. He had also started to block the light and air of petitioner's house which existed over the suit land since 2006-2007. That the respondent was threatening to change the nature of the suit land without getting the same partitioned. Alongwith the civil suit, an application under Order 39 Rule 1 & 2 of CPC was moved by the petitioner, seeking to restrain the respondent from digging the suit land, collecting construction material, raising construction, dispossessing the applicant/plaintiff/petitioner

from the suit land forcibly, blocking the light and air of the applicant's/plaintiff's house existing over the suit land.

2(b) The respondent opposed the application. His case was that parties were in settled separate possession of the suit land under a family arrangement. Pursuant to this family arrangement, petitioner as well as petitioner's brother Kartar Chand had already raised their respective construction over the land in question. Respondent also submitted that he had carried out levelling work on the land in the year 2018 and had already raised the construction upto second floor by 19.06.2019. Petitioner had never objected to raising of construction by the respondent. Respondent in his reply also raised an objection that the petitioner had not even spelled out the basis for his claiming right of light and air. Respondent stated that there was no hindrance of light and air to the petitioner. He also denied covering area in excess to his share over the suit land.

2(c) After considering the pleadings and on hearing learned counsel for the parties, learned trial court vide order dated 25.11.2021 dismissed the application. The appeal filed by the plaintiff against this order was also dismissed by the learned First Appellate Court on 30.12.2021. Both the learned courts below while dismissing the application held that well settled principles for grant of temporary injunction were not met with in the instant case. The plaintiff failed to make out a *prima facie* case in his favour. Balance of convenience was also not in his favour. The plaintiff had also concealed material facts about his having raised residential house over the suit land. It was, therefore, held that the plaintiff could not seek temporary injunction against the defendant for restraining him from raising construction over the joint land.

3. Submissions

3(a) Learned senior counsel for the petitioner/plaintiff argued that both the learned courts below did not appreciate the case of the

petitioner/plaintiff in proper perspective. It was wrongly concluded by the learned Courts below that the petitioner/plaintiff had concealed the material facts about his having raised house over the suit land, whereas the fact was that the petitioner/plaintiff had himself pleaded that the respondent/defendant was blocking the light and air of plaintiff's house existing over the suit land. This pleading amounts to an admission on part of the petitioner/plaintiff that he had raised a house over the suit land. Once the petitioner/plaintiff had not denied about construction raised by him over the suit land then he could not have been denied the relief of temporary injunction on the ground that he had allegedly concealed the material facts of having raised construction over the suit land. Learned senior counsel next submitted that both the learned courts below erred in observing that the petitioner/plaintiff has not been able to show any irreparable loss to be caused to him in case of non grant of temporary injunction. Learned senior counsel argued that the petitioner had categorically submitted that respondent's construction would block light and air of the plaintiff's house existing over the suit land. The petitioner/plaintiffs, therefore, had pointed out the prejudice being caused to him by the construction being raised over the suit land by the respondent/defendant. Learned senior counsel inviting attention to the local commissioner's report dated 29.01.2022 argued that this report also supported the pleadings of the petitioner-plaintiff that the defendant was raising construction in a way, which was causing obstruction to air and light towards the northern side of the house of the plaintiff/petitioner and that projection of ground-floor and first floor of the construction raised by the defendant exceeded the construction raised by the plaintiff-petitioner. In support of his submission, learned senior counsel relied upon HLJ 2017 (HP) 606, titled ***Piar Chand & Ors Vs Sandhya Devi & Ors***. 2016(1) SLC, titled ***Ashok Kapoor Vs. Murtu Devi*** and 2006 (1) SLC 97, titled ***Shiv Ram Vs. Nuratta and Ors***. Prayer was made for setting aside

the impugned orders passed by the learned trial Court on 25.11.2021 and by the learned First Appellate Court on 31.12.2021.

3(b) Learned counsel for the respondent-defendent defended the impugned order. It was argued that the petitioner/plaintiff had neither any *prima facie* case nor balance of convenience in his favour. Learned counsel for the defendant argued that the plaintiff had already raised construction over the suit land. This fact was not disclosed by the plaintiff-petitioner. Plaintiff had already covered the land adjoining to the road more than his share in the suit land. Plaintiff had raised construction over the best and most valuable portion of the suit land.The plaintiff had even allowed his brother Sh. Kartar Chand to raise construction over the suit land. No objection was raised by the petitioner/plaintiff against the construction raised by his brother Kartar Chand. The respondent/defendant alongwith his two brothers are the co-sharers on 26 marlas in terms of their shares recorded in the jamabandi. Brothers of the defendant had given their no objections to the defendant for raising construction over 26 marla of the suit land. The defendant had raised huge loan for carrying out the construction over the suit land. Defendant had started levelling the suit land for raising the construction in the year 2018. Two stories had already been constructed by the defendant by 01.01.2020 when the petitioner filed the instant civil suit. He is now estopped even by his conduct to seek injunction against the defendant.

Learned counsel for the respondent/defendant also contended that the petitioner/plaintiff cannot take advantage of report of the local commissioner for proving the prejudice allegedly being caused to him as the report is yet to be proved in accordance with law by leading cogent evidence. Objection filed by the respondent/defendant against the report of the local commissioner is pending for adjudication before the learned Trial Court.

During hearing of the case, learned counsel for the defendant also produced copy of the plaint filed by the plaintiff/petitioner to contend

that essential pleadings in respect of easementry rights with respect to air and light of the house of the plaintiff/petitioner allegedly being blocked by defendant's construction, were lacking in the plaint. In support of his submission, learned counsel for the defendant relied upon (2022) 4 SCC 181 titled ***Garmet Craft Vs Prakash Chand Goel,*** CMPMO NO.555/2018, titled ***Ajay Kumar & Ors. Vs. Ishwar Dutt*** and RSA No.287/2007 titled ***Piar Chand & Ors Vs. Sandhya Devi & O***rs.

4. I have heard learned counsel for the parties at length and gone through the case file.

5. Following points are of paramount importance for adjudication of the instant petition:-

5(a) It is not in dispute that the plaintiff had already raised construction over the suit land alleged by him to be the joint land of the parties alongwith other co-sharers. This fact was not disclosed by the plaintiff in the manner it ought to have been stated in the plaint. Plaintiff in a round about manner averred that the defendant was trying to block the air and light of the house of the plaintiff existing over the suit land. Prima facie observation of both the learned courts below that the plaintiff had himself raised construction on the best and most valuable portion of the suit land also assumes significance. It is well settled that when a person seeks equity, he must come with clean hands.

5(b) It is admitted fact that Sh. Kartar Chand brother of the petitioner/plaintiff and one of the co-sharer had also raised construction over the suit land in the year 2010. It is not the case of the petitioner/plaintiff that he had objected to the construction work done by his brother over the suit land or that the plaintiff had instituted any civil suit for restraining his brother from raising construction over the suit land. It is apparent that the petitioner/plaintiff has selectively chosen the respondent/defendant for filing

the suit for injunction. At this stage, it will be relevant to notice following references :-

In **(2010) 3 Shimla L.C. 205**, titled **Payar Singh** Vs. **Narayan Dass and others,** the respondents pleaded themselves to be in settled separate possession of joint land in family partition over which they were raising construction. They also took up a stand that petitioner had also constructed his house over the land in his possession. The Court upheld the contentions of the respondents. Following observations made in the judgment are material :-

> *"12. The respondents in the written statement have specifically pleaded that parties are in separate possession under family arrangement. The petitioner has also constructed his house on the joint land. It is not the stand of the petitioner that respondents are raising construction on an area which is more than their share. The case of the respondents is that petitioner has constructed his house on a better portion of the land. The under construction house of the respondents is away from the National Highway 21 whereas the house of the petitioner abuts N. H.21. The respondents have placed on record on the file of revision photographs construction of under construction house of the respondents. The photographs indicate sufficient gap between the already constructed house of petitioner and under construction house of the respondents over which even slab has been placed. It is the case of the respondents in written statement that they are in separate possession of the land in family arrangement. This fact has not been denied by filing replication. The respondents are claiming possession over the suit land under family arrangement i.e. with the consent of the petitioner over which they are raising construction. The respondents have thus established prima facie case, balance of convenience, irreparable loss in their favour. In these circumstances, no fault can be found with the impugned judgment. In revision the scope is limited as held in The Managing Director (MIG) Hindustan Aeronautics Ltd. Balanagar, Hyderabad and another Vs. Ajit Prasad Tarway, Manager (Purchase and Stores) Hindustan Aeronautics Ltd. Balanagar, Hyderabad, AIR 1973 SC 76. The suit*

is for permanent prohibitory and mandatory injunction. The rights of the parties will be decided in the suit. It has not been established that the view taken by the learned District Judge does not emerge from the material on record."

In **(2016)1 Shim. L.C. 207**, titled **Ashok Kapoor** Vs. **Murtu Devi**, following principles were culled out after considering several judgments on the inter-se rights and liabilities of co-sharers :-

"41.The exposition of law as enunciated in the various judgments referred above including those of this High Court, insofar as the rights and liabilities of the co-owners is concerned, gives rise to the following propositions:-

1. A co-owner has an interest in the whole property and also in every parcel of it.

2. Possession of joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.

3. A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.

4. The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of either as, when a co-owner openly asserts his own title and denies that of the other.

5. Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.

6. Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.

7. Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to any body to dispute the arrangement without the consent of others except by filing a suit for partition.

8. The remedy of a co-owner not in possession, or not in possession of a share of the joint property, is by way of a suit for

partition or for actual joint possession, but not for ejectment. Same is the case where a co-owner sets up an exclusive title in himself.

9. Where a portion of the joint property is, by common consent of the co-owners, reserved for a particular common purpose, it cannot be diverted to an inconsistent user by a co-owner, if he does so, he is liable to be ejected and the particular parcel will be liable to be restored to its original condition. It is not necessary in such a case to show that special damage has been suffered.

46. On consideration of the various judicial pronouncements and on the basis of the dominant view taken in these decisions on the rights and liabilities of the co-sharers and their rights to raise construction to the exclusion of others, the following principles can conveniently be laid down:-

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. The discretion of the Court is exercised to grant a temporary injunction only when the following requirements are made out by the plaintiff :-

(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."

In judgment dated 03.09.2021, delivered in **CMPMO No. 555 of 2018**, **Ajay Kumar** Vs. **Ishwar Dutt**, it was held that when a co-sharer himself raises a construction over the joint land, when a co-sharer does not object to raising of construction over the joint land by some other co-owners, then, he cannot seek to restrain one specific co-owner from raising construction over part of suit land, more so, when the construction being raised by that particular co-owner is over a portion, which, as per the revenue record, is in his possession alongwith others and when the plaintiff has not been shown in possession of this specific portion of land.

Placing reliance upon various authorities, defendants in **CMPMO No. 77 of 2021**, titled **Smt. Vyasa Devi** Vs. **Harish Kumar** were permitted to undertake construction inter-alia on the ground that the

plaintiff had also carried out construction on the joint land. Material observations made by the Court on facts are as under :-

> *"10. The facts involved in the case have been narrated by me hereinabove and the same are not being repeated for the sake of brevity. It is not in dispute that the parties are co-sharers of the suit land but the petitioners herein are recorded to be in possession of the portion of the suit land in issue alongwith other co-sharers. It is further not in dispute that the respondents herein are not recorded to be in possession of the suit land. It is also not in dispute that the respondents herein have also carried out construction activities by raising constructions over the joint land, as is evident from the record. In these circumstances, this Court is of the considered view that the petitioners herein, who besides being the co-owners of the suit land are also recorded to be in possession thereof, cannot be estopped from raising construction pending the adjudication of the civil suit. It is settled law that injunction cannot be granted against a co-sharer and further as the respondents herein themselves have constructed their houses over the joint suit land, in these circumstances, they cannot be permitted to restrain other co-sharers, i.e. present petitioners, from doing so. The construction, which is being carried out by the petitioners, however obviously shall be subject to the final adjudication of the suit as also partition proceedings, if any, and if the area upon which construction being carried out by the present petitioners ultimately falls in the share of the plaintiffs in partition proceedings, then, of course, consequences will ensue. However, this does not means that till the suit land is partitioned, the petitioners herein should be restrained from raising construction over the parcel of the suit land in their possession."*

CMPMO No.522/2017, decided on 29.11.2018 titled ***Chanchal Kumar Vs. Prem Parkash & Anr.*** *was a case where plaintiff was one of the co-sharers over the suit land. He raised construction and*

filed suit for prohibitory injunction to restrain the respondents from raising construction on the vacant portion of land. The Court held that :-

> *".....Once, plaintiff himself raised construction over one portion of the land, it is not understood, how he could raise objection, if any, qua the construction on the other portion of land, by the defendants, who are admittedly co-owners of suit land to the extent of one half share. Needless to say, applicant, while seeking relief of injunction is required to show that he/she has a prima facie case in his/her favour and balance of convenience also lies in his/her favour, but, in the instant case, aforesaid basic ingredients/conditions are totally missing, rather, very conduct of the plaintiff suggests that he wants to take advantage of the situation."*

5(c) Petitioner/plaintiff has projected a theory of prejudice having been caused to him by the construction raised by respondent/defendant inasmuch as that light and air of his already existing house on the suit land has allegedly been blocked by the defendant's construction. Plea of prejudice being caused to the petitioner/plaintiff by raising of construction by the defendant/respondent cannot be accepted at this stage. It has been observed by both the learned Courts below that the construction was started by the respondent/defendant in the year 2018. Plaintiff did not object to the construction at that time. The defendant had already completed two stories at the time of filing of the civil suit on 01.01.2020. It is the case of the respondent/defendant that he has raised huge loans for raising the construction. Under the circumstances, petitioner/plaintiff cannot be heard to say that the prejudice is being caused to him on account of alleged blockage of light and air of his house by the construction raised by the defendant. From the perusal of the plaint produced during hearing of the case, prima facie, it appears

that the essential pleadings in this regard are lacking in the plaint. This aspect though is to be examined by the learned trial Court in accordance with law but it assumes significance in view of law laid down in **(2008) 17 SCC 491** titled **Bachhaj Nahar** Vs. **Nilima Mandal and another** wherein it was held as under :-

> *"17. It is thus clear that a case not specifically pleaded can be considered by the court only where the pleadings in substance, though not in specific terms, contains the necessary averments to make out a particular case and the issues framed also generally cover the question involved and the parties proceed on the basis that such case was at issue and had led evidence thereon. As the very requirements indicate, this should be only in exceptional cases where the court is fully satisfied that the pleadings and issues generally cover the case subsequently put forward and that the parties being conscious of the issue, had led evidence on such issue. But where the court is not satisfied that such case was at issue, the question of resorting to the exception to the general rule does not arise. The principles laid down in Bhagwati Prasad and Ram Sarup Gupta (supra) referred to above and several other decisions of this Court following the same cannot be construed as diluting the well settled principle that without pleadings and issues, evidence cannot be considered to make out a new case which is not pleaded. Another aspect to be noticed, is that the court can consider such a case not specifically pleaded, only when one of the parties raises the same at the stage of arguments by contending that the pleadings and issues are sufficient to make out a particular case and that the parties proceeded on that basis and had led evidence on that case. Where neither party puts forth such a contention, the court cannot obviously make out such a case not pleaded, suo moto.*
>
> *18. A perusal of the plaint clearly shows that entire case of the plaintiffs was that they were the owners of the suit property and that the first defendant had encroached upon it. The plaintiffs had not pleaded, even as an alternative case, that they were entitled to an easementary right of passage over the*

schedule property. The facts to be pleaded and proved for establishing title are different from the facts that are to be pleaded and proved for making out an easementary right. A suit for declaration of title and possession relates to the existence and establishment of natural rights which inhere in a person by virtue of his ownership of a property. On the other hand, a suit for enforcement of an easementary right, relates to a right possessed by a dominant owner/occupier over a property not his own, having the effect of restricting the natural rights of the owner/occupier of such property.

19. Easements may relate to a right of way, a right to light and air, right to draw water, right to support, right to have overhanging eaves, right of drainage, right to a water course etc. Easements can be acquired by different ways and are of different kinds, that is, easement by grant, easement of necessity, easement by prescription, etc. A dominant owner seeking any declaratory or injunctive relief relating to an easementary right shall have plead and prove the nature of easement, manner of acquisition of the easementary right, and the manner of disturbance or obstruction to the easementary right.

20. The pleadings necessary to establish an easement by prescription, are different from the pleadings and proof necessary for easement of necessity or easement by grant. In regard to an easement by prescription, the plaintiff is required to plead and prove that he was in peaceful, open and uninterrupted enjoyment of the right for a period of twenty years (ending within two years next before the institution of the suit). He should also plead and prove that the right claimed was enjoyed independent of any agreement with the owner of the property over which the right is claimed, as any user with the express permission of the owner will be a licence and not an easement. For claiming an easement of necessity, the plaintiff has to plead that his dominant tenement and defendant's servient tenement originally constituted a single tenement and the ownership thereof vested in the same person and that there has been a severance of such ownership and that without the

easementary right claimed, the dominant tenement cannot be used. We may also note that the pleadings necessary for establishing a right of passage is different from a right of drainage or right to support of a roof or right to water course. We have referred to these aspects only to show that a court cannot assume or infer a case of easementary right, by referring to a stray sentence here and a stray sentence there in the pleading or evidence.

21. A right of easement can be declared only when the servient owner is a party to the suit. But nowhere in the plaint, the plaintiffs allege, and nowhere in the judgment, the High Court holds, that the first or second defendant is the owner of the suit property. While concluding that the plaintiffs were not the owners of the suit property, the High Court has held that they have a better right as compared to the first defendant and has also reserved liberty to the plaintiffs to get their title established in a competent court. This means that the court did not recognize the first defendant as the owner of the suit property. If the High Court was of the view that defendants were not the owners of the suit property, it could not have granted declaration of easementary right as no such relief could be granted unless the servient owner is impleaded as a defendant. It is also ununderstandable as to how while declaring that plaintiffs have only an easementary right over the suit property, the court can reserve a right to the plaintiffs to establish their title thereto by a separate suit, when deciding a second appeal arising from a suit by the plaintiffs for declaration of title. Nor is it understandable how the High Court could hold that the apart from plaintiffs, other persons living adjacent to and north of the suit property were entitled to use the same as passage, when they are not parties, and when they have not sought such a relief.

22. The observation of the High Court that when a plaintiff sets forth the facts and makes a prayer for a particular relief in the suit, he is merely suggesting what the relief should be, and that it is for the court, as a matter of law, to decide upon the relief that should be granted, is not sound. Such an observation may

be appropriate with reference to a writ proceeding. It may even be appropriate in a civil suit while proposing to grant as relief, a lesser or smaller version of what is claimed. But the said observation is misconceived if it is meant to hold that a civil court may grant any relief it deems fit, ignoring the prayer.

23. It is fundamental that in a civil suit, relief to be granted can be only with reference to the prayers made in the pleadings. That apart, in civil suits, grant of relief is circumscribed by various factors like court fee, limitation, parties to the suits, as also grounds barring relief, like res judicata, estoppel, acquiescence, non-joinder of causes of action or parties etc., which require pleading and proof. Therefore, it would be hazardous to hold that in a civil suit whatever be the relief that is prayed, the court can on examination of facts grant any relief as it thinks fit. In a suit for recovery of Rs.one lakh, the court cannot grant a decree for Rs. Ten lakhs. In a suit for recovery possession of property `A', court cannot grant possession of property `B'. In a suit praying for permanent injunction, court grant a relief of declaration or possession. The jurisdiction to grant relief in a civil suit necessarily depends on the pleadings, prayer, court fee paid, evidence let in, etc.

24. In the absence of a claim by plaintiffs based on an easementary right, the first defendant did not have an opportunity to demonstrate that the plaintiffs had no easementary right. In the absence of pleadings and an opportunity to the first defendant to deny such claim, the High Court could not have converted a suit for title into a suit for enforcement of an easementary right. The first appellate court had recorded a finding of fact that plaintiffs had not made out title. The High Court in second appeal did not disturb the said finding. As no question of law arose for consideration, the High Court ought to have dismissed the second appeal. Even if the High Court felt that a case for easement was made out, at best liberty could have been reserved to the plaintiffs to file a separate suit for easement. But the High court could not, in a second appeal, while rejecting the plea of the plaintiffs that they were owners of the suit property, grant the relief of

injunction in regard to an easementary right by assuming that they had an easementary right to use the schedule property as a passage."

5(d) Reliance upon report of Local Commissioner is also misplaced. No advantage can be taken by the petitioner from the report of the Local Commissioner at this stage as the report is yet to be proved in accordance with law. Admittedly, the objections preferred by the respondent/defendant against this report are pending adjudication before the learned trial Court. The contentions putforth by learned counsel for the petitioner are to be proved during trial in accordance with law. Acceptance of such prayer at this stage would virtually amount to decreeing the suit, at this stage.

5(e) It would be beneficial to refer here to (***2022) 4 SCC 181*** titled ***Garmet Craft vs Prakash Chand Goel***, wherein the nature and scope of exercise of supervisory jurisdiction under Article 227 was reiterated. The Hon'ble Apex Court held that while exercising supervisory jurisdiction under Article 227 of the Constitution of India, the High Court does not act as a Court of First Appeal to reappreciate, reweigh the evidence or facts upon which the determination under challenge is based. Supervisory jurisdiction is not to correct every error of fact or even a legal flaw when the final finding is justified or can be supported. Power under Article 227 is to be exercised where there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly came to such a conclusion arrived at by the Courts below. Relevant part of the judgment reads as under:-

> *"15. Having heard the counsel for the parties, we are clearly of the view that the impugned order is contrary to law and cannot be sustained for several reasons, but primarily for*

deviation from the limited jurisdiction exercised by the High Court under Article 227 of the Constitution of India. The High Court exercising supervisory jurisdiction does not act as a court of first appeal to reappreciate, reweigh the evidence or facts upon which the determination under challenge is based. Supervisory jurisdiction is not to correct every error of fact or even a legal flaw when the final finding is justified or can be supported. The High Court is not to substitute its own decision on facts and conclusion, for that of the inferior court or tribunal. The jurisdiction exercised is in the nature of correctional jurisdiction to set right grave dereliction of duty or flagrant abuse, violation of fundamental principles of law or justice. The power under Article 227 is exercised sparingly in appropriate cases, like when there is no evidence at all to justify, or the finding is so perverse that no reasonable person can possibly come to such a conclusion that the court or tribunal has come to. It is axiomatic that such discretionary relief must be exercised to ensure there is no miscarriage of justice.

16. Explaining the scope of jurisdiction under Article 227, this Court in Estralla Rubber v. Dass Estate (P) Ltd.2 has observed: (SCC pp. 101-102, para 6)

> *"6. The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a number of decisions of this Court. The exercise of power under this article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required of them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of hardship or wrong decisions made within the limits of the jurisdiction of the subordinate courts or tribunals. Exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles*

of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or tribunal has come to."

For the foregoing reasons, I find no merit in the instant petition and the same is dismissed. Pending miscellaneous applications if any shall also stand disposed of.

It is clarified that observations made in this judgment shall remain confined only to the adjudication of this petition. Learned trial Court shall decide the civil suit on merit without being influenced by the observations made in this judgment.

BEFORE HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

Between:-
RAJ KUMAR SOOD, SON OF LATE SHRI O.P. SUD,
AGED 72 YEARS, RESIDENT OF
OM NIWAS, STOKES PLACE, SHIMLA,
TEHSIL AND DISTICT SHIMLA, H.P.

…PETITIONER

(BY SH. JIYA LAL BHARDWAJ,ADVOCATE).

AND

COMMISSIONER, MUNICIPAL CORPORATION,
SHIMLA, DISTRICT SHIMLA, H.P.

….RESPONDENT.

(BY SH. NARESH KUMAR GUPTA, ADVOCATE,

CIVIL MISC. PETITION (MAIN) (CMPMO)
NO. 92 OF 2022
Reserved on : 28.04.2022
Decided on : 02.05.2022

Code of Civil Procedure, 1908 – Order 47 - Review - Ground of – Held - Review, under aforesaid provision of law is available to any person considering himself aggrieved against an order on account of some mistake or error apparent on face of the record or who, from discovery of new and important matter or evidence which, after the exercise of due diligence are not within his knowledge or could not be produced by him when the order was passed is able to make out a case - Where as, the right of appeal is absolute and such right can always be exercised by assailing the order impugned on the ground of illegality and material irregularity, which can have wide scope - The exercise of right to seek review of an order, if rejected, will not bar the remedy to file appeal - Petition allowed. (Paras 13 & 14)

This petition coming on for ordersthis day, the Court passedthe following:

O R D E R

By way of instant petition, petitioner has prayed for following reliefs:

> *"It is therefore, respectfully prayed that this petition may kindly be allowed throughout with costs and the impugned orders dated 15.11.2019 and 08.01.2021 passed by the respondent-Corporation and order dated 26.02.2022 passed by the learned Additional District Judge (CBI), Shimla in case No.1-S/14 of 2021, Raj Kumar Sood versus The Municipal Commissioner may kindly be quashed and set-aside and the proceedings initiated against the petitioner may kindly be dropped and justice be done."*

2. Petitioner faced proceedings under the Himachal Pradesh Municipal Corporation Act, 1994 (for short 'Act') with the allegations that he had raised unauthorized construction. The chequered history of the case

reveals that twice the demolition orders were passed by the Commissioner under the Act against petitioner and both the times such orders were set-aside in appeal. The matter was remanded to the Commissioner every time. Third time the Commissioner again passed the demolition order against the petitioner under Section 253 of the Act, on 15.11.2019. Petitioner instead of filing appeal under Section 253 (2) of the Act, preferred a review under Section 402-A of the Act, before the Commissioner. The review application of the petitioner was rejected by the Commissioner on 08.01.2021.

3. Petitioner approached the District Judge, Shimla exercising the powers of Appellate Authority under Section 253 (2) of the Act by way of an appeal with the following prayer:

> *"It is, therefore, prayed that this appeal be allowed and the impugned orders passed by learned Commissioner, Municipal Corporation, Shimla in Review Petition case No. 303/Mukhiya/2020 decided on 8.1.21 which affirmed the order passed in case No. 116/Summon/18 decided on 15.11.2019 with a prayer to set aside the said orders and the notice No. 91 dated 25.11.2006 be dropped and in alternative if documents filed by respondent are found to be misplaced then the case of the appellant may be treated and decided as per provisions of the notification dated 20.11.2006 issued by Town and Country Planning Department vide notification No. TCP-F(5)/2004 dated 20.11.2006 which applies to the case of the appellant and the said plan be sought from the appellant in the interest of justice and fair play.*
>
> *Any other relief to which the appellant is found entitled in the facts and circumstances of the present case be granted in favour of the appellant and against the respondent."*

4. The appeal was assigned for disposal to learned Additional District Judge (CBI), Shimla (for short 'Appellate Authority').

5. The Appellate Authority has dismissed the appeal of the petitioner on 26.02.2022 (Annexure P-21) being not maintainable on the ground that the petitioner had availed the remedy of review under Section

402-A of the Act and the order rejecting review is not appealable by virtue of Rule 7 of Order 47 of the Code of Civil Procedure (for short 'CPC'). Hence this petition.

6. I have heard learned counsel for the parties and have also gone through the records of the case carefully.

7. Section 402-A of the Act vests the Commissioner with power to review the order passed by him under the Act in accordance with the provisions of Order 47 of CPC and to modify or reverse the same accordingly.

8. Section 253 (2) of the Act provides a right to any person, who is aggrieved against the order of the Commissioner made under sub-Section (1) of Section 253, to prefer an appeal against such order to District Judge within the period specified in the order for the demolition of the erection or work to which it relates. Sub Section (5) of Section 253 of the Act makes the order passed by the Commissioner under sub-section (1) of Section 253 subject to the order passed by the District Judge in appeal in sub section (2) of Section 253 of the Act.

9. The perusal of the provisions of the Act reveals that the right of a person to file an appeal under sub-section (2) of Section 253 is an unbridled right with no rider or exception. There is nothing in the Act which prohibits the filing of the appeal under sub-section (2) of Section 253 of the Act in the case, where the remedy of review under Section 402-A of the Act has also been availed by the same person. On the other hand, the clog is on the right to file review,in case the appeal has already been preferred by the same person before seeking the remedy of review. Further, Rule 7 of Order 47 of CPC prohibits the remedy of appeal against an order rejecting the application for review. Learned Appellate Authority in para-8 of the impugned order has recorded as under:

> *"8. By filing the present appeal, the appellant is claiming to be aggrieved against both the orders i.e. dated 15.11.2019 and onreview of this order dated 15.11.2019 sought by him and rejected on 08.01.2021."*

10. Thus, the learned Appellate Authority proceeded to decide the appeal mindful of the fact that the appellant before such authority i.e. the petitioner herein, had laid challenge to both the orders i.e. the original order passed under Section 253 (1) of the Act on 15.11.2019 and the order dated 08.01.2021 rejecting the application for review.

11. Learned Appellate Authority has rejected the appeal as not maintainable taking cover of the bar created under Rule 7 of Order 47 of CPC. However, there is no finding on the appeal against the order dated 15.11.2019 passed by the Commissioner directing the demolition of unauthorized construction raised by the petitioner under sub-section (1) of Section 253 of the Act.

12. As noticed above, the right of appeal under Section 253(2) of the Act is not circumscribed by any other contemporary provisions of the Act. The result of rejection of review application of the petitioner is that the original order dated 15.11.2019 passed by the Commissioner stood as it is and retained its original efficacy. Such order would have lost its identity in case the application for review had been granted. Both situations have different consequences. Therefore, the refusal to grant application of review, will not disentitle the petitioner to avail the remedy to assail the original order dated 15.11.2019 by way of appeal under sub–section (2) of Section 253 of the Act.

13. The matter can be viewed from another angle. There is marked difference in the remedy of appeal and that of review. The review can always be filed on limited grounds. Since Section 402-A of the Act empowers the Commissioner to review his any order in accordance with the provisions

of Order 47 of CPC, the limitations of grounds for review provided under Order 47 of CPC would apply. Review, under aforesaid provision of law, is available to any person considering himself aggrieved against an order on account of some mistake or error apparent on the face of the record or who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him when the order was passed is able to make out a case. Whereas, the right of appeal is absolute and such right can always be exercised by assailing the order impugned on the ground of illegality and material irregularity, which can have wide scope.

14. In view of this matter, the exercise of right to seek review of an order, if rejected, will not bar the remedy to file appeal under Section 253 (2) of the Act subject of course to the law of limitation as made applicable thereto.

15. In light of the above discussion, the petition is allowed. The order dated 26.02.2022 (Annexure P-21) passed by the Appellate Authority is set-aside to the extent the learned Appellate Authority failed to exercise jurisdiction to decide the appeal against order dated 15.11.2019 passed by the Commissioner under sub-section (1) of Section 253 of the Act.

16. Accordingly, the matter is remitted to the learned Appellate Authority to decide the same afresh by deciding the appeal of petitioner against order dated 15.11.2019 on merits in accordance with law. The proceedings initiated against the petitioner in the year 2006 have not been finally adjudicated upon even after the lapse of about 16 years. In view of this matter, learned Appellate Authority is expected to decide the matter expeditiously and in any case not later than 31st July, 2022.

17. Petition is disposed of accordingly, with no order as to costs. Pending miscellaneous application(s) if any, also stands disposed of.

■■

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

BETWEEN:-

ROOMI RAM
SON OF SMT. DEI D/O CHAND
R/O VILLAGE ANDWAS,
PARGANA, HIMGIRI, TEHSIL SALONI,
DISTRICT CHAMBA, H.P. ....PETITIONER/ DEFENDANT

(BY SH. VINOD CHAUHAN, ADVOCATE)

AND

TEJ SINGH
SON OF SHRI CHAND
R/O VILLAGE ANDWAS,
PARGANA, HIMGIRI, TEHSIL SALONI,
DISTRICT CHAMBA, H.P. ....RESPONDENTS/ PLAINTIFF.

(BY MR. NIMISH GUPTA, ADVOCATE)

CIVIL REVISION PETITION
No. 84 OF 2021
Decided on: 13.05.2022

Code of Civil Procedure, 1908 – Order 8 Rule 1A(3) - Placing on record the document by the defendant at the stage of arguments – Scope of – Held - The order in the matter was not pronounced and the matter thereafter was repeatedly fixed for hearing of arguments - It is still at the stage of advancing of arguments – The application in question was moved by the defendant on 27.7.2019 – What is sought to be produced in terms of this application is certain order sheets and Memorandum of appeal in R.S.A. No. 574 of 2008 instituted before this court – Documents are necessary for arriving at just decision of the case - In view of stand taken by the respondent plaintiff in his

pleading, no prejudice will be caused to him in case the application is allowed - Application filed under order 8 rule 1A (3)read with section 151 CPC is allowed subject to costs of Rs. 10,000/-. (Para 5)

This petition coming on for admission this day, the Court passed the following:

O R D E R

Learned Trial Court vide order dated 6.10.2021 dismissed an application moved by the defendant- petitioner herein under Order 8 Rule 1A(3) read with Section 151 of the Code of Civil Procedure for placing on record memo of appeal and certain order sheets of RSA No. 574 of 2008 instituted before this Court. The order has been questioned by the defendant in this petition.

2. A suit was filed by Tej Singh plaintiff (respondent herein) seeking a decree for permanent prohibitory injunction against Roomi Ram defendant (petitioner herein) in respect of the suit land measuring 39-09-00 bighas, comprised in khata khatauni No. 44/51, 42/49, situated in Mohal Andwas, Pargana Himgiri, Tehsil Salooni, District Chamba. In the alternative, a decree for possession was also prayed for. It was mentioned in paras 3 & 4 of the plaint that defendant Roomi Ram had earlier filed a Civil Suit for declaration and permanent prohibitory injunction. This Civil Suit bearing No. 154 of 2001, titled as *Roomi Ram versus Tej Singh & others* was regarding the same suit land as involved in the present *lis*. That the said Civil Suit was dismissed by the Civil Judge (Sr. Divn.) Chamba vide judgment and decree dated 29.9.2007. Roomi Ram's appeal against this judgment and decree was dismissed on 14.7.2008. It was also stated in the plaint that Roomi Ram had preferred a Regular Second Appeal alongwith an application under Section 5 of the Limitation Act before this Court but the application under Section 5 of the Limitation Act was still pending and had not been adjudicated upon. It

was further pleaded that this meant that the Regular Second Appeal had not been registered or entertained by this Court. Respondent/plaintiff Tej Singh also pleaded in the penultimate para of the plaint that previously instituted suit between the same parties for declaration regarding the same subject matter stood decided and no other matter regarding the same cause of action was pending between the parties in any Court. Paras 3, 4 and 11 of the plaint read as under:-

> "3.That defendant Roomi Ram earlier filed a suit for declaration and permanent prohibitory injunction vide Civil Suit No. 154/01 titled as "Roomi Ram versus Tej Singh & others, regarding the same suit land which was dismissed by Ld. Civil Judge (Sr. Divn.) Chamba vide judgment and decree dated 29/09/2007 and vide that judgment the present plaintiff Tej Singh is declared/found owner in possession of the suit land. Thereafter the said Roomi Ram (Present Defendant) filed an appeal before the Ld. District Judge Chamba against the said judgment and decree passed by the Ld. Civil Judge (Sr. Divn.) Chamba vide Civil Appeal No. 10/2008/07 and same was dismissed vide judgement and decree dated 14/07/2008.
>
> 4. That defendant Roomi Ram filed a regular second appeal alongwith an application under Section 5 of Limitation Act in the Hon'ble High Court of H.P. The application under Section 5 of Limitation Act is still pending and same has not been decided yet as such appeal has not been registered or entertains.
>
> … … …
>
> 11. That no suit regarding same cause of action is pending before any Court of law or decided earlier except the present suit. However, suit for declaration of the same subject matter has been decided and detail of the said suit has already been given in para No. 3 & 4 in the plaint."

On the above submissions, the suit was instituted by Tej Singh against Roomi Ram.

In his written statement, Roomi Ram denied the assertions made in the plaint. He also denied that Regular Second Appeal preferred by him before this Court had not been registered.

3. Parties led evidence in support of their respective contentions. The matter was fixed for arguments. After hearing the submissions the case was fixed for pronouncement of order on 20.6.2019.

It appears from the record that order was not announced and the matter was perhaps adjourned again for arguments. On 27.7.2019 petitioner/defendant Roomi Ram moved an application under Order 8 Rule 1A(3) read with Section 151 CPC with the prayer that he be allowed to place on record certified copies of order sheets dated 31.10.2008, 30.4.2010, 13.5.2010 and 1.12.2016 as well as certified copy of memorandum of Regular Second Appeal preferred by him before this Court arising out of previous litigation between the parties. It was also stated in the application that application filed under Section 5 of the Limitation Act moved by Roomi Ram alongwith the Regular Second Appeal had been allowed by this Court and the said Appeal had been entertained. It was registered as RSA No. 574 of 2008 on 31.10.2008.

Plaintiff Tej Singh opposed the prayer of the defendant. In his reply the plaintiff stated that defendant had adequate opportunity to lead his evidence, evidence in the matter stood closed, arguments in the matter had already been heard, matter thereafter was fixed for pronouncement of order on 20.6.2019.

That the defendant intended to re-open the case by placing on record documents mentioned in the application. While opposing the defendant's application, plaintiff also submitted that he had not appeared in the Regular Second Appeal before this Court and further that no stay order has been passed by this Court in the Regular Second Appeal.

After hearing learned counsel for the parties, learned Trial Court vide order dated 6.10.2021 dismissed the application observing therein that the defendant was in the know of the documents sought to be brought on record. Had he exercised due diligence the same could have been produced on record at the time of leading his evidence. The application was filed at a belated stage. For all these reasons, the prayer made by the defendant was declined. Defendant has agitated this order in this petition.

4. Learned Counsel for the defendant/petitioner would submit that the documents which the petitioner wants to place on record are relevant for coming to just and proper decision of the case. That previous litigation between the parties regarding the same subject matter was still alive in form of RSA No. 574 of 2008 pending adjudication before this Court. The impugned order denying production of documents has caused prejudice to the petitioner/defendant.

Learned Counsel for the respondent/plaintiff defended the impugned order highlighting the reasoning given there. Learned counsel also argued that application under Order 8 Rule 1A(3) CPC was not maintainable at the stage of advancing the arguments.

5. I have heard learned counsel for the parties and considered the relevant material on record.

Sugandhi (dead) by LRs. & anr. Versus P. Rajkumar, **Civil Appeal No. 3427 of 2020,** decided by Hon'ble Apex Court on 13.10.2020 was a case where defendant's application moved under Order 8 Rule 1A(3) CPC seeking leave of Court to produce additional documents was dismissed by the learned Trial Court and the order was confirmed by the High Court. After discerning Order 8 Rule 1A(3) CPC, Apex Court held that if the procedural violation does not seriously cause prejudice to the adversary party, the Court must lean towards doing substantial justice. Litigation is nothing but a journey towards truth which is the foundation of justice and Court is

required to take appropriate steps to thrash out the underlying truth in every dispute. Relevant paras of the judgment read as under:-

> "8. Sub-rule (3), as quoted above, provides a second opportunity to the defendant to produce the documents which ought to have been produced in the court alongwith the written statement, with the leave of the court. The discretion conferred upon the court to grant such leave is to be exercised judiciously. While there is no straight jacket formula, this leave can be granted by the court on a good cause being shown by the defendant.
>
> 9. It is often said that procedure is the handmaid of justice. Procedural and technical hurdles shall not be allowed to come in the way of the court while doing substantial justice. If the procedural violation does not seriously cause prejudice to the adversary party, courts must lean towards doing substantial justice rather than relying upon procedural and technical violation. We should not forget the fact that litigation is nothing but a journey towards truth which is the foundation of justice and the court is required to take appropriate steps to thrash out the underlying truth in every dispute. Therefore, the court should take a lenient view when an application is made for production of the documents under sub-rule(3)."

In the instant case the approach of learned Trial Court in dismissing the application for lack of diligence on part of the defendant cannot be faulted. It is not in dispute that the evidence of the defendant was already over at the time he moved the application under Order 8 Rule 1A(3) read with Section 151 CPC. It also becomes apparent from the record that the arguments in the Civil Suit had also been heard at one stage in the year 2019. However having observed this, it is also a fact that the order in the matter was not pronounced and the matter thereafter was repeatedly fixed for hearing of arguments. It is still at the stage of advancing of arguments. The application in question was moved by the defendant on 27.7.2019. What is sought to be produced in terms of this application is certain order sheets and

memorandum of appeal in RSA No. 574 of 2008 instituted before this Court. A perusal of the reply filed by the plaintiff to the application in question makes it apparent that even the plaintiff has not disputed the pendency of the Regular Second Appeal. What he has stated there is that he has not appeared before this Court and that there is no stay order passed by this Court in the Regular Second Appeal. It also cannot be lost sight of that the plaintiff/respondent has himself averred in paragraphs 3, 4 & 11 of the plaint about the previous litigation between same parties with respect to same subject matter and his seemingly unawareness about the possibility of previous litigation between him and the defendant with respect to same subject matter being still alive in further appeal before this Court. The documents are necessary for arriving at just decision of the case. In view of the stand taken by the respondent/plaintiff in his pleadings, no prejudice will be caused to him in case the application is allowed. Considering all these factors, application moved by petitioner/defendant seeking leave to produce documents is allowed. However, respondent/plaintiff cannot be allowed to go uncompensated for the callous and negligent approach of the petitioner/defendant in moving the application at such a belated stage. Hence, application moved under Order 8 Rule 1A(3) read with Section 151 CPC is allowed but subject to cost of `10,000/- (rupees ten thousand only). The cost shall be paid by the defendant to the plaintiff before the Trial Court.

Learned Counsel for the petitioner/defendant has apprised that the matter is fixed before the learned Trial Court on 25.5.2022. Cost shall be paid by the petitioner/defendant to the respondent/plaintiff before the learned Trial Court on 25.5.2022.

Parties through their learned counsel are directed to appear before the learned trial Court on 25.5.2022.

It is made clear that the observations made herein above are confined to the present petition only and the learned trial Court shall decide the matter uninfluenced by the same.

Petition stands disposed of in the aforesaid terms, so the pending miscellaneous application(s), if any.

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

Between:
MISS TARA VATI,
DAUGHTER OF LATE SH. DINA NATH THAKUR,
RESIDENT OF VILLAGE BHAROI,
POST OFFICE ROURI,
TEHSIL & DISTRICT SHIMLA, H.P.,
AGED ABOUT 36 YEARS.

.....PLAINTIFF/PETITIONER

(MR. DEEPAK BHASIN,
ADVOCATE)

AND

UCO BANK,
BRANCH AT NIGAM VIHAR,
SHIMLA-2, HP THROUGH ITS
CHIEF MANAGER

....DEFENDANT/RESPONDENT

(MR. JITENDER PAL
RANOTE, ADVOCATE)

CIVIL RIVISION NO. 2 OF 2022
Reserved on: 20.5.2022
Decided on: 30 5. 2022

Code of Civil Procedure, 1908 - Section 115 - Defendant Bank initiated the process of recovery against the plaintiff by taking possession of vehicle belonging to the plaintiff, which was challenged – Held -- Plaintiff defaulted in making the payment of installment of loan account, as a consequence of which, defendant bank was compelled to issue notice / remainder upon the plaintiff enabling her to deposit the amount, but once she failed to do so, defendant bank cannot be estopped from taking consequential action pursuant to breach of terms and conditions of the loan agreement including taking possession of the vehicle in question - Mere fact that defendant bank with a view to recover the loan amount initiated recovery proceedings before the DRT Chandigarh cannot be ground to grant Ad-interim injunction in favour of the plaintiff, who is a defaulter - The plaintiff was required to prove that prima-facie case is in her favour and in case the interim relief is denied to her great prejudice and irreparable loss which cannot be compensated would be caused to her - The plaintiff is defaulter so is estopped to claim that there is prima-facie case in her favor -- Onus was upon her to prove that possession of the vehicle is being taken illegally and unauthorizedly in violation of terms and conditions of the loan agreement by the defendant bank, which she failed to do - Petition dismissed.(Paras11, 12 &13)

Cases referred:

Dalpat Kumar and Another vs. Prahlad Singh and Others, (1992) 1 SCC 719;
M/S Gujarat Bottling Co.Ltd. & Ors. v. The Coca Cola Co. & Ors., AIR 1995 2372;
Mahadeo Savlaram Shelke v. The Puna Municipal Corpn., J.T. 1995(2) S.C. 504;

This petition coming on for orders this day, the Court passed the following:

O R D E R

Instant civil revision petition filed under Section 115 of the CPC, lays challenge to order dated 31.12.2021, passed by the learned Additional District Judge-1, Shimla, HP, in CMA No. 14 of 2021, reversing/setting aside order dated 13.12.2019, passed by the learned Civil Judge (Jr. Div.), Court No.4, Shimla, District Shimla, HP in CMA No. 1414 of 2019 in CS No. 131 of 2019, whereby the court below while allowing application under Order 39

Rules 1 and 2 CPC, having been filed by the plaintiff-petitioner, restrained the defendant-respondent-bank from seizing/taking the possession of the vehicle bearing registration No. HP-63A-7036 from the plaintiff-petitioner, who is in lawful possession of the same till the case is decided on merits.

2. Precisely, the facts of the case as emerge from the record are that the plaintiff-petitioner filed suit for Permanent Perpetual Prohibitory Injunction, restraining the defendant from seizing/dispossessing/taking possession of the vehicle bearing registration No. HP-63-A-7036 from her and from anyone in lawful possession with a decree for mandatory injunction directing the defendant to close the vehicle loan account No.09810610008065 and thereafter, issue NOC for removal of the hypothecation entry in the RC.

3. Plaintiff averred in the suit that vide letter dated 20.8.2018, vehicle loan to the tune of Rs. 3,38,000/- was sanctioned in her favour after payment of margin money. As per agreed terms, plaintiff was required to pay EMI @ Rs. 5387/- pm, which included interest and other necessary expenses. Plaintiff kept on paying the necessary remittances regularly to the defendant as per the schedule of the installments settled at the time of grant of loan and yet, outstanding amount was being shown in the account of the plaintiff and as such, she made a demand for supply of detailed settlement of accounts. Plaintiff requested the defendant to close the loan account and issue NOC so that entry with regard to hypothecation could be removed. However, defendant instead of supplying NOC issued demand notice dated 16.9.2019, showing the dues. When plaintiff enquired from the defendant–bank as to why the notice has been sent to her when all the outstanding dues have been cleared by making substantial deposit of Rs. 5,00,000/- lac on 11.6.2019 in her saving account for adjustment in the loan amount as agreed upon and suggested by the Chief Manager Smt. Bima Dutta, they had no answer, but instead, they threatened that either the plaintiff deposit the

demanded amount or they may take away the vehicle. Alongwith the aforesaid suit, plaintiff also filed application under Order 39 Rules 1 and 2 CPC, praying therein to restrain the defendant Bank from taking forcible possession of the vehicle in question during the pendency of the case. Aforesaid application for interim injunction came to be resisted by the defendant-Bank by filing reply, wherein it specifically denied that plaintiff has paid the entire loan amount to the defendant. Defendant claimed that as per the terms of the loan sanction letter, loan was required to be repaid to the defendant bank in 84 equal monthly installments for Rs. 5387 alongwith interest @ 8.70%pa with monthly rest or such other rates as may be revised by the defendant Bank from time to time. Defendant claimed that plaintiff in consideration of sanctioning of the loan of Rs. 3,38,000/-accepted the terms and conditions of the loan agreement dated 20.8.2018, in favour of the defendant-bank. Smt. Geeta Devi daughter of Shi Deena Nath i.e. sister of the plaintiff stood as guarantor in favour of the plaintiff and executed a deed of continuing guarantee dated 20.8.2018 in favour of the defendant Bank. Defendant claimed that vehicle is purchased by the plaintiff with the financial assistance of the defendant bank and vehicle is hypothecated to the defendant bank and entry to that effect stands recorded in the registration certificate of the car. While denying that plaintiff kept on paying the amount as per the schedule of the installments, defendant claimed that immediately after release of the vehicle, she started delaying the payment on the one pretext or the other and thereby violated the terms and conditions of the loan sanction. Defendant further claimed that despite several requests and reminders to the plaintiff to repay the loan, she did not repay the same and defaulted in repayment schedule as a consequence of which, account was declared/classified as NPA on 31.1.2019. Defendant also averred that after account being declared/classified as NPA, defendant again requested the plaintiff to repay the loan amount, but of no avail. Subsequently, on 11.6.2019, plaintiff deposited a sum of Rs. 38,000/-

in her loan account, as a consequence of which, account again became regular. However, thereafter, plaintiff again defaulted in repayment schedule and was again classified as NPA on 30.4.2019. Defendants specifically stated in the reply that plaintiff apart from vehicle loan had raised two house loans for Rs. 40.00 lac and Rs. 35 .00 lac, respectively from the defendant-Bank, which were already classified as NPA and recovery proceedings against the plaintiff and her sister are pending adjudication before the DRT Chandigarh vide OA No. 1553 of 2019 for a sum of Rs. 76,94,326/-. Defendant further averred in the reply that on the request of the plaintiff, sum of Rs. 5,00,000/- was adjusted against all the NPA accounts to make arrangement for regularization of the loan accounts. However, after having made the aforesaid payment, plaintiff again defaulted in making the payment as per the loan repayment schedule. In the aforesaid background, defendant bank prayed for dismissal of the application.

4. Learned Civil Judge, Court No.4, Shimla, District Shimla, H.P., allowed the application filed under Order 39 Rules 1 and 2 CPC and restrained the defendant Bank from seizing/taking possession of the vehicle in question from the plaintiff till the case is not decided on merits.

5. Being aggrieved and dissatisfied with the aforesaid order passed by the learned Civil Judge, defendant bank filed an appeal in the court of learned Additional District Judge Shimla-1, HP, which came to be allowed vide judgment dated 31.12.2021. Learned District Judge while allowing the appeal having been filed by the defendant-Bank set-aside the order granting interim injunction dated 31.12.2019, passed by the learned Civil Judge, Court No. 4, Shimla. Being aggrieved and dissatisfied with the aforesaid order passed by the learned Additional District Judge, Shimla, plaintiff-petitioner has approached this Court in the instant proceedings, praying therein to set-aside the aforesaid judgment dated 31.12.2021, passed by the learned Additional District and Sessions Judge, Shimla and restore the order dated 13.12.2019,

passed by the learned Civil Judge, Court No.2, allowing interim application under Order 39 Rules 1 and 2, passed by the court below.

6. I have heard the learned counsel for the parties and gone through the records.

7. Having heard learned counsel for the parties as well as perused material available on record vis-à-vis reasoning assigned in the judgment dated 31.12.2021, passed by the learned Additional District Judge, Shimla, this Court finds no merit in the present petition and as such, no interference is called for. Precisely, the grouse of the petitioner, as has been highlighted in the petition and further canvassed by Mr. Deepak Bhasin, learned counsel appearing for the plaintiff-petitioner is that since plaintiff had deposited sum of Rs. 5.00 lac in saving bank account with the understanding that same would be adjusted against her vehicle loan account, there was no occasion, if any, for the defendant-respondent-bank to adjust the aforesaid amount deposited by the plaintiff in the house loans. However, after having carefully perused the entire pleadings as well as other material available on record, I do not see any merit in the aforesaid submission made by the learned counsel for the plaintiff because it is not in dispute that plaintiff apart from raising vehicle loan also raised two home loans to the tune of Rs. 40,00,000/- and Rs. 35,00,000/-, respectively. It is also not in dispute that despite several requests, plaintiff failed to make her vehicle loan account regular and as such, it came to be classified as NPA on 31.12.2019. Since plaintiff also failed to make repayment of the house loans taken by her, her both the house loans were also declared/ classified as NPA. Once the vehicle loan account as well as other two house loan accounts were classified/declared as NPA by the defendant Bank, plaintiff with a view to regularize her loan accounts as detailed herein above, deposited sum of Rs. 5.00 lac, in her saving account. Though as per the plaintiff, aforesaid amount of Rs. 5.00 lac was agreed to be adjusted towards the vehicle loan, but no evidence worth credence ever came

to be led on record by the plaintiff to substantiate her aforesaid claim. Reply filed by the defendant bank clearly reveals that sum of Rs. 5.00 lac was deposited by the plaintiff with a view to upgrade her NPA account and aforesaid sum was adjusted in three NPA accounts. Sum of Rs. 38,000/- was adjusted against her car loan account on 11.2.2019, to upgrade her loan account, whereas remaining amount was adjusted in other two house loan accounts so that same are also regularized. Since despite opportunity, plaintiff failed to deposit the amount, defendant bank initiated the recovery proceedings before the DRT Chandigarh for a sum of Rs. 76,94,326/-.

8. Though Mr. Deepak Bhasin, Advocate, vehemently argued that sum of Rs. 5.00 lac was deposited by the plaintiff in the saving bank account with a view to repay the car loan, but such claim/submission is not substantiated by any evidence, be it ocular or documentary. Neither there is any document suggestive of the fact that plaintiff while depositing sum of Rs. 5,00,000/- in her saving bank account specifically requested the defendant bank to adjust this amount in her vehicle loan account nor it is the claim of the plaintiff that aforesaid sum of Rs. 5.00,000/- was not required to be deposited by her in other two house loan accounts. Since there is no dispute that plaintiff besides raising vehicle loan to the tune of Rs. 3,38,000/- also took two house loans to the tune of Rs. 40,00,000/- and 35,00,000/-, respectively, and these two accounts were declared/classified as NPA, plea made by the plaintiff that sum of Rs. 5.00 lac was deposited by her in her saving account with a view to clear her vehicle loan account, cannot be accepted. In the case at hand, plaintiff defaulted in making the payment of installment of the loan account despite several reminders and as such, defendant bank had no option but to declare the loan bank account of the plaintiff as NPA at the first instance. Since in the case at hand, plaintiff with a view to regularize her three loan accounts as detailed herein above, deposited sum of Rs. 5.00/- lac, same rightly came to be deposited/adjusted in three

loan accounts so that all the NPA accounts of the plaintiff could be made regular.

9. Prima-facie case, balance of convenience and irreparable loss or injury are three main factors to be kept in mind while considering the prayer for grant of injunction. Existence of aforesaid three ingredients is not only mandatory, rather they all should co-exist.

10. Before considering the prayer for injunction, the court is required to satisfy itself that the party praying for the relief has a prima-facie case and balance of convenience is also in its favour. While granting injunction, court is also necessarily required to consider whether refusal to grant injunction would cause irreparable loss/injury, if any, to such party and irreparable loss/injury, if any, can be compensated in terms of money or not. Similarly, court while deciding balance of convenience is also required to weigh protection of the plaintiff's right against need for protection of defendant's right or infringement of right. Apart from aforesaid well established parameters/ ingredients, conduct of the party seeking injunction is also of utmost important, as has been held by Hon'ble Apex Court in case **M/S Gujarat Bottling Co.Ltd. & Ors.** v. **The Coca Cola Co. & Ors.,** AIR 1995 2372. If a party seeking injunction fails to make out any of the three ingredients, court should be reluctant to grant injunction. Phrases, "prima facie", "balance of convenience" and "irreparable loss" have been interpreted by Hon'ble Apex Court in case titled as **Mahadeo Savlaram Shelke** v. **The Puna Municipal Corpn.,** J.T. 1995(2) S.C. 504, wherein Hon'ble Apex Court relying upon its earlier judgment in **Dalpat Kumar** v. **Prahlad Singh**, (1992) 1 SCC 719, observed that the phrases "prima facie case", "balance of convenience" and "irreparable loss" are not rhetoric phrases for incantation but words of width and elasticity, intended to meet myriad situations presented by men's ingenuity in given facts and circumstances and should always be hedged with sound exercise of judicial discretion to meet the ends of

justice. The court would be circumspect before granting the injunction and look to the conduct of the party, the probable injury to either party and whether the plaintiff could be adequately compensated if injunction is refused. Though, existence of prima facie right is a condition for the grant of temporary injunction, but prima facie case is not to be confused with prima facie title which has to be established on evidence at the trial. Satisfaction that there is a prima facie case is not sufficient to grant injunction, rather court considering prayer for injunction is under obligation to satisfy itself that non-interference by the court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction. The court while granting or refusing injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury, which is likely to be caused to the parties if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued.

10. In the case at hand, neither there is prima facie case in favour of the plaintiff nor balance of convenience lies in her favour, rather irreparable loss and injury would be caused to the defendant bank in case they are restrained from realizing its own money, which was advanced to the plaintiff for purchase of vehicle. On the top of everything, very conduct of the plaintiff, which is quite apparent from the fact that despite repeated opportunities plaintiff failed to make the payment good, dis-entitles her from ad-interim injunction in terms of provisions contained under Section 41 (b) and (h) of the

Specific Relief Act. Section 41 of the Specific Relief Act lays down the conditions where injunction can be refused, relevant paras whereof read as under:

> " 41. Injunction when refused.—An injunction cannot be granted—
>
> (a) to restrain any person from prosecuting a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;
>
> ***(b) to restrain any person from instituting or prosecuting any proceeding in a court not subordinate to that from which the injunction is sought;***
>
> (c) to restrain any person from applying to any legislative body;
>
> (d) to restrain any person from instituting or prosecuting any proceeding in a criminal matter;
>
> (e) to prevent the breach of a contract the performance of which would not be specifically enforced;
>
> ***(f)*** to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;
>
> (g) to prevent a continuing breach in which the plaintiff has acquiesced;
>
> (h) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust;

(i) when the conduct of the plaintiff or his agents has been such as to disentitle him to the assistance of the court;

(j) when the plaintiff has no personal interest in the matter."

11. In the case at hand, plaintiff defaulted in making the payment of installment of the loan account, as a consequence of which, defendant bank was compelled to issue notices/remainders upon the plaintiff, enabling her to deposit the amount, but once she failed to do so, defendant- bank cannot be esttoped from taking consequential action pursuant to breach of terms and conditions of the loan agreement including the taking possession of the vehicle in question. Mere fact that defendant bank with a view to recover the loan amount initiated recovery proceedings before the DRT Chandigarh, cannot be a ground to grant ad-interim injunction in favor of the plaintiff, who is a defaulter. In a suit filed by the plaintiff, it is/was incumbent upon her to prove that there is a prima-facie case in her favour and in the event of interim relief being denied to her, great prejudice and irreparable loss would be caused to her, but in the case at hand, it is quite apparent from the record that plaintiff despite repeated opportunities, failed to make the repayment of the loan installments as per the installment schedule, as a consequence of which, repeatedly loan amount of the plaintiff came to be classified as NPA. The very fact that vehicle loan as well as house loan accounts were declared NPA on account of irregular payments by the plaintiff, estoppes the plaintiff to claim that there is a prima-facie case in her favour.

12. Once there is a condition in the loan agreement that in the event of non-payment of installments within the time stipulated in the agreement, bank is entitled to take possession of the vehicle, court below while considering the prayer made on behalf of the plaintiff has/had no jurisdiction

to grant interim injunction, especially, when there is nothing on record to suggest that defendant bank before initialing recovery proceedings failed to afford opportunity of being heard to the plaintiff and it with a view to take possession of the vehicle hired the services of muscle men. In the case at hand, plaintiff herself approached the court of law, seeking restrain order against the defendant-bank and as such, onus is/was upon her to prove that possession of the vehicle is being taken illegally and unauthorisedly in violation of the terms and conditions of the loan agreement by the defendant bank, which she failed to do so.

13. Consequently, in view of the detailed discussion made herein above, this Court finds no illegality and infirmity in the impugned order dated 31.12.2021, passed by the learned Additional District and Sessions Judge, Shimla, H.P., and as such, same is upheld. As a consequence of which, present petition fails and dismissed accordingly.

All pending miscellaneous applications also stand disposed of accordingly.

BEFORE HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

Between:-

SUNIL
SON OF SHRI PRAKASH, AGED ABOUT 28 YEARS
RESIDENT OF VILLAGE KUMAHARRI, P.O. DELGI,
TEHSIL KANDAGHAT, DISTRICT SOLAN, H.P.

....PETITIONER

(BY MR. O.C. SHARMA, ADVOCATE)

AND

STATE OF H.P.

..RESPONDENT

(MR. P.K. BHATTI AND MR. BHARAT BHUSHAN, ADDL. A.Gs WITH MR, KUNAL THAKUR, DY. A.G.)

CRIMINAL MISC. PETITION (MAIN)
No. 1101 of 2022
Reserved on: 27.05.2022
Decided on: 31.05.2022

(A) **Criminal Procedure Code, 1973** - Section 439 read with Sections 21 and 29 of Narcotics Drugs and Psychotropic Substances Act, 1985 – Bail in intermediate quantity when second FIR lodged - In earlier FIR heroin measuring 11.20 grams was recovered from the accused - Pending case, the petitioner was found in possession of 4.65 grams which is small quantity heroin - The prosecution has alleged that the accused is involved in the prohibited business of drugs – Held – No material on record suggestive of any sale of heroin to its consumers - Such a quantity cannot be presumed to be possessed for sale to consumers in absence of any specific evidence - The recovery of heroin / contraband from petitioner on earlier occasion also prima-facie reflects his addictive user of heroin – Bail granted – Petition allowed. (Para 6 & 8)

(B) **Criminal Procedure Code, 1973** - Section 439 read with Sections 21 and 29 of NDPS Act, 1985 – Bail in intermediate quantity - Ground of parity - Similar allegations against both accused persons – one accused already been released on bail by Court on similar allegations levelled against him - The petitioner is also entitled to bail on the ground of priority -- Bail granted.(Para 8)

This petition coming on for orders this day, the Court passed the following:-

ORDER

Petitioner is accused in case FIR No. 49 of 2022 dated 23.03.2022 registered at Police Station, Dharampur, District Solan, H.P. under Sections 21 and 29 of the Narcotics Drugs and Psychotropic Act, 1985.

2. Petitioner along-with his co-accused named Sunny Adwan were apprehended by the police at Dharampur, District Solan, H.P. on 23.03.2022 at about 4.10 p.m., while sitting in vehicle No. HP64-4528 (Alto car). The police had prior secret information that petitioner and Sunny Adwan were carrying contraband and were involved in its sale to the consumers. Heroin weighing 11.20 grams was recovered from the vehicle occupied by the petitioner and his co-accused. Petitioner and his co-accused were arrested and petitioner is in custody since then. The investigation is stated to be complete and challan has been presented in the Court on 13.05.2022.

3. Petitioner has approached this Court for grant of bail in the above noted case on the grounds that he is innocent. Nothing has been recovered from his conscious possession. It is stated that petitioner is of young age. The investigation has been completed and no fruitful purpose shall be served by prolonging the custody of the petitioner. Petitioner has undertaken not to tamper with the prosecution evidence. He has also undertaken to abide by all the conditions that may be imposed against him. It is submitted that petitioner is also an accused in another FIR under the NDPS Act involving small quantity of heroine.

