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Code of Criminal Procedure, 1973- Section 482- Inherent powers- Quashing of FIR- **Indian Penal Code, 1860-** Sections 341 and 143- Petitioners alongwith others took out benches from shops and placed them in the middle of road in front of Hatehwari Jewellers and stopped movement of pedestrians a well as vehicles- They have not sought any permission for expressing their resentment either from local administration nor have they informed regarding

this- **Held-** Ingredients of wrongful restraint are missing so as to establish that there was wrongful restraint to any person- Section 339 IPC is not attracted- no sufficient material on record to proceed further in the trial for alleged commission of offence- Quashed- Petition allowed. (Paras 14, 15, 16) Title: Naresh Chauhan & others vs. State of H.P. Page-217

Code of Criminal Procedure, 1973- Sections 482, 309, 91- Inherent powers- **Indian Evidence Act, 1872-** Section 114-**Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 20, 25 and 29- Quashing of FIR- The prayer of the petitioners for issuance of a direction to supply the entire CDR of the Police Officials was rejected by the learned Trial Court- **Held-** The same would compromise the right of privacy of the Investigating Officer, as also it will lead to a possibility of disclosure of information relatable to commission of offence- No merit- Petition dismissed. (Para 7) Title: Manoj Kumar & others vs. State of H.P. Page-546

Code of Criminal Procedure, 1973- Sections 482, 311- Inherent power- **Negotiable Instruments Act, 1881-** Section 138- Dishonour of cheque- Trial pending- Application under section 311 Cr.P.C rejected on the ground that sufficient opportunities provided to the accused to lead evidence- Not assigned any cogent reason for not filing the application at an earlier stage- **Held-** Accused failed to lead his complete evidence despite more than sufficient opportunities having been granted to him- Abuse of process of law to delay the proceedings- No infirmity with the order impugned- Petition dismissed. (Paras 7, 8, 9) Title: Duni Chand vs. Amar Chand Page-223

Code of Criminal Procedure, 1973- Sections 482, 311- Inherent powers- **Indian Penal Code, 1860-** Sections 452, 302, 341- Application filed by petitioner for examining witness- Dismissal order passed by Learned Additional Session Judge- **Held-** Petitioner may be granted an opportunity to examine the witness- Order set aside- Petition allowed. (Para 12) Title: Satinder Giri & another vs. State of H.P. Page-361

Code of Criminal Procedure, 1973- Sections 482, 311 **Negotiable Instruments Act, 1881-** Section 138- Inherent powers- Dishonour of cheque- Insufficient funds- Application by the appellant/accused for re-examination of the complainant has been dismissed by Chief Judicial Magistrate- **Held-** Filing of application was an abuse of process of law- Appellant was given opportunity to lead the evidence- Provisions of Section 311 Cr.P.C. cannot be permitted to

be abused by either party to fill the lacunae in their case- Order upheld- Petition dismissed. (Paras 8, 9, 10) Title: Tara Pati vs. Mamta Malhotra Page-209

Code of Criminal Procedure, 1973- Sections 482, 311-A- **Negotiable Instruments Act, 1881-** Sections 20 and 138- Dishonour of cheque- Petitioner after availing number of opportunities to lead evidence came up with an application under Section 311-A- The learned trial Court dismissed the application by holding that the petitioner/accused had not disputed his signatures on the cheque and thus the comparison of handwriting on other portions of the cheque was immaterial- **Held-** No fault can be found with the impugned order- Petition dismissed. (Paras 10, 11) Title: Ramesh Chauhan vs. Dhani Ram Page-163

Code of Criminal Procedure, 1973-Section 482- Inherent powers- Quashing of FIR- **Indian Penal Code, 1860-** Sections 307 and 34 **Arms Act-** Sections 25-54-59- the matter, between the petitioners and respondent No. 2, has been settled amicably- **Held-** Considering the said conclusion of the police- The FIR, in the present case, as well as the proceedings resultant thereto cannot be quashed- Petition dismissed. (Paras 7, 10) Title: Jitender Singh Chandel & another vs. State of H.P. & another Page-142

Code of Criminal Procerdure, 1973- Section 482- Inherent power- Quashing of FIR- **Indian Penal Code, 1860-** Sections 279, 337 and 338- Petitioner has approached this Court to quash and set-aside the FIR as well as consequent proceedings pending before the competent court of law- **Held-** There is no sufficient material to connect the petitioner with the offence alleged to have been committed by him- If trial is allowed to continue, great prejudice would be caused to the petitioner and same would amount to sheer abuse of process of law- FIR quashed- Petitioner acquitted of the charges framed against him- Petition allowed. (Paras 14, 15) Title: Saurabh Sharma vs. State of H.P. Page-175

Constitution of India, 1908- Article 226- Finance Department of the Government withdrew the earlier decision of granting benefit of increment by counting adhoc service followed by regular service- As a result of such decision of the Government, at much belated stage i.e. in the year 2019 orders were issued for recovery of a sum of Rs. 2,33,517/- from the petitioner- **Held-** The recovery has been sought to be made after more than five years of its

disbursement- It can be seen that the mother of the petitioner had died and petitioner was appointed on compassionate grounds- The recovery at such belated stage will otherwise be iniquitous and harsh- Orders set-aside- Petition allowed. (Paras 8, 9) Title: Chandan Moudgil vs. State of H.P. & others Page-462

Constitution of India, 1950 - Article 226- Fixation order with all consequential benefits including the arrear of salary with interest- Prayer is that the respondents be directed to grant wages/salary/leave kind due to the petitioner- **Held-** Petitioner held entitled to all service benefits- Petition allowed. (Para 16) Title: Prem Raj vs. The Himachal Pradesh Tourism Development Corporation & another Page-419

Constitution of India, 1950 - Article 226- Prayer is that respondents be directed to grant wage/salary to the petitioner with all consequential benefits in consequence of the award passed by the Learned Labour Court- The petitioner was granted relief of reinstatement from the date of retrenchment- Mandated to be conferred all benefits of continuity and seniority except back wages- Petitioner was not re-engaged immediately after passing of award at respondents' own peril- Cannot derive benefits of their own wrong- **Held-** Petitioner entitled to all service benefits- Respondents are directed to re-fix the salary of petitioner and pay entire arrears-Petition allowed. (Paras 12, 13, 14, 15) Title: Narender Kumar vs. The Himachal Pradesh Tourism Development Corporation & another Page-424

Constitution of India, 1950- Article 226- Prayer for direction to review DPC(s) for promotion to the post of Executive Engineer and Superintending Engineer on the basis of fresh seniority list in consonance with the judgments of this Hon'ble Court and the petitioners, may be held entitled to all consequential benefits as a result thereof- **Held-** The petitioners are guilty since they have acquiesced in accepting the appointment of the private respondent from the date and day they came to be appointed and did not challenge the same in time- because of acquiescence and waiver on the part of the petitioners, no relief can be granted to them as this would prejudicially affect rights of the private respondent- Preliminary objections upheld- Petition dismissed.(Paras 41, 42, 43) Title: Suresh Kapoor & others vs. State of H.P. & others **(D.B.)** Page-751

Constitution of India, 1950- Article 226- Aggrieved by the tender process,

the petitioner has filed the instant petition on the ground that the oustees constitute a homogeneous class and their claims could not have been prioritized in a manner as has been done in the advertisement- Held- All the oustees cannot be treated as homogeneous class so as to be treated equally- No irregularity much less an illegality in the priority- No merit- Petition dismissed. (Paras 11, 13) Title: Bhuvnesh Kumar vs. NTPC Ltd. & another **(D.B.)** Page-827

Constitution of India, 1950- Article 226- Appointment to the post of ASHA worker- Grievance of the petitioner is that undue advantage has been conferred upon the near and dear ones due to which incorrect marks for qualification stood awarded to the selected candidates- **Held-** Petition allowed with directions to selection committee to reassess the merit of candidates. (Para 6) Title: Vijeta Sharma vs. State of H.P. & others Page-395

Constitution of India, 1950- Article 226- **CCS (CC&A) Rules, 1965**- Rule 14- Enquiry against the petitioner under Rule 14 of the CCS (CC&A) Rules, 1965- The disciplinary authority has imposed penalty of reduction of pay of the petitioner- Prayer of the petitioner is that the impugned order be quashed and directions be issued to refund the amount of recovery made from the salary of the petitioner- **Held-** The response filed by the petitioner to the enquiry report was not considered by the disciplinary authority at the time of passing of the impugned order- Grave miscarriage of justice to the petitioner- Order quashed and set-aside- Petition allowed with directions and costs. (Para 15) Title: Yashwant Singh vs. H.P. State Electricity Board Ltd. & another Page-510

Constitution of India, 1950- Article 226- **Central Civil Service (Classification, Control and Appeal) Rules, 1965**- Rule 14- Petition to quash the order of removal from service- **Held-** Arguments of petitioner are contrary to the record- No merit- Petition dismissed. (Paras 8, 9) Title: Naresh Kumar vs. State of H.P. Page-984

Constitution of India, 1950- Article 226- **Code of Civil Procedure, 1908-** Order 7 Rule 14(3)- Petitioner assailed the rejection of the application filed seeking leave of the court to file additional documents- **Held-** Prayer made by the plaintiffs before learned trial Court has rightly been rejected being belated- No merit- Petition dismissed. (Para 11) Title: Sarvan & others vs. H.P. State

Electricity Board Ltd. & others Page-624

Constitution of India, 1950- Article 226- **Code of Civil Procedure, 1908-** Section 10- Petition against the order allowing application of the defendant in said suit filed under Section 10 of the Code on the premise that the said Civil Suit was liable to be stayed in view of pendency of Counter Claim - **Held-** The necessary ingredient for application of Section 10 of the Code of Civil Procedure is clearly missing in the case and learned Senior Civil Judge, Kasauli has erred in passing the impugned order- Petition allowed. (Para 8) Title: Durga Dutt vs. Lok Prakash Page-634

Constitution of India, 1950- Article 226- Denial of promotion to the post of pump operator- The petitioner was not promoted to the said post purportedly for want of experience certificate- **Held-** Averments, as are contained in the affidavit filed by Superintending Engineer proves that the petitioner was fulfilling the condition of 5 years experience of working- non-consideration of the petitioner, for want of experience certificate by the DPC is bad in law- Petition allowed with directions. (Paras 6, 7) Title: Ujager Singh vs. State of H.P. & others Page-506

Constitution of India, 1950- Article 226- Direction to allow the petitioner to remain on leave without pay and to grant extension in joining the post- **Held-** permit the petitioner to remain on leave without pay with directions to respondent- Petition allowed with directions to Chief Secretary to the Government of Himachal Pradesh. (Paras 21, 22, 24) Title: Poonam Kumari vs. State of H.P. & others **(D.B.)** Page-817

Constitution of India, 1950- Article 226- Grievance is that decision of respondent No. 1 has caused serious prejudice to their legal vested rights- Petitioners are entitled to retirement gratuity in terms of the Service Bye Laws of SIDC and Group Gratuity Scheme of LIC subscribed by it- **Held-** No reason with the State to deny the benefit available to the petitioners, when there is no financial burden in this regard on the State Government- Decision quashed- Petition allowed. (Paras 19, 20) Title: HPSIDC Officers Welfare Association and ors. vs. State of H.P. & Ors. Page-989

Constitution of India, 1950- Article 226- **H.P. Board of School Education Act, 1968** – Section 23- Prayer of the petitioner is that he be promoted as Joint Secretary on regular or on ad-hoc basis and the respondents may be

directed to give benefit of higher pay fixation- Held- mere existence of post or vacancy does not confer any right on the incumbents in the feeder category to claim promotion- The claim to ad-hoc promotion on behalf of the petitioner is also not tenable for the reason that there could be no anticipation regarding approval or finalization of R & P Regulations merely because the draft regulations had been prepared- No merit- Petition dismissed. (Paras 11, 13) Title: Girdhari Lal Verma vs. State of H.P. & another Page-540

Constitution of India, 1950- Article 226- **H.P. Tenancy and Land Reforms Act, 1972**- Section 118- **Companies Act, 1956-** Sections 20 and 23- Petition against rejection of the request made to change the name of the company- Prayer to issue a writ in the nature of mandamus or any other appropriate writ, order or direction commanding the respondents to record the name of the petitioner M/s Inox Air Products Pvt. Ltd in place of M/s Inox Air Products Ltd. in the revenue record as also all other relevant record of the State Govt- **Held-** Where partnership Firm became a private limited liability partnership, the stamp duty /registration fee cannot be levied upon conversion of partnership firm to a limited liability partnership firm. If it is so, no permission, if any, under Section 118 of H.P. Tenancy and Land Reforms Act, 1972 is required for change of name in the revenue documents from "M/s Inox Air Products Ltd." to "M/s Inox Air Products Private Ltd- Order quashed- Petition allowed with directions. (Para 22) Title: M/s Inox Air Products Pvt. Ltd. vs. State of H.P. & ors. Page-705

Constitution of India, 1950- Article 226- Himachal Pradesh Animal Husbandry Department Veterinary Pharmacist Class-III (Non-Gazetted) Recruitment & Promotion Rules, 2011- Clause 10- Quashing of Rule 10 (ii) of the amended Recruitment & Promotion Rules qua the post of Veterinary Pharmacists and directions for appointment as per old Recruitment & Promotion Rules- **Held-** State has given an opportunity to a Class which was earlier excluded from competing for the post of Panchayat Pharmacist, to now compete for the same- Not an arbitrary act- Petition dismissed. (Paras 12, 14) Title: Namita Saini & others vs. State of H.P. & others Page-1020

Constitution of India, 1950- Article 226- **Himachal Pradesh Land Revenue Act, 1954**- Section 123- Quashing an setting aside of the orders passed by Financial Commissioner against the petition challenging the mode of partition- **Held-** Petitioner failed to satisfy that the order suffers from grave illegality or

perversity or jurisdictional errors- No merit- Petition dismissed. (Paras 17, 18) Title: Roshan Lal & others vs. State of H.P. & others Page-684

Constitution of India, 1950- Article 226- In both these petitions, petitioners have sought identical relief i.e. quashing of letter dated 23.10.2018received by the petitioners where the respondents have afforded an opportunity to the petitioners to present their oral or written version against the proposed action of the respondents regarding the withdrawal of benefit of revision of pay scale from the petitioner- **Held-** The prayer made by them by way of instant petitions is pre-mature- Petitioners shall be at liberty to submit their response to correspondence dated 23.10.2018- Petition dismissed. (Paras 9, 10) Title: Brijesh Kumar vs. State of H.P. & others Page-478

Constitution of India, 1950- Article 226- In both these petitions, petitioners have sought identical relief i.e. quashing of letter dated 03.10.2018 whereby both of them were asked to refund the excess amount found to be recoverable from them after re-fixation of their respective salaries- **Held-** The recovery sought to be made from petitioners after more than five years of its disbursement- The recovery at such belated stage will otherwise be iniquitous and harsh- Letter dated 03.10.2018 in both the cases quashed and set-aside- Petition allowed. (Paras 8, 9) Title: Bihari Lal vs. State of H.P. & others Page-482

Constitution of India, 1950- Article 226- **Income Tax Act, 1961-** Sections 143(1), 148A- The grievance of the petitioner is that Assessing Office proceeded to reject the reply and passed an order under Section 148A(d) of the Act**-Held-** The Assessing Officer has not passed a speaking order under Section 148A(d) and has not dealt with each and every objection in the reply submitted by the petitioner- violated the basic principles of natural justice- Petition allowed with directions. (Para 20) Title: Swastik Wire Products vs. Principal Commissioner of Income Tax & others **(D.B.)** Page-666

Constitution of India, 1950- Article 226- Pay the arrears of annual increment of the ad hoc service period rendered and promotion after due calculation- **Held**- No explanation as to why the office order was not challenged by the petitioner within the statutory period prescribed in the HP Administrative Tribunal or within some reasonable period- Ad hoc service rendered by the candidate is to be treated as qualifying service for the purpose of pension- Petition partly allowed. (Paras 6, 7) Title: Chander Kanta vs. State

of H.P. & Ors. Page-976

Constitution of India, 1950- Article 226- Petition to quash the order of refixation of salary and recovery thereto- Grievance of the petitioner is that his pay has been wrongly revised and re-fixed to his detriment- **Held-** Petitioner entitled to pay band of Rs. 10300-34800 + 3200 Grade Pay- Petitioner also became entitled to annual increments- Office order quashed and set-aside- Petition allowed with directions. (Para 21) Title: Rakesh Kumar vs. State of H.P. & others Page-997

Constitution of India, 1950- Article 226- Petitioner applied for sanction of study leave from 1995-1996 (177 days in total) but his request was rejected- Petitioner has assailed the rejection of his request for grant of study leave and has also sought grant of higher pay scale of lecturer school cadre- **Held-** The petitioner did not fulfil the condition under Rule 50(5)(i) CCA (Leave) Rules 1972- Claim suffers from delay and laches- No merit- Petition dismissed. (Paras 10, 11) Title: Surjeet Singh vs. State of H.P. & another Page-451

Constitution of India, 1950- Article 226- Petitioner filed the present petition aggrieved against order/communication by respondent 3 whereby the pay of petitioner was reduced and recovery of Rs. 3,06,022/- was affected- **Held-** Refixation of pay of petitioner is held to be bad in law- Respondents directed to review and restore the pay as it was before re-fixation- Petition allowed. (Para 14) Title: Suresh Kumar Sharma vs. H.P. State Electricity Board & Ors. Page-445

Constitution of India, 1950- Article 226- Plaintiff has assailed the impugned order passed by learned District Judge vacating the injunction granted by Ld. Trial Court- **Held-** Merely because the resumption proceedings are pending before Revenue Court, the valuable rights of defendants over the suit land cannot be taken away- The balance of convenience and irreparable loss also is in favour of the defendants in comparison to the plaintiff- the order of injunction is an equitable and discretionary relief, no fault can be found with the impugned order passed by learned District Judge- Petition dismissed. (Paras 12, 14, 15) Title: Bhagi Ram vs. Ramesh Chand & others Page-661

Constitution of India, 1950- Article 226- Prayer of petitioner is for upgradation of his MBBS course seat from management quota to HP State quota (SC) Category- Grievance of the petitioner is that before upgradation of

MBBS seats of three candidates from Management quota to HP Quota petitioner was also required to be shifted and upgraded from Management quota to HP Quota (SC) Category- **Held-** Neither the petitioner nor respondent no.7 participated in the mop-up round of counseling- Since these two candidates didn't surrender their seats, these seats were not displayed as vacant for the mop-up round- The process of admissions also stood concluded since long- No merit in claim- Petition dismissed. (Para 5) Title: Divyaish Singh Chouhan vs. State of H.P. & Ors. **(D.B.)** Page-436

Constitution of India, 1950- Article 226- Prayer of the Petitioner is that a writ in the nature of mandamus may kindly be issued directing respondent No.1 to accord the permission forthwith to adopt the Recruitment and Promotion Rules for the post of Superintendent Grade-I; to promote the petitioner to the post of Superintendent Grade-I with effect from 01.03.2021 when the petitioner had become eligible for promotion with all consequential benefits- **Held-** Issuance of a direction to the respondents that the petitioner be considered for promotion against the post of Superintendent Grade-I- Petition allowed with directions. (Para 12) Title: Ashwani Kumar vs. State of H.P. & others Page-492

Constitution of India, 1950- Article 226- Prayer of the petitioner is that the services rendered by the petitioner on contract basis before regularization of his services, be counted for the purpose of calculating pensionary benefits- **Held-** Entire service rendered by the petitioner on contract basis has been treated by the department to be in continuity for all other purposes- Petitioner at least is entitled to his pension on the basis of entire length of service rendered with the department as Medical Officer- Petition allowed- Mandamus issued. (Paras 5, 6) Title: Dr. Lokinder Pal Sharma vs. State of H.P. & others Page-519

Constitution of India, 1950- Article 226- Promotion to the post of Employment Officer- Grievance of the petitioner is that the respondent/Department took option from the private respondents which is bad in law- **Held-** The doctrine of election, at the very first instance, puts an onus upon an employee to make a choice as to whether he wants to opt for promotion to stream 'A' or stream 'B'- Review Departmental Promotion Committee qua the petitioner and consider his candidature for promotion to the post of Employment Officer- Petition allowed with directions. (Para 10)

Title: V. P. Rana vs. State of H.P. & others Page-1014

Constitution of India, 1950- Article 226- promotion with all consequential benefits of pay, arrears and seniority etc- The grievance of the petitioners is that as the petitioners were rightly promoted in terms of order dated 21.06.2014 and the act of the respondent-Board of making their promotion effective 29.12.2015 is bad in law and they are entitled for promotion w.e.f. 21.06.2014 for all intents and purposes- **Held-** No fault of the petitioners, their promotions have been delayed- The act of the respondent-Board making promotion order of the petitioners effective w.e.f. 29.12.2015 is not sustainable in the eyes of law- Petition allowed with directions. (Paras 8, 9) Title: Tilak Raj Sharma & others vs. H.P. State Electricity Board Ltd & another Page-584

Constitution of India, 1950- Article 226- Quashing and setting aside of the selection process to the post of Jr. Programmer S-1 Level- Petitioner claims to be eligible for appointment to the post in terms of R & P Rules and Advertisement- Grievance of the petitioner is that respondent/commission did not verify the eligibility of candidates before conducting written test- **Held-** Omission and commission on the part of respondent including ineligible candidates is illogical, irrational, unreasonable and arbitrary- Respondent directed accordingly- Petition allowed. (Paras 13, 14, 15) Title: Bharat Bhushan Shah vs. H.P. Staff Selection Commission Page-400

Constitution of India, 1950- Article 226- Quashing of recovery order and restoration of the increment allowed to the applicant after 8 years of service of TGT- **Held-** The Department in the year 2016 promoted the petitioner also to the post of Lecturer, though benefits were ordered to be notional as from the year 2008 up to the date when the petitioner was promoted as PGT- Recovery is uncalled for- Communication quashed and set-aside- Petition allowed. (Paras 7, 8) Title: Ramesh Chand vs. State of H.P. & others Page-595

Constitution of India, 1950- Article 226- Quashing of Recruitment and Promotion Rules for the post of JBT Class III or in alternative amendment of the Clause 7 of the Rules-Selection process be kept in abeyance till necessary incorporation qua the minimum qualification- Issue still pending before the Hon'ble Apex Court- Petition disposed off with directions to abide by outcome of decision rendered by Hon'ble Supreme Court. (Para 3) Title: Bindu Bala vs. State of H.P. & others **(D.B.)** Page-393

Constitution of India, 1950- Article 226- **Recruitment & Promotion Rules Promotion**- Clause 10 - Promotion to the post of Assistant Director (Archives)- The grievance of the petitioner is that even though he had completed requisite number of years of service as Technical Assistant (Archives), yet his case had not been considered for promotion to the post of Assistant Director (Archives) by the respondents- **Held-** The petitioner had undergone a training course of one and a half month, i.e. w.e.f. 16.02.2009 to 31.03.2009, from the School of Archival Studies, National Archives of India, New Delhi- His training course cannot be equated to that of diploma- No material put forth by petitioner- No merit- Petition dismissed. (Para 5(iii)) Title: Mohan Singh Thakur vs. State of H.P. & others Page-466

Constitution of India, 1950- Article 226- **Recruitment & Promotion Rules** – Clause 11- Prayer of the petitioner is that the respondents be directed to consider his candidature for promotion to the post of Superintendent Grade-II- Held- The respondents are directed to open the recommendations of the Disciplinary Committee kept in the sealed cover in terms of its proceedings and to take appropriate decision on further promotion of the petitioner- Petition allowed. Title: Sohan Lal Verma vs. State of H.P. & another Page-1043

Constitution of India, 1950- Article 226- Regularisation of service with consequential benefits and arrears on account of retrospective regularization- **Held-** The lack of minimum educational qualification not an impediment in the case of consideration of induction of petitioner to the post of Pump Attendant- Petition allowed with directions. (Paras 12, 13) Title: Bhag Chand vs. State of H.P. & others Page-700

Constitution of India, 1950- Article 226- Release of balance amount of gratuity and retiral benefits with interest at the rate of 12% per annum- **Held-** Respondents directed to file a supplementary affidavit which indicated that the recoveries sought to be affected against petitioner are solely on the basis of the audit objections- Petition allowed with directions. (Paras 5, 6) Title: Vijay Kumar Kaul vs. MD, HP State Forest Development Corporation Ltd. **(D.B.)** Page-383

Constitution of India, 1950- Article 226- Releasing the proficiency set up with all consequential benefits and amount of leave encashment as also arrears on account of enhancement of dearness allowance- **Held-** After the acceptance of the untraced report and pronouncement of the judgment in

case against petitioner by Hon'ble Coordinate Bench, the respondent Council ought to have had released the proficiency step up in favour of the petitioner- Petition allowed with directions. (Para 8) Title: Uma Sharma vs. State of H.P. & another Page-1038

Constitution of India, 1950- Article 226- Retrospective benefit of amendment carried in the R & P Rules and promotion to post of Foreman along with consequential benefits- **Held-** Mere existence of post or vacancy does not confer any right on the incumbents in the feeder category to claim promotion- No merit- Petition dismissed. (Paras 10, 14) Title: Brij Lal vs. State of H.P. & others Page-980

Constitution of India, 1950- Article 226- The grievance of the petitioners is that the promotion panel prepared by the respondents-Department is not legal & valid as vacancies in question are meant for employees belonging to General Category and private respondents No.4 to 15 cannot be considered against the vacancies meant for General category - **Held -** Contention of the petitioners that the eligible officers in the feeder channel belonging to Scheduled Caste category should be considered for promotion only against reserve category posts and only against the roster points meant for that category sans merit- Petition dismissed. (Para 5(iv)) Title: Ram Asra & Ors. vs. State of H.P. & others Page-600

Constitution of India, 1950- Article 226- The grievance of the petitioner is he is entitled to the balance amount of arrears and he is also entitled for all consequential benefits including the allotment of GPF number as his services are liable for consideration for the purpose of pensionary benefits- Held- The respondents are directed to release the balance of arrears payable to the petitioner and also to consider the period of work-charge employment of the petitioner- Petition allowed. (Para 15) Title: Viyas Dev vs. State of H.P. & others Page-1006

Constitution of India, 1950- Article 226- **The Himachal Pradesh Civil Services (Revised Pay) Rules, 1998-** Rule 7- Writ petition for entitlement for benefit of ad-hoc service towards seniority, promotion, ACP, bunching and stagnation Scale w.e.f. due date with all consequential benefits and payment of arrears so accrued- **Held-** Having earned increments for the ad-hoc service, the petitioners are certainly entitled for bunching benefit of counting these increments for fixation of their pay in the revised pay scale- Assured Career

Progression (ACP) Scheme has not been placed on record- Grant of ACP claimed declined- Petition partly allowed. (Para 5) Title: Madan Lal & others vs. State of H.P. & another Page-967

Constitution of India, 1950- Article 226- Writ petition against impugned action of the respondent whereby the applicants have reduced daily from Rs. 82.50 per day to Rs. 65/- per day and further direction to regularize the services of the applicant form the date he was appointed as Lab. Attendant on daily wages- **Held-** Impugned order is without any reason or justification and hence cannot be sustained- Impugned order set-aside- Petition allowed with directions. (Paras 10, 11) Title: Surinder Singh vs. State of H.P. & others Page-876

Constitution of India, 1950- Article 226- Writ petition **CCS (CCA), Rules 1965**- Rule 14- Quashing the compulsory retirement and reinstatement of the petitioner with all consequential benefits- Complaint of sexual harassment was filed against the petitioner- Internal Complaint Committee recommended disciplinary action- **Held-** In absence of the adoption of due procedure of law, the infliction of punishment is wholly unsustainable in law and thus deserves to be quashed and set aside- Petition allowed with directions of reinstatement. (Paras 17, 18) Title: Anil Dutt vs. State of H.P. Page-691

Constitution of India, 1950- Article 226- Writ petition for quashing of the order passed by the Appellate authority whereby the petitioner was penalized by removal from service- Two charges were levelled against the petitioner- First charge was that while discharging the duties as Constable/Driver, the petitioner was involved in undesirable activities in bringing a civil lady in his tent on 21.02.2007 without taking prior permission of the competent authority- Second charge was that the petitioner had unauthorizedly kept a civil lady in his tent without informing his senior officer- Did not maintain the discipline of the force and thus endangered/breached the campus security- **Held-** Petitioner was responsible for maintaining law and order. The inquiry report had proved that the petitioner had engaged himself in undesirable activity with a civilian lady**-** These acts of the petitioner tentamounted to gross indiscipline & misconduct and had endangered/breached the security of the campus- No interference- Petition dismissed. (Para 4) Title: Ramesh Kumar vs. Union of India & others Page-780

Constitution of India, 1950- Article 226- Writ petition praying appointment

of the petitioners against the Computer Assistant (having 21 post vacant) in respondent department- pursuant to walk-in interview for the post of Computer Assistant conducted by the Institute Management Committees (IMCs) of ITI petitioners herein came to be selected and appointed as Computer Assistant at government Vocational Training Institute Nehranpukhar, Palampur and Kasauli respectively and since then, they have been discharging their duties against the aforesaid posts to the utmost satisfaction of the employer- Cases of petitioners herein for taking over their services on contract for the post of Computer Assistant in terms of notification, were not considered on the ground that they do not possess requisite qualification as prescribed under Recruitment & Promotion Rules- **Held-** There is ample material available on record suggestive of the fact that posts of Computer Assistant exist in the Industrial Training Institute and the petitioners herein were appointed against the post of Computer Assistant in the year, 2008- They had been working against such posts continuously without there being any interruption- Deserve to be considered for taking over services by the government on contract basis in terms of policy decision- Petition allowed. (Paras 12, 13) Title: Mandeep Kumar and Ors. vs. State of H.P & Ors. Page-726

Constitution of India, 1950- Article 226- Writ petitions seeking the relief of regularization from the date of their initial appointments- Petitioners were appointed on contract basis- Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995- **Held-** The petitioners are entitled to be considered as regular employees from the dates of their initial appointments- Petition allowed with directions. (Para 10) Title: Umesh Jaswal vs. State of H.P. & others Page-835

Constitution of India, 1950- Articles 226, 229- **The Indian Contract Act, 1872**- Section 70- Directions to pay damages on account of non-performance of contractual obligations- **Held-** The contract being in contravention of Article 299 cannot be enforced- petitioner can sue the respondents for damages- Petition dismissed. (Para 13) Title: Powai Labs Technology Pvt. Ltd. vs. State of H.P. & others **(D.B.).** Page-797

Constitution of India, 1950- Article 226-Grievance of the petitioner is that the appointment and posting has been effected due to favoritism- **Held-** Law with regard to the transfer of an employee is the prerogative of the employer-

Respondent has gone out of way to accommodate respondent no.2 and eventually ended up in discriminating the petitioner and was done with malafide intention- Transfer order quashed and set-aside- Petition allowed. (Para 19)Title: Dr. Richa Salwan vs. Dr. Yashwant Singh Parmar University of Horticulture and Forestry and others **(D.B.)** Page-413

Constitution of India, 1950- Article 226-Quashing of rejection of representation and prayer to equate the post of Receptionist with the post of Clerk with further direction to add the post of Receptionist- Direction to pay revised pay along with all consequential benefits- **Held-** The revised pay scale of the existing pay scale of petitioners, could not have been denied to the petitioners simply because the nomenclature of the post being held by them did not find mention in notification- When respondent No.2 revised the pay scale of other categories of employees, same treatment was required to be given to the petitioners also- Petition allowed- Mandamus issued. (Paras 10, 11) Title: Dinesh Kumar & another vs. State of H.P. Page-1032

Constitution of India, 1950- Articles 226, 227**- Industrial Disputes Act-** Petitioner has assailed the award passed by the Learned Labour Cuort cum Industrial Tribunal cancelling the transfer order passed by the petitioner- Contended that it was the prerogative of the petitioner management to transfer the employees- **Held-** Act of the petitioner to transfer the workmen was not bonafide- Attempt to thwart the process of registration of Union under the Trade union Act- Award upheld- Petition dismissed. (Para 67) Title: The Managing Director, M/s Luminous PowerTech vs. Manoj Kumar & another **(D.B.)** Page-842

Constitution of India, 1950- Article 227- Appointment of the petitioner to the post of language teacher- Grievance of the petitioner was that issuance of advertisement for filling up the posts of Language Teachers on batch-wise basis by way of interview/counseling was *per se* bad in law- **Held-** In the absence of qualification benefit of relaxation flowing therefrom is not and was not applicable to the petitioner or similarly situated persons- Petitioner not eligible for the post- Petition dismissed. (Paras 20, 21) Title: Kamal Kanta vs. State of H.P. & others Page-808

Constitution of India, 1950- Article 227- **Code of Civil Procedure, 1908-** Order 43 Rule 1(r)-**Specific Relief Act**, **1963**- Sections 36, 41- Petitioner has assailed that the learned Appellate Court failed to appreciate the fact

regarding recording of separate possession of co-sharers in the revenue records since long which prima-facie was proof of family arrangement/settlement /partition- **Held-** The conduct of plaintiffs smacks of some ulterior purpose than the assertion of any legal right- Learned Appellate Court erred in granting the injunction in favour of plaintiffs- Order set-aside- Petitions allowed. (Paras 22, 23) Title: Jai Singh vs. Rajeev & others Page-627

Constitution of India, 1950- Article 227- **Code of Civil Procedure, 1908-** Order 6 Rule 17- Petitioner assails order passed by Learned Senior Civil Judge rejecting application seeking amendment in the written statement- **Held-** In the absence of due diligence in the application the prayer made for amendment of written statement was *per se* barred- Order upheld- No merit- Petition dismissed. (Paras 16, 18) Title: Sarbjit Singh vs. Harbhajan Kaur Page-649

Constitution of India, 1950- Article 227- Grievance of the petitioner is that the act of the learned Labour Court of not granting actual pecuniary benefits to the petitioner as from the date when his services were ordered to be regularized is bad in law- **Held-** the award passed by the learned Labour Court suffers from infirmity and the same requires modification- Award modified- Petition allowed. (Paras 13, 14) Title: Janki Dass vs. State of H.P. Page-745

Constitution of India, 1950- Article 227- **Himachal Pradesh Land Revenue Act, 1954** – Section 107- The grievance is that by impugned order direction has been issued to the SHO, Police Station (West), Shimla to ensure the implementation of injunction order dated 15.7.2021 in letter and spirit and for such purpose, the assistance of local Revenue Official/officials for identifying the suit land- **Held-** The impugned order to the extent it granted the liberty to the SHO to take assistance of local Revenue Official/officials for identifying the suit land cannot be sustained-With availability of the demarcation report with it, learned trial Court was not justified in abdicating its powers to the SHO or any Revenue Officer-Order set-aside- Petition allowed. (Paras 16, 17) Title: Veer Singh vs. Leela Devi Page-618

Constitution of India, 1950- Article 227- Petition for quashing of order passed by the learned Appellate Authority dismissing an application filed for reappointment under the PTA Guidelines, 2014- **Held-** the cutoff date after which an incumbent ought to have been terminated as envisaged in the Policy of 2014 was 01.01.2008 and the services of the petitioner stood terminated

before that date- The relief being sought for by the petitioner cannot be granted- Order upheld- No merit- Petition dismissed. (Paras 5, 6) Title: Kusum Lata vs. State of H.P. & others Page-793

Constitution of India, 1950- Articles 227, 311- **CCS (CCA) Rules, 1965**- Rules 11 (vi), 14, 15, 23- The grievance of petitioner is against the vacation of the stay orders stating that impugned order suffers from illegality in as much as, the petitioner was not heard before passing such orders- Case of petitioner is that the Deputy Commissioner, Una being Disciplinary Authority had no *locus-standi* to approach the Appellate Authority i.e. the Commissioner for vacation/modification of order- **Held-** Penalty imposed on petitioner has come into effect without adjudication of the appeal of petitioner on merits- Adoption of such approach in exercise of quasi-judicial functions cannot be countenanced and needs deprecation- The Disciplinary Authority having performed its duties had no role to make submissions to convince the Appellate Authority about the merits of his decision- Order quashed- Petition allowed. (Paras 19, 20, 21) Title: Surya Prakash vs. The Divisional Commissioner & another Page-637

Constitution of India, 1950-Articles 14, 226- Regularize the service of the petitioner as a Clerk and direction to pay wages accordingly- Held- The petitioner as a Peon on contract basis, the work of Diary & Dispatch was being extracted from him- the act of the respondent-Corporation of not regularizing the services of the petitioner against the post is arbitrary and discriminatory and violative of Article 14 of the Constitution of India- Petition allowed- Mandamus issued. (Paras 7, 8) Title: Kamaljeet vs. Municipal Corporation of Shimla Page-590

Constitution of India, 1950-Article 226- Benefit of services rendered by the applicant on ad hoc basis for the purpose of pension- **Held-** the present is not a case where the adhoc service of the petitioner as a JBT teacher was subsequently regularized by the State- petition is completely misconceived- Petition dismissed. (Para 3) Title: Desh Raj vs. State of H.P. & Ors. Page-1012

Constitution of India, 1950-Article 226- Prayer made that the respondents may be directed to appoint the petitioner as anganwadi worker and give other consequential benefits and to quash the order passed by the Ld. Deputy Commissioner allowing the appeal of respondent to set-aside the appointment of the petitioner- **Held-** The Deputy Commissioner concerned has correctly set

aside the appointment of the petitioner as she was recommended for appointment against the post in issue in violation of the provisions of the advertisement and as also notification- The contention of the petitioner has no legs to stand on- No merit- Order upheld- Petition dismissed. (Paras 14, 15) Title: Sanju Devi vs. State of H.P. & others Page-499

Constitution of India, 1950-Article 227- Grievance of the petitioner is that denial of promotion on the ground that the qualification of matriculation possessed by the petitioner was not from a recognized institute, is not sustainable in the eyes of law- **Held-** Not considering her matriculation certificate to be good enough for the purpose of promotion is bad in law- Petition allowed- Mandamus issued. (Paras 9, 10) Title: Kanta Bala vs. State of H.P. & others Page-803

'E'

Employees Compensation Act, 1923- Sections 30, 22- Appeal challenging the award of compensation and whether the learned Commissioner exercising the powers of the Employee's Compensation Act, 1923 has wrongly saddled the Insurance Company with penalty in case of their failure to deposit the compensation amount- **Held-** the Insurance Company will be liable to pay only interest if it has failed to comply with the directions passed by learned Commissioner within the time period granted by learned Commissioner and not 'penalty'- Award modified- Appeal allowed. (Para 8) Title: New India Assurance Company Ltd. vs. Nek Ram & others Page-936

'L'

Land Acquisition Act, 1894- Section 18- **Code of Civil Procedure, 1908**- Order 41 Rule 27-Appeal against dismissal of reference petition and awards passed by Additional District Judge- **Held-** the land owners who have been granted compensation on the lower side cannot be deprived the benefit of subsequent adjudications- Awards modified and compensation enhanced- Appeals Allowed. (Paras 7, 10) Title: Roop Lal vs. State of H.P. & others Page-578

Limitation Act, 1908- Section 5- Condonation of delay in filing regular second appeal against judgment passed by Additional District Judge- Delay of 5 years and 12 days in filing the appeal- Limitation period had already

expired- **Held-** Appears that deceased had accepted the impugned judgment- No merit- Petition dismissed. (Para 5) Title: Gulzari (now deceased) through LRs vs. Chuni Lal & others Page-390

'M'

Motor Vehicle Act, 1988- Section 173- Appellant assails the Award of compensation alongwith interest in favour of the claimants passed by the Court of learned Motor Accidents Claim Tribunal-II- **Held-** Learned Tribunal erred in not appreciating the nomenclature of respondent No.2/Insurance Company impleaded as a party respondent in the Claim Petition was the National Insurance Company Limited, The Mall Shimla, whereas the insurance policy was issued by one Future General Insurance Company which was not a party before learned Trial- Holding the Insurance Company liable to indemnify the claimants not sustainable in the eyes of law- The liability to indemnify the claim shall be that of the respondent/owner- Appeal partly allowed. (Para 11) Title: National Insurance Co. Ltd. vs. Subhadra Devi & others Page-941

Motor Vehicle Act, 1988- Section 173- **HP General Clauses Act, 1968-** Section 26- Appellants challenged award on the ground that they were wrongly proceeded against ex-parte- **Held-** Perusal of the record demonstrates that ex-parte order passed by the Learned Tribunal is based on speed post notices issued to the appellants- No acknowledgment- Order not sustainable in the eyes of law- Appeal allowed with directions. (Para 11) Title: Varun Sethi and another vs. Angrez Singh and another Page-1

Motor Vehicle Act, 1988- Sections 173, 166, 168- The insurer, by way of instant appeal, has assailed the award of compensation in favour of the claimants passed by learned Motor Accident Claims Tribunal-II- **Held-** Claimants held entitled to interest at the rate of 9% per annum from the date of petition till its deposit or payment to the claimants whichever is earlier- Apportionment made by the learned Tribunal in the impugned award shall remain the same- Appeal dismissed. (Paras 28, 29) Title: New India Assurance Co. Ltd. vs. Asha Rani & others Page-1048

Motor Vehicles Act, 1988- Section 173- Appeal for Enhancement of compensation amount- **Held**- Vishni Devi mother of the claimant was not travelling in the vehicle as owner of the goods, therefore, she is entitled to

compensation to be paid by the owner Shri Devi Saran Negi of the vehicle- Whereas Punai Uraw father of the claimant, she is held entitled to compensation to be paid by the Insurance Company- Claimant is entitled to modified compensation- FAO Nos. 95 and 96 of 2021 are dismissed, whereas, FAO Nos. 164 and 165 of 2021 are allowed. (Para 25) Title: National Insurance Co. Ltd. vs. Sarita Kumari & another Page-954

Motor Vehicles Act, 1988- Section 173- Indian Penal Code, 1860- Sections 279, 337 and 304-A- Insurance company has preferred the appeals against the compensation awarded to the claimants by the Learned Tribunal- **Held-** This Court has no hesitation in holding that the Insurance Company produced no material on record from which it could have been inferred that the accident took place on account of contributory negligence of both the drivers of the ill-fated vehicles- No document on record from which it can be inferred as to what was the educational qualification of the deceased and if he indeed was possessing some specialized qualification as a Mechanic etc.- Slightly difficult to believe the fact that in terms of the appointment letter the deceased indeed was engaged as a Mechanic on monthly wages of Rs.20,000/- - Award under FAO 201 of 2019 modified and awards under other appeals remain as it is- Petition partly allowed. (Para 18) Title: National Insurance Company Ltd. vs. Raman Kumar & others Page-564

Motor Vehicles Act, 1988- Sections 166, 173- Appeal challenging award passed by Learned MACT-II for grant of compensation to claimants- **Held-** Findings of the Ld. Tribunal are correct and duly borne out from record- No merit- Appeal dismissed. (Paras 14, 15) Title: National Insurance Company Ltd. vs. Mohar & others Page-406

Motor Vehicles Act, 1988- Sections 166, 173- Appellant has assailed award passed by learned Motor Accidents Claim Tribunal whereby the insurer has been exonerated and appellant/insured has been fastened with liability to pay the compensation- **Held-** The insurer has not discharged the burden of proof regarding allegation of fake license- Absolutely no evidence on record to prove the fact that the driving license was not genuine- Award set-aside- Petition allowed. (Paras 11, 13) Title: Rajinder Singh Thakur vs. Basant Kala and others Page-486

'W'

Workmen's Compensation Act, 1923- Appeal against the award allowing the claim petition preferred by the claimants and directing the appellant to pay penalty in its failure to pay compensation amount- **Held-** Learned Commissioner erred in holding that there was a connection between the death of deceased and his employment- Matter remanded back with directions- Appeal allowed. (Para 17) Title: New India Assurance Co. Ltd. vs. Savitri Devi & others Page-947

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****

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

Sh. Varun Sethi and another ....Appellants.

Vs.

Angrez Singh and another .....Respondents.

For the appellants Mr. Anuj Gupta, Advocate.

For the respondents: Mr. Anil Tomar, Advocate, for respondent No. 1.
Mr. Praneet Gupta, Advocate, for respondent No. 2.

FAO No. 179 of 2022
Decided on: 29.11.2022

Motor Vehicle Act, 1988- Section 173- **HP General Clauses Act, 1968-** Section 26- Appellants challenged award on the ground that they were wrongly proceeded against ex-parte- **Held-** Perusal of the record demonstrates that ex-parte order passed by the Learned Tribunal is based on speed post notices issued to the appellants- No acknowledgment- Order not sustainable in the eyes of law- Appeal allowed with directions. (Para 11)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this appeal, the appellants have challenged award, dated 06.03.2019, passed by the Court of learned Motor Accident Claims Tribunal-II, Kangra at Dharamshala, Circuit Court at Nurpur, District Kangra, H.P. in Claim Petition No. 37-N/II/2013/2012, titled as *Angrez Singh Vs. Rakesh Singh and others, inter alia,* on the ground that the same is not sustainable in the eyes of law, as they were wrongly proceeded against *ex parte* before the learned Tribunal.

2. Learned counsel for the appellants has argued that when the claim petition was preferred by the claimants, only appellant No. 2 herein was impleaded as a respondent and it was subsequently that appellant No. 1 was impleaded. He submitted that neither any notice in the application, which was filed under Order I, Rule 10 of the Code of Civil Procedure was received by appellant No. 1 nor both the appellants received any notice in the claim petition and record would demonstrate that the reason as to why they have been proceeded against *ex parte* is that as notices were served upon the appellants/respondents through Speed Post, therefore, there was deemed service of the said respondents before the learned Tribunal. Learned counsel further argued that the record clearly and categorically demonstrates that notices were in fact never served upon the parties concerned, i.e., the present appellants and even otherwise, as far as the service through Speed Post is concerned, there cannot be any deemed service on the basis of Speed Post, in terms of the provisions of the General Clauses Act, 1897 as well as the Himachal Pradesh General Clauses Act, 1968. Learned counsel has further argued that the act of learned Tribunal of proceeding against the appellants *ex parte* despite the fact that they were not properly served in the claim petition has adversely affected them for the reason that as the vehicle in issue was duly insured with the Insurance Company, therefore, there was no occasion for the appellants not to have had contested the Claim Petition before the learned Tribunal. Accordingly, a prayer has been made that the appeal be allowed and the Award passed by the learned Motor Accident Claims Tribunal be set aside.

3. The appeal is opposed by the claimants as well as by the respondent-Insurance Company. Mr. Praneet Gupta, learned counsel for the Insurance Company has argued that the present is totally mis-conceived and is an abuse of the process of law for the reason that the appellants have approached this Court without first approaching the learned Tribunal under

the provisions of Order IX of the Code of Civil Procedure for recalling of order in issue as well as the award, in terms whereof, they were proceeded against *ex parte.* Mr. Gupta has further argued that the factum of the present appeal being an abuse of the process of law is apparent from the fact that whereas the ground which has been taken in the appealis that the appellants were condemned unheard, as they did not receive any notice in the claim petition, but fact of the matter is that when Execution Petition was filed against them on the same address, they not only appeared before the learned Executing Court, but also invoked the jurisdiction of this Court by way of this appeal. Learned counsel submitted that all these facts clearly demonstrate that the appellants herein were aware of the pendency of the Claim Petition and despite valid service of notice, they did not put in appearance before the learned Tribunal and this appeal being devoid of any merit is liable to be dismissed. Learned counsel has further argued that a perusal of the grounds of appeal and other pleadings would demonstrate that what has been argued by learned counsel for the appellants is not so pleaded. Accordingly, he submitted that as the pleadings are totally cryptic and vague, therefore also, the present appeal deserves to be dismissed.

4. Learned counsel appearing for the claimants has adopted the arguments of learned counsel for respondent No. 1-Insurance Company.

5. I have heard learned counsel for the parties and have also gone through the award passed by the learned Tribunal as well as the record of the case.

6. The Tribunal below has allowed the Claim Petition by awarding an amount of Rs.7,94,720/- with interest @8% per annum jointly and severally against the present appellants. Further direction passed by the learned Tribunal is that the Insurance Company was directed to initially deposit the award amount and liberty was given to the Insurance Company to recover the same from the present appellants.

7. As the award amount is not subject matter of dispute before this Court, therefore, this Court is not going into the factual matrix which led to the passing of the award by the learned Tribunal. A perusal of the record demonstrates that *ex parte* order passed by the learned Tribunal against the present appellants is based on Speed Post notices issued to the appellants on 08.09.2017 for 04.12.2017. There is no acknowledgment on record from which it can be deciphered that the notices were actually served upon the appellants herein. Operative part of order, dated 04.12.2017, in terms whereof, the present appellants were proceeded against *ex parte* reads as under:-

> *"……Case called several time repeatedly since morning but none appeared on behalf of respondents No. 1 & 2 who have been served through speed post. Notice to respondent No. 1 & 2 were sent through speed post on 12.09.2017 as it is transpired from the postal receipt so placed on record. Notice sent through speed post not received back, as such, it is presumed that respondents No. 1 and 2 have duly been served. Respondent No. 1 & 2 did not appear despite due notice, as such, proceeded against ex parte……."*

8. Section 26 of the Himachal Pradesh General Clauses Act, 1968, *inter alia,* provides that where any Himachal Pradesh Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post. Similarly, Section 27 of the General Clauses Act, 1897 provides as under:-

> *"27. Meaning of service by post.- Where any Central Act or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expression "give" or "send" or any other expression is used, then, unless a different intention appears, the service shall be deemed to be effected by properly addressing, pre-paying and posting by registered post, a letter containing the document, and unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post."*

9. A perusal of the provisions of the General Clauses Act, 1897 as well as the Himachal Pradesh General Clauses Act, 1968 demonstrates that both these Statutes refer to deemed service, provided the notices are served by "Registered Post". In other words, the notices which are sent by way of "Speed Post", but natural, do not carry the fiction of "Deemed Service" in terms of the provisions of the General Clauses Act, 1897 as well as the Himachal Pradesh General Clauses Act, 1968.

10. This Court in *Aar Kay Traders Vs. M/s Satish Electronics*, Latest HLJ 2008 (HP) 1296 has discussed at length the mode of service on defendant residing within the jurisdiction of the Court and outside the jurisdiction of the Court and the conclusion as is mentioned in Para-9 of the judgment reads as under:-

> *"9. As discussed above, the summons can be sent by various modes to shorten the time. The summons can be sent by fax, e-mail, courier service or by speed post. They can also be sent through an officer of the Court. Once the officer of the recipient court receives the summons, the same can be served under rule 23 upon the defendant. The impact of this*

> *sub-rule is that when the court serves summons received through fax or e-mail, they may not bear the actual seal and signature of the court. Obviously, summons sent by fax or e-mail cannot contain the original seal and signature of the court shall have only a facsimile image of the same. A presumption will have to be raised that service of these summons not bearing the original seal or signatures is valid service. The Code of Civil Procedure, recognizes that this is a proper means of service and the defendant cannot urge that the service upon him is not proper only on the ground that the summons received by him do not bear the actual seal and signature of the Court."*

11. Accordingly, in view of what has been discussed hereinabove, this Court has no hesitation in holding that the order, in terms whereof, the appellants herein were proceeded against *ex parte*, i.e., order, dated 04.12.2017, passed by the learned Motor Accident Claims Tribunal-II, Kangra at Dharamshala is not sustainable in the eyes of law, as the notice sent through speed post without any acknowledgement of the same having been received by the parties could not have had amounted to "deemed service" of notice upon the appellants. On this short count, this appeal succeeds. However, as the quantum of award etc. is not in dispute in the present appeal and the only issue which now is there for adjudication is as to whether the claimants are to be indemnified by the appellants or the Insurance Company, therefore, the matter is remanded to the learned Tribunal on this issue, i.e., whether the claimants are to be indemnified by the appellants or the Insurance Company? Learned Tribunal is called upon to decide this issue after giving an opportunity to the appellants therein to submit their reply to the claim petition and thereafter, an opportunity to the Insurance Company to file its rebuttal thereto. Onus to prove this issue will be on the appellants. Parties are also permitted to lead their evidence in this regard. Parties through counsel are directed to appear before the learned Motor Accident Claims

Tribunal/ District Judge Kangra at Dharamshala on 26th December, 2022, who thereafter shall transfer the case to the appropriate Court. It is made clear that even if the claimants are not available before the learned Tribunal, then also the issue which has been framed by this Court shall be adjudicated by the learned Tribunal, as for adjudication thereof, the presence of the Claimants otherwise is not necessary. The amount which has been deposited with the Registry of this Court is ordered to be transferred to the office of learned Tribunal below. The appeal stands disposed of in above terms, so also pending miscellaneous applications, if any.

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

Ajay Grover

.....Petitioner

Versus

State of Himachal Pradesh

.....Respondent

For the Petitioner: Mr. Ajay Kochhar, Mr. Bhupinder Ahuja and Mr. Arun Grover, Advocates.

For the Respondent: Mr. Narender Guleria, Additional Advocate General, with Ms. Svaneel Jaswal, Deputy Advocate General.

Cr.MP(M) No.2270 of 2022
Decided on: 1.12.2022

Code of Criminal Procedure, 1973- Section 439- Bail- **Indian Penal Code**, **1860**- Sections 304, 308, 238, 420, 468, 201, 109 and 120-B- **H.P. Excise Act, 2011**- Sections 39, 40 and 41- Bail- Seven persons lost their lives and 14 others got sick/injured due to consumption of spurious country made liquor- **Held**- There is no cogent and convincing evidence to prove the aforesaid allegation- There is no document to substantiate aforesaid claim of the prosecution- At this stage it would be too premature to conclude the guilt, if any, of the petitioner under Sections 304, 308, 328, 420, 468, 471, 201, 109 and 120-B of IPC and Sections 39, 40 and 41 of HP Excise Act-Bail petition allowed. (Para 18)

Cases referred:

Manoranjana Sinh Alias Gupta versus CBI 2017 (5) SCC 218;
Prasanta Kumar Sarkar v. Ashis Chatterjee and Another (2010) 14 SCC 496;
Sanjay Chandra vs. Central Bureau of Investigation (2012)1 SCC 49;
Umarmia Alias Mamumia v. State of Gujarat, (2017) 2 SCC 731;

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Bail petitioner namely Ajay Grover, who is behind the bars since 26.1.2022, has approached this court in the instant proceedings filed under Section 439 Cr.PC, for grant of regular bail, in case FIR No. 15/2022 dated 19.1.2022, registered at Police Station Sundernagar, District Mandi, Himachal Pradesh, under Sections 304, 308, 328, 420, 468, 471, 201, 109 and 120-B of IPC and Sections 39, 40 and 41 of the HP Excise Act.

2. Pursuant to order dated 21.11.2022, respondent-state has filed the status report. ASI Dev Raj, PS Sundernagar, has also come present with the records. Records perused and returned.

3. Close scrutiny of record/status report reveals that on 19.1.2022 at 2:30 pm, Police Station Balh, after having received telephonic information from the Ner Chawk hospital that few persons after having consumed spurious country made liquor have fallen ill, visited the Hospital at Ner Chowk and recorded the statement of complainant Sohan Singh i.e. brother of deceased Lal Singh under Section 154 CPC, who alleged that on 17.1.2022 at 7:00AM, his deceased brother had gone to Slappar driving tipper, but on 18.1.2022, it transpired that his brother has fallen ill after consuming spurious liquor. He alleged that though deceased Lal Singh was taken to hospital for treatment, but he unfortunately died. He alleged that few other persons, who had also consumed country made spurious liquor have also expired and some of them are under treatment. In the aforesaid background, FIR detailed herein above, came to be lodged against the various persons named in the FIR, including the present bail petitioner. In nutshell, case of the prosecution is that on consuming the spurious country made liquor, seven persons lost their lives and 14 others got sick/injured. During investigation, it transpired that present bail petitioner, who was one of the

partner of the M/s Aakash Chemicals, had supplied 170 drums/12000 ltrs of spirit through co-accused Santosh Kumar to the alleged manufacturers of country made liquor. As per prosecution, present bail petitioner called co-accused Santosh on mobile number to inform that one truck containing 12000 ltrs of spirit is coming to Baddi, which he may store in the store of M/s Aakash Chemicals. Co-accused Santosh Kumar allegedly unloaded the spirit with the assistance of person namely Bir Singh, Ashok, Mahender and Jamura and thereafter, stored 170 drums in the store of M/s Aakash Chemicals. Subsequently, above named Santosh Kumar allegedly sold the spirit in different quantities on different dates to different accused persons, viz. Gaurav Minhas alias Goru, Virender alias Gagan, Gurdev and Anil Kumar alias Manu etc., for manufacturing spurious country liquor. Since on 4.01.2022, Gurmit Singh driver of the co-accused Virender died after consuming the spirit, Virender Singh asked Santosh Kumar for testing the spirit contained in the drums. At his insistence, co-accused Santosh sent one litre spirit sample obtained from these drums for testing to 'Auriga Lab under the name of M/s Yamuna Beverages Pvt. Ltd. Report received by co-accused Santosh Kumar in this regard on 12.1.2022, was forwarded through whatsapp to the present bail petitioner, who confirmed the report to be correct. Subsequently, using this spirit, the accused Virender alias Gagan illegally manufactured spurious country liquor marked "Santra" and supplied in Salapar area causing deaths of several persons and injuries to various others. Since spirit, with which spurious country made liquor came to be manufactured, was supplied allegedly at the instructions of the petitioner, he alongwith other persons also came to be named in the FIR. There are total thirty accused named in the FIR and out of which, 18 accused already stand enlarged on bail. Present bail petitioner had also approached this Court by way of Cr.MPM No. 923 of 2022, but same was dismissed on 22.7.2022 on the ground that there is nothing available on record to suggest that persons died

or fell ill had not consumed the liquor made from the spirit supplied by the petitioner. Since challan stands filed in the competent court of law and nothing remains to be recovered from the bail petitioner, he has approached this Court in the instant proceedings, praying therein for grant of regular bail.

4. Mr. Narender Guleria, learned Additional Advocate General while fairly admitting factum with regard to filing of the challan in the competent court of law contends that though nothing remains to be recovered from the bail petitioner, but keeping in view the gravity of offence alleged to have been committed by him, he does not deserve any leniency. Mr. Guleria submits that after having consumed spurious liquor made from the spirit supplied by the petitioner, eight persons have lost their lives and many have fallen sick and as such, it may not be in the interest of justice to enlarge the petitioner on the bail, who in the event of being enlarged on the bail, may not only flee from the justice, but can also temper with the prosecution evidence. Mr. Guleria further submits that though sample taken from 126 drums got recovered by Santosh Kumar, suggests that spirit supplied through these drums was not containing methyl alcohol, but since eight people have lost their lives after consuming spurious liquor, it cannot be said that petitioner has been falsely implicated.

5. Mr. Ajay Kochhar, learned counsel for the petitioner duly assisted by Mr. Bhupinder Ahuja, Advocate, while refuting the aforesaid submissions made by the learned Additional Advocate General submits that though status report itself suggests that one Gurmit, driver of co-accused Virender died after having consumed liquor made from the spirit supplied by the co-accused Ladi, but even if it is presumed that bail petitioner had supplied the spirit, enabling the other co-accused to manufacture spurious country made liquior, there is no evidence available on record suggestive of the fact that spirit supplied by the petitioner was containing methyl alcohol, which was the cause of death of the brother of the complainant and other

persons as has been opined in the post mortem report. While referring to the FSL report given qua the samples drawn from 126 drums recovered by the investigating agency on the disclosure made by the co-accused Santosh, Mr. Kochhar states that no point of time, it has been opined that spirit supplied by the present bail petitioner was containing methyl alcohol, rather it has been categorically stated that sprit supplied through 126 drums was containing ethyl alcohol. Mr. Kochhar, further contends that all the prime accused, who sold the spurious liquor already stand enlarged on bail and as such, petitioner whose complicity if any, is yet to be established in the alleged commission of offence under Sections 304, 308, 328, 420, 468, 471, 201, 109 and 120-B of IPC and Sections 39, 40 and 41 of HP Excise Act, also deserves to be enlarged on bail, especially when he has already suffered for more than ten months.

6. Having heard learned counsel for the parties and perused material available on this record, this Court finds that precise case of the prosecution against the bail petitioner is that he had supplied 12000 liters of spirit containing methyl alcohol, enabling other accused to manufacture the country made spurious liquor. It has been further alleged that on account of consumption of spurious country made liquor, seven persons lost their lives and 14 persons were got injured/ill. Allegedly, co-accused Santosh, who had supplied the spirit to other co-accused, enabling them to manufacture the spurious country made liquor, disclosed to the police that he had stored the spirit in the store of M/s Aakash Chemicals Baddi on the askance of the present bail petitioner. It has nowhere come in the statement of co-accused Santosh that present bail petitioner, who is stated to be one of the partner of M/s Aakash Chemicals, instructed him to supply the spirit to other persons, enabling them to manufacture spurious country made liquor. As per own admission of the co-accused Santosh, he with the help and aid of persons namely Bir Singh, Ashok, Mahender and Jamura sold the spirit in different

quantities on different dates to different accused persons, viz. Gaurav Minhas alias Goru, Virender alias Gagan, Gurdev and Anil Kumar alias Manu etc., who allegedly after manufacturing the spurious liquor supplied to the local vendors in Slappar, from where brother of the complainant and other injured persons purchased the same and died or fell ill after having consumed the spurious country made liquor.

7. Though learned Additional Advocate General vehemently argued that 126 drums recovered at the instance of the co-accused Santosh containing spirit were supplied by present bail petitioner, but there is no cogent and convincing evidence to prove the aforesaid allegation. Though prosecution has claimed that present bail petitioner before becoming partner in M/s Aakash Chemicals was authorized agent of M/s Yamuna Beverages Pvt. Ltd., Paonta Sahib, but at this stage, there is no document to substantiate aforesaid claim of the prosecution. Even if it is presumed that present bail petitioner was authorized agent of M/s Yamuna Beverage Pvt. Ltd., it is not understood how he being authorized agent could arrange for huge quantity of spirit for further supply to the accused named in the FIR, enabling them to manufacturer spurious country made liquor because there is nothing on record to suggest that M/s Yamuna Beverages ever lodged complaint/FIR against such person for having mis-used the spirit lying in their stores. Moreover, status report as well as record made available to this Court is conspicuously silent about the source of spirit allegedly used by persons for making country made spurious liquor. Interestingly, FSL in its report has opined that samples drawn from 126 drums recovered at the behest of co-accused Santosh, contained ethyl alcohol, whereas cause of death, as has been shown in the post mortem report, is consumption of methyl alcohol. Since methyl alcohol was never found in the spirit allegedly supplied by the present bail petitioner to other co-accused for manufacturing spurious country made liquor, it would be too premature at this stage to

conclude the guilt, if any, of the petitioner under Sections 304, 308, 328, 420, 468, 471, 201, 109 and 120-B of IPC and Sections 39, 40 and 41 of HP Excise Act. Moreover, this Court finds from the status report that as per own case of the prosecution, five drums of spirit were supplied by another co-accused Ladi and driver, who transported such drums, died after having consumed that spirit, meaning thereby, spirit supplied by co-accused Ladi was containing some adulterated substance. Interestingly, prosecution failed to apprehend five drums of spirit supplied by Ladi, who is otherwise absconding till date. Apart from above, it is own case of the prosecution that co-accused Virender Kumar, Gurdev, Anil and Rakesh manufactured the country made spurious liquor from the spirit supplied by co-accused Ladi, which was further supplied through co-accused Surender Kumar in Slappar area from where brother of the complainant and other injured had purchased the liquor.

8. At this stage, learned Additional Advocate General forcefully submits that since all the grounds raised in the petition had already been considered and decided by coordinate Bench of this Court while deciding Cr.MP(M) No. 923 of 2022, whereby prayer for grant of regular bail made by the petitioner was rejected, present petition is not maintainable because there is no changed circumstance. However, having carefully perused copy of order dated 22.7.2022 passed by the coordinate Bench of this Court, this Court finds no force in the aforesaid submission of learned Additional Advocate General because at that time though challan was filed, but report of FSL with regard to content of spirit allegedly supplied through 126 drums was not available. Admittedly, copy of FSL report was supplied alongwith copy of challan on 27.8.2022 to the accused, which fact has not been disputed by learned Additional Advocate General. Moreover, if the reasons cited by the coordinate Bench of this Court rejecting earlier bail are perused, it clearly reveal that at that time, court had no material to decipher whether persons died or fell ill after having consumed spurious liquor supplied by the bail

petitioner or not. Though in the case at hand, precise case of the prosecution is that spurious country made liquor was made by the co-accused Gurdev, Virender, Anil and Rakesh by using spirit supplied to them by co-accused Ladi, but even if, for the sake of argument, it is accepted that present bail petitioner had supplied the spirit to Santosh co-accused, but since samples drawn from the drums, got recovered by the co-accused Santosh, had been found to be containing ethyl alcohol, prayer made on behalf of the petitioner for grant of bail, deserves to be accepted. No doubt, seven persons have lost their lives, but the court cannot lose sight of the fact that guilt, if any, of the bail petitioner is yet to be established on record by leading cogent and convincing evidence. Though case at hand is to be decided by the court below in the totality of facts/evidence collected on record by the prosecution, but keeping in view the aforesaid glaring aspect of the matter, there appears to be no reason for this court to curtail the freedom of the bail petitioner for indefinite period, especially when he has already suffered for more than ten months. Hon'ble Apex Court as well as this Court in catena of cases have repeatedly held that one is deemed to be innocent till the time guilt, if any, of his/her is not proved in accordance with law. In the case at hand also, guilt, if any, of the accused is yet to be proved in accordance with law, by leading cogent and convincing material on record. No doubt gravity of offence is a major factor to be kept in mind by the court while considering bail, but it has been repeatedly held by the Hon'ble Apex Court that while considering gravity of offence alleged to have been committed by a person, court is also required to keep several other factors in mind. Apprehension expressed by the learned Additional Advocate General that in the event of petitioner's being enlarged on bail, he may flee from justice, can be best met by putting the bail petitioner to stringent conditions as has been fairly stated by the learned counsel for the petitioner.There is another aspect of the matter i.e. delay in conclusion of the trial. In the instant case, petitioner is behind bars for last

ten months, but till date, charge has been not framed. After framing of charge, considerable time is likely to be consumed in recording the evidence and as such, it may not be in the interest of justice to curtail the freedom of the bail petitioner for indefinite period.

9. Hon'ble Apex Court in case titl***ed Umarmia Alias Mamumia v. State of Gujarat*, (2017) 2 SCC 731**, has held delay in criminal trial to be in violation of right guaranteed to an accused under Article 21 of the Constitution of India. Relevant para of the afore judgment reads as under:-

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

10. Reliance is placed upon judgment passed by Hon'ble Apex Court in **Union of India v. K.A. Najeeb, Criminal Appeal No. 98 of 2021**, wherein it has been held as under:

> "18. It is thus clear to us that the presence of statutory restrictions like Section 43D (5) of UAPA perse does not oust the ability of Constitutional Courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a Statue as well as the powers exercisable under Constitutional Jurisdiction can be well harmonised. Whereas at commencement of proceedings, Courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a

> substantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43D (5) of UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial."

11. Reliance is also placed upon judgment passed by Hon'ble Apex Court in **Prabhakar Tewari v. State of U.P. and Anr, Criminal Appeal No. 152 of 2020**, wherein it has been held as under:

> "2. The accused is Malkhan Singh in this appeal. He was named in the FIR by the appellant Prabhakar Tewari as one of the five persons who had intercepted the motorcycle on which the deceased victim was riding, in front of Warisganj Railway Station (Halt) on the highway. All the five accused persons, including Malkhan Singh, as per the F.I.R. and majority of the witness statements, had fired several rounds upon the deceased victim. The statement of Rahul Tewari recorded on 15th March, 2019, Shubham Tewari recorded on 12 th April, 2019 and Mahipam Mishra recorded on 20th April 2019 giving description of the offending incident has been relied upon by the appellant. It is also submitted that there are other criminal cases pending against him. Learned counsel for the accused- respondent no.2 has however pointed out the delay in recording the witness statements. The accused has been in custody for about seven months. In this case also, we find no error or impropriety in exercise of discretion by the High Court in granting bail to the accused Malkhan Singh. The reason why we come to this conclusion is broadly the same as in the previous appeal. This appeal is also dismissed and the order of the High Court is affirmed."

12. In the aforesaid judgments, Hon'ble Apex Court has held that while considering the prayer for grant of bail, Courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence.

13. 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.

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

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

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

> *(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;*

(ii) nature and gravity of the accusation;
(iii) severity of the punishment in the event of conviction;
(iv) danger of the accused absconding or fleeing, if released on bail;
(v) character, behaviour, means, position and standing of the accused;
(vi) likelihood of the offence being repeated;
(vii) reasonable apprehension of the witnesses being influenced; and
(viii) danger, of course, of justice being thwarted by grant of bail.

17. 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.*

18. In view of the aforesaid discussion as well as law laid down by the Hon'ble Apex Court, petitioner has carved out a case for grant of bail, accordingly, the petition is allowed and the petitioner is ordered to be enlarged on bail in aforesaid FIR, subject to his furnishing personal bond in the sum of Rs. 5,00,000/- with two local sureties in the like amount to the satisfaction of concerned Chief Judicial Magistrate/trial Court, with following conditions:

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

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

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

21. The petitioner is permitted to produce copy of order downloaded from the High Court Website and the trial court shall not insist for certified copy of the order, however, it may verify the order from the High Court website or otherwise.

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

Ranjan Singh

.....Petitioner

Versus

Surat Singh Baniyat and Anr.

.....Respondents

For the Petitioner: Mr. N.K. Tomar, Advocate.

For the Respondents: Mr. V.S. Rathour, Advocate, for respondent No.1.

Mr. Narender Guleria, Additional Advocate General, with Mr. Sunny Dhatwalia, Assistant Advocate General, for the State.

Criminal Revision No. 162 of 2019
Decided on: 22.11.2022

Code of Criminal Procedure, 1973- Sections 397, 401- **Negotiable Instruments Act, 1881-** Sections 138 & 139 - Dishonour of cheque - Trial Court convicting accused for dishonor of cheque- Additional Sessions Judge upholding conviction- Revision against- **Held** - Neither issuance of cheque nor signature thereupon has been denied by the accused- Having scanned the entire evidence led on record by the complainant, there appears to be no illegality and infirmity committed by the courts below while passing the judgments impugned in the instant proceedings- Revision dismissed - Conviction Upheld. (Para 16)

Cases referred:

Krishnan and another Vs. Krishnaveni and another, (1997) 4 SCC 241;
M/s Laxmi Dyechem V. State of Gujarat, 2013(1) RCR(Criminal);
State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri" (1999) 2 SCC 452;

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant criminal revision petition filed under Section 397 of Cr.PC read with Section 401 Cr.PC, lays challenge to judgment dated 11.12.2018, passed by the learned Additional Sessions Judge-I, Shimla, Camp at Rohru, HP, in Criminal Appeal No. 26-R/10 of 2018, affirming judgment of conviction and order of sentence dated 06/16.8.2018, passed by the learned Chief Judicial Magistrate, Court No.1, Rohru, District Shimla, H.P., in Case No. 16-3 of 2016, whereby the learned trial Court while holding the petitioner-accused guilty of having committed offence punishable under Section 138 of the Negotiable Instruments Act (in short the "Act"), convicted and sentenced him to undergo simple imprisonment for a period of one year and pay compensation to the tune of Rs. 10,00,000/- to the complainant.

2. Precisely, the facts of the case, as emerge from the record are that complainant being known to the accused, on his request advanced sum of Rs. 7.00 lac to him, who with a view to discharge his liability, issued cheque bearing No. 059092 dated 28.10.2015 amounting to Rs. 7,00,000/-drawn at SBI Branch Mori, but fact remains that aforesaid cheque on its presentation to the bank concerned, was dishonoured. Since petitioner-accused failed to make the payment good within the time stipulated in the legal notice, respondent/complainant was compelled to initiate proceedings before the competent Court of law under Section 138 of the Act.

3. Learned trial Court on the basis of material adduced on record by the respective parties, vide judgment dated 6/16.8.2018, held the petitioner-accused guilty of having committed offence under Section 138 of the Act and accordingly, convicted and sentenced him as per the description given herein above.

4. Being aggrieved and dissatisfied with the aforesaid judgment of conviction recorded by the court below, accused preferred an appeal in the

court of learned Additional Sessions Judge-I, Shimla, Camp at Rohru, H.P, which also came to be dismissed vide judgment dated 11.12.2018, as a consequence of which, judgment of conviction recorded by the learned trial Court came to be upheld. In the aforesaid background, present petitioner-accused has approached this Court by way of instant proceedings, seeking therein his acquittal after setting aside the judgment of conviction recorded by the court below.