4. In its status report submitted before this Court, respondent has narrated the facts regarding recovery of 11.20 grams heroin from the vehicle occupied by the petitioner and Sunny Adwan on the basis of prior information. It is stated that the police has effected the aforesaid recovery after complying with the provisions of Section 42(2) of the NDPS Act. The investigation is stated to be complete and challan is stated to have been filed in the Court. The co-accused in the case Sunny Adwan is stated to have been released on bail by the learned Special Judge, Solan. The details of the previous case registered against the petitioner vide FIR No. 24/2022 dated 01.02.2022 at police station, Dharampur, District Solan, H.P. has been provided. It is

submitted that petitioner was found in possession of 4.65 grams heroin in the said case.

5. I have heard learned counsel for the petitioner and learned Additional Advocate General for the respondent-State and have also gone through the record carefully.

6. The status report submitted by the respondent in the case reveals that police has already completed the investigation and the challan has been filed in the Court. Police is not in possession of any material which may lead to an inference about the petitioner involved in the sale of heroin to its consumers. Noticeably, the status report reveals that petitioner and his co-accused are stated to have procured the recovered heroin from Delhi for their self consumption. The recovery of 4.65 grams of heroine from the petitioner on earlier occasion also prima-facie reflects his addictive user of the prohibited substance.

7. 11.20 grams of heroin recovered in the instant case is an intermediate quantity. Such a quantity cannot be presumed to be possessed for the sale to the consumers, in absence of any specific evidence suggesting such fact. Intermediate quantity is from 10 grams to 250 grams. Each case has to be decided on its own merits. In the facts of instant case, no fruitful purpose shall be served by prolonging the incarceration of petitioner, especially in absence of any material to suggest his involvement in the sale of contraband to the consumers.

8. The co-accused of the petitioner Sunny Adwan has already been released on bail by the learned Special Judge, Solan on the similar allegations. In view of this matter, petitioner is entitled to bail on the ground of parity also. Merely because he was involved in another case, may not be an impediment for grant of bail to the petitioner in the instant case for the reason that quantity in that case was small and suggestive of the fact that it was possessed by the petitioner for his self use.

9. The petitioner may require proper counseling and medical treatment which may not be available to the petitioner in judicial custody.

10. Petitioner is permanent resident of Village Kumaharri, P.O. Delgi, Tehsil Kandaghat, District Solan, H.P. There is no apprehension of his absconding or fleeing from the course of justice. It is not the case of respondent that in case of release of petitioner on bail, the trial of the case will be adversely affected. No apprehension has been shown by the respondent that petitioner is in a position to tamper with the prosecution evidence, if released on bail.

11. In the peculiar facts and circumstances of the case, the petition is allowed. Petitioner is ordered to be released on bail, in case FIR No. 49 of 2022 dated 23.03.2022 registered at Police Station, Dharampur, District Solan, H.P. under Sections 21 and 29 of the Narcotics Drugs and Psychotropic Act, 1985, subject to his furnishing personal bond in the sum of Rs.50,000/- with one surety in the like amount to the satisfaction of learned trial Court. This order, however, shall be subject to the following conditions:-

i) *That the petitioner shall make himself available for trial during each and every date of hearing before learned Special Judge.*

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 the Court or to the police.*

iii) *That the petitioner shall not leave India without permission of learned trial Court.*

12. Any observations made herein above shall not be taken as an expression of opinion on the merits of the case and the trial Court shall decide the matter uninfluenced by any observations made herein above.

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

Between:-

TIRTHA NAND SON OF SH.RAMA NAND,
RESIDENT OF VILLAGE SALUMNA, P.O.
DHAROT, TEHSIL AND DISTRICT
SOLAN, H.P. ....PETITIONER

(BY SH.SUDHIR THAKUR, SENIOR ADVOCATE
ALONGWITH MR.KARUN NEGI, ADVOCATE.)

AND

STATE OF HIMACHAL PRADESH. ...RESPONDENT

(BY SH. HEMANT VAID, ADDITIONAL
ADVOCATE GENERAL.)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No. 225 OF 2022
Decided on: 06.05.2022

Criminal Procedure Code, 1973 - Section 482 read with Section 186, Indian Penal Code, 1860 - Questions of pending proceedings - Complaint filed on behalf of Sub Divisional Police Officer, Parwanoo against the accused under section 186 IPC - Held - Prosecution under section 186 IPC is governed by provisions of section 195 of CrPC, wherein it is provided that no court shall take cognizance of offence punishable under section 186 IPC except on the complaint in writing of public servant concerned or of some other public servant to whom the said public servant is administratively subordinate - These provisions are mandatory and its non compliance is fatal to the prosecution - Complaint has been filed by SHO Police Station, Parwanoo and there is no complaint made either by SDPO, Parwanoo or any other officer higher in rank to him - In view of non compliance of provisions of section 195 CrPC prosecution of petitioner not sustainable and accordingly quashed - Petition stands disposed of.

(Para 4, 5 & 6)

This petition coming on for admission this day, the Court delivered the following:

J U D G M E N T

The instant petition, under Section 482 of the Code of Criminal Procedure (hereinafter referred to as 'Cr.PC'), has been filed by petitioner for quashing of final report in Case No. 356/3 of 2020, proceeding initiated in pursuance thereto and summoning order dated 11.12.2020 issued therein, pending adjudication before learned Additional Chief Judicial Magistrate, Kasauli, District Solan, H.P.

2. Status report stands filed giving details of the case.

3. Petitioner is an accused in case No. 356/3 of 2020, titled as State of H.P. Vs. Tirtha Nand instituted on the basis of Kalandra presented by SHO Police Station, Parwanoo, District Solan, H.P., alleging therein that petitioner Tirtha Nand had misbehaved with Sub Divisional Police Officer/Deputy Superintendent of Police (SDPO), Parwanoo in a meeting held on 27.8.2020 conducted for discussing and managing law and order in Apple Market, Parwanoo.

4. Complaint has been filed against the petitioner under Section 186 of IPC. Prosecution under Section 186 IPC is governed by provisions of Section 195 of Cr.P.C. wherein it is provided that no Court shall take cognizance of offence punishable under Section 186 IPC, except on the complaint in writing of the public servant concerned or of some other public servant to whom the said public servant is admistratively subordinate. These provisions are mandatory and non-compliance thereof is fatal for prosecution.

5. In present case, it is admitted fact that complaint has been filed by SHO Police Station, Parwanoo and there is no in writing complaint made either by SDPO Parwanoo or any other Officer of higher rank to him.

6. In view of non-compliance of provisions of Section 195 of Cr.P.C. prosecution of the petitioner in case 356/3 of 2020 is not sustainable and accordingly, it is quashed. Resultantly, consequential proceeding, including impugned order dated 11.12.2020 are also quashed.

6. Petition stands disposed of in above terms.

7. 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 VIVEK SINGH THAKUR, J.

Between:-

JAGDISH SON OF SMT. LEELMA DEVI
VILLAGE BIRGARH PO KAYAR, TEH.
THEOG, DISTRICT SHIMLA, H.P.

... PETITIONER

(BY MR. SURENDER VERMA AND MS. BHARTI VERMA ADVOCATES)

AND

STATE OF HIMACHAL PRADESH

.. RESPONDENT

(MR.HEMANT VAID, ADDITIONAL ADVOCATE GENERAL)
(MR. BALWANT SINGH THAKUR, ADVOCATE FOR COMPLAINANT)

CRIMINAL MISC.PETITION (MAIN)
U/S 482 CRPC NO.615 OF 2021

Judgment reserved on:18TH APRIL, 2022
Date of decision:04th MAY, 2022

Code of Criminal Procedure, 1973 – Section 482 – Inherent jurisdiction - Prayer for interim relief not to arrest petitioner being proclaimed offender - Held - The petitioner was declared as proclaimed offender after following prescribed procedure and therefore he was not entitled for anticipatory bail - Accepting the custody of petitioner and enlarging him on bail would be equivalent to granting him anticipatory bail - Proclaimed offender has to surrender before the court and explain the reasons for his absence and in the event of finding sufficient grounds for his absence or non-availability, the court may recall declaration of pronouncing him proclaimed offender or otherwise to pass an appropriate order for his Police or judicial custody as the case may be - Petition dismissed with the direction to the petitioner to surrender before the Ld. Court for explaining reasons for his non-availability by filing appropriate application.(Paras17 & 21)

Cases referred:

Abdul Rehman vs. State of Rajasthan 2007 Cri. L.J.3113 (Rajasthan High Court);
Lavesh vs. State (NCT of Delhi) 2012(8) SCC 730;
Madan Mohan vs. State of Rajasthan 2018(12)SCC 30;
Mehar Singh and another vs. State of Punjab 2010 Cr.LJ 409 (P&H);
Niranjan Singh and another vs. Prabhakar Rajaram Kharote and others 1980 Cri.LJ 426;
Nirmal Singh and another vs. State of Punjab CRM-M-051971 of 2021;
Patel Vinodbhai Shivram Bhai vs. State of Gujarat R/SCR.A/1895/15;
State of Madhya Pradesh vs. Pradeep Sharma, 2014(2) SCC 171; Lachhman Dass vs. Resham Chand Kaler and another 2018(3) SCC 187;
Sundeep Kumar Bafna vs. State of Maharashtra (2014)16 SCC 623;

This petition, coming on for orders this day, the court passed the following:

O R D E R

Petitioner has approached this Court invoking Section 482 Cr.PC seeking interim relief not to arrest him being a Proclaimed Offender declared by the trial Court in case FIR No. 27 of 2017, dated 15.2.2017 registered in Police Station Theog, District Shimla under Sections 307, 451,

506 of Indian Penal Code (hereinafter referred as IPC) and Section 25 of Arms Act with liberty to join criminal proceedings in the trial Court in accordance with law.

2. Status report stands filed. Record was also made available.

3. Prosecution case, in brief, is that on 7.2.2017 complainant Bala Nand had submitted a complaint under Section 154 Cr.PC in Police Station Theog stating that his younger daughter, after solemnizing her marriage according to her liking two weeks ago, came to parental house along with his son-in-law and after having snacks, they went to his brother's house situated at some distance and at about 4 PM, his son-in-law, Vipin (brother of his son-in-law) and his daughters Reeta and Meenakshi came back and when they reached near his house, petitioner/accused rushed having gun in his hand and asked Reeta in loud voice to stop with threat to kill her. Whereupon, his daughters, son-in-law and his wife rushed inside the house and when his daughter Reeta was closing the door, petitioner opened fire causing injury in the head of complainant, in back and waist of Reeta and neck and chest of his wife Savitri, and Reeta was seriously inured. On hearing noise of gunshot, complainant's brother Matha Ram, Prakash and Pradhan Susheela Devi came on spot but by that time petitioner Jagdish Chand fled from spot, after pelting stones on roof of house of complainant with theat that he will kill them all one by one. Injured were taken to hospital for treatment.

4. On the basis of aforesaid complaint, FIR was registered and investigation started.

5. Petitioner Jagdish Chand was searched in the village and other places, but he was not traceable anywhere despite inquiring his villagers and other relatives. Family of petitioner had also expressed inability to reveal whereabouts of petitioner Jagdish Chand for ignorance about it.

6. As per status report, during investigation, petitioner Jagdish Chand was seached in Veergarh, Kotkhai, Jubbal, Rohru, Shimla, Chandigarh and many places in Haryana, but he was not traceable.

7. To trace and arrest the petitioner, warrants were also issued by Court and when he was not traceable, proceedings under Section 82 of Cr.PC were initiated against him and on 10.4.2019 he was declared Proclaimed Offender and thereafter challan was prepared under Section 299 Cr.PC and submitted in the Court on 29.5.2019 which has now been listed for further orders in the Court of learned Additional Chief Judicial Magistrate Theog on 23.6.2022. It has been stated in status report that immediately after commission of offence, petitioner had fled and he did not join the investigation and he has to be interrogated and weapon of offence is yet to be recovered from him.

8. It is contended on behalf of petitioner that he is fatherless and is only son of his mother and is sole bread earner in his family, serving as Sales Executive in Delhi since 16.8.2016 in a firm namely Apurvaroy and Associates situated in E-13A, UGF, Back Side, Bengali Colony, Mahavir Enclave South West Delhi and he was serving in the firm prior to the date of incident and thereafter also and he was not aware about registration of aforesaid FIR and he is a law abiding citizen but he was never asked to join the investigation nor was interrogated. He was never summoned by police nor he received any notice by any means of communication. Further that, petitioner is having a good credential and has no antecedents of commission of any other offence. Further that police has not followed procedure in present case as required to be adhered to under the criminal jurisprudence and now it has come in knowledge of petitioner that he has been delcared Proclaimed Offender, and therefore, he has approached this Court seeking permission to join the investigation as well as criminal proceedings in trial Court with prayer that he may not be arrested as Proclaimed Offender in present case with liberty to join

the criminal proceedings in trial Court in accordance with law by granting him bail.

9. It is matter of record that petitioner had filed a bail application under Section 438 of Cr.PC bearing Cr.MP(M) No. 2099 of 2021 seeking anticipatory bail which was dismissed as withdrawn on 30.10.2021 with liberty to file comprehensive petition under Section 482 Cr.PC and thereafter present petition has been filed.

10 It has been submitted on behalf of petitioner that he is ready to surrender to custody of this Court with prayer that he may be enlarged on bail and he is ready to join the investigation as well as criminal proceedings in the trial Court and therefore, no fruitful purpose is going to be served by arresting the petitioner.

11 Learned counsel for petitioner, for substantiating the submissions made on behalf of petitioner, has referred pronouncements of the Supreme Court in ***Sundeep Kumar Bafna vs. State of Maharashtra*** reported in ***(2014)16 SCC 623*** as well as pronouncements of High Courts in ***Niranjan Singh and another vs. Prabhakar Rajaram Kharote and others*** reported in ***1980 Cri.LJ 426; Abdul Rehman vs. State of Rajasthan*** reported in ***2007 Cri. L.J.3113*** (Rajasthan High Court); ***Mehar Singh and another vs. State of Punjab*** reported in ***2010 Cr.LJ 409*** (P&H); order dated 7.5.2015 passed by Single Bench of High Court of Gujarat in ***R/SCR.A/1895/15 titled Patel Vinodbhai Shivram Bhai vs. State of Gujarat;*** order dated 15.12.2021 passed by Single Bench of Punjab and Haryana High Court in ***CRM-M-051971 of 2021 titled Nirmal Singh and another vs. State of Punjab.***

12 Learned Additional Advocate General has submitted that petitioner is an accused under Section 307 IPC wherein victims have received gunshot injuries and thus hurt has been caused to victims by act of petitioner committed by him with intention to kill and he may be sentenced to

imprisonment for life also and therefore, he is not entitled for bail under Section 437 Cr.PC and his conduct dis-entitles him from seeking anticipatory bail and in case he is permitted to surrender in Court and is enlarged on bail then it will amount to grant him anticipatory bail for which he is not entitled and, therefore, prayer for dismissal of petition has been made.

13 Petitioner is an accused for commission of offence under Section 307 IPC wherein hurt has been caused to victim and, therefore, he may be punished and sentenced for imprisonment for life and despite inquiring about his whereabouts from his mother as well wife nothing was disclosed by his family about his place of job as has now been claimed in petition, rather they had expressed their ignorance about his whereabouts. It is not a case that petitioner was absconding after a minor scuffle and, therefore, he would have presumed that FIR may not have been lodged, but it is a case where he had fired at family of complainant not once but repeatedly causing serious injuries to victims and, thereafter he had pelted stones, and, therefore, it was prudent to expect lodging of FIR by victims and only for that reason, petitioner had fled and was not traceable for a long time despite issuance of non-bailable warrants in the year 2018.

14 In ***Sandeep Kumar Bafna's case,*** issue involved was that whether opinion of the High Court, that High Court was devoid of jurisdiction to accept the surrender of accused to Court custody was corrct or not and in this pronouncement, taking into consideration its earlier judgment in ***Niranjan Singh's case*** it was concluded by the Supreme Court that High Court has jurisdiction to take a person into its custody on surrender and then proceed further in accordance with law with respect to the bail request of such person and if sufficient grounds had not been disclosed for enlargement on bail, necessary orders for judicial or police custody can be passed by High Court.

15 In present case, this point is not in issue as at no point of time it has been observed that this Court is devoid of power to take accused in custody on surrender. But at the time of considering anticipatory bail application Cr.MP(M) No. 2099 of 2021, the Court was not inclined to grant anticipatory bail for the reason that petitioner has been declared as Proclaimed Offender under Section 82 Cr.PC when he was not traceable despite making all out efforts and his family was not disclosing his whereabouts and therefore, petitioner should surrender before the trial Court/concerned Magistrate.

16 On perusal of record, made available to Court, the Court was convinced that petitioner was declared as Proclaimed Offender after following prescribed procedure and therefore, he was not entitled for anticipatory bail. This opinion of Court was based on ***Lavesh vs. State (NCT of Delhi)*** reported in ***2012(8) SCC 730*** and ***State of Madhya Pradesh vs. Pradeep Sharma,*** reported in ***2014(2) SCC 171*** and ***Lachhman Dass vs. Resham Chand Kaler and another*** reported in ***2018(3) SCC 187*** wherein Supreme Court has observed that when a person was not available for interrogation and investigation and was declared absconder as a Proclaimed Offender there is no question of granting him anticipatory bail.

17 In the aforesaid circumstances, bail application filed by petitioner under Section 438 Cr.PC was dismissed as withdrawn. Now accepting the custody of petitioner and enlarging him on bail would be equivalent to granting him anticipatory bail. Whereas, as per prescribed procedure a Proclaimed Offender has to surrender before the Court which has declared him Proclaimed Offender and explain the reasons of his absence and in the event of finding sufficient grounds for his absence or non-availability, the Court may recall declaration of pronouncing him Proclaimed Offender, or otherwise to pass an appropriate order for his police or judicial custody, as the case may be, according to facts and circumstances.

18 In ***Mehar Singh's case*** decided by learned Single Judge of Punjab and Haryana High Court, impugned order declaring the petitioners therein Proclaimed Offenders was set aside for the reason that petitioners were already residing in Canada before registration of FIR and there was no occasion for them to conceal themselves or abscond. Therefore, the facts in the said case were not like present one, where petitioner is permanent resident of village Birgarh and his family did not disclose his whereabouts.

19 In ***Abdul Rehman's case*** proceedings under Sections 82 and 83 Cr.PC were dropped against the petitioner by learned Single Judge of Rajasthan High Court as the said orders were passed without following proper procedure I.e. recording of statements of Process Servers and further the file was sent to Record Room without recording the prosecution evidence which was contrary to provisions of Section 299 Cr.PC. It is not the case in present petition.

20 In ***Patel Bhai's case*** learned Single Judge of Gujarat High Court has quashed and set aside the order declaring the petitioners Proclaimed Offenders. The said order, with due regards, in my opinion, is contrary to pronouncement of Supreme Court referred supra. Similarly order passed by learned Single Judge of Punjab and Haryana High Court in ***Nirmal Singh's case*** directing the trial Court to enlarge the petitioners therein on bail on furnishing fresh bail bonds and surety bonds after surrendering before trial Court, with due regards, in my opinion is also contrary to law settled by the Supreme Court in ***Madan Mohan vs. State of Rajasthan*** reported in ***2018(12)SCC 30***, and ***Lachhman Dass's case (Supra)*** whereby it has been laid down that Court cannot issue mandatory directions which breach the independence of Subordiante Courts and thus, it is not expected from the High Court to pass mandatory orders commanding the Subordiante Courts to compulsorily grant the bail.

21 In the facts and circumstances, material placed before me and in the light of pronouncement of the Supreme Court, I am of the opinin that petitioner is not entitled for relief as prayed in present petition and accordingly, present petition is dismissed with direction to petitioner to surrender before learned Additional Chief Judicial Magistrate, Theog on or beofre 13th May, 2022 for explaining reasons of his non-availability by filing an appropriate application which shall be considered and decided by learned Magistrate in accordance with law and in the given facts and circumstanced placed before him by petitioner as well as prosecution. Till then, i.e. till surrender of petitioner before the Magistrate, petitioner shall not be arrested in furtherance to his declaration as Proclaimed Offender and in case an application is preferred by him, as referred supra, then, till the decision of the said application, he shall not be arrested and after decision of application, he shall be dealt with according to order passed by learned Magistrate.

22 Needless to say that in case of arrest of the petitioner, he shall be entitled for filing appropriate application for enlarging him on bail, if advised so.

Petition stands disposed of, so also pending miscellaneous application(s), if any.

BEFORE HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

Between:-

SAINA DEVI AGED 42 YEARS WIFE OF SH. YOG RAJ RANA RESIDENT OF WARD NUMBER 03, TAMHOL POST OFFICE RAILA, SUB TEHSIL SAINJ, DISTRICT KULLU, HIMACHAL PRADESH.
PRESENTLY IN JUDICIAL CUSTODY AND CONFINED DISTRICT JAIL KULLU, DISTRICT KULLU, HIMACHAL PRADESH.
THROUGH HER SON:
LOVESH KUMAR, AGED 20 YEARS, SON OF

SH. YOG RAJ RANA, RESIDENT OF WARD NUMBER 03, TAMHOL POST OFFICE RAILA, SUB TEHSIL SAINJ, DISTRICT KULLU, HIMACHAL PRADESH.

….PETITIONER.

(BY MR. BHUPINDER SINGH AHUJA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

RESPONDENT.

(BY MR. DESH RAJ THAKUR, ADDL. ADVOCATE GENERAL WITH MR. GAURAV SHARMA, DEPUTY ADVOCATE GENERAL)

CRIMINAL MISC. PETITION (MAIN)
No. 675 OF 2022.
Reserved On: 28th April 2022
Decided On: 4th May, 2022

Code of Criminal Procedure, 1973 - Section 439 read with Sections 20, 25 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 - Bail - Successive bail application -- Maintainability of -- Recovery of 1 kg 555 grams of Charas --Existence of CDR details of accused persons has not been considered as circumstance sufficient to hold prima facie case against accused person and this fact has made out a case for maintainability of successive bail application - Except the existence of CDRs and disclosure statement of accused no other material appears to have been collected against petitioner and the disclosure made by accused cannot be read against petitioner -- It is not the case that on enlargement of petitioner on bail, other trial before the Ld. Special Judge shall be adversely affected - Bail application allowed - Petition disposed of.(Para 17, 18 &19)

Cases referred:

Himachal Pradesh vs. Kajad (2001)7 SCC 673;
Kalyan Chandra Sarkar Etc. vs. Rajesh Ranjan @ Pappu Yadav and another, (2005) 2 SCC 42;
Lt. Col. Prasad Shrikant Purohit vs. State of Maharashtra, (2018) 11 SCC 458;
State by (NCB) Bengaluru vs. Pallulabid Ahmad Arimutta and another, (2022)2 Scale 14;
Tofan Singh Vs State of Tamil Nadu (2021)4 SCC 1;

This petition coming on for orders this day, the Court passed the following: -

O R D E R

By way of instant petition, petitioner has sought bail in case FIR No. 14 of 2021, dated 27.03.2021, registered at Police Station Sainj, District Kullu, Himachal Pradesh, under Sections 20, 25 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "NDPS Act").

2. Petitioner was arrested on 01.06.2021 in the above noted case on disclosure made by co-accused Dabe Ram.

3. Petitioner had earlier also filed Cr.MP(M) No. 1493 of 2021 before this Court for grant of bail in above noted case. However, the prayer made by petitioner was not granted.

4. In nutshell, the prosecution case is that on 27.03.2021, police party headed by HC Anupam Kumar No.13 had laid "Naka" at place Larji. At about 4.30 A.M, a vehicle bearing No. HP-24B-6994 (Tata Tigor) was stopped for checking. Another vehicle HP-24C-6968 (Pick-Up) followed and stopped behind the Tata Tigor car. Two person alighted from vehicle bearing No. HP-24B- 6994 and ran towards river. Vehicle HP-24C-6968 (Pick-up) was occupied by its driver Vinod Kumar. On search of vehicle HP-24C-6968 "Charas" weighing 1 Kg and 555 grams was recovered. Vinod Kumar was arrested. As per his version, the recovered "Charas" belonged to Ram Krishan and Deep Ram @ Nittu, who were occupants of the car number HP-24B-6994.

5. Ram Krishan and Deep Ram alias Nittu were arrested on 30.03.2021. They disclosed that they had purchased the recovered contraband from Dabe Ram, who was also arrested on the same day. As per disclosure made by Dabe Ram, he had purchased the contraband from the

bail petitioner on 26.03.2021. The bail petitioner was arrayed as accused and was arrested on 01.06.2021.

6. The instant successive bail application has been filed by petitioner on the ground that there is a change in circumstance which makes petitioner entitled for bail. As per petitioner mere existence of CDR revealing exchange of phone calls inter-se accused persons cannot be a ground to deny bail to the petitioner. In support of his case petitioner has placed reliance upon para-10 of the judgment passed by the Hon'ble Supreme Court in ***State by (NCB) Bengaluru vs. Pallulabid Ahmad Arimutta and another***, ***(2022)2 Scale 14,*** which reads as under:-

> *"10. It has been held in clear terms in Tofan Singh Vs. State of Tamil Nadu, (2021)4 SCC 1,that a confessional statement recorded under Section 67 of the NDPS Act will remain inadmissible in the trial of an offence under the NDPS Act. In the teeth of the aforesaid decision, the arrests made by the petitioner-NCB, on the basis of the confession/voluntary statements of the respondents or the co-accused under Section 67 of the NDPS Act, cannot form the basis for overturning the impugned orders releasing them on bail. The CDR details of some of the accused or the allegations of tampering of evidence on the part of one of the respondents is an aspect that will be examined at the stage of trial. For the aforesaid reason, this Court is not inclined to interfere in the orders dated 16th September, 2019, 14th January, 2020, 16th January, 2020, 19th December, 2019 and 20th January, 2020, passed in SLP (Crl.) No@ Diary No. 22702/2020, SLP(Crl.) No. 1454/2021, SLP (Crl.) No. 1465/2021, SLP (Crl.) No. 1773-74/2021and SLP (Crl.) No. 2080/2021 respectively. The impugned orders are accordingly, upheld and the Special Leave Petitions filed by the petitioner-NCB seeking cancellation of bail granted to the respective respondents, are dismissed as meritless."*

7. I have heard Shri Bhupender Ahuja Advocate for the petitioner and Shri Desh Raj Thakur learned Additional Advocate General for the State and have also gone through the record.

8. This Court while rejecting the bail application i.e. Cr.MP(M) No. 1493 of 2021 on 24.09.2021, held as under:-

> *"17. Coming to the facts of the case no credible explanation has been given by petitioner regarding her repeated conversation with wife of Dabey Ram on 26th and 27th March, 2021. Nothing has been placed on record to suggest that there was some pending dispute between Dabey Ram and petitioner which could be the reason for her false implication. Otherwise also it is not understandable that in case of dispute between them, what was the occasion to have frequent phone calls between petitioner and Sarla Devi on 26.03.2021 and 27.03.2021.*
>
> *18. It is also no one's case that Dabey Ram and his wife were not residing together or hand strained relations. In the given situation, it could be the modus operandi of Dabey Ram not to converse with petitioner from his mobile and for that reason might have used mobile phone of his wife. Merely because mobile phones of petitioner and Sarla Devi were not seized by police, will not help the cause of petitioner. The omission to seize mobile phones may not make a difference; in case it is otherwise proved that alleged mobile numbers of petitioner and Sarla Devi in fact belonged to them.*
>
> *19. Thus, the implication of petitioner prima facie cannot be said to be without justification. That being so, this court is unable to return findings that there are reasonable grounds to believe that petitioner is not guilty of charged offence. In addition, the possibility of petitioner indulging in similar offence during bail can also not be ruled out. Therefore, Section 37 of NDPS Act comes into place and petitioner's right, if any, to be released on bail gets clogged.*

> *20. The ingredients of Section 37 of NDPS Act are to be read conjunctively and absence of any single condition thereof disentitles a person from relief of bail."*

9. Thus, the conclusion drawn by this Court as to the existence of prima facie case against petitioner was based upon the records of call details exchanged *inter-se* the bail petitioner and wife of co-accused Dabe Ram. However, taking into consideration the fact that the Hon'ble Supreme Court in ***Pallulabid Ahmad's*** *case* ***(supra)***, has observed that CDR details of some of the accused is an aspect that needs to be examined at the stage of trial, the contention of petitioner needs to be examined.

10. In Pallulabid ***Ahmad's*** *case* ***(supra)***, the Hon'ble Supreme Court upheld the orders passed by the High Court of Karnataka whereby the accused persons had been granted bail in case involving offences under NDPS Act, on bail. Existence of CDR details was not considered as sufficient material to deny bail to the accused therein.

11. It is trite law that successive regular bail application under Section 439 of the Cr.P.C. can be maintained only if there are changed circumstances and such changed circumstances warrant the grant of bail. Reference can be made to a decision of Hon'ble Supreme Court in State ***of Himachal Pradesh vs. Kajad (2001)7 SCC 673***. In the absence of the aforesaid conditions, the order granting bail by allowing successive bail application amounts to review of its order by a criminal court which is not permissible under criminal law.

12. In ***Lt. Col. Prasad Shrikant Purohit vs. State of Maharashtra, (2018) 11 SCC 458,*** the Hon'ble Apex Court has held as under:-

> *"30. Before concluding, we must note that though an accused has a right to make successive applications for grant of bail, the court entertaining such subsequent bail applications has a duly to consider the reasons and grounds*

on which the earlier bail applications were rejected. In such cases, the court also has a duly to record the fresh grounds which persuade it to take a view different from the one taken in the earlier applications."

13. Confronted with the aforesaid settled position of law, Shri Bhupinder Ahuja, learned counsel for the petitioner has vehemently contended that the observation made by Hon'ble Apex Court in ***Pallulabid Ahmad's*** *case* ***(supra)*** is the circumstance which should be considered a change from the fact situation as emerged at the time of rejection of earlier bail application of petitioner vide order dated 24.09.2021 passed by this Court in Cr.MP(M) No. 1493 of 2021. Learned counsel for petitioner, in support of his argument, has placed reliance on a judgment passed by the Hon'ble Apex Court in ***Kalyan Chandra Sarkar Etc. vs. Rajesh Ranjan @ Pappu Yadav and another, (2005) 2 SCC 42***, in which it has been held as under:-

"18. It is trite law that personal liberty cannot be taken away except in accordance with the procedure established by law. Personal liberty is a constitutional guarantee. However, Article 21 which guarantees the above right also contemplates deprivation of personal liberty by procedure established by law. Under the criminal laws of this country, a person accused of offences which are non bailable is liable to detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 since the same is authorised by law. But even persons accused of non bailable offences are entitled for bail if the court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and / or if the court is satisfied for reasons to be recorded that in spite of the existence of prima facie case there is a need to release such persons on bail where fact situations require it to do so. In that process a person whose application for enlargement on bail in once rejected is not precluded from filing a subsequent application for grant of bail if there is a change in the fact

situation. In such cases if the circumstances then prevailing requires that such persons to be released on bail, in spite of his earlier applications being rejected, the courts can do so.

19. The principles of res judicata and such analogous principles although are not applicable in a criminal proceeding, still the courts are bound by the doctrine of judicial discipline having regarding to the hierarchical system prevailing in our country. The findings of a higher court or a coordinate bench must receive serious consideration at the hands of the court entertaining a bail application at a large stage when the same had been rejected earlier. In such an event, the courts must give due weight to the grounds which weighed with the former or higher court in rejecting the bail application. Ordinarily, the issues which had been convassed earlier would not be permitted to be re-agitated on the same grounds, as the same it would lead to a speculation and uncertainty in the administration of justice and may lead to forum hunting.

20. The decisions given by a superior forum, undoubtedly, is binding on the subordinate forum on the same issue even in bail matters unless of course, there is a material change in the fact situation calling for a different view being taken. ***Therefore, even though there is room for filing a subsequent bail application in cases where earlier applications have been rejected, the same can be done if there is a change in the fact situation or in law which requires the earlier view being interfered with or where the earlier finding has become obsolete.*** *This is the limited area in which an accused who has been denied bail earlier, can move a subsequent application. Therefore, we are not in agreement with the argument of learned counsel for the accused that in view the guaranty conferred on a person under Article 21 of the Constitution of India, it is open to the aggrieved person to make successive bail applications even on a ground already rejected by courts earlier including the Apex Court of the country."*

14. Hon'ble Apex Court, while dealing with maintainability of successive bail applications has recognised the change in the fact situation or in law or where the earlier findings have become obsolete as grounds for maintaining the successive bail application.

15. In ***Pallulabid Ahmad's*** *case* ***(supra)***, accused were ordered to be released on bail by Karnataka High Court in a case registered against them for commission of offences under NDPS Act involving commercial quantity. In that case also direct recovery was not affected from the accused person(s) so released on bail. In Special Leave Petition preferred against the order directing the release of accused person(s) on bail in that case, Hon'ble Supreme Court upheld the order of Karnataka High Court and one of the contention regarding availability of CDR details of some of accused person(s) was dispelled as a ground to deny the bail to them.

16. In the facts of instant case also the prosecution, for implicating the petitioner, relies upon firstly the confessional statement made by accused Dabe Ram and secondly the CDR details of calls exchanged between the petitioner and the wife of co-accused Dabe Ram. Taking into consideration, the evidence with respect to the availability of CDR details involving phone number of petitioner and mobile phone number of wife of co-accused Dabe Ram, this Court had considered existence of prime facie case against petitioner and had rejected the bail application as not satisfying the conditions of Section 37 of NDPS Act.

17. Since, the existence of CDR details of accused person(s) has not been considered as a circumstance sufficient to hold prima facie case against the accused person(s), in ***Pallulabid Ahmad's*** *case* ***(supra),*** this Court is of the view that petitioner has made out a case for maintainability of his successive bail application as also for grant of bail in his favour.

18. Except the existence of CDRs and disclosure statement of co-accused no other material appears to have been collected against the

petitioner. The disclosure made by co-accused cannot be read against petitioner as per mandate of Hon'ble Supreme Court in ***Tofan Singh Vs State of Tamil Nadu (2021)4SCC1***. Further, on the basis of aforesaid elucidation petitioner is also entitled for the benefit of bail.

19. No past history of petitioner regarding his involvement in similar or any other offence has been pointed out, therefore, there is no reason to presume that petitioner, if enlarged on bail, is likely to commit similar offence.

20. It is not the case of the respondent that in case of enlargement of petitioner on bail, the trial before learned Special Judge shall be adversely affected. Petitioner is permanent resident of Ward No.3, Tamhol Post Office, Raila, Sub Tehsil Sainj, District Kullu, H.P. No apprehension has been shown regarding the possibility of petitioner fleeing from the course of justice. It is also not the case of the respondent that petitioner has potential to tamper with the prosecution evidence.

21. In the light of above discussion and in the peculiar facts and circumstances of the case, the instant petition is allowed and petitioner is ordered to be released on bail in case FIR No. 14 of 2021 dated 27.03.2021, registered at Police Station Sainj, District Kullu, Himachal Pradesh under Sections 20, 25 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985, on her furnishing personal bond in the sum of Rs.1,00,000/- with one surety in the like amount to the satisfaction of the learned trial Court, however, subject to following conditions:-

(i) That the petitioner shall regularly attend the hearings of the case before learned Special Judge and shall not delay the proceedings thereof.

(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 the Court or to any police officer;

(iii) That the petitioner shall not leave the country without the express permission of the trial Court;

22. However, it is made clear that the observations made hereinabove shall have no bearings on the merit of the case and shall be construed for the disposal of the present petition only.

BEFORE HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

BETWEEN:

MOHINDER NATH SOFAT, AGED ABOUT 68 YEARS, S/O RAM KRISHAN SOFAT, R/O SOFAT HOUSE, NEAR RADHA SWAMI BHAWAN, ANJI SOLAN, HIMACHAL PRADESH.

........PETITIONER

(BY SHRI SHRAWAN DOGRA, SR. ADVOCATE WITH SHRI AJAY SIPAHIYA and SHRI TEJASVI DOGRA, ADVOCATES)

AND

STATE OF HIMACHAL PRADESH

.........RESPONDENT

(BY SHRI DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL WITH SHRI GAURAV SHARMA, DEPUTY ADVOCATE GENERAL FOR THE RESPONDENT;

SHRI N.S. CHANDEL, SR. ADVOCATE WITH SHRI VINOD GUPTA, ADVOCATE FOR THE COMPLAINANT)

CRIMINAL MISCELLANEOUS PETITION (MAIN) No. 724 of 2022

BETWEEN:

USHA KIRAN AGED ABOUT 67 YEARS W/O MOHINDER NATH, S/O RAM KRISHAN SOFAT, R/O SOFAT HOUSE, NAR RADHA SWAMI BHAWAN, ANJI, SOLAN, HIMACHAL PRADESH.

........PETITIONER

(BY SHRI SHRAWAN DOGRA, SR. ADVOCATE WITH SHRI AJAY SIPAHIYAand SHRI TEJASVI DOGRA, ADVOCATES)

AND

STATE OF HIMACHAL PRADESH

.........RESPONDENT

(BY SHRI DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL WITH SHRI GAURAV SHARMA, DEPUTY ADVOCATE GENERAL FOR THE RESPONDENT;

SHRI N.S. CHANDEL, SR. ADVOCATE WITH SHRI VINOD GUPTA, ADVOCATE FOR THE COMPLAINANT)

CRIMINAL MISCELLANEOUS PETITION(MAIN)
Nos. 723 & 724 of 2022
RESERVED ON: 29.04.2022
DECIDED ON : 02.05.2022

Code of Criminal Procedure, 1973 - Section 438 read with Sections 420, 406 Indian Penal Code, 1860 - Grant of anticipatory bail - The cheque book was got issued by the petitioner against the account of complainant in the year 2006 - The fact that complainant signed 25 blank cheques and handed them over to petitioner speaks for itself - As per the allegations, 11 cheques were issued in between 2006 misused, about which the complainant came to know in the year of 2014 - The complaint was filed by the complainant on 25.12.2019 - All these facts prima facie raise inference that transactions inter-se the parties at one stage, were clearly consensual - Bail granted. (Para 10)

These petitions coming on for orders this day**,** the Court passed the following :-

O R D E R

Both these petitions arise out of the same FIR and involve identical questions of facts and law, therefore, both the petitions are being disposed of by a common order.

2. Petitioners are accused in case FIR No. 25/2020, dated 07.03.2020, under Sections 420 and 406 of the Indian Penal Code (for short 'IPC'), registered at Police Station Dharampur, District Solan, H.P.

3. The case was registered on 07.03.2020 and is still under investigation. An application under Section 156(3) Cr.P.C. filed by complainant was the source for registration of the FIR. It is alleged against petitioners that petitioner Mohinder Nath Sofat was allotted a Petrol Pump at Dharampur, District Solan H.P. on 16.01.2002. He associated complainant for the purpose of investment of resources. An oral partnership came into being between petitioner Mohinder Nath Sofat and complainant. Later a partnership deed was executed 25.04.2013. Complainant had 49% shares and petitioner Mohinder Nath Sofat had 51% shares. Complainant invested approximately Rs. 34 lacs. Later a dispute arose between the parties. Various litigations including Writ Petition, Criminal Proceedings, Civil Suit and Arbitration proceedings came to be instituted by the respective parties.

4. The allegations relevant to present case are that the complainant was maintaining account No.1177 with Jogindra Central Cooperative Bank, Dharampur. Petitioners used to withdraw amount from the said account by using blank signed withdrawal forms of complainant. In 2006, a cheque book containing 25 leavesbearing No. 0861851 to 0861875 was got issued by the petitioner Mohinder Nath Sofat against aforesaid account of complainant by forging her signature. Thereafter, he got all 25 blank leafs signed from complainant at one time under the pretext of withdrawing the amount of rent which was received by him in the bank account of complainant.

5. It is in respect of some of the cheques out of aforesaid cheque book that the allegations of misuse and misappropriation have been leveled against

the petitioners It is alleged that an amount of Rs. 5,32,000/- was transferred from the SBI account of M/s Jai Hind Filling Station to the aforesaid account of complainant between 06.02.2010 to 20.03.2012 and thereafter, 11 cheques out of blank cheques signed by complainant were used to withdraw the amount from the account of complainant. Transfer of money from SBI account of M/s Jai Hind Filling Station to the account of complainant was shown in lieu of liquidation of loan. It is further alleged that with intent to deceive, petitioner Mohinder Nath Sofat misused three more cheques and presented them in the bank knowing fully well that balance was not enough to honour the cheques and accordingly said cheques were dishonoured.

6. Petitioners have approached this Court for grant of pre arrest bail under apprehension of arrest in above noted case, on the grounds that there is long standing dispute of civil nature between the parties. Complainant with a purpose to put pressure and harass the petitioners has been filing frivolous complaints against them. An Arbitration proceeding is pending between the parties and the mechanism adopted by complainant by putting the police machinery into motion is to prejudice the ongoing Arbitration proceedings. It is submitted that FIR has been got registered against the petitioners by misrepresentation of facts. The bail petitioners have no criminal history. The petitioners are permanent residents of Sofat House near Radha Swami Bhawan, Anji Solan, Himachal Pradesh and have respect in the society. There is no likelihood of their fleeing from the course of justice. No recovery is to be effected from them. Petitioners have undertaken not to make any inducement, threat or promise to any person acquainted with the facts of the case. They have further undertaken to abide by all the conditions, as may be imposed against them.

7. The bail application has been opposed primarily on the ground that the unused blank cheques signed by the complainant are yet to be recovered from the petitioners. The status report filed on behalf of the respondent reveals that despite issuance of notice under Section 91 Cr.P.C., petitioners have failed

to handover the unused cheque leafs. It is further mentioned in the status report that after obtaining a cheque book with 25 leafs against account no. 1177 of complainant maintained with Jogindra Central Cooperative Bank, Dharampur, petitioners used 11 cheques and thereby withdrew a sum of Rs. 5,32,000/- from the account of complainant. This conduct of the petitioners isattributed to the period between the years 2010-2012. Further three cheques in the sum of Rs. 75 lacs are alleged to have been misused by petitioners by presenting such cheques in the bank despite knowledge that the account of complainant did not had sufficient balance.

8. I have heard learned counsel for the petitioners as well as learned Additional Advocate General and also learned counsel for the complainant and have also gone through the status report.

9. It is not in dispute that there is a long standing civil litigation between the parties, which necessarily has emanated from the partnership once entered between the complainant and petitioner Mohinder Nath Sofat. It is evident from the contents of status report that an Arbitration proceeding is presently pending between the parties and there had been civil litigations between the parties in the past including filing of Writ Petition and Civil Suit etc. Evidently, the overtones of dispute between the parties are of civil nature.

10. As per allegations, the cheque book was got issued by petitioner Mohinder Nath Sofat against the account of complainant in the year 2006. The fact that complainant signed 25 blank cheques and handed over the same to petitioner Mohinder Nath Sofat, speaks for itself. As per allegations, 11 cheques were used in between 2010-2012 and thereafter, three other cheques were allegedly misused. In her complaint, the complainant has stated that she came to know about such misfeasance on the part of petitioner in the year 2014. The complaint was filed by the complainant on 25.12.2019 for the first time. All these facts *prima facie* lead to inference that the transactions *inter se* the parties at one stage were clearly consensual.

11. It is not uncommon that in a dispute, which predominantly is of civil nature, tentacles involving criminal investigation or/ and prosecution also emerge. Be that at it may, the issue which requires consideration is, whether petitioners should be denied pre arrest bail in the given facts and circumstances of the case?

12. Though, this Court while dealing with bail petition will not minutely scan the evidence collected during investigation, it is only with a view to assess the seriousness and gravity of allegations against petitioners, the material as noticed above has been taken into consideration.

13. There is nothing in the status report of respondent-State to suggest that petitioners have not associated themselves in the investigation as and when required. Noticeably, the investigation is pending for more than two years. Nothing has been proved on record to suggest, as to what imminence required arrest of petitioners at this stage, which earlier was missing during the investigation for more than two years. The only projected ground is recovery of remaining blank cheques signed by complainant. In my considered view, this ground was available with the investigating agency right from first day and there is no evident and justifiable reason to rake up this issue at such a belated stage. The complainant is armed with more than one legal recourse to prevent apprehended misuse of blank signed cheques.

14. The custodial interrogation cannot be prayed for extracting confession. It is not the case of the respondent-State that in case of enlargement of petitioners on pre arrest bail, there is any real apprehension of tampering with the evidence. As borne out from the contents of status report, the investigating agency is already in possession of the documentary evidence in respect of allegations against the petitioners.

15. Petitioners are the permanent residents of Sofat House near Radha Swami Bhawan, Anji Solan, Himachal Pradesh and there is no apprehension of their fleeing from course of justice. In the given facts of the case, this Court is of

the view that pre trial incarceration of the petitioners is neither warranted nor justified.

16. In the peculiar facts and circumstances of the case, the petitions are allowed and petitioners are ordered to be released on bail, in the event of their arrest, in case FIR No. 25/2020, dated 07.03.2020, under Sections 420 and 406 of the Indian Penal Code, registered at Police Station Dharampur, District Solan, H.P., on their furnishing personal bond in the sum of Rs. 25,000/- each with one surety each in the like amount to the satisfaction of learned trial court. This order shall, however, be subject to the following conditions:-

i) That the petitioners shall continue to join investigation as and when required;

ii) That the petitioners 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 them from disclosing such facts to the Court or to any police officer;

iii) That the petitioners shall not in any manner tamper with the prosecution evidence.

iv) That the petitioners shall not leave India without prior permission of this Court till completion of investigation and thereafter of the trial court, if any.

17. Any expression of opinion herein-above shall have no bearing on the merits of the case and shall be deemed only for the purpose of disposal of this petition.

BEFORE HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

Between:-

JEET RAM, AGED 42 YEARS, SON OF
SH. DHABA RAM, RESIDENT OF
VILLAGE CHHAKY, POST OFFICE

NAGAR, TEHSIL SADAR, DISTRICT
KULLU, HIMACHAL PRADESH, PRESENTLY IN JUDICIAL CUSTODY AND CONFINED DISTRICT JAIL KULLU, DISTRICT KULLU, HIMACHAL PRADESH.
THROUGH HIS WIFE:
LATA DEVI AGED 40, W/O SH. JEET RAM,
VILLAGE CHHAKY, POST OFFICE NAGAR, TEHSIL SADAR, DISTRICT KULLU, H.P.

....PETITIONER.

(BY MR. BHUPINDER SINGH AHUJA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH,
THROUGH SECRETARY (HOME) TO
THE GOVERNMENT OF HIMACHAL
PRADESH, SHIMLA.

....RESPONDENT.

(BY MR. P.K. BHATTI, MR. BHARAT BHUSHAN, ADDITIONAL ADVOCATE GENERALS WITH MR. KUNAL THAKUR, DEPUTY ADVOCATE GENERAL).

CRIMINAL MISC. PETITION (MAIN)
No. 811 OF 2022
Reserved On:06.05.2022
Decided On:09.05.2022

Criminal Procedure Code, 1973 - Section 439 Read With Sections 20 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 - Bail - Third successive regular bail application – Maintability of - Recovery of 3 kg and 382 grams of cannabis from possession of accused arrested with the aid of section 29 of NDPS Act – Held – Successive regular bail application under section 439 of CrPC can be maintained only if there are changed circumstances which warrant the grant of bail - While deciding CRMPM number 1531 of 2021, this court had taken into consideration the fact that another case under NDPS Act was pending against the petitioner - Another case under section 20 of NDPS

Act is registered against the accused at police station, Manali - Bail cannot be granted - Petition dismissed. (Para 15 & 16)

Cases referred:

Lt. Col. Prasad Shrikant Purohit vs. State of Maharashtra, (2018) 11 SCC 458;
State by (NCB) Bengaluru vs. Pallulabid Ahmad Arimutta and another, (2022) 2 Scale 14;
State of Himachal Pradesh vs. Kajad (2001)7 SCC 673;

This petition coming on for orders this day, the Court passed the following: -

ORDER

Petitioner is accused in case registered vide FIR No.204 of 2019 dated 29.09.2019 Registered at Police Station, Bhuntar District Kullu, Himachal Pradesh under Sections 20 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act'). Petitioner was arrested in the above noted case on 06.10.2019 and is in custody since then.

2. Petitioner is seeking his release on bail in above noted case under Section 439 Cr.P.C. on the premise that his implication is false. Since, he has been arrayed as an accused with the aid of Section 29 of the Narcotic Drugs and Psychotropic Substances (for short NDPS) Act, rigors of Section 37 would not apply especially when nothing was recovered from the possession of petitioner. The alleged disclosure by co-accused cannot be used against him. Conspiracy cannot be inferred from alleged telephone calls. There is no legal evidence against the petitioner. The mobile number alleged to be used by petitioner, in fact, did not belong to him.

3. It has further been contended on behalf of the petitioner that he is permanent resident of Village Chhaky, Post office, Nagar Tehsil Sadar, District Kullu, Himachal Pradesh and has roots in the society. There is no likelihood of petitioner absconding from course of justice. He undertakes to

abide by all the conditions as may be imposed. The petitioner has also relied upon statement of his brother Sh. Dharam Chand recorded in the case as PW-1 by learned Special Judge on 01.09.2021.

4. On notice, respondent has placed on record status report. As per case of respondent, a huge quantity of 3 Kg. 382 grams of cannabis (Charas) was seized from personal search of one Joseph Shobal during routine checking in a bus at about 11.20 P.M. on 29.09.2019 at Bajaura District, Mandi, Himachal Pradesh. Further investigation revealed that Joseph Shobal was resident of Kerala and had purchased the seized contraband for Rs.4,80,000/- from bail petitioner through one Mohsin. Contention of respondent is that there were regular telephonic conversations between petitioner Mohsin and Joseph Shobal between 26.09.2019 to 28.09.2019, which sufficiently revealed implication of petitioner in the crime.

5. On completion of investigation, challan was presented and trial is pending before learned Special Judge, Kullu.

6. The first bail application of petitioner before this Court under Section 439 Cr.P.C. was Cr.MP(M) No. 926 of 2020 which was withdrawn by him on 02.07.2020 with liberty to file afresh at appropriate stage.

7. Petitioner preferred another application for grant of bail under Section 439 Cr.P.C. being Cr.MP(M) No.1531 of 2021, which was rejected by this Court on 24.09.2021.

8. The instant petition is third successive application on the ground that there is a change in circumstance. It is contended on behalf of petitioner that the implication of petitioner is only on the basis of confessional statements of co-accused as well as some CDR wrongly attributed to him. Sh. Bhupinder Ahuja, learned counsel for the petitioner has submitted that this Court in the case of ***Saina Devi vs. State of Himachal Pradesh***, Cr.MP(M) No. 675 of 2022, decided on 04.05.2022 has allowed the successive bail

petition. According to learned counsel for the petitioner, the present case is also covered by the case of ***Saina Devi*** (supra).

9. I have heard learned counsel for the parties and have also gone through the records of the case carefully.

10. It is trite law that successive regular bail application under Section 439 of Cr.P.C. can be maintained only if there are changed circumstances and such changed circumstances warrant the grant of bail. Reference can be made to a decision of Hon'ble Supreme Court in ***State of Himachal Pradesh vs. Kajad (2001)7 SCC 673***. In the absence of the aforesaid conditions, the order granting bail by allowing successive bail application amounts to review of its order by a criminal Court, which is not permissible under criminal law.

11. In ***Lt. Col. Prasad Shrikant Purohit vs. State of Maharashtra, (2018) 11 SCC 458,*** the Hon'ble Apex Court has held as under:-

> *"30. Before concluding, we must note that though an accused has a right to make successive applications for grant of bail, the court entertaining such subsequent bail applications has a duly to consider the reasons and grounds on which the earlier bail applications were rejected. In such cases, the court also has a duly to record the fresh grounds which persuade it to take a view different from the one taken in the earlier applications."*

12. Keeping in view the aforesaid exposition of law and after taking notice of the peculiar facts of instant case, this Court is of considered view that the prayer of the petitioner cannot be granted. The earlier bail application of the petitioner Cr.MP(M) No. 1531 of 2021 was rejected by this Court after taking into consideration the following few facts:

(i) Involvement of commercial quantity of contraband;
(ii) Rigors of Section 37 of the NDPS Act;

(iii) Existence of prima-facie material in the shape of CDR details.

(iv) Involvement of petitioner in another case under the NDPS Act.

13. As far as ***Saina Devi (***supra) is concerned, this Court allowed the prayer of petitioner in that case on the ground that in view of a subsequent judgment passed by the Hon'ble Supreme Court in ***State by (NCB) Bengaluru vs. Pallulabid Ahmad Arimutta and another, (2022) 2 Scale 14,*** the existence of CDR was not sufficient to disentitle a person from grant of bail under the NDPS Act. However, as noticed above, apart from existence of CDRs other grounds had weighed with this Court while rejecting the earlier bail application of the petitioner. Section 37 of the NDPS Act, puts an embargo on grant of bail to a person accused of offence under the NDPS Act involving commercial quantity, unless three conditions as detailed hereafter are satisfied: -

(i) *Public Prosecutor has been given an opportunity to oppose the application for such release.*

(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

(iii) That he is not likely to commit any offence while on bail.

14. The above conditions are to be read conjunctively and in order to hold a person, involved in an offence under the NDPS Act, having commercial quantity, entitled to bail, the aforesaid conditions needs to be satisfied and the Court has to record its satisfaction in that respect.

15. While deciding Cr.MP(M) No. 1531 of 2021, this Court had taken into consideration the fact that the petitioner was accused of selling huge quantity of contraband despite the fact that another case under the NDPS Act was pending against the petitioner. In para 13 of the said order, it was observed as under:

"13. Petitioner is accused of selling huge quantity of contraband for consideration. It is also alleged that another case under the NDPS Act, is pending against the petitioner. Thus, it cannot be said that the petitioner if released on bail, will not indulge in the same activity during the bail. "

16. As far as this fact is concerned, no change is stated to have taken place. It is not even the case of petitioner that the earlier findings were incorrect or he has been acquitted in the earlier case. On the other hand, it is revealed from the status report submitted on behalf of the respondent that a case under Section 20 of the NDPS Act registered vide FIR No. 94/2019 at Police Station, Manali is pending against petitioner in the Court.

17. In view of this, there is no material which may warrant a finding different than the finding recorded in para 13 (supra) of order dated 24.9.2021 passed in Cr.MP(M) No. 1531 of 2021.

18. In view of this, the prayer of the petitioner cannot be allowed. Accordingly, the instant petition is dismissed.

19. Any opinion expressed hereinabove shall be construed only for the purposes of disposal of this application and shall have no effect on the merits of the case.

BEFORE HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

Between:-

PANKAJ SON OF SH. KRISHAN CHAND,
RESIDENT OF VILLAGE DARKOTI,
POST OFFICE DRAHAL, TEHSIL
JOGINDER NAGAR DISTRICT MANDI,
AGED ABOUT 26 YEARS OLD.

….PETITIONER

(BY SH. DEVENDER K. SHARMA, ADVOCATE)

AND

THE STATE OF HIMACHAL PRADESH.

....RESPONDENT

(BY SH. P.K. BHATTI, ADDITIONAL ADVOCATE GENERAL)

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1. CR.MP(M) No. 541 of 2022

Between:-

RAMAN THAKUR, SON OF SH.
KRISHAN CHAND, RESIDENT OF
VILLAGE DARKOTI, POST OFFICE DRAHAL
TEHSIL JOGINDER NAGAR, DISTRICT
MANDI, H.P. AGED ABOUT 26 YEARS OLD.

....PETITIONER

(BY SH. DEVENDER K. SHARMA, ADVOCATE)

AND

THE STATE OF HIMACHAL PRADESH.

....RESPONDENT

(BY SH. P.K. BHATTI, ADDITIONAL ADVOCATE GENERAL)

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2. CR.MP(M) No. 542 of 2022

Between:-

VINOD KUMAR, SON OF SH. PRATAP SINGH,
RESIDENT OF VILLAGE DARKOTI,
POST OFFICE DRAHAL, TEHSIL
JOGINDERNAGAR DISTRICT MANDI, H.P.
AGED ABOUT 27 YEARS OLD.

....PETITIONER

(BY SH. DEVENDER K. SHARMA, ADVOCATE)

AND

THE STATE OF HIMACHAL PRADESH.

....RESPONDENT

(BY SH. P.K. BHATTI, ADDITIONAL ADVOCATE GENERAL)

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3. CR.MP(M) No. 543 of 2022

Between:-

GOPAL CHAND SAKLANI,
SON OF SH. TEK CHAND,
RESIDENT OF VILLAGE KUNDNU
POST OFFICE DRAHAL, TEHSIL
JOGINDERNAGAR, DISTRICT
MANDI, H.P. AGED ABOUT 21
YEARS OLD.

....PETITIONER

(BY SH. DEVENDER K. SHARMA, ADVOCATE)

AND

THE STATE OF HIMACHAL PRADESH.

....RESPONDENT

(BY SH. P.K. BHATTI, ADDITIONAL ADVOCATE GENERAL)

CRIMINAL MISC. PETITION MAIN
N0. 540, 541, 542 & 543 of 2022
Reserved on:6.5.2022
Date of decision:9.5.2022

Criminal Procedure Code, 1973 - Section 439 Read With Sections 341, 323, 302, 201 read with Section 34 of Indian Penal Code, 1860 -- Bail in Murder case -- As per the prosecution, the cause of death was due to assault with sticks on head of the deceased - No medical evidence that the blunt force

injuries found present on the body of deceased were accumulatively or singly sufficient to cause death - Medical opinion suggests the cause of death from asphyxia secondary to antemortem wet downing - Held - The material on record is not sufficient to arrive at prima facie conclusions to allegations against the petitioner - Bail granted - Petition allowed. (Paras 5 & 8)

These petitions coming on for orders this day, the Court passed the following:

O R D E R

All these petitions are being decided by a common order, as common questions of law and facts are involved.

2. The case, as set up by respondent-State is that FIR No. 175 of 2021 was registered at Police Station Jogindernagar, District Mandi, H.P. under Sections 341, 323, 302, 201 read with Section 34 IPC on 26.10.2021, on the complaint of complainant Ramesh Chand. The case was investigated and the Investigating Agency, on the basis of material collected, arrived at the hypothesis that the petitioners in furtherance of their common intention caused the murder of deceased Dinesh Kumar @ Panku. It is alleged that on 24.10.2021, deceased Dinesh Kumar visited village Darkoti-Trimblu to attend marriage of his friend and was accompanied by his friends namely Sunil Kumar and others. They were consuming liquor and a small altercation took place between deceased and petitioner Pankaj @ Abbu. After sometime, the deceased alongwith his friends left marriage venue for their respective homes, but were waylaid by the petitioners at some distance and an assault was launched by them with sticks in their hands. Sunil Kumar suffered injuries on his head and fell on the ground. Rest of the friends including deceased ran in different directions. It is further alleged that petitioners chased deceased with sticks in their hands. All other friends of deceased reached their respective homes that night but the whereabouts of deceased were not known.

His mobile phone initially did not respond but later it was found switched off. On the next day, after registration of FIR, a search was made and the body of deceased was found in a rivulet having water and stones. Police collected the evidence on the spot. Petitioners were arrested on 26.10.2021. Post mortem of the deceased was got conducted. The opinions of scientific experts were procured. On completion of investigation, challan has been filed and is stated to be pending before the learned Additional Sessions Judge, Sarkaghat for consideration of charges.

3. Petitioners have approached this Court for grant of bail under Section 439 Cr.P.C. on the grounds that they are innocent and have been falsely implicated. They have denied having given beatings either to Sunil Kumar or the deceased. It has been contended on behalf of the petitioners that the investigation has already been completed and nothing incriminating has been found against them. It is further contended on behalf of the petitioners that they are permanent resident of State of Himachal Pradesh and there is no likelihood or apprehension of their absconding from the course of justice. They have undertaken to face trial and have also undertaken to abide by all the conditions, as may be imposed. They have further undertaken not to tamper with the prosecution evidence in any manner whatsoever.

4. I have heard the learned counsel for the parties and have also gone through the status report as well as police records.

5. Though, at the stage of deciding bail application, this Court will not minutely scan the material collected by the Investigating Agency, however, this Court is not precluded from looking into such material only for the purpose of assessing the seriousness and gravity of allegations against the petitioners, especially when they are accused of having caused murder of deceased Dinesh Kumar.

6. The body of deceased was found in a small rivulet having water and different size of stones around. The autopsy surgeon has opined the cause of death as under:-

> "In the light of the above reports, the post-mortem report has been reviewed and my final opinion in the case is that the deceased died due to Asphyxia secondary to ante mortem wet drowing, in a case where multiple blunt force injuries were present over the head, face, upper and lower limbs. Ethyl alcohol was detected in the blood, as per report received from RFSL Dharmshala. However, quantification of the levels of Ethyl Alcohol has not been done."

Evidently, the cause of death is asphyxia secondary to ante-mortem wet drowing. Multiple blunt force injuries were found present over the head, face, upper and lower limbs of the body but there is no opinion that the blunt force injuries found present on the body of deceased were accumulatively or singly sufficient to cause of death. The small rivulet where the body of deceased was found is stated to be 100-150 feet below the road. Police had collected plant leaves and small twigs found struck on the body of the deceased as well as from the surrounding but no blood has been found thereon. Thus, the material available on record cannot be said to be sufficient to arrive at prima-facie conclusion as to the allegations against the petitioners. Admittedly, none had seen petitioners giving beatings to the deceased. There is no opinion of medical experts that what could be the probable source of ante-mortem injuries found on the body of the deceased.

6. The petitioners are permanent resident of State of Himachal Pradesh and are of young age. There is no tangible material on record to suggest that the petitioners or any of them has any criminal antecedents. There is also nothing on record to suggest that in case of release of petitioners on bail, the trial of the case may be affected adversely or that they have the potential to tamper with prosecution evidence.

7. Pre-trial incarceration cannot be ordered as rule. The petitioners are already in custody since 26.10.2021. The trial of the case is likely to take some time before conclusion. In the given facts and circumstances of the case, no fruitful purpose will be served by prolonging the incarceration of petitioners.

8. In the peculiar facts of the case, all the petitions are allowed and the petitioners are ordered to be released on bail in case FIR No. 175 of 2021 registered at Police Station Jogindernagar, District Mandi, H.P. under Sections 341, 323, 302, 201 read with Section 34 of the Indian Penal Code, on their furnishing personal bonds in the sum of Rs. 25,000/- each with one surety each in the like amount to the satisfaction of learned trial Court. However, this order shall be subject to following conditions:-

i) That the petitioners shall regularly attend the trial.
ii) That the petitioners 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 the Court or to the Police.
iii) That the petitioners shall not in any manner tamper with the prosecution evidence.
iv) That any indulgence of petitioners in similar activities during the continuance of this order shall entail cancellation of the bail granted to the petitioners.
v) That the petitioners shall not leave India without permission of learned trial Court till continuance of investigation and trial, if any.
vi) That in case of violation of any of the conditions, the bail granted to the bail applicant shall be liable for cancellation.

9. Any observation made herein above shall not be taken as an expression of opinion on the merits of the case and the trial Court shall decide the matter uninfluenced by any observation made herein above.

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

BETWEEN:-

RAKESH KUMAR
AGED ABOUT 42 YEARS,
S/O SRHI MULKH RAJ,
R/O GANDHINAGAR, TEHSIL &
DISTRICT JALANDHAR, PUNJAB,
PRESENTLY LODGED AT DISTRICT JAIL
BILASPUR, H.P., THROUGH HIS BROTHER
NAMELY SHRI CHAMAN LAL. ....PETITIONER

(BY SH. RAVI TANTA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH ....RESPONDENT

(BY SH. ARVIND SHARMA,
ADDITIONAL ADVOCATE GENERAL,

ASI SANJEEV JAMWAL, I/O POLICE STATION PADHAR,
DISTT. MANDI, HP PRESENT ALONGWITH RECORD.)

CRIMINAL MISC. PETITION (MAIN)
No. 548 of 2022
Decided on: 11.05.2022

Code of Criminal Procedure, 1973 – Section 439 Read With Section 20 and 29 of Narcotic Drugs and Psychotropic Substances Act 1985 - Bail - Commercial quantity - Recovery of 1 kg and 998 grams of cannabis from accused persons - Held - As per the status report, the cannabis recovered is of commercial quantity so rigors of section 37 of NDPS Act are attracted - In the petition, the petitioner succeeded in making out case for his enlargement on bail on the ground that recovery of contraband in question was effected from the bag belonging

to co-accused Deepak Kumar – Search-cum-seizure memo prepared, post recovery of contraband does not bear signatures of the petitioner - From the records, it appears that CDRs does not indicate any call having been made by the petitioner - The factors brought forth by the petitioner are sufficient to be considered as reasonable grounds in terms of section 37 of NDPS Act for believing that petitioner is not guilty of offences alleged against him and therefore, he has made out a case for enlargement on bail --Bail granted -- Petition disposed of. [Para 4 (i) & 4 (ii)]

Cases referred:

State of Kerala etc. vs. Rajesh etc. AIR 2020 SC 721;
Union of India through Narcotics Control Bureau, Lucknow vs. MD. Nawaz Khan, (2021) 10 SCC 100;

This petition coming on for orders this day, the Court passed the following:

ORDER

Petitioner seeks regular bail by means of instant petition filed under Section 439 of the Code of Criminal Procedure in FIR No. 25 of 2020, dated 17.2.2020, registered under Sections 20 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'NDPS Act') at Police Station Padhar, District Mandi, H.P. Besides the petitioner there are two other accused in the said FIR namely Deepak Kumar and Ev Raj @ 'Guru'.

2. *The **case of the prosecution** is that:-*

2(i) *On 17.2.2020 at about 12.15 p.m., a police party on a routine patrol duty stopped a bus, which came from Manali and was going towards Kangra. The passengers occupying seat Nos. 18 and 19 appeared perplexed. This raised the suspicion of the police personnel. The occupant of seat No. 19 gave his identity as Deepak Kumar, whereas, the person sitting on seat No. 18 disclosed his name as Rakesh Kumar (petitioner herein). Deepak Kumar identified himself to be the owner of a bag lying on the overhead rack in the bus.*

The police personnel thought it prudent to carry out search of the bag. The search was carried out in accordance with law. From the bag belonging to Deepak Kumar, 1 kg & 998 grams of cannabis was recovered which led to registration of the FIR in question. Deepak Kumar and petitioner were arrested on the same day i.e. 17.2.2020.

2(ii) During investigation, Deepak Kumar statedly disclosed about procuring the contraband in question on 17.2.2020 in Mandi from a person known to him as 'Guru'. He also reportedly disclosed having purchased the contraband against cash payment of `1,10,000/- made to said 'Guru' and that after purchasing cannabis from 'Guru' he (Deepak Kumar) came to the bus stand and met his companion Rakesh Kumar (petitioner). After discussion, both of them boarded a bus of the New Prem Bus Service and started from Mandi. The contraband in question, kept in Deepak Kumar's bag was eventually recovered by the police on 17.2.2020.

2(iii) According to the prosecution, Deepak Kumar further disclosed that for procuring the cannabis from co-accused Ev Raj, he remained in constant touch with Ev Raj on his mobile number. The Investigating Agency is stated to have obtained billing address for obtaining the CDR of the mobile number disclosed by Deepak Kumar. The photograph affixed on CAF, the CDR of one of the mobile number was stated to be belonging to Ev Raj @ Evu @ Guru. Ev Raj was apprehended on 21.7.2020. Investigations were carried out from him as well.

2(iv) Co-accused Ev Raj statedly disclosed that he used to prepare cannabis for selling to various customers. He had met Rakesh Kumar (petitioner) during previous year's Dussehra festival. Petitioner used to fix tents in Dussehra and Shivratri Festivals at Kullu and Mandi, respectively. Petitioner had introduced Ev Raj to Deepak Kumar. After getting acquainted with Deepak Kumar, Ev Raj had sold 800 grams of cannabis to Deepak Kumar last year (2019). On 5.2.2020 Deepak Kumar had called him (Ev Raj) and demanded two kilograms of cannabis. Both of them (Ev Raj & Deepak Kumar) were in

constant touch with each other on phone. On 16.2.2020 Ev Raj asked Deepak Kumar to meet him at Kullu bus stand alongwith the requisite money. Deepak Kumar met Ev Raj on 16.2.2020 at Kullu bus stand and handed him the demanded amount. On receipt thereof, Ev Raj assured him that two kilograms of cannabis will reach him (Deepak Kumar) near Mandi bus stand. As a result of this understanding the cannabis in question was finally handed over to Deepak Kumar at the taxi stand Mandi. Deepak Kumar and petitioner (Rakesh Kumar) were arrested on 17.2.2020 and the 3rd co-accused Ev Raj was arrested on 21.7.2020.

2(v) *A regular bail petition filed by the present petitioner was dismissed by the learned Special Judge (III), Mandi, District Mandi, H.P. on 29.7.2021.*

3. Contentions:-

3(i) Praying for release of the petitioner on bail, learned counsel has argued that:

> **(i)** The contraband in question was not recovered from the conscious possession of the bail petitioner. Rather it was recovered from the possession of accused Deepak Kumar. Petitioner had no role to play in the alleged recovery and possession of the contraband. He further submitted that there is no evidence regarding petitioner's involvement with the alleged recovery of the contraband.
>
> **(ii)** The case of the investigating agency is that co-accused Deepak Kumar and the petitioner (Rakesh Kumar) were travelling together in the bus. Hence, petitioner is also to be presumed to be in possession of the contraband recovered from Deepak Kumar's bag, however, the bus tickets appended with the charge-sheet do not support the prosecution case. The petitioner and co-accused Deepak Kumar were not travelling together.
>
> **(iii)** The search-cum-seizure memo prepared by the investigating agency post alleged recovery of the contraband, shows that it was only got signed from co-accused Deepak Kumar. Signatures of the bail petitioner are not there on search-cum-seizure memo.

(iv) Against column No. 2 in form NCB-I, name of only one accused i.e. Deepak Kumar finds mention as an offender. Petitioner's name is nowhere reflected in the NCB form.

(v) During the course of search and seizure operation, the investigating agency had clicked many photographs which have been appended alongwith the charge-sheet. In all these photographs, only co-accused Deepak Kumar is visible.

On the basis of above submissions, learned counsel for the petitioner vehemently argued that there are reasonable grounds to believe, at this stage, that the bail petitioner is not guilty of the offence alleged against him. It was further submitted that petitioner will abide by all the conditions, as may be put to him at the time of grant of bail and further that he will not influence the prosecution witnesses or tamper with the prosecution evidence in any manner in case of his enlargement on bail.

3(ii) Learned Additional Advocate General, while opposing the bail petition, pointed out that commercial quantity of cannabis was recovered in the FIR in question. Petitioner's involvement in the commission of the alleged offence cannot be ruled out at this stage. He is not entitled to be released on bail keeping in view the peculiar facts of the case. It was further argued that petitioner may intimidate or influence the witnesses acquainted with the facts of the case in case he is enlarged on bail. Therefore, considering the provisions of Section 37 of the NDPS Act, petitioner does not deserve to be enlarged on bail.

4. Observations:-

4(i) As per the status report, the cannabis weighing about 1 kg & 998 grams was recovered from the possession of co-accused Deepak Kumar and petitioner Rakesh Kumar. Considering the commercial quantity of cannabis involved in the case, rigors of Section 37 of the NDPS Act are attracted. Section 37 reads 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 subsection (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 make out a case for release on bail, petitioner has to satisfy the following twin conditions imposed in the aforesaid section:-

(i) Court should be satisfied that there are reasonable grounds for believing that the petitioner is not guilty of such offences; and
(ii) Petitioner is not likely to commit any offence while on bail.

In this regard, Hon'ble Apex Court in ***State of Kerala etc. vs. Rajesh etc.*** **AIR 2020 SC 721**, held as under vide paras 19 to 20:-

"19. This Court has laid down broad parameters to be followed while considering the application for bail moved by the accused involved in offences under NDPS Act. In Union of India Vs. Ram Samujh and Ors. 1999(9) SCC 429, it has been elaborated as under:

"7. It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in a murder case, the accused commits

murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting deathblow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are a hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under the NDPS Act, has succinctly observed about the adverse effect of such activities in Durand Didier v. Chief Secy., Union Territory of Goa [(1990) 1 SCC 95)] as under:

> 24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine.

8. To check the menace of dangerous drugs flooding the market, Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory conditions provided in Section 37, namely,

(i) there are reasonable grounds for believing that the accused is not guilty of such offence; and

(ii) that he is not likely to commit any offence while on bail are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate while ordering the

> release of the respondent accused on bail. Instead of attempting to take a holistic view of the harmful socioeconomic consequences and health hazards which would accompany trafficking illegally in dangerous drugs, the court should implement
> the law in the spirit with which Parliament, after due deliberation, has amended."

> 20. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates."

In para 21 of the aforesaid judgment, it was held that the expression "reasonable grounds" appearing 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 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.

With respect to "reasonable ground to believe that the person is not guilty of offence", following was observed by the Hon'ble Apex Court in ***Union of India through Narcotics Control Bureau, Lucknow vs. MD. Nawaz Khan,*** **(2021) 10 SCC 100:-**

"22. The standard prescribed for the grant of bail is 'reasonable ground to believe' that the person is not guilty of the offence. Interpreting the standard of 'reasonable grounds to believe', a two-judge Bench of this Court in *Shiv Shanker Kesari* (supra), held that:

> "7. *The expression used in Section 37(1)(b)(ii) is "reasonable grounds". The expression means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.*
>
> 8. The word "reasonable" has in law the prima facie meaning of reasonable in regard to those circumstances of which the actor, called on to act reasonably, knows or ought to know. It is difficult to give an exact definition of the word "reasonable".
>
> > "7. ... In *Stroud's Judicial Dictionary*, 4th Edn., p. 2258 states that it would be unreasonable to expect an exact definition of the word 'reasonable'. Reason varies in its conclusions according to the idiosyncrasy of the individual, and the times and circumstances in which he thinks. The reasoning which built up the old scholastic logic sounds now like the jingling of a child's toy."
>
> (See *Municipal Corpn. of Delhi v. Jagan NathAshok Kumar* [(1987) 4 SCC 497] (SCC p. 504, para 7) and *Gujarat Water Supply and Sewerage Board v. Unique Erectors (Gujarat)*
> *(P) Ltd.* [(1989) 1 SCC 532]
>
> xxx xxx xxx
>
> 10. The word "reasonable" signifies "in accordance with reason". In the ultimate analysis it is a question of fact,

whether a particular act is reasonable or not depends on the circumstances in a given situation. (See *Municipal Corpn. of Greater Mumbai v. Kamla Mills Ltd.* [(2003) 6 SCC 315]
11. The court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty." (emphasis supplied)

4(ii) After hearing learned counsel for the parties and having gone through the status report as well as the record produced by the respondent-State, I am of the considered view that for the following factors, the petitioner has made out a case for his enlargement on bail at this stage:

(a) It is the case of the prosecution that recovery of contraband in question was effected from the bag belonging to co-accused Deepak Kumar. Co-accused Deepak Kumar had statedly identified himself to be owner of the bag in question. As per prosecution, petitioner was only occupying the seat adjoining to the one occupied by Deepak Kumar and further both of them were travelling in a public bus.

(b) It is the case of prosecution that it was co-accused Ev Raj who had supplied the recovered cannabis to co-accused Deepak Kumar. Ev Raj had statedly disclosed during investigation that petitioner had introduced him to Deepak Kumar during 2019's Dussehra festival.

(c) On perusal of the status report and the record, *prima facie,* it appears that perhaps co-accused Deepak Kumar and petitioner Rakesh Kumar were acquainted with each other and further that it was the petitioner who had introduced Deepak Kumar to Ev Raj. It

was another co-accused Ev Raj who had sold the recovered cannabis to Deepak Kumar.

(d) Search-cum-seizure memo prepared, post recovery of the contraband, does not bear signatures of the petitioner. It is only co-accused Deepak Kumar, who had signed search-cum-seizure memo.

(e) The NCB form, which is filled at the spot, does not mention petitioner as an offender in column No. 2. *Prima facie*, it seems that petitioner does not even figure in the photographs clicked by the investigating agency at the spot.

(f) *Prima facie,* from the record it appears that CDR does not indicate any call having been made by the petitioner.

Though these are all the factors to be adjudicated upon by the Court of competent jurisdiction during trial after considering the evidence in accordance with law, however, in the facts of the instant case, at this stage, the above extracted grounds are sufficient to be considered as reasonable grounds in terms of Section 37 of the NDPS Act and for believing that the petitioner is not guilty of offences alleged against him.

In the facts of the instant case as have come out in the status report and the record, I am of the considered view that at this stage, there are reasonable grounds to believe that the petitioner is not guilty of the offence alleged against him and, therefore, he has made out a case for enlargement on bail. The petitioner is in jail since 17.2.2020. More than two years have gone by. The respondent-State has not indicated any criminal record of the petitioner. It can be reasonably presumed that petitioner is not likely to commit offence in future. Apprehension of prosecution that the petitioner might tamper with the prosecution evidence and influence its witnesses can be taken care of by imposing stringent conditions.

5. Accordingly, the present petition is allowed and petitioner is ordered to be released on bail in the aforesaid FIR on his furnishing personal bond in the sum of `1,00,000/- (rupees one lacs only) with two local sureties in the

like amount each to the satisfaction of the learned trial Court 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.

(vii) It is made clear that in case petitioner is arraigned as an accused, in future, in any FIR, then his bail is liable to be cancelled. It is open for the Investigating Agency to move appropriate application in that regard.

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 uninfluenced by any of 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 SATYEN VAIDYA, J.

BETWEEN:

DILBAR KHAN AGED ABOUT 24 YEARS SON OF SH. FATEH KHAN, RESIDENT OF VILLAGE CHUNJRI KOT KAPRAYAS, P.O. JASSAL TEHSIL KARSOG, DISTRICT MANDI, H.P. PRESENTLY LODGED IN DISTRICT JAIL KAITHU, DISTRICT SHIMLA, H.P.

……..PETITIONER

(BY SHRI RAJESH MANDHOTRA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

………RESPONDENT

(BY SHRI P.K. BHATTI AND SHRI BHARAT BHUSHAN, ADDITIONAL ADVOCATE GENERALS WITH SHRI KUNAL THAKUR, DEPUTY ADVOCATE GENERAL)

CRIMINAL MISCELLANEOUS PETITION (MAIN) No. 948 of 2022

BETWEEN:

RAJINDER SHARMA AGED ABOUT 28 YEARS, S/O SH. SHANKAR DEV SHARMA, RESIDENT OF VILLAGE SABOT, P.O. TATAPANI, TEHSIL KARSOG, DISTRICT MANDI, H.P. PRESENTLY LODGED IN DISTRICT JAIL KAITHU, DISTRICT SHIMLA, H.P.

……..PETITIONER

(BY SHRI RAJESH MANDHOTRA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

………RESPONDENT

BY SHRI P.K. BHATTI AND SHRI BHARAT BHUSHAN, ADDITIONAL ADVOCATE GENERALS WITH SHRI KUNAL THAKUR, DEPUTY ADVOCATE GENERAL)

CRIMINAL MISCELLANEOUS PETITION(MAIN)
Nos. 947 & 948 of 2022
RESERVED ON:27.05.2022
DECIDED ON: 31.05.2022

Code of Criminal Procedure, 1973 - Section 439 Read With Sections 21 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 and Sections 181,192 and 196 of Motor Vehicle Act, 1988 – Bail – Held -- Recovery of 142 grams heroin from the vehicle occupied by the petitioner - Quantity of contraband in the case is in intermediate quantity and rigor of section 37 of and NDPS Act will not be applicable - Contraband recovered is less than commercial quantity is not itself sufficient to grant bail -- Keeping in view the substantial quantity of heroin recovered from the petitioner, it will not be unreasonable to assume that petitioners were carrying the contraband for sale to consumer which definitely include adolescents and young students - Absence of any other case against the petitioners does not necessarily means that the petitioners are first offender -- Bail application dismissed. (Para 9, 11 & 12)

These petitions coming on for orders this day, the Court passed the following :-

O R D E R

Both these petitions arise out of the same FIR and involve identical questions of facts and law, therefore, both the petitions are being disposed of by a common order.

2. The case under Section 21 & 29 of Narcotic Drugs & Psychotropic Substances (for short "ND&PS") Act and Sections 181, 192 and 196 of Motor Vehicles Act, has been registered at Police Station, Sunni, District Shimla, H.P., in case FIR No. 24/2022, dated 10.3.2022.

3. Police recovered and seized 142 grams heroin from vehicle No. HP-01M-2445, which was occupied by the petitioners. Petitioner Dilbar Khan in Cr.M.P(M) No. 947 of 2022, was on driving seat and petitioner Rajinder Sharma in Cr.M.P(M) No. 948 of 2022, was the other occupant of the vehicle. Police had prior intimation about the crime. Compliance of Section 42(2) of ND&PS Act was made and thereafter the contraband was recovered at about 10.30 p.m. at place Bashalti near Madhod Kenchi within the jurisdiction of Police Station, Sunni.

4. As per secret information received by police, two vehicles bearing No. HR-26BP-1008 and HP-01M-2445 were approaching Sunni and occupants thereof were carrying contraband. The information was found to be correct and both the aforesaid vehicles were apprehended. Vehicle No. HR-26BP-1008 was ahead and vehicle No. HP-01M-2445 followed after about 03 minutes. Whereas nothing incriminating was recovered from vehicle No. HR-26BP-1008, 142 grams of heroin was recovered from the other vehicle as noticed above. Vehicle No. HR 26BP-1008 was occupied by two persons named Mohit and Parvez.

5. According to police, all the occupants of both the vehicles had brought heroin from Delhi for being sold to the consumers in Sunni area. Petitioners were arrested on 10.3.2022. The investigation is stated to be complete and challan is in the process of being filed in the Court.

6. Petitioners have approached this Court for grant of bail in above noted case, on the grounds that they are innocent and have been falsely implicated. Their co-accused Mohit and Parvez have been enlarged on bail by learned Special Judge (CBI), Shimla on 20.4.2022. Petitioners are local residents of Himachal Pradesh and belong to respectable families. They are having roots in the society and there is no apprehension of their absconding or fleeing from the course of justice. Petitioners have undertaken not to tamper with the prosecution evidence.

7. I have heard learned counsel for the petitioners as well as learned Additional Advocate General and have also gone through the status report.

8. Learned counsel for the petitioners has contended that the quantity of the contraband recovered in the case is of intermediate i.e. less than commercial quantity. Petitioners have no past history of involvement in offences under ND&PS Act. Their prolonged incarceration will not serve any purpose.

9. No doubt the quantity of contraband in the case is intermediate and therefore the rigors of Section 37 of NDPS Act will not be applicable. Merely because the quantity of contraband recovered is less than commercial quantity may not by itself be sufficient to grant bail.

10. The menace of drug abuse is not unknown in the society in modern times. The victims are innocent adolescents besides others. The drug abuse more often than not leads to drug addiction, which ruins the lives of substantial number of such persons. The question arises as to how young adolescents, who by and large remain in custody of their guardians, are able to procure the prohibited drug. Definitely the drug is made available through a supply chain managed in an organized manner.

11. Recovery of 142 grams of heroin from petitioners can be easily perceived as part of the above stated organized crime. 142 grams of heroin

cannot be presumed to be in possession of petitioners for self consumption. In view of this matter, the petitioners are not entitled for being released on bail. The rights of petitioners have to be weighed against larger public interest. In case of release of petitioners on bail, there is likelihood of their again indulging in similar activity thereby putting lives of numerous of people to peril.

12. As noticed above, keeping in view the substantial quantity of heroin recovered from the petitioners, it will not be unreasonable to assume that the petitioners were carrying the contraband for sale to the consumers which definitely includes number of adolescents and young students etc. Absence of any other case against the petitioners under ND&PS Act does not necessarily mean that petitioners are first offenders under the ND&PS Act. The manner in which the operation of petitioners has been discovered during investigation is definitely evident of their clear intent to commit offence.

13. In light of above discussion, petitioners are not held entitled to bail in the above noted case. Accordingly, the instant petitions are dismissed.

Pending miscellaneous application(s), if any, shall also stand disposed of.

BEFORE HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

BETWEEN:

HARISH KUMAR ALIAS RISHU, S/O SH. PARMANAND, AGED ABOUT 36 YEARS, R/O VILLAGE GHUMARLI, P.O. KANJIAN, TEHSIL BHORANJ, DISTRICT HAMIRPUR, H.P.

……..PETITIONER

(BY SHRI VINOD THAKUR, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH THROUGH PRINCIPAL SECRETARY (HOME0 TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-02.

………RESPONDENT

(BY SHRI P.K. BHATTI & SHRI BHARAT BHUSHAN ADDITIONAL ADVOCATE GENERALS WITH SHRI KUNAL THAKUR, DEPUTY ADVOCATE GENERAL)

CRIMINAL MISCELLANEOUS PETITION (MAIN) No. 873 of 2022

BETWEEN:

SUNIL SHARMA, S/O SH. VIDYA SAGAR, AGED ABOUT 39 YEARS, R/O VILLAGE AND P.O. LAGMANWIN, TEHSIL BHORANJ, DISTRICT HAMIRPUR. H.P.

……..PETITIONER

(BY SHRI VINOD THAKUR, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH THROUGH PRINCIPAL SECRETARY (HOME) TO THE GOVERNMENT OF HIMAHCAL PRADESH, SHIMLA-02.

……..RESPONDENT

(BY SHRI P.K. BHATTI & SHRI BHARAT BHUSHAN ADDITIONAL ADVOCATE GENERALS WITH SHRI KUNAL THAKUR, DEPUTY ADVOCATE GENERAL)

CRIMINAL MISCELLANEOUS PETITION (MAIN) No. 848 of 2022

BETWEEN:

KARTAR SINGH, AGED ABOUT 38 YEARS, S/O SH. MEHAR SIGH, RESIDENT OF VILLAGE AND PO DUMEHAR, TEHSIL GHUMARWIN, DISTRICT BILASPUR, H.P. PRESENT IN JUDICIAL LOCKUP IN DISTRICT JAIL HAMIRPUR, H.P.

........PETITIONER

(BY SMT. MADHURIKA VERMA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

{ ....RESPONDENT

(BY SHRI P.K. BHATTI & SHRI BHARAT BHUSHAN ADDITIONAL ADVOCATE GENERALS WITH SHRI KUNAL THAKUR, DEPUTY ADVOCATE GENERAL)

CRIMINAL MISCELLANEOUS PETITION(MAIN)
Nos. 872, 873 & 848 / 2022
RESERVED ON:06.05.2022
DECIDED ON : 09.05.2022

Criminal Procedure Code, 1973 - Section 439 read with Sections 39 (1)(A), 39(2) 40 & 44 of HP Excise Act and Sections 420, 467, 468, 471 and 120–B of IPC --Criteria of bail-Petitioners contended that investigation for them has already been completed and nothing incriminating has been found against them - As petitioners, Harish Kumar and Kartar Singh Alias Karan, were simply the salesman working under contractor Neeraj Thakur and obeyed the dictates of their master only and other petitioner Sunil was running licenced Ahata - There is no allegations against the petitioners that they had any role in manufacture of such liquor or its procurement and investigation reveals that consignment was received through another employee of the contractor – Held - Petitioners are in custody since 25.01.2022 and their custody will not yield any fruitful purpose – Pre-trial incarceration cannot be ordered as a matter of rule and further the petitioners are permanent residents of State of Himachal Pradesh so there is no likelihood of their absconding from the course of justice -Bail granted - Petition allowed.(Para 7, 10 & 13)

These petitions coming on for orders this day, the Court passed the following :-

O R D E R

All these petitions are being decided by a common order, as common questions of law and facts are involved.

2. The case as setup by respondent is that on 23.01.2022, the police officials of Police Station Bhoranj, received a secret information that Harish Kumar @ Rishu (Petitioner in Cr.MP(M) No. 872 of 2022), working as salesman at liquor vend Bassi, had concealed boxes of country liquor "Santra VRV FOOLS" under culvert near village Plassi, which could be of spurious nature. "*Rukka*" was sent to the police station for registration of FIR and the police party immediately left for spot. On identification of petitioner Harish Kumar @ Rishu, 22 boxes of country liquor "Santra" brand with "VRV FOOLS" printed on each bottle were recovered and seized from underneath a culvert. During investigation, petitioner Harish Kumar @ Rishu disclosed that he was working as a salesman in the liquor vend at Bassi, which belonged to Neeraj Thakur and said Neeraj Thakur was brother-in-law of the person, accused in a case registered at Police Station Sundernagar, in respect of deaths of persons due to consumption of spurious liquor. According to petitioner Harish Kumar @ Rishu, on 18.01.2022, at about 9:30 am, Ashish Soni, who was working as salesman as also the driver for Neeraj Thakur had unloaded 20 boxes of liquor "Santra VRV FOOLS" at his liquor vend without valid pass. He further disclosed that on 19.01.2022, Contractor Neeraj Thakur had informed him telephonicallythat since some persons had died at Sundernagar after consuming liquor "Santra VRV FOOLS", so the liquor of said brand should be concealed. He, accordingly loaded 12 unsold boxes of liquor "Santra VRV FOOLS" in his vehicle and visited Kartar Singh @ Karan (Petitioner in Cr.MP(M)

No. 848 of 2022) who was working as salesman at liquor vend "Chahab", loaded 10 more boxes of the same brand of liquor and thereafter both of them concealed the boxes at the place from where it was recovered by the police.

3. Sunil Sharma (Petitioner in Cr.MP(M) No. 873 of 2022) was stated to be running an "*Ahata*" (bar attached with retail liquor vend) at place Sulagwan, Tehsil Bhoranj, District Hamirpur, H.P. and is also stated to have criminally conspired with a motive to sell the spurious liquor without license.

4. The investigation is stated to be complete and report under Section 173 Cr.P.C. has been filed in the Court against petitioners Harish Kumar @ Rishu, Kartar Singh @ Karan and Sunil Sharma besides other co-accused Ashish Soni, Kuldeep, Rajiv Kumar, Neeraj Thakur and Gaurav Minhas, under Sections 39(1)(a), 39(2), 40, 44 of Himachal Pradesh Excise Act and Sections 420, 467, 468, 471 and 120-B of Indian Penal Code.

5. The allegations against the accused persons arrayed in above noted case are that they criminally conspired with each other to sell spurious liquor and in such process committed offences of fraud and forgery etc.

6. Petitioners have approached this Court for grant of bail under Section 439 of Cr.P.C. in above noted case for the second time. Their earlier bail applications were rejected by this Court vide order dated 16.03.2022, as the investigation was still continuing. Petitioners Sunil Sharma, Kartar Singh @ Karan and Harish Kumar @ Rishu had filed bail applications, respectively, bearing Cr.MP(M) Nos. 429, 495 and 507 of 2022. The samples of such liquor had been sent for chemical examination. Keeping in view the entirety of the circumstances as prevailed at the stage of consideration of earlier applications of petitioners, such applications were rejected at that stage.

7. Petitioners have contended that the investigation qua them has already been completed and nothing incriminating has been found against them. As per petitioners, Harish Kumar @ Rishu & Kartar Singh @ Karan, they were simply the salesmen working under Contractor Neeraj Thakur and had obeyed

the dictates of their master only. Petitioner Sunil Sharma has contended that he was running license "Ahata" (Bar attached with retail liquor vend) and had been supplied the liquor by the employees of the Contractor. He did not have any knowledge about the authenticity or genuineness of the product supplied to him. It is further contended on behalf of the petitioner that they are permanent resident of State of Himachal Pradesh and there is no apprehension of their fleeing from the course of justice. Petitioners have undertaken not to tamper with the prosecution evidence. They have further undertaken to abide by all the conditions as may be imposed.

8. I have heard learned counsel for the petitioners as well as learned Additional Advocate General and have also gone through the status report as well as record of the case.

9. The investigation is complete and challan has been filed in the Court. Perusal of chemical analysis report reveals that the samples of country liquor are opined to be unfit for human consumption on account of presence of suspended particles found in such samples.

10. There is no allegations against the petitioners that they had any role in the manufacture of such liquor or its procurement. The investigation revealed that petitioners Harish Kumar @ Rishu and Kartar Singh @ Karan were salesmen of Contractor and had received the consignment through another employee of the Contractor. They had disposed or concealed the liquor bottles on the asking of the Contractor. As regards petitioner Sunil Sharma, he again has not been attributed with any specific role in manufacture or procurement of the liquor.

11. Though the samples of liquor have been opined to be unfit for human consumption, but it is not the case of respondent-State that any consumer of such product, after having purchased the liquor from liquor vend where petitioners Harish Kumar @ Rishu and Kartar Singh @ Karan were

salesmen or the "Ahata" run by petitioner Sunil Sharma had suffered any ailment, physical discomfort or death.

12. Respondent has not placed any tangible material on record to show that petitioners are influential persons or have the potential to tamper with the prosecution evidence. It is also not the case of respondent that release of petitioners on bail will in any manner affect the trial of the case adversely.

13. Petitioners are in custody since 25.01.2022. Their further custody will not yield any fruitful purpose. Pre trial incarceration cannot be ordered as a matter of rule. The trial of the case is likely to take considerable time before conclusion.

14. Petitioners are permanent resident of State of Himachal Pradesh and there is no likelihood of their absconding or fleeing from the course of justice. No past criminal history is attributed to the petitioners.

15. In the peculiar facts and circumstances of the case, the petitions are allowed and petitioners are ordered to be released on bail in case FIR No. 10.2022, dated 24.01.2022, under Sections 39(1)(a), 39(2), 40, 44 of H.P. Excise Act and Sections 420, 467, 468, 471 and 120-B of IPC, registered at Police Station Bhoranj, District Hamirpur, H.P., on their furnishing personal bond in the sum of Rs. 25,000/- each with one surety each in the like amount to the satisfaction of learned trial court. This order shall, however, be subject to the following conditions:-

i) Petitioners shall regularly attend the trial of the case before learned Trial Court and shall not cause any delay in its conclusion.

ii) Petitioners shall not tamper with the prosecution evidence, in any manner, whatsoever and shall not dissuade any person from speaking the truth in relation to the facts of the case in hand.

iii) Petitioners shall be liable for immediate arrest in the instant case in the event of petitioners violating the conditions of this bail.

(iv) Petitioners shall not leave India without permission of learned trial Court till completion of trial.

16. Any expression of opinion herein-above shall have no bearing on the merits of the case and shall be deemed only for the purpose of disposal of these petitions.

BEFORE HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

Between:-

SMT. SULEKHA SHARMA
W/O SH. SUNIL BHARDWAJ,
RESIDENT OF VILLAGE NARWANA,
POST OFFICE YOL, CANTT., TEHSIL
DHARAMSHALA, DISTRICT KANGRA (H.P.)
PRESENTLY ASSISTANT PROFESSOR (POL.SC.),
BABA BALAK NATH DEGREE COLLEGE, CHAKMOH,
DISTRICT HAMIRPUR (H.P.)

….PETITIONER

(BY MR. BHUVNESH SHARMA, ADVOCATE)

AND

4. THE STATE OF HIMACHAL PRADESH
THROUGH ITS PRINCIPAL SECRETARY
(LANGUAGE & CULTURE), TO THE GOVT.
OF HIMACHAL PRADESH, SHIMLA-171002 (H.P.)

5. BABA BALAK NATH TEMPLE TRUST, DEOTH SIDH,
DISTRICT HAMIRPUR (H.P.), THROUGH ITS CHAIRMAN
-CUM- S.D.O (CIVIL), BARSAR, DISTRICT
HAMIRPUR (H.P.).

6. COMMISSIONER, BABA BALAK NATH TEMPLE TRUST DISTRICT HAMIRPUR-CUM-DEPUTY COMMISSIONER, HAMIRPUR (H.P.).

7. THE CHAIRMAN, BABA BALAK NATH TEMPLE TRUST, DEOTH SIDH-CUM-S.D.O (CIVIL), BARSAR, DISTRICT HAMIRPUR (H.P.)

8. THE PRINCIPAL, BABA BALAK NATH DEGREE COLLEGE, CHAKMOH, TEHSIL BARSAR, DISTRICT HAMIRPUR (H.P.)

..RESPONDENTS

(MR. DESH RAJ THAKUR, ADDL. A.G. FOR R-1.
MR. K.D. SOOD, SR. ADVOCATE WITH MS. RANJANA CHAUHAN, ADVOCATE FOR R-2 TO R-5)

CIVIL WRIT PETITON
No. 365 of 2016
Reserved on: 27.04.2022
Decided on: 02.05.2022

Constitution of India, 1950 - Article 226 -- Service Matter -- The respondent ordered to reduce the pay of the petitioner w.e.f the year 1995 and further directed the recovery to be effected from her salary -- Held - Order dated 06.01.2016, 03.12.2008 and order dated 05.11.2014 have attained the finality due to which respondent number 3 cannot supersede these orders and specifically when these orders had imprimatur of this court through orders passed from time to time in different proceedings -- The respondents are restrained from affecting any recovery from the petitioner in pursuance to order dated 06.01.2016 and 08.01.2016 - The respondents directed to refund the entire amount to the petitioner with interest at the rate of 6% per annum within eight weeks from judgment and the petitioner held entitled for pay band (iv) from due date - Petition stands disposed of.(Paras 13, 14, & 17)

This petition coming on for orders this day, the Court passed the following:-

ORDER

By way of instant petition, petitioner has prayed for the following substantive reliefs:-

"i "That the order dated 6.1.2006 passed by the respondent-Commissioner, Annexure P-13, whereby the pay of the petitioner has been ordered to be reduced w.e.f. the year 1995 and recoveries have been ordered to be effected from her salary, may kindly be quashed and set aside.

ii) That the letter, dated 8.1.2006 issued by respondent No. 2, Annexure P-14, pursuant to the order dated 6.1.2006, Annexure P-13 may kindly be quashed and set aside and the respondent may further be restrained from reducing the salary of the petitioner and also from effecting any recoveries from her

iii) That the petitioner may kindly be held entitled for grant of pay band IV due to her w.e.f. the due date, with all consequential benefits

iv) That the recoveries already effected from the petitioner may kindly be ordered to be restored to her."

2. Petitioner was appointed as Lecturer in Political Science in respondent No.5 College w.e.f. 06.08.1990 on temporary basis for three months against the payment of consolidated fixed pay of Rs.1800/- per month. Petitioner, however, continued to serve respondent No.5-College in the same capacity. She obtained M.Phil degree in Political Science on 06.07.1994. Thereafter petitioner was allowed running scale of 2200-4000/- w.e.f. 01.04.1995.

3. After initial appointment of the petitioner, respondent No.5 College had started recruitment process for fresh appointment to the post of Lecturer in Political Science against the post held by the petitioner. CWP No. 867/1992 was preferred by the petitioner but the petition was later withdrawn due to grant of regular pay-scale to petitioner by respondent No.5 College w.e.f. 01.04.1995.

4. Petitioner became entitled to senior scale on completion of five years after1.4.1995 and to the selection grade on completion of another 5 years, but she was not allowed such benefits. Petitioner approached this Court by way of CWP No. 355 of 2006, which was disposed of on 23.07.2008 in following terms:

> *"The petitioner has preferred this writ petition against the action of respondents, who have refused to release the senior scale and selection grade of Lecturer to her w.e.f. April, 2005. The objection taken by respondents is that she has not qualified the National Eligibility Test and therefore, she is not eligible for the grant, My attention has been invited to Annexure R-2 which has been filed along with the reply and notification issued by University Grant Commission on 14th June, 2006. It is admitted by learned counsel for parties that case of the petitioner is covered by the regulations stating:*
>
> > *"NET shall remain the compulsory requirement for appointment as Lecturer for those with post-graduate degree. However, the candidates having Ph.D. degree in the concerned subject are exempted from NET for PG level and UG level teaching. The candidates having M. Phil degree in the concerned subject are exempted from NET for UG level teaching only."*
>
> *Parties agree and accept that the case of the petitioner is covered by this notification. This writ petition is accepted and a direction is issued to the respondents that the case of petitioner be considered in terms of this notification. Such consideration shall be completed within a period of six weeks from today. This writ petition is disposed of accordingly. There shall be no order as to costs."*

5. In purported compliance to aforesaid orders, Respondent No.2 passed order dated 04.09.2008 and held an amount of Rs. 8.64,809/- recoverable from the petitioner. Respondent No.3, vide correspondence dated 01.12.2008, clarified the correct import of order dated 23.07.2008 passed by learned Single Judge of this Court in CWP No. 355 of 2006 and issued direction to respondent No.2 to examine the case of the petitioner strictly as

per order passed by this Court. In sequel to above, respondent No.2 issued office order dated 03.12.2008 in following terms:-

> *"In compliance to the order/direction of Hon'ble High Court of H.P. dated July 23rd, 2008 and in terms of the UGC, Notification F. No. 1-1/2002 (PS) Exemp. Dated 14-06-2006 and in supersession of the office order Endst. No.902-905/TA-1/SDB/2008 & 906-909/TA/SDB/2008, dated 04-09-2008, Smt. Sulekha Sharma is deemed to be appointed as Lecturer under-graduate classes w.e.f. 01-04-1995 i.e. the date from which grant of scale Rs. 2200-4000 & other allowances applicable to the post of Lecturer (w.e.f. April, 1995). She shall be eligible for the grant of selection grade w.e.f. the date of order passed by the Hon'ble High Court of the (HP) in CWP No. 355/2006 i.e. July 23rd, 2008."*

Thus, petitioner was deemed to be appointed lecturer under-graduate classed w.e.f 1.4.1995. Accordingly, the pay of petitioner was fixed.

6. Aggrieved against the allowance of selection grade w.e.f. 23.07.2008 instead of 01.04.2005 petitioner assailed order dated 03.12.2008 issued by respondent No.2 by way of CWP No. 11893 of 2011 before this Court and also claimed benefit of pay band (iv) as per rules. The petition came to be decided on 02.07.2014 in the following terms:-

> *"Mr. Ramakant Sharma, Advocate, submits at the Bar that the present lis is squarely covered by the judgments rendered by this Court in CWP No 1743/2007 titled as V.D. & Vashistha and anr vs. State of H.P. & ors and other analogous matters decided on 8.7.2010 and in CWP No. 274/2001 titled as Dr. Karan Singh Rana & Ors vs. State of H.P. and ors decided on 31.10.2008.*
>
> *2. in view of this, the present petition is disposed of with a direction to the respondents to consider the case of the petitioner strictly in view of the principles laid down in the judgments cited herein above, within a period of ten weeks,*
>
> *Pending applications, if any, are also disposed of."*

7. In compliance to order dated 02.07.2014 passed by this Court in CWP No. 11893 of 2011, respondent No.2 passed another order dated 05.11.2014 and held as under:-

> *"5. That as far as the relief sought by petitioner is concerned there are two main claims (1) Grant of Sr. scales and selection grade from the due date i.e. 01.04.2000 and 01.04.2005 respectively. (2). For fixation at Rs. 14940 w.e.f. April, 2010. As far as claim no.01 i.e. grant of senior scale and selection grade from the due date is concerned it seems justified in view of the judgment titled as* ***"V.D.Vasishth and another VS State of H.P.& others"*** *which is referred in the order dated 02.07.2014 by the Hon'ble High Court of H.P. The contents of the relevant portion of the above judgment already discussed in para supra. It is also found that the selection grade has already been granted from 23.07.2008 which was due w.e.f. 01.04.2005. The statement of the petitioner also taking in consideration therein she made her statement that there will be no objection to her if the senior scale due from 01.04.2000 is granted alongwith selection grade from 01.04.2005.* ***Hence in view of the above the senior scale and selection grade is allowed to the petitioner from 01.04.2005. As far as claim no. 02 regarding fixation of pay is concerned was also examined and found justified, hence the pay of petitioner will be fixed as per the scales applicable in the institution, therefore, the pay band IV has already been allowed to the petitioner.****.*
>
> *Hence, the matter is decided as per the directions of the Hon'ble High Court of H.P as well as the direction given by the Deputy Commissioner, Hamirpur-cum-Commissioner, Temple vide his office letter No. 714/TA/Court Case/2014 dated 21.10.2014. A copy of the order be sent to the petitioner through the Principal, BBN Degree College, Chakmoh."*

8. Despite passing of order dated 5.11.2014 by respondent No.2, the same was not implemented forcing petitioner to file Contempt Petition being COPC No. 638 of 2015 in this court. In reply to said petition, respondents therein came up with a specific plea as under:-

"5. The petitioner was given the arrear of pre-revise selection grade and revised selection grade by the SDO (C) Barsar-cum-Chairman trust BBN Temple Deotsidh vide letter No. 494-495/TA-II/SDB/2015 dated 20/03/2015. The case regarding payment of arrears of pay band IV claimed by the petitioner has been send to the Director Language Art and Culture H.P. Shimla by the respondent No.1 vide office letter No. 1097/TA-1/LAC/Hmr/2015 dated 17-9-2015.

9. Taking into consideration aforesaid para 5 of the reply filed to said contempt petition, a Division Bench of this Court, on 07.10.2005, passed the following order in COPC No. 638/2015,:-

"The learned Senior Counsel for the respondents stated at the Bar that the respondents have filed the reply. The learned counsel for the petitioner stated that he has already received the copy of the reply and prayed that the Contempt Petition may be disposed of in terms of para 5 of the reply, copy of which has been made available in the open Court.

2. In the given circumstances, the Contempt petition is disposed of along with pending applications, if any, in terms of para 5 of the reply and respondents are directed to do the needful in terms of para 5 of the reply within six weeks from today."

10. Respondent No.3 after disposal of COPC No. 638 of 2015 in aforesaid manner, passed an order dated 06.01.2016, whereby he held the entire service of petitioner w.e.f. 06.08.1990 till 14.06.2006 as gratis and as a consequence thereof, directed recoveries to be affected from the petitioner accordingly. It was held by respondent No.3 that petitioner did not have NET qualification and was only M.Phil. Her services could be said to be in terms of UGC guidelines only w.e.f. 14.06.2006 on which date UGC had exempted NET qualification for those incumbents who were M.Phil and were to teach under graduate classes. It is this order dated 06.01.2016 of respondent No.3, which is under challenge in the present petition.

11. Respondents No. 2 to 5, while admitting the factual position on the one hand, have tried to justify impugned order dated 06.01.2016 Annexure P-13 on the other. It has been submitted on their behalf that petitioner became eligible for senior scale on 14.06.2011 and selection grade on 14.06.2016 and to the benefits of pay band (iv) on completion of another three years of service i.e. 14.06.2019.

12. I have heard learned counsel for the parties and have also gone through the record carefully.

13. The right of petitioner to have senior scale and selection grade considering her service w.e.f 01.04.1995 had already been recognised vide office order dated 03.12.2008 issued by respondent No.2 in pursuance to directions dated 23.7.2008 passed by learned Single Judge of this Court in CWP No. 355 of 2006. Office order dated 03.12.2008 issued by respondent No.2 had not been superseded, set aside or quashed by any authority or the Court.

14. It is not in dispute that vide order dated 05.11.2014 passed by respondent No.2 in compliance to order dated 02.07.2014 passed by this Court in CWP No. 11893 of 2011 the claim of the petitioner with respect to grant of selection grade w.e.f. 01.04.2005 as well as to pay band (iv) was further upheld. Again this order at no point of time had been superseded, set aside or quashed either by any authority or the Court.

15. COPC No. 638 of 2015 was filed by the petitioner with the grievance only that order dated 05.11.2014 had not been implemented. As is evident from para 5 of reply in said contempt petition as noticed above, there was again no denial to the claim of petitioner. Rather, it was represented that case regarding payment of arrears of pay band (iv) claimed by the petitioner had been sent to Director, Language, Art and Culture, Himachal Pradesh on 17.09.2015. It is evident from the records that petitioner, in fact, had agreed

for grant of selection grade to her w.e.f. 23.07.2008, keeping thereafter her claim to pay band (iv) alive.

16. In this view of the matter, order dated 06.01.2016, Annexure P-13 passed by respondent No.3 cannot be sustained for the reasons firstly that office order dated 03.12.2008 Annexure P-7 and order dated 5.11.2014 Annexure P-9 issued by Respondent No.2 had attained finality. Once these orders had attained finality, respondent No.3 could not have superseded these orders especially, when these orders had imprimatur of this Court through orders passed from time to time in different proceedings as noticed above. Secondly, impugned order was passed even without affording any opportunity of being heard to the petitioner and lastly impugned order was passed on wrong interpretation of UGC guidelines dated 14.06.2006. The Notification dated 14.06.2006 issued by the UGC specifically declared that "the candidates having M.Phil degree in the concerned subject **are exempted** from NET for UG level teaching only." Petitioner had qualified her M.Phil examination in July, 1994. On the strength of this Notification dated 14.06.2006, petitioner was held eligible as per UGC guidelines to hold post of Lecturer in Political Science in UG classes. Even impugned order recognized right of petitioner to be eligible for all benefits under UGC norms w.e.f. 14.06.2006. An interpretation, that terms of UGC notification dated 14.06.2006 would be applicable prospectively only, will on one hand be absurd and on the other militate against the very purpose of such notification. In case petitioner was eligible for all benefits under UGC norms w.e.f. the date of issuance of notification, there cannot be any logic to deny her same benefits for the period she had worked with the same qualification. Even otherwise, the purposive construction of the notification dated 14.6.2006 would not be to apply the benefits thereof prospectively only. The term "**are exempted**" used in the notification itself suggest that the benefits thereof would be applicable to the incumbents with requisite M.Phil degree serving as Lecturers though without

NET qualification. Any other interpretation would be absurd especially when the services of petitioner had already been utilized as Lecturer in Political Science for teaching under graduate classes in respondent No.5 College in the same manner as all other Lecturers in the College.

17. In the light of the above discussion, the petition is allowed. Order dated 06.01.2016 Annexure P-13 passed by respondent No. 3 is quashed and set aside as discriminatory being harsh and arbitrary. Consequently, communication dated 8.1.2016 Annexure P-14 issued by respondent No.4 is also quashed and set aside. The respondents are restrained from affecting any recoveries from the petitioner in pursuance to order dated 06.01.2016 Annexure P-13 and order dated 08.01.2016 Annexure P-14. Respondents are further directed to refund the entire amount to the petitioner, if already recovered, with interest @ 6% per annum within a period of eight weeks from the date of passing of this judgment. Further, the petitioner is also held entitled to pay band (iv) from the due date and the respondents are directed to grant the petitioner benefits of pay band (iv) in accordance with the Rules also within the aforesaid period of eight weeks.

18. The petition is disposed of in the aforesaid terms. Pending applications, if any, also stand disposed of.

BEFORE HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

Between:-

SHRI BALBIR SINGH, SON OF
SHRI BIDHI SING, RESIDENT OF
VILLAGE AND POST OFFICE
UPPER LAMBA GAON, TEHSIL
JAISINGHPUR, DISTRICT KANGRA,
H.P. PRESENTLY POSTED AS LECTURER
(HISTORY) IN THE GOVERNMENT SENIOR
SECONDARY SCHOOL, BAWARNA,

DISTRICT KANGRA, H.P.

....PETITIONER

(BY SH. G. C. GUPTA, SR. ADVOCATE WITH MS. MEERA DEVI, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH PRINCIPAL SECRETARY
(EDUCATION) TO THE
GOVT. OF HIMACHAL PRADESH,
SHIMLA-2.

2. DIRECTOR HIGHER EDUCATION,
HIMACHAL PRADESH, SHIMLA-1.

....RESPONDENTS

(SH. DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL WITH SH. GAURAV SHARMA, DEPUTY ADVOCATE GENERAL.)

CIVIL WRIT PETITION
No. 3731 of 2019
Reserved on:27.4.2022
Date of decision:2.5.2022

Constitution of India, 1950 - Article 226 - Service matter - Vide order dated 2nd August 2019 the representation of the petitioner for promotion as Headmaster was rejected – Held - It is not in dispute that promotion to the post of lecturer, in the first instance had been forgone by the petitioner and he was promoted subsequently in September, 2006 when he made request by way of correspondence - It is not the case of the respondents there was some other orders whereby petitioner was promoted as lecturer after having afforded him opportunity to opt - The case of petitioner clearly fail within the ambit of directions issued by a Division Bench of this Court in CWP number 1145 of 2011 decided on 05.07.2012 - The order passed against the petitioner quashed and set aside and the respondents are directed to promote him as

headmaster from the date his immediate junior was promoted to the post and grant him all consequential benefits - Petition disposed of. (Paras 13 & 14)

This petition coming on for orders this day, the Court passed the following:

O R D E R

By way of instant petition, petitioner has prayed for following substantive reliefs:

> "i) That a writ in the nature of certiorari may kindly be issued thereby quashing the order dated 2nd August, 2019 (Annexure P-13) whereby the representation of the petitioner for promotion as Head Master was rejected.
>
> ii) That a writ of mandamus may kindly be issued directing the respondents to promote the petitioner considering him at Sr. No. 2809 in the corrected Seniority List to the post of Head Master and fix his seniority accordingly with all consequential benefits".

2. The case of petitioner is that he was appointed as Trained Graduate Teacher (TGT) by respondents and joined as such on 13.12.1988. Petitioner was promoted as Lecturer in History (School Cadre) in September, 2005 but he was allowed to forego the promotion on his request on account of compelling family circumstances. Vide letter dated 6.5.2006, petitioner applied to respondent No.2 to post him as Lecturer in History, in pursuance to his promotion order, as his domestic problem had settled. Petitioner was accordingly allowed to join as Lecturer in History (School Cadre) and since then had been working as such.

3. On 31.7.2014, petitioner made a written representation to respondent No.2 against non-inclusion of his name in the list of incumbents, promoted as Headmasters, issued on 2.1.2014. It was submitted that petitioner was at Sr. No. 2809 of the seniority list of TGTs and though the

incumbents finding place at Sr. No. 2840 of seniority list had been considered for promotion but the name of the petitioner had been ignored. The representation of the petitioner was rejected in October, 2014 on the ground that the petitioner had already opted for promotion to the post of Lecturer and option once exercised by him could not be changed.

4. Petitioner approached the Himachal Pradesh State Administrative Tribunal by way of Original Application No. 3784 of 2017, which was decided on 14.6.2017 in following terms: -

> "In view of the above, the original application is disposed of in terms of the aforementioned judgment in CWP No. 1545 of 2011-B and the connected matters with a direction to the respondents/ competent authority that subject to the above verification and on finding the applicant to be similarly situate as above, benefit of the said judgment, if the same has attained finality/ implemented, shall be extended to him alongwith consequential benefits, if any, as per law, within three months from the date of production of certified copy of this order along with copy of the aforesaid judgment before the said authority by the applicant."

5. Petitioner again submitted a detailed representation to respondent No.2 on 14.3.2017, specifically denying the fact that he had ever opted to be promoted as Lecturer. The respondents again rejected the representation of the petitioner in July, 2019 on the ground that the petitioner was promoted as Lecturer vide order dated 12.9.2006 as per his option dated 6.5.2006 and thus his case was not similar to the petitioners in CWP No. 1545 of 2011 and, therefore, he would not be entitled to the benefit of this judgment, hence, this petition.

6. In response, respondents have tried to justify the rejection of the claim of petitioner on the ground that petitioner was not entitled to the benefit of judgment, passed by this Court in CWP No. 1545 of 2011, decided on

5.7.2012, whereby there was a direction that only those TGTs, who were promoted as Lecturers prior to 26.4.2010, without having been afforded opportunity of option, would be entitled to be considered for promotion to the post of Headmaster on the basis of his/her position in the seniority list in the cadre of TGTs. Since petitioner had exercised the option and was promoted as Lecturer in September, 2006, he was not entitled to the benefit of aforesaid judgment.

7. I have heard learned counsel for the parties and have also gone through the record carefully.

8. Noticeably, the respondents have not placed on record any document, evidencing option allegedly exercised by the petitioner on 6.5.2006. However, petitioner has placed on record a document Annexure P-6, through which he offered himself for the post of Lecturer, in pursuance to his promotion order, which he earlier had forgone. This document carries an endorsement dated 6.5.2006 at the bottom, evidently made by Principal Government Senior Secondary School, Jaisinghpur, District Kangra, H.P. Mr. Desh Raj Thakur, learned Additional Advocate General has not been able to affirm as to whether Annexure P-6 is the same correspondence, which has been referred to by respondents in their response? On the other hand, petitioner is categoric in his stand that no option was ever called for from him by the respondents and he had no opportunity to opt either for post of Lecturer or Headmaster.Thus, the respondents have failed to substantiate their defence that petitioner had opted for the post of Lecturer and hence was not entitled to be promoted as Headmaster, even in pursuance to the directions issued by this Court vide judgment dated 5.7.2012 in CWP No. 1545 of 2011.

9. As regards document Annexure P-6 is concerned, it is noteworthy to reproduce its contents for adjudication of issue. The relevant contents of Annexure P-6 read as under: -

To

The Director of Education
Higher Education
Shimla

Sub: Option for lecturer in the subject history

Sir,

Reference to your letter No.EDN-H(19)B(2)6/2003,Dated 14 September 2005, in which I was allowed to forgo my promotion due to my domestic problem.

Now my domestic problem has settled and I am hereby opting myself for the post of lecturer in History. Copy of promotion is attached herewith.

You are requested to do the needful and oblige please.

Tanking you in anticipation.

Yours faithfully

"Forwarded in original to the Director of Education DEHP Shimla vide this office letter No.EDN.GSS/ JSP(April)/2075 dated 6/6/2006 for favour of necessary action please".

10. Before adverting to the background and import of aforesaid correspondence Annexure P-6, it will be gainful to notice the relevant part of judgment, passed by this Court in CWP No. 1545 of 2011, decided on 5.7.2012, which reads as under: -

> "12. In CWP 814 of 2012-B another ancillary question has been raised. It has been prayed in this petition by HP Promotee School Lecturer Association that in terms of the judgment delivered by one of us (Deepak Gupta, J) in CWP(T) No. 14932 of 2008, titled Neela Kaushal vs. State of H.P. & others, decided on 26.7.2010, those TGTs who were promoted prior to 26.4.2010 and from

whom no option was sought should also be considered for filling up the posts of Headmaster.

13. The grievance of the petitioner is that despite such clear cut orders, the department is not considering these Lecturers for being promoted to the posts of Headmaster. It would pertinent to mention that this Court in the aforesaid writ petition specifically dealt with the following question of law as is apparent from para-1 of the judgment which reads as follows:-

> This writ petition raises an interesting question of law. The question which arises is whether the trained Graduate Teachers working in the department of Education in the Government of Himachal Pradesh, who were promoted as Lecturers in the Higher Secondary Schools (now Senior Secondary Schools) can be considered to be eligible for the post of Head Master/Head Mistress in the High Schools."

14. Thereafter, this Court held as follows:-

> "11. A perusal of the rules and instructions set out in detail above clearly show that what was envisaged in the rules and instructions was that when there are two avenues of promotion, the person in the feeder category must be asked to exercise his option as to for which promotional category he wants to be considered. Once such option is exercised then the same cannot be withdrawn. If options are taken then even if lien is retained that will not help the employee. However, if no options are taken then the promoted employee would be justified in claiming that he can be considered against the other post." and finally the following directions were issued:-
>
> "13. In view of the aforesaid discussion, this petition is disposed of with the following directions:
>
> a. That no promotions made prior to 26th April 2010 shall be affected by the outcome of this petition. However, since the promotions made after 26th April, 2010 were made expressly subject to the

result of this petition they shall abide by the following directions.

b. That henceforth and w.e.f 26th April,2010 before making any promotions to the post of Lecturers or Head Masters an option shall be sought from the concerned employee.

c. Once an employee gives an option he/she will not be permitted to change the option.

d. Once an employee opts to be promoted as Lecturer/ Head Master he cannot claim that he should be considered for the other post.

e. The Principal Secretary (Education) to the Government of Himachal Pradesh, the Director of Higher Education and Director of Elementary Education i.e respondents No. 1 to 3 are made personally responsible for compliance of these directions in letter and spirit.

f. All promotions, if any, made after 26th April,2010 shall be reviewed and after seeking options of the employees in terms of the aforesaid directions the promotions shall be made."

15. Though an appeal has been filed against this judgment but there is no stay order whereby the operation of the judgment has been stayed.

16. A combined reading of the judgment leaves no manner of doubt that if no option was taken from the TGTs who were promoted as Lecturers they would be justified in claiming that they should be considered for being appointed against the post of Headmaster. It has been brought to our notice that the Law Department has been giving contradictory opinion as to what is to be done. In our opinion, there is no ambiguity in the judgment and any law officer who tried to draw a different meaning from the judgment probably did not understand the judgment or gave the opinion for extraneous reasons. To set the record straight, we are clarifying that as per this judgment any TGT promoted as Lecturer prior to 26.4.2010 without obtaining option from him would be entitled to be considered for

> promotion against the post of Headmaster and can be promoted to the post of Headmaster on the basis of his position in the seniority list in the cadre of TGTs. **Therefore, the State while making efforts to fill up the posts on the basis of promotion shall also consider the names of those TGTs who are promoted as Lecturers and from whom no option was taken."**

11. The aforesaid interdict did not leave any manner of doubt as to the import and purpose of judgment, passed in the case of Neela Kaushal vs. State of H.P. & others, CWP(T) No. 14932 of 2008, decided on 26.7.2010. It was clearly held that the TGTs promoted as Lecturer prior to 26.4.2010, without obtaining option from him/her would be entitled to be considered for promotion against the post of Headmaster and could be so promoted on the basis of his/her position in the seniority list in the cadre of TGTs.

12. Now, coming to the import of correspondence Annexure P-6, this Court has no hesitation to hold that it cannot be equated with the option contemplated by aforesaid judgment. The respondents issued office order dated 13.9.2005, whereby petitioner was promoted as Lecturer in History. There is nothing on record to show that any option was obtained from the petitioner before promoting him as Lecturer.

13. It is not in dispute that promotion, to the post of lecturer, in the first instance had been forgone by the petitioner and he was promoted subsequently in September 2006 when he made request by way of correspondence Annexure P-6. It is not the case of the respondents that there was some other order whereby the petitioner was promoted as Lecturer after having afforded him with opportunity to opt. That being so, the case of the petitioner clearly fell within the ambit of directions issued by a Division Bench of this Court in CWP No. 1145 of 2011, decided on 5.7.2012. Annexure P-6

dated 6.5.2006 cannot be said to be an act of petitioner exercising option as envisaged by aforesaid judgment.

14. In light of above discussion, the impugned rejection order Annexure P-13 is quashed and set aside. The respondents are directed to promote the petitioner as Headmaster w.e.f. the date his immediate junior was promoted to the post and to grant him all consequential benefits ensuing from above directions, within a period of eight weeks from today.

15. In the aforesaid terms, the present petition is disposed of. Pending applications, if any, also stand disposed of.

BEFORE HON'BLE MRS. JUSTICE SABINA, A.C.J. AND HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

Between: -

SUBHASH CHAND S/O LATE SH. MILKHI RAM,
AGED 58 YEARS, OCCUPATION AGRICULTURIST,
R/O VILLAGE KHAROTA, MAUZA JAWALI,
TEHSIL JAWALI, DISTRICT KANGRA, H.P.

……PETITIONER

(BY MR. VIVEK SINGH ATTRI, ADVOCATE).

AND

1. STATE OF HIMACHAL PRADESH,
THROUGH PRINCIPAL SECRETARY(HOME),
TO THE GOVERNMENT OF
HIMACHAL PRADESH, SECRETARIAT,
CHOTTA SHIMLA, H.P.

2. PRINCIPAL SECRETARY (REVENUE),
TO THE GOVERNMENT OF
HIMACHAL PRADESH, SECRETARIAT,
CHOTTA SHIMLA, H.P.

3. EX. CAPT. TARA CHAND
   S/O SH. PIAR CHAND,
   R/O MOHAL SAKOH, TEHSIL JAWALI,
   DISTRICT KANGRA, H.P.

...RESPONDENTS

(BY MR. ANIL JASWAL,
ADDITIONAL ADVOCATE GENERAL,
FOR R-1 & R-2.)

(NONE FOR RESPONDENT NO. 3)

CIVIL WRIT PETITION
No. 3027 OF 2022
Decided on: 26.05.2022

Constitution of India, 1950 – Article 226 – Read With Sections 34 (i) (d) and (dd) of HP Tenancy and Land Reforms Act, 1972 challenged on the ground that they are ultra vires to principles of equity as this section tends to create a special class for members of armed forces by entitling them to eject tenant from talented land up to maximum of 5 acres – Held -- The contention of petitioner is misconceived as section 104 (1) (i) operates in completely different domain than the field of operation prescribed by Section 34 of the Act -- The special rights conferred upon the members of armed forces and certain other categories viz., minors, unmarried women, divorced or separated women etc. does not militate against the purpose of the Act, though the Act has been connected for benefit of tenants - The saving of certain rights in favour of a force at categories of persons is justified keeping in view the intent and purpose of the Act - There is no violation of Article 14 of Constitution of India in view of provision of Article 31 (b) of the Constitution of India - Petition dismissed. (Para 5, 11 & 12)

This petition coming on for admission before notice this day, ***Hon'ble Mr. Justice Satyen Vaidya,*** *passed the following:*

ORDER

Heard.

2. The instant petition has been filed by the petitioner praying for following reliefs:

(i) To declare Section 34 (i) (d) & (dd) of the H.P. Tenancy and Land Reforms Act, 1972 ultra vires to principles of equality under Article 14 of the Constitution of India, 1951.

(ii) To struck down Section 34 (i) (d) & (dd) of the H.P. Tenancy and Land Reforms Act, 1972.