5. Vide order dated 2.5.2019, this Court suspended the substantive sentence imposed by the court below subject to petitioner's depositing 50% of the compensation amount, however fact remains that aforesaid order never came to be complied with and matter was repeatedly adjourned on the request of learned counsel for the petitioner-accused, enabling him to make the payment. Though at one point of time, undertaking was also given by the petitioner to this court that he will pay the entire amount, but fact remains that neither amount was deposited nor petitioner despite repeated orders came present before this Court and as such, this court has no option, but decide the case on its own merits.

6. Having heard learned counsel for the parties and perused the material available on record vis-à-vis reasoning assigned in the judgment passed by the courts below, this Court finds no illegality and infirmity in the same, rather same appear to be based upon proper appreciation of the evidence led on record by the respective parties. Neither issuance of cheque nor signature thereupon has been denied by the accused, rather in his statement recorded under Section 313 Cr.PC, he has simply stated that he had issued blank cheque in favour of the complainant as security. Since accused never disputed the factum with regard to issuance of cheque as well as signature thereupon, there is presumption in favour of the complainant in terms of provisions contained in Section 118 and 139 of the Act that cheque was issued in his favour for discharge of lawful liability. No doubt, aforesaid

presumption is rebuttable, but for that purpose, accused is/was under obligation to raise probable defence. Probable defence could be raised by the accused by referring to the documents adduced on record by the complainant or by leading some cogent and convincing evidence. However, in the case at hand, accused, despite ample opportunities, failed to lead the evidence in defence and raise the probable defence.

7. The Hon'ble Apex Court in ***M/s Laxmi Dyechem V. State of Gujarat***, 2013(1) RCR(Criminal), has categorically held that if the accused is able to establish a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. To raise probable defence, accused can rely on the materials submitted by the complainant. Needless to say, if the accused/drawer of the cheque in question neither raises a probable defence nor able to contest existence of a legally enforceable debt or liability, statutory presumption under Section 139 of the Negotiable Instruments Act, regarding commission of the offence comes into play. It would be profitable to reproduce relevant paras No.23 to 25 of the judgment herein:-

2. ***"23. Further, a three judge Bench of this Court in the matter of Rangappa vs. Sri Mohan [3] held that Section 139 is an example of a reverse onus clause that has been included in furtherance of the legislative objective of improving the credibility of negotiable instruments. While Section 138 of the Act specifies the strong criminal remedy in relation to the dishonour of the cheques, the rebuttable presumption under Section 139 is a device to prevent undue delay in the course of litigation. The Court however, further observed that it must be remembered that the offence made punishable by Section 138can be better described as a regulatory offence since the bouncing of a cheque is largely in the nature of a civil wrong whose money is usually confined to the private parties involved in commercial transactions. In such a scenario, the test of proportionality should guide the construction and interpretation of reverse***

onus clauses and the defendant accused cannot be expected to discharge an unduly high standard of proof". The Court further observed that it is a settled position that when an accused has to rebut the presumption under Section 139, the standard of proof for doing so is all preponderance of probabilities.

3. ***24. Therefore, if the accused is able to establish a probable defence which creates doubt about the existence of a legally enforceable debt or liability, the prosecution can fail. The accused can rely on the materials submitted by the complainant in order to raise such a defence and it is inconceivable that in some cases the accused may not need to adduce the evidence of his/her own. If however, the accused/drawer of a cheque in question neither raises a probable defence nor able to contest existence of a legally enforceable debt or liability, obviously statutory presumption under Section 139 of the NI Act regarding commission of the offence comes into play if the same is not rebutted with regard to the materials submitted by the complainant.***

4. ***25. It is no doubt true that the dishonour of cheques in order to qualify for prosecution under Section 138 of the NI Act precedes a statutory notice where the drawer is called upon by allowing him to avail the opportunity to arrange the payment of the amount covered by the cheque and it is only when the drawer despite the receipt of such a notice and despite the opportunity to make the payment within the time stipulated under the statute does not pay the amount, that the said default would be considered a dishonour constituting an offence, hence punishable. But even in such cases, the question whether or not there was lawfully recoverable debt or liability for discharge whereof the cheque was issued, would be a matter that the trial court will have to examine having regard to the evidence adduced before it keeping in view the statutory presumption that unless rebutted, the cheque is presumed to have been issued for a valid consideration. In view of this the responsibility of the trial judge while issuing summons to conduct the trial in matters where there has been instruction to stop payment despite sufficiency of funds and whether the same would be a***

sufficient ground to proceed in the matter, would be extremely heavy."

8. In his statement recorded under Section 313 Cr.PC., the accused admitted that he had to pay only sum of Rs. 3,47,000/- in lieu of the business transaction. He stated that he had issued a blank cheque as security, however he has not been able to probablize the aforesaid defence by leading cogent and convincing evidence. In case, accused had already paid the aforesaid amount allegedly taken by him from the complainant, he was required to explain that why he did not take steps, if any, to get the cheque issued by him as security back from the complainant.

9. In the case at hand, complainant tendered the evidence by way of affidavit Ex.CW1/A in examination in chief and also tendered documents Ext.CW1/B and Ext.CW1/C in evidence. In his cross-examination, he stated that he is contractor by profession and earns rupees 60 to 70 lacs per year and he also used to file ITR. He also admitted that he has not annexed any income tax return with his complaint. He deposed that apart from this contractor ship, he also deals in apple business. He deposed that in routine manner, he used to keep Rs.2-3 lac in his house as he has to make payment to the labourers. He specifically denied the suggestion put to him that he himself filled cheque Ext.CW2/A. He also denied that accused had only received Rs. 1.00 lac from him and cheque given to him was security and was mis-used by him. CW2 Amit Pal Singh, Assistant Manager, SBI Rohru, categorically deposed that cheque Ext.CW2/A came to his bank for recovery and same was dishonoured vide memo Ext.CW2/B for want of sufficient funds.

10. Accused while examining himself as DW1 deposed that complainant is known to him and he had paid loan to him through someone for the purpose of work. He also stated that complainant had paid Rs. 15,50,000/- through someone and he had returned the entire amount except

Rs. 3,47,000/-. He further stated that he had handed over the blank cheque to Sh. Kushal Singh, but as a security. In his cross-examination, he admitted that Cheque was issued by him and it bears his signatures. He also admitted that his bank account is in SBI, Mori. He also admitted that cheque is multicity cheque. He deposed that amount was paid to him in 2014. He deposed that Sh. Kushal Singh Rawat is resident of his village and he has not cited him as witness. He specifically denied that he had borrowed Rs. 7.00 lac from the complainant. He also admitted the receipt of demand notice.

11. Having scanned the entire evidence, be it ocular or documentary, led on record by the complainant, there appears to be no illegality and infirmity committed by the court below while passing the judgment impugned in the instant proceedings. Complainant successfully proved on record that he had lent sum of Rs. 7.00 lac to the accused, who with a view to discharge his liability, issued cheque amounting to Rs. 7,00,000/-, but same was dishonored on account of insufficient funds. In the case at hand, complainant successfully proved on record all the ingredients of Section 138 of the Act and as such, no illegality can be said to have been committed by the courts below while holding the petitioner-accused guilty of having committed offence punishable under Section 138 of the Act and as such, same have been rightly upheld by the courts below.

12. Moreover, this Court has a very limited jurisdiction under Section 397 of the Cr.PC, to re-appreciate the evidence, especially, in view of the concurrent findings of fact and law recorded by the courts below. In this regard, reliance is placed upon the judgment passed by Hon'ble Apex Court in case ***"State of Kerala Vs. Puttumana Illath Jathavedan Namboodiri"*** *(*1999) 2 Supreme Court Cases 452, wherein it has been held as under:-

> 5. ***"In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. In***

> ***other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to re-appreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice."***

6.

13. Since after having carefully examined the evidence in the present case, this Court is unable to find any error of law as well as fact, if any, committed by the courts below while passing impugned judgments, and as such, there is no occasion, whatsoever, to exercise the revisional power.

14. True it is that the Hon'ble Apex Court in ***Krishnan and another*** *Versus* ***Krishnaveni and another,*** **(1997) 4 Supreme Court Case 241**; has held that in case Court notices that there is a failure of justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities/ incorrectness committed by inferior criminal court in its judicial process or illegality of sentence or order, but learned counsel representing the accused has failed to point out any material irregularity committed by the courts below while appreciating the evidence and as such, this Court sees no reason to interfere with the well reasoned judgments passed by the courts below.

15. Consequently, in view of the discussion made herein above as well as law laid down by the Hon'ble Apex Court, this Court sees no valid reason to interfere with the well reasoned finding recorded by the courts below, which otherwise, appear to be based upon proper appreciation of evidence available on record and as such, same are upheld.

16. Accordingly, the present revision petition is dismissed being devoid of any merit. The petitioner is directed to surrender himself before the learned trial Court forthwith to serve the sentence as awarded by the learned trial Court, if not already served. Interim direction, if any, stands vacated. Pending applications, if any, also stand disposed of.

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

Rajat Kumar. ...Petitioner.

Versus

State of Himachal Pradesh & others. ...Respondents.

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

For the Respondents: *Ms.Seema Sharma, Deputy Advocate General, for respondent No. 1.*

Mr.Y.P.S. Dhaulta, Advocate, for respondents No. 2 to 4.

Cr.MMO No.396 of 2020

Decided on: 29.11.2022

Code of Criminal Procedure, 1973- Sections 482, 156(3), 197- Inherent power- Application filed by petitioner for registration of FIR against respondents- Dismissed by Judicial Magistrate First Class for want of sanction under Section 197 Cr.P.C- **Held**- At the stage of directing the Police to investigate the matter provisions of Section 197 Cr.P.C. shall not be attracted- Order of Trial Court set aside. (Para 4)

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge (Oral)

Petitioner has approached this Court against order dated 14.7.2020 passed by Judicial Magistrate First Class, Court No. 2, Amb, District Una, H.P. in case No. 102-1-2020, titled Rajat Kumar Vs. Sushil Kumar and others, whereby application filed by the petitioner under Section 156(3) of the Code of Criminal Procedure (for short Cr.P.C.) for registration of FIR against respondents has been dismissed for want of sanction under

Section 197 Cr.P.C., on the ground that respondents No. 3 and 4 (respondents No. 2 and 3 before the Magistrate) are Government servants and for taking cognizance of a criminal offence committed by them during discharge of their official duty, there shall be requirement of sanction under Section 197 Cr.P.C.

2. Section 156(3) Cr.P.C. empowers any Magistrate, empowered under Section 190 of Cr.P.C., to order such an investigation as provided under sub Section (1) and (2) of Section 156, which provides that any Officer Incharge of Police Station may, without the order of the Magistrate, investigate any cognizable case, which a Court having jurisdiction over the local area, within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.

3. Passing of an order directing the Police to investigate the matter does not amount to taking cognizance of a criminal case for commission of offence by the person against whom application has been filed. Whether any offence has been committed or not shall be subject matter of investigation and, therefore, at the stage of directing the Police to investigate the matter provisions of Section 197 of Cr.P.C. shall not be attracted.

4. In view of above, I find that the Magistrate has committed a mistake by dismissing the application under Section 156(3) Cr.P.C. for want of sanction for prosecution under Section 197 of Cr.P.C. Accordingly, impugned order dated 14.7.2020 is set aside and matter is directed to be restored before the Magistrate to its original position with direction to the Magistrate to proceed further in accordance with law and to decide the application on merits as to whether a case for direction to investigate is made out or not and to pass appropriate order without being influenced by any observations made by this Court herein above.

5. Parties are directed to appear before the Magistrate on 5th January, 2023. Registry to transmit copy of this order to the Magistrate for necessary compliance.

6. The parties are permitted to produce copy of order downloaded from the High Court website before the trial Court and trial Court shall not insist for certified copy of the order, however, if required, passing of order can be verified from the High Court website or otherwise.

The petition stands disposed of with aforesaid observations, so also pending applications, if any.

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

Satvinder Singh Padda. …Petitioner.

Versus

Virender Kumar. …Respondent.

For the Petitioner. *Mr.Mukul Sood, Advocate.*
For the Respondent: *Nemo.*

Cr. Appeal No. 246 of 2022
Date of decision: 18.11.2022

Code of Criminal Procedure, 1973- Section 378(4), 256- **Negotiable Instruments Act, 1881-** Sections 138 & 139- Dishonour of cheque- Complaint dismissed in default for non-appearance of petitioner or his counsel when the case was listed for service of respondent- **Held**- The witnesses on behalf of the complainant already examined, the Court was required to pass a judgment on merits in the matter- Magistrate was not justified in dismissing the complaint- Appeal allowed- Order set aside- Complaint restored. (Paras 20, 21)

Cases referred:
Associated Cement Co. Ltd. versus Keshvanand, (1998) 1 SCC 687;
Boby versus Vineet Kumar, Latest HLJ 2009 (HP) 723;
Dole Raj Thakur versus Jagdish Shishodia, Latest HLJ 2018 (HP) 296;
Dole Raj Thakur versus Pankaj Prashar, Latest HLJ 2018(HP) 266;
M/s Accord Plantations Pvt. Ltd. & another, 2008 (2) Latest HLJ 1249;
Mohd. Azeem versus A. Venkatesh and another, (2002) 7 SCC 726;
S. Anand versus Vasumathi Chandrasekar, (2008) 4 SCC 67;
Vinay Kumar versus State of U.P. & Anr., 2007 Cri.L.J. 3161;

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge (Oral)

Present appeal has been filed against impugned order dated 13.12.2021 passed by Judicial Magistrate 1st Class, Kangra, District Kangra

(hereinafter referred to as "Magistrate") in Criminal Case No. 117-3/2019, whereby the complaint filed by appellant-Satvinder Singh Padda against respondent-Virender Kumar under Section 138 of the Negotiable Instruments Act (hereinafter referred to as "NI Act"), has been dismissed in default for non-appearance of petitioner or his counsel when the case was listed for service of respondent.

2. As the complaint filed by the appellant has been dismissed prior to the service of respondent Virender Kumar in the trial Court and impugned order has been passed in his absence, therefore, it has not been considered appropriate to issue the notice to respondent for the purpose of deciding present appeal. However, record of the trial Court has been summoned and perused.

3. The impugned order passed by the Magistrate is reproduced herein:-

> "***13.12.2021***
>
> *Present: None for the complainant.*
>
> *None appeared on behalf of the complainant, despite the fact that complainant was duly represented by a counsel on the previous dates of hearing. It is 11:00 A.M. Be called against after some respite.*
>
> *Sd/-*
> *(Shweta Narla)*
> *Judicial Magistrate First Class,*
> *Kangra, Distt. Kangra (HP)*
>
> ***13.12.2021***
>
> *Present: As above.*
>
> *Taken up again. Case called repeatedly since morning, but none appeared for complainant. It is 3:50 P.M. Remaining cause list is almost exhausted. Hence, the present complaint under Section 138 of the Negotiable Instrument Act is dismissed in default. File after due completion be consigned to record room.*

Announced
1`3.12.2021

Sd/-
(Shweta Narula)
Judicial Magistrate Fist Class,
Kangra Distt. Kangra (HP)"

4. In view of Section 143 of the NI Act, offence under Section 138 of the NI Act is to be tried summarily and accordingly, procedure for summons case provided in Chapter XX of the Code of Criminal Procedure (hereinafter referred to as "CrPC") is applicable during the trial initiated on filing a complaint under Section 138 of the NI Act. In this Chapter, Section 256 CrPC deals with a situation of non-appearance or death of complainant.

5. I am in agreement with finding returned by Allahabad High Court in case titled as ***Vinay Kumar versus State of U.P. & Anr.***, reported in ***2007 Cri.L.J. 3161***, and another judgment passed by co-ordinate Bench of this Court in case titled as N.K. Sharma versus ***M/s Accord Plantations Pvt. Ltd. & another***, reported in ***2008 (2) Latest HLJ 1249*** with respect to applicability of Section 256 CrPC in a complaint filed under Section 138 of the NI Act.

6. I deem it proper to reproduce Section 256 CrPC herein:

> *"256. Non-appearance or death of complainant. - (1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:*
> *Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the*

> *complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.*
> *(2) The provisions of sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death."*

7. Section 256 CrPC provides discretion to the Magistrate either to acquit the accused or to adjourn the case for some other day, if he thinks it proper. Proviso to this Section also empowers the Magistrate to dispense with the complainant from his personal attendance if it is found not necessary and to proceed with the case. Also, when the complainant is represented by a pleader or by the officer conducting the prosecution, the Magistrate may proceed with the case in absence of the complainant.

8. When the Magistrate, in a summons case, dismisses the complaint and acquits the accused due to absence of complainant on the date of hearing, it becomes final and it cannot be restored in view of Section 362 CrPC, which reads as under:

> *"**362. Court not to alter judgment**. - Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error."*

9. Keeping in view the effect of dismissal of complaint under Section 138 of the NI Act, the apex Court in case titled as ***Associated Cement Co. Ltd. versus Keshvanand***, reported in ***(1998) 1 Supreme Court Cases 687***, after discussing the object and scope of Section 256 CrPC, has held that, though, the Section affords protection to an accused against dilatory tactics on the part of the complainant, but, at the same time, it does not mean that if the complainant is absent, the Court has duty to acquit the accused in invitum. It has further been held in the said judgment that the discretion under Section 256 CrPC must be exercised judicially and fairly without impairing the cause of administration of criminal justice.

10. Similarly, the apex Court in case titled as ***Mohd. Azeem versus A. Venkatesh and another***, reported in ***(2002) 7 Supreme Court Cases 726***, has considered dismissal of the complaint on account of one singular default in appearance on the part of the complainant as a very strict and unjust attitude resulting in failure of justice.

11. Also in case titled as ***S. Anand versus Vasumathi Chandrasekar***, reported in ***(2008) 4 Supreme Court Cases 67***, wherein the complaint under Section 138 of the NI Act was dismissed by the trial Court exercising the power under Section 256 CrPC on failure of the complainant or her power of attorney or the lawyer appointed by her to appear in Court on the date of hearing fixed for examination of witnesses on behalf of the defence, the apex Court has considered as to whether provisions of Section 256 CrPC, providing for disposal of a complaint in default, could have been resorted to in the facts of the case as the witnesses on behalf of the complainant have already been examined and it has been held that in such a situation, particularly, when the accused had been examined under Section 313 CrPC, the Court was required to pass a judgment on merit in the matter.

12. This Court in ***N.K. Sharma's*** case (supra) also, relying upon in ***Associated Cement Co. Ltd.'s*** case (supra), has held that when the Court notices that complainant is absent on a particular day, the Court must consider whether the personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason and if the situation does not justify the case being adjourned, then only Court is free to dismiss the complaint and acquit the accused, but if the presence of complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of power envisaged under Section 256 CrPC.

13. This Court in another case titled as ***Boby versus Vineet Kumar***, reported in ***Latest HLJ 2009 (HP) 723***, has reiterated ratio of law laid down in N.K. Sharma' case (supra), again relying upon in ***Associated Cement Co. Ltd.'s*** case (supra).

14. Coordinate Bench of this Court in ***Criminal Appeal No. 367 of 2015***, titled as ***Vinod Kumar Verma versus Ranjeet Singh Rathore***, decided on 6th May, 2016 and ***Criminal Appeal No. 559 of 2017***, titled as ***Harpal Singh versus Lajwanti***, decided on 13th October, 2017, has held that dismissal of the complaint in default for nonappearance of the complainant on the date fixed without affording him even a single opportunity is unjustified.

15. The same principle has been reiterated by this Court in cases titled ***Dole Raj Thakur versus Pankaj Prashar***, reported in ***Latest HLJ 2018(HP) 266***; ***Dole Raj Thakur versus Jagdish Shishodia***, reported in ***Latest HLJ 2018 (HP) 296*** and in ***Cr. Appeal No. 301 of 2018*** titled ***Hemant Kumar vs. Sher Singh*** decided on 27.9.2018.

16. It is true that Magistrate has a discretion to dismiss the complaint for default resulting into acquittal of the accused. However, in present case, for the discussions made hereinafter, I am inclined to set aside the impugned order.

17. Keeping in view the effect of dismissal in default, the Magistrate is supposed to exercise his discretion with care and caution clearly mentioning in the order that there was no reason for him to think it proper to adjourn the hearing of the case to some other day.

18. In present case, complaint was filed on 14.5.2019, whereafter it was listed for 23.5.2019 for recording preliminary evidence. On the basis of preliminary evidence recorded, notice was issued to respondent Virender Kumar for 10.7.2019. However, respondent was not served for 10.7.2019, 12.9.2019, 19.11.2019 and subsequent dates despite issuance of bailable warrants against him. Complainant was duly represented by his Advocate and

lastly the case was fixed for 13.12.2021, for which date, non-bailable warrant was issued against respondent, but the same remained unexecuted. However, on 13.12.2021, neither complainant nor his counsel appeared and respondent, for non-execution of non-bailable warrants upon him, was also not present in Court.

19. In aforesaid facts, particularly when complainant continued himself to be represented either through counsel or in person, the observation of the Magistrate that complainant was not interested in continuing with the complaint is contrary to the record. In normal circumstances, no complainant will be disinterested in pursuing his complaint without any reason. In the given circumstances, it was a fit case for the Magistrate to exercise her discretion to adjourn the case for a subsequent date.

20. In view of the aforesaid facts and circumstances and the ratio of law laid down by the apex Court and High Courts including this Court, I am of the opinion that the Magistrate was not justified in dismissing the complaint in default for absence of complainant coupled with failure of his counsel to attend the case on that date, particularly, when the complainant was pursuing his case since May, 2019 and has led preliminary evidence in support of his complaint and was being represented through counsel on numerous dates fixed for service of respondent through bailable warrants. It is also a fact that the date on which the case has been dismissed in default was listed for service of respondent and on that day, personally presence of complainant was not necessary especially when he had already engaged the counsel to represent him and the said counsel was regularly appearing before the Magistrate but except the date of passing of impugned order.

21. For aforesaid discussion, I am of the considered opinion that there is merit in the appeal and the same deserves to be allowed. Accordingly, impugned order, dated 13.12.2021, passed by Judicial Magistrate First Class, Kangra, District Kangra, H.P. in Criminal Case No. 117-III of 2019 is set aside

and complaint before Judicial Magistrate First Class, Kangra, District Kangra, H.P. is ordered to be restored to its original number and directed to be decided in accordance with law.

22. Complainant is directed to appear before the Magistrate on **19th December, 2022.**

23. Appeal is allowed and disposed of in above terms alongwith all pending applications, if any.

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

Ravinder Singh and Ors.

.....Petitioners

Versus

State of Himachal Pradesh

.....Respondent

For the Petitioners: Mr. Adarsh K. Vashista, Advocate.
For the Respondent: Mr. Narender Thakur, Deputy Advocate General with Mr. Manoj Bagga, Assistant Advocate General.

Criminal Revision No.140 of 2022
Date of Decision:30.11.2022

Code of Criminal Procedure, 1973- Sections 320, 397, 482 - **Indian Penal Code, 1860-** Sections 34, 452, 506 & 205- Inherent powers- Quashing of judgment of conviction- Petitioners convicted and sentenced by Trial Court- Additional Sessions Court upheld the conviction and sentence awarded by the learned trial court under Sections 452 and 506 read with Section 34 of IPC partly acquitting the petitioners-accused of offence under section 205 read with section 34 Indian Penal Code- **Held-** Petitioners-Accused and complainant entered into compromise of their own volition thereby resolving the dispute amicably inter-se- Petition allowed- Conviction set aside- Petitioners acquitted. (Paras 12, 13)

Cases referred:
Narinder Singh & others vs. State of Punjab & another, (2014) 6 SCC 466;

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of instant criminal revision petition filed under Section 397 of Cr.PC read with Section 482 Cr.PC, challenge has been laid to judgment dated 25.2.2022, passed by the learned Additional Sessions Judge-III, Kangra at Dharamshala, in Criminal Appeal No. 8-K/X/2015 thereby

modifying the judgment of conviction and order of sentence dated 4/7.3.2015, passed by the learned JMFC, Kangra, District Kangra, H.P., in Criminal Case No. 106-II/2005, whereby court below while holding the petitioners-accused guilty of having committed offences punishable under Sections 452, 506 and 205 of IPC read with Section 34 IPC, convicted and sentenced him, as per the description given herein below:-

Sr. No.	Offence	Sentence	Fine Amount (Rs.)	Sentence of imprisonment in default of fine to undergo SI
1.	452 of IPC	SI for six months	Rs. 1000/-	Three days.
2.	506 of IPC	SI for three months	Rs.1000/-	Three days.
3.	205 of IPC	SI for three months	Rs. 1000/-	Three days.

17. Precisely, the facts of the case, as emerge from the record are that on 16.1.2005 at about 6:20pm, police after having received telephonic information that quarrel was taking place at Zamanabad, entered the information in the DDR at Sr. No. 22 and thereafter, ASI Ramesh Chand alongwith HHC Madan Lal went to Panchayat house, Zamanabad, and recorded the statement of complainant Smt. Suman Lata, who claimed herself to be Advocate, under Section 154 Cr.PC. She alleged that on 16.1.2005 at about 5:45 pm, while she was present in her house alongwith mother-in-law Smt. Samangla Devi and Smt. Dharmo Devi, four persons namely Sandeep Singh & Surender Singh, both sons of Amar Singh, Rajinder Kumar s/o Sh. Saldu Ram and Pardeep Kumar entered her house unauthorizedly carrying iron rods in their hand. She alleged that above named persons started

breaking the articles kept in the house and also hurled abuses at her. Complainant alleged that aforesaid persons were looking for one Sanjay Kumar, who at that relevant time was not present in the house. She alleged that in the meanwhile, her brother in law Nishant came there and tried to inquire about the matter from the above named persons, but person namely Billu attacked Nishant with iron rod. In the meantime, Neelam Kumar s/o Dhani Ram came on the spot and snatched the iron rod from Billu, who alongwith other persons ran away from the spot on seeing Nishant, Neelam Kumar and Dhani Ram, however they were later on caught by the villagers near Panchayat house and information of the incident was given to the police on telephone by the villagers. On the basis of aforesaid statement made by the complainant, FIR Ex.PW9/A came to be lodged against the petitioners-accused.

18. Learned trial Court on the basis of material adduced on record by the respective parties, vide judgment dated 4/7.3.2015, held the petitioners-accused guilty of having committed offence punishable under Sections 452, 504 and 205 read with Section 34 of the IPC and accordingly, convicted and sentenced him as per the description given herein above.

19. Being aggrieved and dissatisfied with the aforesaid judgment of conviction recorded by the court below, accused preferred an appeal in the court of learned Additional Sessions Judge-III, Kangra at Dharmshala, H.P., who while partly allowing the appeal acquitted the accused of offence punishable under Section 205 read with Section 34 of IPC but upheld the conviction and sentence awarded by the learned trial court under Sections 452 and 506 read with Section 34 of IPC. In the aforesaid background, present petitioners-accused have approached this Court by way of instant proceedings, seeking therein their acquittal after setting aside the judgment of conviction recorded by the court below.

20. Though vide order dated 25.3.2022, this Court suspended the substantive sentence imposed by the court below subject to furnishing personal bonds in the sum of Rs. 50,000/- each with one surety each in the like amount to the satisfaction of the trial court and admitted the petition for hearing, but before same could decided on its own merits, an application bearing Cr.MP No. 3164 of 2022 under Section 482 of Cr.PC, praying therein for quashing of judgment of conviction and order of sentence recorded against them under Sections 452 and 506 of IPC.

21. Though opportunity was granted to the respondent-State to file reply to the afore application, but same has not been filed. Learned Deputy Advocate General fairly states that application at hand can be heard and decided on its own merits on the basis of material available on record.

22. Careful perusal of averments contained in the aforesaid application i.e. CrMP No. 3164 of 2022 reveals that after recording of conviction and order of sentence against the petitioners, petitioners and complainant Smt. Suman Lata have entered into compromise, whereby they have resolved to settle their dispute amicably inter-se them. Compromise placed on record alongwith application reveals that both the parties i.e. accused and the complainant, who belong to the same village and are related to each other, with the intervention of the elders and with a view to maintain cordial relations in future, have decided to live peacefully and as such, complainant has decided not to prosecute the case further and shall have no objection in care petitioners are acquitted of the offences alleged to have been committed by them under Sections 452 and 506 of IPC. It has been further stated in the compromise that both the parties of their own volition and without there being external pressure have entered into compromise.

23. Complainant Suman Lata, who is otherwise an Advocate, stated on oath that she of her own volition and without any external pressure has entered into compromise with the accused, whereby both the parties have

decided to settle their dispute amicably. She stated that since the accused apologized for their misbehavior and misconduct and have undertaken not to repeat such act in future coupled with the fact that both the parties, want to maintain cordial relations with each other, she shall have no objection in case the accused are acquitted of the charges framed against them for their having committed offences punishable under Sections 452 and 506 of IPC read with Section 34 IPC. While admitting contents of the compromise to be correct, she also admitted her signatures on the same. Her aforesaid statement made on oath is taken on record.

24. After having heard aforesaid statement made by the complainant, learned Deputy Advocate General stated that though parties have entered into compromise, but since petitioners-accused already stand convicted, it may not be in the interest of justice to consider their prayer for quashing of judgment of conviction, which is otherwise not permissible under the law.

25. Mr. Adarsh Vashista, learned counsel for the petitioners while inviting attention of this Court to the judgment passed by the Hon'ble Apex Court in **Cr.Appeal Nos. 1488 and 1489 of 2012, titled Ramgopal and Anr v. The State of Madhya Pradesh (a/w connected matter**), submitted that even after recording of conviction, court can proceed to compound the offence if it is satisfied that same would bring harmony and peace among the parties and no prejudice would be caused to either of the parties.

26. Having perused aforesaid judgment passed by the Hon'ble Apex Court, this Court finds that court while exercising power under Section 482 Cr.PC can proceed to compound the offence even after recording of the judgment of conviction and order of sentence. In the aforesaid judgment Hon'ble Apex Court has categorically held that High Court having regard to the nature of offence and the fact that parties have 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.PC., even if the offense are non-compoundable, however while doing so, high court is under obligation to 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. The Hon'ble Apex Court having taken note of its earlier judgment passed in **Narinder Singh & others vs. State of Punjab & another, (2014) 6 SCC 466,** has though reiterated that court should be reluctant in compounding the heinous and serious offences of mental depravity, murder, rape and dacoity etc, but categorically ruled that criminal proceedings involving non-heinous offences, where the offences predominantly are of private nature, could be set aside at any stage of the proceedings, including at the appellate level. It would be apt to take note of following paras of the judgment passed in Ramgopal's case (supra):

> "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 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."

19. We thus sum-up and hold that as opposed to Section 320 Cr.P.C. where the Court is squarely guided by the compromise between the parties in respect of offences 'compoundable' within the statutory framework, the extra-ordinary power enjoined upon a High Court under Section 482 Cr.P.C. or vested in this Court under Article 142 of the Constitution, can be invoked beyond the metes and bounds of Section 320 Cr.P.C. Nonetheless, we reiterate that such powers of wide amplitude ought to be exercised carefully in the context of quashing criminal proceedings, bearing in mind: (i) Nature and effect of the offence on the conscious of the society; (ii) Seriousness of the injury, if any; (iii) Voluntary nature of compromise between the accused and the victim; & (iv) Conduct

of the accused persons, prior to and after the occurrence of the purported offence and/or other relevant considerations."

27. Since in the case at hand, petitioners-accused and complainant, who hail from the same village, of their own volition and without there being any external pressure, have entered into compromise, thereby resolving their dispute amicably inter-se them, no fruitful purpose would be served by declining the prayer made by the petitioners for compounding of offence alleged to have been committed by them under Sectiosn 452 and 506 of IPC. Complainant has categorically stated before this Court that since petitioners-accused have already apologized for their misbehavior and undertaken not to repeat such act in future coupled with the fact that they want to maintain cordial relations with each other in future, no fruitful purpose would be served by sending the persons behind bars pursuant to judgment of conviction recorded against them because in that eventuality, bitterness inter-se both the parties would further aggravate. To the contrary, if compromise is effected between the parties, as has been prayed for, there are chances of the parties living in peace in future. In the peculiar facts and circumstances of the case as well as law taken into consideration, this Court finds no impediment in accepting the prayer made by the parties for quashing of judgment of conviction and order of sentence dated 25.2.2022, passed by the learned Additional Sessions Judge, Kangra.

28. Consequently, in view of the above, present petition is disposed of as compromised, as a result of which, judgment of conviction dated 25.2.2022, passed by the learned Additional Sessions Judge-III, Kangra, is quashed and set-aside and petitioners are acquitted of the charges framed against them under Sections 452 and 506 read with Section 34 IPC. Bail bonds are ordered to be discharged and interim order, if any, is vacated. Pending application(s), if any, also stands disposed of.

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

Inder Dev ...Petitioner.

Versus

State of Himachal Pradesh ..Respondent.

For the Petitioner: Mr.Sudhir Thakur, Senior Advocate, alongwith Mr.Karun Negi, Advocate.

For the Respondent: Mr. Hemant Vaid, Additional Advocate General.

Cr.M.P(M) No.2054 of 2022
Date of Decision: 01.12.2022

Code of Criminal Procedure, 1973- Section 439, **Indian Penal Code, 1860-** Sections 302, 307, 323, 325, 326, 201, 147, 148, 149, 440, 354, 354-B, 109 and 34 **Arms Act-**Section 25 - **Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989**- Sections 3(1)(r), (s), (w) & 3 (2)(va)- Bail-Trial is pending- Victims were beaten badly by the petitioner-Accused- **Held-** It is not a case where no prima facie case at all is made out against the petitioner- Bail Petition dismissed. (Para 19)

The following judgment of the Court was delivered:

Vivek Singh Thakur, J (oral)

Petitioner has approached this Court under Section 439 of the Code of Criminal Procedure (for short Cr.P.C.) seeking bail in case FIR No. 239 of 2021, dated 26.8.2021, registered in Police Station Kullu, District Kullu, Himachal Pradesh, under Sections 302, 307, 323, 325, 326, 201, 147, 148, 149, 440, 354, 354-B, 109 and 34 of the Indian Penal Code (for short 'IPC'), Section 25 of Arms Act and Sections 3(1)(r), (s), (w) & 3 (2)(va) of Schedule

Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989 (herein after referred to as SC&ST Act).

2. Status Report stands filed. Record was also made available along with CCTV Footage of Café Waters Edge, being relied upon by the prosecution for identification of accused and other persons.

3. Prosecution case is that on 25.8.2021 at about 7:30 P.M. an information was received in Police Station, Kullu that at near Saeubag at Chhururu, some mishap had occurred. This information was transmitted by Police Station staff to QRT team and to SI Kushal Kumar, the then SHO, who was on patrolling. SI Kushal Kumar, out of his Patrolling Party, deputed ASI Vij Ram and Constable Om Parkash to reach Regional Hospital, Kullu to handle the situation on arrival of injured and alongwith remaining team of Patrolling Party he rushed to spot. On reaching near Café Water Edge (hereinafter referred as Café) at Chhururu, he met Constables of QRT Team of Kullu Police who were controlling the traffic on the spot, managing preservation of the spot and were waiting for Ambulance to shift injured persons from spot. Son of victim Yuma Devi and other onlookers were also present on the spot. Paras Ram was lying in katcha portion of road on side of road. He was bleeding badly and at some distance from him, in the middle of the road, his broken vehicle was there. On left front seat thereof injured Yuma Devi was crying due to pains. SI Kushal Kumar instead of waiting for Ambulance directed QRT Team and son of victim to shift injured to the Hospital in his Police vehicle. Thereafter on reaching the Hospital, treatment of injured was started in emergency. During treatment, statement of Yuma Devi was recorded under Section 154 Cr.P.C. by ASI Vij Ram, on the basis of which FIR was registered under Sections 307, 320, 147, 148, 149 IPC, Section 25 of Arms Act and Section 3 of Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act.

4. Keeping in view serious condition of victims during night, they were referred to Medical College and Hospital, Nerchowk, Mandi. As provisions of SC&ST Act were attracted, therefore, in compliance of communication dated 26.8.2021 issued by Superintendent of Police, Kullu, investigation was transferred to Additional Superintendent of Police, Kullu.