3. Section 34 (i) (d) & (dd) of the Himachal Pradesh Tenancy and Land Reforms Act, 1972, (for short 'Act'), reads as under:

"34. Grounds of ejectment of tenants. -(1) A tenant other than occupancy tenant shall not be liable to ejectment from his tenancy except on anyone or more of the following grounds, namely,-

(a) to (c) xx xx xx

(d) that he holds his tenancy, from a person who created such tenancy within a period of six months before he became a member of the Armed Forces or while he was serving in the Armed Forces and wants to cultivate it himself on his ceasing to be a member of the Armed Forces;

(dd) that he holds his tenancy on the land comprising the share of a member of the Armed Forces covered by clause (d) of sub-section (8) of section 104 and who wants to cultivate it himself on his ceasing to be a member of the Armed Forces;

Provided that such person or member of Armed Forces referred to in clause (d) and (dd) above, as the case may be, shall be entitled to eject a tenant from such land upto a maximum of five acres, in the prescribed manner:

Provided further that a tenant so ejected shall be restored to possession of the land if the landowner after ejecting him does not within one year cultivate it personally:

Provided also that if a tenant holding land from persons mentioned in clauses (d) and (dd) of this sub-section is also a member of the Armed Forces, the provision of first proviso shall not apply and the tenancy shall remain and the ejectment from

tenancy shall only be on the grounds given in clauses (a) to (c) of this sub-section."

4. By virtue of the aforesaid provisions of the Act, additional grounds for eviction of tenant have been enacted whereby a person having served Armed Forces, who either had created the tenancy within a period of six months before he became a member of the Armed Forces or had done so while he was serving the Armed Forces, has been entitled to evict tenant on his ceasing to be a member of the Armed Forces and wanting to cultivate it himself. Similar right has been provided to a member of the Armed Forces covered by clause (d) of sub-section (8) of Section 104 of the Act, who wants to cultivate it himself on ceasing to be a member of the Armed Forces. However, the extent of land from which such eviction can be ordered has been capped at five acres.

5. Petitioner has assailed the aforesaid provision as violative of Article 14 of the Constitution of India on the ground that it tends to create a special class for members of Armed Forces by entitling them to eject a tenant from tenanted land upto a maximum of five acres, whereas, none of the other category of persons as provided in clause (c) of sub-section (1) of Section 34 of the Act have been provided which privilege.

6. Section 34 provides for grounds on which the tenant can be ejected. Clause (c) of sub section (1) of Section 34 provides one such ground wherein the ejectment can be ordered in case tenant sublets the holding or part thereof for profit without the consent of the landowner. A proviso, however, attached to such sub-section creates an exception in favour of certain categories of tenants including members of Armed Forces from ejectment on the aforesaid ground.

7. Thus, the comparison of the members of Armed Forces as landowners having been granted rights under sub-sections (d) and (dd) of

Section (1) of Section 34 of the Act cannot be compared to the class of tenants described in clause (c) of sub-section (1) of Section 34 and proviso appended thereto. The objection of the petitioner in this regard is clearly misplaced.

8. Further, challenge has been laid to Section 34 (1) (d) and (dd) of the Act on the ground that the same is in conflict with Section 104 (1) (i) of the Act. As per petitioner, Section 104 (1) and (i) provides that a landowner is entitled to evict the tenant to an extent of one and a half acres of irrigated and three acres of un-irrigated land and thus creates a differentia between members of Armed Forces and other categories of landowners under Section 104 (1) (i) of the Act.

9. Section 104 (1) (i) of the Act, reads as under:

> *"**104. Right of tenant other than occupancy tenant to acquire interests of landowner.**- (1) Notwithstanding anything to the contrary contained in any law, contract, custom or usage for the time being in force, on and from the commencement of this Act, if the whole of the land of the landowner is under non-occupancy tenants, and if such a landowner has not exercised the right of resumption of tenancy land at any time since January 26, 1955, under any law as in force:-*
>
> *(i) such a landowner shall be entitled to resume before the date to be notified by the State Government in the official Gazette and in the manner prescribed, either one and a half acres of irrigated land or three acres of un-irrigated land under tenancy from one or more than one tenants for his personal cultivation and the right, title and interest (including contingent interest, if any) of the tenant or tenants, as the case may be, therefrom shall stand extinguished free from all encumbrances created by the tenant or tenants to that extent :*
>
> *Provided that if the tenant has taken loan from the State Government, a co-operative society or a bank for the improvement of tenancy land which the landowner has resumed under clause (i) or clause (ii) and has used such loan*

> *for the improvement of such land, then the landowner shall be liable to repay the outstanding amount of such loan and to the extent actually used for the said purpose and interest thereon to the State Government or to the Cooperative Society or a bank, as the case may be, proportionate to the improved land resumed by him:*
>
> *Provided further that the landowner shall not be entitled to resume from a tenant more than one half of the tenancy land."*

10. The plank of challenge on behalf of petitioner is described as inequality being caused by aforesaid provision.

11. We are of the considered view that such contention of petitioner is also misconceived. Section 104 (1) (i) operates in completely different domain than the field of operation prescribed by Section 34 of the Act. Whereas, Section 34 prescribes grounds of eviction of tenants, section 104 of the Act prescribes the vestment of rights in non-occupancy tenants subject to right of resumption by landowner to resume one and half acre of irrigated or three acre un-irrigated land in case the entire holding of landowner was under tenancy. Right of resumption and right of ejectment cannot be compared.

12. Even otherwise, the special rights conferred upon members of Armed Forces and certain other categories viz., minors, unmarried woman, divorced or separated woman etc. does not militate against the purpose of the Act. Though the Act has been enacted for benefits of tenants and to further the cause of agrarian reforms, the saving of certain rights in favour of aforesaid categories of persons is justified keeping in view the intent and purpose of the Act.

13. The Act finds place at serial No. 138 of 9th Schedule of the Constitution of India. Therefore, the petitioner is not entitled to challenge the vires of Section 34 (1) (d) & (dd) of the Act being in violation of Article 14 of the Constitution of India in view of the provision of Article 31B of the Constitution

of India. The provision of Section 34 (1) (d) & (dd) of the Act in no manner touches the basis structure of Constitution.

14. The petition even otherwise does not appear to be bonafide. Petitioner is tenant and respondent No.3 is the landowner and also a person having served Armed Forces. Petitioner having failed to stall his ejectment from tenanted land by fighting the litigation upto the Hon'ble Apex Court has now chosen to approach this Court by way of instant petition. Thus, the petition is nothing, but an abuse of process of Court.

15. In light of above discussion, we don't find any merit in the instant petition and the same is dismissed, so also the pending application(s), if any.

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

Between:-

1. BHAGWAN SINGH, SON OF SHRI BHAG SINGH, VPO MANPURA, TEHSIL BADDI, DISTRICT SOLAN HIMACHAL PRADESH AGED 45 YEARS.

2. DARSHAN SINGH SON OF SHRI BELI RAM, RESIDENT OF VILLAGE BEHLI KHOL, POST OFFICE MANPURA, TEHSIL NALAGARH, DISTRICT SOLAN HIMACHAL PRADESH

....PETITIONERS

(BY MS. AMBIKA KOTWAL, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY (REVENUE) TO THE GOVT. OF HIMACHAL PRADESH.

2. THE TEHSILDAR, TEHSIL NALAGARH, DISTRICT SOLAN HIMACHAL PRADESH

3. HIMACHAL PRADESH STATE ELECTRICITY BOARD LTD., VIDYUT AAYOG BHAWAN, BLOCK NO. 37, SDA COMPLEX, KASUMPTI SHIMLA-171009

4. STATE EXCISE AND TAXATION DEPARTMENT B-30, SDA COMPLEX, NEAR CID OFFICE KASUMPTI, SHIMLA HIMACHAL PRADESH 171009

5. STATE BANK OF INDIA, THROUGH ITS AUTHORIZED OFFICER, STRESSED ASSETS MANAGEMENT BRANCH, FIRST FLOOR, LOCAL HEAD OFFICE, SECTOR-17-A, CHANDIGARH-160017 .....RESPONDENTS

(BY SHRI AJAY VAIDYA, SENIOR ADDITIONAL ADVOCATE GENERAL, FOR R-1, 2 AND 4).

(BY SHRI VIKRANT THAKUR, AND SH. SUSHANTVIR SINGH THAKUR, ADVOCATES FOR R-3)

(BY SHRI ARVIND SHARMA, ADVOCATE FOR R-5)

CIVIL WRIT PETITION
NO. 3446 OF 2020
Judgment Reserved on: 25th February, 2022
Date of Decision: 31st May, 2022

(A) Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 – Section 26E read with the Section 31 B of the Recovery of Debts and Bankruptcy Act, 1993 - Whether secured creditors shall have priority over all other debts and all revenue taxes cesses and other rates payable to Central or State Government or blue local authorities-Held-SARFAESI Act and RDB Act declare priority of secured creditors upon secured assets over all revenue, taxes, cesses and other rates payable to Central Government or State government or local authorities-Provisions contained in SARFAESI, Act 2002 will have an overriding effect on the provisions of Central Excise Act, 1944 – Therefore, the provisions of

SARFAESI Act shall have priority not over the State Excise Act but also over Central Excise Act. (Para 15 & 17)

(B) Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 – Section 26E read with the Section 31 B of the Recovery of Debts and Bankruptcy Act, 1993- Priority to secured creditors – Property purchased in e-auction conducted by the bank – The petitioners are not permitted by revenue officials to execute the sale deed as charge recorded in revenue record in favour of outstanding bill of Electricity board and State Excise Department – held - SARFAESI Act and RDB Act shall have overriding effect to provisions of HP VAT Act - Respondents directed to permit petitioner to execute sale deed after removing entries made in revenue record and to attest the mutation of property – Petition allowed. (Para 20 &21)

Cases referred:

Central Bank of India vs. State of Kerala & others, (2009)4 SCC 94;
Punjab National Bank vs. State of HP, 2021(3) Shim.LC 1545;
Punjab National Bank vs. Union of India (2022) SCC Online SC 227;
UCO Bank and another vs. Dipak Debbarma and other (2017)2 SCC 585;

This Writ Petition coming on for pronouncement this day, the Court passed the following:

O R D E R

Petitioners herein are purchasers of property in reference for consideration of Rs.3,71,50,000/- in an E-auction conducted by respondent No.5-Bank in proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short SARFAESI Act) for default in payment of Loan Cash Credit etc. by previous owner of property M/s Dev Bhumi Ispat.

2 Respondent No.5-Bank has issued Sale Certificate in favour of petitioners, but respondents No. 1 and 2, for the charge recorded in revenue record in favour of respondent No.3 H.P. State Electricity Board for outstanding electricity bill and respondent No.4- State Excise and Taxation

Department for outstanding taxes declared as arrears of land revenue, are not permitting the petitioners and respondent No.5 to execute the sale deed after removing the charges recorded in favour of respondents No.3 and 4 and treating the property in question free from all encumbrances. Therefore, petitioners have approached this Court with following main reliefs:-

> 1. That respondent No.2 may kindly be directed to grant the permission to the petitioners to get the sale deed executed and registered in view of Annexure P-1, certificate of sale and decide Annexure P-5, within the time bound period;
>
> 2. That respondent No.2 may kindly be directed to sanction/attest the mutation of the property purchased by the petitioners in an auction in their favour;
>
> 3. That respondent No.2 may kindly be directed to remove the entries/note made in the revenue record in favour of respondents No.3 and 4 within time bound period, as requested in Annexure P-5.

3 Undisputed facts, in present case, are that one M/s Dev Bhumi Ispact had availed financial assistance i.e. Cash Credit and Term Loan from respondent No.5 by keeping the property in question as a secured assets with respondent No.5-Bank by creating a lien/charge over the property and a corresponding entry in the revenue record was made by Report No. 401 dated 14.5.2010. For non-payment/re-payment of cash credit and term loans by M/s Dev Bhumi Ispat, respondent No.5-Bank had invoked provisions of SARFAESI Act and Security Interest (Enforcement) Rules, 2002 and in furtherance thereto, had advertised public notice for E-auction of suit property in newspaper dated 12.7.2019 proposing E-auction on 30.7.2019. In E-auction, petitioners were confirmed as highest bidders and to this effect, respondent No.5-Bank had issued Certificate of Confirmation of Sale of property under SARFAESI Act, 2002 vide communication/certificate dated

2.8.2019 (Annexure P-3). Thereafter, on depositing sale amount of Rs.3,71,50,000/- including TDS amount, Sale Certificate dated 4.11.2019 (Annexure P-1) was issued by Authorized Officer. In sequel thereto, possession of suit property was handed over to petitioners and a certificate of handing and taking over the possession was issued on 5.11.2019.

4 It is also on record that vide Report No. 745 dated 8.8.2014, an entry was made in revenue record creating charge in favour of H.P. State Electricity Board for non-payment of Electricity Bill amounting to Rs.7,80,725/- by M/s Dev Bhumi Ispact. Thereafter, another entry was made in revenue record creating charge, vide Report No. 190 dated 10.12.2014, in favour of Collector-cum-Assistant Excise and Taxation Commissioner, BBN, Baddi for recovery of unpaid taxes amounting to Rs.7,53,17,197/- which has been declared as arrears of land revenue.

5 In aforesaid circumstances, petitioners intend to execute and register the sale deed and attestation of mutation thereof accordingly for updating the revenue entry, but with removal of charges created in favour of respondents No. 3 and 4 from revenue entries recorded vide Rapat Nos. 745 and 190. For denial thereof by respondents No. 1 to 4, petitioners have approached this Court.

6 According to petitioners as well as respondent No.5-Bank, on the suit property M/s Dev Bhumi Ispact has created security interest in favour of secured creditor i.e. respondent No.5-Bank by creating mortgage and, therefore, security assets under Sections 26-E and 35 of SARFAESI Act and Section 31-B of Recovery of Debts Due to Banks, Financial Institutions Act, 1993 (RDB Act), respondent No.5 has priority over all other debts and all revenue taxes, cesses and other rates payable to Central Government or State Government or local authorities. Whereas, claim of respondent No.4 is that in view of Section 26 of H.P. Value Added Tax Act 2005 (in short HPVAT), respondent No. 4, on the basis of “Doctrine of Priority of State’s Debt” treating

the unpaid tax as a "Crown Debt" as first charge over the property in reference, irrespective of mortgage created by M/s Dev Bhumi Ispact in favour of respondent No.5-Bank and irrespective of provisions of SARFAESI and RDB Acts; it has first charge.

7 To substantiate its claim, State has placed reliance on ***Central Bank of India vs. State of Kerala & others,*** reported in ***(2009)4 SCC 94,*** wherein it was held that in terms of Section 26-B of Kerala Act, the State had got prior charge over the property of defaulter in preference to financial institutions/bank.

8 In reply filed by respondents No.1 and 2, it has been stated that they are always ready to accept the Sale Deed executed between respondent-bank and petitioners and register the same, but without removal of charge of respondents No. 3 and 4 which cannot be removed by them (respondents No. 1 and 2) at the time of execution and registration of sale deed.

9 Despite availing numerous opportunities, no reply has been filed by respondent No.3-Electricity Board.

10 Learned Senior Additional Advocate General, referring judgment dated 31.3.2021 of the Division Bench of this Court passed in LPA Nos. 27 to 31 to 2021 has canvassed that being an excise and taxation matter, as per Roster, present petition requires to be listed before and decided by Division Bench.

11 As per Roster, tax matters are to be listed before Division Bench. Every matter wherein Excise and Taxation Department is a party, does not become a tax matter only for a dispute with Excise and Taxation Department. The tax matter to be listed before the Division Bench would be a matter wherein validity of taxation law; imposition; levy and/or charging on tax; quantum of calculations of tax; interpretation of a tax charging provision etc are to be adjudicated. It is not the case in present case as in present case, issue involved is that as to whether secured creditors shall have priority, over

all other debts and all revenues, taxes, cesses and other rates payable to Central Government or State Government or local authorities, upon the secured assets or respondent No.4-Excise Department shall have first charge on such property irrespective of creation of charge in the assets in favour of secured creditors. Therefore, it is not a tax matter, which is required to be listed before Division Bench as per roster and, therefore, I proceed to decide this petition.

12 Petitioners to substantiate their claim have relied upon judgment of the Supreme Court in ***UCO Bank and another vs. Dipak Debbarma and other,*** reported in ***(2017)2 SCC 585;*** pronouncement dated 24.2.2022 of the Supreme Court in ***Civil Appeal No. 2196 of 2012, titled Punjab National Bank vs. Union of India and others;*** judgment of this Court in ***Punjab National Bank vs. State of HP,*** reported in ***2021(3) Shim.LC 1545;*** decisions rendered by this Court in ***CWP No. 2491 of 2020 titled Canara Bank vs. State of HP decided on 23rd July, 2021; CWP No. 3447 of 2019, titled Sunil Kumar vs. State of HP, decided on 6.9.2021; CWP No. 984 of 2019, titled Dr. Ajit Pal Jain and others vs. Punjab National Bank and others, decided on 9.9.2021;*** and judgment rendered by High Court of Judicature at Bombay in ***Writ Petition (ST.) No. 92816 of 2020, titled State Bank of India vs. State of Maharashtra, decided on 17.12.2020.***

13 At the time of adjudication of ***Central Bank of India's case*** (referred supra), Section 26-E of SARFAESI Act and Section 31-B of RDB Act were not in existence and only Section 26-B of Kerala Act which is similar to Section 26 of HPVAT Act was in existence.

14 Learned Senior Additional Advocate General has not cited any case law dealing with same situation after insertion of Section 26-E in SARFAESI Act and 31-B in RDB Act.

15 SARFAESI Act as well as RDB Act are Central Legislations whereas HPVAT is a State Legislation. SARFAESI Act and RDB Act declare

priority of secured creditors upon secured assets over all revenues, taxes, cesses and other rates payable to Central Government or State Government or local authorities. Provisions of Section 31-B of RDB Act are also the same. Section 26 of HPVAT creates first charge on property of dealer or such other person from whom any amount of tax or penalty including interest is recoverable.

16 As has been reiterated by the Supreme Court in ***UCO Bank's case*** (referred supra), by virtue of provisions of Article 246(1), the Parliamentary Legislation would prevail and such Legislation will have to give way notwithstanding the fact that the State Legislation is within demarcated field.

17 The Supreme Court in its recent decision dated 24.2.2022 passed in ***Civil Appeal No. 2196 of 2012 titled Punjab National Bank vs. Union of India,*** reported in ***(2022 SCC Online SC 227)*** has held that provisions contained in SARFAESI Act, 2002 will have an overriding effect on the provisions of Central Excise Act of 1944. Therefore, the provisions of SARFAESI Act shall have priority not over the State Excise Act but also over the Central Excise Act.

18 A Coordinate Bench of this Court in ***Punjab National Bank vs. State of HP,*** reported in ***2021(3) Shim.LC 1545,*** has considered the relevant case law and provisions of HPVAT Act, SARFAESI Act as well as RDB Act and has concluded that provisions of Section 26 of HPVAT Act, 2005 shall have to give way to the provisions of Section 26-E of SARFAESI Act, 2002 and 31-B of RDB Act 1993. I, for the reasons assigned in said judgment and also for recent pronouncement of the Supreme Court, concur with findings returned by the Coordinate Bench.

19 Pronouncements of Coordinate Bench in ***CWP No. 2491 of 2020 titled Canara Bank vs. State of HP and others; CWP No. 3447 of 2019 titled Sunil Kumar vs. State of HP and CWP No. 984 of 2019 titled Dr.***

Ajit Pal Jain and others vs. Punjab National Bank and others are based upon pronouncement in ***CWP No. 1638 of 2017 titled Punjab National Bank vs. State of HP,*** reported in ***(2021)3 Shim.LC 1545,*** wherein judgment of High Court of Judicature at Bombay passed in Writ Petition (ST.) No. 92816 of 2020 has also been considered.

20 In the light of aforesaid discussion, it is concluded that SARFAESI Act and RDB Act shall have overriding effect to provisions of HPVAT Act and therefore, creation of charge upon the property in reference by and in favour of respondents No. 3 and 4 vide Rapat Nos. 745 dated 8.8.2014 and 190 dated 10.12.2014 is not sustainable and the said property is to be permitted to be transferred in favour of petitioners free from all encumbrances in terms of E-aution dated 30.7.2019, confirmation of sale dated 2.8.2019 and Sale Certificate dated 4.11.2019, possession whereof has already been handed over to petitioners vide document Annexure P-2 on 5.11.2019.

21 Accordingly petition is allowed and respondents No. 1 and 2 are directed to permit the petitioners to execute the sale deed in aforesaid terms and to register the same in accordance with law after removing the entries/notes made in revenue record in favour of respondents No. 3 and 4 vide Rapat Nos. 745 and 190 and to attest the mutation of property in aforesaid terms on or before ***30th June, 2022.***

Petition disposed of in aforesaid terms, so also pending application(s), if any.

Parties are permitted to produce a copy of this order, 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 certified copy, but, if required, may verify it from the Website of the High Court.

BEFORE HON'BLE MS. JUSTICE SABINA, J. AND HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

Between:-

SUBEENA SABRI, WIFE OF SADIQ MOHAMMED,
RESIDENT OF VILLAGE BENLA, POST OFFICE
CHANDPUR, TEHSIL SADAR, DISTRICT
BILASPUR, HIMACHAL PRADESH.

....PETITIONER

(BY SH. R. K. GAUTAM, SR. ADVOCATE WITH SH. RISHAB CHANDEL, ADVOCATE).

AND

1. STATE OF H.P. THROUGH ADDITIONAL CHIEF SECRETARY (SOCIAL JUSTICE AND EMPOWERMENT) H.P.

2. DIRECTORATE FOR THE EMPOWERMENT OF SCHEDULE CASTES, OTHER BACKWARD CLASSES, MINORITIES AND SPECIALLY ABLED THROUGH ITS DIRECTOR.

3. THE TEHSILDAR, TEHSIL SADAR, DISTRICT BILASPUR, HIMACHAL PRADESH.

....RESPONDENTS

(SH. ASHWANI SHARMA, ADDITIONAL ADVOCATE GENERAL).

CIVIL WRIT PETITION
No. 8043 OF 2021
Reserved on :11.5.2022
Date of decision:19.5.2022

Constitution of India, 1950 – Article 226 – Petitioner claimed that since he has been married to Sadiq Mohammed, who belong to a Caste/Community, which is recognized as OBC in State of Himachal Pradesh, so, respondent may be directed to allow her application for issuance of a certificate for eligibility for reservation of jobs for Other Backward Classes - In order to protect the salutary principle enshrined in Articles 341 and 342 of the Constitution of India, Hon'ble Apex Court repeatedly has held that migration for whatsoever reason from one state to another cannot be a sufficient ground for cleaning benefit of being SC/ST/OBC in the migratee State - The objective criteria for declaration of a particular caste or tribe as SC/ST/OBC in one State is the specific level of backwardness social disparage and economic disadvantages prevalent in such state -- Though, one caste notified as SC/ST/OBC in one State may also find place in the list of notified SC/ST/OBC in the other but the same has not been held to be sufficient for claiming the benefit in other State by a person after migration for the reason that degree of disadvantages of various elements which constitute the data for specification may be entirely different - Petitioner is married in the state of Himachal Pradesh to a person belonging to OBC and even the caste to which petitioner belonged in the state of her origin has been declared as OBC in the state of Himachal Pradesh which cannot be held sufficient to carve out an exception to the mandate of law - Petition found without merits – Petition dismissed.(Paras 19, 20 & 22)

Cases referred:

Bhadar Ram vs. Jassa Ram & others, 2022 (4) SCC 259;
MCD vs. Veena & others 2001 (6) SCC 571;
Pankaj Kumar vs. State of Jharkhand & others, 2021 SCC (online) SC 616;

This petition coming on for orders this day, ***Hon'ble Mr. Justice Satyen Vaidya*** *passed the following*:

O R D E R

By way of instant petition, petitioner has prayed for the following substantive relief: -

> "*That the respondents be directed to allow her application for issuance of a certificate for eligibility for reservation of jobs for Other Backward Classes and services under Government of India as she belongs to a Caste/Community, which is recognized by the State of Himachal Pradesh and she is married to Sadiq*

Mohammed, who also belongs to a Caste/Community, which is recognized as Other Backward Classes in the State of Himachal Pradesh."

2. Petitioner was born in State of Bihar. She belonged to Muslim (Ansari) Caste/Community, which has been declared as Other Backward Class (for short, "OBC") in the State of Bihar. Petitioner married one Sadiq Mohammed, a bonafide resident of State of Himachal Pradesh. The husband of petitioner belongs to Muslim (Teli) Caste/Community, which is also declared as OBC in state of Himachal Pradesh. The Ansari Caste/Community is also included in the Central List of OBC in State of Himachal Pradesh. Petitioner has also been issued Bonafide Himachali Certificate, after her marriage with Sadiq Mohammed.

3. Petitioner has applied to respondent No.2 for issuance of a certificate of eligibility for reservation of jobs for OBC. However, her application has remained undecided, forcing the petitioner to approach this Court by way of the present petition.

4. We have heard learned counsel for the parties and have also gone through the record carefully.

5. The question that arises for determination is whether the petitioner by virtue of being married to a person belonging to OBC in Himachal Pradesh or by inclusion of the original caste of petitioner (Ansari) in the list of Other Backward Classes in the State of Himachal Pradesh is entitled for issuance of a certificate of eligibility for reservation of jobs for Other Backward Classes in the State of Himachal Pradesh?

6. Articles 341 and 342 of the Constitution of India read as under: -

*"**341. Scheduled Castes**. — (1) The President [may with respect to any State [or Union territory], and where it is a State, after consultation with the Governor thereof,] by public notification, specify the castes, races or tribes or parts of or groups within*

castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State [or Union territory, as the case may be.]

(2) Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

***342. Scheduled Tribes**. — (1) The President [may with respect to any State or Union territory, and where it is a State , after consultation with the Governor thereof,] by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State or Union territory, as the case may be.*

(2) Parliament may by law include in or exclude from the list of Scheduled Tribes specified in a notification issued under clause (1) any tribe or tribal community or part of or group within any tribe or tribal community, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification.

***342A. Socially and educationally backward classes. —** (1) The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the socially and educationally backward classes which shall for the purposes of this Constitution be deemed to be socially and educationally backward classes in relation to that State or Union territory, as the case may be.*

(2) Parliament may by law include in or exclude from the Central List of socially and educationally backward classes specified in a notification issued under clause (1) any socially and educationally backward class, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification."

7. All the above noted provisions expressly provide for powers of the President of India to specify the castes, races or tribes or socially and educationally backward classes for parts or groups within castes, races or tribes to be Scheduled Caste or Scheduled Tribes or the Other Backward Classes for the purpose of the Constitution of India in respect of any State or Union Territory and in relation to such State or Union Territory, as the case may be. Thus, the Scheduled caste, tribe or other backward class, declared in pursuance to above noted constitutional provisions, are required to be State or Union Territory specific.

8. In ***Pankaj Kumar vs. State of Jharkhand & others, 2021 SCC (online) SC 616***, the Hon'ble Supreme Court has observed as under: -

> *"24. The mandate of affirmative action in favour of Scheduled Castes/Scheduled Tribes indeed has an important place in our constitutional scheme. Articles 341(1) and Article 342(1) of the Constitution of India empowers the President to specify the race or tribes or part of groups within caste, race or tribes with respect to any State or Union Territory for the purpose of the Constitution deemed to be SC/ST in relation to that State or Union Territory, as the case may be. The object of Articles 341(1) and 342(1) of the Constitution is to provide additional protection to the members of the SC/ST having regard to the social and economical backwardness from which they suffer. It is obvious that in specifying castes, race or tribes, the President has been authorised to limit notification to part of groups with the castes, etc. and that must mean that after examination of the disadvantages from which they have suffered and the social and economic backwardness, the President may specify castes/tribes etc. as parts thereof in relation to the entire State or in relation to parts of the State where he is satisfied that after examination of the disadvantages, social and educational hardship and backwardness of the race, caste or tribes justifies such specification.*

25. Articles 341 and 342 make it clear that the caste, race or tribe or part of or group within any caste, race or tribe as specified in the Presidential Order under Article 341(1) or a tribal community, as notified in the Presidential Order under Article 342(1) shall be deemed to be Scheduled Castes/ Scheduled Tribes for the purpose of the Constitution in relation to that State or Union Territory, as the case may be and this exposition has been made clear from clause (2) of the Constitution(Scheduled Castes)/ (Scheduled Tribes) Order, 1950.

37. The Constitution Bench of this Court in Marri Chandra Shekhar Rao(supra) had an occasion to examine as to whether the person belonging to Scheduled Castes in relation to a particular State would be entitled to the benefits or concessions allowed to Scheduled Castes in the matter of education/ employment in another State. Referring to various provisions of the Constitution and the grounds on which the Presidential Orders were issued and noticing earlier judgments, this Court held as under: -

> *"9. It appears that Scheduled Castes and Scheduled Tribes in some States had to suffer the social disadvantages and did not have the facilities for development and growth. It is, therefore, necessary in order to make them equal in those areas where they have so suffered and are in the state of underdevelopment to have reservations or protection in their favour so that they can compete on equal terms with the more advantageous or developed sections of the community. Extreme social and economic backwardness arising out of traditional practices of untouchability is normally considered as criterion for including a community in the list of Scheduled Castes and Scheduled Tribes. The social conditions of a caste, however, varies from State to State and it will not be proper to generalise any caste or any tribe as a Scheduled Tribe or Scheduled Caste for the whole country. This, however, is a different problem whether a member or the Scheduled Caste in one part of the country who migrates to another State or any other Union territory should continue to be treated as a*

> *Scheduled Caste or Scheduled Tribe in which he has migrated. That question has to be judged taking into consideration the interest and well-being of the Scheduled Castes and Scheduled Tribes in the country as a whole." (Emphasis supplied)*

38. This Court, while rejecting the contention that the member of the Scheduled Castes/Scheduled Tribes should get the benefit for the purpose of Constitution throughout the territory of India, observed that if such contention is to be accepted, the very expression "in relation to State" would lose its significance. Marri Chandra Shekhar Rao(supra) was further followed by another Constitution Bench of this Court in Action Committee on Issue of Caste Certificate to Scheduled Castes and Scheduled Tribes in the State of Maharashtra and Anr. (supra) which further came to be followed by another Constitution Bench of this Court in Bir Singh(supra) wherein in para 34, it was held as under: -

> *"34. Unhesitatingly, therefore, it can be said that a person belonging to a Scheduled Caste in one State cannot be deemed to be a Scheduled Caste person in relation to any other State to which he migrates for the purpose of employment or education. The expressions "in relation to that State or Union Territory" and "for the purpose of this Constitution" used in Articles 341 and 342 of the Constitution of India would mean that the benefits of reservation provided for by the Constitution would stand confined to the geographical territories of a State/Union Territory in respect of which the lists of Scheduled Castes/Scheduled Tribes have been notified by the Presidential Orders issued from time to time. A person notified as a Scheduled Caste in State 'A' cannot claim the same status in another State on the basis that he is declared as a Scheduled Caste in State 'A'." (emphasis supplied)*

39. So far as involuntary migration from one State to another State is concerned, the Constitution Bench of this Court in Marri Chandra Shekhar Rao(supra) taking note of the fate of those

castes/tribes seeking protection of being classed as Scheduled Castes or Scheduled Tribes in the State of their origin when, because of transfer or movement of their father or guardian's business or service, they move to another State having considered the fate of their migration from one State to another State being involuntary, by force or circumstances either of employment or of profession, left it for the legislature or the Parliament to consider it for appropriate legislation bearing that aspect in mind that their rights and privileges as members of Scheduled Castes/Scheduled Tribes be well protected by virtue of provisions of Articles 341(1) and 342(1) of the Constitution and observed in para 23 as under:-

> *"23. Having construed the provisions of Articles 341 and 342 of the Constitution in the manner we have done, the next question that falls for consideration, is, the question of the fate of those Scheduled Caste and Scheduled Tribe students who get the protection of being classed as Scheduled Caste or Scheduled Tribe in the States of origin when, because of transfer or movement of their father or guardian's business or service, they move to other States as a matter of voluntary (sic involuntary) transfer, will they be entitled to some sort of protective treatment so that they may continue or pursue their education. Having considered the facts and circumstances of such situation, it appears to us that where the migration from one State to another is involuntary, by force of circumstances either of employment or of profession, in such cases if students or persons apply in the migrated State where without affecting prejudicially the rights of the Scheduled Castes or Scheduled Tribes in those States or areas, any facility or protection for continuance of study or admission can be given to one who has or migrated then some consideration is desirable to be made on that ground. It would, therefore, be necessary and perhaps desirable for the legislatures or the Parliament to consider appropriate legislations bearing this aspect in mind so that proper effect is given to the rights given to Scheduled Castes and Scheduled Tribes by virtue of the*

> *provisions under Articles 341 and 342 of the Constitution. This is a matter which the State legislatures or the Parliament may appropriately take into consideration.” (emphasis supplied)*

40. In relation to Backward Classes, this Court in M.C.D. Vs. Veena and Others, 2001 (6) SCC 571, has specifically held that migrants are not entitled for reservation as Other Backward Classes (OBCs) in the States/Union Territories where they have migrated. The relevant portion of the judgment that may be noticed is as hereunder:

> *“6. Castes or groups are specified in relation to a given State or Union Territory, which obviously means that such caste would include caste belonging to an OBC group in relation to that State or Union Territory for which it is specified. The matters that are to be taken into consideration for specifying a particular caste in a particular group belonging to OBCs would depend on the nature and extent of disadvantages and social hardships suffered by that caste or group in that State. However, it may not be so in another State to which a person belonging thereto goes by migration. It may also be that a caste belonging to the same nomenclature is specified in two States but the considerations on the basis of which they had been specified may be totally different. So the degree of disadvantages of various elements which constitute the data for specification may also be entirely different.*

Thus, merely because a given caste is specified in one State as belonging to OBCs does not necessarily mean that if there be another group belonging to the same nomenclature in another State, a person belonging to that group is entitled to the rights, privileges and benefits admissible to the members of that caste. These aspects have to be borne in mind in interpreting the provisions of the Constitution with reference to application of reservation to OBCs.” (emphasis supplied).

41. By the judgments of the Constitution Bench of which the reference has been made (supra), it has been settled that the person belonging to Scheduled Castes/Scheduled Tribes/OBC of

the State, on migration to another State voluntarily or involuntarily, will not be entitled to claim benefits of reservation including privileges and benefits admissible to the member of the Scheduled Castes/Scheduled Tribes/OBC even though, the caste or tribe of the same nomenclature is notified in the latter State(State where migrated) and if that is being permitted, the very expression as mandated under Articles 341(1) and 342(1) of the Constitution in "relation to the State" would become otiose and this issue remain no more res integra after the pronouncements made by the Constitution Bench of this Court.

9. In **Ranjana Kumari vs. State of Uttaranchal & others, Civil Appeal No. 8425 of 2013,** two Judges Bench of Hon'ble Supreme Court referred an identical question to a larger Bench in following terms: -

"15. The question arising in this appeal is whether a person like the appellant, who is a Scheduled Caste in the State where she was born will not be entitled to the benefit of reservation after marriage in the State where her husband is living despite the fact that the husband also belongs to Scheduled Caste and the particular Caste falls in the same reserved category in the State of migration and that she is a permanent resident of that State."

10. The question so referred in Ranjana Kumari's case (supra) has been answered by three Judges of Hon'ble Supreme Court in ***2019 (15) SCC 664***, as under: -

"1. We have heard the learned counsel for the parties and perused the relevant material.

2. The appellant who belongs to Valmiki caste (Scheduled Caste) of the State of Punjab married a person belonging to the Valmiki caste of Uttarakhand and migrated to that State. In the State of Uttarakhand under the Presidential Order "Valmiki" is also recognized as a notified Scheduled Caste. The State of Uttarakhand issued a certificate to the appellant.

3. The appellant contended before the High Court that she was a Scheduled Caste of the State of Uttarakhand. The High Court having rejected the claim, the appellant is in appeal before us.

4. Two constitution bench judgments of this Court in Marri Chandra Shekhar Rao v. Seth G.S. Medical College and Action Committee on Issue of Caste Certificate to SCs/STs v. Union of India have taken the view that merely because in the migrant State the same caste is recognized as Scheduled Caste, the migrant cannot be recognized as Scheduled Caste of the migrant State. The issuance of a caste certificate by the State of Uttarakhand, as in the present case, cannot dilute the rigours of the constitution bench judgments in Marri Chandra Shekhar Rao and Action Committee.

5. We, therefore, find no error in the order of the High Court to justify any interference. The appeal is accordingly dismissed."

11. The aforesaid judgment has recently been followed by the two Judges Bench of Hon'ble Supreme Court in the case, titled as, ***Bhadar Ram vs. Jassa Ram & others, 2022 (4) SCC 259***.

12. From the above noticed exposition of law, the answer to question, formulated by us (*supra*) for adjudication in the instant petition, is no more *res-integra*. However, a Coordinate Bench of this Court in ***CWP No. 5951 of 2020***, titled as, ***Naveen Kumari vs. State of H.P. & others***, decided on, ***22.2.2021***, while dealing with an identical question held as under: -

"4. The necessity(ies)/reasons cast therein, vis-à-vis, a person/candidate concerned, for hence validly applying, against the apposite scheduled caste vacancy, occurring in Himachal Pradesh, becomes grooved, in, upon her, becoming born, after the date of notification, of, Presidential Order, thereupon(s) his/her parents, being proven to be permanently domiciled, within the State of Himachal Pradesh, and, whereas, for wants thereof, the candidate concerned, loosing his/her status, as a scheduled caste

category, within the State of Himachal Pradesh, does, (a) erode the unitary fabric, besides, the territorial integrity, of, the Union of India, (b) and, also erodes the holistic purpose, behind the constitutional engraftment(s), of, reservations, to, scheduled caste category, rather made, in consonance, with Articles 14 and 16, of, the Constitution of India, (c) the omnibus denial, of, the constitutionally bestowed benefits, of, reservation to rather befitting aspirants, against theirs applying in the afore category, and, against vacancies, occurring in any federal unit(s), of, the Union of India, or and, concomitantly, the scheduled caste certificate, not migrating from the place, of, permanent domicile, of, the parents, of the scheduled caste aspirants concerned, to other federal units, within, the Union of India, may not be, completely valid, and, especially qua (i) those aspirants concerned, who after marriage, borrow the caste, of, their husbands, and caste whereof, is, alike their parental caste, yet the scheduled caste certificate, becoming rejected, upon, its emerging from federal states, other than Himachal Pradesh, merely for/upon, uncalled for insistences being made, vis-à-vis, the parents, of, the aspirants concerned, being, at the relevant stage, also provenly domiciled, within the State of Himachal Pradesh. (ii) Moreover, the afore necessity, may not also be constitutionally valid, rather the rejection, of, the afore status, upon the afore parameter, by any federal unit, within the Union of India, despite his/her becoming validly recognized and accepted, by other federal units, within Union of India, hence as a member, of, the apposite Scheduled caste community, (iii) may become waned, conspicuously, upon the parents, of, the candidate/aspirant concerned, hence acquiring property within the State of Himachal Pradesh, where through they become permanently, domiciled, within the territory, of, Himachal Pradesh, a part, of, the Union of India, (iv) whereupon, upon the above eventuality, making its occurrence, and, even if, within the territory, of, Himachal Pradesh, the parental caste, of, the aspirants/candidate concerned, is, not, akin to the scheduled caste, which each hold, within the federal State(s), of the Union of India, wherefrom, they permanently migrate, into Himachal Pradesh, or hence become permanently domiciled in Himachal

Pradesh, or even if the afore caste, is, not recognized within Himachal Pradesh, as a Scheduled Caste, (v) thereupon, too any completest invalidation, or, de-recognition, of/to any hereat similar thereto, hence apposite scheduled caste, rather anvilled, upon, the afore alluded echoing(s), borne, in, the herebefore reflected scribed instructions, may not become completely vindicable, nor may work as a deterrence against the afore hence applying against a scheduled caste vacancy, occurring in Himachal Pradesh, (vi) given, thereupon, the unitary fabric, of, the Union of India, hence becoming an inapt casuality, and, also hence would bring an inapt casuality, to the holistic purpose, behind creation, of, reservation(s), for, scheduled caste aspirants through Articles 14 and 16, of, the Constitution of India, inasmuch as, the therethrough strived inter-generational remediation, becoming nullified. Moreover, a candidate concerned, upon his migrating, from other federal units, within Union of India, into Himachal Pradesh, and, whereafter(s), he/she and his/her parents, each become domiciled, within the State of Himachal Pradesh, and, though, each of them, may not, hold a co-equal hence declared scheduled caste, within the State of Himachal Pradesh, or rather upon, the, Scheduled caste, than the one, they earlier held, within other federal units, rather within the Union of India, being not recognized, as a Scheduled Caste, in, Himachal Pradesh, also may not become completely amenable, for, becoming completely stripped off, the, cloak of, constitutional reservation, meted to, the apposite scheduled caste aspirants, unless forthright material surges forth, and, makes displays, (vii) qua that the parental scheduled caste, hence held within, federal states of the Union of India, other than Himachal Pradesh, and, caste whereof may not be recognized, within the State of Himachal Pradesh, as a Scheduled caste, or even if other than, the domiciled state, of, the parents, or of, the aspirants concerned, it becomes not recognized, hence as a scheduled caste, or and, becomes cogently established, to, over the years, or with efflux of time, to hence make social marches, beyond the one, as, made by a co-equal thereto rather unrecognized scheduled caste, within the State of Himachal Pradesh, (viii) and, or upon cogent evidence becoming adduced,

and its unfolding that the apposite unrecognized, in, Himachal Pradesh, Scheduled Caste, has overcome the bane of socially backwardness, or/and upon it extantly satiating the innate rubric behind reservation, inasmuch as, intergenerational remediation. (viii) and/or, reiteratedly, upon material surging forth, and, making display(s), that the holistic purpose, behind caste reservation, inasmuch as therethrough the apposite inter-generational remediation, becoming effectuated, or the afore becoming completely accomplished, vis-à-vis, the apposite caste, in Himachal Pradesh, though not recognized hereat, as a scheduled caste, despite, its being recognized, as, a scheduled caste, in other federal units, within the Union of India.

5. Be that as it may, the constitutional validity, of, the afore letter also becomes, completely un-hinged, specifically, vis-à-vis, the writ petitioner, as, uncontrovertedly, 'Megh' caste, is, recognized, as a "scheduled caste", both in Himachal Pradesh and in Punjab, (a) thereupon, the necessity therein, of, the parents, of, the writ petitioner, becoming domiciled, within the State of Punjab, is, an un-necessarily created hurdle, against the writ petitioner, as, she has been married in Himachal Pradesh and, her husband holds, a, scheduled caste, alike the one her domiciled within the State of Punjab, hence parents, rather hold. In addition, the necessity, of, the parents, of, the aspirants concerned, holding, a, permanent domicile, within the State of Himachal Pradesh, is, uncalled for, and, also a constitutionally invalid, necessity, against the operation, of, a valid scheduled caste certificate, of, the writ petitioner, rather also within the State of Himachal Pradesh, (b) as within all federal units, within the Union of India, the status, of the aspirants concerned, as scheduled caste, rather assumes, more relevance, and preponderant importance, than the domiciling(s), of, the parents, of, the aspirants/candidates concerned, within the State of Himachal Pradesh, and, also when thereupon, the completest deference is bestowed, to the constitutional reservation(s), bestowed, upon, the scheduled caste category(ies). 6. Furthermore, the constitutionality, of, the further reason, voiced in the letter (supra), for invalidating, the caste certificate, of, the writ petitioner, inasmuch as it stemming,

from weightage being given, to the schedule caste aspirants, domiciled within the State of Himachal Pradesh, is, perse constitutionally impermissible, and, besides, is constitutionally flawed, as, therethrough, an un-necessary territorial fetter rather within the Union of India, becomes created, vis-à-vis, the operation, of, scheduled caste certificate, whereas, the scheduled caste identity, of, its holder, travels alongwith him/her, in, all federal units, within the Union of India, unless the dispelling efficacy thereto rather material hence alluded, in, para-3 evidently surges forth.

7. Consequently, there is merit in the petition, and,the same is allowed. The respondents are directed to, forthwith, declare the result, of, the writ petitioner, and, in case, she occurs in the merit list, they are also directed to, forthwith, upon, completion, of, all the codal formalities, issue an appointment letter to her, Also, the pending application(s), if any, are disposed of.

13. The State of Himachal sought review of aforesaid judgment by way of Review Petition No. 47 of 2021, which was decided *vide* judgment dated 4.9.2021, by holding as under: -

"8. Be that as it may, both in Marri Chandra Shekhar Rao's case (supra), and, in Action Committee's case (supra) the issue of voluntarily and involuntarily migration, of, a person to a migratee State, and, as becomes occasioned upon her marriage, were never encompassed within the realm of the factual foundation(s) cast thereins, nor obviously any pointed, and, stark declaration qua the afore hence emerged. Moreover, in Ranjana Kumari's case (supra), the Hon'ble Apex Court, though had declined to validate the caste certificate of a lady from Punjab, married to a groom in Uttrakhand, despite in both States, an alike notified Scheduled Caste(s), rather existing, inasmuch as Valmiki caste apparently existing. However, the afore invalidation, is on the basis of judgments (supra), as, made by the Hon'ble Apex Court. Nonetheless, as aforestated, rather in none of the afore verdicts, of the Hon'ble Apex Court, the latter became seized with foundational facts hence appertaining to the legality of Schedule Castes

certificate(s), as, held by any married spouse in both the State(s) of her origin, and, in the migratee State, conspicuously, when even in a migratee State a similar nomenclatured caste became validly notified. Therefore, the invalidation by the Hon'ble Apex Court of the caste certificate of the aspirant concerned, in its verdict, drawn in Ranjana Kumari's case (supra), does appear, to be beyond the ambit of the ratio decidendi, as propounded in the verdicts (surpa), whereons reliance has been placed by the Hon'ble Apex Court, inasmuch, as, in both the verdicts (supra) as became relied by the Hon'ble Apex Court, there were neither any foundational facts, vis-a-vis, the fact as repelled by the Hon'ble Apex Court, in the verdict rendered, in Ranjana Kumari's case (supra), nor any firm ratio decidendi qua therewith became expostulated, in the, verdicts (supra), as became relied upon.

9. Moreover, even in Pankaj Kumar's case (supra), the Hon'ble Apex Court neither came to be seized with the legality of a caste certificate, of a spouse, as arose from her marriage, in the migratee State, where also her husband belonged to a similar validly notified caste, nor hence any clinching verdict became pronounced thereons hence by the Hon'ble Apex Court.

10. For, wants of any firm declaration (supra) becoming carried, in the verdicts supra of the Hon'ble Apex Court, hence with respect to invalidation of a caste certificate, as purportedly arises, from the writ petitioner involuntarily shifting or migrating, on her marriage, to the State of Himachal Pradesh, and, her husband also carrying a caste alike her caste of origin, inasmuch, as "Megh" caste, besides in both the States, the afore caste being a validly notified scheduled caste. Therefore, this Court even upon leaving aside, the afore attribution of meaning, to the word "service qualification" as occurs in the Representation of the People Act, and its being borrowed, by the Apex Court, does proceed, to hence bring the petitioner also within the ambit of the meaning ascribed to "ordinary resident" (supra) by the Hon'ble Apex Court, inasmuch, as, within the ambit, and, clout thereof, that, upon hers migrating to Himachal Pradesh, upon hers marrying a groom, who alike her belongs to a Megh caste, and, when the said caste is also notified as a Scheduled Caste, in

Himachal Pradesh, she rather making only temporary or fleeting movements to her matrimonial home, hence has not, ipso facto, rather ceased to be an ordinary resident within Himachal Pradesh, rather after marriage she becomes permanently domiciled in Himachal Pradesh.

11. Moreover, she establishes that upon her marriage in Himachal Pradesh, she has provenly established the requisite animus deserdendi, from the State of her origin i.e. Punjab. Therefore, she becomes an ordinary resident of Himachal Pradesh, as she has not migrated to Himachal Pradesh rather solitarily for the purpose of service, employment, and, education, rather has migrated on account of her marriage in Himachal Pradesh with her husband.

12. Emphasisingly, the settling of the conundrum with regard to "ordinary resident and bonafide resident" is/are of utmost importance. The meaning of the term "bonafide resident" as defined under various pronouncements made by different Courts, is, that of residence with a permanent intention to reside, in the State concerned.

13. Now the intention to reside permanently, is to be inferred from the circumstance of a particular caste. Since various states including the State of Himachal Pradesh, have framed rules for issuance of a bonafide certificate. The Himachal Pradesh Rules, for issuance of a bonafide certificate, prescribe that a person, who continuously resides in Himachal Pradesh for 15 years, becomes entitled for issuance of a bonafide certificate. If, a person continuously for 15 years holds his residence at Himachal Pradesh, it means that he has a permanent intention to reside in Himachal Pradesh, and, hence evinces his animus deserendi from the State of his origin. Consequently, a person, who becomes a bonafide resident of Himachal Pradesh, has definitely suffered and has become socially disadvantaged, disadvantages whereof, arise from his caste, given his for a minimum period of 15 years, rather being permanently domiciled in H.P. Therefore, he cannot be considered to be a migratee after 15 years, as, after the afore period he becomes entitled, for the issuance of a bonafide certificate, as per the rules. Consequently, if the caste of his origin is by birth in the State of his origin, and, is notified in the State

where he is a bonafide resident, or is permanently domiciled. Therefore, he becomes entitled to receive an apposite caste certificate.

14. Consequently, as discussed above, when a person is issued a bonafide certificate, it means that he is a permanent resident of the State, for all intents and purposes as he has intention to live permanently there, and, he remains no more a migrant. Similarly, the petitioner after her marriage no more remains a migrant, and, she for all intents and purposes, is, now settled in the house of her husband.

15. However, subject to supra, paragraphs No. 4, 5 and 6 of the judgment under review are beyond the ambit of Article 340, and, are hence declared to be per incuriam.

16. In summa, the review petition is partly allowed to the extent (supra). The respondents concerned are, however, directed to forthwith declare the result of the writ petitioner, and, if she has successfully qualified the test, she be forthwith offered an appointment letter in accordance with law. All pending applications also stand disposed of."

14. Thus, the Coordinate Bench of this Court, while partly allowing the Review Petition No. 47 of 2021 held paragraphs 6 to 8 thereof, *per incuriam*. However, it was held that since none of the judgments referred before it had dealt with a situation where a person having migrated from one State to another had married in the migratee State and had been granted a bonafide resident certificate in that State, therefore, a person under such category could not be denied the benefit of having a certificate of SC/ST/OBC, as the case may be, in the migratee State.

15. With due deference to the judgment passed by the Coordinate Bench of this Court in Naveen Kumari's case (*supra*), we are not inclined to scribe to the view taken by the said bench, for the reasons that in Ranjana Kumari vs. State of Uttaranchal & others (Civil Appeal No. 8425 of 2013), a two Judges Bench of Hon'ble Supreme Court had referred to larger bench,the

question as noticed above, which already was germane with the issue as noticed in Naveen Kumari (*supra*).

16. Before forming such a question, the provision of Articles 341 & 342 of the Constitution of India, judgments of the Constitutional Bench in Marri Chandra Shekhar Rao vs. Deen Seth G.S. Medical College and others 1990 (3) SCC 130, Action Committee on issue of Caste Certificate to Scheduled Castes and Scheduled Tribes in the State of Maharashtra and another vs. Union of India and others 1994 (5) SCC, 244 and Subhash Chandra and another vs. Delhi Subordinate Services Selection Board and others 2009 (15) SCC, 458 were considered in the backdrop of factual matrix, as noticed by their Lordships in paras 5 and 6 of the judgment as under:-

> *"5. Ms. Priya Hingorani, learned counsel for the appellant argued that the impugned order is liable to be set aside because the view taken by the High Court on the appellant's entitlement to be treated as Scheduled Caste of Uttarakhand is not only erroneous, but is also contrary to the law laid down by this Court. She pointed out that the appellant had married Shri Rajesh Gill, who is Valmiki by caste and is a resident of Dehradun since 1988 and argued that the Commission committed an error by rejecting her plea for appointment against the post reserved for Scheduled Caste despite the fact that Valmiki is recognised as a Scheduled Caste in the States of Uttar Pradesh and Uttarakhand. Ms. Hingorani also invited our attention to certificates dated 10.9.2002 and 13.6.2005 issued by Tahsildar, Dehradun showing the appellant as Valmiki of Uttar Pradesh and Uttaranchal and a resident of Dehradun and argued that as on the last date of application, the appellant could not be treated as a person belonging to Punjab because she is a permanent resident of Dehradun (Uttarakhand). Learned counsel also assailed the other ground on which the Commission rejected the appellant's candidature by pointing out that result of the examination held by Rajrshi Tandon Open University, Allahabad was declared on 15.9.2002, i.e., one day before the last date fixed for receipt of*

application and she had produced all the documents at the time of interview.

6. Ms. Rachana Srivastava, learned counsel for the respondents supported the impugned order and argued that the High Court did not commit any error by negating the appellant's challenge to the decision of the Commission to cancel her candidature because she cannot be treated as a Scheduled Caste of Uttarakhand. In support of her argument, Ms. Srivastava relied upon the judgments of the Constitution Bench in Marri Chandra Shekhar Rao v. Dean, Seth G. S. Medical College and others (1990) 3 SCC 130, Action Committee on Issue of Caste Certificate to Scheduled Castes and Scheduled Tribes in the State of Maharashtra and another v. Union of India and another (1994) 5 SCC 244 and Subhash Chandra and another v. Delhi Subordinate Services Selection Board and others (2009) 15 SCC 458."

17. The question so framed in *Ranjana Kumari,*thus, was in respect of a female, who belonged to Scheduled Caste in one State and after marrying a person of Scheduled Caste in another State had started residing in the State of her husband. The three Judges Bench has negated the question, so referred, meaning thereby that even the facts of that case were not found fit to be an exception to the general rule.

18. In ***MCD vs. Veena & others 2001 (6) SCC 571***, Hon'ble Supreme Court had observed as under: -

"Castes or groups are specified in relation to a given State or Union Territory, which obviously means that such caste would include caste belonging to an OBC group in relation to that State or Union Territory for which it is specified. The matters that are to be taken into consideration for specifying a particular caste in a particular group belonging to OBCs would depend on the nature and extent of disadvantages and social hardships suffered by that caste or group in that State. However, it may not be so in another State to which a person belongs thereto goes by migration. It may also be that a caste belonging to the same nomenclature is specified in two States but the considerations on the basis of

which they been specified may be totally different. So, the degree of disadvantages of various elements which constitute the data for specification may also be entirely different. Thus, merely because a given caste is specified in one State as belonging to OBCs does not necessarily mean that if there be another group belonging to the same nomenclature in other State and a person belonging to that group is entitled to the rights, privileges and benefits admissible to the members of that caste. These aspects have to be borne in mind in interpreting the provisions of the Constitution with reference to application of reservation to OBCs."

19. In our considered view,in none of the judgments noticed by the Coordinate Bench of this court while deciding Review Petition No. 47 of 2021, scope for any exception was left. It cannot be overlooked that in all the cases the purpose was to protect the salutary principle enshrined in Articles 341 & 342 of the Constitution of India. To achieve such purpose, Hon'ble Apex Court repeatedly has held that migration for whatsoever reason, from one State to another, cannot be a sufficient ground for claiming benefit of being SC/ST/OBC in the migratee state. The objective criteria for declaration of a particular Caste or Tribe as SC/ST/OBC in one State is the specific level of backwardness, social disparage and economic disadvantages prevalent in such state. Though, one Caste notified as Scheduled Caste/ tribe/ OBC in one State may also find place in the list of notified Scheduled Caste/ Tribe/OBC in the other, but the same has not been held to be sufficient for claiming the benefit in other State by a person after migration for the reason that the degree of disadvantages of various elements which constitute the data for specification may be entirely different. The migrations be it voluntary or involuntary have been taken care of in the judgments passed by the Hon'ble Supreme Court, as noticed above. Thus, in our considered view, mere grant of a certificate of bonafide resident to a person by the migratee State after her marriage in such State cannot be an exception. The view taken by a

Coordinate Bench in Review Petition No. 47 of 2021, titled State of H.P. & others Vs Navin Kumari to that effect, in our understanding, is *per incuriam*.

20. In the instant case, the facts that petitioner is married in the State of Himachal Pradesh to a person belonging to OBC and even the Caste to which the petitioner belonged in the State of her origin has been declared as a OBC in the State of Himachal Pradesh, cannot be held sufficient to carve out an exception to the mandate of law, as declared by Hon'ble Supreme Court in *Marri Chandra Shekhar Rao vs. Deen, Seth G.S. Medical College and others 1990 (3) SCC, 130, Action Committee on issue of Caste Certificate to Scheduled Castes and Scheduled Tribes in the State of Maharashtra and another vs. Union of India and others, 1994 (5) SCC, 244 and Subhash Chandra and another vs. Delhi Subordinate Services Selection Board and others 2009 (15) SCC, 458, Pankaj Kumar vs. State of Jharkhand & others, 2021 SCC (online) SC 616 and Ranjana Kumari Vs State of Uttaranchal 2019 (15) SCC 664.*

21. Question is answered accordingly.

22. In light of above discussion, we find no merit in the instant petition and the same is accordingly dismissed. Pending applications, if any, also stand disposed of.

BEFORE HON'BLE MR. JUSTICE MOHAMMAD RAFIQ, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Between:

HIMACHAL PRADESH STAFF SELECTION
COMMISSION, HAMIRPUR, THROUGH
ITS SECRETARY.

….PETITIONER

(MR. RAJ KUMAR NEGI,
ADVOCATE)

AND

1. RAJESH CHAUHAN,
   S/O SH. GOPI CHAND,
   R/O VILLAGE ANJI VIKAS NAGAR,
   PO KASUMPTI,
   DISTRICT KANGRA, H.P.

….RESPONDENT

2. STATE OF H.P. THROUGH
   ITS SECRETARY (PERSONNEL)
   GOVT. OF HIMACHAL PRADESH.

….PRO-FORMA RESPONDENT

(MR. SUNIL MOHAN GOEL,
ADVOCATE, FOR R-1)

(MS. RITA GOSWAMI, ADDITIONAL
ADVOCATE GENERAL FOR R-2)

CIVIL WRIT PETITION
NO. 734 of 2018
Decided on: 13.05.2022

Constitution of India 1950 – Article 226 – Service matter - The learned HP State Administrative Tribunal directed the Commission through Secretary to consider the case of petitioner for change of category from General to scheduled caste in terms of order dated 2.11.2017, passed by the Tribunal in T A. number 3825 of 2015 –Held-Respondent was admitted to selection process under general category where as he should have been rejected at the time of scrutiny - Respondent despite his having wrongly ticked his category as general that too on Blue form was permitted to participate in written test and thereafter in qualification skill test and it was only at the time of interview when the respondent claim to be candidate belonging to scheduled caste he was not interviewed and his candidature was rejected -There was report of committee constituted by the commission itself that there is no fault of respondent and it had recommended to consider the candidates of respondent

under scheduled caste category-As such the petitioner had no option but to consider him under the category of scheduled caste and thereafter offered appointment if he was selected-The order passed by the Tribunal was not suffering from any illegality and infirmly and accordingly up held - Petition dismissed.(Para 8 & 9)

This petition coming on for orders this day, **Hon'ble Mr. Justice Sandeep Sharma,** *passed the following:*

O R D E R

By way of instant writ petition filed under Article 226 of the Constitution of India, challenge has been laid to order dated 14.12.2017, passed by the erstwhile HP State Administrative Tribunal in OA No. 3340 of 2017 titled *Rajesh Chauhan v. State of HP and Ors* (Annexure P-1), whereby the erstwhile HP State Administrative Tribunal ("*in short the Tribunal"*) while allowing the Original Application having been filed by the petitioner (respondent No.1 herein), directed the Commission through Secretary to consider the case of the petitioner for change of category from General to Scheduled Caste (Unreserved) in terms of order dated 2.11.2017, passed by the Tribunal in TA No. 3825 of 2015 and the report of its Internal Committee (extract Annexure A-12). The Tribunal further ordered that in case respondent-petitioner is successful in the process for appointment to the post of Junior Office Assistant, further action be taken by making requests to respondent No.1-State for creation of supernumerary post as expeditiously as possible, but in any case not later than thirty days from the date of production of the certified copy of the order.

2. Precisely, the facts of the case as emerge from the record are that on 13.2.2015, posts of Junior Office Assistant (IT), came to be advertised under Post Code 447 vide advertisement No. 30 of 2015 dated 13.2.2015.

However, subsequently, number of posts of Junior Office Assistant (IT) were increased due to fresh requisitions from the various departments and vide third addendum dated 13.10.2015, the last date to apply was ultimately extended till 31.10.2015 for normal area and 05.11.2015 for the candidates residing in Lahaul and Spiti and Kinnaur District, Pangi & Bharmour Sub Divisions of Chamba District and Dodra Kawar Sub Division of Shimla District of Himachal Pradesh. Two different red and blue coloured application forms were separately provided to the candidates belonging to the General Category and Scheduled Caste Category. Scheduled Caste Category candidates were required to fill up blue coloured application forms. Respondent-petitioner submitted his application on 28.10.2018, for the post in question, but inadvertently, filled up his category as General (UR) in the blue application form. After being declared successful in the written test, typing skill test of the respondent--petitioner was conducted in the computer lab of the Commission. On 2.5.2017, result of typing skill test was declared and the category wise candidates were shortlisted for personal interview in the ratio of 1:3. Respondent-petitioner was declared qualified in the General (UR) category. On 29.6.2017, respondent-petitioner appeared in the personal interview and claimed that his category is Scheduled Caste (Unreserved) and as such, he was not interviewed by the Commission. Respondent-petitioner made a representation to the Commission to consider him as Scheduled Caste (Unreserved), but vide communication dated 12.7.2017, he was informed qua the decision of the Commission with regard to rejection of his candidature.

3. Being aggrieved and dissatisfied with aforesaid action of the Commission, respondent-petitioner approached the erstwhile Tribunal vide OA No. 3340 of 2017, wherein an interim order came to be passed to the effect that respondent-petitioner be permitted to appear in the interview for the post of Junior Office Assistant provisionally on a date fixed by the Secretary,

HPSSC, however his result shall not be declared and instead, be produced before it on the next date of hearing.

4. On 31.7.2017, respondent-petitioner was interviewed in compliance of the interim order passed by the Tribunal. On 15.9.2017, Commission on the basis of merit of the written objective typing/screening test held on 10.4.2016, followed by qualifying skill typing test on computer held w.e.f. 23.5.2017 to 7.9.2017, declared the final result for 1421 posts of Junior Office Assistant (on contract basis) (Post Code: 447). During proceedings, the Tribunal specifically asked the standing counsel representing the Commission to have instructions whether the category of the respondent-petitioner from "General" to "Scheduled Caste" can be changed at this stage or not. However, the Tribunal was informed that it is not possible to change the category of the respondent-petitioner at this stage, but learned Tribunal placing reliance upon order dated 2.11.2017, passed in TA No. 3825 of 2015 and the report submitted by the Internal Committee constituted by the Commission, wherein it was specifically concluded that in the given facts and circumstances of the case, candidate having Roll No. 515556, who had otherwise filled up blue form meant for reserved category be admitted to the selection process in Scheduled Caste (Unreserved) category, disposed of the Original Application having been filed by the respondent-petitioner vide order impugned in the instant proceedings, with direction to the Petitioner-Commission to consider the case of the respondent-petitioner for change of category from "General" to "Scheduled Caste (Unreserved)". Being aggrieved and dissatisfied with aforesaid order passed by the erstwhile Tribunal, petitioner-Commission has approached this Court in the instant proceedings, praying therein to set-aside the aforesaid impugned order passed by the erstwhile Tribunal.