5. As per medical record, following major injuries were found on the person of victim Yuma Devi and Paras Ram.

(a) Yuma Devi.
"1. Open wound left leg-blunt injury.
2. Lacerated wound left leg-blunt injury.
3. Swelling both arms-blunt injury.
4. Swelling distal phalange both arms-blunt injury.
5. Open wound left thumb blunt injury.
6. Fracture both bone forearm-grievous nature.
7. Fracture left leg-grievous nature."

(b) Paras Ram:
"(1) Lacerated Wound (3x2 CM) over frontal region.
(2) Bruise (variable size) over right and left shoulder 10x3, 2x1 cm, 5x3 cm.
(3) Bruise (10x3 cm) over left shoulder.
(4) Open wound over right forearm (3x1 cm, 3x1 cm, 4x2 cm).
(5) Open wound over left forearm.
(6) Bruise (6x4 cm) over left thigh 9 cm from ASIS.
(7) Bruise (5x3 cm over Right thigh 10 cm from ASIS.
(8) Open wound (3x1, 4x2, 3x1.5 cm, 4x1) over left leg.
(9) Open wound (4x1) cm over right leg.
(10) Lacerated wound (6x3 cm) over left arm.
(11) Bruise (5x3 cm) over left knee.
(12) Bruise (variable size).
(13) fracture hank both bone forearm & leg both side."

6. During investigation statement of Yuma Devi was also recorded on 2.9.2021 in Medical College and Hospital, Nerchowk, wherein she had given detailed statement about dispute and incident with explanation that at the time of recording of previous statement immediately after the attack when

she was in Kullu Hospital, she was grievously injured and was under shock and influence of various kinds of drugs/injections administered to her by the doctors, and was in semi-conscious state, and in between her statement was being recorded by the Police and in such state of mind and body she could not narrate the facts of incident properly and completely.

7. Statement of victim has also been recorded under section 164 Cr.P.C. before Judicial Magistrate First Class, Kullu on 9.11.2021. As per prosecution case, as also narrated in the statement of victim Yuma Devi dispute had arisen between complainant party and assailants party with respect to sale and purchase of land and a threat was extended by Khimi Ram alias Kewlu to the injured party, whereupon on 23.8.2021 injured party went to Police Station, Kullu, but their FIR was not registered and they were called on next morning and on 24.8.2021, when they went to Police Station, Kullu, Khimi Ram alias Kewlu was also found summoned there, but he did not come to I.O., but kept on sitting in his vehicle behind the Police Station and when by noon Yuma Devi felt hungry, she alongwith her husband went outside the Police Station to have some eatables. When they reached near District Court Kullu, Khimi Ram came behind them in his vehicle and stopped his Car near the couple and took out a danda from Dickey of his Car, whereas his driver Vijay took out a rod and both of them tried to beat her husband and at that time Sidhu was also accompanying the assailants. Sidhu held her husband, whereas Khimi Ram went on beating him. The moment Vijay tried to give blow to her husband, Yuma Devi rushed and snatched the rod from him and asked to leave her husband, with warning that otherwise she will also hit. By that time, two Policemen also came, one of them caught her husband alongwith Sidhu and Khimi Ram kept on beating her husband. Yuma Devi hit the vehicle of Khimi Ram with rod and cried loudly asking to leave her husband with threat that otherwise she would damage the vehicle. In the meanwhile, Vijay came and snatched the rod from her and slapped her and

thereafter Khimi Ram, Policemen and Vijay beat her husband. With fist blow of Khimi Ram, her front tooth was dislocated. Thereafter Police came and scuffle was ended and they went home.

8. On 25.8.2021, they were again called in the Police Station at 10:00 A.M., wherefrom they were sent for medical examination and thereafter they returned back to Police Station, where in front of Additional S.P., Khimi Ram and injured party explained their respective versions. Despite advice of Additional S.P., Khimi Ram did not agree to resolve the dispute and they left the Police Station. Thereafter husband of Yuma Devi received a telephonic call from Raj Kumar, who was with Chander Kiran alias Gaurav, Sidhu, one Advocate and brother-in-law of Khimi Ram for the whole day. Raj Kumar had suggested to resolve the dispute by sitting together, but husband of victim had replied that Khimi Ram did not pay heed to the advice of Additional S.P., therefore, there is least possibility of compromise and had stated that tomorrow they shall meet in Police Station. At 6:00 P.M., Gaurav again called them telephonically and said that incident, which had taken place was not a good thing and asked to resolve the matter by sitting together. By that time, they reached near Water Edge Café, but movement of their vehicle was blocked by parking a Scorpio in the middle of the road and Khimi Ram alias Kewlu, Sidhu, Vijay, brother-in-law of Khimi (Akhil) and other persons came from front side and some persons came from back side and hit their vehicle with stones and when they stopped the vehicle, assailants attacked the couple and husband of complainant was taken to back side of the vehicle and was beaten badly by breaking his foot and causing other injuries and she was also beaten on the seat of vehicle. Assailants tried to pull her out, but she held the liver of gear with her leg, as such they could not pull her out. They torn her clothes and molested her, apart from breaking her arms and leg. She has given details of role of accused persons in her statement recorded under

Section 161 Cr.P.C. and statement recorded on oath before Judicial Magistrate Fist Class.

9. As per prosecution case, after having CCTV Footage of Café, it has been found that assailants were present in café since about quarter to 4:00 P.M. on 25.8.2021 and they were waiting for victims and the moment victims reached there, they stopped their vehicle and attacked them. In CCTV Footage one Ritik was also found present, who has been interrogated intensively and in his statement he has also stated that Khimi Ram, Vijay, Sidhu and Akhil and some other persons unknown to him were present in Café and were discussing about some matter at a side and they were trying to hide something from him. He has also witnessed the incident and had stated that Akhil was also involved in the attack.

10. Learned counsel for the petitioner has submitted that petitioner was arrested on 14.06.2021 and since then he is in judicial custody whereas he has been arrayed as an accused in present case without any incriminating evidence or material against him and he has not been named by any witness, including complainant Yuma Devi, as assailant in the incident. Further that, though he has been noticed as present in the Café in CCTV footage, but he was not sitting with main accused Khimi Ram and others who had conspired and planned to attack deceased Paras Ram and his wife complainant Yuma Devi, but he was sitting inside the Café and he was not among the assailants, but had gone outside the Café out of curiosity like other passersby of the Café and not even a single witness has named him as an accused or a person involved in attacking the victims and, therefore, going to Café alongwith three other persons and walking hurriedly towards the spot of incident cannot be treated sufficient evidence to implicate the petitioner for commission of offence under Section 302 IPC. Further that, petitioner has not been found alongwith main accused persons, who have been named by the witnesses or have been

noticed in the CCTV footage actively participating in the incident and, therefore, he is entitled for bail.

11. Learned counsel for the petitioner has submitted that clothes of petitioner Inder Dev, alleged to have been worn by him on the day of incident, were sent to RFSL for examination and as per report of RFSFL, no blood was detected on his clothes which substantiates that petitioner was not accompanying attacking party.

12. It has further been submitted by learned counsel for the petitioner that 37 years old petitioner is a married person having two minor children and old ailing bedridden mother because his six brothers are living separately and are not looking after his family and mother, and petitioner is sole bread earner for all of them and, therefore, petitioner, who has been implicated falsely despite being innocent and not connected in commission of offence in any manner, is entitled for bail.

13. Petitioner had also approached Special Judge, Kullu, H.P., by filing Bail Application No.129 of 2022 for enlarging him on bail. The said application was dismissed by Special Judge, Kullu, vide order dated 26.07.2022.

14. Learned Additional Advocate General has submitted that petitioner Inder Dev, in CCTV footage, has been noticed coming on the spot on 25.08.2021 at 3.50.51 p.m., [(as per Camera time which was lacking behind 22 minutes 32 seconds from Indian Standard Time (IST)], alongwith three other accused persons namely Chaman Singh alias Shyama, Kamal Singh alias Tiger and Room Singh and he has been noticed entering in Café after one minute, and thereafter till occurrence of the incident he was present in the Café alongwith other accused persons and was sitting in a Shed located below the lawn of the Café. At 6.40.28 p.m. (time according to CCTV), all accused persons came out from the gate on signal of main accused Khimi Ram and were attacking victim and at 6.43.06 p.m. petitioner was noticed running

towards spot of incident from the out gate. He has been identified in CCTV footage by independent witnesses and Regional Forensic Science Laboratory (RFSL) Dharamshala has also reported that petitioner was there in CCTV footage. As per Tower location of mobile of petitioner Inder Dev, he was found present on the spot of occurrence.

15. Learned Additional Advocate General has submitted that when on the call of Khimi Ram all assailants rushed outside the Café to attack victim, petitioner is clearly visible rushing outside the Café alongwith others, including Chaman Singh alias Shyama, Kamal Singh alias Tiger and Room Singh.

16. Learned Additional Advocate General has submitted that Taxi driver Hem Raj alias Anku has also substantiated involvement of petitioner in the offence by stating that on 25.08.2022 Chaman Singh alias Shyama, Kamal Singh alias Tiger alongwith two other persons, not known to him, were dropped by him by his Taxi at Café Water Edge. Learned Additional Advocate General has further submitted that during 24.08.2022 and 25.08.2022 petitioner Inder Dev and Room Singh had conversation on mobile for ten times.

17. It has further been submitted by learned Additional Advocate General that plea taken on behalf of the petitioner, that he was not among the main accused involved in commission of offence, is not correct as Chaman Singh alias Shyama, Kamal Singh alias Tiger and Room Singh have been named by eye witness Ritik as persons hitting the car with sticks and beating the victims. Further that, eye witness Rajan Sharma has also named Chaman Singh alias Shyama, Kamal Singh alias Tiger as active participants in conspiracy and attacking the victims. Therefore, it has been submitted that absence of name of the petitioner in the statements and also absence of blood on his clothes cannot be made basis to claim that petitioner was not involved in commission of offence in furtherance of common intention of all accused

persons. As his presence is established through CCTV footage and he has been noticed running towards place of incident alongwith other co-accused with whom he had come to the Café.

18. Learned Additional Advocate General has further submitted that petitioner is an accused in a heinous crime under Section 302 IPC, wherein cold blooded murder has been committed after planning it. It is not a case where a person had expired in a scuffle or on account of an incident taken place for sudden provocation. In this case, it appears that victims were traced, trapped and beaten badly and, injuries are sufficient to draw conclusion that intention of assailants was clear.

19. Taking into consideration submissions of learned counsel for the petitioner as well as learned Additional Advocate General and also material on record including statements of victim, MLCs of Victim, nature of injuries received by victims, possibility of mental state of Yuma Devi at the time of recording her statement under Section 154 Cr.P.C. and also statement of Ritik, Rajan Sharma and Ravinder Negi and conclusion of investigation but without commenting upon merits of the case, however, taking into consideration parameters and factors required to be taken into consideration at the time of considering bail application, I find that it is not a case where no prima facie case at all is made out against the petitioner. Therefore, I do not find it a fit case for enlarging the petitioner on bail at this stage. Accordingly, petition is dismissed.

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

Gurpreet Kaur. ...Petitioner.

Versus

M/s Radha Krishan Industries. ...Respondent.

2. Cr.MMO No. 718 of 2019

Gurpreet Kaur. ...Petitioner.

Versus

M/s Radha Krishan Industries. ...Respondent.

3. Cr.MMO No. 719 of 2019

Gurpreet Kaur. ...Petitioner.

Versus

M/s Radha Krishan Industries. ...Respondent.

4. Cr.MMO No. 720 of 2019

Gurpreet Kaur. ...Petitioner.

Versus

M/s Radha Krishan Industries. ...Respondent.

5. Cr.MMO No. 637 of 2019

Gurpreet Kaur. ...Petitioner.

Versus

M/s Radha Krishan Industries. ...Respondent.

For the Petitioner(s). Mr.Bipin C. Negi, Senior Advocate alongwith Mr.Nitin Thakur, Advocate, vice Mr.Gobind Korla, Advocate for petitioner in all petitions except Cr.MMO No. 637 of 2019.

Mr.Sanjay Kumar Sharma, Advocate, for the petitioner in Cr.MMO No. 637 of 2019.

For the Respondents: Mr.Susheel Gautam, Advocate, for the respondents in all petitions.

Cr.MMO No. 717 of 2019 alongwith
Cr.MMO Nos. 718 to 721
and 637 of 2019
Date of decision: 30.11.2022

Code of Criminal Procedure, 1973- Section 482 - **Negotiable Instruments Act, 1881-** Sections 138 &142- Inherent powers- Quashing of complaint- Judicial Magistrate First Class Sirmaur at Nahan has no jurisdiction to entertain and adjudicate these complaints as the cheques in reference were delivered for collection through account in a Bank or Branch of the Bank managing the account of payee, not situated in the local jurisdiction of the Judicial Magistrate- **Held**- Appropriate Court having jurisdiction to take cognizance of the offence is Court of Judicial Magistrate at Jagadhri- Complaints quashed - Petition allowed. (Paras 5, 8, 9)

Cases referred:

P. Mohanraj and others Vs. Shah Brothers Ispat Private Limited, (2021) 6 SCC 258;

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge (Oral)

Petitioner has approached this Court for quashing complaint Nos. 245 of 2016, 246 of 2016, 247 of 2016, 63 of 2017 and 64 of 2017, filed under Section 138 of the Negotiable Instruments Act (for short "NI Act"), titled as M/s Radha Krishan Industries Vs. Gurpreet Kaur and subsequent proceedings arising thereto, pending adjudication before Judicial Magistrate First Class, Sirmour at Nahan, H.P., on the ground that the said Judicial Magistrate has no jurisdiction to entertain and adjudicate these complaints as

the cheques in reference were delivered for collection through account in a Bank or Branch of the Bank managing the account of payee, not situated in the local jurisdiction of the Judicial Magistrate.

2. It is undisputed that respondent has filed complaints against petitioner under Sections 138 of the NI Act before Judicial Magistrate at Nahan for dishonour of cheques alleged to have been issued by petitioner for discharging her liability for purchase of goods from respondent from its Industry, Meerpur Gurudwara, Kala Amb Tehsil Nahan, District Sirmour, H.P. which were presented for collection through account maintained by respondent in HDFC Bank Jagadhri (Haryana) and by claiming that these cheques were delivered by the petitioner in the factory of respondent/complainant, complaints have been filed at Nahan, District Sirmour, H.P.

3. Section 142 of NI Act, prescribes the Court which can take cognizance of offence punishable under Section 138 of the NI Act. By way of amendment Act No. 26 of 2015, sub section (2) was inserted in Section 142 of NI Act, which came into force w.e.f. 15.6.2015.

4. Present complaints were filed on 25.10.2016 and 31.3.2017. At that time sub section (2) of Section 142 of NI Act had come in force and, therefore, jurisdiction of the Court empowered to take cognizance of the offence under Section 138 of the NI Act was to be determined in terms of this sub section. Section 142, as existing at the time of filing complaints, reads as under:-

> *"142. **Cognizance of offences**. — (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—*
>
> *(a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque;*

(b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138

Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period.

(c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138.

"(2) The offence under Section 138 shall be inquired into and tried only by a court within whose local jurisdiction,--

(a) if the cheque is delivered for collection through an account, the branch of the bank where the payee or holder in due course, as the case may be, maintains the account, is situated; or

(b) if the cheque is presented for payment by the payee or holder in due course, otherwise through an account, the branch of the drawee bank where the drawer maintains the account, is situated.

Explanation—For the purpose of clause (a), where a cheque is delivered for collection at any branch of the bank of the payee or holder in due course, then, the cheque shall be deemed to have been delivered to the branch of the bank in which the payee or holder in due course, as the case may be, maintains the account."

5. Respondent-complainant is maintaining account at HDFC Bank Jagadhri (Haryana) and cheques were delivered for collection through said account in the branch of the Bank at Jagadhri, which were dishonoured, therefore, in view of Section 142(2) of NI Act, appropriate Court having jurisdiction to take cognizance of the offence is Court of Judicial Magistrate at Jagadhri.

6. In ***P. Mohanraj and others Vs. Shah Brothers Ispat Private Limited, (2021) 6 SCC 258***, it has been observed by the Supreme Court that under Section 138 of NI Act, a civil liability, has also been deemed to be an offence and this liability has been made punishable by law but by providing

opportunity to the drawer of the cheque to make payment of amount within 15 days of receipt of notice which makes it clear that real object of the provision is not to penalize the wrong doer for offence which is already made out but to compensate the victim and it reflects that in really it is a hybrid provision to enforce payment of a bounced cheque if it is otherwise enforceable in civil law, and though language of Section 138 of NI Act has been couched making the act complained of an offence in proceeding under this Section but it is, in fact, in order to get back the amount contained in dishonoured cheque together with interest and cost, expeditiously and cheaply, through summary proceeding.

7. Limitation period for filing complaint under Section 138 of the NI Act has been provided in Section 142 (1) (b) of NI Act. However, in proviso thereto, Court has been empowered to take cognizance of complaint after prescribed period, if the complainant satisfies the Court that there was sufficient cause for not making the complaint within such period.

8. In view of aforesaid discussion proceedings before Judicial Magistrate First Class, Sirmour at Nahan in above referred complaints are quashed with direction to the Judicial Magistrate to return the complaints to the respondent/complainant alongwith documents in original after retaining photocopies thereof in record and if respondent/complainant desires and/or is advised so, it may file the same in appropriate competent Court for adjudication in accordance with law having jurisdiction to do so.

9. On filing application(s) alongwith copy of this order, by the complainant, Judicial Magistrate, First Class, Sirmour at Nahan shall return the complaint(s) alongwith original documents to the complainant/respondent in aforesaid terms. Needless to say that on filing complaints before Magistrate having jurisdiction to adjudicate the same within reasonable period after receiving from Nahan, respondent/ complainant shall be entitled to claim benefit of proviso to Section 142(1)(b) of the NI Act by filing appropriate

application/making necessary averment alongwith/in the complaints and, in that eventuality, time spent in pursuing the complaints in the Court at Nahan as well as this High Court shall also be liable to be excluded as respondent/complainant was pursuing the matter at Nahan bonafide under legal advice of expert and experienced Advocate, for which respondent/complainant should not be punished.

Petitions are allowed and disposed of in aforesaid terms, so also pending applications, if any.

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

Between:-

STATE OF HIMACHAL PRADESH

...APPELLANT

(BY MR. J.S. GULERIA, DEPUTY ADVOCATE GENERAL)

AND

1. SURESH KUMAR
SN OF SHRI JOGINDER SINGH,
R/O MOHALLA LOWER JULAKARI,
CHAMBA TOWN, TEHSIL AND DISTT. CHAMBA, H.P.

2. KULJEET SINGH
SON OF SHRI GURBAX SINGH,
R/O MOHALLA LOWER JULAKARI,
CHAMBA TOWN, TEHSIL AND DISTT. CHAMBA, H.P.

...RESPONDENTS

(MR. N.K. THAKUR, SENIOR ADVOCATE WITH MR. DIVYA RAJ SINGH, ADVOCATE)

CRIMINAL APPEAL
No. 170 OF 2011
Reserved on:13.10.2022
Decided on:29.11.2022

Code of Criminal Procedure, 1973- Section 378(3) - **The Narcotic Drugs and Psychotropic Substances Act, 1985-** Sections 20, 42, 43 & 50- Appeal against acquittal- Charas weighing 3 kg 750 Grams- **Held-** There is nothing on the file, even to suggest that the police party, which was present at the spot, was having any prior information, with regard to the involvement of the accused, in the transportation of the contraband i.e. charas- Version of Police

officials not supported by independent witnesses- Accused persons entitled for benefit of doubt- Acquittal upheld- Appeal dismissed. (Paras 56, 57)

Cases referred:

SK Raju @ Abdul Haque @ Jagga vs. State of West Bengal 2018(10) SCALE 730;

State of H.P. vs. Pawan Kumar (2005) 4 Supreme Court Cases 350;

State of Punjab versus Baldev Singh, reported in (1999) 6 SCC 172;

State of Punjab vs. Baljinder Singh & Anr. 2019 (14) SCALE 226;

This appeal coming on for admission on this day, ***Hon'ble Mr. Justice Virender Singh***, passed the following:-

J U D G M E N T

The State has filed the present appeal filed under Section 378(3) of the Code of Criminal Procedure against the judgment dated 28.02.2011 passed by the learned Special Judge, Chamba, District Chamba, H.P. (hereinafter referred to as the 'trial Court').

2. By way of judgment dated 28.02.2011, the learned trial Court has acquitted the respondents (hereinafter referred to as the 'accused persons') from the offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'NDPS Act').

3. Brief facts, leadings to the filing of the present appeal, before this Court, may be summed up as under:-

On 19.06.2010 ASI Vinod Singh, Incharge, Police Post, Sultanpur has forwarded a 'Rukka' to the Police Station Chamba disclosing therein that he, alongwith other police officials, was on picketing and traffic checking duty and was present at "Bhataluan bridge". When, he was checking the vehicles, then, at about 3.30 p.m. one scooter was noticed, being driven by its driver, coming there, from Chamba side.

3.1 Apart from the driver, one pillion rider was also there on the scooter. On seeing the police party, the driver stopped the scooter, at a distance of about 15-20 meter away and tried to return back and to flee away, upon which, the pillion rider, who was having the rucksack, on his back, had thrown the said rucksack towards the scooter driver and fled away. The said person was nabbed at a distance of 20-25 meter. Meanwhile, the scooter driver also made efforts to flee away along-with the rucksack, however, he was also nabbed.

3.2 From the activities of the said persons, ASI developed a suspicion, in his mind, that the said persons might be having some illegal article or narcotic substance in their possession, as such, keeping in view their activities, ASI has associated Harish Chand son Tara Chand, HC Uttam Chand and HHC Raj Kumar and inquired about the name of those persons. (Both the accused persons).

3.3 On inquiry, the pillion rider has disclosed his name as Kuljeet Singh son of Gurbax Singh and scooter driver has disclosed his name as Suresh Kumar son of Joginder Singh. (Both the accused person).

3.4 Thereafter, the IO had obtained the written consent of aforesaid persons regarding their personal search and search of their rucksack. After obtaining their consent to be searched by the police, the rucksack was searched. On its checking, a plastic envelop was found in it. On opening the same, charas was found in it. On weighment, the charas was found to be 3.750kgs.

3.5 Other codal formalities were completed on the spot and accused persons were arrested. After receipt of the positive report from FSL, Junga, the police has filed the challan, for the commission of the offence punishable under Section 20 of the NDPS Act against the accused.

4. The learned trial Court, on the basis of the report under Section 173(2) Cr.P.C found a *prima-facie* case, for the commission of the offence,

punishable under Section 20 of the NDPS Act against both the accused and accordingly, both of them were charge-sheeted.

5. When, the charge, so framed, put to the accused persons, they have not pleaded guilty and claimed trial.

6. Since, the accused persons have not pleaded guilty, as such, the prosecution has been directed to adduce evidence, to prove the charge, against the accused persons.

7. Consequently, the prosecution has examined as many as nine witnesses.

8. After closure of the prosecution evidence, the entire incriminating evidence, appearing against the accused persons, was put to them, in their statements, recorded under Section 313 Cr.P.C.

9. The accused persons have denied the entire prosecution case and took the plea that they are innocent persons and have falsely been implicated, in this case.

10. However, the accused persons have not opted to lead evidence, in defence.

11. Thereafter, the learned trial Court, after hearing the learned Public Prosecutor and the learned defence counsel has acquitted the accused persons from the charge framed against them, in this case, vide judgment dated 28.02.2011.

12. Feeling aggrieved from the judgment of acquittal, the present appeal has been filed by State before this Court assailing the findings, so recorded by the learned trial Court on the ground that the evidence, adduced by the prosecution, has not been considered by the learned trial Court in its proper perspective and the version of the prosecution witnesses has simply been discarded without assigning cogent reasons. Highlighting the deposition of PW-3, PW-4 as well as the official witnesses, it has been argued by Mr. J.S. Guleria, learned Deputy Advocate General that contraband was recovered

from the conscious possession of the accused and all the witnesses have supported the prosecution case on material aspects.

13. The chain of evidence is stated to be completed in this case and the IO has completed all the codal formalities in this case. These facts, according to learned Deputy Advocate General, have not been taken into consideration by the learned trial Court, in this case.

14. Lastly, the findings of the learned trial Court have been assailed on the ground that the evidence of the official witnesses is confidence inspiring and there was no occasion for the learned trial Court to discard the trustworthy statements of the official witnesses.

15. Thus, it has been prayed that the present appeal may kindly be accepted by setting aside the judgment of acquittal and the accused persons may kindly be convicted, for the offence, for which, they have been charge-sheeted, in this case.

16. Per contra, Mr. N.K. Thakur, learned Senior Advocate assisted by Mr. Divya Raj Singh, Advocate has supported the judgment of acquittal on the ground that the story put forth by the I.O in this case is highly improbable and from the evidence of the official witnesses, it has prima-facie been proved on record that the things were not happened, on the spot, as deposed by these witnesses. Highlighting the fact that the alleged independent witnesses, who have been associated, in this case, when, called, in the witness box, has not supported the case of the prosecution and despite of the best efforts made by the learned Public Prosecutor, nothing material could be elicited from him. Apart from this, it has also been argued by learned Senior Advocate that the mandatory provisions of Sections 42 and 50 of the NDPS Act have not been complied with by the I.O. and the learned trial Court has rightly taken, all these factors, into consideration and thus passed a reasoned judgment, which requires to be upheld by this Court. Thus, a prayer has been made to dismiss the appeal.

17. Arguments heard and file perused with the active assistance of the learned counsel for the parties.

18. In order to decide the matter, in an effective manner, it would be just and appropriate for this Court to discuss the evidence of the star witnesses examined by the prosecution in this case.

19. The Investigating Officer of the case is PW-9. According to this witness, on 19.06.2010, he, along-with HC Uttam Chand, LHC Raj Kumar, HHG Pankaj Kumar, HHG Man Singh and HHG Ranjit Singh, went to Bhataluan bridge in Government vehicle No. HP-73-0919 for picketing duty by recording departure report Ext.PW-9/A. They had left the Police Post, Sultanpur at about 1.30 in the noon and were on the way towards Mangla. At about 2.30 p.m., they had put a picketing at Bhataluan bridge, some vehicle were challaned.

19.1 At about 3.30 p.m. they noticed one scooter being driven by its driver coming from Chamba side bearing registration No. HP-48-4453. One pillion rider was also on the scooter.

19.2 On seeing the police, the driver stopped the scooter and trying to flee away from the spot towards Chamba side. Upon this, a suspicion had arisen in the mind of the I.O. The pillion rider was having a rucksack on his shoulder and he threw the same on the driver and tried to flee away. He was apprehended at a distance of 15-20 steps from the scooter.

19.3 Thereafter, the driver had also made unsuccessful attempt to flee away, but was nabbed.

19.4 On inquiry, the driver disclosed his name as Suresh Kumar (accused No.1) whereas the pillion rider disclosed his name as Kuljeet (accused No.2).

19.5 Thereafter, the options, as per Section 50 of the NDPS Act were given to them regarding their search by a Gazetted Officer, Magistrate or by the police, upon which, both of them had consented to be searched by the

police present there. In this regard, the consent memos Ext.PW3/A, and Ext.PW-3/F were prepared.

19.6 After giving the personal search to the accused, the I.O. had opened the rucksack, the same was found containing the charas, which, on weighment, was found to be 3.750Kgs.

19.7 The other codal formalities were completed on the spot regarding sealing of the case property.

19.8 Thereafter, the rukka Ext.PW-9/A was prepared and forwarded to Police Station, Sadar, District Chamba, H.P., through Constable Raj Kumar for registration of the case and copy of the same was given to the same Constable, for being handed over to Superintendent of Police Chamba, for his information.

19.9 Thereafter, the site plan was prepared and the statements of the witnesses were recorded, as per their version. NCB forms, in triplicate, were also filled on the spot. Special report was also prepared and the same was sent to SP, Chamba through HHC Kartar Singh.

19.10 After the receipt of the chemical examiner report, the file was submitted to the SHO for preparing the challan.

19.11 In the cross-examination by learned counsel for the accused, this witness has deposed that before reaching the spot, they had stopped, on the way at Sultanpur and Obri Chowk for 15 minutes each. All the police officials as mentioned in the examination-in-chief were with him. However, this fact was not recorded in the statement of any of the witness. He has denied that from 2.30 to 3.30 p.m., he returned back to the Police Post, Sultanpur. He has also denied that thereafter, he had telephonically directed the police officials to lay a picketing, but admitted that the picketing was done at his instance.

19.12 The pillion rider could run only for 10-15 steps from the scooter, when, the driver was apprehended, the engine of the scooter was switched off.

However, the driver made efforts to start it. Accused Kuljeet was chased by Raj Kumar and accused Suresh was chased by this witness. But this fact has not been recorded in the statement of Raj Kumar.

20. PW-3 HC Uttam Chand was also member of the police team headed by PW-9. He has supported the IO on all the material aspects of the case. He has feigned his ignorance as to whether the IO had given the option regarding the personal search of the accused after preparing the seizure memo.

20.1 According to the cross-examination of this witness, PW-8 Harish Kumar is a resident of Sultanpur. He was having his shop near Police Post, Sultanpur. Said Harish Kumar met them near Bhataluan bridge at about 3:15 p.m. The scooter was noticed by them at a distance of 15-20 meter and same was apprehended by them while negotiating a curve. Site plan Ext. D-A was prepared in his presence and he has admitted that the picketing was done at point 'B'. He has admitted that in the site plan Ext. D-A, there is no curve between at point 'A' where, the accused persons were nabbed from point 'B' where the nakka was laid. According to him, the bag was thrown by the pillion rider on the lap of the driver.

20.2 In his further cross-examination, a new story by this witness was introduced by stating that both the accused had tried to run away on the scooter and police party had chased them on foot. A vague statement was made by him by stating that the almost all the officials were present on the spot and both the accused were apprehended when they were on scooter. He has admitted that a person eventuality running could not chase a person who was on the moving scooter.

21. PW-4 is also member of the raiding party. He has also supported the version of the IO on almost all material facts. This witness remained on the spot upto 3:30 p.m and rukka was given to him at about 4:30 p.m. The consent memo papers were prepared within 15-20 minutes and search was

taken within 15-20 minutes. Rukka was handed over to this witness after completion of the entire proceedings. This witness was called from police station to Police post Sultanpur by ASI Vinod Singh for picketing. The instructions were with regard to the picketing. Harish met them at the bridge of Bhataluan at about 3:15 p.m. He was directed by the IO to be there. The bag was thrown from about 15-20 meter by the pillion rider. Rest he has denied the other suggestions, which have been given to this witness by learned defence counsel.

22. PW-8 Harish Kumar is the independent witness associated by the IO in this case. According to this witness, he was present at his shop near Police Post, Sultanpur. One Head Constable came to him at about 3.00-4.00 p.m. and took him inside the police post, where he was directed to put signatures on same papers.

22.1 Since this witness has not supported the case of the prosecution, as such, on the request of learned Public Prosecutor, this witness has been declared as hostile by the learned trial Court and learned Public Prosecutor has been permitted to cross-examine this witness.

22.2 Despite of the best efforts made by the learned Public Prosecutor, except his admission about signatures over memos Ext.PW-3/A to Ext.PW-3/D and Ext.PW-3/F, nothing material could be elicited from him.

22.3 In the cross-examination by the learned defence counsel, he has admitted that his tea stall is adjacent to the Police Post, Sultanpur and this witness is in the habit of frequently visiting the police post.

23. Rest of the witnesses are with regard to the link evidence.

24. This is the entire evidence adduced by the prosecution in this case.

25. The learned trial Court has acquitted the accused persons, in the present case, on the ground that the provisions of Sections 42 and 50 of the

NDPS Act have not been complied with by the IO and on the ground that non-compliance of above two provisions, vitiates the trial against the accused.

26. Apart from this, the learned trial Court has also taken into consideration the factum that the alleged eye witness PW-8 has not supported the version of the IO, as such, according to the learned trial Court, the prosecution could not establish the case against the accused persons as per requirement of law.

27. These findings have been assailed by the State before this Court, in the present appeal.

28. So far as the findings of the learned trial Court, qua the non compliance of Section 42 of the NDPS Act are concerned, in this case, it is not the case of the prosecution that the police party or Investigating Officer was having any prior information regarding the transportation of the charas by the accused. Para 11 to 14 of the judgment do not contain any reason as how the learned trial Court has concluded that the provisions of Section 42 of the NDPS Act are being applicable in the present case, as it is the specific stand of the prosecution, in the shape of the statement of Investigating Officer PW-9 ASI Vinod Singh that on 19.06.2010, he, alongwith the other police officials, was present at Bhataluan bridge and they had led a picketing there. They had challaned some vehicles and thereafter, the accused persons, allegedly came there on Scooter bearing registration No. HP-48-4453. The entire statement of PW-9 does not contain a single whisper that they were having any prior information regarding the indulgence of the accused persons in transporting the contraband. The case, as set up by the prosecution in this case, is squarely falls within the definition of “chance recovery”.

29. The learned trial Court, in the present case, has also concluded that there is non-compliance of Section 42 of the NDPS Act, on the basis of the fact that the police was having the prior information on the fact that they had put a picketing at a particular place at Bhataluan and there was no occasion

for the Investigating Officer to take PW-8 Harish Kumar with them or calling PW-4 Raj Kumar at the spot. The statement of the witness is to be considered as a whole, not in the piecemeal.

30. PW-3 in his cross-examination has specifically deposed that PW-8 Harish Kumar is a resident of Sultanpur and he was having a shop near P.P. Sultanpur. However, he met them near Bhataluan mode at about 3:15 p.m., where the police party was checking the vehicles. The distance of the spot from Police Station Chamba is stated to be 10 k.m., and presence of PW-8 Harish Kumar, at the spot, cannot be doubted merely on the ground that he is having a shop nearby P.P. Sultanpur.

31. No doubt, PW-4 in his cross-examination has deposed that he was called from Police Station Chamba to P.P. Sultanpur by ASI Vinod Singh for laying a nakka. From this stray sentence of this witness, no inference could be drawn that the police party was having prior information, as in the departure report Ext. PW-9/A, three purposes have been mentioned i.e. patrolling, picketing and traffic checking duty. Moreover, it is not unnatural for the law enforcement agency i.e. police to lay nakka (picketing) as the said work is a routine work of the police. Moreover, there is nothing on the file even to suggest that the nakka was not led within the territorial jurisdiction of Police Station Chamba as well as P.P. Sultanpur.

32. At the sake of repetition, there is nothing on the file, even to suggest that the police party, which was present at the spot, was having any prior information, with regard to the involvement of the accused, in the transportation of the contraband i.e. charas. The Hon'ble Apex Court, in ***State of Punjab versus Baldev Singh, reported in (1999) 6 Supreme Court Cases 172***, have categorically held that where the seizure of the contraband is from a public place, then, provisions of Section 43 of the NDPS Act are applicable, not Section 42 of the NDPS Act. The relevant paragraph of the judgment is reproduced as under:-

> *10. "The proviso to sub-section (1) lays down that if the empowered officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place, at any time between sunset and sunrise, after recording the grounds of his belief. Vide sub-section (2) of* Section 42*, the empowered officer who takes down information in writing or records the grounds of his belief under the proviso to sub-section (1), shall forthwith send a copy of the same to his immediate official superior.* Section 43 *deals with the power of seizure and arrest of the suspect in a public place. The material difference between the provisions of* Section 43 *and* Section 42 *is that whereas* Section 42 *requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure,* Section 43 *does not contain any such provision and as such while acting under* Section 43 *of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any Narcotic Drug or Psychotropic Substances in a public place where such possession appears to him to be unlawful."*

33. The said decision has again been reiterated by Hon'ble Apex Court in **SK Raju @ Abdul Haque @ Jagga vs. State of West Bengal 2018(10) SCALE 730**. The relevant paragraph of the judgment is reproduced as under:-

> *6. We are unable to accept the submission made by the learned counsel for the appellant that* Section 42 *is attracted to the facts of the present case. In State of Punjab v Baldev Singh ("Baldev Singh"),[7] Chief Justice Dr*

A S Anand speaking for a Constitution Bench of this Court, held:

"The material difference between the provisions of Section 43 and Section 42 is that whereas Section 42 requires recording of reasons for belief and for taking down of information received in writing with regard to the commission of an offence before conducting search and seizure, Section 43 does not contain any such provision and as such while acting under Section 43 of the Act, the empowered officer has the power of seizure of the article etc. and arrest of a person who is found to be in possession of any Narcotic Drug or Psychotropic Substances in a public place where such possession appears to him to be unlawful." [Emphasis supplied] In Narayanaswamy Ravishankar v Assistant Director, Directorate of Revenue Intelligence,8 a three judge Bench of this Court considered whether the empowered officer was bound to comply with the mandatory provisions of Section 42 before recovering heroin from the suitcase of the appellant at the airport and subsequently arresting him. Answering the above question in the negative, the Court held:

"In the instant case, according to the documents on record and the evidence of the witnesses, the search and seizure took place at the airport which is a public place. This being so, it is the provisions of Section 43 *of the NDPS Act which would be applicable. Further, as* Section 42 *of the NDPS Act was not applicable in the present case, the seizure having been effected in a public place, the question of non-compliance, if any, of the provisions of* Section 42 *of the NDPS Act is wholly irrelevant." In Krishna Kanwar (Smt) Alias Thakuraeen v State of Rajasthan,9 a two judge Bench of this Court considered whether a police officer who had prior information was required to comply with the provisions of* Section 42 *before seizing contraband and arresting the appellant who was travelling on a motorcycle on the highway. Answering the above question in the negative, the Court held:*

"Section 42 comprises of two components. One relates to the basis of information i.e.: (i) from personal knowledge,

and (ii) information given by person and taken down in writing. The second is that the information must relate to commission of offence punishable under Chapter IV and/or keeping or concealment of document or article in any building, conveyance or enclosed place which may furnish evidence of commission of such offence. Unless both the components exist Section 42 has no application. Sub-

section (2) mandates, as was noted in Baldev Singh case that where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior. Therefore, sub-section (2) only comes into operation where the officer concerned does the enumerated acts, in case any offence under Chapter IV has been committed or documents etc. are concealed in any building, conveyance or enclosed place. Therefore, the commission of the act or concealment of document etc. must be in any building, conveyance or enclosed place."