5. Vide order dated 21.10.2021, passed by the Division Bench of this Court, direction was issued to petitioner-Commission to file specific

affidavit as to how many posts were reserved for the "Scheduled Caste Category" in the recruitment in question and whether any candidate lower in merit than the respondent-petitioner Rajesh Chauhan has been selected and appointed as Junior Office Assistant (IT).

6. Pursuant to aforesaid direction, petitioner-Commission has filed an affidavit specifically, stating therein that 140 persons, who were below the respondent/petitioner in merit were offered appointment to the post of Junior Office Assistant (IT) and apart from this, 19 other candidates from the waiting list have been also offered appointment.

7. Having heard learned counsel for the parties and perused the material available on record vis-à-vis reasoning assigned in the order impugned in the instant proceedings, this Court finds that there is no dispute that petitioner-Commission while issuing advertisement inviting application had specifically mentioned that candidate belonging to the "General Category" would fill up red form and candidate belonging to "Reserved Category" would fill up blue form. It is also not in dispute that in the case at hand, respondent-petitioner had filled up blue form, but inadvertently, he ticked on the box meant for "General Category (UR)" and as such, his candidature despite his being declared successful in written and skill test, came to be rejected by the petitioner-Commission. It is also not in dispute that pursuant to interim direction issued by the erstwhile Tribunal, petitioner-respondent was permitted to participate in the interview alongwith other successful candidates. It is also not in dispute that respondent while considering representation having been filed by the respondent-petitioner constituted Internal Committee, which after having gone through the record concluded as under:

> *" There is 01 candidate bearing Roll No. 515556, who is now otherwise eligible has claimed his category as SC (UR) and also filled up the blue colour form meant for reserved category. This candidate was initially admitted*

to the selection process under General (UR) category whereas he should have been rejected at the time of scrutiny and has now been rejected for the reason less fee paid despite the thing that there no provision at the relevant time to deposit the fee manually but the forms for General and Reserved category sold for Rs.360/- and Rs. 120/- respectively. The Committee is of the view that in the given facts and circumstances this very candidate be admitted to the selection process in SC(UR) category as he applied on the form of SC Category as per his request in the Hon'ble HPSAT, to end the litigation as per the minutes of the meeting of the Departmental Litigation Monitoring Committee of Personnel Deptt held on 22.08.2015 and 29.08.2015."

8. Though Committee had specifically concluded that respondent-petitioner belongs to the "Scheduled Caste (Unreserved)" category and he had filled up blue form, but yet petitioner-Commission not acceded to the prayer made by the respondent-petitioner and as such, he was compelled to approach the erstwhile Tribunal. No doubt, in the case at hand, respondent-petitioner was admitted to the selection process under "General (UR) Category", whereas he should have been rejected at the time of the scrutiny. However, in the case at hand, respondent-petitioner despite his having wrongly ticked his category as "General (UR)" that too on blue form was permitted to participate in the written test and thereafter in qualifying skill test. It is only at the time of the interview when he himself claimed to be candidate belonging to "Scheduled Caste (Unreserved)", he was not interviewed and his candidature was rejected. Since there is no dispute that blue coloured application form was specifically meant for Scheduled Caste Category and respondent-petitioner had filled up the blue form, there was otherwise no occasion for the Commission, to consider the candidature of the respondent-petitioner under "General Category (UR)". It is also not understood that when separate blue coloured form was

prescribed for the candidates belonging to the Scheduled Caste (Unreserved), where was the occasion for the Commission to write/prescribe the category of General Category (UR) in that form. True it is that respondent-petitioner while filling up blue form inadvertently, ticked at column/box containing General Category (UR), but that would not make him ineligible to participate in the selection process because he had rightly, as per the instructions, filled up the blue application form specifically prescribed for the candidates belonging to the Scheduled Caste (Unreserved).

9. Leaving everything aside, once there was report of the Committee constituted by the Commission itself that there is no fault, if any, of the respondent-petitioner and it had recommended to consider the candidature of the respondent-petitioner under the Scheduled Caste (Unreserved) category, petitioner-Commission had no option but to consider him under the category of Scheduled Caste (Unreserved) and thereafter, offer appointment, if he was selected. Order impugned in the instant proceedings passed by the erstwhile Tribunal is clearly based upon the report of the Committee constituted by the Commission and as such, no illegality and infirmity can be said to have been committed by the learned Tribunal below while directing the Commission to consider the case of the respondent-petitioner in light of report submitted by the Committee. As has been noticed herein above, 140 candidates, who were below the respondent-petitioner in merit, already stand offered appointment. Even 19 candidates from the waiting list have been also offered appointment and as such, great prejudice would be caused to the petitioner in case he is denied the appointment against the post in question despite his having cleared the entire selection process.

10. Consequently, in view of the above, we do not find any illegality and infirmity in the order impugned in the instant proceedings and same is upheld. Accordingly, present petition fails and dismissed being devoid of any merits. Needful in terms of directions passed by the erstwhile Tribunal vide

impugned order may be done expeditiously, preferably within two weeks and thereafter compliance report be filed before this Court forthwith. Pending applications, if any, stand disposed of.

BEFORE HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

BETWEEN:

DEVINDER KUMAR, SON OF SH. MADHAV SHARMA, R/O VILLAGE KANGAR P.O. RAJWARI TEHSIL BALH, DISTRICT MANDI, H.P.

........PETITIONER

(BY SHRI DIGVIJAY SINGH, ADVOCATE)

AND

1.STATE OF H.P. THROUGH PR. SECRETARY (I&PH), GOVERNMENT OF H.P. SHIMLA, H.P.

2.EXECUTIVE ENGINEER, I&PH DIVISION BAGGI, DISTRICT MANDI, H.P.

3.ACCOUNTANT GENERAL (A&E), HIMACHAL PRADESH, SHIMLA-03, H.P.
DELETED VIDE HON'BLE COURT'S ORDER DATED 07.11.2017.

.........RESPONDENTS

(BY SHRI DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL WITH SHRI GAURAV SHARMA, DEPUTY ADVOCATE GENERAL)

CIVIL WRIT PETITON (ORIGINAL APPLICATION)
No. 2442 of 2020

RESERVED ON:27.04.2022
DECIDED ON:02.05.2022

Constitution of India, 1950 – Article 226 service matter - Recovery of Rupees 2,08,520 /- (Rupees two lac eight thousand five hundred twenty only) was effected from the retirement gratuity of the petitioner on the pretext of access payment of salary to the petitioner for the period 01.01.2013 to 28.02.2017 – Held -- Excess payment, if any, made to the petitioner by the employer was not the result of any misrepresentation or fraud on the part of the petitioner to the recovery made from petitioner is harsh and arbitrary - Petitioner was a class-III employee and his retrial benefits definitely meant a lot to him and this factor would far out way the equitable balance of the employers right to recover-Order of the respondents quashed and set aside and they are directed to release amount of retirement gratuity to the petitioner within 4 weeks from date of order along with interest at the rate of 6% per annum w.e.f 28.02.2017 - Petition disposed of. (Paras 9 and 10)

This petition coming on for hearing this day**,** the Court passed the following :-

O R D E R

In the instant petition, petitioner has prayed for the following substantive relief(s):-

> *"i) That the present O.A. may kindly be allowed and order No. IPH-EE-BGI-EA-1-DCRG/2017-4294-99, dated 27.06.2017 (Annexure A-3), issued by respondent No.2 may kindly be quashed and set aside qua recovery of Rs. 2,08,520/- against applicant and further the respondents may be directed to release gratuity amount to the applicant forthwith alongwith interest."*

2. The case of the petitioner is that he retired as Pump Operator on 28.02.2017 from the office of respondent No.2. After undue delay, the retirement gratuity of petitioner was finally assessed on 02.05.2017 at Rs. 4,10,435/-. However, instead of disbursement of retirement gratuity at the earliest, respondent No. 2, vide office order dated 27.06.2017 effected recovery

of Rs.2,08,520/- from the sanctioned amount of retirement gratuity. The recovery was effected on the pretext of payment of excess salary to the petitioner for the period 01.01.2013 to 28.02.2017.

3. Petitioner has assailed the aforesaid recovery on the ground that the order, Annexure A-3, was vague without specifying the reasons for recovery. Petitioner was not afforded any opportunity of being heard before effecting the recovery. Petitioner further denied having received excess salary.

4. In reply, respondents No. 1 and 2 tried to justify the recovery on the ground that the category of Technician including Pump Operator were not entitled to the benefits of ACP Scheme as they were granted three tier pay structure. It is also contended that the pay fixation order in itself does not carry any right, as such order is always carrying a note that fixation is subject to approval of Audit/Head Office.

5. I have heard learned counsel for the petitioner as well as learned Additional Advocate General and have also gone through the status report.

6. It is not in dispute that petitioner, at the time of his retirement, held Class-III post under respondents No. 1 and 2. It is not the case of the respondents that the excess payment was received by the petitioner by misrepresentation of fact or fraud.

7. A Division Bench of this Court vide judgment dated 24.03.2022 in a bunch of matters with **CWPOA No. 3145 of 2019, titled as S.S. Chaudhary** Vs. **State of H.P & others,** as a lead case has held as under:-

> "34. It was after taking into consideration the entire law on the subject, the Hon'ble Supreme Court in Rafiq Masih (2) laid down guidelines relating to recovery in para-18 of its judgment (supra). Thus, in such circumstances, it cannot be said that Rafiq Masih (ii) does not lay down correct law.
>
> 35. In view of the aforesaid discussion, as held by Hon'ble Supreme Court in ***Rafiq Masih's case*** (supra), it is not possible to postulate all situations of hardship, where payments have mistakenly been made by

the employer, yet in the following situations, recovery by the employer would be impermissible in law:-

(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.

(vi) Recovery on the basis of undertaking from the employees essentially has to be confined to Class I/Group-A and Class-II/Group-B, but even then, the Court may be required to see whether the recovery would be iniquitous, harsh or arbitrary to such an extent, as would far over weigh the equitable balance of the employer's right to recover.

(vii) Recovery from the employees belonging to Class-III and Class-IV even on the basis of undertaking is impermissible.

(viii) The aforesaid categories of cases are by way of illustration and it may not be possible to lay down any precise, clearly defined, sufficiently channelised and inflexible guidelines or rigid formula and to give any exhaustive list of myriad kinds of cases. Therefore, each of such cases would be required to be decided on its own merit.

[

36. Thus, it would be clear that no inflexible rules regarding the recovery can be culled out and each case will have to be decided on its own merit keeping in view the broad guidelines as mentioned above."

8. Keeping in view the aforesaid exposition, petitioner falls in situations (i) & (ii). Thus, the instant case is covered by aforesaid judgment and the recovery effected by respondents from the petitioner vide Annexure A-3, cannot be sustained.

9. Since, the excess payment, if any, made to the petitioner by the employer was not the result of any misrepresentation or fraud on the part of the petitioner, the recovery made from the petitioner is harsh and arbitrary. Petitioner was a Class-III employee and his retiral benefits definitely meant a lot to him and this factor would far out way the equitable balance of the employer's right to recover.

10. In view of above discussion, the instant petition is allowed. Order No. IPH-EE-BGI-EA-1-DCRG/2017-4294-99, dated 27.06.2017 (Annexure A-3), issued by respondent No. 2, qua the recovery of Rs. 2,08,520/- is quashed and set aside and respondents are directed to release the amount of retirement gratuity to the petitioner within four weeks from the date of this order alongwith interest @ 6% per annum w.e.f. 28.02.2017 i.e. the date of retirement of the petitioner.

Accordingly, the instant petition is disposed of, so also the pending miscellaneous application(s), if any.

BEFORE HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

<u>Between:-</u>

1. SH. ATTAR SINGH S/O DHARAM SINGH, R/O VILLAGE PALOURA, P.O. DARKOTI, TEHSIL JAWALI, DISTT. KANGRA, H.P. PRESENTLY SERVING AS FOREMAN INSTRUCTOR, GOVT. POLY TECHNIC COLLEGE, DHAULAKUNA, DISTT. SIRMOUR.

2. SH. ASHOK KUMAR S/O LATE HIMAL CHAND, R/O VPO PHARER, TEHSIL PALAMPUR, DISTT. KANGRA,

H.P. PRESENTLY SERVING AS FOREMAN INSTRUCTOR, GOVT. POLYTECHNIC COLLEGE KANGRA, H.P.

3. SH. KARAM CHAND S/O SH. RANU RAM, R/O VILLAGE BATWARA, P.O. NALTI, TEHSIL & DISTT. HAMIRPUR, PRESENTLY SERVING AS FOREMAN INSTRUCTOR, Govt. POLYTECHNIC COLLEGE, HAMIRPUR, H.P.

4. SH. VINAYBIR SINGH S/O LATE JAI SINGH, R/O VILLAGE LOWERBERI, P.O. KOTHUWAN, TEHSIL SANDHOL, DISTT. MANDI, H.P. PRESENTLY SERVING AS FOREMAN INSTRUCTOR, GOVT. POLYTECHNIC COLLEGE, SUNDER NAGAR, DISTT. MANDI, H.P.

5. SH. PAN SINGH S/O SH. GANGA RAM, R/O VILLAGE KULARU, P.O. TAKERA, TEHSIL GHUMARWIN, DISTT. BILASPUR, H.P. PRESENTLY SERVING AS FOREMAN INSTRUCTOR, GOVT. POLYTECHNIC COLLEGE UDAYPUR, DISTT. LAHUL & SPITI, H.P.

6. SH. HARI NAND S/O SH. GITA RAM, R/O VILLAGE BAHRYAL, P.O. BADHARI VIA TOTU, TEHSIL & DISTT. SHIMLA, PRESENTLY SERVING AS FOREMAN INSTRUCTOR, GOVT. POLYTECHNIC COLLEGE, KANDAGHAT, DISTT. SOLAN, H.P.

7. SH. VIJAY KUMAR S/O JAMBA RAM, R/O VPO AND TEHSIL BHORANJ, DISTT. HAMIPUR H.P. PRESENTLY SERVING AS FOREMAN INSTRUCTOR, GOVT. POLYTECHNIC COLLEGE, BILASPUR, CAMPT AT HAMIRPUR, H.P.

8. SH. AJIT KUMAR S/O DURGA DASS, R/O VILLAGE SALOA, FAKLOH, TEHSIL JAWALAMUKHI, DISTT. KANGRA, H.P. PRESENTLY SERVING AS FOREMAN

INSTRUCTOR, GOVT. POLY TECHNIC COLLEGE, KULLU, DISTT. KULLU, H.P.

9. SH. BALBIR SINGH S/O LATE JIWAN DASS, R/O VPO, LOHARLI, TEHSIL GHANARI (AMB) DISTT. UNA, H.P. KANDAGHAT, DISTT. SOLAN, H.P. PRESENTLY SERVING AS FOREMAN INSTRUCTOR, GOVT. POLYTECHNIC COLLEGE, UNA, H.P.

10. SH. HARINDER SINGH S/O LATE BUDHI SINGH, R/O VPO BALUGLOD, TEHSIL BAROH, DISTT. KANGRA, H.P. PRESENTLY SERVING AS FOREMAN INSTRUCTOR, GOVT. POLYTECHNIC COLLEGE.

….PETITIONERS.

(BY MR. L.N. SHARMA, ADVOCATE)

AND

1. STATE OF H.P. THROUGH ITS SECRETARY (TECHNICAL EDUCATION) TO THE GOVT. OF H.P. SHIMLA-2.

2. PR. SECRETARY (FINANCE) TO THE GOVT. OF H.P. SHIMLA-2.

3. DIRECTOR, TECHNICAL EDUCATION VOCATIONAL INDUSTRIAL TRAINING, SUNDERNAGAR, H.P.

….RESPONDENTS.

(BY MR. P.K. BHATTI, ADDITIONAL ADVOCATE GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
NO. 6543 OF 2019.
RESERVED ON:13.05.2022
DECIDED ON: 20.05.2022

Constitution of India, 1950 - Article 226 - Service matter - Parity in the pay scale -- Petitioners claimed parity of pay scale with their counterparts in Punjab – Held -- The petitioners cannot claim parity of pay scale with their counterparts in Punjab because the pay scales are fixed in view of staffing pattern, recruitment and promotion rules, method of recruitment, educational qualifications and financial resources -- The petitioners cannot claim parity of pay scale with their counterparts in Punjab – However the respondents are directed to reconsider the case of the petitioners by removing the anomaly and allow them appropriate higher pay than pay granted to feeder category post of workshop instructors.(Paras 12, 15 & 18)

Cases referred:
State of H.P. vs. P.D. Attri and others, (1999)3 SCC 217;
State of H.P. and Others vs. Dr. Suman Sharma, 2020 (4) Shim. LC 2031;

This petition coming on for hearing this day, the Court passed the following:-

O R D E R

The petitioners filed O.A. No. 5298 of 2016 before the Himachal Pradesh State Administrative Tribunal praying for following reliefs:-

> *"(i) That the respondents be directed to the pay scale of Rs.15,600-39100+5400GP to the applicant on their promotion to the post of foreman instructors at par with the Punjab Government Employee immediately.*
> *(ii) That the respondent be further directed not make further promotion to the post of Workshop Superintendent without considering the case of the applicants, since all the applicants fulfills all the requisite qualification as per the R&P Rules of Punjab.*

> *(iii) That the directions may kindly be issued to the respondents to pay the entire arrears to the applicant from the due date along with interest."*

2. O.A. No. 5298 of 2016 came to be transferred to this Court after abolition of H.P. State Administrative Tribunal and has been registered as CWPOA No. 6543 of 2019.

3. Petitioners were initially appointed as Workshop Instructors on regular basis in the pay scale of 1350-2400. Pay scale of petitioners as Workshop Instructors was revised from time to time and was fixed in the pay band of Rs.10300-34800 with 3600 as grade pay w.e.f. 1.1.2006.

4. Respondents created posts of Foreman Instructors and framed recruitment and promotion rules for such post vide notification dated 13.10.2011. Post of Foreman Instructor was to be filled 100% by promotion from the feeder category of Workshop Instructors who had five years regular service or regular combined with continuous ad-hoc service, in the cadre. The post of Foreman Instructor was placed in the pay band of Rs.10300-34800 with 4200 grade pay.

5. Petitioners No.1 to 5 were promoted as Foreman Instructors in 2011 and 2012. After their promotion to the posts of Foreman Instructors, petitioners represented to respondents for grant of pay scale of Rs.15,600-39100+5400 G.P. as was being paid to their counter parts in State of Punjab. Respondent No.3 recommended the case of petitioners, but vide notification dated 16.07.2016, Annexure A-8, petitioners were allowed pay scale of 10300-34800 with 4600 Grade Pay w.e.f. 01.08.2016.

6. Aggrieved against the denial of pay scale of 15600-39100+5400 Grade Pay, petitioners approached the Himachal Pradesh State Administrative Tribunal by way of O.A. No.5298 of 2016 *inter alia* praying for reliefs as noticed above.

7. Petitioners contended that State of Himachal Pradesh has adopted Punjab pay pattern for all categories of employees. The category of

Foreman Instructors in Punjab was paid Rs.15600-39100+5400 Grade Pay since 2009. Petitioners were also entitled to the same scale on the ground of parity. It was also contended on behalf of petitioners that respondents had allowed pay scale of 10300-34800+4600 G.P. even to the Workshop Instructors w.e.f. 01.12.2012.

8. In response, respondents submitted that the staff structure in the workshop in Polytechnics of the State since 1973 to 2011 included posts of Workshop Instructor in respective fields in each workshop for imparting training to the diploma students in the workshop and the overall Incharge of the workshop was Workshop Superintendent, who also taught theory subjects in addition to overall supervision. Post of Workshop Instructor was Class-III Non-gazetted in the pay scale of 10300-34800 with 3600 Grade Pay and the post of Workshop Superintendent was Class-I Gazetted post in the pay scale of 15600-39100+5400 Grade Pay. Whereas the qualification for the post of Workshop Instructor was possession of ITI certificate in the concerned trade from a recognized Board/Institution with two years' post certificate industrial experience or three years diploma in respective branch or its equivalent for Workshop Instructor from a recognized Polytechnic Institute/ Institution, the qualification for the post of Workshop Superintendent was possession of Bachelor or Masters Degree in Mechanical/Auto Engineering with first class or equivalent.

9. As per respondents, the State Government in the year 2008, created new posts of Foreman Instructor in pre-revised pay scale of 6400-10649 and revised to 10300-34800+4600 Grade Pay. It is also the stand of the respondents that vide notification dated 28.09.2012, the grade pay of Rs.4600 was allowed to those Workshop Instructors, who had rendered two years of regular service.

10. Respondents further contended that the State Government is independent to decide on grant of pay scale etc., and to revise such pay scales

from time to time in exercise of power conferred by proviso to Article 309 of the Constitution of India. The specific stand of respondents is that the State Government is not bound to follow the Punjab pattern for grant of pay scales to its employees. The matter regarding grant of revised pay scales/grade pays to the category of Foreman Instructors was placed before the expert committee and thereafter the same was also placed before the Council of Ministers for consideration. Accordingly, the pay structure of Rs.10300-34,800+4600 G.P. was approved to be granted to Foreman Instructors prospectively w.e.f. 1.08.2016.

11. I have heard Mr. L.N. Sharma, learned counsel for the petitioners and Mr. P.K. Bhatti, learned Additional Advocate General for the respondents and have also gone through the records.

12. Petitioners are claiming pay scale of 15600-39100+5400 Grade Pay for themselves as Foreman Instructors on the basis of same scale being drawn by their counter parts in State of Punjab. It is no more *res integra* that the Government of Himachal Pradesh is not bound to follow the pay scales granted by the State of Punjab to its employees. In ***State of Himachal Pradesh vs. P.D. Attri and others, (1999)3 SCC 217***, the Hon'ble Apex Court has held as under:-

> *"5. The Case of the respondents is not based on any Constitutional or any other legal provisions when they claim parity with the posts similarly designated in the Punjab & Haryana High Court and their pay-scales from the same date. They do not allege any violation of any Constitutional provision or any other provision of law. They say it is so because of "accepted policy and common practice" which according to them are undisputed. We do not think we can import such vague principles while interpreting the provisions of law. India is a union of States. Each State has its own individualistic way of governance under the Constitution. One State is not bound to follow the rules and regulations applicable to the*

employees of the other State or if it had adopted the same rules and regulations, it is not bound to follow every change brought in the rules and regulations in the other State. The question then arises before us is if the State of Himachal Pradesh has to follow every change brought in the States of Punjab & Haryana in regard to the rules and regulations applicable to the employees in the States of Punjab & Haryana. The answer has to be in negative. No argument is needed for that as anyone having basic knowledge of the Constitution would not argue otherwise. True, the State as per "policy and practice" had been adopting the same pay-scales for the employees of the High Court as sanctioned from time to time for the employees of the Punjab & Haryana High Court and it may even now follow to grant pay-scales but is certainly not bound to follow. No law commands it to do so."

13. Following the aforesaid mandate, the Division Bench of this Court in ***State of Himachal Pradesh and Others vs. Dr. Suman Sharma, 2020 (4) Shim. LC 2031 ,*** has held as under:-

"4(i) Reliance upon the notification dated 21.12.2011 issued by State of Punjab for claiming Grade Pay of Rs.6600/- is misplaced. This notification was issued by Government of Punjab and not by Government of Himachal Pradesh. Even though petitioner-State has admitted that by and large it takes into consideration the Punjab pattern of pay-scale. But the fact cannot be lost sight of that the petitioner-State examines the matter of pay-scales in view of it own staffing pattern, Recruitment & Promotion Rules, method of recruitment, educational qualifications, geographical/traditional/territorial conditions and financial resources and then fixes the pay-scales for its employees by framing statutory Rules under Article 309 of Constitution of India. Government of Himachal Pradesh is not legally bound to follow Punjab pattern pay-scales."

14. In view of the aforesaid exposition of law, petitioners cannot claim parity of pay scale with their counter parts in Punjab. Otherwise also the post of Foreman Instructor in Punjab cannot be equated with the posts held by petitioners in State of Himachal Pradesh for the reason that in State of Punjab there are two modes for filling up the post of Foreman Instructor, first being direct recruitment and second by promotion. For direct recruitment the essential qualification is First Class Bachelor Degree or First Class Master Degree in Mechanical Engineering/Production Engineering/Electrical Engineering/ Electronic and Communication Engineering with two years' experience in a Workshop/industrial concern of repute. For recruitment to the post of Foreman Instructor by promotion, the prescribed requirement is 10 years experience as regular Workshop Instructor in the relevant trade in a recognized technical institution. In State of Himachal Pradesh, only one mode i.e. by promotion is prescribed for the post of Foreman Instructor and Workshop Instructor with five years regular service or regular continuous *ad-hoc* service rendered, if any, in the grade is eligible for promotion. Noticeably, for the post of Workshop Superintendent in State of Himachal Pradesh, the essential qualification is possession of Bachelor Degree, as noticed above, and the mode of recruitment is by way of direct recruitment only.

15. Thus, the qualification for the post of Foreman Instructor in Punjab, in the case of direct recruitment is possession of First Class Bachelor Degree or Master degree and by way of promotion, experience of 10 years as regular Workshop Instructor is required. Petitioners neither hold the qualification as required for the post of Foreman Instructor through direct recruitment in State of Punjab nor have the requisite experience of 10 years before their promotion. Further, even the essential qualification prescribed for the post of Workshop Instructors in the State of Himachal Pradesh and State of Punjab are not identical.

16. In view of above discussion and exposition of law, petitioners are not entitled to the reliefs as claimed by them.

17. However it cannot be ignored that the category of Workshop Instructor in Himachal Pradesh, indisputably, is drawing pay scale of 10300-34800 +4600 Grade Pay w.e.f. 1.12.2012, in pursuance to notification dated 28.09.2012. Petitioners who were promoted as Foreman Instructors prior to issuance of notification dated 28.09.2012 were being paid pay scale of 10300-34800 + 4200 Grade Pay and their grade pay was increased to Rs.4600/- w.e.f. 01.08.2016. This anomaly remains unexplained. It is strange that feeder category as well as promotional category have been placed in the same pay band and are also being paid the same grade pay. It is not the case of the respondents that the post of Foreman Instructor is not a promotional post and does not carry higher duties and responsibility. It is clear from the recruitment and promotion Rules framed for the post of Foreman Instructors that initially they were granted higher grade pay of Rs.4200 in comparison to the feeder category of Workshop Instructor who was being paid Grade Pay of Rs.3600/-. Since the Workshop Instructors were allowed enhanced Grade Pay of Rs.4600/- after regular service of two years, no corresponding provision has been made for Foreman Instructors. Such conduct of respondents is not only irrational but is highly arbitrary.

18. In view of the above discussion, though the reliefs as prayed by the petitioners are declined, however, the respondents are directed to reconsider the case of the petitioners by removing anomaly as detailed above and to allow them appropriate higher pay than pay granted to feeder category post of Workshop Instructors. The respondents are directed to do the needful within three months from the date of passing of this order. Petition is accordingly disposed of. All pending applications shall also stand disposed of.

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

Between :-

NATIONAL INSURANCE COMPANY LIMITED, SUB DIVISIONAL OFFICE, BAIJNATH ROAD, PALAMPUR, H.P. THROUGH ITS ADMINISTRATIVE OFFICER (LEGAL) DIVISIONAL OFFICE, NATIONAL INSURANCE COMPANY LIMITED, HIMLAND HOTEL, CIRCULAR ROAD, SHIMLA, H.P.

...APPELLANT

(BY MR. JAGDISH THAKUR, ADVOCATE)

AND

1. INDER KAUR, W/O LATE RAM PAL, R/O VILLAGE JEETPUR, BAHERI, TEHSIL AMB, DISTRICT UNA, H.P.

2. PANKAJ GULERIA, S/O LATE SHRI KULDEEP SINGH, R/O VILLAGE JHAGNOLI, TEHSIL FATEHPUR, DISTRICT KANGRA, H.P.

3. SURINDER SINGH, S/O SHRI PARTAP SINGH, R/O VILLAGE JHUMB, TEHSIL FATEHPUR, DISTRICT KANGRA, H.P. (OWNER OF VEHICLE BEARING REGISTRATION No. HP-68A(T)-6245

...RESPONDENTS

FIRST APPEAL FROM ORDER (MVA)
No. 34 of 2021
Decided on:11.05.2022

Motor Vehicle Act, 1988 - Section 166 -- In the instant case, Ld. Motor Accident Claims Tribunal has determined the potential income of deceased at Rs. 15,000/- per month and the Honorable Apex Court in Arvind Mishra's

case had determined the potential income of injured student at Rs. 5,000/- per month in the year of 2010 -- The victim in that case was undergoing course in prestigious institute and the accident in the instant case occurred in the year 2015 - There is no specific evidence on record regarding merit or future prospect of the deceased - Therefore considering all relevant factors and the material which have come on record, it will be appropriate to determine the potential income of deceased at Rs. 12,000/- per month - Award dated 24.12.2018 passed by the Motor Accident Claims Tribunal Una in M.A.C. petition number 126 of 2016 is modified and the appellant is held liable to pay 70% of total compensation amount of Rs. 18,84,400/-, i.e. Rs. 13,19,080/- along with interest @ 9% per annum – Appeal stands disposed of. [Paras 3 (ii)]

Cases referred:

Arvind Kumar Mishra Vs. New India Assurance Co. Ltd. and another 2010 ACJ 2867 (SC);

Lata Wadhwa Vs. State of Bihar 2001 ACJ 1735 (SC);

M.R. Krishna Murthi Vs. New India Assurance Co. Ltd. and others, 2019 ACJ 1291 (SC);

Radhakrishna and another Vs. Gokul and others 2013 ACJ 2860 (SC);

This appeal coming on for orders this day, ***Hon'ble Ms. Justice Jyotsna Rewal Dua****, delivered the following :*

J U D G M E N T

One Rohit Kumar was a student of Architectural Assistantship Course in Dr. B.R. Ambedkar Government Polytechnic College Ambota, District Una, H.P. His date of birth was 07.05.1995. On 17.09.2015, he was travelling as a pillion rider on the motor cycle alongwith one Vicky. The motor cycle met with an accident on account of rash and negligent driving of a car driven by respondent No. 2. Rohit Kumar and Vicky died on the spot. Respondent No. 1 Smt. Inder Kaur-mother of Rohit Kumar preferred a claim petition under Section 166 of the Motor Vehicles Act. Learned Motor Accident Claims Tribunal vide award dated 24.12.2018 allowed the claim petition. Respondents No. 2 and 3 and the appellant-Insurance Company were held liable for payment of compensation to the extent of 70% with interest @ 9%

per annum from the date of filing of the petition till deposit. The potential income of the deceased was assessed as Rs. 15,000/- per month. On that basis, compensation was determined as Rs. 16,36,600/-. The liability of payment of compensation to the extent of 70% was to be discharged by the Insurance Company i.e. the appellant.

2. The appellant-Insurance Company has assailed the award passed by the learned Motor Accident Claims Tribunal. Learned counsel for the appellant confined his submission only on the ground that potential income of the deceased was determined on the higher side by the learned Tribunal.

3. I have heard learned counsel for the parties and gone through the record.

3(i) It is not in dispute that the deceased was a student of 3 years course in Dr. B.R. Ambedkar Government Polytechnic College Ambota, District Una, H.P. The deceased was to become a qualified Architectural Assistant by the year 2016. At the time of his death in the fateful accident, he had already completed two years of the said course. Deceased was a student. Thus, in a case of such facts, it is the potential income which had to be ascertained. It will be appropriate at this stage to notice a judgment passed by Hon'ble Apex Court in ***Arvind Kumar Mishra*** *Vs.* ***New India Assurance Co. Ltd. and another 2010 ACJ 2867 (SC)***. This case pertained to award of compensation to the appellant who had sustained grievous injuries in a road accident. The appellant aged 25 years at the time of the accident was a student of Bachelor of Engineering (Mechanical) in B.I.T. institution. The Hon'ble Apex Court noticed that the appellant in his evidence had stated that in the campus interview, he was selected by TATA as well as by Reliance Industry and was offered a pay package of Rs. 3,50,000/- per annum. The Hon'ble Apex Court observed that it can be reasonably assumed that the

appellant would have got a good job and accordingly assessed the appellant's future earning as Rs. 60,000/- per annum.

In ***Lata Wadhwa*** *Vs.* ***State of Bihar 2001 ACJ 1735 (SC)***, Hon'ble Apex Court awarded compensation of Rs. 5,00,000/- to the parents of children who were students of 4th, 5th and 6th classes.

In ***Radhakrishna and another*** *Vs.* ***Gokul and others 2013 ACJ 2860 (SC)***, the deceased was 19 years old and student of Engineering course. The Tribunal determined the compensation by taking his annual income as Rs. 15,000/-. After noticing the above two judgments, the Hon'ble Apex Court held the appellants therein entitled to compensation of Rs. 7,00,000/- with interest @ 6% per annum. It will also be appropriate to refer to ***2019 ACJ 1291 (SC)***, *titled* ***M.R. Krishna Murthi*** *Vs.* ***New India Assurance Co. Ltd. and others***, wherein after considering various precedents including the judgment rendered in Arvind Kumar Mishra (supra), the Hon'ble Court culled out following principles for assessing the compensation :-

> *"(i) In those cases where the victim of the accident is not an earning person but a student, while assessing the compensation for loss of future earning, the focus of the examination would be the career prospect and the likely earning of such a person in future. For example, where the claimant is pursuing a particular professional course, the poser would be: what would have been his income had he joined a service commensurating with the said course. That can be the future earning.*
>
> *(ii) There may be cases where the victim is not, at that stage, doing any such course to get a particular job. He or she may be studying in a school. In such a case, future career would depend upon multiple factors like the family background, choice/interest of the complainant to pursue a particular career, facilities available to him/her for adopting such a career, the favourable surrounding circumstances to see which would have enabled the claimant to successfully pick up the said career etc.*

If the chosen field is employment, then the future earning can be taken on the basis of salary and allowances which are payable for such calling. In case, career is a particular profession, the future earning would depend on host of other factors on the basis of which chances to achieve success in such a profession can be ascertained.

(iii) There may be cases like Deo Patodi where even a student, the claimant would have made earnings on part-time basis or would have received offer for a particular job. In such cases, these factors would also assume relevance.

(iv) After ascertaining the likely earning of the victim in the aforesaid manner, the nature of injuries and disability suffered as a result thereof would be kept in mind while determining as to how much earning has been affected thereby. Here, impact of injuries on functional disability is to be seen. In case of death of victim, it would result in total loss of earning. In the case of injuries, the nature of disability becomes important. Such an exercise was undertaken in N. Manjegowda case {(1014 ACJ 617 (SC)}."

3(ii) In the instant case, learned Motor Accident Claims Tribunal has determined the potential income of the deceased at Rs. 15,000/- per month. The Hon'ble Apex Court in Arvind Mishra's case (supra) had determined the potential income of the injured student at Rs. 5,000/- per month in the year 2010. The victim in that case was undergoing course in a prestigious institute. The accident in the instant case occurred in the year 2015. There is no specific evidence on record regarding merit or future prospect of the deceased. Therefore, considering all relevant factors and the material which have come on record, it will be appropriate to determine the potential income of the deceased at Rs. 12,000/- per month. The learned Motor Accident Claims Tribunal has awarded 9% interest per annum on the compensation amount. Accordingly the payable compensation is worked out as under :-

1. Income of deceased Rs. 12,000/-

2.	Additional 40% on account of future prospects as per National Insurance Co. Ltd. Vs. Pranay Sethi 2017 ACJ 2700 (SC)	Rs. $\frac{12,000 \times 40}{100}$ = 4,800/-
3.	Total Income	Rs. 12,000 + 4800 = Rs. 16,800/-
4.	½ deducted for personal expenses as per Smt. Sarla Verma and others Vs. Delhi Transport Corporation and another 2009 (6) SCC 121	Rs. $\frac{16,800}{2}$ = 8,400/-
5.	Loss of Dependency	Rs. 8,400/-
6.	Multiplier of 18 considering age of deceased	Total amount = Rs. 8,400 x 12 x 18 = 18,14,400/-
7.	Loss of parental consortium.	Rs. 40,000/-
	Loss of estate	Rs. 15,000/-
	Funeral expenses	Rs. 15,000/-
	Grand Total	Rs. 18,84,400.
		70% of Rs. 18,84,400/- comes to Rs. 13,19,080/- + 9% interest p.a.

Learned Tribunal has fixed the liability of the appellant to the extent of 70% of the total compensation amount. This has been accepted by the claimant. Accordingly, appellant is held liable to pay 70% of the total compensation amount of Rs. 18,84,400/- i.e. Rs. 13,19,080/- alongwith interest @ 9% per annum.

The award dated 24.12.2018 passed by the Motor Accident Claims Tribunal-I, Una in M.A.C. Petition No. 126 of 2015 is modified

to the aforesaid extent. Remaining part of the award including the interest component awarded therein shall remain as it is. Registry is directed to release the compensation amount, alongwith upto date interest, to the claimant/respondent No. 1 in terms of this judgment on her furnishing the details of her bank account The appeal stands disposed, so also the pending applications, if any.

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

Between:-

SHRIRAM GENERAL INSURANCE COMPANY
SHAMSHERPUR, NEAR Y-POINT,
PAONTA SAHIB, DISTT. SIRMOUR, HP,
THROUGH SH. AMANDEEP SHARMA
LEGAL OFFICER & AUTHORIZED SIGNATORY,
SCO-178, 1ST FLOOR, SEC.38-C,
CHANDIGARH

……APPELLANT

(BY SH. VIRENDER SHARMA, ADVOCATE)

AND

1. SMT. NIRMALA DEVI
W/O SH. SUNIL DUTT,
AGED 33 YRS.

2. SMT. VIDYA DEVI
W/O SH. NATHU RAM,
(MOTHER OF DECEASED)
AGED 56 YRS.

3. MASTER KABIR PUNDEER (MINOR)
S/O SH. SUNIL DUTT,
AGED ABOUT 10 YRS.

4. MASTER MANAV PUNDEER (MINOR)
S/O SH. SUNIL DUTT,
AGED ABOUT 9 YRS.
BOTH SONS THROUGH THEIR
NATURAL GUARDIAN MOTHER
SMT. NIRMALA DEVI,
ALL RESIDENTS OF VILLAGE DUGANA,
SUB-TEHSIL KAMRAOO, TEHSIL PAONTA SAHIB,
DISTT. SIRMOUR, HP

.......RESPONDENTS/PETITIONERS

5. SH. JAI PAL
S/O SH. LAL SINGH,
R/O VILL. ASHYARI, PO TIMBI,
TEHSIL SHILLAI, DISTT. SIRMOUR, H.P.

6. SH. ROHIT CHAUHAN
S/O SH. INDER SINGH,
R/O MUINAL BAG, SUB-TEHSIL KAMRAOO,
TEHSIL PAONTA SAHIB, DISTT. SIRMOUR, HP
(OWNER AS PER AGREEMENT DATED 31-01-2013
OF BOLERO CAMPER HP-17B-1959)

7. SH. HIRDA RAM
S/O SH. LAYAK RAM,
R/O VILL. DHAL (NADA),
PO DUGANA, SUB-TEHSIL KAMRAOO,
TEHSIL PAONTA SAHIB, DISTT. SIRMOUR, HP
(DRIVER OF BOLERO CAMPER HP-17B-1959)

......RESPONDENTS

(BY SH. VINOD CHAUHAN, ADVOCATE,
FOR R-1 TO R-4,

MR. AVINASH JARYAL, ADVOCATE VICE MR. SHYAM SINGH
CHAUHAN, ADVOCATE, FOR R-5 TO R-7)

FIRST APPEAL FROM ORDER
No.245 of 2019

RESERVED ON:09.05.2022
PRONOUNCED ON:23.05.2022

Motor vehicle Act, 1988 – Section 166 – Claim for compensation -- Liability to pay compensation in case of gratuitous passenger – Held -- Merely for the reason that permissible sitting capacity of vehicle was not exhausted would not mean that question raised by the insurer did not need to be examined, more so in the facts of the case - Registration certificate did say that authorized capacity of total travelers in the vehicle was 5 - The insurance policy covered the risk of 4+1 persons including the driver - There is no escape from the conclusion that deceased was travelling as gratuitous passenger in the goods vehicle in violation of terms of its insurance policy -- The insurance company is not liable to suffer the liability on the strength of breach of insurance policy -- However, the insurance company after payment of the award dated 22.11.2018 passed by Ld. Motor Accident Claims Tribunal shall recover the same from the registered owner of the vehicle -- Appeal allowed. (Paras 3(c) & 5)

Cases referred:

Anu Bhanvara vs. Iffco Tokio General Insurance Company Ltd. (2019) 10 Scale 668;

Chandra alias Chandaram and another Vs. Mukesh Kumar Yadav and others (2022)1 SCC 198;

Manager National Insurance Company Vs. Saju P. Paul (2013) 2 SCC 41;

Manuara Khatun vs. Rajesh Kr. Singh (2017) 4 SCC 796;

National Insurance Company Limited Vs. Anjana Shyam & others (2007) 7 SCC 445;

This Appeal coming on for admission this day, the Courtdelivered the following:

<u>J U D G M E N T</u>

Learned Motor Accident Claims Tribunal awarded Rs.12,12,400/- to the claimants alongwith 9% interest per annum from the date of filing of petition till its deposit. Liability to pay the compensation was fastened on the appellant, being insurer and indemnifier of respondent No.5– the registered owner of the vehicle. The insurer has taken exception to the award in the instant appeal. Though many grounds have been taken in the memo of appeal, but during hearing, learned counsel confined his

submissions only on following three points for challenging the impugned award:-

i) Driver of the offending vehicle did not possess a valid driving license.

ii) Deceased was a gratuitous passenger in the goods vehicle.

iii) The compensation has been assessed on the higher side.

The above points are being separately discussed hereinafter.

2. Driving License

Learned counsel for the appellant/insurer argued that driving license of the driver was fake. The deposition of Aman Deep Sharma (RW-1) proved fakeness of the driving license. He had stated having checked the status of the driving license on the website of concerned Registering and Licensing Authority. The downloaded copy of the documents Ext. RW1/D and endorsement made thereon as RW1/E prove the assertion of the appellant that driving license Ext. R-1 was fake.

The plea that driving license of the driver of offending vehicle was fake is not supported by the evidence. The onus to prove this issue was on the Insurer/appellant. Aman Deep Sharma (RW1) as per his statement had only checked the status of driving license on the website of the concerned Registering & Licensing Authority. It was for the insurer to produce evidence from the concerned Authority. No witness was examined by the Insurer to prove alleged fakeness of the driving license. Documents downloaded from the website, i.e. Ext. RW1/D and Ext. RW1/E-the endorsement thereupon, are not admissible. Merely on the strength of these downloaded documents, the driving license, Ext. R-1, cannot be held to be fake. It is also well settled that fake license in itself is not sufficient to exonerate the insurance company unless it is proved on the record that the owner of the vehicle knew that the license was fake and despite this knowledge, he permitted the driver to drive the vehicle. Such evidence is not available in the present case. Therefore, plea of the insurer is rejected. Point is answered accordingly.

3. Gratuitous passenger

3(a). Learned counsel for the appellant next contended that the deceased was travelling as a gratuitous passenger in a goods vehicle. He was travelling unauthorizedly in violation of terms of Insurance Policy. Appellant-insurance company is, therefore, not liable to pay any compensation to the claimants.

3(b). Section 147 of the Motor Vehicles Act, 1988 falling under Chapter XI 'Insurance of Motor Vehicles Against Third Party Risks' lays down requirements of policies and limits of liability. Provisions of Section 147(1)(a) and (b) read as under:-

> *"147. Requirement of policies and limits of liability.- (1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which-*
>
> *(a) is issued by a person who is an authorised insurer; and*
>
> *(b) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)-*
>
> *(i) against any liability which may be incurred by him in respect of the death of or bodily injury to any person including owner of the goods or his authorised representative carried in the motor vehicle or damage to any property of a third party caused by or arising out of the use of the motor vehicle in a public place;*
>
> *(ii) against the death of or bodily injury to any passenger of a transport vehicle, except gratuitous passengers of a goods vehicle, caused by or arising out of the use of the motor vehicle in a public place.*
>
> *Explanation.- For the removal of doubts, it is hereby clarified that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place, notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place………………"*

3(c). 'Whether the petitioner was an unauthorized passenger on the vehicle' was one of the issues framed in the claim petition. Instant was a case where deceased was travelling in a goods vehicle (Pick-up Mahindra &

Mahindra Camper Bolero). The Registration Certificate (Ext. R2) of this vehicle delineated sitting capacity of the vehicle as five (5). Learned Motor Accident Claims Tribunal observed that Insurance Policy (Ext. R3) had covered the risk of four plus one passenger. Taking note of the Registration Certificate of the vehicle and the Insurance Policy, learned Tribunal held that four passengers could travel in the vehicle apart from its driver. Learned Tribunal held that the capacity in which the deceased travelled in the vehicle became immaterial as the vehicle in question could carry four persons apart from its driver and the risk of four passengers apart from its driver was covered under the insurance policy. Learned Tribunal, thus, declined to go into the question whether deceased was travelling in the offending vehicle as a gratuitous passenger and its effect on the liability of the insurer.

Merely for the reason that permissible sitting capacity of the vehicle was not exhausted would not mean that question raised by the insurer did not need to be examined, more so in the facts of the case. The Registration Certificate (Ext.R2) did say that authorized capacity of total travellers in the vehicle was five. The insurance policy (Ext. R3) covered the risk of 4+1 persons including the driver. But the terms and conditions of the insurance policy clearly put in place following limitations as to use of motor vehicle:-

> *"Use only for carriage of goods within the meaning of the Motor Vehicles Act. The Policy does not cover: 1) Use for organized racing, pace-making, reliability trial or speed testing.2) Use whilst drawing a trailer except the towing (other than for reward) of anyone disabled mechanically propelled vehicle.* ***3) Use for carrying passengers in the vehicles; except employees (other than the driver) not exceeding the number permitted in the registration document and coming under the purview of Workmen's Compensation Act 1923****."*

Insurance is a contract between the owner/insured and the insurer. Parties are governed by the terms of the contract. The Motor Vehicles

Act has made insurance obligatory in public interest and by way of social security, it has also provided that the insurer would be obliged to fulfil his obligations as imposed by the contract and as overseen by the statute notwithstanding any claim he may have against the other contracting party, the owner and meet the claim of third parties subject to the exceptions provided in Section 149(2) of the Act. But that does not mean that an insurer is bound to pay amount outside the contract of insurance itself or in respect of persons not covered by the contract at all[Re ***(2007) 7 SCC 445***,titled ***National Insurance Company Limited Vs. Anjana Shyam & others***]. In the facts of the case in hand, the insurance policy did not permit carrying of passengers in the vehicle. In terms of the Insurance Policy, the risk of 4+1 persons was covered provided that they were travelling as employees falling within the purview of Workmen's Compensation Act and their number was within the permissible limit set forth in the registration certificate of the vehicle. It is an admitted position that the deceased was travelling in the goods vehicle. The claimants have not pleaded that the deceased was travelling in the vehicle as an owner of goods or that he was carrying some goods in the vehicle. It is not even the case of the claimants that deceased was an employee of the owner of the vehicle and was travelling in the vehicle in that capacity. In its reply, the insurer took up the defence of deceased being a gratuitous and unauthorized passenger in the goods vehicle. The claimants had neither pleaded that the deceased was travelling in the vehicle as an owner of the goods or in the capacity of an employee of the owner of the vehicle, nor any evidence was led by them in this regard. Whereas, in support of its plea of deceased being a gratuitous& unauthorized passenger, the insurer also produced Ext. RW1/C–a statement of Nathu Ram, father of the deceased, to the effect that his son had taken a lift in the vehicle for going from village Kafota to village Kando. This was the plea taken in the claim petition by the claimants themselves. In their claim petition, the claimants had specifically

pleaded that deceased was an employee of one Khajan Singh r/o Kamraoo and worked in his mines. Said Khajan Singh appeared in the witness box as PW4 and stated that deceased was his employee. The pleadings and evidence on record thus clearly pointed out that the deceased was neither an employee of the owner of the goods vehicle in question nor travelled in the goods vehicle as owner of the goods. He had merely taken a lift in the goods vehicle for reaching his destination. Hon'ble Apex Court in ***(2013) 2 SCC 41,***titled***Manager National Insurance Company Vs. Saju P. Paul,*** held that since the victim was travelling in the vehicle as a gratuitous passenger, therefore, the insurer was not liable. In the facts of the present case, there is no escape from the conclusion that deceased was travelling as a gratuitous passenger in the goods vehicle in violation of terms of its insurance policy. Therefore, there is force in the contention of the appellant/insurer that it had discharged its onus on the issue of breach of terms and conditions of the insurance policy with oral as well as documentary evidence. The award passed by the learned Tribunal cannot be upheld on this issue.

4. Assessment of Compensation

Learned counsel for the appellant/insurer contended that the assessment of compensation had been made on the higher side by the learned Tribunal. It was argued that determination of income of the deceased at Rs.6000/- per month was on the higher side. This assessment was contrary to the permissible wages of Rs.120/- per day under the Minimum Wages Act prevailing at the time of accident in the year 2013.

The contention cannot be accepted. Hon'ble Apex Court in ***(2022)1 SCC 198,*** *titled* ***Chandra alias Chandaram and another Vs. Mukesh Kumar Yadav and others,*** held that 'in absence of salary certificate, the minimum wage notification can be a yardstick, but at the same time, cannot be an absolute one to fix the income of the deceased. In absence of documentary evidence on record, some amount of guesswork is required to be

done, but at the same time, the guesswork for assessing the income of the deceased should not be totally detached from reality. Merely because claimants were unable to produce documentary evidence to show the monthly income of the deceased, same does not justify adoption of lowest tier of minimum wage while computing the income. There is no reason to discard the oral evidence of the wife of the deceased deposing about the income of the deceased.' In the instance case, wife of the deceased had stated that her husband was earning Rs.12000/-per month by working as a labourer under the employment of Khazan Singh. The claimants did not examine co-labourers. Khazan Singh appeared as PW4 and deposed that deceased was working under him and being paid Rs.12000/-per month. Despite this, learned Tribunal assessed the income of the deceased at Rs.6000/- on the basis of assumption of monthly income of the deceased in the year 2014 under the Minimum Wages Act. The accident had occurred on 5.2.2013. Taking into consideration the judgment passed by the Hon'ble Apex Court, I do not find that assessment of Rs.6000/- as monthly income of the deceased was on the higher side. Point is answered accordingly.

5. In view of above discussions, the pleas of appellant/insurer on the point of driving license of the driver of the offending vehicle being fake and on the point of income of the deceased having been assessed on the higher side by the Learned Motor Accident Claims Tribunal, are rejected having no force. For the reasons discussed above, it is, however, held that the deceased was travelling in the goods vehicle as a gratuitous passenger and in violation of terms and conditions of the Insurance Policy. The appellant-Insurance Company is not liable to suffer the liability on the strength of breach of insurance policy. Having held that deceased was travelling in the vehicle in breach of the conditions of insurance policy, it will be appropriate at this stage to notice ***(2017) 4 SCC 796,*** titled ***Manuara Khatun vs. Rajesh Kr. Singh,*** where the deceased was travelling as a gratuitous passenger. The Apex Court

held that even though the insurance company was not liable to pay the compensation in view of breach of the policy, yet considering the benevolent object of the Act, the insurer was directed to pay compensation to the claimants in the first instance with a right to recover it from the owner of the motor vehicle in question. ***(2019) 10 Scale 668,*** titled ***Anu Bhanvara vs. Iffco Tokio General Insurance Company Limited***, was a case where gratuitous passengers were injured in a motor accident case. Hon'ble Supreme Court invoked doctrine of 'pay and recover' and held that insurance company shall be liable to pay the awarded compensation to the claimants and entitled to recover the same from the driver and owner of the vehicle. The awarded amount has been deposited by the appellant-Insurance Company. Even though the Insurance Company is exonerated, yet relying upon these pronouncements, in the interest of justice, the appellant/insurer is directed to pay the compensation amount as assessed in the impugned award dated 22.11.2018 passed by the Learned Motor Accident Claims Tribunal-II, Sirmour District at Nahan in MAC Petition No.62-N/2 of 2013 to the claimants/respondents No.1 to 4 and to recover the same from the registered owner of the vehicle, i.e. respondent No.5-Sh. Jai Pal.

The appeal is accordingly allowed and disposed of in the above termsalongwith all pending application(s), if any.

BEFORE HON'BLE MR. JUSTICE MOHAMMAD RAFIQ, C.J. AND HON'BLE MR. JUSTICE SANDEEP SHARMA, J.

Between:

1. STATE OF HP THROUGH
   SECRETARY (FINANCE) TO THE
   GOVT. OF HP, SHIMLA-2.

2. THE ADDITIONAL CHIEF
SECRETARY-CUM-SECRETARY
(E&T) TO THE GOVT. OF HP
SHIMLA-2.

3. THE EXCISE & TAXATION
COMMISSIONER,
HIMACHAL PRADESH, SHIMLA-3

....APPELLANTS/RESPONDENTS

(MR. AJAY VAIDYA, SENIOR
ADDITIONAL ADVOCATE
GENERAL)

AND

PRAMOD KUMAR (RETD.)
ETI SON OF SHRI ROSHAN LAL,
R/O HOUSE NO. 299/6, NAYA BAZAR,
NAHAN, DISTRICT SIRMOUR, HP.

....RESPONDENT/PETITIONER

(MR. A.K. GUPTA,
ADVOCATE)

LETTERS PATENT APPEAL
NO. 369 of 2012
Decided on: 11.05.2022

Constitution of India, 1950 - Article 226 - Service matter / Respondent claimed that since the State of Himachal Pradesh follows Punjab pattern as for as pay scale is concerned, so, the post of junior scale stenographer is required to be upgraded to senior scale stenographer w.e.f. 16.12.1992, which claim of the petitioner refuted by the appellants on the ground that the state of Himachal Pradesh is not bound to follow the Punjab pattern - The respondent claimed before Ld. Single Judge that he himself undertook to forego his promotion in stream of senior scale stenographer and as such, he was

promoted as Excise and Taxation Inspector - Petitioner stated no objection if any junior officer is promoted to post of senior scale stenographer - Held - Since promotion of petitioner to the post of Excise and Taxation Inspector was effected after his having furnished undertaking that he will forego his promotion in the stream of senior scale stenographer and in case he is promoted as Excise and Taxation Inspector, there was no occasion for the Ld. Single Judge to issue direction to the appellants to upgrade the post of junior scale stenographer to the post of senior scale stenographer w.e.f. 16.12.1992 - The order of Ld. Single Judge cannot be said to be justifiable and sustainable in the eyes of law - Appeal allowed and the impugned judgment dated 11.11.2010 and 05.03.2012 passed by the Ld. Single Judge in CWP-T Number 16707 of 2008 and RP number 139 of 2011 are quashed and set aside. (Paras 5 & 6)

This appeal coming on for hearing this day, Hon'ble ***Mr. Justice Sandeep sharma,*** *passed the following:*

JUDGMENT

Instant Letters Patent Appeal lays challenge to the judgment dated 11.11.2010, passed by the learned Single Judge in CWP-T No. 16707 of 2008, *Promod Kumar and Ors v. State of HP and Ors*, whereby the writ petition having been filed by the petitioner/respondent herein came to be partly allowed with direction to the appellants/respondents to upgrade the post of Junior Scale Stenographer to the post of Senior Scale Stenographer w.e.f. 16.12.1992, till the promotion of the petitioner to the post of Excise and Taxation Inspector with all consequential benefits.

2. The briefly stated facts, as emerge from the record are that the petitioner-respondent herein was appointed as Camp Clerk in the year, 1977 in the respondent department. In the month of May, 1981, he was promoted to the post of Junior Scale Stenographer and was confirmed in the year, 1991. By way of OA No. 1011 of 1985 filed before the erstwhile HP State Administrative Tribunal, petitioner-respondent sought direction to the

appellants/respondents to upgrade the post of Junior Scale Stenographer to the post of Senior Scale Stenographer. However, aforesaid Original Application came to be disposed of vide order dated 31.5.1995 by treating the same as representation to the Secretary (E&T), Government of Himachal Pradesh. Since the Additional Secretary (E&T) rejected the representation of the petitioner-respondent on 28.5.1995, he was compelled to approach the erstwhile HP State Administrative Tribunal by way of Original Application No. 2034 of 1995, praying therein for following main reliefs:

> *"(a) That the respondents may kindly be directed to upgrade the posts of Junior Scale Stenographers to Senior Scale Stenographers on Punjab pattern as has been done in the case of other officials/officers in the same department w.e.f. 16.12.1992.*
>
> *(b) That the applicant alongwith others be given promotion after up-gradation when it became due to them.*
>
> *(c) That the record pertaining to the case of up-gradation of posts of Sub-Inspectors to Inspectors, Assistant Excise and Taxation Officers to Excise and taxation Officers and Excise and Taxation Inspectors to Assistant Excise and Taxation Commissioner, I/cs of the districts be summoned for the perusal of this Hon'ble Tribal as the H.P. Govt. has adopted staffing and upgradation on Punjab pattern as such denial to Junior Scale Stenographers which amounts to discrimination.*
>
> *(d) That the respondent be directed to give all consequential and monetary benefits to the applicant and other similarly situated persons with effect from the date he was entitled to."*

However after abolition of the erstwhile HP State Administrative Tribunal, aforesaid case came to be transferred to this Court for adjudication and was allowed by the learned Single Judge of this court vide judgment impugned in the instant proceedings.

3. In the aforesaid proceedings, petitioner-respondent claimed that once the appellants/respondents have upgraded the posts of Sub-Inspectors to Inspectors, Assistant Excise and Taxation Officers to Excise and Taxation Officers and Excise and Taxation Inspectors to Assistant Excise and Taxation Commissioners, post of Junior Scale Stenographer is also required to be upgraded to the post of Senior Scale Stenographer. Learned Single Judge finding merit in the case of the petitioner-respondent partly allowed the petition and directed the respondents to upgrade the post of Junior Scale Stenographer to the post of Senior Scale Stenographer w.e.f. 16.12.192, till the promotion of the petitioner to the post of Inspector with all consequential benefits

4. Having heard learned counsel for the parties and perused the material available on record vis-à-vis reasoning assigned in the judgment impugned in the instant proceedings, we find merit in the contention of Mr. Ajay Vaidya, learned Senior Additional Advocate General that once learned Single Judge having taken note of the fact that petitioner had foregone his promotion in the stream of Senior Scale Stenographer and he was promoted as Excise and Taxation Inspector, categorically recorded in the judgment that at this belated stage, petitioner cannot be permitted to change the promotional stream, there was no occasion if any, to issue direction to the respondents to upgrade the post of Junior Scale Stenographer to the post of Senior Scale Stenographer w.e.f. 16.12.1992 till the promotion of the petitioner to the post of inspector.

5. In nutshell, case of the petitioner-respondent is that State of Himachal Pradesh follows Punjab pattern as well as pay scale concerned and since Punjab government has taken a decision to upgrade the post of Junior Scale Stenographer to the post of Senior Scale Stenographer, post of Junior Scale Stenographer is required to be upgraded to Senior Scale Stenographer w.e.f. 16.12.1992. Aforesaid claim of the petitioner came to be refuted by the

appellants/respondents on the ground that State of Himachal Pradesh is not bound to follow the Punjab Pattern. While admitting the factum with regard to up-gradation of the posts of Sub-Inspectors to Inspectors, Assistant Excise and Taxation Officers to Excise and Taxation Officers and Excise and Taxation Inspectors to Assistant Excise and Taxation Commissioner on Punjab Pattern, appellants/respondents claimed before the learned Single Judge that petitioner-respondent himself undertook to forego his promotion in the stream of Senior Scale Stenographer and as such, he was promoted as Excise and Taxation Inspector. Careful perusal of communication dated 20.12.2001 (Annexure R-1) annexed with the reply filed by the respondents clearly reveals that petitioner-respondent himself submitted to the Excise and Taxation Commissioner, Himachal Pradesh that he be promoted to the post of Excise and Taxation Inspector and he shall have no objection of any kind even if any junior official is promoted to the post of Senior Scale Stenographer. He also undertook vide aforesaid communication that he shall have no right for promotion to the second category after his being promoted to Excise and Taxation Inspector. After being promoted to the post of Excise and Taxation Inspector, petitioner-respondent filed writ petition, seeking therein direction to the respondents to upgrade the post of Junior Scale Stenographer to the post of Senior Scale Stenographer. Though learned Single Judge having taken note of the aforesaid undertaking given by the petitioner-respondent coupled with the fact that he already stood promoted to the post of Excise and Taxation Inspector, specifically recorded in the impugned judgment that petitioner cannot be permitted to change the promotional stream at this belated stage, but yet proceeded to issue directions to the appellants/respondents to upgrade the post of Junior Scale Stenographer to the post of Senior Scale Stenographer w.e.f. 16.12.1992 till the promotion of the petitioner to the post of Excise and Taxation Inspector. Since promotion of the petitioner to the post of Excise and Taxation Inspector was effected after his having furnished

undertaking that he will forego his promotion in the stream of Senior Scale Stenographer in case he is promoted as Excise and Taxation Inspector, there was no occasion for the learned Single Judge to issue direction to the appellants/respondents to upgrade the post of Junior Scale Stenographer to the post of Senior Scale Stenographer w.e.f. 16.12.1992 i.e. when the State of Punjab took a conscious decision to upgrade the post of Junior Scale Stenographer to the post of Senior Scale Stenographer w.e.f. 16.12.1992. Once petitioner himself changed his stream from Junior Scale Stenographer to Excise and Taxation Inspector, that too, before approaching the learned Single Judge by way of writ petition, direction issued by the learned Single Judge to upgrade the post of Junior Scale Stenographer to post of Senior Scale Stenographer w.e.f. 16.12.1992, cannot be said to be justifiable and sustainable in the eye of law.

6. Consequently, in view of the detailed discussion made herein above, we find merit in the present appeal and accordingly, the impugned judgments dated 11.11.2010 and 5.3.2012 passed by the learned Single Judge in CWP-T No. 16707 of 2008 and RP No. 139 of 2011, respectively, are quashed and set-aside.

7. The present appeal is disposed of a/w pending applications, if any.

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

Between:-

AMIT KUMAR SON OF SHRI RATTAN CHAND, AGED 39 YEARS, RESIDENT OF VILLAGE JHALWANI, POST OFFICE NARELI, TEHSIL AND DISTRICT HAMIRPUR, HIMACHAL PRADESH.