34. If the facts and circumstances of the present case are seen in the light of the decision of Hon'ble Apex Court in Baldev Singh (supra) case, then, it cannot be said that the police was having any prior information regarding the indulgence/involvement of the accused persons in the transportation of charas.

35. The police party was on patrolling as well as traffic checking duty, as deposed by the Investigating Officer. The relevant portion of his statement is reproduced as under:-

"We proceeded from PP Sultanpur at 1:30 p.m. and was on way towards Mangla. I laid a nakka at 2:30 p.m. at Bhataluan Bridge. Some vehicles were challenged. By about 3:30 p.m. one scooter came from Chamba side bearing No. HP-48-4453 carrying two persons."

36. Even otherwise, in the departure report Ext. PW-9/A, the Investigating Officer got recorded the factum that the police party in the official vehicle bearing registration No. HP-73-0919 has left the Police Post Sultanpur for patrolling picketing and traffic checking duty, as such, the findings of the learned trial Court qua non compliance of Section 42 of the NDPS Act do not sustain in the judicial scrutiny by this Court, thus, the findings of the learned trial Court qua non compliance of Section 42 of NDPS do not sustain, in the judicial scrutiny by this Court.

37. The learned trial Court has also held that there is non-compliance of provision of Section 50 of the NDPS Act of the case. The provisions of Section 50 of the NDPS Act are reproduced as under:-

> 50. Conditions under which search of persons shall be conducted.—
> (1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.
> (2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section (1).
> (3) The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.
> (4) No female shall be searched by anyone excepting a female. 1[(5) When an officer duly authorised under section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure, 1973 (2 of 1974).

> (6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.]

38. According to the deposition of the Investigating Officer, when, the accused persons were nabbed, then, their names were ascertained and thereafter, options, as per the provisions of Section 50 were given to them by stating that if they want to get their personal search carried, then, they could give their search to Magistrate, Gazetted Officer or to the police, upon which, both the accused persons have opted to be searched by the Police. Investigating Officer has prepared the consented memos in this regard as Ex. PW-3/A and Ex. PW-3/F. By virtue of the above documents, the Investigating Officer had expressed his suspicion against the accused persons that they might be having some illegal articles or Narcotic Substance, as such, the options were given to them for their personal search, as well as search of their rucksack, upon which, above two documents, were prepared. Whereas, the Investigating Officer, when appeared in the witness box, introduced a different story by deposing that he had given the options to the accused persons regarding their search as well as search of their rucksack by the Magistrate, Gazetted Officer or by the police.

39. In the above factual background, the first and foremost questions, which arises for determination before this Court is whether the provisions of Section 50 NDPS Act are applicable in the present case or not.

40. The alleged recovery, in the present case, has not been effected from the personal search of the accused, but, the same was allegedly found containing in the rucksack, which was with the accused Kuljeet Singh, who was a pillion rider of the scooter driven by accused Suresh Kumar. As per the prosecution story, on seeing the police, accused Kuljeet Singh had thrown the

said rucksack to accused Suresh Kumar, who had also tried to flee away from the spot, however, was nabbed alongwith Kuljeet Singh.

41. Question regarding the applicability of the provisions of Section 50 arose before the Hon'ble Apex Court in a case reported as ***(2005) 4 Supreme Court Cases 350***, titled as ***State of H.P. vs. Pawan Kumar***. The relevant paragraphs of the judgment are reproduced as under:-

> *"10.We are not concerned here with the wide definition of the word "person", which in the legal world includes corporations, associations or body of individuals as factually in these type of cases search of their premises can be done and not of their person. Having regard to the scheme of the Act and the context in which it has been used in the Section it naturally means a human being or a living individual unit and not an artificial person. The word has to be understood in a broad commonsense manner and, therefore, not a naked or nude body of a human being but the manner in which a normal human being will move about in a civilized society. Therefore, the most appropriate meaning of the word "person" appears to be "the body of a human being as presented to public view usually with its appropriate coverings and clothings". In a civilized society appropriate coverings and clothings are considered absolutely essential and no sane human being comes in the gaze of others without appropriate coverings and clothings. The appropriate coverings will include footwear also as normally it is considered an essential article to be worn while moving outside one's home. Such appropriate coverings or clothings or footwear, after being worn, move along with the human body without any appreciable or extra effort. Once worn, they would not normally get detached from the body of the human being unless some specific effort in that direction is made. For interpreting the provision, rare cases of some religious monks and sages, who, according to the tenets of their religious belief do not cover their body with clothings, are not to be taken notice of. Therefore, the word "person" would mean a*

human being with appropriate coverings and clothings and also footwear.

11. A bag, briefcase or any such article or container, etc. can, under no circumstances, be treated as body of a human being. They are given a separate name and are identifiable as such. They cannot even remotely be treated to be part of the body of a human being. Depending upon the physical capacity of a person, he may carry any number of items like a bag, a briefcase, a suitcase, a tin box, a thaila, a jhola, a gathri, a holdall, a carton, etc. of varying size, dimension or weight. However, while carrying or moving along with them, some extra effort or energy would be required. They would have to be carried either by the hand or hung on the shoulder or back or placed on the head. In common parlance it would be said that a person is carrying a particular article, specifying the manner in which it was carried like hand, shoulder, back or head, etc. Therefore, it is not possible to include these articles within the ambit of the word "person" occurring in Section 50 *of the Act.*

42. Similar view has also been taken by Hon'ble Apex Court in a case reported as ***2019 (14) SCALE 226***, titled as ***State of Punjab vs. Baljinder Singh & Anr***. The relevant paragraph of the judgment is reproduced as under:-

"15. The learned counsel for the appellant contended that the provision of Section 50 *of the Act would also apply, while searching the bag, briefcase, etc. carried by the person and its non-compliance would be fatal to the proceedings initiated under the Act. We find no merit in the contention of 6 [(2010) 3 SCC 746] the learned counsel. It requires to be noticed that the question of compliance or non-compliance with* Section 50 *of the NDPS Act is relevant only where search of a person is involved and the said section is not applicable nor attracted where no search of a person is involved. Search and recovery from a bag, briefcase, container, etc. does not come within the ambit of* Section

> 50 *of the NDPS Act, because firstly,* Section 50 *expressly speaks of search of person only. Secondly, the section speaks of taking of the person to be searched by the gazetted officer or a Magistrate for the purpose of search. Thirdly, this issue in our considered opinion is no more res integra in view of the observations made by this Court in* Madan Lal v. State of H.P. *[(2003) 7 SCC 465]. The Court has observed: (SCC p. 471, para 16) "16. A bare reading of* Section 50 *shows that it only applies in case of personal search of a person. It does not extend to search of a vehicle or a container or a bag or premises (see* Kalema Tumba v. State of Maharashtra*[(1999) 8 SCC 257],* State of Punjab v. Baldev Singh *[(1999) 6 SCC 172] and* Gurbax Singh v. State of Haryana *[(2001) 3 SCC 28]). The language of* Section 50 *is implicitly clear that the search has to be in relation to a person as contrasted to search of premises, vehicles or articles. This position was settled beyond doubt by the Constitution Bench in Baldev Singh case1. Above being the position, the contention regarding non-compliance with* Section 50 *of the Act is also without any substance."*

43. Judging the facts and circumstances of the present case, in the light of the above two decisions of Hon'ble Apex Court, this Court is of the considered view that although the personal search of the accused was conducted, but, nothing was recovered from their personal search and the contraband allegedly recovered from the search of the rucksack. At the most, at can be said that the Investigating Officer, in this case, had adopted over cautious approach, when he had made a futile attempt to comply with the provisions of Section 50 of the NDPS Act. In fact, those provisions are not applicable in the present case, as such, the findings of the learned trial Court, on that account also, do not pass the judicial scrutiny, by this Court.

44. Stringent punishment has been provided for the offences punishable under the NDPS Act. when the strict punishment has been provided, then, it is obligatory upon the prosecution to prove each and every ingredient of the offence, for which, the accused persons have been charge sheeted.

45. There is no rule of law that before relying upon the version of the official witnesses, the same must have been supported by the independent witnesses. But, rule of caution says that if the version of the official witnesses is corroborated by the independent witnesses, it will lend credence to the version of the official witnesses. Hence the version of the official witnesses has not been supported by lone independent witnesses.

46. There is no bar that the conviction cannot be recorded merely on the statements of the official witnesses. The official witnesses are as good as the independent witnesses. However, before relying upon the statements of the prosecution witnesses, it is the bounden duty of the Court to see whether the statements of the official witnesses are having a ring of truth in it and the same inspire confidence.

47. The star witness is the I.O. in this case. According to PW-9, he has left the Police Post, Sultanpur after recording his departure report which is Ext.PW-9/A. As per departure report, ASI Vinod Singh (PW-9) along-with ASI Kuldeep Singh, HC Uttam Chand, HHC Raj Kumar, HHC Man Singh, HHG Pankaj Kumar and HHG Ranjit Singh in the official vehicle No. HP-73-0919 being driven by HHG Jalam Singh had proceeded towards Sultanpur, Obri Bhataluan, Mangla, Garori gate for patrolling, laying nakka and for traffic checking. The IO while appearing as PW-9 has almost deposed as per the stand taken by the prosecution. According to this witness, when the accused persons were nabbed, after inquiry, their names, options were given to them to give their search to a Magistrate, Gazetted Officer or to the police. This has

been stated by the I.O in his examination-in-chief. Documents in this regard are Ext.PW-3A and Ext. PW-3/F.

48. Perusal of these documents shows that the IO mentioned, in these documents, that the police are having a valid suspicion against them that they might be having some illegal thing or narcotic substance in their possession. As such, their consent was obtained for search of the rucksack. These documents do not contain the third option which was allegedly stated to be given by the IO. These documents, admittedly, as per the case of the prosecution, were prepared by the IO. The author of these documents who happens to be the IO of the case, put forward a case, according to which, third option was given to the accused persons was not mentioned in the documents, then, this clearly raises a suspicion in the prosecution case.

49. The star witness of the prosecution in the present case is the Investigating Officer, who himself has destroyed the prosecution case by deposing on oath that in the alleged consent memos, he has given three options to the accused persons and not the two. His over jealous approach to depose about the fact that he had given three options to the accused persons regarding their search i.e. before the Magistrate, Gazetted Officer or police, is a fact, which casts a shadow of doubt over the prosecution case.

50. It has rightly been pointed out by the learned counsel appearing for the accused persons in the present case that rukka Ex. PW-9/B, in this case was forwarded to Police Station by the Investigating Officer at about 4:30 p.m., upon which, the formal FIR was registered with Police Station Chamba at about 5:30 p.m. The rukka was brought to the Police Station by PW-4, who has deposed that the scooter was also taken into possession vide memo Ex. PW-3/E and thereafter, the Investigating Officer prepared the rukka and was given to him with a direction to submit the same before MHC Police Station Sadar, Chamba. This witness has nowhere stated that the file was handed over to him by MHC Police Station Sadar, Chamba and after registration of the

FIR, the file was again submitted to the Investigating Officer on the spot, then, how the FIR No. 163 of 2010 appeared in the documents Ex. PW3/C, Ex.PW3/D, Ex. PW3/E, Ex. PW3/G, Ex. PW3/H, NCB form Ex. PW-9/E, reseal memo Ex. PW-10/A, spot memo Ex. DA, which are allegedly prepared by the Investigating Officer on the spot, is a question, which has not been answered by any of the witnesses including the Investigating Officer. In the prosecution of such type of cases, the Court could not assume or presume anything unless or until, it has specifically has not been provided in the statute i.e. NDPS Act.

51. Moreover, perusal of documents Ex. PW3/C, Ex.PW3/D, Ex. PW3/E, Ex. PW3/G, Ex. PW3/H, NCB form Ex. PW-9/E, reseal memo Ex. PW-10/A, spot memo Ex. DA, which are allegedly prepared by the Investigating Officer on the spot, containing the FIR number, it seems that the entire contents were written in one go. Omissions of the Investigating Officer to depose that after receiving the case file and registration of the FIR, he had filled the relevant column of the documents by mentioning the FIR number in it. This omission is fatal for the case of the prosecution and given an occasion to this Court to infer that the things were not happened on the spot, as deposed by the Investigating Officer.

52. Another fact, which has rightly been highlighted by learned counsel appearing for the accused is qua the fact that Investigating Officer allegedly prepared the spot map, which is on the file as Ex. DA. There are contradictions regarding the spot map. Even in the cross-examination of PW-3 Uttam Chand, as he on the one hand has stated that the accused were apprehended when they were negotiating the curve on the scooter and on the other hand in the further cross-examination has stated that in the spot map Ex. DA, no curve has been shown. Meaning thereby, even the spot map, has not been prepared by the Investigating Officer, as per the factual and actual position on the spot.

53. It is the case of the Investigating Officer that he had prepared the rukka at about 4:30 p.m. and handed over the same to HHC Raj Kumar No. 177 for taking the same to the Police Station Chamba for registration of FIR, upon which, FIR Ex. PW-9/D was registered. Perusal of this document shows that the rukka was received in the Police Station at about 5:30 p.m., whereas, the special report, which is Ex. PW-1/A, has been stated to be received at 4:55 p.m. on 19.06.2010. The said report was taken to SP Chamba by HHC Raj Kumar PW-3, who has deposed that he had handed over the said documents to HHC Subhash Chand, Reader of SP Chamba. The said HHC has appeared in the witness box as PW-1 and his omission to depose about the time when he had received the special report and the time when he had presented the same before the then SP Chamba, H.P., is also a fact, which creates a doubt about the submission of the special report to SP Chamba.

54. At the sake of repetition, bare perusal of Ex. PW-9/F shows that the Investigating Officer has filled the column of this document in one go especially column No.1, which contains the FIR number. Admittedly, this document was supposed to be prepared by the Investigating Officer at the time of recovery of the contraband and before sending the rukka Ex. PW-9/B to the Police Station, as it has been mentioned in this document that after sealing the case property, he had sealed the NCB form in triplicate. As such, column No.1 of this document, creates a doubt that this document was not prepared at the spot, as alleged by the Investigating Officer.

55. From this fact alone, this Court has no hesitation to hold that the evidence of the official witnesses do not inspire confidence. Moreover, the said version of the police officials regarding search and seizure of the alleged contraband from the possession of the accused is also not supported by the independent witnesses. The alleged eye witness PW-8 Harish Kumar has not supported the version of the police and despite of the fact that he has been declared as hostile by the learned trial Court, nothing material could be

elicited from him by the learned Public Prosecutor despite of the best efforts made by him.

56. In view of the discussions made above, although the ground that non compliance of Sections 42 and 50 of the NDPS Act do not sustain in the judicial scrutiny by this Court, but, for the reasons assigned by this Court from paragraphs Nos. 47 to 54, this Court has no hesitation to hold that the story of the prosecution comes under the cloud of suspicion and, as such, the accused persons are entitled for the benefit of doubt.

57. Considering all these facts, the *conclusion* drawn by the learned trial Court in acquitting the accused is not liable to be interfered, but, for the reasons as stated herein above, the appeal is dismissed accordingly. Pending miscellaneous application(s), if any, also stands disposed of.

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

Between:-

STATE OF HIMACHAL PRADESH.

...APPELLANT

(BY MR. J.S. GULERIA, DEPUTY ADVOCATE GENERAL)

AND

GHANDHI RAM, S/O SALO RAM, R/O VILLAGE SUGARI, P.O. WANGAL PARGNA BHALEI, P.S. KHAIRI, DISTRICT CHAMBA, H.P.

...RESPONDENTS

(BY MR. NAVEEN K. BHARDWAJ, ADVOCATE).

CRIMINAL APPEAL
No.382 of 2010
Reserved on: 11.10.2022
Decided on: 04.11.2022

Code of Criminal Procedure, 1973- Section 378 - **Indian Penal Code-** Section 302- **Indian Evidence Act, 1872-** Section 27- Circumstantial evidence- Last seen theory- **Held-** The quality of evidence adduced by the prosecution in order to prove the alleged disclosure statement and recovery, pursuant thereto, it is not safe to rely upon such evidence- The requirement of Section 27 of the Evidence Act has not been complied with by the prosecution. The alleged recovery has also become doubtful- The onus is upon the prosecution to prove each and every circumstance against the accused by leading cogent and convincing evidence- Presumption of innocence- Acquittal upheld- Appeal dismissed. (Paras 63, 77, 81 to 86)

Cases referred:

Munikrishna @ Krishna Etc. vs. State by Ulsoor PS, Supreme Today 2022(0) Supreme (SC) 1097;

Ravi Sharma vs. State (Government of NCT of Delhi) & another (2022) 8 SCC 536;

Sunny Kapoor vs. State (UT of Chandigarh) 2006(3) Criminal Court Cases 01 (S.C.);

This appeal coming on for pronouncement of judgment this day, ***Hon'ble Mr. Justice Virender Singh,*** *delivered the following:*

J U D G M E N T

The State has preferred the present appeal under Section 378 of the Code of Criminal Procedure (hereinafter referred as to as the 'Cr.P.C.') against the judgment dated 17.05.2010, passed by the learned Additional Sessions Judge, (Fast Track Court), Chamba, District Chamba, H.P., (hereinafter referred to as the 'learned trial Court') in Sessions Trial No.34 of 2009.

2. By way of the judgment dated 17.05.2010, the learned trial Court has acquitted the respondent (hereinafter referred to as the 'accused') from the offence punishable under Section 302 of the Indian Penal Code, (hereinafter referred to as the 'IPC').

3. Brief facts, leading to the filing of the present appeal, before this Court, may be summed up, as under:-

4. That on 23.04.2009, Sh. Uttam Chand alongwith Sh. Balam Ram and Sh. Subhash Kumar, reported the matter to the police at Police Post Chouhra that Smt. Koula Devi, Wd/o Sh. Madho Ram, who was residing in her Adhwar (seasonal abode), had been found, in a naked condition and she might have died.

5. In order to verify the above facts, ASI Manohar Lal, In-charge, Police Post Chouhra, alongwith police officials had reached at the spot, where, Sh. Sunko Ram(complainant), got recorded his statement under Section 154 of the Cr.P.C., in which, he has disclosed that he is resident of Village Kanda and labourer by profession. He was married to Ms. Saroj, D/o Smt. Koula Devi, about 25 years ago. His father-in-law had died and thereafter, his mother-in-law had started residing in Adhwar (seasonal abode), pursuing her

agriculture pursuits and also looking after the livestock. The daughter of the complainant, namely, Shamo Devi, was also residing with her maternal grandmother and she used to return back daily in the evening, as there was no electricity connection in the said Adhwar.

6. On 23.04.2009, at about 6:30 a.m., as usual, she had gone to Adhwar, she immediately returned back and disclosed to her mother that someone had killed her maternal grandmother during the night time, upon which, Sh. Vijay Singh, has informed the complainant about the incident and he reached at the place of incident at about 9:00 a.m. When, he reached there, he found his mother-in-law lying dead and having the marks of injuries on her face. One blood stained danda was also found lying there.

7. According to the complainant, some unknown person had killed his mother-in-law in the intervening night of 22/23.04.2009.

8. On the basis of the above facts, police registered the case under Section 302 of the IPC and criminal machinery swung into motion.

9. After completing the formalities of inquest report, the dead body of the deceased was sent for post mortem examination to CHC Dalhousie and spot map was prepared. The danda, lying at the spot, was taken into possession and the blood stained portion of the danda was peeled off and was also taken into possession. The blood stained soil was taken into possession alongwith the control soil sample. After the post mortem, dead body of the deceased was handed over to her relatives for last rites. The viscera, alongwith the peeled off portion of the danda, control soil sample and blood stained soil were sent to FSL Junga, for chemical analysis.

10. In the chemical examination, the human blood was found in the blood stained soil as well as the peeled off portion of the danda and the blood group of the same was found to be B^{+ve}. Statements of the witnesses were recorded.

11. On the basis of the suspicion, accused Ghandhi Ram was associated in the investigation of the case and on 25.05.2009, he was arrested. During his interrogation, accused has confessed that he had killed Smt. Koula Devi with the danda, as she used to object him for grazing the livestock near her Adhwar. On the basis of the statement of the accused, the ornaments of Smt. Koula Devi were got recovered from the shop of one goldsmith at Chamba, which were identified by the daughter of the deceased. The empty purse, which, according to the accused, was concealed in the bushes, was also recovered. The said purse was identified by Shamo Devi, as of her deceased maternal grandmother, Smt. Koula Devi. From the spot, the police also recovered one wooden box, which was stated to be used by the deceased to keep the money as well as the ornaments.

12. After obtaining the final report, regarding the cause of death of the deceased, the police submitted the charge-sheet under Section 302 of the IPC against the accused.

13. The Charge-sheet was submitted, in the Court of learned Judicial Magistrate Ist Class, Dalhousie, who has committed the same to the Court of Sessions and consequently, the case was assigned to the Court of learned Additional Sessions Judge, Fast Track Court, District Chamba, H.P., (learned trial Court).

14. The learned trial Court found a *prima facie* case against the accused, for the commission of offence, punishable under Section 302 of the IPC. Accordingly, the accused was charge-sheeted on 07.10.2009.

15. When, the charge, so framed, was put to the accused, he had not pleaded guilty and claimed to be tried.

16. Since, the accused had not admitted his guilt and claimed to be tried, as such, the prosecution has been directed to adduce evidence, to prove the charge framed against the accused, under Section 302 of the IPC.

17. Consequently, the prosecution has examined as many as 21 witnesses, in this case.

18. After closure of the evidence, the entire incriminating evidence, appearing against the accused, was put to him, in his statement, recorded under Section 313 of the Cr.P.C.

19. The accused had denied the entire prosecution case, which was put to him and claimed that the witnesses have deposed against him falsely.

20. However, the accused has not opted to lead evidence, in his defence.

21. Thereafter, the learned trial Court has heard the arguments of the learned Public Prosecutor as well as learned defence counsel, representing the accused, and acquitted the accused, from the offence, punishable under Section 302 of the IPC, vide judgment dated 17.05.2010.

22. The findings of the learned trial Court have been assailed before this Court, by the State, on the ground that the learned trial Court has not only failed to appreciate the prosecution evidence in its proper perspective, but, adopted the unrealistic standard/approach to evaluate the direct and cogent prosecution evidence. The reasoning, as recorded by the learned trial Court, is stated to be unreasonable and unsustainable in the eyes of law, as the consistent testimony of the prosecution witnesses, on the material points, has been stated to be wrongly not considered. The findings have also been assailed on the ground that the learned trial Court has discarded the testimony of the prosecution witnesses, for untenable reasons, in the absence of any proof of animosity, between the accused and the prosecution witnesses.

23. Heavily relying upon the testimony of PW-5 Smt. Saroj, it has been argued by Sh. J.S. Guleria, Deputy Advocate General for the appellant-State that she has categorically testified that accused used to abuse her mother, who used to object the entry of the cattles, in the land of her son-in-law and the said dispute continued for years together.

24. The said statement has been highlighted to attribute the motive against the accused for killing the deceased. The factum of recovery of jewellery and purse belonging to the deceased has also been highlighted. Apart from this, the statements of PW-2 Smt. Shamo Devi and PW-4 Sh. Sobhia Ram have also been relied upon, to attribute the motive against the accused, to kill the deceased.

25. According to the learned Deputy Advocate General, the last seen theory has also been proved by the prosecution, in this case, through the evidence of PW-9 Sh. Parveen Kumar and PW-10 Sh. Puran Chand. The factum of making the disclosure statements as well as recovery, in pursuance thereto, has also been stated to be ignored by the learned trial Court.

26. On all these submissions, a prayer has been made by Sh. J.S. Guleria, learned Deputy Advocate General, appearing for the appellant-State, that the appeal may kindly be accepted and impugned judgment of acquittal may kindly be set aside by convicting the accused, for the commission of offence, for which, he has been charge-sheeted, in the case.

27. Per contra, it has been argued by Sh. Naveen K. Bhardwaj, learned counsel, appearing for the respondent-accused, that the learned trial Court has rightly acquitted the accused, as there was no evidence, from which, even a finger of suspicion, can be raised, against the accused and that the prosecution was required to prove the case against the accused beyond the shadow of reasonable doubt.

28. Highlighting the fact that the evidence of the interested witnesses has rightly been discarded by the learned trial Court and there is nothing on the file to show that any iota of evidence is there, from which, the accused could remotely be connected with the alleged offence, the learned counsel appearing for the accused has argued that, in this case, the learned trial Court has discussed each and every circumstance, which has heavily been relied upon by the prosecution, to prove the guilt of the accused and, then, the

learned trial Court has rightly found that the evidence, so adduced by the prosecution, is too short, to raise any finger, against the accused. Consequently, the learned trial Court has rightly acquitted the accused and the said judgment of acquittal does not require any interference, from this Court, as, from no stretch of imagination, the findings, so recorded by the learned trial Court, falls within the definition of "perverse findings". Hence, a prayer has been made to dismiss the appeal.

29. Arguments heard and perused the case file, with the active assistance of the learned counsel appearing for the parties.

30. In order to decide the present appeal, in an effective manner, it would be just and appropriate, for this Court, to discuss the evidence, adduced by the prosecution and, then, to decide the fact as to whether the alleged chain of circumstantial evidence is complete, to connect the accused, with the commission of crime.

31. As stated above, when the accused had not pleaded guilty, then, the prosecution has examined as many as 21 witnesses, in this case, to prove the guilt of the accused.

32. The person, who had made the statement to the police under Section 154 of the Cr.P.C., upon which, the FIR in question has been registered and the police machinery swung into motion, is Sh. Sunko Ram, who has been examined by the prosecution as PW-1.

32.1. According to this witness, his mother-in-law had started residing with him, after the death of her husband. She was residing in the Adhwar (seasonal abode), where, she had kept livestock and she used to look after the same. This witness was having his agricultural land there. Accused Ghandhi Ram used to go to the said Adhwar as his land was also situated near the Adhwar.

32.2. The daughter of this witness used to go to that Adhwar in the morning and return back to the home in the evening. On the date of incident, she had gone to that Adhwar, in the morning and noticed the dead body of her maternal grandmother lying in the Adhwar. After noticing the dead body, the daughter of this witness returned back to the home. Since, this witness was not present in his house, as such, he was telephonically informed by one Sh. Vijay Singh about the incident around 7:45 a.m., upon which, he straightaway went to the Adhwar and noticed that his mother-in-law was lying dead, in a naked condition and there were injury marks on her forehead. One danda was lying there near the dead body. Except the danda, this witness did not notice anything there.

32.3. The son of this witness, alongwith the other villagers, had gone to Police Station to inform the Police. At about 11:00 a.m., the police reached at the spot and this witness has given his statement, Ex. PW-1/A, to the police. One danda, found lying there on the spot was also taken into possession vide memo Ex. PW-1/D. He has duly identified the danda as Ex. P-2. The blood stained soil as well as control sample soil was also taken into possession vide memo Ex. PW-1/E. Thereafter, the dead body was taken to Dalhousie Hospital for post mortem examination.

32.4. After one month, the police has arrested the accused and while in custody, he has made a statement that he had committed the murder of mother-in-law of this witness and on the next day, he had again made a statement to the police, in the presence of this witness, that he had sold the ornaments of the deceased at Chamba. On the third day, accused had again disclosed to the police about the manner, in which, he had committed the murder.

32.5. The disclosure statement of the accused is Ex. PW-1/F. The accused, in pursuance of his disclosure statement, took the police party to a shop of goldsmith at Chamba, to whom, he had sold the ornaments. The

ornaments were recovered by the police and identified by the wife of this witness and the same were taken into possession vide memo Ex. PW-1/G. He has also identified the gold ornaments Ex. P-8, silver chain Ex.P-9, rings Ex. P-10, 11 and 12.

32.6. According to the cross-examination of this witness, he was having 8-10 bighas land in Khabbal, Mohal Kantha, but, he feigned his ignorance about the land, which was owned by the accused in the said village. He has also feigned ignorance about the fact whether the accused Ghandhi Ram is recorded as owner of agricultural land or not. When the accused had allegedly made the disclosure statement, no one was present in the police station except this witness.

32.7. The police have informed this witness that accused Ghandhi Ram had admitted to have committed murder of mother-in-law of this witness. Next day, police had again informed him that accused had confessed to have sold the ornaments at Chamba. At that time, this witness alongwith his wife, accused and police officials was present. The police remained, at the spot, from 11:00 a.m. to 3:00 p.m. and during the said period, the police officials might have gone inside the Adhwar number of times. Previously, the small wooden box (sandookri) was not taken into possession and the same was taken into possession, after one month of the incident. The police had visited the said Adhwar for about thirty times. The said premises were not sealed, nor the articles lying there were taken into possession.

32.8. When police left the spot, this witness had put his lock there. He has admitted that the danda, like Ex. P-2, was easily available in the village. He has admitted that in their area, widows do not wear ornaments. Easy availability of the ornaments, like P-9 to P-12, in the area, has also been admitted by him. He has admitted that when he lodged the report, he was having the knowledge that the crime has been committed by Ghandhi Ram. He has further deposed that the name of accused Ghandhi Ram was disclosed

to the police, at the time of lodging the report. When, he was confronted with statement Ex. PW-1/A, then, he clearly stated that he had told the police that he was having suspicion regarding the involvement of the accused.

32.9. The ornaments were taken into possession by the police from the shop of goldsmith. Some other old ornaments were also there in the box in broken condition. Police had stayed in the jewellery shop for about 30-45 minutes. Accused lastly took the police to one shop, then to another shop and then, to the shop, from where, the said ornaments were recovered. Police stayed for about 10 minutes in the shop of goldsmith.

33. PW-2, Shamo Devi, is the daughter of complainant, namely, Sh. Sunko Ram. According to this witness, she had studied upto 5th standard and thereafter, she had discontinued her studies and started helping her parents in the domestic work. On 23.04.2009, she had gone to Adhwar at about 6:30 a.m. and noticed there that her maternal grandmother, Smt. Koula Devi was lying dead in a naked condition and there were injury marks on her face. This witness, then, returned back to her house and narrated this fact to her mother, brother and one Sh. Vijay. According to her, later on, police brought accused Ghandhi Ram. At that time, her father was also with the police when accused Ghandhi Ram took the police party to Adhwar from where, he took out a purse kept concealed in the bushes and handed over the same to the police. She has identified the said purse as the purse of her maternal grandmother. One Channan and one person from Gadeti were also with the police, at that time.

33.1. According to the cross-examination of the witness, the police had recorded her statement twice on the spot. This witness had not requested her father to search the wooden box. She has admitted that purse, like Ex. P-14, is easily available in the market. There is no special identification mark on the purse Ex.P-14.

34. PW-4 Sh. Sobhia Ram, was requested by Sh. Uttam Chand to reach at Adhwar as his grandmother has been murdered, upon which, he reached at the spot. He noticed that the door of the said Adhwar was open and dead body of Smt. Koula Devi was lying in a naked condition. There were injury marks on her head. On the intimation, the police reached at the spot, at about 12:15 p.m. and inspected the spot. One danda was found lying near the dead body, which was measured and taken into possession. Lastly, he has stated that there was a dispute between the accused and the deceased, as the deceased, used to chase away the cattle out of the land of Sunko.

34.1. According to the cross-examination of this witness, the dispute between deceased and accused, firstly arose about six months ago from the date, when, he had appeared, in the witness box. No complaint, with regard to the dispute, was lodged to the police. On the day of incident, the police remained there till 3:00 p.m. This witness has admitted that on 23.04.2009, he had not got recorded, in his statement, to the police that there was a dispute between Smt. Koula Devi and Ghandhi Ram. However, according to him, Sh. Sunko had disclosed this fact to the police. The statement of this witness was recorded in the month of Baisakh. From the date of incident, this witness had visited the police post twice.

34.2. When this witness had gone to the police station, the SHO concerned had inquired as why Smt. Koula Devi (deceased) was residing at Adhwar, upon which, he had replied that she was looking after the cattle of her son-in-law Sh. Sunko. The agricultural land of accused is situated in village Wangal, not in Kandha/Khabbal.

34.3. This witness was also having his Adhwar at Khabbal and according to him, the distance of Khabbal from Kantha is about 50 meters.

35. PW-5 Smt. Saroj Kumari is the daughter of deceased Smt. Koula Devi. According to her, after the death of her father, Smt. Koula Devi had

started residing in Adhwar, where she had been looking after their cattle and also taking care of the crops. On 23.04.2009, PW-2 had gone to Adhwar from where, she returned back and informed this witness that deceased was found lying in Adhwar in a naked condition. Accused used to abuse the deceased as his cattle used to enter into the land owned by the husband of this witness. Not only the accused, his father and Prem Bhadur also used to abuse them.

35.1. When the accused disclosed to the police that he had sold one chain and three rings to a goldsmith at Chamba and got recovered one chain and three rings, at that time, this witness was present with the police party and he had identified the recovered chain as the same of her mother.

35.2. In the cross-examination by the learned defence counsel, this witness has admitted that she had stayed at Khabbal on the date of incident till the dead body was shifted to the hospital. On the day of alleged recovery of ornaments, this witness alongwith Bitu, S/o Sh. Baldev, was with the police party. They left for Khabbal at about 2:30 p.m. The articles Ex. P-9 to P-12 do not bear any special identification mark. The police officials had brought those articles to Police Post Chamba. This witness had also gone to the shop of the goldsmith. Police party was taken to the shop of that goldsmith by the accused. No conversation between police and goldsmith had taken place in the presence of this witness. This witness had identified the box, in which, her mother used to keep the jewellery and cash. The said box was not taken into possession by the police. The same was taken into possession, after the arrest of the accused. The last quarrel allegedly took place between the deceased and the accused about 10-12 days prior to the death of her mother, however, this witness was not present at the spot.

36. PW-7 Sh. Sanjeev Kumar is the Jeweller. According to him, on 23.04.2009, accused came to his shop and requested that his father is ill and admitted in hospital. According to him, the accused requested that he was in dire need of money and wanted to sell his ornaments. This witness firstly

refused to purchase the said ornaments, but, in view of the persistent requests of accused, had purchased the same. On 28.05.2009, the accused alongwith police came to the shop and told that he had sold silver ornaments to this witness. Those ornaments were identified by one lady. Thereafter, those ornaments were taken into possession. He has also identified those ornaments.

36.1. In the cross-examination, this witness has admitted that the ornaments, which were allegedly identified by a lady and were recovered by the police, from the shop, were not having any special identification mark over them. This witness has not maintained any record of the customers, who used to visit the shop. The police had firstly visited the shop of this witness and thereafter, had gone to the shop of Ashok, then, to the shop of Vijay.