……….PETITIONER

(BY MR. K.D. SOOD, SENIOR ADVOCATE WITH MR. AJEET SINGH SAKLANI, ADVOCATE)

AND

ADITI SAREEN WIFE OF SHRI AMIT KUMAR AT PRESENT AT THE HOUSE OF HER MOTHER SMT. KIRAN SAREEN, WIDOW OF SHRI AMARJEET SINGH, RESIDENT OF VILLAGE SANARLI, POST OFFICE BHANTHAL, TEHSIL KARSOG, DISTRICT MANDI, HIMACHAL PRADESH.

……..RESPONDENT

(NONE)

CIVIL MISC. PETITION MAIN (ORIGINAL)
No. 137 of 2021
Decided on : 22.05.2022

Constitution of India, 1950 – Article 227 - Hindu Marriage Act, 1955 - Section 24 – Maintenance @ 6500/- per month granted in favour of respondent / wife from the date of filing the application till disposal of main petition - Criteria for granting maintenance - Held - The total income of the petitioner reflected as Rupees 3,45,625/- in the income tax return filed for the year 2018-19, so, possibility of petitioner now intentionally reflecting his income on the lower side due to matrimonial discord cannot be ruled out, so, the order for paying maintenance in some of Rupees 6500/- per month cannot be said to be on higher side -- In view of income of the husband, applicant was at least entitled for maintenance of Rupees 8000/- per month and after deducting and amount of Rupees 1500/- which she was already getting under Protection of Women from Domestic Violence Act, Rupees 6500/- as maintenance is justified - The petition found devoid of merits – Petition dismissed. (Para 5)

This petition coming on for orders this day, the Court passed the following:-

O R D E R

By way of this petition filed under Article 227 of the Constitution of India, the petitioner has prayed for setting aside of the order passed by the Court of learned Principal Judge, Family Court, Hamirpur, in CMP (HMA) No. 248 of 2020, filed in HMA No. 17 of 2018, titled as Aditi Sareen vs. Amit Kumar, dated 19.04.2021, in terms whereof an application filed by the respondent under Section 24 of the Hindu Marriage Act has been allowed by the learned Court below by ordering maintenance at the rate of Rs.6500/- per month in favour of the respondent/wife from the date of filing of the application till disposal of the main petition.

2. Mr. K.D. Sood, learned Senior Counsel appearing for the petitioner has argued that the order passed by learned Court below is not sustainable in the eyes of law for the reason that while awarding the amount of Rs.6500/- per month, learned Court has not appreciated in the correct perspective the effect of the applicant already receiving an amount of Rs.1500/- per month as maintenance in the proceedings initiated by her under the provisions of the Protection of Women from Domestic Violence Act. Learned Senior Counsel has submitted that learned Court below has erred in not appreciating that monthly income of the petitioner was only Rs.12078/-, and in view thereof, the award of maintenance by the learned Court below was on the higher side. Accordingly, learned Senior Counsel has prayed that this petition be allowed and the order passed by learned Principal Judge, Family Court, Hamirpur, be set aside.

3. When this case was listed before the Court on 13.12.2021, the following order was passed:-

> *"The petitioner and the respondent are present in person in the Court. The Court has interacted with the respondent who has stated in the Court that the marriage solemnized between her and the petitioner was an arranged marriage. She hails from Karsog*

area in District Mandi, H.P., and is presently residing with her mother. She has further stated in the Court that her father was serving in the Forest Department and he died in harness as a Deputy Ranger and presently, the source of income of her mother is the family pension which she is getting in lieu of the service rendered by her father in the Forest Department. On a query put to her by the Court, she stated that she has no independent source of income. She has no brother(s). She stated that they are three sisters two of whom are married. She further informed the Court that at the time of marriage, her family was informed by the family of the petitioner that the petitioner was having business of cosmetic. She further stated in the Court that as per her information, the petitioner/family of the petitioner possesses sufficient landed property. They have their own Mall(s) in Hamirpur near the vicinity of Ghandhi Chowk. They also have their own shop(s) in Ghandhi Chowk. She also stated that she resided with the petitioner as his wife in a joint family set up and the home of the petitioner (ancestral home) is also joint. She also stated that the family of the petitioner owns sufficient land in the village also. On the other hand, the petitioner has refuted the said contentions which have been made by the respondent.

Be that as it may, as this Court of the considered view that before any endeavour is made to have the matter amicably settled between the parties, it is necessary to find out the financial worth of the petitioner, accordingly, Deputy Commissioner, Hamirpur is directed to have the property of the family of the petitioner identified. The property which has to be identified will not only be that which is owned by the petitioner but also which is owned and possessed by his father and his grandfather. It will also include property owned and possessed by his brothers. The report of the Deputy Commissioner shall specifically spell out as to whether the properties which are possessed by the brothers of the petitioner are self acquired properties or ancestral in nature. The value of the said properties be also informed to the Court. In addition, the details of the bank accounts of the family members of the petitioner shall also be intimated to the Court.

*List on **27.12.2021**, on which date, parties shall remain present in person."*

4. In compliance to this order, report of the Deputy Commissioner, District Hamirpur, is on record. A perusal of the report demonstrates that the petitioner hails from a well off family. His father and grand-father own reasonable landed property, and in addition, family members of the petitioner as well as the petitioner himself is financially well off. In terms of said report, the value of the property of the grand-father of the petitioner is worth amount Rs.90.00 Lac. Further as per the report, the annual income of the family members of the petitioner as per ITRs is as under:-

Sr. No.	Name of family member of petitioner	Annual income as per ITR
1.	Rattan Chand s/o Sh. Babu Ram	4,82,690/-
2.	Sushma Devi w/o Sh. Rattan Chand	4,55,900/-
3.	Amit Kumar S/o Sh. Rattan Chand	1,98,990/-
4.	Aman Kumar S/o Sh. Rattan Chand	6,07,790/-
5.	Tapinder Kumar S/o Sh. Rattan Chand	5,68,000/-
6.	Ankuj Kumara S/o Rattan Chand	4,23,220/-

5. In this background, when one goes through the impugned order passed by learned Principal Judge, Family Court, Hamirpur, the same demonstrates that in para-9 of the order, learned Court has taken into consideration the contents of the affidavit which stood filed by the present petitioner before the said Court, wherein the petitioner was stated to have raised loans almost to the tune of Rs.20.00 Lac. Learned Court below also took into consideration the fact that as per income tax return for the year 2017-18 submitted by the petitioner, the gross total income of his was

reflected Rs.3,40,413/- and in terms of income tax return filed by him for the year 2018-19, the total income reflected was Rs.3,45,625/-. The possibility of the petitioner now intentionally reflecting his annual income on the lower side due to the matrimonial discord cannot be ruled out. In this background, this Court is of the considered view that award of maintenance, which has been granted by the learned Court below in favour of the respondent, i.e. Rs.6500/- per month, cannot be said to be on the higher side. In addition, it is not as if the learned Court below has not taken into consideration the quantum of maintenance, which has been awarded in favour of the respondent/applicant in the proceedings initiated under the Protection of Women from Domestic Violence Act. After taking into consideration the amount which was ordered to be paid in the said proceedings, learned Principal Judge, Family Court, Hamirpur, observed that keeping in view the income of the husband, the applicant/wife was at least entitled for maintenance of Rs.8000/- per month and after deducting an amount of Rs.1500/- which she was already getting, further a sum of Rs.6500/- per month was being ordered to be paid in favour of the respondent-wife. Therefore, as this Court does not finds any perversity with the impugned order, and further as this Court is convinced that the amount which has been awarded by the learned Court below is reasonable, this petition being devoid of merit is dismissed.

The petition stands disposed of in above terms, so also pending miscellaneous application(s), if any. No order as to costs.

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

Between:-

DINESH DUTT SON OF SH. SURAJ PRAKASH, RESIDENT OF VILLAGE JHAL, P.O. HINNER, TEHSIL KANDAGHAT, DISTRICT SOLAN, H.P.

……….PETITIONER

(BY MR. SUDHIR THAKUR, SENIOR ADVOCATE
WITH MR. KARUN NEGI, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH, THROUGH SECRETARY HOME, GOVERNMENT OF H.P., SHIMLA.
2. THE HIMACHAL PRADESH STATE ELECTRICITY BOARD, THROUGH ITS ENGINEER IN CHIEF.
3. SMT. MEENA WIFE OF SH. BABU RAM, RESIDENT OF VILLAGE KURGAL, POST OFFICE HINNER, TEHSIL KANDAGHAT, DISTRICT SOLAN, H.P.

……..RESPONDENTS

(M/S SUMESH RAJ, ADARSH SHARMA AND SANJEEV SOOD, ADDL. AGS WITH MR. SUNNY DATWALIA, ASSTT. AG FOR R-1;
MR. VIKRANT THAKUR, ADVOCATE FOR R-2;
MR. AJAY CHAUHAN, ADVOATE FOR R-3)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No. 692 OF 2019
Decided on: 29.12.2021

Code of Criminal Procedure, 1973 – Section 482 read with Section 336 Indian Penal Code, 1860 -- Quashing of final report prepared under section 173 of Cr PC - Held - Provisions of section 482 CrPC cannot be invoked by a party at the throw of the hat when there is a procedure prescribed under CrPC which has to be adhered to after lodging of FIR -- In case the High Courts start interfering with this procedure by invoking section 482 of Criminal Procedure Code at any and every stage without permitting the trial courts to exercise the jurisdiction which stands conferred upon them the entire machinery of trial

court is likely to collapse as every accused would approach this Court under section 482 of code of criminal procedure asking for quashing of FIR as well as subsequent criminal proceedings -- Proceedings are ordered to be closed but with the observations that petitioner shall be at liberty to raise the issue before Ld. Trial Court at appropriate stage – Petition stands disposed of. (Para 4 & 5)

This petition coming on for orders this day, the Court passed the following:-

ORDER

By way of this petition filed under Section 482 of the Code of Criminal Procedure, the petitioner has prayed for quashing of FIR No. 27/19, dated 03.03.2019, registered at Police Station Kandaghat, under Section 336 of the Indian Penal Code and also for quashing of the final report prepared under Section 173 of the Code of Criminal Procedure.

2. Mr. Sudhir Thakur, learned Senior Counsel appearing for the petitioner has vehemently argued that the proceedings, which are pending before the learned Court below, are nothing but an abuse of process of law as the petitioner is not guilty of the offence alleged against him. He submits that a bare perusal of the FIR demonstrates that there is no allegation of the alleged offence made out against the petitioner, yet, he is being made to undergo/face the agony of the trial. He further submits that even the stand of the complainant is that she has no objection in case this petition is allowed and the FIR is quashed because she has not leveled any specific allegation against the petitioner.

3. I have heard learned Counsel for the petitioner and also gone through the petition as well as documents appended therewith.

4. This Court is of the considered view that the provisions of Section 482 of the Code of Criminal Procedure cannot be invoked by a party at the throw of the hat when there is a procedure which stands prescribed under the Criminal Procedure Code which has to be adhered to after lodging of the FIR. This Court can safely take note of the fact that very rarely does an accused admits that he is guilty of the offences alleged against him. This Court is also aware of the well settled principle of law that ordinarily in criminal jurisprudence, until the accused is held guilty, he is presumed to be innocent. Yet, after lodging of the FIR, the investigating agency has to carry out the investigation and thereafter challan has to be filed or a closure report has to be presented before the appropriate Court of law whereupon the Court has to take a call as to how the matter has to be further proceeded with. In case, the High Courts start interfering with this procedure by invoking Section 482 of the Criminal Procedure Code at any and every stage, without permitting the Trial Courts to exercise the jurisdiction, which stands conferred upon them and also the duty which stands enshrined upon them, then, the entire machinery of the trial Courts, is likely to collapse, because, as has been observed hereinabove also, then in that eventuality, every accused would approach this Court under Section 482 of the Code of Criminal Procedure asking for quashing of the FIR as well as subsequent criminal proceedings. The Court is not discarding the contention of the petitioner that he is innocent, however this Court is observing that at the first instance all these issues can be and should be raised by the petitioner before the learned Trial Court and this Court has no reason to believe that learned Trial Court will not look into the issues which are being raised by the petitioner in the present petition and take a appropriate call on the matter. The contention of learned Senior Counsel appearing for the petitioner that in case this High Court does not interferes under Section 482 of the Code of Criminal Procedure, then, the provisions of this Section will become otiose, is completely mis-conceived because the provisions of Section

482 which are contained in the Criminal Procedure Code are meant to prevent the abuse of process of law and the Court exercises these powers where its judicial conscious is satisfied that in case it does not interferes under Section 482 of Cr.P.C, then, same would indeed amount to abuse of process of law. In the given facts of this case, this Court is of the view that no case for interference under Section 482 of the Code of Criminal Procedure is made out and it is purposely that this Court is not referring to the factual matrix involved in this petition so as not to prejudice the case of the petitioner.

5. Accordingly, these proceedings are ordered to be closed but with the observations that the petitioner shall be at liberty to raise all these issues before the learned Trial Court at the appropriate stage.

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.

Between:-

SH. OM PRAKASH S/O DHYAN SINGH, R/O VILLAGE CHAMION, P.O. PAV MANAL, TEHSIL DISTRICT SIRMOUR, H.P.

……….PETITIONER

(BY MR. DALEEP CHAND, ADVOCATE)

AND

1. THE STATE OF HIMACHAL PRADESH THROUGH ITS SECRETARY (PWD) TO THE GOVT. OF HIMACHAL PRADESH SHIMLA-2.

2. THE ENGINEER-IN-CHIEF, GOVT. OF HIMACHAL PRADESH, NIRMAN BHAWAN, NIGAM VIHAR SHIMLA-2.
3. THE SUPERINTENDING ENGINEER, 12TH CIRCLE, HPPWD, NAHAN, DISTRICT SIRMOUR, H.P.
4. ASSISTANT ENGINEER, HPPWD SUB DIVISION SHILLAI, DISTRICT SIRMOUR, H.P.

………. RESPONDENT

(BY M/S SUMESH RAJ, DINESH THAKUR AND SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS WITH MR. MANOJ BAGGA, ASSISTANT ADVOCATE GENERAL)

CIVIL WRIT PETITION
No. 5011 OF 2020
Decided on: 05.03.2022

Constitution of India, 1950 -- Article 226 -- Minimum educational qualification for compassionate appointment – Held -- The case of the candidate for appointment on compassionate grounds has to be assessed in terms of scheme /circular prevalent as on the date of death of deceased employee -- Case of the petitioner was rejected on the basis of subsequent instructions / circular which came into existence in the year 2016, so, the impugned act of respondent department is not sustainable – Petition allowed and the respondent department is directed to consider the case of the petitioner for grant of appointment on compassionate basis in terms of policy in vogue as on the date of death of deceased employee read with office memorandum dated 24-02-2016.(Paras 7 & 8)

This petition coming on for hearing this day, the Court passed the following:-

J E D G E M E N T

The case of the petitioner is that his father, who was serving as *Beldar* with the respondent-department, died in harness on 01.04.2016. The petitioner applied for appointment on compassionate grounds post death of his father on 16.08.2017. His grievance is that his prayer for offering him appointment on compassionate basis has been rejected by the respondent-department vide order Annexure P-4, dated 03.07.2020, on the ground that the petitioner does not fulfils minimum prescribed educational qualification in terms of instructions dated 07.03.2019 and 01.11.2019 issued by the Finance Department.

2. Mr. Daleep Chand, learned Counsel for the petitioner has argued that the rejection of the case of the petitioner by the respondent-Department is not sustainable in law as the department has erred in not appreciating that the case of the petitioner for compassionate appointment had to be considered on the touchstone of the policy which was prevalent in this regard as on the date when father of the petitioner died and not on the basis of subsequent policy/instructions which came into existence in the year 2019. Learned Counsel has also argued that in terms of previous policy and instructions, i.e. office memorandum dated 24.02.2016, issued by the Finance Department of the Government of Himachal Pradesh, there was power conferred upon the concerned Administrative Secretary to grant relaxation in educational qualification in cases it deemed appropriate to do so. Accordingly, a prayer has been made by the petitioner for quashing of the impugned order and issuance of direction to the respondent-department to appoint the petitioner as a *Beldar* on compassionate grounds.

3. The petition stands opposed by the State *inter alia* on the ground that the right of appointment on compassionate basis is a concession and not a right and same is always subject to availability of sanctioned posts. It is further the stand of the State that as the petitioner was not fulfilling the minimum educational qualification for being considered for appointment as

Beldar/ Class-IV employee, therefore, his case was rightly rejected by the department.

4. Mr. Dinesh Thakur, learned Additional Advocate General has argued that the minimum educational qualification as per policy of the Government in this regard, be it the earlier policy or the subsequent policy, was middle pass as far as the post of Beldar/Class-IV is concerned and the case of the petitioner being strictly in sync with the policy in issue, there is no merit in the same and the same be dismissed.

5. I have heard learned Counsel for the parties and also gone through the pleadings as well as documents appended therewith.

6. It is not in dispute that the father of the petitioner died in harness on 01.04.2016, and thereafter, the petitioner applied for appointment on compassionate basis in the year 2017. The case of the petitioner has been rejected by the competent authority on the ground that the petitioner was not possessing minimum qualification for being appointed as a *Beldar* on compassionate grounds. The minimum prescribed educational qualification for the post in issue is middle pass, and as on the date, when the petitioner applied for the post in issue, admittedly he was not middle pass. His qualification was 7th standard.

7. Hon'ble Supreme Court of India in the **State of Madhya Pradesh and others** vs. **Ashish Awasthi**, Civil Appeal No. 6903 of 2021 and other connected matter, decided on 18.11.2011, has been pleased to hold that the case of a candidate for appointment on compassionate grounds has to be assessed in terms of the scheme/circular prevalent as on the date of death of the deceased- employee. In the present case, the case of the petitioner has been rejected on the basis of instructions dated 07.03.2019 and 01.11.2019. It is not in dispute that vide office memorandum dated 24.02.2016, relaxation in age for joining government job and minimum educational qualification, time limit for submission of compassionate employment cases was redefined in

terms whereof the Administrative Secretary was having the power in relation to cases of compassionate appointment to accord relaxation in educational qualification in cases, in which, it deemed appropriate to do so through a reasoned order. This Court is of the considered view that taking into consideration the date of death of the deceased-employee and the date when the petitioner had applied for compassionate appointment, the case of the petitioner ought to have been considered by the department in terms of the policy in vogue for considering the cases for compassionate appointment, as on the date of death of deceased-employee read with office memorandum dated 24.02.2016. That having not been done and the case of the petitioner having been rejected on the basis of subsequent instructions/circular, which came into existence in the year 2019, the impugned act of the respondent-department is not sustainable.

8. Accordingly, in view of observations made hereinabove, this petition is allowed and impugned order (Annexure P-4) is quashed and set aside, with a direction to the respondent-department to reconsider the case of the petitioner for grant of appointment on compassionate basis in terms of policy in vogue as on the date of death of the deceased-employee read with office memorandum dated 24.02.2016. Taking into consideration the fact that the father of the petitioner was serving as a Class-IV employee and the petitioner himself is seeking appointment against a Class-IV post, the Court hopes and expects that a sympathetic view will be taken by the Administrative Secretary with regard to grant of relaxation in educational qualification, if so required. Let appropriate order on the application of the petitioner for appointment on compassionate ground be passed on or before 30th April, 2022.

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.

Between:-

DR. ABHISHEK THAKUR, S/O SH. JAGAN NATH THAKUR, VPO BHARMOTI, TEHSIL NADAUN, DISTRICT HAMIRPUR, (H.P.) PRESENTLY POSTED AS MHA, MEDICAL OFFICER (SPECIALIST) SLBSGMCH, MANDI, AT NER CHOWK (H.P.)

……….PETITIONER

(BY MR. DILIP SHARMA, SENIOR ADVOCATE WITH MR. MANISH SHARMA, ADVOCATE)

AND

1. STATE OF H.P. THROUGH SECRETARY HEALTH TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-171002.
2. DIRECTOR, MEDICAL EDUCATION AND RESEARCH, H.P. SHIMLA-171009.
3. DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA-171009.

……….RESPONDENTS

(BY MR. AJAY VAIDYA, SENIOR ADDL. AG)

CIVIL WRIT PETITION
No.4520 OF 2021
Decided on: 24.02.2022

Constitution of India, 1950 – Article 226 – Service matter - Field posting - Candidate has to complete mandatory peripheral service of one year to be eligible to apply for the post of Senior Resident – Held -- There is no serious dispute on the issue that only two incumbents had applied for the post of

senior resident in the specialization of hospital administration and the only other candidate was held to be ineligible by the selection committee for want of basic medical educational qualification itself, then, in case this petition is allowed and the petitioner is permitted to join the post of senior resident, no prejudice shall be caused to anyone and rather in turn, State would also be getting a qualified professional to man the post of senior resident in the medical college concerned and his appointment will serve larger interests - The petition allowed by directing the respondent department to offer appointment to the petitioner against the tenure post of senior resident in the specialization of hospital administration, without insisting upon for no objection certificate on the ground of petitioner having served in the peripheral area / field posting. (Paras 10 & 11)

This petition coming on for hearing this day, the Court passed the following:-

O R D E R

By way of this writ petition, the petitioner has prayed for the following substantive reliefs:-

> *"(i) That the definition of "field posting" as amended vide office order Annexure P-7 dated 21.8.2019 read with Annexure P-8 dated 9.12.2019; and notification dated 21.1.2020 at Annexure P-9, may be read down to mean that "field posting" after PG would be necessary for "eligibility" and "field posting incentive" only if opportunity has been given to the candidates to serve in a field posting station after doing PG.*
> *(ii) That the rejection of the claim of the petitioner vide Annexure P-10 for Senior Residency on the ground that he is ineligible for Senior Residency for not having completed mandatory "Field posting" for 1 year, may kindly be quashed and set aside.*
> *(iii) That the respondents may kindly be directed to consider the petitioner for the post of Senior Resident in Hospital Administration advertised vide Annexure P-1/A with a further direction to give him posting as Senior Resident as a result of such consideration."*

2. Brief facts necessary for the adjudication of the present petitioner are as under:-

The petitioner herein initially joined the service of the respondent-department as a Medical Officer on contract basis w.e.f. 19.08.2011. Thereafter, he was recruited on regular basis as a Medical Officer on the recommendation of the Himachal Pradesh Public Service Commission in the month of October, 2013. He was sponsored by the Government for Master's Course in Hospital Administration at PGIMER Chandigarh for session commencing from the year 2018, which he 5completed in December, 2019.

3. Before proceeding further, it is pertinent to mention, as is evident from the service certificate of the petitioner appended with the petition as Annexure P-1, that after the petitioner completed the Post Graduation course on 31.12.2019, he rejoined the respondent-department on 01.01.2020, in the Directorate of Health Services and thereafter w.e.f. 30.01.2020, petitioner was posted as Medical Officer (Specialist) at Shri Lal Bahadur Shastri Government Medical College, Ner Chowk, District Mandi, where he is continuing to serve till date.

4. Vide Annexure P-1/A, applications were invited from eligible candidates for the tenure post of Senior Resident, for which the eligibility criteria was possessing a Post Graduation degree in the concerned specialization by the candidate concerned. Last date for submission of the applications in the advertisement was stated to be 05.04.2021.

5. In the month of March, 2021, the petitioner applied for the tenure post of Senior Resident in terms of advertisement Annexure P-1/A, however, his candidature was not considered by the Counselling Committee on the ground that the petitioner as on the date when he applied for the post in issue, had not completed one year peripheral service after completion of Post Graduation, which was mandatory for the issuance of a no objection

certificate in favour of a Medical Officer to apply for the post of Senior Resident.

6. Mr. Dilip Sharma, learned Senior Counsel appearing for the petitioner has argued that the petitioner after completion of his Post Graduate Degree was posted by the respondent-Department as a Medical Officer (Specialist) in Shri Lal Bahadur Shastri Government Medical College, Ner Chowk and the petitioner accepted said posting offered to him and joined as Medical Officer (Specialist) in the said college. After completion of his Post Graduation, he was not offered any posting in peripheral area of the State of Himachal Pradesh, which he refused to join. Accordingly, it is submitted by learned Senior Counsel that it is not a case where the petitioner despite having been posted in peripheral area refused to serve in that area and got his transfer to a non-peripheral area station. Learned Senior Counsel has further argued that the cooling period of one year required after completion of Post Graduation and applying for the post of Senior Resident was undergone by the petitioner, which is evident from the fact that he completed his Post Graduation on 31st December, 2019 and he applied to the post of Senior Resident in the month of March, 2021 in response to advertisement Annexure P-1/A. Learned Senior Counsel has also submitted that the issue otherwise is also no more res-integra as this Court in CWP No. 2101 of 2020, titled as Dr. Pradeep Kumar Attri and another vs. State of Himachal Pradesh and others and other connected matters, decided on 25.11.2020, has held that an incumbent, who has completed one year service after completing Post Graduation shall be considered eligible for competing to the post of Senior Resident, irrespective of the place where the incumbent has served as such, until and unless he was offered appointment at a place which is termed as 'field posting' and he/she has refused to do so. Accordingly, on these bases, a prayer has been made that the petition be allowed and a mandamus be issued

to the respondent-department to offer appointment to the petitioner against tenure post of Senior Resident.

7. The Court stands informed that in response to advertisement Annexure P-1/A, two candidates, including the petitioner, had applied and the other candidate was held to be ineligible by the Committee on the basis of the qualifications possessed by him, therefore, in case the petition is allowed and the respondent-department is directed to offer appointment to the petitioner against said tenure post of Senior Resident, no prejudice shall be caused to anyone.

8. Petition has been opposed by the State on the ground that for regulating the appointments to the post of Senior Residents in the Department of Medical Education, the government has notified a policy for Residency in the Government Medical Colleges in the State of Himachal Pradesh, vide notification dated 22.06.2019, Annexure P-6, in supersession of all the previous notifications issued in this regard in continuation of PG/Super Specialty Policy notified vide Notification dated 27.02.2019 (Annexure P-5). The same mandates that a candidate has to complete mandatory peripheral service of one year to be eligible to apply for the post of Senior Resident. Learned Senior Additional Advocate General has argued that the rationale behind the said policy is that after a Medical Officer completes his Post Graduation, then he should at least serve the medical department in a peripheral area for a period of one year so that benefit of his superior qualification can be availed by public at large in the health sector. Learned Senior Additional Advocate General has also drawn the attention of the Court to para-4 of the reply filed to the writ petition wherein it stands mentioned that the petitioner had applied for the post of Senior Resident to the office of respondent No. 3 for issuance of no objection certificate but since the petitioner had not completed mandatory one year peripheral service after completion of Post Graduation, therefore, 'No Objection' was not cleared by the

Committee constituted for the said purpose. He has further submitted on the strength of averments made in para-5 of the reply that the petitioner cannot take benefit of the judgment passed by this Court in CWP No. 2101 of 2021 mentioned supra as he was not party to the same.

9. I have heard learned Counsel for the parties and gone through the averments made in the pleadings and documents appended therewith.

10. It is not in dispute that the policy in vogue at the time pertaining to appointment of Senior Residents in Government Medical Colleges of the State envisaged that a Medical Officer to be eligible to apply for the post in issue after completion of Post Graduation course must put in mandatory one year service/field posting in peripheral areas. Field posting stands defined in the policy, which has been so formulated by the government. In this case, the petitioner completed his Post Graduation on 31st December, 2019. Thereafter he reported back on duty to the Directorate of Health Services on 01.01.2020. He was posted as a Medical Officer (Specialist) in Shri Lal Bahadur Shastri Government Medical College at Ner Chowk by the department concerned and he joined the said college in his capacity as Medical Officer (Specialist) on 30.01.2020. Thus at the first blush, it appears to be a case where a Medical officer after completion of his Post Graduate degree was posted by the department in a Medical College and he joined the same in compliance to the order of posting. In fact, the reply, which has been filed to the writ petition by the State also does not give any indication that the petitioner after completing his Post Graduation was ordered to be posted at a station which is defined as "field posting" but rather than joining said field posting station, on his request, he was posted as a Medical Officer (Specialist) in the Shri Lal Bahadur Shastri Government Medical College, Ner Chowk. However, during the course of arguments, learned Senior Additional Advocate General informed the Court that the posting of the petitioner as a Medical Officer (Specialist) was on his asking. There is on record, appended with rejoinder filed by the petitioner to

the reply of the State, Annexure RJ/1, perusal whereof demonstrates that the posting of the petitioner in the Medical College concerned was on the basis of approval so granted by the Health and Family Welfare Minister, Himachal Pradesh. *Per se* the respondent-department has not been able to place any material on record from which it can be inferred that it was on the basis of some request on behalf of the petitioner that he was posted in the said Medical College. Be that as it may, even if it is to be assumed that posting of the petitioner in the Medical College concerned was on the behest of the petitioner, then also, this Court is of the considered view that as on the date when the petitioner applied for the post of Senior Resident, he had completed one year of service with the respondent-department, may be in a Medical College of the Government of Himachal Pradesh, he could not have been denied no objection certificate because it is not the case of the department concerned that after completion of Post Graduation, the petitioner was posted at a station defined as 'field posting' but he refused to join there or rather than joining, he got his transfer/posting order modified to the place where he was posted by the department. Otherwise also, this Court is of the considered view that as there is no serious dispute on the issue that only two incumbents had applied for the post of Senior Resident in the Specialization of Hospital Administration and the only other candidate was held to be ineligible by the Selection Committee for want of basic medical educational qualifications itself, then, in case this petition is allowed and the petitioner is permitted to join the post of Senior Resident, no prejudice shall be caused to anyone and rather in turn, State would also be getting a qualified professional to man the post of Senior Resident in the Medical College concerned. This will serve larger interest of the medical college where students admitted would be benefitted of being taught by a Senior Resident in Hospital Administration, who presently are bereft of said benefit. The patients will also be benefitted accordingly.

11. Therefore, in view of what has been discussed in the peculiar facts of this case, this petition is allowed by directing the respondent-department to offer appointment to the petitioner against the tenure post of Senior Resident in the Specialization of Hospital Administration, without insisting upon for a no objection certificate on the ground of petitioner having served in the peripheral area/filed posting. It is again clarified that this order has been passed in the peculiar facts of this case. Needful be positively done within a period of four weeks from today.

The petition stands disposed of in above terms, so also pending miscellaneous application(s), if any. No order as to costs.

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

Between:-

1) BOEHRINGER INGELHEIM INTERNATIONAL GMBH 55216, INGELHEIM AM RHEIN GERMANY THROUGH ITS POWER OF ATTORNEY HOLDER
2. BOEHRINDER INGELHEIM (INDIA) PVT. LTD. UNIT NO. 202 AND PART OF UNIT NO. 201, SECOND FLOOR, GODREJ 2, PRIOJSHA NAGAR, EASTERN EXPRESS HIGHWAY, VIKHROLI (E), MUMBAI-400079, INDIA THROUGH ITS POWER OF ATTORTNEY HOLDER

……….PLAINTIFFS

(BY M/S ASHOK AGGARWAL AND VINAY KUTHIALA, SENIOR ADVOCATES WITH M/S ATUL JHINGAN, SHILPA SOOD, SANJAY KUMAR, PRIYANSH SHARMA AND HARSHIT DIXIT, ADVOCATES)

AND

DR. REDDY'S LABORATORIES LIMITED KHOL, NALAGARH, SOLAN DISTRICT, NALAGARH ROAD, BADDI, HIMACHAL PRADESH.
ALSO AT
DR. REDDY'S LABORATORIES LIMITED, VILLAGE MAUJA THANA, NALAGARH, BADDI ROAD, BADDI, SOLAN DISTRICT, HIMACHAL PRADESH 173205.
ALSO AT
DR. REDDY'S LABORATORIES LIMITED, 8K-3-337, ROAD NO. 3 BANJARA HILLS HYDERABAD, TELANGANA 500034.

……..DEFENDANT

(BY MR. BIPIN CHANDER NEGI, SENIOR ADVOCATE WITH M/S JAI SAI DEEPAK, GURUSWAMY NATRAJAN, SHRADHA KAROL, ANKUR VYAS & UDIT KAUSHIK, ADVOCATES FOR THE DEFENDANT)

OMPS NO. 532, 565 AND 692 OF 2021
IN COMS No. 5 of 2021
Reserved on: 07.01.2022
Decided on: 11.03.2022

Code of Civil Procedure, 1908 - Order 8 Rule 1 – Striking of defence in commercial suits – Plaintiff filed application within 120 days - Held - Till the period of 120 days is over the plaintiff cannot call up on the Court to close the right of defendant from filing the written statement – Application without merits – Application dismissed. (Para 34)

Code of Civil Procedure, 1908 – Order 39 rules 1 and 2 read with Section 43 of Patent Act, 1970 - Interim injunction - The Subject Patent is old and well established - Defendant neither has any patent in its name nor did it lay any challenge at time when plaintiff if had applied for the subject patent or even after the patent was granted in favour of the plaintiff – Held – The facts do create prima facie case and balance of convenience in favour of the plaintiff – Temporary injunction granted.

Cases referred:

Dalpat Kumar and Another vs. Prahlad Singh and Others, (1992) 1 SCC 719;

M/s Bishwanath Prasad Radhey Shyam vs. Hindustan Metal Industries, (1979) 2 SCC 511;

These applications coming on for pronouncement of order this day, Hon'ble Mr. Ajay Mohan Goel, passed the following:-

O R D E R

OMPS No. 532 AND 565 OF 2021

This order shall dispose of OMP No. 532 of 2021, which has been filed by the plaintiffs/applicants under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure praying for interim directions as also OMP No. 565 of 2021, which has been filed under Order XXXIX, Rule 4, read with Section 151 of the Code of Civil Procedure, praying for vacation of ad-interim injunction, dated 20.10.2021.

2. Brief facts necessary for the adjudication of these applications are as under:-

Applicants/plaintiffs in OMP No. 532 of 2021 (hereinafter to be referred as 'the plaintiffs' for convenience sake) have filed a suit for permanent prohibitory injunction for restraining the defendants from infringing the patent owned by plaintiff No. 1 alongwith other ensuing reliefs. The case of the plaintiffs is that plaintiff No. 1 is a company incorporated under the laws of Germany and plaintiff No. 2 is a company registered under the Companies Act. Plaintiff No. 1 is the owner of plethora of patents worldwide, including Indian Patent No. 268846 (hereinafter to be referred as 'subject patent or IN 846' for short). The subject patent was granted in favour of plaintiff No. 1 on 18.09.2015 as per Section 43 of the Indian Patents Act 1970, under 'IN 846' for pharmaceuticals product titled "GLUCOPYRANOSYL-SUBSTITUTED BENZENOL DERIVATIVES, DRUGS CONTAINING SAID COMPOUNDS, THE

USE THEREOF AND METHOD FOR THE PRODUCTION THEREOF” for a term of 20 years from the date of filing.

3. When OMP No. 532 was listed on 20.10.2021, the following order was passed:-

> *“Notice in above terms. Till the next date of hearing, the respondent is restrained either itself or through its directors, licensees, stockiest and distributors, retailers, agents, servants and/or anyone claiming through any of it, jointly and severally, from infringing the patent rights of plaintiff/applicant No. 1 under Indian Patent No. 268846 by launching, making, using, offering for sale, selling, importing and/or exporting the medicinal product Empagliflozin in any form whatsoever, including Empagliflozin API, the medicinal product “Empagliflozin Tablet” and/or “Empagliflozin + Metformin Hydrochloride Tablets” or any “generic version” thereof or any product sold under the trademark/name “VICRA” or any other trademark/name whatsoever, or any other product covered by the subject patents granted by the Controller of Patents in favour of plaintiff/applicant No. 1. Respondent is further directed to remove the impugned product from its website or any other website(s)/e-portal(s).*
>
> *This order is subject to compliance of provisions of Order 39, Rule 3 of the Code of Civil Procedure.”*

4. In the order sheet, the OMP number is mentioned as OMP No. 535 of 2021, which appears to be a typographical error as the OMP in issue is OMP No. 532 of 2021.

5. The arguments on behalf of the plaintiffs were advanced by Mr. Ashok Aggarwal, learned Senior Counsel and Mr. Vinay Kuthiala, learned Senior Counsel. Arguments on behalf of the defendants were advanced by Mr. Bipin Chander Negi, learned Senior Counsel and Mr. Jai Sai Deepak, learned Counsel.

6. Learned Senior Counsel appearing for the plaintiffs argued that for the purpose of grant of interim relief, three primary ingredients, i.e. *prima*

facie case, balance of convenience and irreparable loss are all in favour of the plaintiffs. In addition, they argued that as the defendant has not been able to lay any credible challenge to the 'subject patent', therefore, this application be disposed of by confirming ad-interim order dated 20.10.2021.

7. On the other hand, learned Counsel for the defendant have submitted that as the defendant has laid a credible challenge to the 'subject patent' therefore, its prayer for vacation of ad-interim injunction granted on 20.10.2021 be allowed and the application filed under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure be dismissed and the application filed under Order XXXIX, Rule 4 of the Code of Civil Procedure be allowed.

8. To substantiate their contention that all ingredients exist in favour of the plaintiffs for the continuation of interim order, learned Senior Counsel have argued that in the present case, the 'subject patent' was granted to the plaintiffs on 18.09.2015, the international date of filing of the 'subject patent' being 11th March, 2005, the date of expiry of the patent is 11th March, 2025. According to the plaintiffs, the following points demonstrate that there exists a good case in their favour for confirmation of the interim order:

(a) 'subject patent' is old and well established;
(b) 'subject patent' is commercially highly successful and extensively useful;
(c) admittedly, no party, including the defendant, raised any pre-grant opposition, post-grant opposition, including against the quality and strength of the 'subject patent';
(d) the patent was granted in favour of the plaintiffs after following the substantive provisions of the The Patents Act, 1970;
(e) the patent has had a successful commercial run in India for more than six years, without any challenge, including that from the defendant;
(f) the Central Government has not filed any revocation for the 'subject patent' in terms of Section 64 of the Patents Act, 1970;

(g) the Central Government has not made any declaration for revocation of the 'subject patent' in public interest in terms of Section 67 of the Patents Act;

(h) none, including the defendant, applied under Section 84 of the Patents Act for grant of compulsory licence of the 'subject patent' on the grounds as mentioned therein;

(i) no challenge was ever put forth by the defendants to the 'subject patent' except immediately before the commercial launch of its infringing product in the month of October 2021, when a revocation petition was filed by the defendants under Section 64 of the Patents Act.

9. Learned Senior Counsel appearing for the plaintiffs argued that that above facts clearly and categorically demonstrate that there exists a *prima facie* case in favour of the plaintiffs and balance of convenience is also in their favour and in this backdrop, in case, ad-interim order is not confirmed and the defendant is permitted to infringe the 'subject patent' of the plaintiffs, then, the plaintiffs shall suffer irreparable loss, which cannot be compensated monetarily as all the hard work that has gone into the invention of the product in issue and getting it patented would be washed away. Learned Senior Counsel stressed that admittedly the defendant neither has any patent in its name nor did it lay any challenge at the time when the plaintiffs had applied for the 'subject patent' or even after the patent was granted in favour of the plaintiffs. They further submitted that the filing of revocation petition by the defendant, in close proximity with the launch of the infringing product was nothing but an afterthought to hold out that in lieu of its having filed a revocation petition, it has laid a credible challenge to the 'subject patent'.

10. Opposing the prayer of the plaintiffs, learned Counsel for the defendant submitted that in the present case, the defendants have filed a revocation petition against the 'subject patent', as would be evident from the averments also made in the application filed by it under Order XXXIX, Rule 4 of the Code of Civil Procedure, perusal whereof would demonstrate that there

is a credible challenge which has been laid by it to the 'subject patent'. Learned Counsel have submitted that it is settled law that mere grant of patent does not lend a presumption of validity to the patent. The scheme of the Patents Act is to provide multi-layer challenges, which are available to a non-patentee to challenge and question the validity of a patent at any time and such validity has to be tested on the anvil of the provisions of the The Patents Act, 1970. It was argued that the provisions of Section 13(4) of the The Patents Act expressly set out the absence of any presumption of validity due to mere grant and further, as there has been non-compliance of the statutory provisions of Sections 8 and 64 of the Patents Act, therefore, the patent in issue is not a valid patent and the defendant has laid a credible challenge to the same. They have also argued that in the case of pharmaceutical patents, which have been recognized as a specific species of patent infringement litigation, the overwhelming factor is that of public interest-namely the need to provide for affordable and accessible healthcare products. They also argued that in addition to the settled principles of *prima facie* case, balance of convenience and irreparable loss, the plaintiffs also have to satisfy that there is no **credible challenge** to the 'subject patent' which in the present case, the plaintiffs have not been able to demonstrate and in this view of the matter, the ad-interim injunction granted in favour of the plaintiffs is liable to be vacated and the prayer of the plaintiffs for interim injunction is liable to be dismissed.

11. I have heard learned Counsel for the parties and have also gone through the relevant pleadings and documents appended therewith.

12. Following orders passed by various High Courts disposing of applications filed under Order 39, Rules 1 and 2 of the Code of Civil Procedure as well as appeals thereof, were relied upon by the learned Counsel for the parties:-

(1) Bajaj Auto Limited vs. TVS Motor Company Limited, 2008 SCC Online Madras 121;

(2) Cipla Limited vs. Novartis AG and another, 2017 SCC Online Delhi 7393;
(3) M/s National Research Development Corporation of India, New Delhi vs. M/s The Delhi Cloth and General Mills Co. Ltd and others, AIR 1980 Delhi 132;
(4) Bristol Myers Squibb Company & Ors vs. Mr. J.D. Joshi and another, 2015 SCC Online Delhi 10109;
(5) Communication Components Antenna Inc. vs. ACE Technologies Corporation and others, 2019 SCC Online Delohi 9123;
(6) Merck Sharp and Dohme Corporation and Another vs. Glenmark Pharmaceuticals, 2015 SCC Online Delhi 8227;
(7) FMC Corporation & Another vs. Best Crop Science LLP & Another, 2021 SCC Online Delhi 3646;
Natco Pharma Ltd. vs. Bristol Myers Squibb Holdings Ireland Unlimited Company and others, 2019 SCC Online Delhi 9124;
Ten XC Wireless Inc and Others vs. Mobi Antenna Technologies (Shenzhen) Co. Ltd., 2011 SCC Online Delhi 4648;
Astrazeneca AB and Others vs. Intas Pharmaceuticals Ltd. and Others, 2021 SCC Online Delhi 3746;

13. The pronouncements made by High Courts mentioned hereinabove in the orders passed by them either on the applications filed by the parties concerned under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure or in the appeals, which were referred to by the parties against the orders passed by learned Single Judge in the applications filed under Order XXXIX, Rules 1 and 2 are not being quoted to by me in extensio for the reason that the orders which were so passed by the Courts were in the backdrop of the factual matrix involved in the cases before them. Suffice it to say that the principles in general being followed for the grant of interim injunction in patent matters by various Courts, as they stand summarized in Ten XC Wireless Inc (supra), are as under:-

(i) The registration of a patent per se does not entitle the plaintiffs to an injunction. The certificate does not establish a conclusive right.

(ii) There is no presumption of validity of a patent, which is evident from the reading of Section 13(4) as well as Sections 64 and 107 of the Patents Act.

(iii) The claimed invention has to be tested and tried in the laboratory of Courts.

(iv) The Courts lean against monopolies. The purpose of the legal regime in the area is to ensure that the inventions should benefit the public at large.

(v) The plaintiff is not entitled to an injunction if the defendant raises a credible challenge to the patent. Credible challenge means a serious question to be tried. The defendant need not make out a case of actual invalidity. Vulnerability is the issue at the preliminary injunction stage whereas the validity is the issue at trial. The showing of a substantial question as to invalidity thus requires less proof than the clear and convincing showing necessary to establish invalidity itself.

(vi) At this stage, the Court is not expected to examine the challenge in detail and arrive at a definite finding on the question of validity of the patent. That will have to await at the time of trial. However, the Court has to be satisfied that a substantial, tenable and credible challenge has been made.

(vii) The plaintiff is not entitled to an injunction, if the patent is recent, its validity has not been established and there is a serious controversy about the validity of the patent.

14. In addition, the parties also relied upon following judgments passed by Hon'ble Supreme Court of India:-

(1) M/s Bishwanath Prasad Radhey Shyam vs. Hindustan Metal Industries, (1979) 2 Supreme Court Cases 511;
(2) Dalpat Kumar and another vs. Prahlad Singh and others, (1992) 1 Supreme Court Cases 719;

15. In **M/s Bishwanath Prasad Radhey Shyam** vs. **Hindustan Metal Industries**, (1979) 2 Supreme Court Cases 511, Hon'ble Supreme Court has been pleased to hold that grant and sealing of the patent, or the decision rendered by the Controller in the case of opposition, does not guarantee the validity of the patent, which can be challenged before the High Court on various grounds in revocation or infringement proceedings. Hon'ble Supreme Court further held that the 'validity of a patent is not guaranteed by the grant', was also expressly provided in Section 13(4) of the Patents Act, 1970.

16. Hon'ble Supreme Court of India in **Dalpat Kumar and Another** vs. **Prahlad Singh and Others**, (1992) 1 Supreme Court Cases 719 has held that it is settled law that the grant of injunction is a discretionary relief and exercise thereof is subject to the Court satisfying that (1) there is a serious disputed questions to be tried in the suit and that an act, on the facts before the Court, there is probability of his being entitled to the relief asked for by the plaintiff/defendant; (2) the Court's interference is necessary to protect the party from the species of injury. In other words, irreparable injury or damage would ensue before the legal right would be established at trial' and (3) that the comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that would be likely to arise from granting it. In para-5 of the judgment, Hon'ble Apex Court has been further pleased to hold as under:-

> *"5. Therefore, the burden is on the plaintiff by evidence aliunde by affidavit or otherwise that there is "a prima facie case" in his favour which needs adjudication at the trial. The existence of the prima facie right and infraction of the enjoyment of his property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be*

confused with prima facie title which has to be established, on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition also is that "the balance of convenience" must be in favour of granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject-matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit."

17. Coming back to the facts of the present case, the plaintiffs in this case filed an international patent application for the subject patent on 11.03.2005 and national phase patent application in India on 23rd August, 2006. The patent was granted in favour of the plaintiffs in India on 18th of September, 2015 under the Patents Act, 1970, which was published under Section 43(2) of the Patents Act on 25th September, 2015. The term of the patent is 20 years and the same is to expire on 11.03.2025.

18. On the other hand, admittedly, the defendant does not has any patent qua the infringing product and no challenge, either to the application filed by the plaintiffs for grant of patent was laid by the defendant nor any post patent challenge was laid by it. Of course, in light of law laid down by Hon'ble Supreme Court in M/s Bishwanath Prasad Radhey Shyam (supra), grant of patent does not guarantee the validity of a patent, which can be challenged before the High Court on various grounds in revocation or infringement proceedings, but the factum of a patent being there in favour of the plaintiffs and the factum of no pre or post grant challenge to the same by anyone, including the defendant, except now by way of a revocation petition which was filed in close proximity to the launch of the infringing product, does creates a *prima facie* case and balance of convenience in favour of the plaintiffs. The Court is observing so for the reason that as per the plaintiffs, since the patent was granted on 18th September, 2015, the same has had a successful commercial run till date which continues and there is no serious dispute qua the same. The patent is an old patent and it has not been granted recently to the plaintiffs. Therefore, these facts do create *prima facie* case and balance of convenience in favour of the plaintiffs vis-a-vis the defendant, who admittedly does not has any patent qua the infringing product.

19. In the light of what has been discussed hereinabove, if an infringer is not restrained from infringing the patent of patent holder, then, but of course, the patent holder will suffer from irreparable loss and it cannot be said that the infringer stands on the same pedestal on which the patent holder is. Of course, the patent of the plaintiffs is vulnerable. It is open to challenge and now it has also been challenged by the defendant by way of a revocation petition. But mere filing of revocation proceedings cannot be treated to be a "credible challenge" to the old and successful patent of the plaintiffs. As far as the element of public interest is concerned, it may be observed that in the present case, the Central Government has not invoked the provisions of

Section 66 of the Patents Act and after following the procedure referred to therein, made a declaration in the Official Gazette to the effect that the patent of the plaintiffs stand revoked in public interest. Not only this, the defendant has not approached the competent authority under Section 84 of the Patents Act after the expiry of three years from the grant of the patent for grant of compulsory licence of patent on the conditions enumerated therein.

20. At this stage, it is relevant to refer to Section 48 of the Patents Act as it stood prior to the amendment and also post amendment, which amendment was carried out in the said section w.e.f. 20.05.2003.

21. Section 48 of the Patents Act, which deals with rights of the patentees, before amendment provided as under:

Section 48. Rights of patentees

(1) Subject to the other provisions contained in this Act, a patent granted before the commencement of this Act, shall confer on the patentee the exclusive right by himself, his agents or licensees to make, use, exercise, sell or distribute the invention in India.

2) Subject to the other provisions contained in this Act and the conditions specified in Section 47, a patent granted after the commencement this Act shall confer upon the patentee---

(a) where the patent is for an article or substance, the exclusive right by himself, his agents or licensees to make, use, exercise, sell or distribute such article or substance in India;

(b) where a patent is for a method or process of manufacturing an article or substance, the exclusive right by himself, his agents or licensees to use or exercise the method or process in India."

22. After amendment, said Section now reads as under:-

Section 48: Rights of patentees.

Subject to the other provisions contained in this Act and the conditions specified in Section 47, a patent granted under this Act shall confer upon the patentee--

(a) where the subject-matter of the patent is a product, the exclusive right to prevent third parties, who do not have his consent, from the act of making, using, offering for sale, selling or importing for those purposes that product in India;

(b) where the subject-matter of the patent is a process, the exclusive right to prevent third parties, who do not have his consent, from the act of using that process, and from the act of using, offering for sale, selling or importing for those purposes the product obtained directly by that process in India:

23. It is evident that though subject to other provisions contained in the Patents Act, including Section 47 thereof, a patent granted under the Patents Act does confers upon the patentee, where the subject matter of the patent is a product, the exclusive right to prevent a third party, who do not have his consent, from the act of making, using, offering for sale etc. of that product in India. Thus, a statutory right, which has been conferred upon the patentee, clothes the patentee with an umbrella of safety qua the infringement of its patent by a third party.

24. In just a few lines if this Court may add, the premise of the defendant that there is “credible challenge” to the subject patent of the plaintiffs is that the subject matter of the subject patent ‘IN 846’ granted to the plaintiffs was covered by the claim of another Indian Patent i.e.

Patent Number 'IN 205147' and further that the priority dates claimed in 'IN147' were 12.10.1999 and 05.04.2000, which patent was granted on 15.03.2007 and has thus expired on 02.12.2020 and the patent of the plaintiffs is nothing but evergreening of the earlier patent. Suffice to say that the holder of the patent, evergreening of whose patent is alleged by the defendant to have been done by the plaintiffs, never filed any objections, either pre-grant or post-grant, against the application for grant of patent by the plaintiffs and further there is no allegation made by the defendant, as of now, that there was some collusion between the party, which was granted patent 'IN147' and the plaintiffs, who was granted patent 'IN846'. Therefore, on this count, it cannot be said that at this stage, the defendant has rendered the patent of the plaintiffs to be vulnerable so as to lay a credible challenge to it for the purpose of declining interim protection. These observations have been made by this Court only to demonstrate its *prima facie* satisfaction on the point urged and this Court is refraining itself from making any further observation on merit in view of observations made by Hon'ble Supreme Court of India in Special Leave to Appeal C No. 18892/2017, titled as ***Az Tech (India) & Anr. Vs. Intex Technologies (India) Ltd. & Anr***., on 16.08.2017, in which Hon'ble Apex Court has been pleased to observe as under:-

> *"3. In the present Special Leave Petition (No.18892 of 2017) on 31st July, 2017, this Court passed the following order: Having read the order of the High Court of Delhi dated 10th March, 2017 passed in FAO(OS) No.1/2017 we find that it is virtually a decision on merits of the suit. We wonder if the High Court has thought it proper to write such an exhaustive judgment only because of acceptance of the fact that the interim orders in Intellectual Property Rights (IPR) matters in the Delhi*

High Court would govern the parties for a long duration of time and disposal of the main suit is a far cry.

This is a disturbing trend which we need to address in the first instance before delving into the respective rights of the parties raised in the present case. We, therefore, direct the Registrar General of the Delhi High Court to report to the Court about the total number of pending IPR suits, divided into different categories, in the Delhi High Court; stage of each suit; and also the period for which injunction/interim orders held/holding the field in each of the such suits.

The Registrar General of the Delhi High Court will also indicate to the Court what, according to the High Court, would be a reasonable way of ensuring the speedy disposal of the suits involving intellectual property rights which are presently pending.

We will expect the Registrar General of the Delhi High Court to report to the Court within two weeks from today, latest by 14th August, 2017."

25. Accordingly, in light of the observations made hereinabove, the ad-interim protection granted to the plaintiffs, vide order dated 20.10.2021, is made absolute during the pendency of the civil suit, of course, subject to any further order(s) which may be passed by this Court and the application filed under Order 39 Rule 4 of the Code of Civil Procedure praying for vacation of ad-interim injunction is dismissed. No order as to costs. Both the applications stand disposed of in above terms.

OMP No. 692 of 2021

26. This order shall dispose of an application filed under Order VIII, Rule 1 read with Section 151 of the Civil Procedure Code, vide which the applicants/plaintiffs have prayed for the following reliefs:-

"*a) Close the right of the Respondent to file its Written Statement and pronounce judgment against the Respondent;*
b) Strike out the defence of the Respondent."

27. The case of the applicants is that they have filed a suit for infringement, i.e. Commercial Suit No.5 of 2021, against respondent/defendant, praying for restraining the respondent from infringing the patent rights of the applicants under the Indian Patent No.268846 by launching, advertising etc. their medicinal products details whereof are mentioned in the application. It is further averred in the application that when the matter came up for hearing before this Court on 20.10.2021, an ad-interim order was passed in favour of the applicants. As per the applicants, respondent received a copy of order dated 20.10.2021 via e-mail and the entire set of pleadings via post which were forwarded in compliance of order XXXIX, Rule 3 of the Civil Procedure Code on 25.10.2021. Thereafter, on 29.10.2021, respondent filed an application under Order XXXIX, Rule 4 of the Civil Procedure Code, praying for vacation of ad-interim injunction granted on 20.10.2021. According to the applicants, till the date of filing of the present application, the respondent had not filed its written statement, though the statutory period of 30 days provided under Order VIII, Rule 1 of the Civil Procedure Code as amended by Section 16 read with Schedule 1 of the Commercial Courts Act, 2015 to file the same expired on 24.11.2021. The contention of the applicants is that as respondent failed to adhere to the statutory and mandatory time line of 30 days to file the written statement and thereafter its not taking any step to extend such time line, shows complete disregard to the due process of law on its behalf, accordingly a vested right has accrued upon the applicants praying for pronouncement of judgment in their favour. It is further the case of the applicants that in terms of the amendment of the Civil Procedure Code by this Court, Rule 11 has been added to Order VIII, perusal of which demonstrates that it is mandatory to comply with said Rule and failure to comply thereto results in striking off the defence of the respondent. Accordingly, a prayer has been made for striking off

the defence of the respondent. It is also the contention of the applicants that the respondent/defendant in the absence of having filed the written statement cannot take the assistance of the averments which have been made in the application filed by them under Order XXXIX, Rule 4 of the Civil Procedure Code and no cognizance of the contents thereof can be taken by this Court. It is in this background that the application has been filed, praying for the reliefs already enumerated hereinabove.

28. In reply to the application, the defendant has taken the stand that the filing of application is frivolous and a dilatory tactic on the part of the applicants to evade the arguments in the application filed under Order XXXIX, Rule 4 of the Civil Procedure Code by the defendant. The contention of the defendant is that the provisions of Order XXXIX, Rule 4 of the Civil Procedure Code, as they stand after coming into force of the Commercial Disputes Act, 2015, nowhere provide that the application can be filed only subject to the filing of the written statement in terms of Order VIII, Rule 1 of the Civil Procedure Code. As per the defendant, the Civil Procedure Code expressly provides for an application under Order XXXIX, Rule 4 of the Civil Procedure Code to be preferred by an aggrieved defendant so that such a party can quickly knock the doors of the Court which has issued *ex parte* ad-interim order. It is further the stand of the defendant that even otherwise the statutory period which is envisaged in Order VIII, Rule 1 of the Civil Procedure Code as it stands in relation to the Commercial Disputes also, had not elapsed as on the date of filing of the application or on the date of filing of the reply, therefore, the prayer of the applicants to struck of the defence of the defendant was premature and the application was liable to be dismissed.

29. I have heard learned Senior Counsel appearing for the parties and also gone through the averments as they stand contained in the application as well as reply.

30. Chapter-5 of the Commercial Disputes Act, 2015 deals with the amendments to the provisions of the Code of Civil Procedure, 1908. Section 16 of the Commercial Disputes Act, 2015 provides as under:-

> "***16. Amendments to the Code of Civil Procedure, 1908 in its application to commercial disputes****- (1) The provisions of the Code of Civil Procedure, 1908 (5 of 1908) shall, in their application to any suit in respect of a commercial dispute of a Specified Value, stand amended in the manner as specified in the Schedule.*
>
> *(2). The Commercial Division and Commercial Court shall follow the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act, in the trial of a suit in respect of a commercial dispute of a Specified Value.*
>
> *(3). Where any provision of any rule of the jurisdictional High Court or any amendment to the Code of Civil Procedure, 1908 (5 of 2908), by the State Government is in conflict with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act, the provisions of the Code of Civil Procedure as amended by this Act shall prevail.*"

31. In terms of the Schedule appended with the Commercial Disputes Act, 2015, in Order VIII, Rule 1 of the Civil Procedure Code, for the proviso already existing, the following proviso has been substituted:-

> **"***Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the written statement on such other day, as may be specified by the Court, for reasons to be recorded in writing and on payment of such costs As the Court deems fit, but which shall not be later than one hundred twenty days from the date of service of summons and on expiry of one hundred twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record.*"

32. A perusal of the proviso as it exists in Order VIII, Rule 1 of the Civil Procedure Code and as it exists with regard to the Commercial Disputes Act, 2015, demonstrates that the provisions thereof are almost *pari materia* except that when it comes to a commercial dispute the extra riders which are now contained in the proviso are to the effect that if the defendant is being allowed to file written statement after 30 days from the date of receipt of summons, then the same has to be on payment of such costs as the Court may deem fit but it shall not be later than 120 days from the date of service of summons and on expiry of 120 days from the date of service of summons the defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record.

33. While interpreting said proviso, Hon'ble Supreme Court of India in *SCG Contracts (India) Private Limited* Versus *K.S. Chamankar Infrastructure Private Limited and Others*, *(2019) 12 Supreme Court Cases 210*, has been pleased to hold that several High Court judgments on the amended Order VIII, Rule 1 of the Civil Procedure Code have held that given the consequence of non filing of written statement, the amended provisions of the Civil Procedure Code will have to be held to be mandatory and said view is correct in view of the fact that the consequence of forfeiting a right to file a written statement: "non-extension of any further time and the fact that the Court will not allow the written statement to be taken on record, all points to the fact that the earlier law on Order VIII, Rule 1 of the Civil Procedure Code on filing of written statement under Order VIII, Rule 1 has been set at naught". The relevant paras of the said judgments are quoted hereinbelow:-

> *"8) The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 came into force on 23.10.2015 bringing in their wake certain amendments to the Code of Civil Procedure. In Order V, Rule 1, sub-rule (1), for the second proviso, the following proviso was substituted:*

"Provided further that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the written statement on such other days, as may be specified by the Court, for reasons to be recorded in writing and on payment of such costs as the court deems fit, but which shall not be later than one hundred twenty days from the date of service of summons and on expiry of one hundred and twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the court shall not allow the written statement to be taken on record." Equally, in Order VIII Rule 1, a new proviso was substituted as follows:

"Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the written statement on such other day, as may be specified by the court, for reasons to be recorded in writing and on payment of such costs as the Court deems fit, but which shall not be later than one hundred and twenty days from the date of service of summons and on expiry of one hundred and twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the court shall not allow the written statement to be taken on record." This was re-emphasized by re-inserting yet another proviso in Order VIII Rule 10 CPC, which reads as under:-

"Procedure when party fails to present written statement called for by Court.- Where any party from whom a written statement is required under Rule 1 or Rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on pronouncement of such judgment a decree shall be drawn up.

Provided further that no Court shall make an order to extend the time provided under Rule 1 of this Order for

filing of the written statement." A perusal of these provisions would show that ordinarily a written statement is to be filed within a period of 30 days. *However, grace period of a further 90 days is granted which the Court may employ for reasons to be recorded in writing and payment of such costs as it deems fit to allow such written statement to come on record. What is of great importance is the fact that beyond 120 days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record. This is further buttressed by the proviso in Order VIII Rule 10 also adding that the Court has no further power to extend the time beyond this period of 120 days.*

9) In Bihar Rajya Bhumi Vikas Bank Samiti (supra), a question was raised as to whether Section 34(5) of the Arbitration and Conciliation Act, 1996, inserted by Amending Act 3 of 2016 is mandatory or directory. In para 11 of the said judgment, this Court referred to Kailash vs. Nanhku, (2005) 4 SCC 480 referring to the text of Order 8 Rule 1 as it stood pre the amendment made by the Commercial Courts Act. It also referred to the Salem Advocate Bar Association vs. Union of India, (2005) 6 SCC 344, which, like the Kailash judgment, held that the mere expression "shall" in Order 8 Rule 1 would not make the provision mandatory. This Court then went on to discuss in para 17 State vs. N.S. Gnaneswaran, (2013) 3 SCC 594 in which Section 154(2) of the Code of Criminal Procedure was held to be directory inasmuch as no consequence was provided if the Section was breached. In para 22 by way of contrast to Section 34, Section 29-A of the Arbitration Act was set out. This Court then noted in para 23 as under:

"23. It will be seen from this provision that, unlike Sections 34(5) and (6), if an award is made beyond the stipulated or extended period contained in the section, the consequence of the mandate of the arbitrator being terminated is expressly provided. This provision is in stark contrast to Sections 34(5) and (6) where, as has been stated hereinabove, if the period for deciding the

application under Section 34 has elapsed, no consequence is provided. This is one more indicator that the same Amendment Act, when it provided time periods in different situations, did so intending different consequences."

10) Several High Court judgments on the amended Order VIII Rule 1 have now held that given the consequence of non-filing of written statement, the amended provisions of the CPC will have to be held to be mandatory. [See Oku Tech Private Limited vs. Sangeet Agarwal & Ors. by a learned Single Judge of the Delhi High Court dated 11.08.2016 in CS (OS) No. 3390/2015 as followed by several other judgments including a judgment of the Delhi High Court in Maja Cosmetics vs. Oasis Commercial Pvt. Ltd. 2018 SCC Online Del 6698.

11) We are of the view that the view taken by the Delhi High Court in these judgments is correct in view of the fact that the consequence of forfeiting a right to file the written statement; non-extension of any further time; and the fact that the Court shall not allow the written statement to be taken on record all points to the fact that the earlier law on Order VIII Rule 1 on the filing of written statement under Order VIII Rule 1 has now been set at naught."

34. Coming to the facts of this case, admittedly neither on the date of filing of application under Order VIII, Rule 1 of the Civil Procedure Code, nor on the dates of hearing of the arguments on the same the statutory period of 120 days provided under the amended proviso had expired. This Court is of the considered view that whereas the defendant has a statutory right of filing written statement in a commercial dispute as within 30 days form the date of receipt of the notice, it further has a right to file a written statement if not filed within 30 days, then within 120 days of the receipt of the notice, subject to the conditions mentioned in the proviso. In the event of the defendant preferring a written statement beyond 30 days and before 120 days as from the date of receipt of the summons, then it is for the Court to take a call as to whether the

written statement has to be permitted to be taken on record or not, by assigning reasons. However, till the period of 120 days is over, the plaintiff cannot call upon the Court to close the right of the defendant from filing the written statement.

35. In a given case, the defendant may file the written statement on the last day and make out a good case justifying the late filing of the same. Therefore, when the statute envisages a specific period, the same cannot be curtailed by the Court on the mere asking of the other side. In case the Court concedes to such request of the plaintiff the same shall cause irreparable loss to the defendant because the Court shall be extinguishing a right of the defendant which stands conferred upon it by the statute. However, in case the defendant in a commercial dispute fails to file a written statement even within 120 days as from the date of service of the summons, then written statement filed subsequently, cannot be ordered, even by the Court, to be taken on record in terms of the provisions of the amended proviso as interpreted by the Hon'ble Supreme Court of India in SCG Contracts' case (supra). Accordingly, this Court does not concurs with the prayer of the plaintiffs to strike of the defence of the defendant in the application filed under Order VIII, Rule 1 of the Civil Procedure Code at the stage of filing of the present application.

36. Now, coming to the contentions which stand raised with regard to the effect of not filing of written statement vis-a-vis the application which has been filed under Order XXXIX, Rule 4 of the Civil Procedure Code, by the defendant for vacation of the ad-interim order, this Court is of the considered view that when the Civil Procedure Code itself does not expressly provides that an application under Order XXXIX, Rule 4 of the Civil Procedure Code cannot be filed in the absence of a written statement, then such an rider cannot be created by the Court.

37. This Court is of the considered view that a defendant who has suffered an *ex parte* ad-interim order, can always file an application under

Order XXXIX, Rule 4 of the Civil Procedure Code for vacation of the ad-interim order on the grounds available under the said provision and for this it is not necessary for it to file a written statement. The effect of an ad-interim order against the defendant may in a given situation demand an urgent re-look upon the same by the Court concerned on an application of the defendant, for which waiting for a written statement also to be filed, may lead to great injustice as far as the defendant is concerned in the given facts of the case.

38. Therefore, this Court does not concurs with the submissions which have been made on behalf of the applicants that the averments made in the application filed under Order XXXIX, Rule 4 of the Civil Procedure Code or the documents appended therewith cannot be gone into by this Court for the purpose of adjudication of the issue of ad-interim relief in the absence of any written statement being filed by the respondent/defendant.

Accordingly, in view of the findings returned hereinabove, this application being devoid of any merit is dismissed.

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

Between

THE KANGRA CENTRAL COOPERATIVE BANK
DHARAMSALA LTD;
THROUGH ITS MANAGING DIRECTOR,
HEAD OFFICE DHARAMSALA,
DISTRICT KANGRA, H.P.

…APPELLANT

(BY SH. RAKESH KUMAR THAKUR, ADVOCATE)

AND

1. SUBASH CHAND
   S/O SH. PREM CHAND,

R / O VILLAGE KANDROH,
P.O. & TEHSIL SANDHOL,
DISTRICT MANDI, H.P.
PRESENTLY WORKING AS PEON CUM-CHOWKIDAR,
THE KANGRA CENTRAL COOPERATIVE BANK LTD;
BRANCH BEED-BAGHEDA,
DISTRICT KANGRA, H.P.

…RESPONDENT

2. REGISTRAR OF CO-OPERATIVE SOCIETIES,
H.P. CO-OPERATIVE DEPARTMENT,
KASUMPTI, SHIMLA, H.P.

…PERFORMA-RESPONDENT

(BY SH. JAGDISH THAKUR, ADVOCATE FOR RESPONDENT NO.1)

(BY SH. RAJU RAM RAHI, DEPUTY ADVOCATE GENERAL FOR RESPONDENT NO.2)

REGULAR SECOND APPEAL
NO.117 OF 2020
Reserved on: 27.5.2022
Decided on: 31.5.2022

Specific Relief Act, 1963 – Suit for declaration – The respondent number 1 / plaintiff was held entitled for declaration that he is entitled for the post in special drive against the quota of Ex-serviceman and the defendant – Bank shall, after ascertaining quota of Ex-serviceman and the vacant roster points available on that day when the posts were advertised for other categories, if any vacant roster was available for Ex-serviceman consider the plaintiff for appointment against the post as per rules by giving him all consequential benefits with further directions to the defendant - Bank to carry out such exercise within two months from passing of judgment - Held - Despite availability of 200 Point Roster and availability of posts for Ex-serviceman, there was no provision made in the application form to enable Ex-serviceman sub staff employees to apply against post meant for Ex-serviceman in the 200 Point Roster and further that for filling up posts from amongst In-service

candidates names were not to be sponsored by this special Ex-serviceman cell, but such posts were to be identified in the recruitment process and option to the Ex-servicemen in service candidates was to be provided to apply against such post -- There is no illegality or perversity in impugned judgment and decree warranting framing of substantial question of law as proposed -- The defendant bank is directed to complete the recruitment process on or before 30.06.2012 -- Appeal dismissed. (Paras 12 & 14)

This appeal coming on for pronouncement this day, the Court delivered the following:

J U D G M E N T

In present appeal, filed by the defendant-Bank - appellant (hereinafter referred to as 'defendant-Bank'), judgment and decree dated 26.12.2019, passed by learned District Judge, Kangra at Dharamshala, District Kangra, Himachal Pradesh, in Civil Appeal No.56-D/XII/2019, tilted as **The Kangra Central Co-operative Bank v. Subhash Chand and another,** whereby judgment and decree dated 27.5.2019, passed by Civil Judge-II, Dharamshala, District Kangra, Himachal Pradesh, in Civil Suit No.523 of 2013, titled as **Subhash Chand v. The Kangra Central Co-operative Bank and another,** has been affirmed partly, directing that plaintiff-respondent No.1 (hereinafter referred to as 'plaintiff') is entitled for declaration that he is entitled for the post in the special drive against the quota of Ex-serviceman and the defendant-Bank shall, after ascertaining quota of Ex-serviceman and the vacant roster points available on that day when the posts were advertised for other categories, if any vacant roster point was available for Ex-serviceman, consider the plaintiff for appointment against that post as per Rules by giving him all consequential benefits, with further direction to the defendant-Bank to carry out such exercise within two months from the passing of the judgment and decree, i.e. 26.12.2019.

2. Defendant-Bank has filed the present appeal by proposing the following Substantial Questions of Law:

> "a. Whether the learned lower appellate court ignored the settled law that once a candidate had applied for the post under one category he cannot claim for the same post under any other category?
>
> b. Whether the learned lower appellate court being last court of fact has failed to consider the entire oral as well as documentary evidence and law applicable in this behalf, as the post for which plaintiff had put forward was to be advertised through Special Ex servicemen Cell in the labor and employment department of the State Government?
>
> c. Whether the impugned judgments and decrees are the result of complete misreading, misinterpretation of statement of DW-1 Sh. Navneet Sharma?"

3. For request made on behalf of the parties, appeal has been heard at admission stage.

4. I have heard learned counsel for the parties and gone through the record.

5. Plaintiff, who is an Ex-serviceman, is a Sub-Staff employee of the defendant-Bank and has been appointed against post meant for Ex-serviceman. Admittedly, in the posts of Grade-IV advertised by the defendant-Bank to be filled from amongst eligible Sub-Staff of the defendant-Bank under 15% quota (one time relaxation), governed by 200-Point Roster for reservation, not even a single post was advertised as post reserved for Ex-serviceman and in the Procedure and Application Form circulated vide Communication dated 2.6.2012 (Ex. P-7), there was no provision and/or Column in the Procedure or in Application Form to tick the category and sub-category as Ex-serviceman. In the categories mentioned in the Application Form, there are only four vertical categories, i.e. General, SC, ST, OBC, whereas in sub-category only

category is PH-Ortho. Plaintiff being a General Category candidate, but an Ex-serviceman, thus, was having no other option but to mention his category as 'General'.

6. Plaintiff made representation by issuing Legal Notice, under Section 72 of the H.P. Co-operative Societies Act, 1968 (Ex. P-8) to the defendant-Bank, asking the defendant-Bank to apply 200-Point Roster to the proposed Grade-IV posts to be filled from amongst the eligible Sub-Staff and to provide posts to the Ex-serviceman serving in the Sub-Staff.

7. Reply dated 10.12.2012 (Ex.P-10) to the aforesaid notice was given by defendant-Bank, stating therein that the Bank has conducted Limited Direct Recruitment for the posts of Grade-IV from amongst the eligible Sub-Staff and there is recognized Policy for the recruitment of candidates belonging to Ex-serviceman Category and further that as per Policy the posts reserved for Ex-serviceman shall have to be filled through sponsorship of the Ex-serviceman Cell.

8. Plea of the defendant-Bank is either misconceived or mischievous. Plaintiff has also placed on record Ex.P-12, an advertisement issued by H.P. Subordinate Service Selection Board, Hamirpur, with respect to Limited Direct Recruitment to the post of Clerk from eligible Class-IV employees of various departments. Reservation of posts indicated in the said advertisement clearly depicts that in such recruitment posts of Ex-servicemen are to be identified and advertised/circulated enabling the in-service Ex-serviceman candidates to apply for those posts. No such posts were identified and advertised or provided by the defendant-Bank in the recruitment drive undertaken by it despite applicability of 200-Point Roster wherein posts for Ex-servicemen are identified.

9. Functioning of Special Cell of Ex-servicemen, sponsoring the names of Ex-servicemen for various Departments/Corporations/Boards/Bank etc., has been placed on record as Ex. DW-1/B, wherein it is provided that

names registered in the Special Ex-servicemen Cell are required to be renewed after three years. Definitely, where a candidate is sponsored and is appointed in the Department/Corporation/ Board/Bank, there shall be no occasion or reason for renewal of his name in the Special Ex-serviceman Cell. Therefore, as recruitment process was initiated for in-service candidates and no requisition was sent to the Special Ex-servicemen Cell for sponsoring the names, rather it was not required as there was no occasion for the Ex-servicemen Cell to sponsor the names of Ex-serviceman candidates who are already serving with defendant-Bank. It is also noticeable that no posts were identified for Ex-servicemen in the recruitment process which is contrary to the Policy of the State as well as 200-Point Roster, which is stated to have been applied by the defendant-Bank for conducting the recruitment in reference.

10. DW-1 Shri Navneet Sharma, in his examination-in-chief, has reiterated that defendant-Bank conducted Limited Direct Recruitment for the post of Grade-IV from amongst the eligible Sub-Staff. In his cross-examination, he has admitted that with respect to these appointments no requisition was sent to Special Ex-servicemen Cell and in this recruitment process neither names were requisitioned from the Employment Exchanges nor any advertisement was given in the Newspaper, because these posts were to be filled from amongst in-service Sub-Cadre as it was a special recruitment process for the employees of Sub-cadre who had more than five years regular service with the Bank. He has admitted that for reservation of these posts 200-Point Roster was to be made applicable and in the Application Form circulated during recruitment process there is no Column for Ex-serviceman. He has also admitted that it has been mentioned in Ex. P-7 that for recruitment process 200-Point Roster was applied. He has admitted that posts meant for Ex-servicemen in the 200-Point Roster were kept vacant.

11. Nothing has been brought on record to show that the judgments and decrees, passed by the Courts below, are result of complete misreading, misinterpretation of statement of DW-1 Shri Navneet Sharma rather on perusal it has been found appreciated correctly.

12. From the aforesaid facts and circumstances, it is apparent that despite applicability of 200-Point Roster and availability of vacant posts for Ex-servicemen as per the said Roster, there was no provision made in the Application Form to enable Ex-serviceman Sub-Staff employees to apply against the post meant for Ex-serviceman in the 200-Point Roster and further that for filling up posts from amongst in-service candidates names were not to be sponsored by the Special Ex-servicemen Cell but such posts were to be identified in the recruitment process and option to the Ex-serviceman in-service candidates was to be provided to apply against such posts and DW-1 Shri Navneet Sharma, in his statement, has admitted the aforesaid facts and procedure required to be adopted.

13. There is no illegality or perversity in impugned judgment and decree warranting framing of Substantial Questions of Law as proposed.

14. In view of above discussion, I find that no Question of Law, muchless Substantial Question of Law, is made out for admission and adjudication of the appeal. Consequently, judgment and decree dated 26.12.2019, passed by learned District Judge, Kangra at Dharamshala, District Kangra, Himachal Pradesh, in Civil Appeal No.56-D/XII/2019, tilted as **The Kangra Central Co-operative Bank v. Subhash Chand and another,** whereby judgment and decree dated 27.5.2019, passed by Civil Judge-II, Dharamshala, District Kangra, Himachal Pradesh, in Civil Suit No.523 of 2013, titled as **Subhash Chand v. The Kangra Central Co-operative Bank and another,** has been affirmed partly, is upheld, and the defendant-Bank is directed to complete the recruitment process on or before 30.6.2022.

The appeal is dismissed and disposed of, so also pending application, if any.

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

Between:-

1. MASADI SON OF SH. PURAN CHAND

2. SMT. MANBHARU, WIFE OF SH. MASADI.

BOTH RESIDENTS OF VILLAGE NAL, PARGANA
FATEHPUR, TEHSIL SHRI NAINA DEVI JI,
DISTRICT BILASPUR, H.P.

……APPELLANTS/PLAINTIFFS.

(BY SH. AJAY SHARMA, SENIOR ADVOCATE
WITH SH. ATHARV SHARMA, ADVOCATE)

AND

KRISHANI DEVI, W/O SH. RAM DASS,
RESIDENT OF VILLAGE CHELLI, PARGANA
FATEHPUR, TEHSIL SHRI NAINA DEVI JI,
DISTRICT BILASPUR, H.P.

…..RESPONDENT/DEFENDANT.

(BY SH. J.R. POSWAL, ADVOCATE)

REGULAR SECOND APPEAL
No.49 of 2016
Reserved on: 29.04.2022
Decided on: 09.05.2022

Indian Evidence Act, 1872 - Section 68 - Will – Examination of attesting witnesses – Suspicious circumstances in Will – Held -- It was the specific case of the plaintiff that he executed a will and not a gift deed then it was incumbent upon the defendant to examine the sole surviving witness who alone could have stated about fact as to whether plaintiff number 1 had executed a will or a gift deed - Stamps in the instant case were purchased on

3.8.2000 as is evident from stamp papers, but the so called gift deed was executed a week later on 10.08.2000 - There is no explanation forth coming from the side of the defendant as to why the so called gift deed was not executed at the time of purchasing the stamp paper i.e. on 03.08.2000 - Defendant was none other than the daughter of plaintiff number 1 and therefore was in position to dominate the will of a plaintiff - The findings of courts below are perverse and not legally sustainable - Appeal allowed and the judgments and decree of Courts below set aside.(Paras 32, 33, 37 & 39)

Cases referred:

Babu Singh and others vs. Ram Sahai alias Ram Singh (2008) 14 SCC 754;
Habeeb Mohammad vs. The State of Hyderabad, AIR 1954 SC 51;
Ram Ranjan Roy vs. Emperor, AIR 1915 Calcutta 545;
Sohan Singh and another vs. Amrik Singh and others, AIR 2005 Punjab and Haryana, 176;
Stephen Seneviratne vs. The King AIR 1936 SC 289;

This appeal coming on for hearing this day, the Court delivered the following:

JUDGMENT

Aggrieved by the judgments and decrees passed by both the learned Courts below, the plaintiffs-appellants have filed the instant regular second appeal.

2. The parties hereinafter shall be referred to as the 'plaintiffs' and 'defendant'.

3. The defendant is the only daughter of Shri Masadi(plaintiff No.1) born from his first wife (late Smt. Devku).

4. The plaintiffs filed a suit for declaration to the effect that plaintiff is owner in possession of the land measuring 6-10 bighas out of the total land measuring 17-00 bighas comprised in Khewat No. 26, Khatauni No. 29, Khasra Nos. 9, 11, 18, 19,23, 25 and 64, situate in Village Nal, Pargana Fatehpur, Tehsil Shri Naina Devi Ji, District Bilaspur, H.P. (hereinafter to be referred as the suit land). The plaintiffs also prayed for a decree of

permanent prohibitory injunction restraining the defendant from interfering into their peaceful ownership and possession.

5. The case of the plaintiffs is that plaintiff No.1 is an old man residing in a remote corner of the District with his old wife (plaintiff No.2). There was no one to look-after them and their estate. Smt. Devku first wife of plaintiff No.1 expired when defendant was a small child. It is averred that plaintiff No.1 looked after defendant and got her married by spending huge amount. Being a daughter, the defendant had a lot of influence upon the plaintiffs and she always assured to look-after them. It is further averred that the defendant even cultivated the land owned by them on their behalf and used to handover the usufruct to them as she was their licensee. Being under the total influence of the defendant, she took plaintiff No.1 to Tehsil to get a Will prepared in her name by assuring them that plaintiffs will remain exclusive owners in possession of the suit property and after their death, the property will devolve upon her. It is also averred that the defendant even assured the plaintiffs that in case they are not satisfied with the services rendered by her, they will be at liberty to revoke the Will. According to the plaintiffs, the defendant obtained thumb-impressions of plaintiff No.1 on a document by representing that the same is a Will and she even told to the plaintiffs that she will retain the Will and they can take the Will back from her as and when required and being daughter, the plaintiffs trusted the defendant.

6. It is further averred that after a few years, the defendant told them that she is unable to cultivate the land on their behalf. Then, the plaintiffs requested one Shri Garja Ram, who was related to them to cultivate the land for them and on their behalf. This arrangement continued for 4-5 years and Shri Garja Ram used to help them. Thereafter, the defendant asked Shri Garja Ram not cultivate the suit land on the pretext that she is owner in possession of the suit land. On this, the plaintiffs were taken aback

and even remained bed ridden for months together, but the defendant did not turn up to help them. As per the plaintiffs, Shri Garja Ram took their care and is constantly looking after them and when they recovered from ailment, they inquired from defendant about the manipulation of the so-called gift deed. Instead of helping the plaintiffs, the defendant proclaimed that they should approach Shri Garja Ram to serve them.

7. It is also averred that gift deed dated 10.08.2000 is a result of misrepresentation and undue influence exercised by the defendant. As per the plaintiffs, they have revoked the licence of the defendant and she has nothing to do with the disputed property which is owned and possessed by plaintiff No.1. The defendant has failed to look after and serve them as was promised.

8. It is further averred that the cause of action accrued to the plaintiffs on 14.01.2007 when the defendant entered into the suit land and tried to cut and sell the trees standing thereon by saying that the suit land belongs to her. The plaintiffs requested the defendant to admit their claim and desist from her unlawful activities, but in vain, hence the suit.

9. The defendant contested the suit by filing written statement and controverted the averments made in the plaint and has taken preliminary objections regarding maintainability of the suit, suppression of material facts, estoppel, non-joinder and valuation of the suit property.

10. On merits, it was admitted that plaintiff No.1 is an old man, however, it is averred that he is hale and hearty. Plaintiff No.1 was married to Smt. Devku (mother of the defendant), who expired 30 years ago. It is further averred that after the demise of Smt.Devku, plaintiff No.1 tied nuptial knot with Smt. Hardei daughter of Sh. Durga Ram. The second wife of plaintiff No.1 left the land after about 10 years of the marriage and no child was born to her. It is also averred that thereafter plaintiff No.1 brought Smt. Manbharu (plaintiff No.2) and stated residing with her. No child took birth from the

womb of plaintiff No.2. Plaintiff No.1 being father had full love and affection for the defendant. Defendant and her husband served plaintiff No.1 as is expected from a daughter in Hindu society and out of love and affection, plaintiff No.1 persuaded her and her husband to stay with him in the village and they started living in the house of plaintiff No.1 and served him whole heartedly.

11. According to the defendant, satisfied with the services rendered by her, plaintiff No.1 requested her to get a gift deed executed in her favour. She told her father that there is no necessity to execute the deed since there is no one to claim his property. Plaintiff No.1 did not agree to this proposal and remarked that he wanted to make her the owner of the disputed land during his life time so that she is not harassed by anyone including plaintiff No.2 after his death. Accordingly, plaintiff No.1 executed a gift deed dated 10.08.2000 qua the suit property in her name. As per defendant, after execution of the gift deed, she and her husband were left with no other option but to built a house consisting of 3 rooms after spending approximately Rs.two lacs over the suit land. Mutation No.166 on the basis of the gift deed was sanctioned in her favour on 27.04.2001 in the presence of plaintiff No.1. Neither any facts were misrepresented nor the gift deed in question is the result of undue influence because the deed in question was executed by plaintiff No.1 of his own accord and free volition.

12. It is also averred that when defendant started living in the village, some commotion took place amongst the relatives and they started poisoning the plaintiffs against her. Plaintiff No.1 is an habitual drunkard. Sh. Garja Ram, who happens to be nephew of plaintiff No.1, taking full advantage of the drinking habit of plaintiff No.1, took him in his grip and now plaintiff No.1 is dancing on the tunes of Shri Garja Ram. In the year 2006, defendant fell ill. Her husband took her to Shimla for treatment. During her absence, Shri Garja Ram got prepared a false Will of about 2 bighas of the

land from plaintiff No.1 and to throw out her from the disputed property, Shri Garja Ram managed to get the suit filed by the plaintiffs. After the execution of the gift deed, she is owner in possession of the suit land and she will continue to serve her father. No threat was every advanced and a false story has been cooked up by the plaintiffs. The defendant prayed for dismissal of the suit.

13. The plaintiff filed replication reiterating the averments made in the plaint and controverted the objections put forth by the defendant. It was denied that a house was constructed by the defendant and her husband in and over the suit land.

14. Out of the pleadings of the parties, the learned trial Court on 28.04.2007 framed the following issues:-

> "1. Whether the plaintiffs are entitled for relief of declaration as prayed for? OPP.
> 2. Whether the plaintiffs are entitled for relief of permanent prohibitory injunction as prayed for? OPP.
> 3. Whether the present suit is not maintainable? OPD.
> 4. Whether the plaintiffs have no cause of action? OPD.
> 5. Whether the plaintiffs have not approached to the Court with clean hands? OPD.
> 6. Whether the plaintiffs are stopped by their act, conduct and acquiescence from filing the present suit. OPD.
> 7. Whether the suit is bad for non-joinder of necessary parties? OPD.
> 8. Whether the suit is not properly valued for the purpose of court fee and jurisdiction? OPD.
> 9. Relief."

15. On 20.03.2013, the learned trial Court framed an additional issue to the following effect:-

> "2A. Whether the gift deed dated 10.8.2000 is a result of undue influence and misrepresentation? OPP."

16. After recording evidence led by both the parties and evaluating the same, the learned trial Court on 30.05.2015 dismissed the suit filed by the plaintiffs. The appeal filed by the plaintiffs against the judgment and decree passed by the learned trial Court before the learned first appellate Court also met with the same fate.

17. This Court vide order dated 12.05.2016 admitted the appeal on the following substantial question of law:-

> "Whether on account of misappreciation 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 the main appeal being perverse is vitiated and not legally sustainable?"

18. I have heard the learned counsel for the parties and have also gone through the records of the case carefully.

19. It has been the case of the plaintiffs throughout that what he had executed was not a gift deed, but was a Will and, therefore, the gift deed in favour of the defendant was null and void and an outcome of fraud, undue influence and misrepresentation.

20. In order to prove his case, plaintiff No.1 stepped into the witness box as PW-1 and reaffirmed and reasserted the contents of the plaint in his examination-in-chief and also placed on record copy of jamabandi Ex.PA which shows an entry of 2 bighas of land of plaintiff No.1 in favour of Garja Ram, nephew of the plaintiff. According to the plaintiffs, Garja Ram was looking after them, therefore, he (plaintiff No.1) executed gift deed in his favour. The plaintiff stated that the gift deed in question in favour of the defendant is null and void and is an outcome of fraud, undue influence and misrepresentation on the part of the defendant. In these circumstances, the

onus to prove the gift deed as held by the learned trial Court shifts upon the defendant.

21. The defendant examined herself as DW-3 and reaffirmed and reasserted the contents of the written statement in her examination-in-chief and placed on record copy of gift deed Ex. DW-1/A.

22. To prove the gift deed Ex. DW-1/A, she also examined one Naval Kishore, Sub Registrar as DW-1 and DW-2 Munshi Ram, Naib Tehsildar.

23. DW-1 Naval Kishore stated that the gift deed was correct as per their record, whereas, DW-2 Munshi Ram stated that one Chet Ram and another Chet Ram son of Shri Mahant Ram appeared as witnesses with plaintiff No.1 when gift deed was executed. He further stated that gift deed was read over and explained to plaintiff No.1 in his own language and after admitting the same to be true, plaintiff No.1 voluntarily executed the gift deed in favour of the defendant.

24. The learned Courts below after placing reliance on the statements of the defendant's witnesses and mutation No. 166 dated 27.04.2001 Ex. DW-3/A wherein presence of plaintiff No.1 and defendant was stated to be marked in "Jalsa Aam", dismissed the suit of the plaintiffs.

25. However, one material fact which both the learned Courts below have not touched upon much less dealt with is the non-examination of at least one of the attesting witnesses as per the requirement of Section 68 of the Indian Evidence Act (for short 'Act') which reads as under:-

> "**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:
>
> 3[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 whom it purports to have been executed is specifically denied.]"

26. The defendant has not examined the scribe as also the attesting witnesses of the alleged gift deed. Save and except witness Chet Ram son of Shri Rubel Ram, resident of Village Tunhu, Tehsil Sadar, District Bilaspur, the other attesting witness had died and as regards this witness, he admittedly was not examined by the defendant while leading her evidence. But, later on, an application came to be filed by the defendant under Order 16 Rule 1(3) read with Section 151 CPC for examining the aforesaid Chet Ram as a witness. In the application, it was pleaded that while preparing the list of witnesses, the name of Chet Ram had bonafidely been left out and since he was alive, therefore, she may be permitted to examine him. The application was duly allowed subject to payment of Rs.300/- vide order dated 20.03.2013. The witness Chet Ram was though present in the Court on 10.12.20213, however, since the original counsel representing the defendant was not present on account of death of his relative, he was discharged for the day and the case was listed for defendant's evidence on 16.01.2013, as is evident from the order dated 10.12.2013. On 16.01.2014, the learned trial Court proceeded to pass the following order:-

> "The counsel for defendant given up PW Chet Ram being won over by the plaintiffs and closed evidence vide separate statement placed on record. Now case be listed for arguments on 28.2.2014."

27. A similar issue regarding non-compliance of mandatory requirement of Section 68 of the Act came up before the Hon'ble Punjab and Haryana High Court in ***Sohan Singh and another*** *vs.* ***Amrik Singh and others, AIR 2005 Punjab and Haryana, 176,*** wherein one of the attesting witnesses though alive was not examined to prove the due execution of the

Will and was given up as won-over, it was held that this amounted to non-compliance of mandatory provisions of Section 68 of the Act and the Will in question could not be used as evidence. It is apt to reproduce the relevant observations as contained in para-4 and 5 of the judgment which read as under:-

> "4. As referred to above, in my opinion, there is no merit in this appeal and the same is liable to be dismissed. While considering the question regarding validity of Will dated 30-8-1988, allegedly executed by Raju deceased in favour of defendants 1 to 3, it was found by the learned Addl. Distt. Judge that the execution of the said Will was not duly proved on the record. It was found that as per the Will Ex. D1, the same was attested by Jarnail Singh and Gurbachan Singh, Numberdar. It was found that Jarnail Singh, one of the attesting witnesses, was not produced in evidence and was given up as having been won over by the plaintiffs whereas the other attesting witness namely Gurbachan Singh, Numberdar had allegedly died before he could be examined even though he had sworn on affidavit on 28-10-1996, Ex. DW 5/A but the same could not be looked into and could not be made the basis for holding the due execution of the Will in question. In my opinion, this finding recorded by the learned Addl. Distt. Judge is perfectly in accordance with law and no fault could be found with the same. Jarnail Singh, One of the attesting witnesses, was not examined by the defendants to prove the due execution of the Will in question by Raju deceased, whereas Gurbachan Singh, Numberdar was also not examined as he had allegedly expired. In my opinion this finding recorded by the learned Addl. Distt. Judge is perfectly in accordance with law and no fault could be found with the same. Jarnail Singh, one of the attesting witnesses was not examined by the defendants to prove the due execution of the Will in question by Raju deceased whereas Gurbachan Singh, Numberdar was also not examined as he had allegedly expired. In my opinion, the learned Addl. Distt. Judge had rightly not placed reliance on the affidavit Ex. DW 5/A, allegedly executed by Gurbachan Singh, Numberdar since the

plaintiffs did not have any opportunity to cross-examine Gurbachan Singh and as such on the basis of said affidavit it could not be said that the due execution of the Will in question was proved on the record. Under Section 63 of the Indian Succession Act, 1925, it has been provided that Will shall be attested by two or more witnesses each of whom has seen the Testator sign or affix his mark to the Will 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 form of attestation shall be necessary. Under Section 68 of the Indian Evidence Act, 1872, it has been provided that 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 capable of giving evidence. In the present case, as referred to above, none of the attesting witnesses had been examined by the defendants to prove due execution of the Will in question. If one of the attesting witnesses had died during the pendency of the suit, the other attesting witness could be examined to prove the due execution of the Will. As referred to above, Jarnail Singh was still alive but was not examined and was, given up as won over. This is in spite of the fact that diet money in respect of Jarnail Singh was deposited in the Court but still he was not examined and was given up as won over. So far as Gurbachan Singh is concerned, even though diet money qua, him was deposited but before he could be examined as a witness he expired and as such his statement could not be recorded. The affidavit sworn by him, in my opinion, would, be of no consequence since admittedly, the plaintiffs did not have a chance to cross-examine Gurbachan Singh and thus the affidavit sworn by him would be neither here nor there and would not help the defendants to prove the due execution of the Will in question. By not examining one of the attesting witnesses, the defendants have failed to comply with the mandatory requirement of Section 68 of the Indian Evidence Act, 1872 and as such the Will in question could not be used as evidence.

> 5. The authority Surinder Singh v. Anup Singh, 2002 (1) Rec Civ R 207 : (2001 AIHC 4551), relied upon by the learned counsel for the defendants appellants, in my opinion, would be of no help to the defendants. In the reported case, both the attesting witnesses of the Will were examined. However, they refused to support the Will. On the other hand from the evidence of Doctor it was found that the Testator was mentally alert, sound and cautious and was thus in sound and disposing mind. It was also found that where both the witnesses had not supported the Will, in such a case the Court could not be a mute spectator and the Court can look into the whole circumstances of the case and come to the conclusion whether formalities of Section 63 of the Indian Succession Act had been complied with. In the reported case, it was found that the Testator had distributed his property in a very natural and intelligent manner and the Will was scribed in the hospital in the presence of the Doctor and two witnesses. In my opinion, the law laid down in the aforesaid authority would have no application to the facts of the present case, inasmuch as in the present case none of the: attesting witnesses has been examined to prove the due execution of the said Will. Merely by giving up one witness as won over, in my opinion, would not be sufficient to prove the requirement of Section 68 of the Indian Evidence Act."

28. That apart, a similar issue came up before the Hon'ble Supreme Court in ***Babu Singh and others*** *vs.* ***Ram Sahai alias Ram Singh (2008) 14 SCC 754,*** regarding the proof of execution of Will as per Section 68 of the Act wherein it was held that mere statement of a Counsel for the plaintiff that only surviving attesting witness was won over by the opposite party was not sufficient to prove his absence as there must be some evidence brought on record in that behalf. It is apt to reproduce the relevant observations as contained in paras 19 and 20 of the judgment which reads as under:-

> "19. Indisputably, one of the attesting witnesses was dead. Our attention, however, has been drawn to the fact that a purported summons were taken out against the said Harnek Singh.

> Admittedly, it was not served. There is nothing on record to show that any step was taken to compel his appearance as a witness. Ram Sahai in his deposition did not make any statement that the said Harnek Singh had been won over by the appellant. He did not say that despite service of summons, Harnek Singh did not appear as a witness. In his cross-examination, he alleged that he and Harnek Singh were inimically disposed of towards each other even prior to 1991 and in fact "since the time of his ancestors". It was furthermore alleged that they are not on speaking terms. A suggestion was given to him that in fact Harnek Singh had come to Court on that day to which he denied his knowledge. It is only in answer to a question in cross-examination, he stated that he did not intend to examine the said Harnek Singh.
>
> 20. Harnek Singh may be a person who had been won over by the appellant but there must be some evidence brought on records in that behalf. The learned Trial Judge, in our opinion, rightly rejected the bare statement made by the learned counsel for the plaintiff that the other attesting witness had gone out of the country. Respondent himself did not say so on oath. He did not examine any other witness."

29. Even in a Criminal Law, the mere statement on behalf of the prosecution that the witness has been won-over is not conclusive on the question that the witness has indeed been won-over . Such inference can be drawn only after the witness has appeared in the witness box and his statement recorded. Meaning thereby, when the prosecution alleges that a material witness has been won-over by the accused, it is still necessary that such witness must be produced and examined at the trial to reveal the truth. (See: **Habeeb Mohammad** vs. **The State of Hyderabad, AIR 1954 SC 51, Stephen Seneviratne** vs. **The King AIR 1936 SC 289** and **Ram Ranjan Roy** vs. **Emperor, AIR 1915 Calcutta 545).**

30. Apart from the above, it would be noticed that both the Courts below have unnecessarily been swayed by some sort of entry made in

mutation No. 166 dated 27.04.2001 Ex. DW-3/A to conclude that it recorded the presence of plaintiff No.1 and the defendant in 'Jalsa Aam" convened on the said date.

31. The learned Courts below have failed to take into consideration that the object of mutation is to get the entries recorded in the record of rights up-to-date. It is the record of rights that have presumption of correctness attached to it under the Land Revenue Act, whereas, the mutation proceedings by themselves do not determine the question of right and title. Therefore, it is only the correctness with regard to record of rights and not the attendance that is marked in these proceedings that carries a presumption of truth, that too, a rebuttable one, which has to be proved independently by leading clear, convincing and cogent evidence.

32. Given the background, that it was the specific case of the plaintiff that he had executed a Will and not a gift deed, then it was incumbent upon the defendant to examine the sole surviving witness, who alone could have stated about the fact as to whether plaintiff No.1 had executed a Will or a gift deed.

33. Another factor which creates suspicion is the fact that the stamps in the instant case were purchased on 03.08.2000 as is evident from the stamp papers, but the so-called gift deed was executed a week later on 10.08.2000. There is no explanation forthcoming from the side of the defendant as to why the so-called gift deed was not executed at the time of purchasing the stamp papers i.e. on 03.08.2000.

34. The learned counsel for the defendant would, however, contend that since the Registering Authority has stated about the attestation of the document, therefore, there was no requirement or otherwise necessity for the defendant to have examined the witness Shri Chet Ram. However, I find no merit in this contention.

35. The word “attested” occurs in Section 3 of the Transfer of Property Act, (for short ‘Act’), as part of the definition itself. To attest is to bear witness to a fact. The essential conditions of a valid attestation under Section 3 of the Act are : (1) two or more witnesses have seen the executant sign the instrument or have received from him a personal acknowledgment of his signature; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant. It is, therefore, essential that the witness should have put his signature animo attestandi, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgement of his signature. If a person puts his signature on the document for some other purpose, for example, to certify that he is a scribe or an identifier or a Registering Officer, he is not an attesting witness. 36. The Registering Officer puts his signatures on the document in discharge of his statutory duties under Section 59 of the Registration Act and not for the purpose of attesting it or certifying that he has received from the executant a personal acknowledgment of his signatures or then there is a positive evidence led that the Registering Officer had put his signatures on the document for the purpose of attesting and in addition to or for the purpose of attesting also. There is no such evidence led in the instant case. In absence of any evidence, the mere fact that the Registering Authority has been examined would only go to show that he had registered the document, but it cannot be relied upon for the purpose of treating the Registering Officer to be a witness in the instant case.

37. Moreover, it is established on record that the defendant was none other than the daughter of plaintiff No.1 and, therefore, was in a position to dominate the Will of the plaintiffs.

38. In view of the aforesaid discussion and for the reasons stated above, I find that the findings of both the learned Courts below are perverse and, therefore, are not legally sustainable.

39. The substantial question of law is answered accordingly.

40. In view of the aforesaid discussion and for the reasons stated above, I find merit in this appeal and the same is allowed. The suit filed by the plaintiffs is decreed throughout with costs and the judgments and decrees passed by both the learned Courts below are ordered to be set aside. Pending application, if any, also stands disposed of.

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

Between:-

NARAIN SINGH
S/O LATE SH. SURAT RAM,
R/O VILLAGE SHAUNTHAR,
P.O. GAONSARI, TEHSIL CHIRGAON,
DISTT. SHIMLA, H.P.

(BY SH.VIRENDER SINGH CHAUHAN, SENIOR ADVOCATE,
ALONGWITH SH.RAJUL CHAUHAN, ADVOCATE)

….APPELLANT

AND

DHARMA SAIN
S/O SH. SUPAN DASS,
R/O VILLAGE ROHAL, TEHSIL CHIRGAON,
DISTT. SHIMLA, H.P.

(BY SH.DEEPAK BHASIN, ADVOCATE)

…..RESPONDENT

REGULAR SECOND APPEAL
NO.457 OF 2010

Reserved on:30.05.2022
Decided on:31.05.2022

Specific Relief Act, 1963 - Section 16 (C) -- Specific performance of contract - Plaintiff claimed that he has performed his part of agreement by paying complete sale consideration of Rs. 60,000/- and is in possession of the suit land and further is ready and willing to perform his part of agreement for executives in his favor but the defendant is not ready and willing to execute regular sale deed in the office of Sub Registrar -- From the perusal of the evidence it stands proved on record that entire sale consideration was paid and possession of the plaintiff acknowledged by the defendant - Refusal to execute sale deed can easily be culled out from averment made in the written statement and deposition of the defendant – Plaintiff performed his part of agreement by paying complete consideration and his role to be performed is only to remain present in the office of Sub Registrar at the time of execution of sale deed by the defendant and for that the plaintiff is ready and willing to perform his part of agreement – Averments made in the plaint as a whole are demonstrating substantial compliance of provisions of section 16 (C) of the Act - Appeal dismissed. (Paras 20, 21 & 24)

Cases referred:

Bal Krishna & Anr. Vs. Bhagwan Das (Dead) by L.Rs. & Ors., AIR 2008 SC 1786;
Jagjit Singh (Dead) Through Legal Representatives vs. Amarjit Singh, (2018) 9 SCC 805
Manjunath Anandappa Urf Shivappa Hansi vs. Tammanasa and others, AIR 2003 SC 1391;
Padmakumari and others vs. Dassayyan and others, (2015) 8 SCC 695;

This appeal coming on for pronouncement this day, the Court delivered the following:

J U D G M E N T

Present appeal has been preferred against judgment and decree dated 19.03.2009, passed by learned Additional District Judge, Shimla, Camp at Rohru, in Civil Appeal No.56-R/13 of 2006, titled as *Narain Singh vs. Dharam Sain,* whereby judgment and decree dated 17.07.2004, passed by learned Civil Judge, Junior Division, Court No.1, Rohru, District Shimla, H.P.,

in Civil Suit No.162-1 of 2003, titled as *Dharam Sain vs. Narain Singh,* has been affirmed.

2. Parties to the *lis,* for convenience, are being referred according to their status in the Civil Suit i.e. as plaintiff and defendant.

3. Plaintiff has filed a suit for specific performance of agreement of sale, on the ground that suit land was agreed to be sold by the defendant to plaintiff for consideration of `60,000/- by entering into agreement dated 16.04.2003 (Ex.PW.2/A) and plaintiff had paid entire consideration amount at the time of execution of sale agreement. However, at that time, mutation of land had not been attested in favour of the defendant, but was in the name of earlier owner Suresh Kumar from whom defendant had purchased the land and, therefore, sale deed was not executed, but was agreed to be executed shortly after attestation of mutation in the name of vendor-defendant.

4. According to plaintiff, he was put in possession of the suit land in the year 1995 by predecessors-in-interest of defendant namely Hinsri Nand and Huma Saran from whom estate had devolved on Suresh Kumar, Dropti and Viram Patti, and Suresh Kumar had sold his share to the defendant whereafter, defendant agreed to sell land to the plaintiff vide agreement referred supra.

5. After purchasing land from Suresh Kumar, defendant had agreed to sell it to plaintiff and received entire consideration amount and had acknowledged possession of the plaintiff upon suit land. He had also signed agreement having a clause that plaintiff had been put into possession of the suit land and defendant had agreed for executing sale deed in favour of the plaintiff after getting the mutation of suit land attested in his favour.

6. On completion of trial, trial Court had concluded that plaintiff has proved his case against the defendant and, thus, defendant was directed to execute regular sale deed in the office of Sub-Registrar, Chirgaon, pertaining to the suit land and defendant was also restrained from alienating

the aforesaid land and also dispossessing the plaintiff forcibly from the suit land.

7. First appeal preferred by the defendant has been dismissed by the First Appellate Court. Hence, present appeal has been filed, which has been admitted on 28.04.2011 on following substantial question of law:-

> "Since there is no pleading and evidence with respect to willingness and readiness on the part of plaintiff to perform his part of agreement, whether the findings of the Ld. Courts below decreeing the suit for specific performance is legally sustainable?"

8. Learned counsel for the defendant has submitted that there is neither pleading in the plaint nor any witness has deposed about fulfilling requirement of readiness and willingness on the part of the plaintiff, as required in law, to perform his part of agreement and, therefore, both the Courts below have committed a mistake of law by decreeing the suit and affirming it. To substantiate his plea, he has referred para-4 of the plaint and deposition in the statements of these witnesses and has submitted that these are vague, and further that no notice ever was issued by the plaintiff to the defendant expressing his intention about readiness and willingness for execution of sale deed and, therefore, it is advocated that necessary ingredients for passing a decree for specific performance of agreement to sell are not on record and, therefore, prayer for setting aside judgment and decree passed by the trial Court and affirmed by First Appellate Court has been made.

9. It is submitted on behalf of the defendant that Courts below have not returned any finding with respect to readiness and willingness of the plaintiff to perform his part, and legal requirement, which is necessary in terms of Section 16(c) of the Specific Relief Act, 1963 (hereinafter referred to as 'the Act') is missing in the impugned judgments and, thus, impugned

judgments and decrees are liable to be set aside by dismissing suit of plaintiff on this sole ground.

10. In support of contention made on behalf of the defendant, learned counsel for the defendant has put reliance on ***Manjunath Anandappa Urf Shivappa Hansi vs. Tammanasa and others, AIR 2003 SC 1391; Bal Krishna & Anr. Vs. Bhagwan Das (Dead) by L.Rs. & Ors., AIR 2008 SC 1786; Padmakumari and others vs. Dassayyan and others, (2015) 8 SCC 695; and Jagjit Singh (Dead) Through Legal Representatives vs. Amarjit Singh, (2018) 9 SCC 805.***

11. Learned counsel for the plaintiff has also referred para-4 of the plaint and submissions of plaintiff and other witnesses to demonstrate expression of readiness and willingness on the part of the plaintiff in pleading and evidence to perform his part of agreement. Referring contents of agreement to sell (Ex.PW.2/A), it is contended on behalf of the plaintiff that entire amount of sale consideration was paid to the defendant on the day of execution of agreement to sell and everything, on the part of the plaintiff, except remaining present at the time of execution of sale deed in the office of Sub-Registrar, was complete on the part of the plaintiff and it was defendant who had to perform his part by executing sale deed in favour of plaintiff after attestation of mutation in the name of defendant as his name was not entered in the revenue record after purchase of the suit land by the defendant from Suresh Kumar (PW.5).

12. It is pleaded on behalf of the plaintiff that in view of nature of performance required on the part of the plaintiff for execution of sale deed, pleadings as well as evidence in this regard, available on record, is sufficient for dismissal of appeal.

13. Section 16(c) of the Act reads as under:-

> "16. Personal bars to relief.-Specific performance of a contract cannot be enforced in favour of a person-

(a)-(b) … … …

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms of the performance of which has been prevented or waived by the defendant.

Explanation.-For the purposes of clause (c),-

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the court;

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction."

14. In *Manjunath's case* referred supra observing that in terms of provisions of Section 16(c) of the Act, it is incumbent upon the plaintiff, to aver and to prove that he had all along been ready and willing to perform the essential terms of contract which were required to be performed by him. Considering various earlier pronouncements of the Supreme Court, it has been concluded that decisions of the Supreme Court leave no manner of doubt that a plaintiff, in a suit for specific performance of contract not only, must raise a plea that he had all along been and even on the date of filing of suit was ready and willing to perform his part of contract, but also prove the same with further clarification that statutory requirement of Section 16(c) of the Act, may be held to have been complied with only in certain exceptional situations where although in letter and spirit exact words had not been used, but readiness and willingness can be culled out from reading of the averments made in the plaint as a whole coupled with material brought on record at the trial of the suit to the said effect.

15. In *Bal Krishna's case*, the Supreme Court has held that specific performance of contract cannot be enforced in favour of a person, who fails to aver and prove his readiness and willingness to perform essential term of the

contract and, thus, plaintiff must aver performance of or readiness and willingness to perform contract according to its true construction and compliance of such requirement is mandatory and in absence of proof of the same a suit cannot succeed. Further that plaintiff's readiness and willingness to perform essential part of contract must be in accordance of terms of the agreement and it would be required to be demonstrated from the institution of suit till its culmination into decree of Court.

16. In *Padamakumari's case* also, for absence of clear averments in the plaint as provided in Clause 3 of Form 47 in Appendix-A with reference to Order 6 Rule 3 of the Code of Civil Procedure (CPC), the suit was dismissed.

17. Para-4 of the judgment of the Supreme Court in *Jagjit Singh's case*, relied upon on behalf of the defendant, reads as under:-

> "It is settled law that a plaintiff who seeks specific performance of contract is required to plead and prove that he was always ready and willing to perform his part of the contract. Section 16(c) of the Specific Relief Act mandates that the plaintiff should plead and prove his readiness and willingness as a condition precedent for obtaining relief of grant of specific performance. As far back as in 1967, this Court in *Gomathinayagam Pillai v. Palaniswami Nadar, AIR 1967 SC 868* held that in a suit for specific performance the plaintiff must plead and prove that he was ready and willing to perform his part of the contract right from the date of the contract up to the date of the filing of the suit. This law continues to hold the field and it has been reiterated in *J.P. Builders v. A. Ramadas Rao, (2011) 1 SCC 429* and *P. Meenakshisundaram v. P. Vijayakumar, (2018) 15 SCC 80.* It is the duty of the plaintiff to plead and then lead evidence to show that the plaintiff from the date he entered into an agreement till the stage of filing of the suit always had the capacity and willingness to perform the contract."

18. Plaintiff has filed the suit for specific performance for execution of sale deed by the defendant in his favour in pursuance to the agreement to

sell dated 16.04.2003. In plaint, it has been averred that plaintiff has performed his part of agreement by paying complete sale consideration of `60,000/- and is in possession of the suit land and is also ready and willing to perform his part of agreement for executing sale deed in his favour, but defendant is not ready and willing to execute regular sale deed in the office of Sub-Registrar. The same thing has been reiterated by the plaintiff in his deposition as PW.1 stating that by paying `60,000/- in cash he is ready and willing to execute the sale deed as he has already paid the entire sale consideration and is in possession and has also planted apple trees on some portion of the suit land by spending amount. Payment of sale consideration of `60,000/- has been substantiated in deposition of other witnesses and also in deposition of the defendant.

19. In response, in the written statement, firstly it has been averred that sale agreement is a sham paper and is a result of undue influence, misrepresentation and fraud and the said document was never readover and explained to the defendant. It has also been averred that consideration amount was `1,20,000/- and out of which only `60,000/- has been paid to the defendant and remaining amount was never paid which was to be paid at the time of sale deed, but plaintiff is not paying the same and, therefore, plaintiff is not entitled for execution of sale deed, rather defendant is ready and willing to refund the amount of `60,000/- to the plaintiff.

20. The execution of agreement (Ex.PW.2/A) and contents thereof stand duly proved by the plaintiff by leading cogent and reliable evidence in deposition of plaintiff's witnesses, including plaintiff, examined as PW.1 to PW.6. Execution of agreement has also been admitted by the defendant, but he has disputed contents thereof by stating that total sale consideration was `1,20,000/- and `60,000/- was only part payment, but there is no cogent and reliable evidence to substantiate the said fact.

21. From the depositions of the witnesses and Ex.PW.2/A, it stands proved on record that entire sale consideration was paid, and possession of plaintiff was acknowledged by the defendant and on the date of execution of sale agreement, name of defendant was not entered in the revenue record, as he had purchased the suit land from PW.5 Suresh Kumar and, therefore, he had agreed to execute sale deed immediately after attestation of mutation of suit land in his favour. Refusal to execute sale deed can easily be culled out from the averments made in the written statement and deposition of defendant. Plaintiff has performed his part of agreement by paying complete sale consideration and his role to be performed thereafter is only to remain present in the office of Sub-Registrar at the time of execution of sale deed by the defendant and for that he has expressed his readiness and willingness on his part. Plaintiff has also been found in possession of the suit land.

22. In present case, though exact words have not been used by stating that plaintiff has been and is ready and willing to perform his own part, but only it has been stated that plaintiff is ready and willing to perform his part to execute the sale deed but in the given facts and circumstances, proved on record, statutory requirement of Section 16(c) of the Act can be culled out substantially.

23. Readiness and willingness expressed by the plaintiff in the plaint and in his statement in present case, is in accordance with terms of agreement, as nothing, except his presence in the office of Sub-Registrar, is required to be performed on his part. Facts of *Padamakumari's case* are not identical to the present case. In present case, averments made in the plaint as a whole are demonstrating substantial compliance of provisions of Section 16(c) of the Act. Plaintiff has paid entire sale consideration and is in possession of the suit land and has developed it by planting trees thereon, therefore, there is nothing material or major action required to be taken on his part for execution of sale deed, rather now defendant has to perform the action

on his part by executing sale deed in presence of plaintiff for which plaintiff is ready and willing and, therefore, case law referred on behalf of the defendant is of no help to him.

24. In view of above discussion, substantial question of law is answered in negative to the claim of the defendant and resultantly appeal is dismissed and judgments and decrees passed by the Courts below are upheld. Records be sent back.

25. Appeal stands disposed of, so also pending application(s), if any.

26. Parties are permitted to produce a copy of this judgment, downloaded from the web-page of the High Court of Himachal Pradesh, before the trial Court/authorities concerned, and the said Court/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 TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Between:

1. SHIMLA COLLEGE OF EDUCATION, SHEETAL KUNJ, KAMLA NAGAR, SANJAULI, SHIMLA THROUGH ITS CHAIRMAN DR. R.K. SHANIL.
2. RAMESHWARI TEACHER TRAINING INSTITUTE SARABAI,KULLU DISTRICT KULLU, THROUGH ITSCHAIRPERSON DR. USHA SHARMA.
3. TRISHA COLLEGE OF EDUCATION, THAIN (JOL SAPPAR), DISTT. HAMIRPUR, THROUGHITS CHAIRMAN, MR. RAJIV SHARMA.
4. ABHILASHI D.EL.ED. TRAINING INSTITUTE, NER CHOWK, DISTT. MANDI, THROUGH ITSSECRETARY, MR.NARENDER KUMAR.
5. KRISHMA EDUCATION CENTRE, NER CHOWK,DISTT. MANDI THROUGH ITS SECRETARY MR. LALIT PATHAK.
6. SVN COLLEGE OF EDUCATION, TARKWARI (BHORANJ), DISTT. HAMIRPUR, THROUGH ITS CHAIRMAN SH. N.K. SHARMA.
7. HAMIRPUR COLLEGE OF EDUCATION, RAM NAGAR, HAMIRPUR, DISTT. HAMIRPUR THROUGHITS CHAIRMAN SH. KARNAL JAI CHAND.
8. VAID SHANKAR LAL MEMORIAL COLLEGE OF EDUCATION, CHANDI, DISTT. SOLAN, THROUGH ITS CHAIRMAN MR. CHANDER

MOHAN.

9. JAI BHARTI COLLEGE OF EDUCATION, LOHARIAN, DISTT. HAMIRPUR, THROUGH ITS CHAIRMAN MR. J.K. CHAUHAN.

10. JAGRITI TEACHER TRAINING COLLEGE DEODHAR, MANDI, DISTT. MANDI THROUGH ITS CHAIRMAN DR. VEENA RAJU.

11. VIJAY MEMORIAL COLLEGE OF EDUCATION BHANGROTU, DISTT. MANDI, THROUGH ITS CHAIRMAN MR. GAURAV MARWAH.

12. RAJ RAJESHWARI COLLEGE OF EDUCATION, CHORAB (BHOTA) HAMIRPUR, THROUGH ITS CHAIRMAN SH. MANJEET DOGRA.

13. KSHATRIYA COLLEGE OF EDUCATION, KATHGARH ROAD, CHANOUR, INDORA,DISTRICT KANGRA, THROUGH ITS CHAIRMAN SH. SHATRUJEET.

14. KLB DAV COLLEGE FOR GIRLS, PALAMPUR, DISTT. KANGRA, THROUGH ITS DIRECTOR DR.
N.D. SHARMA.

15. KULLU COLLEGE OF EDUCATION, VILLAGE BOHGANA P.O. GARSA, DISTT. KULLU THROUGH ITS CHAIRMAN MR. SURENDER SOOD.

16. R.C. COLLEGE OF EDUCATION, DHANOTE,
P.O. ADHWANI (DEHRA) DISTT. KANGRA THROUGH ITS CHAIRMAN MR. JEEVAN.

17. SHIKHA BHARTI INSTITUTE OF EDUCATION, TRAINING & RESEARCH, SAMOOR KHURD (UNA) THROUGH ITS CHAIRMAN MR. NIRMAL.

18. SHANTI COLLEGE OF EDUCATION KAILASH NAGAR, NAKROH (UNA) THROUGH ITS CHAIRMAN SH. VED PRAKASH.

…PETITIONERS

(BY MR. SHRAWAN DOGRA, SENIOR ADVOCATEWITH MR. HARSH KALTA AND MS. SUMAN THAKUR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH ITS PRINCIPAL SECRETARY (EDUCATION) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-171002, H.P.

2. DIRECTOR, ELEMENTARY EDUCATION, GOVERNMENT OF HIMACHAL PRADESH SHIMLA- 171001.

3. H.P. BOARD OF SCHOOL EDUCATION, DHARAMSHALA, DISTRICT

KANGRA,H.P. THROUGH ITS SECRETARY.

…RESPONDENTS

(BY MR. ASHOK SHARMA, ADVOCATE GENERALWITH MR.RAJINDER DOGRA, SENIOR ADDITIONAL ADVOCATE GENERAL, MR. VINOD THAKUR, MR. SHIV PAL MANHANS, ADDITIONALADVOCATE GENERALs, MR. YUDHVIR SINGHTHAKUR, DY. ADVOCATE GENERAL, FOR THE RESPONDENTS-STATE)

(BY MR. V.B. VERMA, ADVOCATE, FOR RESPONDENT NO. 3.)

CIVIL MISCELLANEOUS APPLICATION
NO. 4734 OF 2022
IN CIVIL WRIT PETITION
NO. 4113 OF 2019
Decided on: 02.05.2022

Constitution of India, 1950 – Article 226 – The petitioners sought relief that in case the seats remain vacant after third round of counseling the Institutions may be allowed to fill the remaining vacancies it's from amongst candidates eligible as per NCTE regulations in consonance with the judgment dated 20.9.2010 of this Court in CWP Number 5728 of 2010 and the petitioner institutes may be allowed to fill up management quota up to extent 20% to 240% of sanctioned seat strength of each Institute and such admissions may be allowed to be made from any source – Held – The question before full bench of this court after judgment in CWP No. 5728 of 2010 & CWP No. 7688 of 2013 was regarding authority of university to conduct the counseling and allocate the students to B.Ed. colleges, if seats remain vacant, where candidates are available otherwise than counseling – Hon'ble Full Bench held that judgment rendered in CWP No. 5728 of 2010 as not laying good law – Admission of students made on basis of judgment rendered in CWP No. 5728 is in jeopardy in view of decision of Full Bench – The interest of the students who have been admitted pursuant to interim order passed by this court needs to be protected because the students on the basis of interim orders passed by this court pursued more than two years of courses - Showing indulgence at the stage will cause extreme hardship to such students apart from irrepable

loss and injury and their entire careers will be at stake – Para 10 of order dated 10.1.2022 modified and the students who have already admitted to their respective courses by virtue of interim order dated 10.01.2022 are ordered to be protected - Application allowed and disposed of. (Paras 5, 13, 16 & 17)

This application coming on fororders this day, the Court passed the following:

O R D E R

The instant application has been filed for the grant of followingrelief(s):

> "*It is therefore humbly prayed that this application may kindly be allowed and the order dated 10.1.2020 passed in the present petition may be recalled and modified to the extent that the admissions of the students who have already been admitted to their respective courses by virtue of the said interim order may be protected in light of the subsequent directions issued by the Hon'ble Supreme Court.*"

2. The applicant/petitioner has filed this application for recalling order dated 10.1.2020, passed in CMP No. 14645 of 2019 and for seeking necessary directions in view of the subsequent developments in the interest of justice.

3. During the pendency of the instant petition, the petitioner moved an application for interim directions bearing CMP No. 14645 of 2019, seeking following reliefs:

> *(i) Pending final adjudication of the present petition the respondent Authorities may be directed to conduct the thirdround of counselling forthwith;*
>
> *(ii) In case of any seats still remaining vacant after the third round of counselling the petitioner*

institution may kindly be allowed to fill the remaining vacant seats from amongst candidates eligible as per NCTE regulations in consonance with the judgment dated 20.9.2010 of this Hon'ble Court in CWP No. 5728 of 2010 and commence the current academic session without further delay subject to the outcome of the present petition;

(iii) The applicant/petitioner institutes may be allowed to fill up management quota up to the extent 20% to 40% of the sanctioned seat strength of each institute and such admissions may be allowed to be made from any source and not insisting upon qualifying the entrance test for such candidates being considered against management quota in peculiar situation, subject however, that such candidates possess essential qualifications as prescribed by NCTE Norms."

4. The application came up for consideration before this Court on 10.1.2022 when the following order came to be passed:

"Heard. This application has been filed for the following reliefs :

(i) Pending final adjudication of the present petition the respondent Authorities may be directed to conduct the third round of counselingforthwith;

(ii) In case of any seats still remaining vacant after the third round of counseling the petitioner Institutions may kindly be allowed to fill the remaining vacant seats from amongst candidates eligible as per NCTE regulations in consonance with the judgment dated 20.9.2010 of this Hon'ble Court in CWP No.5728 of 2010 and commence the current academic session without further delay subject to the outcome of the present petition;

(iii) The applicant/petitioner Institutes may be

> *allowed tofill up management quota up to the extent 20% to 40% of the sanctioned seat strength of each Institute and such admissions may be allowed to be made from any source and not insisting upon qualifying the entrance test for such candidates being considered againstmanagement quota, inpeculiar situation, subject however, that such candidates possess essential qualifications as prescribed by NCTE Norms.*

2. It appears that earlier in similar circumstances, a Coordinate Bench of this Court in CWP No.5728 of 2019, titled H.P. B.ED. College Association and ors. vs. State of H.P. & anr, decided on 20.9.2010 (Annexure P-5) has passed the following directions :

> *"The learned counsel for the petitioners submits that since the admissions are made in respect of vacant seats and since despite all efforts takenby the University, there are no candidates, there may not be further restriction in terms of the prospectus in the matter of admission in the college. The learned standing counsel for the University vehemently contends that the admission can be made only in terms of the prospectus and whateverrestriction imposed in the prospectus should be followedby the College concerned aswell. We are afraid that the stand taken by the University cannot be appreciated. Once admission has been closed in terms of the prospectus andsince the efforts taken by the*

University itself for filling- up the vacant seats not yielding any fruits and still seats remaining vacant, there is no point in putting anyrigor or restriction in thematter of admission. This does not mean that Institutions should not comply withstatutory requirements in termsof the qualification and age. Hence, it will be open, in the above circumstances to make admission to any slot subjectto the fulfillment of the statutory condition regarding qualifying and age. In the above circumstances, we dispose of the writ petition as follows:-

It will be open to the petitioners to admit any student in respect of the seats subject to the candidate fulfilling the required qualifications and age limit. However, we make it clear that above process shall be completed on or before8.10.2010, since it is submitted that even if the students start the first day on 8.10.2010, they will be in a position to complete the required number of teaching days prior to their examination. The matter will be duly processed by the concerned College as well asthe University. As soon as the admission is made, the matter will be duly intimated by the College concerned to the University. At any rate, we further make it clear that the intimation shall be given to the University on or before 20.10.2010 and it will be certainly open to the University to verify the application forms of the students to satisfy as to whether the students have fulfilled the requirements in terms of their qualificationand age limit."

3. A coordinate Bench of this Court in CMP No.10419 of

2019, in CWP No.2664 of 2019, titled ***Abhilashi Ayurvedic College and Research Institute vs. Union of India and others***, decided on 27.11.2019, in identical circumstances, after relyingupon the judgments of Hon'ble HighCourts of Karnataka, Punjab and Haryana and also placing reliance on certain directions of Hon'ble High Courts of Uttrakhand, Allahabad and Rajasthan, have permitted the institutes to carryout the admissions, subject to the candidates' possessing essential qualifications, asprescribed under the norms. However, when similar issue came up before this Court in CWP No.7688 of 2013 in case titled ***H-Private Universities Management Association (H-PUMA) vs. State of Himachal Pradesh and others***, decided on 23.7.2014, this Court did not accede to the request of the institutions for permitting them to carryout admissions at their own leveland it was observed that as under :

> "It is in this background that this Court is required to consider as to whether the CET in this case violates the freedom of the institutions under Article 19 (1) (g) or whether such regulatory control is permissible. It is not disputed that the CET prescribes a fair equitable standard for judging the merit of the students. The only difficulty which the petitioners express is that in this regulatoryprocess, the seats in their respective colleges are lying vacant due to non- availability of the students because it is claimed that the total number of sanctioned seats for B. Tech courses inthe country (government as well as private including IIT and NITs) is 65 lakh : 20 thousand, total number of All India applicants for JEE Test 2014 is
> 13 lakh : 67 thousand, total number of sanctioned seats for B Tech courses in Himachal (Government

and HPU) is 540and 120 respectively, total number of sanctioned seats for B Tech Courses in Himachal (Private Institutions) is 7680 in Private Engineering Colleges and 7820 in Private Universities, total approx. 15,000 and admissions made in B Tech Courses in Himachal (Private Colleges like petitioners) year 2012-13 through JEE 1049, year 2013-14 through
JEE 429 and year 2014-15 less than 500 students have registered themselves with H.P. Technical University for admission in institutions in the State of H.P. i.e. Government B Tech Courses offering Colleges and Private B Tech Courses offering Colleges out of which also many may finally not opt for the seats available in Himachal. Therefore, in this background, it is pleaded that the petitioners cannot be asked to perform the impossible and, therefore, should be permitted to devise a merit based process themselves rather than permitting the State to impose its determination of merit. This according to the petitioners in fact amounts to an unreasonable interference in itsright to administer the institutions.