37. PW-8 Sh. Ashwani Kumar has stated that on 23.04.2009 at about 7:00 p.m., he was going to the house of Raju at Kathuadu. On the way, accused Ghandhi met him. He had proceeded towards village Lohad. This witness, alongwith Parveen, had gone to the house of Raju at Kathuadu and inquired about the mobile. On the next day of murder of Smt. Koula Devi, this witness had disclosed to the police that accused Ghandhi Ram had met them on the way.

37.1. On 28.05.2009, this witness was present in the market of Brangal, when, police came there, alongwith Sunko and his wife. Accused was also with them. According to his further deposition, accused disclosed to the police that he had sold the ornaments to goldsmith at Chamba and he could get those ornaments recovered from Chamba. Thereafter, the accused took the police to Chamba and in this regard, memo Ex. PW-1/F was prepared. In the shop of the goldsmith, the accused identified the ornaments, which were taken into possession vide memo, Ex. PW-1/G. He has also identified those ornaments as Ex. P-9 to Ex. P-12. Accused Ghandhi was also called by the police at the shop where this witness was standing. No document was

prepared at the shop. The police party reached at Chamba at about 2:30 p.m. After reaching Chamba, the police party straightaway went to the shop of goldsmith. The accused had not disclosed the name of the goldsmith to the police. The police party remained in the shop of the goldsmith for about one and a half hours. The police inquired from the goldsmith as to whether the accused had sold the ornaments to him, upon which, he has replied in affirmative. On the directions of the police, goldsmith had taken out the ornaments and handed over to the same to the police. Other ornaments were also there in the box. He has admitted that several ornaments, like Ex. P-9 to P-12, were kept in the said box. The police party had not visited the shop of other goldsmiths, except the shop, from where, the alleged recovery was effected.

38. PW-9 is Sh. Parveen Kumar. He deposed that in the year 2009, he had gone to Chamba to see his brother-in-law, who was admitted in TB Hospital, Chamba. When, he was on his way, his sister told him regarding the theft of her mobile phone. On receiving this information, this witness, alongwith Sh. Ashwani, had gone to Village Kathwadu, to the house of Raju, to inquire about the stolen mobile, who had disclosed that he had not taken the mobile phone. Thereafter, he and Sh. Ashwani had returned back from the house of Raju to their village. On the way, when they were taking rest, they noticed that the accused Ghandhi Ram had proceeded towards the house of Koula Devi. Thereafter, they returned back to their house. Next day, they came to know about the death of "someone."

38.1. On 29th May, this witness was summoned by the police at Police Post Brangal, where, accused was in custody of the police. Accused had admitted before the police that he had committed the murder of old lady and stolen money and kept concealed purse. The accused also disclosed that he had taken the purse out of the wooden box. The accused took the police party to the place, where he had kept the purse and got recovered the same from the

bushes under banana tree. He has also disclosed to the police about the place, where he had kept the box, which was under a cot in the room. The purse was recovered from a distance of 25 meters from the house of the deceased. A number of residential houses were there in Village Brangal.

38.2. This witness has not disclosed to anyone that he had seen accused Ghandhi Ram proceeding towards the house of deceased. This witness was summoned to the Police of Police Post Brangal and he remained present there till 5:00 p.m. The police continued to make enquiries from the accused till 5:00 p.m. Accused was handcuffed on that day. The documents, which bear the signatures of this witness, were prepared. The distance between the Police Post from the house of the deceased is stated to be about 8 k.m. The recovery was made between 3:00 p.m. to 5:00 p.m.

39. PW-10 Sh. Puran Chand could not tell the month and year, but, stated that the date was 22nd. He was not feeling well, so, he had hired vehicle and went to Koti Hospital and returned back. While on the way back, when he reached at Wangal, at about 5:30 p.m., Madan also met him. Thereafter, when this witness reached at Gadeti, where, Parveen and Bittu met him. At Gadeti, he noticed that accused Ghandhi Ram, with one Chandan, was consuming liquor in the house of Nirjla. He and Madan also sat in one room of the house of Nirjla and consumed one peg of liquor. Thereafter, he and Ghandhi Ram left the house of Nirjla and this witness proceeded towards his house. Ghandhi Ram carried his luggage. This witness had reached his house at about 7:30-8:00 p.m. Thereafter Ghandhi Ram demanded money for purchasing liquor. Consequently, this witness has given Rs. 10/- to Resho to provide liquor to accused Gandhi Ram. Resho gave a pint of liquor to accused Ghandhi Ram and thereafter he had consumed liquor. This witness has failed to depose about the time when the accused Ghandhi Ram had gone from there. However, according to him, he came to know about the death of Koula Devi on 23rd.

39.1. In the cross-examination, this witness has admitted that he has not disclosed to anyone that the liquor was provided by him to accused Ghandhi Ram.

40. PW-11 Sh. Parkash Chand has stated that on 22.04.2009 at about 8:00-8:30 p.m., he was sitting in the house of Resho Devi in Village Lohad and was consuming liquor. Accused Ghandhi Ram and Puran Chand were also present there. Puran Chand gave Rs. 10/- to Resho, who provided a pint of liquor to Ghandhi Ram. Accused consumed the liquor and he had also provided one peg of liquor to him. Thereafter, the accused left the spot and proceeded towards his house. On the next day, this witness had gone to attend his duty at Bharmour and in the evening, he came to know about the fact that Smt. Koula Devi was murdered by someone.

40.1. In the cross-examination, this witness has admitted that he had not disclosed to anyone before making the statement to the police that accused Ghandhi alongwith the uncle of this witness came to the house of Resho, where his uncle got purchased liquor for him.

41. PW-14 Dr. Om Parkash has conducted the post mortem report of the deceased Ex. PW-14/B. According to this witness, cause of death was head injury, which led to irreversible shock, cardiopulmonary arrest. This witness has noticed three visible fractures on the person of the deceased. This witness has not seen invisible fractures on the person of deceased.

42. PW-19, ASi Manohar Lal, has partly investigated the case. On 23.04.2009, Sh. Uttam Chand has lodged report with the police at Police Post Chauhra. Thereafter, this witness, alongwith police officials, went to the spot and recorded the statement of Sh. Sunko Ram Ex. PW-1/A. After making the endorsement, the same was sent to the Police, on the basis of which, FIR Ex. PW-19/B was registered. The photographs of the spot were got clicked by summoning the photographer. He has separated peeled off portion of the

danda and sealed the same separately. Blood stained soil and control sample of soil were also taken into possession.

42.1. This witness, in the cross examination, has admitted that Sh. Sunko Ram did not express his suspicion, on any person, about the involvement in the crime. This witness remained on the spot for about one and a half hours and during his stay, he had examined the site minutely, but, had not noticed the sandookari (small wooden box). At that time, Sh. Sunko Ram was accompanying this witness and nobody had told this witness about this sandookari, on that day.

43. PW-21, Inspector Kanwar Singh Guleria, has also partly investigated the case. According to him, on 28.05.2009, accused, while in police custody, had made a disclosure statement, Ex. PW-1/F, in the presence of Sh. Sunko Ram and Sh. Ashwani Kumar, disclosing therein that he had committed the murder of Smt. Koula Devi and had taken away the ornaments of the deceased and sold the same at Chamba and could get the same recovered. Thereafter, the accused took the police party to Chamba and shown a shop situated at Museum Road Chamba. Jeweller Sh. Sanjeev Kumar, shown the ornaments, which the accused had sold to him by saying that his father was ill. Stolen articles were identified by Smt. Saroj Kumari, to be of the deceased. Those ornaments were taken into possession vide memo Ex. PW-1/G in the presence of Sh. Sunki and Sh. Ashwani Kumar.

43.1. On 29.05.2009 the accused, while in the police custody, again made a disclosure statement that he could get recovered a purse from the bushes situated near the place of incident, upon which, the statement, Ex. PW-9/A, was recorded. Pursuant to the said statement, the accused got recovered the purse from the bushes. The said purse was identified by Shamo Devi to be of the deceased.

43.2. In the cross-examination, this witness had admitted that the accused was arrested from the Court premises, as he had applied for anticipatory bail, which was declined to him.

43.3. On 04.05.2009, this witness had recorded the statement of Smt. Saroj Kumari. She had raised suspicion qua the involvement of the accused in the commission of crime.

43.4. On 28.05.2009, accused allegedly made the disclosure statement at Brangal at tea stall. Then, the accused took the police party to the shop of jeweler. According to this witness, he had not taken the police party to any other shop. After seeing the photographs, this witness had not inquired from ASI Manohar Lal, as to why the wooden box was not taken into possession, as the same was visible in the photograph, Ex. PW-20/B.

44. This is the entire evidence, which has been led by the prosecution, in this case.

45. The learned trial Court, in this case, has discussed as many as five circumstances to judge the guilt of the accused and ultimately come to the conclusion that the circumstances, so relied upon by the prosecution, neither point out definitely and unerringly, towards the guilt of the accused, nor they formed the complete chain to suggest that within all human probabilities, the crime was committed by the accused and none else. These findings have been assailed before this Court.

46. Admittedly, this case is based upon the circumstantial evidence. It is no longer res-integra, that the conviction can be based upon the circumstantial evidence. The circumstantial evidence is not the weak type of evidence, but, in order to base the conviction on the circumstantial evidence, it has to be seen that the circumstances, so established on the record, are incriminating in nature and the chain of the circumstances, so

relied/established by the prosecution, is so complete, as not to be inconsistent with any other hypothesis, except the guilt of the accused.

47. While dealing with the case, where the prosecution wants to prove the guilt of the accused on the basis of circumstantial evidence, the rule specifically applicable to such evidence must be borne in mind, as in such cases, there is always the danger that conjecture or suspicion may take place of the "legal proof."

48. In order to base a conviction, on the circumstantial evidence, each and every piece of incriminating circumstance, must be clearly established by reliable and clinching evidence. Hon'ble Apex Court, in a recent decision in **Munikrishna @ Krishna Etc. vs. State by Ulsoor PS**, reported in Supreme Today 2022(0) Supreme (SC) 1097 (Criminal Appeal No(s). 1597-1600/2022), has elaborately discussed about the nature of the circumstantial evidence. Relevant paragraphs of the judgment are reproduced as under:-

> *"11. It is a case of circumstantial evidence and in a case of circumstantial evidence, the entire chain of evidence must be complete and the conclusions which is arrived after examining the chain of*
> *evidence must point towards the culpability of the accused and to no other conclusion. This, however, is clearly missing from the case of the prosecution. The entire case of the prosecution is based on the so called confessional statements or voluntary statements given by accused Nos. 1 to 5 (all the present appellants) while they were in police custody. Statement given by an accused to police under Section 161 of Cr.P.C. is not admissible as evidence. The so-called evidence discovered under section 27 of Indian Evidence Act, 1872, i.e., the recovery of stolen items and the recovery of the weapon are also very doubtful.*
>
> *12. In a case of circumstantial evidence, the Court has to scrutinize each and every circumstantial possibility, which is placed before it in the form of an evidence and the evidence must point towards only one conclusion, which is the guilt of*

the accused. In other words, a very heavy duty is cast upon the prosecution to prove its case, beyond reasonable doubt. As early as in 1952, this Court in its seminal judgment of Hanumant Govind Nargundkar & Anr. v. State of Madhya Pradesh1 had laid down the parameters under which the case of circumstantial evidence is to be evaluated. It states:-

"… It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused…"

Hanumant (supra) has been consistently followed by this Court. To name a few, Tufail (Alias) Simmi v. State of Uttar Pradesh2 , Ram Gopal v. State of Maharashtra3 and Sharad Birdhichand Sarda v. State of Maharashtra4 . In Musheer Khan @ Badshah Khan & Anr. v. State of Madhya Pradesh5 dated 28.01.2010, this Court while discussing the nature of circumstantial evidence and the burden of proof of prosecution stated as under:-

"39. In a case of circumstantial evidence, one must look for complete chain of circumstances and not on snapped and scattered links which do not make a complete sequence. This Court finds that this case is entirely based on circumstantial evidence. While appreciating circumstantial evidence, the Court must adopt a cautious approach as circumstantial evidence is "inferential evidence" and proof in such a case is derivable by inference from circumstances.

40. Chief Justice Fletcher Moulton once observed that "proof does not mean rigid mathematical formula" since "that is impossible". However, proof must mean such evidence as would induce a reasonable man to come to a definite conclusion. Circumstantial evidence, on the other hand, has been compared by Lord Coleridge "like a gossamer thread, light and as unsubstantial as the air itself and may vanish with the merest of touches". The learned Judge also observed that such evidence may be strong in parts but it may also leave great gaps and rents through which the accused may escape. Therefore, certain rules have been judicially evolved for appreciation of circumstantial evidence.

41. To my mind, the first rule is that the facts alleged as the basis of any legal inference from circumstantial evidence must be clearly proved beyond any reasonable doubt. If conviction rests solely on circumstantial evidence, it must create a network from which there is no escape for the accused. The facts evolving out of such circumstantial evidence must be such as not to admit of any inference except that of guilt of the accused. (See Raghav Prapanna Tripathi v. State of U.P. [AIR 1963 SC 74 : (1963) 1 Cri LJ 70])

42. The second principle is that all the links in the chain of evidence must be proved beyond reasonable doubt and they must exclude the evidence of guilt of any other person than the accused. (See State of U.P. v. Dr. Ravindra Prakash Mittal [(1992) 3 SCC 300 : 1992 SCC (Cri) 642 : 1992 Cri LJ 3693] , SCC p. 309, para 20.)

43. While appreciating circumstantial evidence, we must remember the principle laid down in Ashraf Ali v. King Emperor [21 CWN 1152 : 43 IC 241] (IC at para 14) that when in a criminal case there is conflict between presumption of innocence and any other presumption, the former must prevail.

44. The next principle is that in order to justify the inference of guilt, the inculpatory facts must be incompatible

with the innocence of the accused and are incapable of explanation upon any other reasonable hypothesis except his guilt. 45. When a murder charge is to be proved solely on circumstantial evidence, as in this case, presumption of innocence of the accused must have a dominant role. In Nibaran Chandra Roy v. King Emperor [11 CWN 1085] it was held that the fact that an accused person was found with a gun in his hand immediately after a gun was fired and a man was killed on the spot from which the gun was fired may be strong circumstantial evidence against the accused, but it is an error of law to hold that the burden of proving innocence lies upon the accused under such circumstances. It seems, therefore, to follow that whatever force a presumption arising under Section 106 of the Evidence Act may have in civil or in less serious criminal cases, in a trial for murder it is extremely weak in comparison with the dominant presumption of innocence.

46. The same principles have been followedby the Constitution Bench of this Court in Govinda Reddy v. State of Mysore [AIR 1960 SC 29 1960 Cri LJ 137] where the learned Judges quoted the principles laid down in Hanumant Govind Nargundkar v. State of M.P. [AIR 1952 SC 343 : 1953 Cri LJ 129] The ratio in Govind [AIR 1952 SC 343 : 1953 Cri LJ 129] quoted in AIR para 5, p. 30 of the Report in Govinda Reddy [AIR 1960 SC 29 : 1960 Cri LJ 137] are:

"5. … '10. … in cases where the evidence is of a circumstantial nature, the circumstances [which lead to the conclusion of guilt should be in the first instance] fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be [shown] that within all human probability the act must have

been [committed] by the accused.' [As observed in Hanumant Govind Nargundkar v. State of M.P., AIR 1952 SC 343 at pp. 345-46, para 10.] " The same principle has also been followed by this Court in Mohan Lal Pangasa v. State of U.P. [(1974) 4 SCC 607: 1974 SCC (Cri) 643: AIR 1974 SC 1144]"

49. During the course of arguments, the learned Deputy Advocate General has relied upon two circumstances i.e. recovery of the purse and recovery of the ornaments, at the instance of the accused.

50. Before discussing those two circumstances, it would be appropriate for this Court, to point out the feeble attempt made by the prosecution, to establish the factum of animosity between the accused and the deceased.

51. Motive assumes significance, in a case, where the prosecution wants to prove the guilt of the accused, on the basis of the circumstantial evidence. The Hon'ble Apex Court in a recent decision **titled as Ravi Sharma vs. State (Government of NCT of Delhi) and another** reported in **(2022) 8 SCC 536,** has held as under:-

"14. *When we deal with a case of circumstantial evidence, as aforesaid, motive assumes significance. Though, the motive may pale into insignificance in a case involving eyewitnesses, it may not be so when an accused is implicated based upon the circumstantial evidence.*

This position of law has been dealt with by this Court in the case of Tarsem Kumar v. Delhi Administration (1994) Supp 3 SCC 367 in the following terms:

"8. Normally, there is a motive behind every criminal act and that is why investigating agency as well as the court while examining the complicity of an accused try to ascertain as to what was the motive on the part of the accused to commit the crime in question. It has been repeatedly pointed out by this Court that where the case of the prosecution has been proved beyond all reasonable

> *doubts on basis of the materials produced before the court, the motive loses its importance. But in a case which is based on circumstantial evidence, motive for committing the crime on the part of the accused assumes greater importance. Of course, if each of the circumstances proved on behalf of the prosecution is accepted by the court for purpose of recording a finding that it was the accused who committed the crime in question, even in absence of proof of a motive for commission of such a crime, the accused can be convicted. But the investigating agency as well as the court should ascertain as far as possible as to what was the immediate impelling motive on the part of the accused which led him to commit the crime in question."*

52. Being guided by the decision of Hon'ble Apex Court, as referred to above, in **Ravi Sharma's case (supra)**, now this Court proceeds to discuss the evidence of the prosecution, which has been led in order to prove the fact that the accused had motive to kill Koula Devi, as there was animosity between accused and deceased on account of the fact that the accused used to chase away the domesticated animals of the deceased.

53. Admittedly, the person, who has put the criminal machinery into motion, has not named the accused, in his statement, recorded under Section 154 of the Cr.P.C., Ex. PW-1/A. No doubt, the FIR is not the encyclopedia of the events, but, the accused is stated to be the neighbour of the deceased and had there been any animosity or strained relations between the deceased and the accused, then, in the normal circumstances, such material facts should not have been skipped from the version of the person, who has got recorded his statement under Section 154 of the Cr.P.C.

54. The deposition of PW-1, in the cross-examination, that he had knowledge, at the time of lodging the report with the police, that accused Ghandhi Ram had committed the murder, is a fact, which can be said to be an afterthought story. Had this fact been in the knowledge of PW-1, at the time of recording his statement, under Section 154 of the Cr.P.C, then, such

important fact should have been got recorded by him, in the said statement to the Police.

55. The story of the animosity between the deceased and accused was firstly introduced in the supplementary statement of PW-4, namely, Sh. Sobhia Ram, which, as per the record, was recorded on 27.05.2009. It is highly improbable that the factum of animosity, which must be in the knowledge of the near and dear of the deceased, has not been disclosed by them to the police, but, the said factum seems to be introduced by the police, for the first time, in the supplementary statement of PW-4 Sh. Sobhia Ram on 27.05.2009.

56. PW-4 has deposed that when the dispute arose between the accused and deceased, then, Sunko Ram and his wife were present there. However, no such deposition has been made by the complainant as well as his wife, who are relatives of the deceased. In case, such type of dispute had taken place in the presence of these two witnesses, who are daughter and son-in-law of the deceased, then, in the natural course of the events, such important fact must have been mentioned by these witnesses in their statements. Whatsoever, deposed by this witness regarding the alleged animosity, has been demolished by this witness himself, when, he has deposed in the cross examination, that when he had visited the police post, after the third day of the incident, he had not disclosed to the police about the alleged dispute between the accused and the deceased. The improved version of this witness is also fatal for the case of the prosecution.

57. There is no whisper, in the statement of the son-in-law of the deceased, that his mother-in-law was having any animosity with the accused. Similarly, daughter of PW-1 has also not bothered to depose about the alleged animosity between the accused and the deceased. The daughter of the deceased, with whom the deceased was residing, after the death of her husband, has been examined as PW-5. This witness has also not uttered a

single word regarding the alleged animosity between the deceased and the accused. In such situation, the feeble attempt of the prosecution to introduce the alleged animosity between the deceased and accused to prove the "motive" remains futile.

58. Now, coming to the factum of the alleged recoveries, in pursuance of the alleged disclosure statement(s) made by the accused.

59. The prosecution, in this case, has heavily relied upon the circumstances that the accused, in the custody, had made a disclosure statement that he had sold one silver necklace and three silver rings to a goldsmith at Chamba and he could identify the said shop and get recovered the above articles. According to the prosecution, the said statement was recorded by the Investigating Officer and documents have been proved as Ex. PW-1/F, which has allegedly been witnessed by PW-1 Sh. Sunko Ram and PW-8 Sh. Ashwani Kumar. The person, who has recorded the said statement, is PW-21. This witness, while stating on oath, has exaggerated the alleged version given by the accused, in the document Ex. PW-1/F. He has deposed on oath that on 28.05.2009, accused, while in police custody, made a disclosure statement, Ex. PW-1/F, in the presence of the witnesses has stated that "*after committing murder of Smt. Koula Devi he had taken the ornaments of the deceased and sold the same at Chamba and could get them recovered,"* whereas, no such words, have been found to be recorded in the statement, Ex. PW-1/F. In this document, the accused has stated *"I have sold one silver necklace and three silver rings to a goldsmith at Chamba. I can get recovered the same after identifying the shop of goldsmith."* The over-enthusiasm of the Investigating Officer to add the words that *the accused had stated that after committing murder of Smt. Koula Devi, he had taken the ornaments of the deceased and sold them out at Chamba*, is a fact, which destroyed the evidentiary value of the alleged disclosure statement.

60. The Investigating Officer is supposed to reiterate the exact information or statement given by the accused. By virtue of the provision under Section 27 of the Evidence Act, the legislature in its wisdom, has, partially lifted the ban, in admitting the statement of the accused, made during the custody. The failure of the Investigating Officer to depose about the "exact information", allegedly given by the accused, is also fatal for the case of the prosecution. Even otherwise, PW-1, who is the alleged signatory of the disclosure statement, Ex.PW1/F, also could not disclose about the exact information given by the accused, in his statement, recorded under Section 27 of the Evidence Act. The other signatory of the statement, Ex. PW-1/F, is Sh. Ashwani Kumar, who has been examined as PW-8. This witness has also failed to depose about the exact information given by the accused, in his statement recorded under Section 27 of the Evidence Act.

61. Even otherwise, the statement of PW-8 Ashwani Kumar, is sufficient to destroy the case of the prosecution about the alleged recovery of ornaments Ex. P-9 to P-12, as this witness has stated that in his presence, the accused has allegedly made the statement that he had sold the ornaments to one goldsmith at Chamba and could get the same recovered from Chamba. Thereafter, the accused allegedly took the police party to Chamba.

62. This witness in his deposition, has stated that they had straightaway gone to the shop of goldsmith, whereas, in the next line, he has deposed that accused had not disclosed the name of goldsmith to the police in his presence. Then, how the police had gone to the shop of Sh. Sanjeev Kumar is a fact, which remained unanswered in this case. His further deposition that the accused had shown the shop of goldsmith to the police, is not liable to be accepted, as in the next line, he has deposed that the police had enquired from the said goldsmith, that the accused had sold ornaments to him. The material discrepancy between the statement of PW-8 with the statement of PW-1, as well as, his wife, is fatal for the case of prosecution.

63. In view of the discussions made above, this Court is in full agreement with the findings of the learned trial Court, qua the fact, that in view of the quality of the evidence adduced by the prosecution, in order to prove the alleged disclosure statement and recovery, pursuant thereto, it is not safe to rely upon such evidence.

64. The another fact, which has rightly been highlighted by the learned counsel appearing for the accused, in this case, is that the information allegedly given by the accused, in his disclosure statement, Ex. PW-1/F, does not fall within the definition of Section 27 of the Evidence Act, as in the alleged statement, accused has not given any definite information. Rather, from the evidence of PW-1, it has been proved that the police had made the fishy inquiry by taking the accused to the one shop, then, to another shop and lastly, to the shop, from where the ornaments were allegedly recovered. Similarly, from the deposition of PW-8, the presence of PW-1 and PW-8, with the police, on the date of alleged recovery also become doubtful, as, PW-1 has stated that the accused had taken the police, firstly, to the one shop, then to the second shop and then, to the third shop, from where the alleged recovery was made, whereas, PW-8 has stated that the police party had not visited the shop of any other goldsmith except the shop, from where the alleged recovery was effected.

65. In such situation, there is no occasion for this Court to differ with the findings of the learned trial Court.

66. So far as the second disclosure statement, allegedly made by the accused, on 29.05.2009 is concerned, as per the prosecution case, accused Ghandhi Ram made a disclosure statement that he had taken out Rs. 1100/- from a yellow coloured purse and had thrown the purse near Adhwar and get the same recovered. The said statement was allegedly witnessed by prosecution witnesses, namely, Sh. Parveen Kumar and Sh. Chanden Lal. The Investigating Officer has deposed regarding this fact by stating that on

29.05.2009, accused made a disclosure statement that he could get recovered the purse in the bushes, near the place of incident. Again the exact information, which was allegedly given by the accused, has not been deposed by this witness during his statement on oath.

67. PW-9 Sh. Parveen Kumar has deposed that accused Ghandhi Ram admitted before the police that he had committed murder of old lady, had stolen money and kept concealed the purse (batua), whereas, in the document, Ex. PW-9/A, the word allegedly used by accused are that *he had removed Rs. 1100/- from the purse and thrown the purse near Adhwar*. There is much difference between the terms 'concealed' and 'thrown'.

68. The other signatory of the disclosure statement, Ex. PW-9/A, has not been examined by the prosecution, in this case, and was simply given up by the learned Public Prosecutor.

69. In such situation, there is no legal hesitation, for this Court, to draw an inference that had this witness been examined, then, he would have deposed against the prosecution.

70. As per the evidence of Investigating Officer as well as PW-9, the requirement of Section 27 of the Evidence Act has not been complied with, by the prosecution. The alleged recovery has also become doubtful, as, PW-2 has allegedly deposed that the accused took the police party to Adhwar, from where, he took out a purse kept concealed in the bushes and handed over the same to the police. Interestingly, in the examination-in-Chief, this witness has deposed that her grandmother used to keep the purse in her wooden box (sandookri). The said sandookri, with the lock on it, is

clearly visible in the photograph, Ext. PW-20/B, as admitted by the Investigating Officer. When the said sandookri has not been taken into possession at the initial stage, then, the alleged recovery of the purse, that too, at the instance of the accused, comes under the cloud of suspicion.

71. At the cost of repetition, the disclosure statement allegedly made by the accused regarding the purse is Ex. PW-9/A. The said statement was recorded by PW-21. According to him, the accused, in custody, on 29.05.2009, has made the disclosure statement that he could get recovered a purse from the bushes situated near the place of incident and allegedly got recovered the purse from the bushes. Whereas, in Ex. PW-9/A, the accused allegedly made the disclosure statement, that, on 22.04.2009, he had killed Smt. Koula Devi and, thereafter, Rs. 1100/-, which were in a yellow purse, were taken away and after removing the money, the purse was thrown near Adhwar. The new story, regarding the recovery of the purse from the bushes, introduced by PW-21, is a fact, which, compels this Court to hold that the things had not happened in the manner, as deposed by PW-21. Even otherwise, PW-9 has deposed, in examination-in-chief, that he had stolen money and kept concealed the purse and the alleged recovery is stated to be from the bushes under a banana tree. Statements of PW-21 and PW-9 are in contradiction of the document Ex. PW9/A. In such situation, the prosecution has miserably failed to prove the alleged recovery in pursuance to the disclosure statement, Ex. PW9/A.

72. In the post mortem report, Ex. PW-14/B, the age of the deceased has been mentioned as 70 years. As per the prosecution case, after the death of her husband, she was residing in the village of her daughter at Adhwar. In such situation, the story regarding the fact that the accused had taken away the ornaments Ex. P-9 to P-12, is not liable to be accepted as the sandookri, which was having lock over it, has not been taken into possession by the PW-19 Investigating Officer. This witness has admitted that the said sandookri was found lying under the cot, but, the Investigating Officer had not thought it proper to check the same, what to talk about taking into possession the said sandookri.

73. The grand daughter of the deceased, PW-2 Shamo Devi, has made a futile attempt by deposing that her maternal grandmother used to keep the purse, Ex. P-14 in the sandookri, this is a fact, which is not liable to be accepted, as PW-21 Investigating Officer, has admitted that the sandookri is clearly visible in the photograph, Ex. PW-20/B.

74. A bare perusal of the photograph Ex. PW-20/B shows that the said sandookri is having lock over it, then, how the accused could succeed in removing the ornaments and money out of the said sandookri. This fact remains unanswered by the prosecution, in this case.

75. The prosecution, in this case, has also relied upon the last seen theory. In order to prove the said fact, the prosecution has heavily relied upon the statement of PW-8, PW-9 and PW-10, in this case.

76. Hon'ble Apex Court in a case **titled as Sunny Kapoor vs. State (UT of Chandigarh)** reported in **2006(3) Criminal Court Cases 01 (S.C.),** has elaborately discussed this theory i.e. last seen theory. The relevant para of this judgment is reproduced as under:-

> *19. The appellants have been convicted on the basis of circumstantial evidence. It is now well settled by a catena of decisions of this Court that for proving the guilt of commission of an offence under Section 302 IPC, the prosecution must lead evidence to connect all links in the chain so as to clearly point the guilt of the accused alone and nobody else. Recently in Ramreddy Rajeshkhanna Reddy & Anr. Vs. State of Andhra Pradesh, 2006 (3) SCALE 452, this Court has held as under:*
>
> *"It is now well-settled that with a view to base a conviction on circumstantial evidence, the prosecution must establish all the pieces of incriminating circumstances by reliable and clinching evidence and the circumstances so proved must form such a chain of events as would permit no conclusion other than one of guilt of the accused. The circumstances cannot be on any other hypothesis. It is also well- settled that suspicion, however, grave may be, cannot be a substitute for*

> *a proof and the courts shall take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence. .*
>
> *The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case courts should look for some corroboration."*

77. Judging the facts and circumstances of the present case, the material question which arises for determination before this Court is whether the statements of these three witnesses are sufficient to establish the last seen theory, in this case, and to convict the accused on the basis of the above facts.

78. PW-9, Ashwani Kumar has stated that on 22nd April 2009, at about 7:00 p.m., when this witness and Parveen Kumar were going to the house of Raju at Kathuadu, then, accused Ghandhi Ram met them on the way. The accused is stated to be going towards Village Lohad and he was having some articles, which were kept by him in a sack. This witness is resident of Village Wangal. Admittedly, the accused is resident of Village Khabbal. As such, his presence in the area is natural. As such, no inference can be drawn from the said statement.

79. So far as the statement of PW-9 is concerned, his statement is too short to raise any finger of suspicion against the accused, as this witness has simply stated that when they were taking rest, while returning back from the house of Raju, then, they noticed accused Ghandhi Ram proceeding towards the house of an old lady (deceased). However, this witness, in his examination-in-chief, could not disclose about the month and simply stated that it was 22nd of 2009. From this, no inference can be drawn that on the day

of incident, the accused was found allegedly going towards the house of the deceased.

80. PW-10 Puran Chand is resident of Village Lohad. He could not tell about the month and year of the alleged incident. From his entire statement, no inference can be drawn that the deceased and the accused were last seen together. As such, the said theory is also not liable even to consider, what to talk to base the conviction on the basis of said fact.

81. No doubt, a brutal murder has taken place, but this does not mean that without any clinching and clear evidence, the person, who has been named as accused, in the case, should be convicted.

82. The prosecution has to stand upon its own legs and no adverse inference could be drawn from the fact that the accused has denied the entire prosecution case, as the onus is upon the prosecution to prove each and every circumstance against the accused, by leading the cogent and convincing evidence. The accused has every right to take shelter under the golden principle to remain silent during the trial.

83. From any stretch of imagination, the findings, so recorded by the learned trial Court, do not fall within the definition of 'perverse'. Moreover, with the judgment of acquittal in favour of accused, the presumption of innocence, which was available to the accused, at the time of inception of the trial, becomes double.

84. No other point has been urged or argued.

85. In view of the above, there is no occasion for this Court to differ with the findings recorded by the learned trial Court, while acquitting the accused.

86. Accordingly, there is no merit in the appeal and the same is accordingly dismissed. Bail bonds are ordered to be discharged.

87. Records be sent back.

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

Kuldeep

....Petitioner.

Versus

Kartik

...Respondent.

For the petitioner : Mr. Vinod Chauhan, Advocate.
For the respondent : Mr. Surender Sharma, Advocate.

Cr. Revision No. 256 of 2022
Reserved on :23.11.2022
Decided on: 08.12.2022

Code of Criminal Procedure, 1973- Sections 125, 397, 401- Respondent sought maintenance from petitioner claiming himself to be his son-Petitioner directed to pay maintenance @Rs. 2500/- per month to the respondent by Learned Principal Judge Family Court Chamba- The petitioner contended that the petitioner was not proved to be father of the respondent and hence, the impugned order was unsustainable - **Held-** The statement of mother of the respondent regarding the paternity of respondent cannot be brushed aside easily- Contest by petitioner to the prayer for DNA test strengthens the claim of the respondent- Petition dismissed. (Paras 12, 13)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge *(Oral)*

By way of instant petition, petitioner has assailed order dated 07.03.2020, passed by learned Principal Judge Family Court, Chamba, District Chamba, H.P. in Petition No. 94 of 2019, whereby petitioner herein has been directed to pay maintenance @ Rs. 2,500/- per month to the respondent herein from the date of filing of the petition i.e. 31.03.2016.

2. Respondent sought maintenance from the petitioner claiming himself to be his son. It was alleged that respondent was born out of

relationship that, once, existed between the petitioner and mother of the respondent.

3. Petitioner denied the allegations. He denied himself to be the father of the respondent. He even denied his relationship with the mother of the respondent.

4. Learned Principal Judge, Family Court, Chamba framed following points for determination:-

1. Whether the respondent has not provided any maintenance to the petitioner being his minor child?

2. If Point No.1 is proved in affirmative, as to what amount of maintenance the petitioner is entitled to?

3. Final order.

5. After recording the evidence of the parties, respondent has been held entitled to maintenance from the petitioner.

6. I have heard learned counsel for the parties and also gone through the record.

7. Petitioner has assailed the impugned order on the ground that petitioner has been fastened with the liability to pay maintenance to the respondent without their being any evidence on record to prove such entitlement. Learned counsel for the petitioner contended that the petitioner was not proved to be father of the respondent and hence, the impugned order was unsustainable. As per petitioner, respondent was neither his legitimate nor illegitimate son.

8. The mother of the respondent entered into the witness box and made categoric allegations against the petitioner. She alleged that she had fallen in love with the petitioner, who had kept her as a mistress. She further stated on oath that petitioner had maintained physical relation with her, as a result of which she conceived and ultimately delivered a baby boy. i.e. the respondent. On the other hand, petitioner denied all such allegations. He,

besides examining himself also examined his wife Smt. Manju Devi to support his contention.

9. Learned Principal Judge, Family Court, Chamba, after analyzing the evidence came to the conclusion that respondent had been able to establish his case. Version put forward by the mother of respondent was believed. Reliance was also placed on document Ext. PW2/A, which was a copy of immunization certificate of respondent.

10. During the course of proceedings before learned Principal Judge, Family Court, Chamba, an application was moved on behalf of the respondent for conducting the DNA test in order to establish his paternity. Petitioner opposed such prayer by filing a response. Learned Principal Judge, Family Court, Chamba, however, held that since there was sufficient proof regarding paternity of the respondent on record, there was no need to conduct the DNA test of the respondent.

11. The statement of mother of the respondent regarding the paternity of respondent cannot be brushed aside easily. It is hard to believe that a female would name any unknown person to be the father of her son. Contest by petitioner to the prayer for DNA test strengthens the claim of the respondent. It would have been more appropriate for petitioner to agree for DNA test, as his fidelity towards his wife and sincerity towards his children was at stake. Keeping in view the dependability of DNA test, petitioner could have availed the opportunity to prove the allegation against him wrong. On the other hand, respondent and for that matter his mother had stepped forward with a prayer for conduct of DNA test. The circumstance noticed above, is sufficient to draw adverse inference against the petitioner.

12. Even otherwise, the findings recorded by learned Principle Judge, Family Court, Chamba, are borne from the available records. The view taken by learned Principal Judge, Family Court, Chamba, cannot be said to be perverse, rather, it is a possible view based on the material on record. The

quantum of maintenance also cannot be said to be excessive on the basis of material on record.

13. In light of above discussion, there is no merit in the petition and the same is dismissed.

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

Jaspal Singh ...Petitioner

Versus

State of H.P. & another ....Respondents

For the Petitioner: Mr. Ankit Dhiman, Advocate.

For the Respondents: Mr. Hemant Vaid, Additional Advocate General for respondent No.1.

None for respondent No.2.

Cr Revision No. 232 of 2022
Date of Decision 30.11. 2022

Code of Criminal Procedure, 1973- Section 397- Cancellation report- **Held-** Reasoning part of Magistrate that deceased was accused himself and he has expired on spot and due to this proceedings are dropped, is set aside being contrary to record- Cancellation report submitted by SHO Police Station is accepted in terms of prayer made that there was no rash or negligent act on the part of motorcycle driver- Accordingly, proceedings dropped by Magistrate shall be considered to have been dropped in accordance with cancellation report submitted by police- Petition Allowed. (Paras 7, 8)

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

Petitioner has approached this Court against impugned order dated 19.7.2021 passed by Judicial Magistrate First Class, Court No.3, Mandi, District Mandi ('JMFC' in short) in cancellation report submitted by police in Case FIR No. 294 of 2019 registered in Police Station Balh on the basis of complaint lodged in Police Chowki Riwalsar, District Mandi HP.

2 Grievance of petitioner is that police, after completion of investigation had filed a cancellation report before the Magistrate concluding that no fault on the part of motorcycle driver (deceased) was found and accident was found to have occurred due to mud and water on road leading to death of motorcycle driver Harvinder son of Jaspal Singh (present petitioner), whereas Judicial Magistrate First Class instead of accepting the cancellation report, in terms of report filed under Section 173 Cr.P.C., had dropped the proceedings of police on the ground that victim himself was an accused and had died on spot and for that reason police had filed the report to drop the proceedings, which is contrary to factual report submitted by the police.

3 From perusal of report submitted by police under Section 173 Cr.PC, it transpires that though FIR was registered at the instance of one Pawan Kumar, recording therein that accident took place due to rash or negligent driving of motorcycle driver, however, during investigation, complainant himself, in his statement recorded by Investigating Officer, had stated that occurrence of accident did not take place in his presence but he arrived on spot after hearing loud sound of occurrence of accident and noticed that motorcycle was lying outside the road and throat of victim was cut with tin causing the death of motorcycle driver. He had further stated that on having a glance at the spot, it was found that at the time of accident, water was flowing on road causing formation of pond of mud and slippery on road and thus, according to him, accident took place on account of slippery road and mud on spot and there was no negligence or fault on the part of motorcycle driver.

4 After completing investigation, Investigating Officer also opined that from the available evidence, it appeared that there was no fault of motorcycle driver and accident took place due to the reason as explained by complainant in his statement, leading to death of motorcycle driver.

5 In the last, in report, prayer was made for accepting the cancellation report on the ground that there was no rash or negligent act on the part of deceased driver of motorcycle.

6 In view of above, I find that reasoning part of Magistrate that deceased was accused himself and he has expired on spot and due to this proceedings are dropped, is set aside being contrary to record.

7 Cancellation report submitted by SHO Police Station Balh, District Mandi in FIR No. 294 of 2019 is accepted in terms of prayer made in report under Section 173 Cr.PC and matter is deemed to have been closed with observations that in accident, in reference, there was no rash or negligent act on the part of motorcycle driver.

8 Accordingly, proceedings dropped by Magistrate vide order dated 19.7.2021 shall be considered to have been dropped in accordance with cancellation report submitted by police wherein it has been categorically stated that there was no rash or negligent act on the part of deceased driver of motorcycle and, therefore, no case was made out against him.

The present petitioner is disposed of in the above terms, so also pending application, if any.

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

Meena ...Petitioner.

Versus

Sanjay Kumar ...Respondent

For the petitioner : Mr. Shanti Swaroop, Advocate.
For the respondent : Mr. Ajit Sharma, Advocate.

Cr.MMO No. 509 of 2021
Reserved on:23.11.2022
Date of decision :9.12.2022

Code of Criminal Procedure, 1973- Section 482- Inherent power- Quashing of complaint- **Indian Penal Code, 1860-** Section 420- Agreement to sell- The grievance of the respondent was that despite his depositing the overdue amount of Rs. 63,404/- with interest, the petitioner on 18.3.2021 had taken forcible possession of the vehicle at Shimla- **Held**- Perusal of complaint, as also the documents, filed by the respondent before Learned trial Court in evidence do not reveal the commission of offence- The material on record does not suggest the commission of any part of alleged offence within the jurisdiction of learned trial Magistrate- Complaint quashed- Petition allowed. (Paras 10,11,12)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

By way of instant petition, petitioner has prayed for quashing of Complaint No.3 of 2021, titled as Sanjay Kumar vs. Meena & others and all subsequent proceedings pending before the learned Judicial Magistrate, 1st Class, Court No.3, Mandi, H.P.

2. Brief facts necessary for adjudication of petition are that the petitioner had purchased a vehicle (Innova Crysta) for plying the same as taxi and had obtained financial assistance from AU Small Finance Bank. Petitioner entered into an agreement to sell dated 11.8.2020 with respondent,

whereby the aforesaid vehicle was agreed to be transferred to respondent against total consideration of Rs. 21,44,000/-. Out of the aforesaid consideration amount, a sum of Rs. 2,30,000/- was paid to the petitioner and remaining amount of Rs. 19,14,000/- was to be paid to the financer AU Small Finance Bank in equal monthly installments of Rs. 33,000/-. Possession of the vehicle was handed over to the respondent. Allegedly, respondent defaulted in payment of installments to the AU Small Finance Bank. Petitioner re-possessed the vehicle. Before possessing the vehicle, petitioner had issued a legal notice to respondent on 5.3.2021. The notice was replied on behalf of the respondent vide reply dated 23.3.2021 and it was mentioned that as per agreement, the vehicle could be re-possessed only on default of three consecutive installments.

3. Respondent filed an application before learned Chief Judicial Magistrate, Mandi under Section 156 (3) of Cr.P.C., seeking direction to the SHO, Police Station, Sadar to lodge FIR against the petitioner. The grievance of the respondent was that despite his depositing the overdue amount of Rs. 63,404/- with interest, the petitioner on 18.3.2021 had taken forcible possession of the vehicle at Shimla. Respondent had filed complaint to the police at Shimla but no action was taken. Respondent further alleged that later the vehicle was found at Manali and the respondent had made a request for handing over the vehicle to him and on his request, the vehicle was in fact handed over to him. However, on complaint of the petitioner, the vehicle was taken in possession by police and was wrongly released in favour of the petitioner.

4. Petitioner by way of instant petition has contended that though from perusal of contents of application, filed by respondent, no offence was made out against the petitioner, still learned Judicial Magistrate, 1st Class, Court No.3, Mandi has treated the application as complaint and has taken cognizance against the petitioner for commission of offence under Section 420

of IPC. It has further been contended on behalf of the petitioner that without admitting the commission of offence, the taking of cognizance by learned Judicial Magistrate, 1st Class, Court No.3, Mandi in aforesaid matter was without jurisdiction, as no offence was even alleged to have been committed within the jurisdiction of said Court.

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

6. Perusal of application filed under Section 156 (3) of Cr.P.C. by respondent before learned trial Court reveals that reference has been made to agreement dated 11.8.2020 executed between the parties and on the basis of such agreement, respondent claimed right to possess of the vehicle. It was admitted in the application that an amount of Rs. 63,404/- had become due and payable to AU Small Finance Bank. Respondent further averred that he had received the legal notice from petitioner and thereafter he had cleared the overdue amount but despite of such clearance, the vehicle was re-possessed by petitioner at Shimla on 18.3.2021. Respondent further alleged that he had reported the matter to police at Shimla but no action was taken. It was further submitted that the respondent had found the vehicle at Manali and had made a request for handing over its possession to the petitioner. His request was acceded to but the petitioner lodged online complaint with the police and on such complaint, the police seized the vehicle at Bhunter and on the next day, the vehicle was released in favour of the petitioner.

7. Learned trial Court vide order dated 15.7.2021 treated the application of respondent as a complaint and directed the respondent to lead preliminary evidence. Respondent tendered his evidence by way of an affidavit and also placed on record a copy of agreement to sell dated 11.8.2020 as CW-1/B along with other documents. Perusal of evidence affidavit filed by respondent before learned trial Court reveals the same contents, as were

contained in the application under Section 156 (3) Cr.P.C. Para-7 of the affidavit, was additionally incorporated as under:-

> *"That the original agreement to sell for sale or purchase of the vehicle was executed at the office of Respondent No.2 AU Small Finance Bank Ltd at their office Lunapani where the deponent paid earnest money and take the possession but the documents lied in Shimla as such agreement was executed at Shimla as such oral agreement to sell and the possessory right of the vehicle was executed at the office of AU Small finance Bank Ltd. at Lunapani hence the part cause of action arose at Lunapani."*

8. Learned trial Court vide order dated 24.7.2021 took cognizance of the offence under Section 420 of IPC against the petitioner and proceeded to summon the petitioner.

9. Perusal of complaint, as also the documents, filed by the respondent before learned trial Court in evidence do not reveal the commission of offence under Section 420 IPC. There is no allegation that the petitioner had cheated the respondent and had thereby dishonestly induced him to deliver any property to the petitioner. There is also no allegation that the petitioner committed cheating and thereby dishonestly induced the respondent to alter or destroy the whole or any part of valuable security or anything which is signed or sealed or which is being converted into a valuable security. The allegation simplicitor was that the petitioner had re-possessed the vehicle on noticing default in payment of dues of the financer. It can simply be a case of violation of terms of agreement but it cannot be said to be a case of cheating and thereby dishonestly inducing the other to deliver any property to any person. The order dated 24.7.2021, passed by learned trial Court clearly is a non-speaking order.

10. Additionally, it can also be safely concluded that the material on record does not suggest the commission of any part of alleged offence within the jurisdiction of learned trial Magistrate. As per averments made in para-7

of the affidavit filed by respondent as evidence before learned trial Court, it was averred that the original agreement to sell was executed at Shimla. Copy of agreement placed on record as Ext. CW-1/B also evidences the same fact that the agreement was executed on 11.8.2020 at Shimla. The stamp paper for preparation of agreement to sell dated 11.8.2020 was purchased on the same date from District Treasury Shimla and in view of such admission and otherwise proved fact on record, the contradictory plea of respondent that the agreement was executed orally at the office of AU Small Finance Bank Ltd Lunapani in District Mandi had no meaning and could not be taken into consideration for holding that part of the offence was committed within the jurisdiction of learned Judicial Magistrate 1st Class, Mandi.

11. The jurisdiction of this Court under Section 482 Cr.P.C. though is restrictive but can always be exercised in order to stop the abuse of process of law. The continuance of the proceedings before learned trial Court in pursuance to the aforesaid orders passed by such Court will be is nothing but abuse of process of law. No prima-facie case under Section 420 of IPC is made out in the facts of the case against the petitioner. In alternative, even if such offence is presumed to have been committed, no part of it has been shown to have been committed within the jurisdiction of learned trial Court. Simply because respondent has residence within jurisdiction of learned trial Court will not vest such court with jurisdiction to proceed in the matter over which it otherwise had no jurisdiction.

12. In result, the petition succeeds. The complaint No. 3 of 2021 titled Sanjay Kumar vs. Meena and others pending before learned Judicial Magistrate, 1st Class, Mandi along with order dated 24.7.2021 as also all subsequent orders passed in the aforesaid complaint are quashed and set aside in the interest of justice. Pending applications, if any, also stand disposed of.

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

Umar Ibrahim ...Petitioner

Versus

State of H.P. ....Respondent

For the Petitioner: Mr. Vijender Katoch, Advocate.

For the Respondent: Mr. Hemant Vaid, Additional Advocate General.

Cr.MP(M) No. 1426 of 2022
Date of Decision:09.12.2022

Code of Criminal Procedure, 1973- Section 439 **Narcotic Drugs and psychotropic Substances Act, 1985-**Sections 15, 37 and 52A- Bail- 12 gunnybags containing 3 quintals 63 Kgs,18 grams (363.18 Kg.) contraband (poppystraw)- **Held-** Considering the quantity of the contraband petitioner not entitled for bail- Bail petition dismissed. (Para 15)

Cases referred:

A.R.Antulay vs. Ramdas Sriniwas Nayak and another, (1984)2 SCC 500;
Noor Aga vs. State of Punjab and others, (2008)16 SCC 417;
Union of India vs. Rattan Malik @ Habul, (2009)2 SCC 624;
Union of India vs. Shiv Shankar Kesari (2007)7 SCC 798;

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

Petitioner has approached this Court seeking bail under Section 439 Code of Criminal Procedure (in short 'Cr.P.C.'), in FIR No.154 of 2020, dated 1.10.2020, registered in Police Station Damtal, District Kangra, H.P., under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act').

2. Status report stands filed and record was also made available.

3. As per status report, on 1.10.2022 at 5.02 AM, an information was received from reliable informer that in a Truck No. JK-03D-8971, parked near Hill Top Mandir Damtal, on the side of National Highway-44 facing towards Mukerian, poppystraw is being transported from Jammu. Information was reliable. In case of delay, there was possibility of disappearance of contraband and evidence as well as possibility of movement of Truck from spot. Therefore, Ruka was sent by Inspector Harish Guleria, SHO Police Station Damtal to Duty Officer of Police Station Damtal to record the said information and this information/Ruka was directed to be considered an information letter under Section 42(2) of NDPS Act with instruction to send the said report to SDPO Nurpur District Kangra. Through mobile phone contact, Surender Singh and Sudesh Kumar were joined as independent witnesses in the raiding party and on reaching at spot, driver Ibrahim and Hilal Kadir Bhatt were found sitting in the Truck. They were inquired about material being transported in the truck. They responded that they were transporting apples but they could not give satisfactory answer for parking the truck at that spot. Whereupon, information received by police was communicated to both of them and in presence of independent witnesses truck was searched. After removing tarpaulin, gunny bags were found in the truck which were covered by apple boxes. On unloading, in total, 12 gunny bags were recovered. In each gunny bag, there were small polythene packets containing poppystraw.

4 After arranging weighing machine, each gunny bag was checked and polythene envelopes containing poppystraw, found therein, were weighed. Out of 12 gunny bags, total 3 quintal 363 Kg.18 grams (363.18 Kg.) contraband was recovered. After taking into possession and seizing the recovered contraband, Ruka was sent to Police Station and FIR was registered. Thereafter, investigation was carried out and on finding sufficient grounds for arrest, petitioner Ibrahim along with co-accused Hilal Kadir was arrested.

Whereafter, after remaining in police custody, petitioner and co-accused Hilal Kadir have been sent to judicial custody.

5 During interrogation, petitioner and co-accused disclosed that they loaded 12 gunny bags of poppystraw on the direction of truck owner Samasdeen and as there was no space for gunny bags, therefore, 30-40 apple boxes were unloaded and gunny bags of poppystraw were loaded. However, both accused expressed their ignorance about parentage and address of truck owner Samasdeen but every time, they replied that on asking of Samasdeen, they loaded poppystraw in truck but out of greed.

6 Representative sample of recovered contraband was sent for chemical analysis to State FSL. As per State FSL report, contraband recovered has been identified as poppystraw.

7 Challan has been presented before Special Judge on 31.3.2021 and now case has been listed for recording evidence of prosecution on 15.12.2022.

8 As per status report, owner of truck Samasdeen was not found to be owner of truck, rather one Bilal Ahmad Gani of District Anantnag was found to be recorded owner of truck and on 16.7.2021, truck was also released to Bilal Ahmad Gani. But during that and thereafter, no one has come forward, much less Samasdeen, claiming himself owner of truck.

9 It has also been stated in status report that remaining contraband, i.e. 356 Kg. 24 grams poppystraw was disposed of on 9.3.2021 in compliance of order of Superintendent of Police.

10 Learned counsel for the petitioner has submitted that in drawing sample, for sending it to State FSL for chemical analysis, the police has acted in violation of adopted and approved procedure for that as contained in Standing Order 1 of 1989 communicated by Government of India as 'Laws and Regulations promulgated to give effect to provisions of International Treaties on Narcotic Drugs and Psychotropic Substances'. He has referred para 2.3 of

Standing Order No. 1 of 89 wherein it has been provided that the seized drug in packages/containers shall be well mixed to make it a homogeneous and representative, before the sample in duplicate is drawn. According to him, material in those packages and containers was not mixed and, therefore, sample drawn for chemical analysis cannot be treated as homogeneous and representative sample of contraband alleged to be recovered from petitioner.

11 Learned counsel for petitioner has also referred ***A.R.Antulay vs. Ramdas Sriniwas Nayak and another,*** reported in ***(1984)2 SCC 500,*** contending that Supreme Court has held that failure to comply with provisions made for doing a particular act in a particular manner, renders the action nonest. Referring ***Union of India vs. Shiv Shankar Kesari*** reported in ***(2007)7 SCC 798*** and ***Union of India vs. Rattan Malik @ Habul,***reported in ***(2009)2 SCC 624,*** learned counsel for petitioner has submitted that Section 37 of NDPS Act is for limited purpose and confined to question of releasing the accused on bail, and as Investigating Agency has failed to comply with procedure prescribed as notified in Standing Order 1 of 89, petitioner is entitled for bail.

12 Learned counsel for petitioner has also referred ***Noor Aga vs. State of Punjab and others,*** reported in ***(2008)16 SCC 417,*** with submissions that guidelines under the Standing Order are enforceable and presumption raised in case of present nature is one for shifting the burden subject to fulfillment of conditions precedent there for. He has submitted that as petitioner has been able to point out defect in drawing the sample which would break the chain of prosecution case entitling the petitioner to be acquitted, therefore, present bail application deserves to be allowed.

13 Learned counsel for the petitioner has also placed reliance on judgment dated 5th July, 2022 passed by Division Bench of this Court in ***Cr. Appeal No. 289 of 2021 titled Taj Deen vs. State*** wherein for defective faulty procedure for drawing the samples, accused has been acquitted.

14 Learned Additional Advocate General has submitted that in present case commercial quantity starts from 50 Kg and recovered contraband from petitioner is about 7 times more than the minimum prescribed quantity of contraband. He has further submitted that there is no violation of Standing Order No. 1 of 89 and he has placed on record copy of Certification of Inventory under Section 52-A of NDPS Act wherein it has been reflected that each small gunny bag was opened and thereafter each small polythene bag contained therein was opened and 10 grams contraband was taken from each polythene bag of a gunny bag and thereafter sample drawn from each bag was mixed and sent for chemical analysis to State FSL. He further points out that in Inventory every gunny bag was opened separately but all packets contained in each bag were opened for drawing the representative and homogeneous sample and two samples from each gunny bag, after extracting poppystraw from each polythene bag contained in gunny bag, were drawn and one sample each was sent to State FSL and the said fact has been substantiated by chemical analysis examination report received from State FSL Junga and therefore learned Additional Advocate General has submitted that keeping in view the quantity of contraband, period of detention and the fact that matter has been listed for recording evidence of prosecution witnesses on 15.12.2022 petitioner does not deserve to be enlarged on bail.

14 Learned Additional Advocate General further submits that in Taj Deen's case, as observed in judgment, witness to drug sample did not state mode and manner in which samples were drawn and learned Judicial Magistrate First Class was also not examined and no other witness had stated on record about mode and manner of drawing of sample, whereas in present case prosecution witnesses are being examined and trial is pending adjudication whereas in Taj Deen's case Division Bench was hearing the final arguments of Criminal Appeal and, therefore, putting reliance of those observations for enlarging the petitioner on bail is pre-mature.

15 Taking into consideration entire material placed before me including the quantity of recovered contraband, period of detention, but without commenting upon the merits of rival contentions of parties, however, considering factors and parameters propounded by the Courts including Supreme Court necessary to be considered at the time of adjudication of bail application, I am of the opinion that petitioner is not entitled for bail at this stage.

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

The bail application is dismissed and disposed of

BEFORE HON'BLE MR. JUSTICE VIRENDER SINGH, J.

Jitender Singh Chandel and another …Petitioners

Versus

State of Himachal Pradesh and another …Respondents

For the petitioners: Mr. G.R. Palsra, Advocate.

For the respondents: Mr. Shiv Pal Manhans, Additional Advocate General, with Mr. Bhupinder Thakur, Deputy Advocate General, for respondent No. 1.

CrMMO No. 1181 of 2022
Decided on : 16.12.2022

Code of Criminal Procedure, 1973-Section 482- Inherent powers- Quashing of FIR- **Indian Penal Code, 1860-** Sections 307 and 34 **Arms Act-** Sections 25-54-59- the matter, between the petitioners and respondent No. 2, has been settled amicably- **Held-** Considering the said conclusion of the police- The FIR, in the present case, as well as the proceedings resultant thereto cannot be quashed- Petition dismissed. (Paras 7, 10)

Cases referred:

State of Madhya Pradesh versus Laxmi Narayan and others, (2019) 5 SCC 688;

The following judgment of the Court was delivered:

Virender Singh, Judge. *(Oral)*

Petitioners have filed the present petition, under Section 482 of the Code of Criminal Procedure (hereinafter referred to as 'CrPC'), for quashing FIR No. 153 of 2019, dated 10th June, 2019, registered under Section 307 read with Section 34 of the Indian Penal Code (hereinafter referred to as 'IPC') and Section 25-54-59 of the Arms Act, registered with Police Station Balh, District Mandi, H.P., as well as the resultant proceedings, in case, titled as State versus Jitender Singh Chandel and another, pending in the Court of learned Additional Sessions Judge-II, Mandi.

2. It is the stand of the petitioners that after the registration of the above-mentioned FIR, the matter, between the petitioners and respondent No. 2, has been settled amicably and respondent No. 2 does not want to pursue his case.

3. Supporting the compromise, on the ground that the same has been entered into by the petitioners and respondent No. 2, with their free will and consent, without any fear, pressure and coercion, it has been prayed that the above-mentioned FIR and the resultant proceedings be quashed, in the interest of justice. Alongwith the petition, the compromise, duly attested by the Notary Public, has also been annexed.

4. On the basis of the above facts, a prayer has been made, in this case, to quash the FIR in issue as well as the resultant proceedings.

5. In view of the said factual position, the first and foremost question, which arises for determination, before this Court, is about the fact, as to whether, the power, under Section 482 CrPC, can be exercised in such cases.

6. Perusal of the record shows that the FIR in question has been registered at the instance of respondent No. 2, in which he has specifically stated that a bullet has been fired by the accused with an intention to kill him. After the investigation, the police filed the report, under Section 173 (2) CrPC, wherein it has specifically been mentioned that a bullet has been fired from a weapon, i.e. Pistol 9 mm Glock, by accused-Jitender Singh Chandel.

7. Considering the said conclusion of the police, as mentioned in the report under Section 173 (2) CrPC, this Court is of the considered view that the FIR, in the present case, as well as the proceedings resultant thereto cannot be quashed, by this Court while exercising the power, under Section 482 CrPC.

8. While holding so, the view of this Court is fortified by the judgment of the Hon'ble Supreme Court, in case titled as **State of Madhya**

Pradesh versus Laxmi Narayan and others, reported in **(2019) 5 Supreme Court Cases 688,** wherein it has been clearly held that the proceedings in such type of cases, i.e. cases under Section 307 IPC and Arms Act, cannot be quashed in exercise of power under Section 482 CrPC, on the ground that the matter has been compromised between the parties. Relevant para-15.4 of the judgment, is reproduced, as under:

> *"15. Considering the law on the point and the other decisions of this Court on the point, referred to hereinabove, it is observed and held as under:*
>
> *15.1. … … …*
>
> *15.2. … … …*
>
> *15.3. … … …*
>
> *15.4. offences under Section 307 IPC and the Arms Act etc. would fall in the category of heinous and serious offences and therefore are to be treated as crime against the society and not against the individual alone, and therefore, the criminal proceedings for the offence under Section 307 IPC and/or the Arms Act etc. which have a serious impact on the society cannot be quashed in exercise of powers under Section 482 of the Code, on the ground that the parties have resolved their entire dispute amongst themselves. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to framing the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. However, such an exercise by the High Court would be permissible only after the evidence is collected after investigation and the charge sheet is filed/charge is framed and/or during the trial. Such exercise is not permissible when the matter is still under investigation. Therefore, the ultimate conclusion in paragraphs 29.6 and 29.7 of the decision of this Court in the case of Narinder Singh (supra)*

should be read harmoniously and to be read as a whole and in the circumstances stated hereinabove."

9. In view of the above, there is no merit in the present petition and the same is accordingly dismissed.

10. Before parting with the order, it would be just and proper for this Court to mention herein that the findings, so recorded by this Court, are confined only for the decision of the present petition, under Section 482 CrPC and the learned trial Court shall decide the matter, uninfluenced by any observation made hereinabove.

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

Ramesh Kumar & others ...Petitioners.

Versus

State of H.P. & others ...Respondents

For the petitioner : Mr. Ajay Singh Rana, Advocate.

For the respondent : Mr. Narender Thakur, Deputy Advocate General, for respondent No. 1.

Mr. Jeet Singh, Advocate, for respondents No. 2 to 5.

Cr.MMO No.916 of 2022
Decided on:12.12.2022

Code of Criminal Procedure, 1973- Section 482- Inherent power- Quashing of FIR- **Indian Penal Code,1860-**Sections 451, 323, 324, 504, 506 and 34- Petitioners and private respondents have settled their past dispute and have agreed to live in peace- **Held-** The compromise has been effected with a purpose to live in future- FIR quashed-Petition allowed. (Paras 6, 7)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge (Oral)

By way of instant petition, petitioners have prayed for quashing of FIR No. FIR No. 157 of 2016 dated 27.8.2016 under Sections 451, 323, 324, 504, 506 and 34 of IPC, registered at Police Station Nalagarh, District Solan, H.P. and subsequent proceedings arising out of the said FIR.

2. It is submitted that on behalf of the petitioners and private respondents that they have settled their past dispute and have agreed to live in peace. It is further submitted by them that they all belong to the same area

and do not want to continue their strained relations. They have done so for their as well as future generations' benefit.

3. Respondents No. 2 to 5 have made their statements in the Court today and have accepted the contents of compromise deed Annexure P-3 to be correct. They have stated that the matter has been settled with the petitioners and in view of such settlement, they do not want to prosecute the petitioners further.

4. Similarly, the joint statement of petitioners has also been recorded. They have also accepted the terms of Annexure P-3 to be the correct. They have further undertaken to abide by the terms of the compromise in future.

5. I have gone through the contents of the compromise deed Annexure P-3 and have not found anything contrary to law.

6. The petitioners and private respondents belong to same area. Petitioners belong to one family and respondents No. 2 to 5 belong to another. Both the families have come closure by entering into a compromise. The compromise has been effected with a purpose to live in peace in future.

7. Accordingly, keeping in view the facts and circumstances of the case, the petition is allowed and FIR No. 157 of 2016 dated 27.8.2016 under Sections 451, 323, 324, 504, 506 and 34 of IPC, registered at Police Station Nalagarh, District Solan, H.P. and subsequent proceedings arising out of the said FIR are ordered to be quashed. The petition stands disposed of. Pending applications, if any, also stand disposed of.

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

Ram Singh & Ors. ...Appellant.

Versus

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

For the Appellant: Mr. Rajesh Mandhotra, Advocate.

For the Respondent: Mr. Desh Raj Thakur, Addl. A.G., and Mr. Narender Thakur, Deputy Advocate General.

Cr. Appeal No. 268 of 2010
Reserved on: 6.12. 2022
Decided on: 19.12. 2022

Code of Criminal Procedure, 1973- Section 374**-** Appeal against acquittal- **Indian Penal Code, 1860-** Sections 498A read with 34, 306-Death caused due to ingestion of poison- Learned Session Judge convicted the appellants-Accused- **Held-** The prosecution had failed to prove the charge against the appellants beyond all reasonable doubts- Conviction set aside- Appeal allowed. (Para 19)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge.

The instant appeal has been preferred against the judgment dated 24.7.2010/27.07.2010 passed by learned Sessions Judge, Kagra at Dharamshala, H.P., in Sessions Case No. 3-D/VII-2008, whereby the appellants were convicted and sentenced as under:-

Offence(s)	Substantive sentence	Fine	Default Punishment.
498-A/34 IPC	Simple imprisonment for three years	Rs.5,000/-	Simple imprisonment for six months

306 of the IPC	Simple imprisonment for three years	Rs. 5,000/-	Simple imprisonment for six months.

All the sentences were ordered to run concurrently.

2. During the pendency of appeal, appellants No.2 and 3 have died and only appellant No.1 survives.

3. Brief facts of the case are that Smt. Sumna Devi was wife of the appellant No.1. She consumed poison on 18.07.2006 and as a result thereof died on 28.07.2006. Brother of deceased got recorded his statement under section 154 Cr.P.C. on 18.7.2006 and on its basis FIR No. 153/2006 was registered under section 498-A/34 IPC.

4. It was alleged in statement under section 154 Cr.P.C. that the appellant No.1 and deceased were married for the last about four years and had a daughter aged about three years from the wedlock. Complainant further alleged that his wife Seena Devi had disclosed to him about 3-5 months back that the deceased had complained about the demand of dowry and her harassment for such demand by the appellants. She had allegedly complained that she was being tortured and given beatings for demand of dowry. As per the complainant, he had remained silence assuming that it was normal wear and tear of life and had not taken the disclosure made by his wife seriously. He had received an information on 18.07.2006 at about 7.30 a.m. that his sister Sumana Devi was ill and was hospitalized. He telephonically contacted at the house of in-laws of Sumana Devi and got a response from her father-in-law that Sumana Devi had died in hospital at Dharamshala. On such information, complainant along with his relatives reached the hospital at Dharamshala and found that his sister was alive and was admitted in the hospital. Complainant also suspected that his sister was

being ill-treated because the appellant No.1 had illicit relations with some other lady.

5. Postmortem report opined the cause of death as asphyxia due to pulmonary oedema and brain oedema under the circumstances of ingestion of poison "Aluminium Phosphide" and anemia.

6. Prosecution examined total 13 witnesses. PW-1 Piar Chand is the complainant and PW-2 Sheena Devi is his wife. PW-3 Jumloo Ram is the uncle of deceased Smt. Sumna Devi and PW-4 Smt. Kaushalya Devi is her mother. PW-5. Dr. D.P. Swami had conducted the postmortem on the body of deceased. PW-8 Dr. V.D. Dogra, proved the treatment summary of deceased Smt. Sumana Devi as Ex.PW8/A. PW-6 HHC Kartar Singh, PW-9 ASI Surjeet Kumar, PW-10 ASI Onkar Nath, PW-11 S.I. Om Parkash, PW-12 ASI Vinod Kumar and PW-13 ASI Anil Kumar were the official witnesses of police. PW-7 Shiv Kumar was the photographer.

7. Learned trial Court held the offences proved against the appellant and convicted and sentenced him as noticed above.

8. I have heard Mr. Rajesh Mandhotra, Advocate, for the appellant and Mr. Desh Raj Thakur, Additional Advocate General, for the respondent-State and have also gone through the entire record carefully.

9. The police machinery was moved on the basis of statement of PW-1 made under Section 154 of the Cr.P.C. The basis of recording of FIR Ex.PW10/B was the aforesaid statement. In the aforesaid statement under Section 154 of the Cr.P.C. PW-1 had not disclosed any personal knowledge regarding ill-treatment of the deceased for dowry at the hands of her in-laws. Even with respect to the alleged illicit relations of appellant with some other lady, PW-1 had only suspicion. PW-1 while deposing before the learned trial Court again reiterated the same stand. He stated that after some time of marriage of Smt. Sumana Devi, his wife had informed him about the ill-treatment being given to Smt. Sumana Devi by her in-laws. He further stated

that he had not taken the complaint of his wife seriously. He further disclosed that it was his wife only who had disclosed about the suspicion of appellant having illicit relations with other women of the village.

10. The wife of PW-1 Smt. Sheena Devi has also been examined as prosecution witness (PW-2). She has stated that Sumana Devi was treated by her in-laws well for about three years. She further stated that it had been disclosed to her by Sumana Devi about 3-4 months back that the appellant had illicit relations with some other lady of his village and the appellant used to maltreat Smt. Sumana Devi due to this reason. As per PW-2, parents of the appellant were also supporting the appellant. While being cross-examined on behalf of the accused persons, PW-2 stated that she had informed the police about the factum of illicit relations of the appellant, however, she was confronted with her statement under Section 161 of the Cr.P.C., wherein it was not found so recorded. She further disclosed during cross-examination that relations of appellant with Sumana Devi had turned strained for last about 6 months and before that she was carrying on well with her husband. She also admitted that the appellant had taken Smt. Sumana Devi for treatment to PGI Chandigarh. The daughter of deceased Smt. Sumana Devi was also stated to be looked after by accused persons only.

11. From the analysis of the statements of PW-1 and PW-2 it is found that the prosecution case does not stand on sound footing. PW-2 nowhere stated that the deceased was being ill-treated by the appellant and his parents for demand of dowry. In fact, PW-2 did not utter even a single word regarding demand of dowry ever made by the appellant or his parents from the deceased. From such version of PW-2, the case as put forward by PW-1 by way of his statement under Section 154, Cr.P.C. or his deposition in the Court, is completely falsified. As per PW-1, the fact about ill-treatment of Smt. Sumana Devi by the appellant and his parents for demand of dowry was

disclosed to him by PW-2, whereas the said witness i.e. PW-2 has remained silent on this aspect.

12. PW-3 Shri Jumloo Ram was the uncle of the deceased. He deposed before the learned trial Court that about 4-5 months prior to her death, Smt. Sumna Devi had disclosed to him about her maltreatment for demand of dowry. He further stated that the appellant and his parents had demanded motorcycle and Rs. One lakh from the deceased, as per the disclosure made by her.

13. PW-4 Smt. Kaushalya Devi also stated before the learned trial Court during her deposition that the deceased had been complaining about her maltreatment at the hands of appellant and his parents for demand of dowry. In her cross-examination on behalf of the accused persons, PW-4 specifically stated that she had informed her son i.e. PW-1 regarding ill-treatment given to Sumana Devi.

14. There is nothing on record to suggest that any of the relatives of deceased including PW-1 to PW-4 had ever made any complaint to any authority regarding alleged ill-treatment of the deceased at the hands of her in-laws before her death. There is also nothing to suggest that the deceased herself had made any complaint to any authority in this regard at any point of time. PW-1 did not state that his mother was aware about the ill-treatment of Sumana Devi at the hands of her in-laws or PW-4 had ever disclosed to him about such fact. It is hard to assume that PW-1, in his first version given under Section 154 of the Cr.P.C., would not have attributed source of his information to his mother. It is equally difficult to believe that if the mother and uncle of the deceased were aware about the alleged ill-treatment of deceased, PW-1 would not be aware of such fact. It would be quite unnatural that the mother and uncle of deceased were aware about the ill-treatment of deceased for dowry and they had not disclosed such fact to the brother of the deceased. PW-1 has not stated at any point of time that his mother and uncle

were aware about the ill-treatment of deceased or they had disclosed it to him. Rather, PW-1 attributed his source of information to his wife and as noticed above, his wife did not utter even a single word regarding ill-treatment of deceased for dowry.

15. Though, it has been proved on record that the deceased died as a result of consumption of poison, but it remained to be proved that the poison was consumed by her in order to commit suicide abetted by the appellant or any of his family members. In the absence of prove of demand of dowry by the appellant or his family members from the deceased or her ill-treatment for such reason, no presumption could have been drawn against them of abetment under Section 113-A of the Indian Evidence Act.

16. Except for the statements of PW-1 to PW-4, the prosecution had not led any evidence to prove the factum of alleged ill-treatment of deceased at the hands of her in-laws that too for demand of dowry. Thus, the factum of such ill-treatment or demand of dowry has not been proved by the prosecution in accordance with law. The prosecution has failed in this regard in meeting the degree of proof as required in law.

17. Further, there is no evidence on record, save and except, the bald statement of PW-2 regarding illicit relationship of appellant with some other lady. Though, such suspicion was shown by PW-1 to the police on the very first day when he got recorded his statement under Section 154 of the Cr.P.C., but no investigation appears to have been made to that effect and consequently no material has been placed on record to prove such fact.

18. On the basis of material on record, it can be said that the learned trial Court has clearly misread and mis-appreciated the evidence on record. The prosecution had failed to prove the charge against the appellants beyond all reasonable doubts. Prosecution carries a very heavy burden of proof in a criminal trial and as held above, the prosecution has been found wanting in meeting the required standards of proof in the facts of instant case.