23. The State has power to regulate academic excellence particularly in matters of admissions to the institutions and, therefore, is competent to prescribe merit based admission processes for creating uniform admission process through CET. Any prayer for seeking dilution or even questioning the authority of the State to act an regulator is totally ill-founded in view of the various judicial pronouncements, particularly in Visveswaraiah Technological University (supra) and reiterated in Mahatma Gandhi University (supra).

24. The learned counsel for the petitioners have strenuously argued that the complete answer to the proposition involved in the

case has been answered in its favour vide recent decision in Christian Medical College (supra) and, therefore, the petitions ought to be allowed as prayed for. He particularly relied upon the following observations:

"……. However, in cases of unaided institutions, the position is that except for laying down standards for maintaining the excellence of education, the right to admit students into the different courses could not be interfered with. In the case of aided minority institutions, it has been held that the authority giving aid has the right to insist upon the admission of a certain percentage of students not belonging to the minority community, so as to maintain the balance of Article
19 (2) and Article 30 (1) of the Constitution. Even with regard to unaided minority institutions, the view is that while the majority of students to be admitted should be from the minority community concerned, a certain percentage of students from other communities should also be admitted to maintain the secular character of education in the country in what has been described as a "sprinkling effect".

25. The aforesaid observations cannot be read out of context because the Hon'ble Supreme Court in this case was dealing with the validity of regulations framed by the MCI which mandated the Combined Entrance Test (CET) for all medical colleges i.e. aided as well as unaided. The Hon'ble Supreme Court was primarily concerned with a situation where the parent enactment did not provide for or enable such regulation to be framed and in this background, the Hon'ble Supreme Court held that such regulations were not permissible and that any regulation which had the effect of take-over

> of seats, or reserving some part of unaided college's intake, would be an impermissible nationalization. This is not the fact situation obtaining in the present case. Unlike in Christian Medical College, where the rights of minorities were involved, the present case is confined to the applicability to the scope and ambit of Article 19 (1) (g) and for this purpose, we have to fall back to the law laid down by the larger Bench decisions of the Hon'ble Supreme Court in T.M.A. Pai Islamic Academy and
> P.A. Inamdar which have recognized the State's power to direct a joint entrance examination, so long as itdoes not nationalize the intake "and result in imposition of a reservation policy". The equity and excellence in academic institutions have to be maintained and what better way can it be maintained than by ensuring that each students competes in the same examination i.e. CET so as to ensure that in terms of the access to education (equity) and merit ofstudents (excellence) a common platform is that for admissions in to professional colleges."

4. Evidently, there is a conflict in various judgments, more particularly the judgments rendered inCWP No.5728 of 2010, titled ***H.P. B.ED.College Association and ors. vs. State of H.P. & anr*** (Annexure P-5) with that of the judgment rendered by another Bench in CWP No.7688 of 2013, titled ***H-Private Universities Management Association (H-PUMA) vs. State of Himachal Pradesh*** and others alongwith CWP No.840 of 2014, titled ***Private Technical Institution's Association Himachal Pradesh and others vs. State of Himachal Pradesh and others.***

5. At this stage, we are only concerned about the admissions and there is also an order governing the field passed by the coordinate Benchin CMP No.10419 of 2019 in CWP No.2664 of 2019, titled Abhilashi Ayurvedic

> College and Research Institute vs. Union of India and others, therefore, we deem it proper to adopt the course that has been so taken by the coordinate Bench in Abhilashi Ayurvedic College and Research Institute's case (supra) and in *interim* direct that it shall be open to the petitioners-institutes to fill up the unfilled seats, but only from the candidates who possess the essential qualifications, asprescribed by NCTE norms.
>
> 6. This order shall not only be subject to the final outcome of the petition and any such further orders, which the appropriate Bench may pass from time to time.
>
> 7. In addition to the aforesaid, it will be the sole responsibility of the petitioners- institutes to apprise each and every student about the pendency of the petition and admissions being made, subject to further orders that may be passed in the matter.
>
> 8. Needless to say, the same principle will apply to the managementseats also.
>
> 9. Since there is an apparent conflict between the various judgments rendered by two different Benches of this Court, therefore, the Registry is directed to place the matter before Hon'ble the Chief Justice for constituting a larger Bench to resolvethe issue.
>
> 10. It is made clear that the students, so admitted on the basis of the order passed by this Court, shall not be entitled to claim any equity, much lessany right, in the eventuality ofadmissions are set aside."

5. Since the petitioner-Instituteswere permitted to fill up unfilled seats, butonly from the candidates who possessed the essential qualifications, as prescribed by NCTE norms, they proceeded to fill up such seats.

6. Likewise, a Coordinate Bench of this Court in CMP No. 10419 of 2019 in CWP No. 2664 of 2019, titled as **"Abhilashi Ayurvedic College and Research Institute vs. Union of India and others"**, decided on 27.11.2019, in identical circumstances and after placing reliance on the

orders passed by Punjab and Haryana High Court in CWP No. 23710 of 2019, case titled as, **"Federation of Pvt. Self Financial Ayurvedic Colleges Association Vs. Union of India"**, decided on 18.12.2019 and order passed by Karnataka High Court in W.P. No. 41486 of 2018, case titled as, **"KarnatakaState Ayush Med. Colleges Fed. Versus Union of India"** decided on 11.12.2020, permitted the institutes to carry out admissions, subject to the candidates' possessing essential qualifications, as prescribed under the norms.

7. As regards the interim orders passed by Punjab & Haryana High Court, the same was set aside at the time of final adjudication and the Court dismissed the claim of the petitioners therein and consequently the admissions of the students, which were given on the basis of interim order were held to be illegal and unsustainable vide judgment dated18.12.2019.

8. The aggrieved parties appealed against the judgment dated 18.12.2019 before the Hon'ble Supreme Court in Civil Appeal No. 603 of 2020, which was finally adjudicated on20.2.2020 by the Hon'ble Supreme Court whereby it dismissed the appeal and affirmed the decision of the High Court partly, but after taking into consideration the number of the students, who had already been admitted to the Courses, based upon interim directionspassed by the High Courts, the interest of such students was protected and it was directed that the students be permitted to continue with their courses.

9. Placing reliance on the directions issued by Hon'ble Supreme Court, the High Court of Karnataka also disposed of WP No. 41485 of 2018, vide judgment dated 11.12.2020, protecting the admissions of similarly situated students, admitted on the basis of interim orders passed by that Court.

10. It is vehemently argued by Mr. Shrawan Dogra,

Senior Advocate assisted by Mr. Harsh Kalta, Advocate that the order passed by this Court, whereby students were permitted to be admitted made clear that no equity muchless right would accrue in favour of the students, so admitted on the basis of interim order, was earlier to the order passed by Hon'ble Supreme Court on 20.2.2020. Now that the Hon'ble Supreme Court has itself protected the interest of students who were given admissions on the basis of interim orders of the various high Courts, it would be just, fair and equitable that same indulgence is also shown by this Court in thepresent case.

11. We have heard learned counsel for the parties and gone through the findings recorded by the various Courts.

12. At the outset, it needs to be noticed that this Court vide its order dated 10.1.2020 after noticing the conflict ofdecision in the judgment rendered by this Court, it referred the matter to the Full Bench and till such decision permitted the institutes to fill up the unfilled seats, but only from the students possessing/fulfilling the essential qualification, as prescribed bythe NCTE norms.

13. The question before Full Bench was whether the university was authorized to conduct the counseling and allocate the students to B.Ed. Colleges, if seats remain vacant, where the candidates are available otherwise than by counseling. A Division Bench of this Court in CWP No. 5728 of 2010, titled as "H.P. B.Ed. College Association and others versus State of H.P. and another" had held that there is no point in putting any rigor or restriction in the matter of admission. However, another Division Bench of this Court in CWP No. 7688 of 2013, titled as "H.P. Private Universities versus State of H.P. and others, in its judgment, authored byone of us (Justice Tarlok Singh Chauhan) held to the

contrary as follows:

> "The equity and excellence in academic institutions have to be maintained andwhat better way can be maintained than by ensuring that each students competes in the same examination i.e. CET so as to ensure that in terms of the access to education (equity) and merit of students (excellence) a common platform is that foradmissions into professional colleges."

14. The Hon'ble Full Bench, vide itsjudgment dated 6.4.2022 held the judgment rendered in CWP No. 5728 of 2010 as notlaying down good law, whereas the judgment rendered in CWP No. 7688 of 2013 was held to be in tune with the settled proposition oflaw on the subject and further held to be correctly decided.

15. It is because of the decision of the Full Bench that the admission of the students made on the basis of interim order is in jeopardy as these admissions admittedly had been carried out on the basis of judgment rendered in CWP No. 5728 of 2010, which has now been held to be not laying down the correct law.

16. Having considered the issue minutely, we are of the considered opinion that in viewof the orders passed by Hon'ble Supreme Courtand also by Karnataka High Court, the interest of the students who have been admitted pursuant to the interim order passed by this Court, needs to be protected. More especially when the students have, on the basis of interim orders passed by this Court, pursued more than two years of the courses. Not showing indulgence at this stage will cause extreme hardship to such students,apart from irreperable loss and injury and their entire careers will be at stake.

17. In view of the given facts and circumstances of the case, We deem it proper to recall para-10 of the order dated 10.1.2022 and modify the same to the extent that the students, who have already been admitted to their respective courses by virtue of interim order dated 10.1.2022, are

ordered to be protected. Consequently, the application is allowed and the same is disposed of.

CWP No. 4113 of 2019

18. The instant petition has been filed for the grant of following relief(s):

> i) That decision No. 2 and Decision No. 3 taking in the impugned meeting dated 22.10.2019 (Annexure P-4) may be quashedand set aside;
>
> ii) That respondents may be directed to implement judgment dated 20.9.2010 in CWP No. 5278 of 2010 in letter and spirit by applying the same to the admission to the present course of D.EI.Ed. for the current session and in future also;
>
> iii) That the petitioner Institutes may be permitted to fill up the vacant seats remaining after holding of third counselling out of the candidates fulfilling the essential eligibility conditions as prescribed by NCTE, without insisting for qualifying the entrance test held by respondents in peculiar situation;
>
> iv) That petitioner institute may be allowed to fill up to 20% to 40% of the sanctioned seats for the course of D.Ei.Ed. as Management seats subject to fulfilling the essential eligibility conditions as prescribed by NCTE, without insisting for qualifying the entrance test held by respondents in peculiar situation."

19. Since the petition has otherwise served its purpose, therefore the same is disposed of accordingly in view of the orders passed in CMP No. 4734 of 2022, making it once again clear that the admissions of the students, who have been admitted on the basis of interim order dated 10.1.2020, shall remain protected and they shall be allowed topursue their respective courses without any further hindrance.

20. Further, it is made clear that since this order is being passed in view of the peculiar facts and circumstances of the instant case, therefore the same shall not betreated as a precedent. The pendingapplication(s), if any, are also disposed of.

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

Between:

SH. VISHAL SINGH MEHTA S/O SHRI PRATAP SINGH MEHTA, PROPRIETOR OF M/S MEHTA TOURS AND TRAVELS, MEHTA COMPLEX, SHAMTI, SOLAN, H.P.

…PETITIONER

(BY MR. ANUJ GUPTA AND MR.ROHIT SHARMA, ADVOCATES)

AND

THE DIRECTOR,
DEPARTMENT OF INFORMATION AND TECHNOLOGY, GOVT. OF HIMACHAL PRADESH, SHIMLA-2(H.P.)

…RESPONDENT

(MR. RAJINDER DOGRA, ADDL. ADVOCATE GENERAL WITH MR. VINDO THAKUR, ADDITIONAL ADVOCATE GENERAL AND MR.RAJAT CHAUHAN, LAW OFFICER, FOR THE RESPONDENT)

CIVIL MISCELLANEOUS PETITION MAIN (ORIGINAL)
NO. 138 OF 2022
Decided on: 20.05.2022

Arbitration and Conciliation Act, 1996 – Section 8 - Matter referred to arbitrator - Conditions to be fulfilled – Held - Conditions which are required to be satisfied under sub-section (1) and (2) of Section 8 before the court can exercise its powers are 1) there is an arbitration agreement .2) a party to the agreement brings an action in the court against other party 3) subject matter of arbitration agreement 4) the other party moves the court for referring the parties to arbitration before it submits his first statement on the substance of

the dispute – This last provision creates right in the person bringing the action to have the dispute adjudicated by Court, once the other party has submitted his first statement of defence – But if the party wants the matter to referred to arbitration apply to the court after submission of his statement and the party who has brought the action does not object, as is the case before us, there is no bar on the court referring the parties to arbitration- Petition allowed. (Paras 6 & 8)

Cases referred:

P. Anand Gajapathi Raju and others versus P.V.G. Raju(died) and others, AIR 2000 Supreme Court 1886;

This petition coming on for admissions this day, this Court delivered the following:

O R D E R

By way of the instant petition under Article 227 of the Constitution of India, the petitioner seeks to assail order passed by learned trial Court, whereby it referred the dispute to the arbitration after dismissing the application filed by petitioner under Order 12 Rule 6 read with Section 151 CPC.

2. Brief facts of the case are that the petitioner/plaintiff filed a suit for recovery of Rs. 2,60,117/- against the defendant/respondent. The respondent after filing an application under Order 8 Rule 1 read with Section 148 of CPC, filed its written statement.

3. Since the plaintiff was of the view that there were vital admissions made by respondent/defendant in the written statement, it moved an application under Order 12 Rule 6 read with Section 151 CPC praying therein that decree be passed on the basis of admissions made by the respondent/defendant in the pleadings made in the written statement and the documents annexed

therewith.

4. However, the learned trial Court not only dismissed the application but thereafter shockingly referred the matter to arbitration in terms of agreement dated 1.6.2015. Aggrieved thereby, petitioner filed the instant petition.

5. To say the least, learned trial Court has feigned ignorance of the legal position while passing the aforesaid order. As observed above, the defendant/respondent had filed the written statement and in this way, it had created a right in favour of the plaintiff/petitioner in bringing action to have the dispute adjudicated by the Court.

6. It is more than two decades back that this legal position was settled by Hon'ble Supreme Court in **"P. Anand Gajapathi Raju and others versus P.V.G. Raju(died) and others,** AIR 2000 Supreme Court 1886, wherein it was held as follows:

> "The conditions which are required to be satisfied under sub-
>
> sections(1) and (2) of Section 8 before the Court can exercise its powers are: (1) there is an arbitration agreement; (2) a party to the agreement brings an action in the Court against the other party; (3) subject matter of the arbitration agreement; (4) the other party moves the Court for referring the parties to arbitration before it submits his first statement on the substance of the dispute. This last provision creates a right in the person bringing the action to have the dispute adjudicated by Court, once the other party has submitted his first statement of defence. But if the party, who wants the matter to be referred to arbitration applies to the Court after submission of his statement and the party who

has brought the action does not object, as is the case before us, there is no bar on the Court referring the parties to arbitration."

7 The legal position has not only been reiterated by Hon'ble Supreme Court, but followed by this Court as is duty bound in various judgments. A reference can conveniently be made to judgments rendered by learned Division Bench of this Court in "**Satluj Jal Vidyut Nigam Ltd. Vs. M/s Continental Joint Venture**", decided on 27.8.2008 and by learned Single Judge of this Court in OMP No. 434 of 2012 in Civil Suit No. 73 of 2012, titled as **"M/s Ambuja Cements Ltd. Versus M/s Vishwakarma Projects (India) Pvt.Ltd and another**, decided on 19.12.2012.

8. In view of the aforesaid discussions and for the reasons stated above, the instant petition is allowed and the order dated 30.3.2022, passed by learned Civil Judge, Court No. 7, Shimla in Application under Order 12 Rule 6 CPC read with Section 151 CPC in case No. 344 of 2019 is quashed and set aside, leaving the parties to bear their own costs. The pending application(s), if any, are also disposed of.

9. Parties to appear before learned trial Court on 3.6.2022.

BEFORE HON'BLE MR. JUSTICE SATYEN VAIDYA, J.

Between:-

1. CIVIL WRIT PETITION (ORIGINAL APPLICATION) No. 6401OF 2019.

1. DR. SANJAY GULERIA, SON OF SHRI BHUP-SINGH GÜLERIA, AYURVEDIC MEDICAL OFFICER, DISTRICT AYURVEDIC HOSPITAL, MANDI, DISTRICT MANDI (H.P.)

2. DR. SHALINI THAKUR GULERIA, WIFE OF DR. ASHISH GULERIA, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, RAKHOH, POST OFFICE CHOULTHRA, TEHSIL SARKAGHAT, DISTRICT MANDI (H.P.)

3. DR. MONIKA SHARMA, WIFE OF DR. VIPAN KUMAR SHARMA, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, BAGGI,POST OFFICE KATOLA, TEHSIL SADAR, DISTRITMANDI (H.P.)

4. DR. MANJU, WIFE OF DR. RAKESH BANSAL, AYURVEDIC MEDICAL OFFICER, BERI- RAZDIYAN, POST OFFICE BERI-RAZDIYAN,TEHSIL SADAR, DISTRICT BILASPUR-174 001(H.P.)

5. DR. MONICA BHARDWAJ, WIFE OF DR. RUCHITPUNN, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, SAMOH, POST OFFICE SAMOH, TEHSIL JHANDUTTA, DISTRICT BILASPUR-174 021 (H.P.)

6. DR. VIPAN SHARMA, SON OF SHRI VIDYA SAGAR SHARMA, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, MORSINGHI, POST OFFICE MORSHIGHI, TEHSIL GHUMARWIN, DISTRICT BILASPUR-174021(H.P.)

7. DR. PARUL SHARMA, WIFE OF DR. DINESH SHARMA, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, RANI-KOTLA, POST OFFICE RANI KOTLA, TEHSIL SADAR, DISTRICT BILASPUR-174033 (H.P.)

8. DR. NARENDER MOUDGIL, SON OF SHRI UDHOM RAM MOUDGIL, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, GHANDALWIN, POST OFFICE GHANDALWIN, TEHSIL GHUMARWIN, DISTRICT BILASPUR - 171021 (H.P.)

9. DR. RAMESH SHAMSHER SINGH SEN, SON OF SHRI SHIV CHARAN

SINGH SAIN, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, TAMBOL, POST OFFICE TAMBOL, TEHSIL SRI NAINA DEVI JI, BILASPUR (H.P.)

10. DR. ANIL SHARMA, SON OF LATE SHRI DHANI RAM SHARMA, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, KUNGARHATTI, POST OFFICE KOTHI, TEHSIL SADAR, DISTRICT BILASPUR-174 004 (H.P.)
11. DR. SURESH KUMAR, SON OF SHRI KULWANT SINGH, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, TANDAKOT, POST OFFICE KOT. TEHSIL GHUMARWIN, DISTRICT BILASPUR-174021 (H.P.)

12. DR. HARISH SHEKHAR, SON OF SHRI SUKHDEV SINGH, AYUREDIC MEDICAL OFFICER. AYURVEDIC HEALTH CENTRE, CHALELI, POST OFFICE CHALELI, TEHSIL GHUMARWIN, DISTRIT BILASPUR (H.P.)

13. DR. VIKRANT KOUNDAL, SON OF SHRI SOHAN LAL KOUNDAL, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, KHANGAR, POST OFFICE SALNOO, TEHSIL SADAR, DISTRICT BILASPUR-174013 (H.P.)

14. DR. JAGJIT KAUR, WIFE OF DR. G.S DEHAL, AYURVEDIC MEDICAL OFFICER,AYURVEDIC HEALTH CENTRE, JALGRAN, DISTRICT UNA (H.P.)
15. DR. SHIPRA THAKUR, WIFE OF DR. RAKESH THAKUR, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, LATHIANI, POSTOFFICE LATHIANI, TEHSIL BANGANA, DISTRICTUNA (H.P.)

16. DR. HEENA BATTA, WIFE OF DR. UMESH CHADHA, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, GONDPUR BANHERA, TEHSIL AMB. DISTRICT UNA (H.P.)

17. DR. BHARAT BHUSHAN, SON OF SHRI MADAN LAL, AYURVEDIC MEDICAL OFFICER, GOVERNMENT AYURVEDIC HOSPITAL ISPUR, TEHSIL & DISTRICT UNA (H.P.)
18. DR. NAVEEN KAUNDAL, SON OF SHRI GURBAKSH SINGH AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, TAKOLI,TEHSIL AMB, DISTRICT UNA (H.P.)

19. DR. CHANDER MOHAN SHARMA, SON OF SHRI RAMESH CHANDER SHARMA, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, AJOULI, TEHSIL & DISTRICT UNA (H.P.)

20. DR. AMRIK SINGH, SON OF SHRI NIRANJAN SINGH, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, POLIAN BEET, TEHSIL HAROLI, DISTRICT UNA (H.P.)

21. DR. GURBAKSH CHAUDHARY, SON OF SHRI AMIN CHAND, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, SADDON BARGAIN, POST OFFICE SADDON BARGAIN, TEHSIL BAROH, DISTRICT KANGA (H.P.)

22. DR. ARVIND SHARMA, SON OF SHRI NARENDER KUMAR, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, DUHUK, DISTRICT KANGRA (H.P.)

23. DR. BHAWANI DUTT, SON OF SHRI DINA NATHWALIA, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, AMBARI, POST OFFICE RAIT, TEHSIL SHAHPUR, DISTRICT KANGRA (H.P.)

24. DR. SHIKHA SHARMA, WIFE OF DR. RAMAN VAID, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, NAYANGAL, TEHSIL JAWALL, DISTRICT KANGRA (H.P.)

25. DR. BHASKAR JAMUAL, SON OF SHRI DESH RAJ DHIMAN, AYURVEDIC MEDICAL OFFICER,AYURVEDIC HEALTH CENTRE, SOL-BANED, POST OFFICE UPPER LAMBA-GAON, TEHSIL JAISINGHPUR, DISTRICT KANGRA (H.P.)

26. DR. ASHIMA JANETA, DAUGHTER OF SHRI MOHAN LAL JANETA, AYURVEDIC MEDICAL OFFICER, GOVERNMENT AYURVEDIC HOSPITAL, HALDRAKONA, POST OFFICE KONA, TEHSILPALAMPUR, DISTRICT KANGRA (H.P.)

27. DR. SONU RAM, SON OF SHRI SANT RAM, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, SANGHOLE, POST OFFICESANGHOLE, TEHSIL JAISINGHPUR, DISTRICT KANGRA (H.P.)

28. DR. ARCHNA CHAUHAN, DAUGHTER OF SHRI PRITHI CHAND, AYURVEID MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, MARERA, POST OFFICE MARERA, TEHSIL JAISINGHPUR, DISTRICT KANGRA (H.P.)

29. DR. VIJAY KARAN, SON OF SHRI MILAP CHAND, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, DARATI, TEHSIL PALAMPUR,DISTRICT KANGRA (H.P.)

30. DR. MANOJ KUMAR, SON OF SHRI GOARKH NATH, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, MALHANTA, TEHSIL FATEHPUR, DISTRICT KANGRA (H.P.)

31. DR. JITENDER KUMAR GUPTA, SON OF SHRI MAHENDER LAL GUPTA, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, JUMB- KHAS, POST OFFICE TEHSIL, DISTRICT KANGRA (H.P.)

32. DR. ANUPMA KUMARI, WIFE OF DR. VISHAL SAMYAL, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, SIHUINI, POST OFFICE, TEHSIL, DISTRICT KANGRA (H.P.)

33. DR. SANJEEV GULERIA, SON OF SHRI S.S. GULERIA, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, THER-KUKHER, POST OFFICE KUKHER, TEHSIL NURPUR, DISTRICT KANGRA -176 211(H.P.)

34. DR. VIPON KUMAR MAJAHAN, SON OF SHRI KISHOR CHAND, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, GANOH, POST OFFICE. GANOH, TEHSIL NURPUR, DISTRICT KANGRA (H.P.)

35. DR. MRIDULA KOHLI, DAUTHER OF LATE SHRI NARESH KOHLI, AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, JONTA, TEHSIL NURPUR, DISTRICT KANGRA (H.P.)

36. DR. ASHA MADHANIA, WIFE OF DR. PANKAJ KUNDAL, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, LARHOON, POST OFFICE POROL, TEHSIL FATEHPUR, DISTRICT KANGRA (H.P.)

37. DR. PAWAN KUMAR, SON OF SHRI PURSHOTAM LAL, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, DAHKULARA, POST OFFICE DALHKULARA, TEHSIL INDORA, DISTRICT KAGRA (H.P.)

38. DR. GEETIKA TOMAR, DAUGHTER OF SHRI RAJENDER SINGH, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, DHUPKIARA, POST OFFICE. DHUPKIARA, TEHSIL JAISINGHPUR, DISTRICT KANGRA (H.P.)

....PETITIONERS.

(BY MR. RAJNISH MANIKTALA, SENIOR ADVOCATE

WITH MR. NARESH VERMA, ADVOCATE)

AND

1. State of Himachal Pradesh through Principal Secretary (Ayurveda) to the Government of Himachal Pradesh, SHIMLA-171 002 (H.P.)
2. Director, Directorate of Ayurveda, Government of Himachal Pradesh, SDACommercial Complex, Kasumpti, SHIMLA-171 009 (H.P.)

3. District Ayurvedic Officer, Mandi, Tehsil Sadar, District Mandi, Himachal Pradesh (H.P.)

4. District Ayurvedic Officer, Bilaspur, Tehsil Sadar, District Bilaspur, Himachal Pradesh (H.P.)

5. District Ayurvedic Officer, Una, Tehsil &District Una, Himachal Pradesh (H.P.)

6. District Ayurvedic Officer, Kangra at Dharamshala, Tehsil Dharamshala, District Kangra, Himachal Pradesh (H.P.)

....RESPONDENTS.

(BY MR. DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL WITH MR. GAURAV SHARMA, DEPUTY ADVOCATE GENERAL)

2. CIVIL WRIT PETITION (ORIGINAL APPLICATION) NO. 2223OF 2020.

1. DR. VIVEK SHARMA, SON OF SHRI RAMESHSHARMA, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, OLD JUNGA, DISTRICT SHIMLA (H.P.)

2. DR. SUSHIL NEGI, SON OF SHRI GAGANJEET, AYURVEDIC MEDICAL OFFICER,AYURVEDIC HEALTH CENTRE, MOHLI, TEHSIL KUMARSAIN, DISTRICT SHIMLA (H.P.)

3. DR. VIKAS KHAJURIA, DAUGHTER OF SHRI R.P. KHAJURIA, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE,DIRECTORATE OF AYURVEDA, SDA COMMERCIAL COMPLEX, KASUMPTI, SHIMLA-171 009 (H.P.)

4. DR. SHALINI GUPTA, DAUGHTER OF DR.SANTOSH GUPTA, AYURVEDIC MEDICALOFFICER, AYURVEDIC HEALTH CENTRE, TANDA DISTRICT MANDI (H.P.)

5. DR. AMAN SHARMA, SON OF SHRI ASHOK KUMAR SHARMA, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH KASOL, POST KASOL, TEHSIL BHUNTAR, DISTRICT KULLU (H.P.)

6. DR. POONAM JAMBLA, DAUGHTER OF LATESHRI TARSEM LAL, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, KHURWIN, DISTRICT UNA, (H.P.)

7. DR. SHIVANI THAKUR, DAUGHTER OF SHRIPRATAP SINGH THAKUR, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, CHURAG, POST OFFICE CHURAG, TEHSIL KARSOG, DISTRICT MANDI, (H.P.)

8. DR. NANCY GULIANI, DAUGHTER OF SHRI

D.R. KOUNDAL, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, BAROTIWALA, POST OFFICE BAROTIWALA, DISTRICT SOLAN, (H.P.)

9. DR. NEETU KAUL, DAUGHTER OF SHRI BRIJ NATH KAUL, AYURVEDIC MEDICAL OFFICER,AYURVEDIC HEALTH CENTRE, DOL-PADDAR,POST OFFICE DOL, TEHSIL JAWALI,DISTRICT KANGRA, (H.P.)

10. DR. VIVEK SHARMA, SON OF LATE SHRI C.D.SHARMA, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, GHAMROOR, POST OFFICE GHAMROOR, DISTRICT KANGRA, (H.P.)

11. DR. GULVINDER SINGH DEHAL, SON OF SHRI CHANAN SINGH, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, RAISARI, POST OFFICE RAISARI,TEHSIL & DISTRICT UNA, (H.P.)

12. DR. MANJU LATA, DAUGHTER OF LATE SHRIGORKH RAM, AYUREDIC MEDICAL OFFICER,AYURVEDIC HEALTH CENTRE, RAIPUR MAIDAN, POST OFFICE RAIPUR MAIDAN, TEHSIL BANGANA, DISTRIT UNA, (H.P.)

13. DR. AASTHA MARWAH, DAUGHTER OF SHRI SURENDER MARWAH, AYURVEDIC MEDICALOFFICER, AYURVEDIC HEALTH CENTRE, SANIO-DEEDAG, DISTRICT SIRMOUR (H.P.)

14. DR. SANJEEV DHIMAN. SON OF LATE SHRI SATPAL DHIMAN, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, JOH. POST OFFICE JOH, TEHSIL GHANARI, DISTRICT UNA (H.P.)

15. DR. SANDEEP KUMAR, SON OF SHIV KUMAR, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, PANDAL, POST OFFICE DIGGAL, TEHSIL NALAGARH,DISTRICT SOLAN (H.P.)

16. DR. MANPREET SINGH, SON OF SHRI AJMERSINGH, AYURVEDIC MEDICAL OFFICER,AYURVEDIC HEALTH CENTRE, ZAKAT-KHANA, POST OFFICE ZAKAT KHANA,TEHSIL SRI NAINA DEVI JI, DISTRICT BILASPUR (H.P.)

17. DR. ABHISHEK BHARDWAJ, SON OF SHRI SURESH BHARDWA), AYURVEDIC MEDICALOFFICER, RED CROSS DISPENSARY, TUTI-KANDI, SHIMLA-171 004, (H.P.)

18. DR. PRIYANKA SAKLANI, DAUGHTER OF SHRI AMAR SINGH SAKLANI, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, THAILA, TEHSIL SUNNI, DISTRICTSHIMLA (H.P.)

19. DR. ANCHIT SAGAR, SON OF SHRI VIDYA SAGAR SHARMA, AYURVEDIC MEDICAL OFFICER, GOVERNMENT AYURVEDIC HOSPITAL, MANWIN, DISTRICT HAMIRPUR,(H.P.)

20. DR. INDER KUMAR GARG, SON OF SHRI DINA NATH GARG, AYURVEDIC MEDICALOFFICER, AYURVEDIC HEALTH CENTRE, SEHROL, POST OFFICE SEHROL, TEHSIL ARKI, DISTRICT SOLAN (H.P.)
21. DR. KAVITA CHAUDHARY, DAUGHTER OF SHRI TARSEM LAL, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, GHANARI, POST OFFICE GHANARI, TEHSIL,DISTRICT UNA (H.P.)

22. DR. UPSANA TANWAR, SON OF SHRI NARENDER KUMAR, AYURVEDIC MEDICALOFFICER, AYURVEDIC HEALTH CENTRE, DUHUK, DISTRICT KANGRA (H.P.)
23. DR. SOBHA SHARMA, SON OF SHRI B.R. CHAUDHARY, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, KALION-PAB, DISTRICT SIRMOUR, (H.P.)

24. DR. AMIT CHAUDHARY, SON OF SHRI B.R.CHAUDHARY, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, PAISA, DISTRICT KANGRA (H.P.)

25. DR. GAURAV CHOPRA, SON OF SHRI YOGRAJCHOPRA, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, KARANGHAT, VILLAGE & POST OFFICE JAISINGHPUR, DISTRICT KANGRA (H.P.)

26. DR. ROOMIL SAINI, DAUGHTER OF SHRI TRILOCHAN SAINI, AYURVEDIC MEDICALOFFICER, GOVERNMENT AYURVEDIC HOSPITAL, DOLI, TEHSIL NALAGARH, DISTRICT SOLAN, (H.P.)

27. DR. MONIKA BINDAL, DAUGHTER OF DR. Y.R. GOYAL, AYURVEDIC MEDICAL OFFICER,AYURVEDIC HEALTH CENTRE, DOLI, DISTRICT SOLAN, (H.P.)

28. DR. SURENDER KUMAR, SON OF SHRI CHAND LAL SHARMA, AYURVEDIC MEDICALOFFICER, AYURVEDIC HEALTH CENTRE, JHARWAD, TEHSIL PADHAR. DISTRICT MANDI, (H.P.)

29. DR. SHALINI SOOD. DAUGHTER OF SHRI ASHOK KUMAR SOOD, AYURVEDIC MEDICALOFFICER, AYURVEDIC HEALTH CENTRE, AMB-PATHLAR, POST OFFICE. AMB- PATHLAR, TEHSIL JAWALAMUKHI, DISTRICT KANGRA, (H.P.)

30. DR. KIRAN GUPTA, DAUGHTER OF LATE SHRI O.P. GUPTA, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, DHUNDHAN, POST OFFICE DHUNDHAN TEHSIL AKRI, DISTRICT SOLAN (H.P.)

31. DR. BIRBAL SHARMA, SON OF LATE SHRIBRAHMA NAND SHARMA, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, NANGE-THAKUR, DISTRICT BILASPUR (H.P.)

32. DR. ARCHANA SHARDA, DAUGHTER OF SHRI B.K. SHARMA, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE,BEHAL, POST OFFICE BEHAL, DISTRICT BILASPUR (H.P.)

33. DR. ASHISH AWASTHI, SON OF SHRI O.N. AWASTHI, AYURVEDIC MEDICAL OFFICER, GOVERNMENT AYURVEDIC PHARMACY, JODINGERNAGAR, TEHSIL JOGINDERNAGAR, DISTRICT MANDI, (H.P.)

34. DR. ANU VERMA, DAUGHTER OF SHRI MADAN LAL, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, MORSINGHI, POST MORSINGHI, DISTRICT,BILASPUR (H.P.)

35. DR. KUMAR, SON OF LATE SHRI BIRBALSINGH, AYURVEDIC MEDICAL OFFICER,AYUVEDIC HEALTH CENTRE, SHILLA, DISTRICT SIRMOUR (H.P.)

36. DR. ARUN KUMAR, SON OF SHRI RAMESHCHAND, AYURVEDIC MEDICAL OFFICER, CIRCLE AYURVEDIC HOSPITAL, JOGINDERNAGAR, TEHSIL JOGINDERNAGAR, DISTRICT MANDI, (H.P.)
37. DR. MONIKA RANA, DAUGHTER OF SHRIKASHMIR SINGH RANA, AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE, CHANOUR, POST OFFICE. CHANOUR, TEHSIL DADA-SIBA, DISTRICT KANGRA (H.P.))
38. DR. DISHA THAKUR, DAUGHTER OF SHRI SUBHASH CHANDEL, AYURVEDIC MEDICALOFFICER, AYUVEDIC HEALTH CENTRE, SULAH, VILLAGE & POST OFFICE NAURA, TEHSIL PALAMPUR, DISTRICT KANGRA (H.P.))
39. DR. NAVDEEP KAUR, WIFE OF SHRI AMARDEEP DESI, AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, ANDORA, POST OFFICE ANDORA, TEHSILAMB, DISTRICT UNA, (H.P.)
40. DR. SANDEEP, SON OF SHRI RATTAN CHAND. AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, DHAR, POST OFFICE JUBBAL, TEHSIL JUBBAL, DISTRICTSHIMLA. (H.P.)
41. DR. VINOD, SON OF SHRI GURDASS, AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, MARAOG POST OFFICE JUBBAL. TEHSIL JUBBAL. DISTRICT SHIMLA,(H.P.)
42. DR. AMIT KUMAR, SON OF LATE SHRI HARNAM SINGH, AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, MANHAN, POST OFFICE SUNHANI, TEHSILJHANDUTTA, DISTRICT BILASPUR, (H.P.)
43. DR. OSUMAN KUMAR, SON OF SHRI OM PRAKASH, AYURVEDIC MEDICAL OFFICER,AYUVEDIC HEALTH CENTRE, GAWARDOO, POST OFFICE GAWARDOO, DISTRICT HAMIRPUR. (H.P.)
44. DR. YOGRAJ THAKUR, SON OF SHRI KUNDAN LAL. AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, BATAHAR, POST OFFICE BALOH, DISTRICTMANDI, (H.P.)
45. DR. PANKAJ KASHYAP, SON OF SHRI DINANATH, AYURVEDIC

MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, DRANG- BHATOG, POST OFFICE DRANG, DISTRICT MANDI, (H.P.)

46. DR. SUSHMA, DAUGHTER OF SHRI BALDEV, AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, BHALLAN-2, POST OFFICE SAIN), DISTRICT KULLU, (H.P.)

47. DR. RUCHI BHAGOTIA, DAUGHTER OF SHRIVINOD BHAGOTIA, AYURVEDIC OFFICER, AYUVEDIC HEALTH CENTRE, NIAR, TEHSIL JASWAN-KOTLA, DISTRICT KANGRA, (H.P.))

48. DR. KULBHUSHAN CHAUHAN, SON OF SHRIROSHAN LAL CHAUHAN, AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, BHAKERA, POST OFFICE SULKHAN,TEHSIL BHORAN), DISTRICT HAMIRPUR. (H.P.)

49. DR. INDERVESH SHARMA, SON OF SHRIKISHNANAND SHARMA, AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, ADHAL, POST OFFICE ADHAL ROHROO, DISTRICT SHIMLA, (H.P.)

50. DR. SHAKUNTLA, DAUGHTER OF SHRI VISHAMBHAR SINGH, AYURVEDIC MEDICALOFFICER, AYUVEDIC HEALTH CENTRE, BAGHI, POST OFFICE BAGHI, TEHSIL KOTKHAI, DISTRICT SHIMLA, (H.P.)

51. DR. MEERA DEVI, DAUGHTER OF SHAM LAL,AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, LARANKELO, POST OFFICE LARANKELO, DISTRICT KULLU, (H.P.)

52. DR. ROHIT SHARMA, SON OF SHRI SUBHASH SHARMA, AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, HARNOTA, POST OFFICE HARNOTA, TEHSILJAWALL, DISTRICT KANGRA, (H.P.).

53. DR. SONIA LUBHAYA, DAUGHTER OF SHRIRAJ PAUL LUBHAYA, AYURVEDIC MEDICALOFFICER, AYUVEDIC HEALTH CENTRE, KHATIAR, POST OFFICE KHATLAR, TEHSILFATEHPUR, DISTRICT KANGRA, (H.P.)

54. DR. ANOOP KUMAR, SON OF LATE SHRI SURAJ PRAKASH NATH, AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, BAGA,

TEHSIL JAWALL, DISTRICTKANGRA, (H.P.)

55. DR. HITESH KUMAR, SON OF SHRI KUMARCHAND SHARMA, AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, DAWAHAN, POST OFFICE KOTLI, DISTRICTMANDI, (H.P.)

56. DR. REENA KATWAL, DAUGHTER OF SHRIKISHNU RAM KATWAL, AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, KUNNU, POST OFFICE KUNNU,DISTRICT MANDI, (H.P.)

57. DR. SANJEEV KUMAR, SON OF SHRI RAGHIBIR SINGH, AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, BHANERI, POST OFFICE MAKRAHAN, TEHSIL SUJANPUR, DISTRICT HAMIRPUR,(H.P.)

58. DR. RAVINDER KATOCH, SON OF SHRI PRABHAT CHAND KATOCH, AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, JANDROO, POST OFFICE JANDROO,TEHSIL SUJANPUR, DISTRICT HAMIRPUR. (H.P.)

59. DR. PRIYANKA SHARMA, DAUGHTER OF SHRI MADAN LAL, AYURVEDIC MEDICALOFFICER, AYUVEDIC HEALTH CENTRE, BARAN), POST OFFICE HARNERA, TEHSILSHAHPUR, DISTRICT KANGRA, (H.P.)

60. DR. SHWETPARNA GAUR, DAUGHTER OF SHRI G.S. GAUR, AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, BARYARA, TEHSIL KOTLI, DISTRICT MANDI,(H.P.)

61. DR. RITA KUMARI, SON OF SHRI HOSHIARSINGH, AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, BHALOON, TEHSIL NADAUN, DISTRICT HAMIRPUR, (H.P.)

62. DR. HEMANT KUMAR, SON OF SHRI GULJARI LAL BHATIA, AYURVEDIC MEDICAL.OFFICER, AYUVEDIC HEALTH CENTRE, HIRAN, POST OFFICE PHAKLOH, TEHSIL JAWALAMUKHI, DISTRICT KANGRA, (H.P.)

63. DR. LUCKY PALMO, DAUGHTER OF SHRI MOHAR SINGH NEGI, AYURVEDIC MEDICALOFFICER, AYUVEDIC HEALTH CENTRE, BATHARA, POST OFFICE SHAHDHAR, TEHSILRAMPUR, DISTRICT

SHIMLA, (H.P.)

64. DR. RUPALI VERMA, DAUGHTER OF SHRI R.K. VERMA, AYURVEDIC MEDICAL OFFICER,AYUVEDIC HEALTH CENTRE, MALLL, POST OFFICE MAKOL, TEHSIL JAISINGHPUR, DISTRICT KANGRA, (H.P.)

65. DR. BAL KRISHAN, SON OF SHRI BABU RAM,AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, DARINI, DISTRICT KANGRA, (H.P.)

66. DR. RICHA SHARMA, DAUGHTER OF SHRI DEVINDER LAL SHARMADINA NATH AYURVEDIC MEDICAL OFFICER, AYURVEDIC HEALTH CENTRE. BHOGARWAN, POST OFFICE BHOGARWAN, TEHSIL INDORA, DISTRICT KANGRA, (HP)

67. DR. INDU, DAUGHTER OF SHRI TASHI ANGROOP, KUMAR, AYURVEDIC MEDICALOMEER, AYUVEDIC HEALTH CENTRE, JANA, POST OFFICE ARCHHANDI, TEHSIL & DISTRICT KULLU. (H.P.)

68. DR. DEEPAK NARYAL, SON OF SHRI VIRENDER KUMAR, AYURVEDIC MEDICALOFFICER, AYUVEDIC HEALTH CENTRE, BARIAL, POST OFFICE BARIAL, TEHSIL. JAWALL, DISTRICT KANGRA, (H.P.)

69. DR. REENA, DAUGHTER OF SHRI PRABHATCHANDRA, DINA NATH, AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTHCENTRE, BALH, POST OFFICE LAKE, DISTRICT KANGRA, (H.P.)

70. DR. ATUL, SON OF SHRI RAJ KUMAR, AYURVEDIC MEDICAL OFFICER, AYUVEDICHEALTH CENTRE, GANGOTI, POST OFFICE SAPOURI, DISTRICT UNA. (H.P.)

71. DR. PUJA CHAUDHARY, WIFE OF DR. ATUL,AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, JAGER-SURI, POST OFFICE JAVER-SURL, DISTRICT UNA, (H.P.)

72. DR. SACHIN DHIMAN, SON OF SHRI RAMESH CHAND, AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, KHANLAG, POST

OFFICE MANJU, TEHSILARKI, DISTRICT SOLAN, (H.P.)

73. DR. SURENDER, SON OF SHRI ROSHAN LAL,AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, ASLOO, TEHSIL ARKI, DISTRICT SOLAN, (H.P.)

74. DR. ABHA SHARMA, SON OF SHRI ARVIND SHARMA, AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, SWANA, POST OFFICE SWANA, TEHSIL JASWAN, DISTRICTKANGRA, (H.P.)

75. DR. SULEKH KUMAR, SON OF SHRI JAGANNATH SHARMA, AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, HAWAN, POST OFFICE HAWAN, TEHSIL GHUMARWIN, DISTRICT BILASPUR, (H.P.)

76. DR. SUNITA NEGI, SON OF SHRI JAGANNATH SHARMA, AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, HAWAN, TEHSIL GHUMARWIN, DISTRICTBILASPUR, (H.P.)

77. DR. PANKAJ KUMAR, SON OF SHRI SARVANKUMAR, AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, KHEEL, TEHSIL DHARMAUR, TEHSIL KARSOG, DISTRICT MANDL, (H.P.)

78. DR. RAVINDER SINGH RANA, SON OF SHRISADHU RAM RANA, AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, ZAKHBAR, POST OFFICE SUTHANA, TEHSILFATEHPUR, DISTRICT KANGRA, (H.P.)

79. DR. CHANDAN VERMA, SON OF SHRI PARASRAM VERMA, AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, MEHLA, POST OFFICE MEHLA, DISTRICT CHAMBA, (H.P.)

80. DR. SANGEETA, DAUGHTER OF SHRI M.L. DHADWAL, AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, KALLAR, POST OFFICE KALLAR, DISTRICT BILASPUR, (H.P.)

81. DR. SANJEEV THAKUR, SON OF SHRI V.K. THAKUR, AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, KAPHRA, POST OFFICE KAPHRA, DISTRICT BILASPUR, (H.P.)

82. DR. BALDEEP KAUR, SON OF SHRI BHAGWAN SINGH, AYURVEDIC MEDICALOFFICER, AYUVEDIC HEALTH CENTRE, NARL-DEVI, POST OFFICE NARI-DEVI, TEHSIL BANGANA, DISTRICT UNA, (H.P.)

83. DR. YASHPAL RANA, SON OF SHRI GUMAR RAM RANA, AYURVEDIC MEDICAL OFFICER,AYUVEDIC HEALTH CENTRE, KARANA, POST OFFICE KARANA, TEHSIL ANI, DISTRICTKULLU, (H.P.)

84. DR. MOKINA DEVI, DAUGHTER OF SHRI RAVINDER SINGH, AYURVEDIC MEDICAL OFFICER, DISTRICT AYUVEDIC HOSPITAL, KEYLONG. DISTRICT LAHAUL SPITI, (H.P.)

85. DR. RITU DHIMAN, WIFE OF SHRI BHASKARJAMUAL. AYURVEDIC MEDICAL OFFICER, DISTRICT AYUVEDIC HOSPITAL, UTTARPUR, BLOCK JAISINGHPUR BLOCK, DISTRICT KANGRA, (H.P.)

86. DR. RAVI KUMAR BHOGAL, SON OF SHRI BALBIR SINGH, AYURVEDIC MEDICAL OFFICER, AYUVEDIC HEALTH CENTRE, JASSI, POST OFFICE JANSUH, TEHSIL NADAUN, DISTRICT HAMIRPUR, (H.P.)

87. DR. VIJAY GAUTAM, SON OF LATE SHRI JAGDISH GAUTAM, AYURVEDIC MEDICALOFFICER, AYUVEDIC HEALTH CENTRE, KARORA, DISTRICT KANGRA, (H.P.)

88. DR. RICHA SHARMA, DAUGHTER OF SHRI KULWANT RAJ, AYURVEDIC MEDICAL OFFICER, DISTRICT AYUVEDIC HOSPITAL, DAGLA, SUB-DIVISIONNURPUR, DISTRICT KANGRA, (H.P.)

….PETITIONER.

(BY MR. RAJNISH MANIKTALA, SENIOR ADVOCATE WITH MR. NARESH VERMA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH PRINCIPAL SECRETARY (AYURVEDA TO THE GOVERNMENT OF HIMACHAL PRADESH,SHIMLA-171002 (H.P.)

2. DIRECTOR, DIRECTORATE OF AYURVEDA, GOVERNMENT OF HIMACHAL PRADESH, SDA COMMERCIAL COMPLEX, KASUMPTI, SHIMLA-171009 (H.P.).

....RESPONDENTS.

(BY MR. DESH RAJ THAKUR, ADDITIONAL ADVOCATE GENERAL WITH MR. GAURAV SHARMA, DEPUTY ADVOCATE GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)

Nos. 6401 of2019 and 2223 of 2020

Reserved on:29.04.2022

Decided on: 02.05.2022

Constitution of India, 1950 - Article 226 – Service matter -Respondent No.1 framed the Recruitment and Promotion Rules for the posts of AMOs under Article 309 of constitution of India-Petitioner in CWPOA number of 2223 of 2021 regularized as a AMOs with effect from 06.10.2016 and their pay fixation was also made in terms of communication dated 27.11.2015 and was fixed at Rupees 15000 per month as basic pay-Petitioners claimed that their pay fixation is not proper – Held - Fixation of pay and determination of parity in duties is a function of Executive and scope of Judicial review is limited, however, this court cannot be mere mute spectator even in the case where administrative action is found unreasonable, unjust and prejudicial to a section of employees or such action is otherwise harsh and arbitrary - 2012 rules have been framed by the state government in exercise of powers emanating from the proviso to Article 309 of the Constitution of India and

once the State Government had omitted to include the category of AMOs in the schedule appended to the said rules it cannot be allowed to turn around and try to justify its action of so called equitable consideration-There was nothing to prevent the State Government to include the category of AMOs in the schedule appended to 2012 Rules-Communication dated 27.11.2015 being mere administrative instructions will not supersede 2012 rules framed under Article 309 of Constitution of India-Both petitions allowed - The respondents are directed to fix the initial pay of petitioners in both the petitions at rupees 18450 from the respective date of their regulation and they will be entitled to consequential benefits. (Paras 10, 19 & 20)

Cases referred:

K.T. Veerappa and others vs. State of Karnataka and others,(2006)9 SCC 406;

These petitions coming on for hearing this day, theCourt passed the following:-

O R D E R

Both these petitions are being decided by a commonjudgment as common question of law and facts are involved.

2. Petitioners in both the petitions are AyurvedicMedical Officers (for short "AMOs") serving respondent No.1.

3. Respondent No.1 framed Recruitment and Promotion Rules for the post of AMOs under Article 309 of the Constitution of India, on 17.02.2009 (for short "2009 R & P Rules"). As per these rules, the prescribed pay scale for AMOs, appointed on regular basis was 7220-220-8100-275-10300-340-11660, whereas AMOs appointed on contract basis were to get fixed pay of Rs. 10,830/- with due and admissible increase on extension of contract service on year-to-year basis.

4. Government of Himachal Pradesh vide notification dated 26.08.2009, Annexure P-9, notified Himachal Pradesh Civil Services (Revised Pay) Rules,

2009 and were made effective from 01.01.2006. Accordingly, respondent No.1 also amended 2009 R & P Rules of AMOs on 20.09.2020. The pay scale for regular AMOs was prescribed at Rs. 10,300-34800+5000 grade pay. AMOs appointed on contract basis were to get Rs.15,300/- per month with due and admissible increase on extension of contract service on year-to-year basis.

5. Petitioners in CWPOA No. 6401 of 2019, who earlier were working on contract basis were regularised as AMOs vide order dated 10.08.2015, Annexure A-4, in the pay scale of Rs.10,300-34,800+5000 grade pay + admissible NPA. The pay ofpetitioners in CWPOA No. 6401 of 2019 was fixed in terms of Himachal Pradesh Civil Services (Revised Pay) Rules, 2009 and the General Conversion Table as also Fitment Table-17 included in the schedule to such rules were applied. The relevant extract of General Conversion Table reads as under: -

	Pre-revised			Revised			
Sr. No	Group	Pay Scale	Pay Band	Group	Corresponding pay Bands	Grade Pay	Initial
1	2.	3.	4.	5.	6.	7.	8.
17	(i)	7220-220-8100-275-10300-340-11660	PB-3	(I)	10300-34800	5000	18450

Further the relevant extract of Fitment Table 17 reads as under:=

Pre-revised pay Scale	Revised pay structure
	Revised pay Scale+ Grade Pay
	Rs.10300-34800+ Rs.5000

Rs.7220-11660	Revised Pay		
Basic Pay	Pay in the pay Band	Grade Pay	Revised BasicPay
1.	2.	3.	4.
7220	13450	5000	18450

Accordingly, the pay scale of petitioners in CWPOA No. 6401of 2019, was fixed at 13450+5000=18450.

6. The Respondent No.1, vide notification dated 13.09.2012, Annexure A-12, had ordered the grant of pay scale of Rs.15,600-39100 plus 5400/- Grade Pay toAMOs/Homeopathic Medical Officers/Unani Medical Officer/Amchi with immediate effect, after rendering two yearsregular service.

7. The Government of Himachal Pradesh further notified Himachal Pradesh Civil Services (category/post wiserevised pay) Rules, 2012, on 24.09.2012.

8. On dated 27.11.2015, respondent No.1 issued a communication to respondent No.2 to the following effect"

> *"I am directed to refer to your letter No. Ay-H(B)(06)-01-10-1/6027 dated 02.09.;2015 on the subject cited above and to say that the matter has been examined at the Government level in consultation with the Finance Department and it is clarified that the pay structure of AMOs has been re-revised as Rs.13,600-*

39100+ Rs.5400 Grade Pay on completion of two years of regular service after 01.01.2006 i.e. general revision of pay scales by the Ayurveda Department vide Notification dated 13.09.2012 with immediate effect and as such the pay of AMOs category regularized/appointed after this date is to be fixed in the pay structure of Rs.10300-34800

+5000 Grade Pay without any initial pay start. You are, therefore, requested to take action accordingly in the matter under intimation to this department.

This issue with the prior approval of Finance Department Obtained vide Diary No. 53397533-Fin(PR)- B(7)-662/2010-Loose dated 18.11.2015."

9. In pursuance to the aforesaid communication dated27.11.2015, the pay scale of AMOs i.e. petitioners in CWPOA No. 6401/2019 was placed at the minimum of 10300-34800+5000 Grade Pay without any initial pay start. Their pay accordingly was reduced to Rs.15,300/- per month in place of 18,450/- asoriginally fixed.

10. Petitioners in CWPOA No. 2223 of 2020 were regularised as AMOs with effect from 6.10.2016 and their pay fixation was also made in terms of communication dated 27.11.2015, Annexure A-1 and were fixed at Rs.15,300/- per month as basic pay.

11. Petitioners in both the petitions, therefore, are aggrieved against the communication dated 27.11.2015, Annexure A-1, and also its consequential effect and have approached this Court with following prayers: -

"***Prayers in CWPOA No. 6401 of 2019.***

(A) That the order/letter dated 27.11.2015 (Asnnexure A- 1) may be quashed and set aside.

(B) That the office order dated 9.12.2015 (Annexure A-14)may also be quashed and set aside.

(C) That the applicants may be held entitled to initial basic pay of Rs.18450/- in the pay band of Rs. 10300- 34800+5000 Grade Pay as per Schedule, Fitment Table and provisions of Himachal Pradesh Civil Services (Revised Pay) Rules, 2009.

(D) That the respondents may further be directed to pay all the arrears pursuant to fixation of basic pay atRs.18,450/- in the pay band of Rs. 10300-34,800 + 5000 Grade Pay as per Schedule, Fitment Table and provisions of Himachal Pradesh Civil Services (Revised Pay) Rules,2009.

Prayers in CWPOA No. 2223 of 2020.

(A) That the action of the respondent in fixing the basicpay of the Applicants at Rs.10300+5000 Grade Pay i.e. Rs.15,300/- instead of Rs.13,450 +5000 Grade Pay i.e. Rs.18450/- may be declared to be wrong and illegal and the pay fixation made vide Annexure A-10 may be quashed and set aside.

(B) That the applicants may be held entitled to initial basic pay of Rs.18450/- in the pay band of Rs.10300- 34800+5000 Grade Pay as per Schedule, Fitment Table and provisions of Himachal Pradesh Civil Services (Revised Pay) Rules, 2009.

(C) That the respondents may further be directed to pay all the arrears with effect from 06.10.2016 pursuant to fixation of basic pay at Rs.18450/- in the pay band of Rs.10300-34800 +5000 Grade Pay as per Schedule, Fitment Table and provisions of Himachal Pradesh CivilServices (Revised Pay) Rules, 2009."

12. In response, the contention on behalf of the respondents has been that the pay scales of the employees of the State of Himachal Pradesh are allowed keeping in view the following facts: -

"(i) H.P. Government, by and large, follows Punjab Government pay scales, but it is not done blindly and the State Government in any particular case may or may not implement a particular pay scale in view of the R&P rules, administrative level, staffing pattern, impact on other similarly placed categories etc.

> (ii) Punjab Government pay scales are not automatically applicable in Himachal Pradesh. Even pay scale is to be examined and after careful consideration matter is to be decided with the approval of competent authority.
>
> (iii) Even where government intends to implement a particular pay scale, such a pay scale comes into force only from such date and as such terms and conditions,as are determined by the State Government in its order/notification.
>
> (iv) Himachal Pradesh is an independent State and only its orders are applicable on its employees. No one can claim a pay scale just on the basis of order issued by the Punjab Government."

Further, it has been submitted that Himachal Pradesh Government to allow re-revision during the intervening period ofGeneral Revision of pay scales in exercise of powers conferred by proviso to Article 309 of the Constitution of India has framed Himachal Pradesh Civil Services (Category/Post wise Revised Pay) Rules, 2012, vide notification dated 24.09.2012. These Rules have overriding effect over Recruitment and Promotion Rules framed for the post of AMOs. Communication dated 27.11.2015, Annexure A-1, is stated to have been issued on the dictum of these rules.

13. I have heard the learned counsel appearing for the parties and have also carefully gone through the records.

14. The controversy involved in these petitions is in narrow encompass. The contention raised on behalf of the petitioners is that the Himachal Pradesh Civil Services (Category/Post wise Revised Pay) Rules, 2012 applied only to such categories of Himachal Pradesh Government employees as mentioned in the Schedule annexed to these rules. As per petitioners, the category of AMOs has never been included in the Schedule appended to the aforesaid rules, therefore, said rules cannot be a valid source for issuance of communication dated 27.11.2015, Annexure A-1.

15. Rules 1 & 2 of Himachal Pradesh Civil Services (Category/Post wise Revised Pay) Rules, 2012, read as under: -

"1. Short title and commencement: -

(i) These rules may be called the HimachalPradesh Civil Services (Category/Post-wiseRevised Pay) Rules, 2012.

(ii) They shall come into force with effectfrom the date as mentioned in Column 6 of the "Schedule" appended to these rules.

2. Application: -Save as otherwise expressly provided by or under these rules; they shall apply to only suchcategories of Himachal Pradesh Governmentemployees as mentioned in the aforesaid Schedule;

Provided that the Himachal Pradesh Civil Services(Revised Pay) Rules, 2009 notified vide No. Fin-(PR)B(7)-1/2009 dated:26th august, 2009 and subsequent amendment(s) thereto shall not apply to the category/post of employees as mentioned in the'Schedule" with effect from the date mentioned in Column No.6 of the said Schedule."

16. The plain reading of these rules clearly suggests onlyone inference that for applicability of these rules to a category ofHimachal Pradesh Government employees, the inclusion of such category in Schedule appended to these rules is *sine qua non*. Itis only from the date of inclusion of any category of Himachal Pradesh Government employees in such schedule, these rules would be applicable.

17. It is evident from the rules and Schedules appended thereto from time to time that the category of AMOs has not been included in any of the Schedules. That being so, the contention of respondents regarding applicability of 2012 Rules to the category of AMOs cannot be sustained and consequently the communication dated 27th November, 2012, Annexure A-1

and its consequence deserves to be quashed.

18. Mr. Desh Raj Thakur, learned Additional Advocate General has raised an argument that the effect of communication dated 27.11.2015, Annexure A-1, is only to drawparity with all other employees of the State Government covered under 2012 Rules. Simultaneously, Mr. Desh Raj Thakur, learned Additional Advocate General has fairly submitted that an exception has been carved for the employees of Agriculture Department. In support of his contention Shri Thakur has relied upon a decision of the Hon'ble Supreme Court in a case titled as ***K.T. Veerappa and others vs. State of Karnataka and others, (2006)9 SCC 406***, wherein it has been held that:

> *"13. He next contended that fixation of pay and parity in duties is the function of the Executive and financial capacity of the Government and the priority given to different types of posts under the prevailingpolicies of the Government are also relevant factors. Insupport of this contention, he has placed reliance inthe case of State of Haryana and Anr. v. Haryana CivilSecretariat Personal Staff Association (2002) 6 SCC 72 and Union of India and Anr. v. S.B. Vohra and Ors. (2004) 2 SCC 150. There is no dispute nor can there be any to the principle as settled in the case of State ofHaryana & Anr. v. Haryana Civil Secretariat PersonalStaff Association (supra) that fixation of pay and determination of parity in duties is the function of theExecutive and the scope of judicial review of administrative decision in this regard is very limited. However, it is also equally well-settled that the courts should interfere with administrative decisions pertaining to pay fixation and pay parity when they find such a decision to be unreasonable, unjust and prejudicial to a section of employees and taken in ignorance of material and relevant factors."*

19. No doubt, fixation of pay and determination of parity in duties is a function of the executive and the scope of judicial review is limited. However, the writ court cannot be a mute spectator even in the cases where the administrative action is found unreasonable, unjust and prejudicial to a

section of employees or such action is otherwise harsh and arbitrary. In the facts of the present case, the respondents have come up with a specific defence that communication dated 27.11.2015, Annexure A-1, was issued on the strength of 2012 Rules. No other explanation has been rendered. In view of this, the argument raised by learned Additional Advocate General cannot be countenanced as the same would be in conflict with the pleaded case of the respondents. 2012 Rules have been framed by the State Government in exercise of powers emanating from the proviso to the Article 309 of the Constitution of India. Once the State Government had omitted to include the category of AMOs in the Schedule appended to the said rules, it cannot be allowed to turn around and try to justify its action of so-called equitable consideration. As noticed above, the categories of employees in Agriculture department of the State have also been exempted from the rigors of these rules. There was nothing to prevent the State Government to include the category of AMOs in the Schedule appended to the 2012 Rules. Communication dated 27.11.2015 Annexure A-1 being mere administrative instructions will not supersede 2012 rules framed under Article 309 of the Constitution of India. The argument so raised by the learned Additional Advocate General is thus rejected.

20. In the light of above discussion, both these petitions are allowed and the impugned communication dated 27.11.2015 (Annexure A-1) as also the order dated 9.12.2015 (Annexure A- 14) in CWPOA No. 6401 of 2019 are quashed and set aside. The respondents are directed to fix the initial pay of petitioners in both the petitions at Rs.18450/- from the respective dates of their regularization. Needless to say, consequential benefits, if any, accrued to the petitioners shall follow. No order as to the costs. All pending applications also stand disposed of.