19. In result, the appeal is allowed and the judgment of conviction and sentence dated 24.7.2010/27.07.2010 passed by learned Sessions Judge, Kangra at Dharamshala, H.P., in Sessions Case No. 3-D/VII-2008, is set aside. The appellant is acquitted of all charges. The fine amount, if deposited, be refunded to the appellant. Records be sent back forthwith.

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

Shri Vinod Kumar & others ...Petitioners.

Versus

State of H.P. & others ....Respondents.

For the Petitioner: Ms. Vandana Misra and Mr. Aakash Thakur, Advocates.

For Respondent No.1: Mr. Desh Raj Thakur, Addl. A.G. with Mr. Narender Thakur, Deputy Advocate General.

For Respondent No.2: Mr. Vivek Singh Attri, Advocate.

For Respondent No.3: Ms. Anamika Chauhan, Advocate, vice Mr. C.S. Thakur, Advocate.

Cr.MMO No. 395 of 2019
Reserved on : 6.12. 2022
Decided on : 19.12. 2022

Code of Criminal Procedure, 1973- Section 482- Inherent power- Quashing of complaint- **Indian Penal Code, 1860-** Sections 451, 323, 504, 506 read with Sections 34-353, 332, 504 and 186- **Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act-** Section 3(1)(x)- Quashing of summons issued by learned Judicial Magistrate 1st Class, Anni- **Held-** Summoning of parties totally uncalled for and reflects non-Application of mind-Proceedings undertaken by Judicial Magistrate First Class are quashed to prevent abuse of law- Petition allowed. (Paras 19, 20, 21)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge.

By way of instant petition, petitioners have prayed for following relief:-

> *"It is, therefore, most respectfully prayed that this petition may kindly be allowed and impugned summons dated 26.06.2019 (AnnexureP-6) issued by learned Judicial Magistrate 1st Class, Anni, District Kullu, H.P. to the petitioners may kindly be quashed and set aside and further proceedings before the learned Judicial Magistrate 1st Class, Anni, District Kullu, H.P. connected with the same summons may also be quashed and set aside, in the interest of law and justice."*

2. Facts necessary for adjudication of the instant petition can be summed up as under:

(a) Two cross FIRs bearing Nos. 17 of 2016 and 18 of 2016, arising out of the same incident, came to be registered at Police station Nirmand, District Kullu, H.P. on 03.03.2016.

(b) FIR No. 17 of 2016 was registered under Sections 451, 323, 504, 506 read with Section 34 of the IPC and Section 3(1)(x) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act at the instance of Respondent No.2 and the petitioner alongwith one Bhima Ram were named as accused.

(c) FIR No. 18 of 2016 was registered under Sections 353, 332, 504 and 186 of the IPC on the basis of written complaint of the Assistant Engineer, IPH Sub Division Nither, Distt Kullu and Respondent No.2 was named as accused therein.

(d) It was alleged by way of FIR No. 18 of 2016 that on 03.03.2016, at about 8.00 a.m., petitioner No.1 along with Bhima Ram, Fitter, was on duty to inspect water supply scheme. During such inspection, it was noticed that respondent No.2 had illegally attached an electrical motor/pump to main water supply line. On being asked to disconnect the electric motor/pump from the water supply line, respondent No.2 got infuriated and committed offence of obstructing the public servant in discharge of his duty. It was further alleged that respondent No.2 had even physically assaulted petitioner No.1.

(e) On the other hand, respondent No.2 had alleged in his complaint that it was petitioner No.1 and Bhima Ram, Fitter, who had visited his house at about 7.00 a.m., on 03.03.2016. Bhima

Ram, Fitter, started argument with him and his family members in connection with drinking water. Petitioner No.1, who was also an employee of IPH Department also started abusing respondent No.2 and called him by his caste. On being objected, respondent No.2 was given beatings with kick and fist blows. In the meanwhile, petitioners No.2 and 3 also arrived at the spot and started manhandling respondent No.2 after abusing him.

(f) Investigation in both the FIRs was carried out. In FIR No.17 of 2016, police presented challan under Sections 323 and 504 that too against petitioner No.1 only. Since, both the offences were triable by the Panchayat in accordance with provisions of Himachal Panchayati Raj Act, 1994, challan was presented before the concerned Panchayat i.e. Respondent No.3.

(g) As regards FIR No.18 of 2016, the police presented the challan against respondent No.2 before the learned Judicial Magistrate 1st Class, Anni, District Kullu, H.P.

3. Petitioners have alleged that petitioner No.1 had presented himself once before respondent No.3 on 24.04.2018 in compliance to the summon received by him, but respondent No.3 had remained absent. It is further alleged they did not hear anything from respondent No.3 after 24.04.2018, however, they received summons from the Court of learned Judicial Magistrate 1st Class, Anni, District Kullu, H.P., directing them to appear on 20.07.2019 in case titled as State vs. Vinod Kumar, under Sections 451 and 323 of the IPC.

4. It is contended on behalf of the petitioners that the police had filed challan against petitioner No.1 only under Sections 504 and 323 of the IPC, which were exclusively triable by Gram Panchayat. Respondent No.2 in connivance with respondent No.3 had managed the transfer of case from jurisdiction of respondent No.3 to the Court of learned Judicial Magistrate 1st Class, Anni, District Kullu, H.P. in an illegal manner by wrongfully inserting Section 457 of the IPC in the case. Further, grievance of the petitioner is that the learned Judicial Magistrate 1st Class, Anni, without application of mind

proceeded to issue summons against all the petitioners without even realising that petitioners No.2 and 3 were not the accused in the case.

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

6. Respondent No.1 in its reply has submitted that the police had filed the challan under Sections 504 and 323 IPC against petitioner No.1 before Gram Panchayat, Dehra, on 30.03.2016. It has further been submitted that as per the report of Secretary, Gram Panchayat Dehra, neither petitioner No.1 nor respondent No.2 had attended the proceedings before the Gram Panchayat on the date fixed, therefore, on 29.09.2018, Gram Panchayat Dehra had returned the case to learned Judicial Magistrate 1st Class, Anni, District Kullu, H.P.

7. Respondent No.3 has also filed its separate reply and has averred that the matter was rightly referred by the Gram Panchayat to the learned Judicial Magistrate 1st Class, Ani for adjudication in terms of unanimous resolution passed by the members of the Gram Panchayat.

8. Record divulges that the case was transferred by respondent No.3 to the Court of learned Judicial Magistrate 1st Class, Anni, on the basis of resolution which reads as under:-

> "निवेदन है कि मुक्कदमा फाईल FIR No. 17/2016 दिनांक 31.03.2016 को थाना निरमण्ड से प्राप्त हुई थीं। जिसकी सुनवाई पंचायत न्यायालय में चल रही है। जिसके लिए समन 06.10.17, 26.10.17 व 06.04.2018 को जारी किए गए थे। परन्तु दोनों पक्ष व विपक्ष पंचायत में उपस्थित नहीं हुए जो कि पंचायत न्यायालय की अवहेलना है। महोदय दिनांक 24.08.2018 को पंचायत न्यायालय ने निर्णय लिया गया कि इस केस को माननीय न्यायधीश महोदय आनी को भेजा जाए।"

9. As per Schedule-III appended to the H.P. Panchayati Raj Act (for short, "the Act"), Sections 323 and 504 of the IPC are cognizable by a Gram

Panchayat, if committed within the jurisdiction of such Panchayat. The exclusivity of such cognizance has been provided by Section 34 of the Act, which bars any other Court from taking cognizance of any proceeding which is cognizable under the Act by a Gram Panchayat. Thus, respondent No.3 was under legal mandate to decide the case presented before it in pursuance to investigation in FIR No.18 of 2016.

10. Section 37 of the Act provides for following circumstances in which the Gram Panchayat can return the complaint to the complainant directing it to be filed before the Magistrate having jurisdiction to try the case:-

(a) it has no jurisdiction to try the case before it;
(b) the offence is one for which it cannot award adequate punishment and
(c) the case is of such a nature or complicity that it should be tried by a regular Court.

11. It is evident from the above noted resolution of respondent No.3 that the case was not sent to the Court of learned Judicial Magistrate 1st Class, Anni, on any of the situations contemplated by Section 37 of the Act. Rather, it is revealed from the resolution of Respondent No.3 that matter was decided to be sent to learned Judicial Magistrate 1st Class, Anni, District Kullu, H.P. as the parties had failed to appear before the Gram Panchayat despite repeated issuance of summons/notices.

12. Order dated 04.10.2018, passed by learned Judicial Magistrate 1st Class, Anni, reads as under:-

"04.10.2018 Present: Sh. P.S. Negi, Ld. APP for the State.

Office report seen. As per which there is an objection that the proceedings of the concerned Gram Panchayat Dehra, Tehsil Nirmand, District Kullu, H.P. is not enclosed herewith. A perusal of the record reveals that the challan is accompanied with the letter from the concerned Panchayat stating that the concerned Panchayat had issued summons to the parties to appear before the Panchayat on 06.10.2017, 26.10.2017 and 06.04.2017, however, the parties did not appear before the Panchayat. In view of the

above, report, let summons be issued to the Pradhan and Secretary of the concerned Gram Panchayat returnable for 12.12.2018."

13. On perusal of the aforesaid order, there remains no doubt that the case came to be transferred to the Court of learned Judicial Magistrate 1st Class, Anni, in pursuance to the resolution passed by respondent No.3 in the aforesaid terms. It is further divulged from the records of file maintained in the Court of learned Judicial Magistrate 1st Class, Anni that though the records of Gram Panchayat were requisitioned but instead of production of record, some report was submitted by the Secretary of the Gram Panchayat concerned, again reiterating the fact that the complainant and accused had not appeared before the gram Panchayat and it was on such basis that the case was transferred to the Court of learned Judicial Magistrate 1st Class, Anni.

14. Learned Judicial Magistrate 1st Class, Anni had proceeded to issue summons to both the parties purportedly under Section 64 of the Act. The record further reveals that in addition to petitioner No.1, petitioners No.2 and 3 were also summoned by learned Judicial Magistrate 1st Class, Anni.

15. Evidently, none has seen the record of proceedings allegedly undertaken by the Gram Panchayat. The only available record is a copy of extract of proceeding register annexed as Annexure R-2, with the reply of respondent No.3. It is shown from this document that on 24.08.2018 in the meeting of Gram Panchayat, a resolution was passed authorising the transfer of case to the Court of learned Judicial Magistrate 1st Class, Anni.

16. Respondent No.3 has not placed on record any proceedings undertaken by it, whereby petitioner No.1 had been summoned and he had remained absent. On the contrary, petitioners have placed on record, a copy of notice dated 06.04.2018, whereby petitioner No.1 was asked to remain present before the Panchayat on 24.04.2018. On the said date i.e. 24.04.2018, the presence of petitioner has been recorded vide Annexure P-5,

whereas respondent No.2 has been marked absent. Except as above, there is no material to justify the stand of respondent No.3.

17. Section 64 of the Act provides that the Gram Panchayat shall report the fact if the accused fails to appear or cannot be found, to the nearest Magistrate. On such reference, the only jurisdiction vested with the Magistrate is to issue warrants of arrest to the accused in accordance with sub-section (2) of Section 64 of the Act and in pursuance thereto on appearance of accused before the Magistrate, to direct him to execute a bond with or without surety to appear before the Gram Panchayat and also to continue to appear before the Panchayat.

18. Admittedly, petitioners No.2 and 3 were not accused before the Gram Panchayat. In such circumstances, it is not understandable as to how the learned Judicial Magistrate 1st Class, Anni, District Kullu, issued summons to petitioners No.2 and 3.

19. Above noticed facts clearly demonstrate that respondent No.3 and also the learned Judicial Magistrate 1st Class, Anni, have failed to undertake proceedings in accordance with law. The illegalities have been perpetuated by both of them. The act of Respondent No.3 in transferring the matter to learned Judicial Magistrate 1st Class, Anni is not legally sustainable for want of fulfillment of conditions of Section 37 or 64 of the Act. The manner in which learned Judicial Magistrate 1st Class, Anni conducted himself in the matter also cannot be countenanced. Merely on the report of Secretary of the Panchayat and without testing the veracity of resolution passed by the Panchayat, the summoning of parties especially petitioners 2 and 3, who were not even the named accused in the case, was totally uncalled for and reflects non application of mind.

20. Thus it is a fit case where the proceedings so undertaken by respondent No.3 and learned Judicial Magistrate 1st Class, Anni, District

Kullu, H.P. are required to be quashed and set aside to prevent abuse of process of law.

21. In result, the instant petition is allowed and the proceedings under taken by respondent No.3 and learned Judicial Magistrate 1st Class, Anni, District Kullu, H.P. in the matter till date are quashed and set aside. The case is ordered to be heard afresh by respondent No.3 afresh strictly in accordance with law. Learned Judicial Magistrate 1st Class, Anni, District Kullu, H.P. is directed to send back the records of the case to Respondent No.3 forthwith. The petition is accordingly disposed of. Pending applications, if any, also stand disposed of.

22. Records be sent back forthwith.

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

Shri Ramesh Chauhan ...Petitioner.

Versus

Shri Dhani Ram ....Respondent.

For the Petitioner: Ms. Anu Tuli, Advocate.
For the Respondent: Mr. Ravi Tanta, Advocate.

Cr.MMO No. 755 of 2021
Reserved on : 7.12. 2022
Decided on : 19.12. 2022

Code of Criminal Procedure, 1973- Sections 482, 311-A- **Negotiable Instruments Act, 1881-** Sections 20 and 138- Dishonour of cheque- Petitioner after availing number of opportunities to lead evidence came up with an application under Section 311-A- The learned trial Court dismissed the application by holding that the petitioner/accused had not disputed his signatures on the cheque and thus the comparison of handwriting on other portions of the cheque was immaterial- **Held-** No fault can be found with the impugned order- Petition dismissed. (Paras 10, 11)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge.

By way of instant petition, petitioner has assailed the order dated 30.11.2021, passed by learned Judicial Magistrate 1st Class, Jubbal, District Shimla, in Criminal Misc. Application No. 14/4 of 2020, whereby the application of the petitioner under Section 311-A of the Code of Criminal Procedure has been dismissed.

2. Petitioner herein is facing prosecution for offence under Section 138 of the Negotiable Instruments Act before the learned trial Court in a complaint filed by the respondent. Respondent/Complainant concluded his evidence. Petitioner after availing number of opportunities to lead evidence

came up with an application under Section 311-A of the Negotiable Instruments Act before the learned trial Court prayed *inter alia* as under:-

> *"Therefore it is most respectfully prayed that the signature of the accused and the date of the cheque in dispute must be examined by the expert and the date filled on the cheque be kindly examined by the handwriting expert to prove the cheque was filled by the accused himself and also the opinion how old is the cheque and the handwriting of the complainant be also matched with the cheque. Any other relief which this learned court deems fit and proper be also granted in favour of the accused/applicant."*

3. The respondent/complainant contested the application. The learned trial Court dismissed the application vide impugned order by holding that the petitioner/accused had not disputed his signatures on the cheque and thus the comparison of handwriting on other portions of the cheque was immaterial. It also weighed with the learned trial Court that the application appeared to have been moved only to delay the proceedings as the petitioner/accused had already availed five opportunity to lead defence evidence before moving the application.

4. I have heard Ms. Anu Tuli, Advocate, learned counsel for the petitioner and Mr. Ravi Tanta, Advocate, learned counsel for the respondent and have also gone through the entire record carefully.

5. Ms. Anu Tuli, Advocate, learned counsel for the petitioner has contended that the impugned order was wrong inasmuch as the ground on which the application was filed, was not rightly appreciated by learned trial Court. The case put forth by the learned counsel for the petitioner is that the petitioner/accused had no legal liability towards the complainant/respondent and the cheque in question was being misused.

6. On the other hand, Mr. Ravi Tanta, Advocate, learned counsel for the respondent/complainant has submitted that the petitioner/accused had been adopting delaying tactics and there was no merit in his contention. He

further submitted that the comparison of handwriting on the cheque in the facts and circumstances of the case will be irrelevant especially in view of the fact that the petitioner/accused has not disputed his signatures on the cheque.

7. Petitioner/accused has placed on record a copy of statement of respondent/complainant recorded by the learned trial Court on 14th September, 2018. While cross-examining the complainant, no dispute has been raised in respect of the signatures of petitioner/accused on the cheque. Rather, it was suggested to the complainant/respondent that the cheque was given in lieu of security. A question was also asked that the accused had already made payment of Rs. Eight lakhs.

8. Thus, it is clear that the petitioner/accused has not disputed his signatures on the cheque. Assuming, that the writing on other portions of cheque is not in the hand of accused, it will not make any effect on the merits of the case. The issue that is required to be adjudicated by the learned trial Court is regarding the existence of legal liability of accused/petitioner in favour of the complainant/respondent. Section 139 of the Negotiable Instruments Act raises presumption that a drawer of handing over a cheque signed by him is liable unless it is proved that the cheque was not in discharge of debt or any other legal liability.

9. In ***Oriental Bank of Commerce vs. Prabodh Kumar Tewari***, bearing ***Criminal Appeal No. 1260 of 2022***, decided by the Hon'ble Supreme Court on 16.08.2022, the Hon'ble Supreme Court while dealing with the almost identical fact situation has held as under:-

> ***"17. For such a determination, the fact that the details in the cheque have been filled up not by the drawer, but by some other person would be immaterial. The presumption which arises on the signing of the cheque cannot be rebutted merely by the report of a hand-writing expert. Even if the details in the cheque have not been filled up by drawer but by another person, this is not relevant to the***

defense whether cheque was issued towards payment of a debt or in discharge of a liability.

18. Undoubtedly, it would be open to the respondents to raise all other defenses which they may legitimately be entitled to otherwise raise in support of their plea that the cheque was not issued in pursuance of a pre-existing debt or outstanding liability.

10. In view of the above exposition, no fault can be found with the impugned order. Further the impugned order has rightly been passed by relying upon the provisions of Section 20 of the Negotiable Instruments Act.

11. In result, the petition fails and the same is dismissed. Consequently, the impugned order dated 30.11.2021 passed by learned Judicial Magistrate 1st Class, Jubbal, H.P., in Criminal Misc. Application No. 14/4 of 2020 is upheld. The petition is accordingly disposed of, so also, the pending applications, if any.

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

Naveen Kumar and another .....Petitioners

Versus

State of H.P.and another .....Respondents

For the petitioners: Mr.Sanjay Kumar and Ms. Anjali SoniVerma, Advocates.

For the respondents: Mr. Desh Raj Thakur, Additional Advocate General with Mr. Narender Thakur, Deputy Advocate General, for respondent No.1.

Mr. Tarun Thakur, Advocate, for respondent No.2/Complainant.

Cr.MMO No. 810 of 2022
Reserved on: 12.12.2022
Decided on: 19.12.2022

Code of Criminal Procedure, 1973- Section 482- Inherent power- Quashing of FIR- **Indian Penal Code, 1860-** Sections 376, 384 and 506- Petitioners contended that respondent No.2 has compromised and settled all her disputes with the petitioners and they have entered into a written compromise- **Held-** By continuance of prosecution of petitioners no fruitful purpose is going to be achieved- By allowing the prayer made in the petition, no prejudice is going to be caused to the Society at large, keeping in view the peculiar facts and circumstances of the case- Petition allowed. (Paras 14, 15)

Cases referred:

Narinder Singh and others Vs. State of Punjab and another, (2014) 6 SCC 466;

State of Madhya Pradesh Vs. Laxmi Narayan and others, (2019) 5 SCC 688;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge.

Heard.

2. By way of instant petition, a prayer has been made to quash FIR No.26/2020, dated 20.09.2020, registered at Women Police Station, Dharamshala, District Kangra, H.P. under Sections 376, ,384 and 506 of IPC and consequent criminal proceedings i.e. case No. 192/2020, titled State of H.P. Vs. Naveen Kumar and another, pending before learned Judicial Magistrate, 1st Class, Dharamshala, District Kangra, H.P.

3. It is contended on behalf of the petitioners that respondent No.2 has compromised and settled all her disputes with the petitioners and they have entered into a written compromise placed on record as Annexure P-3. On the basis of such settlement, the above noted FIR as also the consequential criminal proceedings arising therefrom have been sought to be quashed.

4. Respondent No.2 had implicated the petitioners on the allegations that she had developed intimate relationship with petitioner No.1 in the year 2014 and during this period financial transactions took place between them. This relationship continued till 2020whereafter both started levelling allegations and counter-allegations against each other. The enmity got intense between the two and culminated into the filing of FIR in question.

5. Respondent No.2 and petitioners were present in the Court on 12.12.2022 and their statements were recorded on oath.

6. Respondent No.2 stated that firstly she was married to a person named Sh. Aman Bhatt and their marriage was dissolved by a decree of divorce. Presently, she is married to one Sh.Rakesh and she was residing happily in her matrimonial house. She further stated that the petitioners were implicated by her in a criminal case due to circumstance which had developed at the relevant time. She further stated that now all her misunderstanding with petitioners have been resolved and the settlement had been arrived at. She verified the contents of settlement Annexure P-3. She expressed her intention to withdraw from the prosecution on the basis of compromise and

has further stated that she has no objection in case FIR No.FIR No.26/2020, dated 20.09.2020, registered at Women Police Station, Dharamshala, District Kangra and consequent criminal proceedings arising therefrom are ordered to be quashed.

7. Petitioners in their joint statements endorsed the statement made by respondent No.2 to be correct. They also verified the contents of compromise deed Annexure P-3. Petitioners undertook to abide by the terms and conditions of the compromise.

8. Respondent No.2 is about 33 years old. In compromise deed Annexure P-3, she has specifically admitted that she was in relationship with petitioner No.1. Respondent No.2 had developed affinity towards another person named Rakesh and she fell in love with him. Due to said reason misunderstanding had developed between the parties. Finally, respondent No.2 married Sh. Rakesh in 2021 and since then she is residing with him. The FIR was result of aforesaid misunderstanding and strained relations. It is further stated in the compromise deed that now the misunderstanding between the petitioners and respondent No.2 have been sorted out and as a result thereof, respondent No.2 has agreed to withdraw from prosecution of petitioners.

9. In her statement dated 12.12.2022 recorded by this Court, respondent No.2 had admitted that whatever relations she had with petitioner No.1, those had developed with her consent and she had consented for every part of it.

10. Keeping in view the age of respondent No.2, it cannot be said that she had remained under any misapprehension at any point of time. As per the contents of the petition, the relationship between petitioner No.1 and respondent No.2 had developed in the year 2014. At that time also, respondent No.2 was of sufficient mature age. Her relationship with petitioner No.1 continued for about six years. In the given circumstances of the case, the

allegation of rape levelled by respondent No.2 against petitioner No.1 are seriously doubtful.

11. The offence under Section 376 of IPC has been termed to be a serious and heinous offence and generally treated as crime against society as per dictum of ***Narinder Singh and others*** Vs. ***State of Punjab and another, (2014) 6 SCC 466*** and ***State of Madhya Pradesh*** Vs. ***Laxmi Narayan and others, (2019) 5 SCC 688***.

12. However, in Criminal Appeal No. 1217 of 2020, titled ***Kapil Gupta*** Vs. ***State of NCT of Delhi and anr.***, decided on 10.08.2022, Hon'ble Supreme Court has observed as under:-

> *"It can thus be seen that this Court has clearly held that though the Court should be slow in quashing the proceedings wherein heinous and serious offences are involved, the High Court is not foreclosed from examining as to whether there exists material for incorporation of such an offence or as to whether there is sufficient evidence which if proved would lead to proving the charge for the offence charged with. The Court has also to take into consideration as to whether the settlement between the parties is going to result into harmony between them which may improve their mutual relationship."*

13. Keeping in view the above said exposition, I am of the considered view that the facts of the case warrant exercise of jurisdiction under Section 482 Cr.P.C. to quash the FIR lodged at the instance of respondent No.2 against the petitioners.

14. The objective of every legal system is to ensure maintenance of peace and harmony in the society. Respondent No.2 is married and is happily living with her husband. By continuance of prosecution of petitioners in pursuance to FIR No.26/2020, dated 20.09.2020, registered at Women Police Station, Dharamshala, District Kangra, H.P. no fruitful purpose is going to be achieved. Rather, the married life of respondent No.2 is likely to be jeopardized. By allowing the prayer made in the petition, no prejudice is going

to be caused to the Society at large, keeping in view the peculiar facts and circumstances of the case.

15. In light of above discussion, the instant petition is allowed. FIR No.26/2020, dated 20.09.2020, registered at Women Police Station, Dharamshala, District Kangra, H.P. under Sections 376, 384 and 506 of IPC and consequent criminal proceedings i.e. case No. 192/2020, titled State of H.P. Vs. Naveen Kumar and another, pending before learned Judicial Magistrate, 1st Class, Dharamshala, District Kangra, H.P.against the petitioners, are ordered to be quashed.

16. The petition stands disposed of in the aforesaid terms, so also the pending miscellaneous application(s), if any.

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

Sukhbir Singh .....Petitioner

Versus

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

For the petitioner: Mr.Manohar Lal Sharma, Advocate.

For the respondents: Mr. Desh Raj Thakur, Addl. A.G. with Mr. Narender Thakur, Dy. A.G. for respondent No.1/State.

Mr. Rajesh Verma, Advocate, for respondents No. 2 and 3.

Cr.MMO No. 1033 of 2022
Decided on: 19.12.2022

Code of Criminal Procedure, 1973- Section 482- Inherent power- Quashing of FIR-**Indian Penal Code, 1860-** Sections 451, 506, 34- compromise has been arrived at between the parties with the intervention of respectable persons and elders- **Held-** They have now decided to live in peace it will be in the interest of justice to allow the prayer made in the petition- FIR ordered to be quashed- Petition allowed. (Para 8)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge (oral).

The instant petition has been filed for quashing of FIR No. 0112 dated 1707.2022, registered at Police Station, Dharampur, District Solan, H.P. under Sections 451, 506, 34 of IPC and consequent criminal proceedings arising therefrom, on the ground that the parties have compromised the matter.

2. It is averred in the petition that on 25/26.09.2022, compromise has been arrived at between the parties with the intervention of respectable persons and elders. After such compromise, all disputes inter se them, have been resolved and they have decided to live in peace in future.

3. Petitioner as well as respondents No. 2 and 3 are present in the Court today. Their separate statements have been recorded.

4. Respondent No.3 has stated that a civil dispute in respect of certain immoveable properties existed between her husband and petitioner, which now stands settled and compromised amicably. She has further stated that there were cross criminal cases between the parties and the FIR No. 0112 dated 17.07.2022 was one of them. The terms of compromise have been stated to be recorded vide Annexure P-2. Respondent No.3 has stated that though she was not a signatory to compromise Annexure P-2, but her husband is signatory and she has no objection in case the FIR in question is ordered to be quashed on the basis of such compromise.

5. Respondent No.2 stated that the FIR No. 0112 dated 17.07.2022 was result of civil litigation between the parties, which now stands compromised. He further verified the contents of compromise Annexure P-2 to be correct.

6. The petitioner also endorsed the statements of respondents No. 2 and 3 to be correct. The contents of compromise Annexure P-2, have also been verified by him. He has further undertaken to abide by the terms of the compromise Annexure P-2.

7. Perusal of FIR No. 0112 reveals that on the basis of allegations contained therein, a case under Sections 451, 506, 34 of IPC was registered againstthe petitioner. The allegations contained therein, had overtones of civil dispute. Now, better sense hasprevailed uponthe parties and they have settled all their pending disputes including civil/property dispute. As a necessary consequence, the dispute arising out of the aforesaid FIR has also been

compromised. Parties were known to each other since long. Since, they have now decided to live in peace, it will be in the interest of justice to allow the prayer made in the petition so as to enable them to have harmonious relations in future, which otherwise is also the ultimate object of every civilized society.

8. In light of above discussion, the instant petition is allowed. FIR No. 0112, dated 17.07.2022, registered at Police Station,Dharampur, District Solan, H.P., under Sections 451, 506, 34 of IPC and consequent criminal proceedings arising therefrom, against the petitioner, are ordered to be quashed. Pending miscellaneous application(s), if any, shall also stand disposed of

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

Saurabh Sharma

.....Petitioner

Versus

State of Himachal Pradesh.

.....Respondent

For the Petitioner: Mr. Mukesh Thakur, Advocate.

For the Respondent: Mr. Sudhir Bhatnagar, Additional Advocate General, with Mr. Sunny Dhatwalia, Assistant Advocate General with SI Hasi Madhu Singh, PS Eas, Shimla, H.P.

Cr.MMO No.1096 of 2022
Decided on:8.12.2022

Code of Criminal Procerdure, 1973- Section 482- Inherent power- Quashing of FIR- **Indian Penal Code, 1860-** Sections 279, 337 and 338- Petitioner has approached this Court to quash and set-aside the FIR as well as consequent proceedings pending before the competent court of law- **Held-** There is no sufficient material to connect the petitioner with the offence alleged to have been committed by him- If trial is allowed to continue, great prejudice would be caused to the petitioner and same would amount to sheer abuse of process of law- FIR quashed- Petitioner acquitted of the charges framed against him- Petition allowed. (Paras 14, 15)

Cases referred:

Akshay Kumar v. State of HP, Latest HP LJ 2009 HP 72;
Gurcharan Singh versus State of Himachal Pradesh 1990 (2) ACJ 598;
State of Haryana and others vs. Bhajan Lal and others, 1992 Supp (1) SCC 335;

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

By way of instant petition, prayer has been made by the petitioner for quashing of FIR No. 106 of 2021 dated 21.10.2021, under Sections 379 and 337 of IPC, registered with Police Station Shimla East, District Shimla H.P. as well as consequent proceedings i.e. Cr.Case No. 592 of 2021, titled Saurabh Sharma v. State of H.P. pending before the learned Additional Chief Judicial Magistrate-I, Shimla, Himachal Pradesh.

2. Precisely the facts of the case as emerge from the record are that on the basis of information received from the IGMC hospital that one person has been brought for treatment on account of his having suffered injuries in the accident, police reached the Hospital but since at that time person who suffered injuries in the accident was not in position to give statement, police visited the site of the accident and lodged FIR against the petitioner, who suffered injuries in the accident, under Section 279, 337 and 338 of the IPC. After completion of the investigation, police presented challan in the competent court of law, but before same could be taken to its logical end, petitioner has approached this Court in the instant proceedings, praying therein to quash and set-aside the FIR as well as consequent proceedings pending before the competent court of law.

3. Pursuant to notice issued in the instant proceedings, respondent State has filed the status report under the signatures of SHO, PS East, Shimla, which is taken on record. Perusal of the same reveals that PS Shimla East after having received intimation from the police post IGMC with regard to accident, in Vikas Nagar area visited the hospital to record the statement of the injured i.e. petitioner, but since he was declared unfit to give statement, police after having visited the site of the accident recorded the FIR against the petitioner under Section 279 on the pretext that motorcycle was being driven rashly and negligently by him. As per own case of the investigating agency, neither anyone was present at the site of the accident nor anyone had occasion to see the accident with his/her eyes, but even then, it is not

understood on what basis, investigating agency while filing challan under Section 173 Cr.PC, concluded that vehicle in question was being driven rashly and negligently by the accused. In the aforesaid background, petitioner has approached this Court in the instant proceedings for quashing of FIR.

4. Mr. Mukesh Thakur, learned counsel for the petitioner, vehemently argued that since no independent witnesses ever reported the matter with regard to accident of the petitioner on the date of the alleged incident, it is not understood that on what basis, police arrived at conclusion that vehicle in question was being driven rashly and negligently. He further submitted that it has been stated in the challan that on account of driving rashly and negligently, petitioner firstly hit one car from behind and thereafter, he suffered injuries after having fallen from motorcycle, but there is no complaint, if any, of damage, if any, caused to the car by the owner of the car. He stated that since there is none to prove the rash and negligent driving of the petitioner coupled with the fact that none other than petitioner has suffered injuries in the accident, no fruitful purpose would be served by making the petitioner to suffer the ordeal of the protracted trial, which otherwise is bound to fail. In support of his aforesaid submissions, learned counsel for the petitioner invited attentnion of this court to judgment passed by the Hon'ble Apex Court in ***State of Haryana and others vs. Bhajan Lal and others, 1992 Supp (1) SCC 335.*** He stated that in case there is no evidence to connect the accused with the offence alleged to have been committed by him, court while exercising power under Section 482 Cr.PC can proceed to quash the FIR as well as consequent proceedings.

5. Mr. Sudhir Bhatnagar, learned Additional Advocate General, while fairly admitting that there was no eye witness to the accident submitted that there is ample evidence collected on record suggestive of the fact that accident occurred on account of rash and negligent driving of the petitioner. He submitted that absence, if any, of the eye witness may not be ground to

discharge the petitioner, especially when police after having visited the spot of accident has arrived at definite conclusion that at the time of the accident, motorcycle was being driven rashly and negligently. He submitted that had accident occurred during the day time, petitioner besides suffering injury would have caused harm to people and as such, he has been rightly booked under the aforesaid provisions of law

6. Having heard learned counsel for the parties and perused material available on record, especially status report placed on record as well as copy of final report filed under Section 173 Cr.PC, which was made available to the court by the learned counsel for the petitioner, this Court is persuaded to agree with Mr. Mukesh Thakur, learned counsel for the petitioner that there is none to prove rash and negligent driving, if any, by the petitioner on the date of the alleged incident. Interestingly, in the case at hand, police merely after having visited the site of the accident proceeded to conclude that accident occurred on account of rash and negligent driving of the petitioner. Neither statement of independent witnesses nor statement of the petitioner ever came to be recorded because admittedly at the time of lodging of FIR, petitioner was not in position to make the statement. Moreover, it has been stated in the status report that before having fallen from the motorcycle, the petitioner struck his motorcycle against the car standing on the road, but there is nothing on record to suggest that complaint, if any, ever came to be lodged by the driver with regard to damage, if any, caused to his/her car allegedly hit by the motorcycle being driven by the petitioner and as such, this Court finds force in the submission of Mr. Mukesh Thakur, learned counsel for the petitioner that had motorcycle being driven rashly and negligently hit the car parked on the road, damage would have been caused to the rear portion of the car, but there is no such evidence. To prove the damage caused to the vehicle parked on the road, photographs have been placed on record, but that is not sufficient to prove the guilt, if any, of the

petitioner, especially when no report if any, with regard to accident ever came to be lodged at the behest of the owner/driver of the car. Even if for the sake of argument, case as put forth by the prosecution is presumed to be correct that petitioner while driving motorcycle rashly and negligently hit the car, that may not be sufficient to conclude the rash and negligent driving because mere speed is not sufficient to conclude the act of rashness. To prove the offence, if any, punishable under Section 279 of IPC, it is necessary to prove that vehicle responsible for accident was being driven on public way in rash and negligent manner so as to endanger human life.

7. By now, it is well settled that specific evidence is required to be adduced on record by prosecution to prove rash and negligent driving, if any, on the part of the accused. Mere allegations are not sufficient to hold accused guilty of having committed offence punishable under Section 279 IPC. Rash and negligent act may be described as criminal rashness negligence, but to prove guilt, if any, under Section 279 IPC, prosecution is required to prove that the act of the accused was more than mere carelessness or error of judgment.

8. At this stage, reliance is placed on judgment rendered by our own High Court in case titled **Akshay Kumar v. State of HP**, Latest HP LJ 2009 HP 72, relevant para of which reads as under:-

> "8. In fact, an injury shall be deemed to be negligently caused whomsoever it is willfully caused, but results from want of reasonable caution, in the undertaking and doing of any act either without such skill, knowledge or ability as is suitable to consequences of such act, or when it results from the not exercising reasonable manner of using them or from the doing of any act without using reasonable caution for the prevention of mischief, of from the omitting to do any act which is hazarding a dangerous or wanton act with the knowledge that it is so and that it may cause injury, but without an intention to cause injury or knowledge that it will be probably caused. The criminality lies in running the risk of doing such an act with recklessness or indifference as to the consequences. Rash and

negligent act may be described as criminal rashness negligence. It must be more than mere carelessness or error of judgment."

The courts below did not appreciate the above facts that there was debris on the side of the road on the curve due to the slip, while negotiating the curve, as stated above, some witnesses have admitted that the danga gave way to the bus which caused the accident and the rash and negligent driving by the petitioner is also denied, therefore, it find that the findings of quilt arrived at against the petitioner by both the courts below were not based upon legal and proper appreciation of evidence. In the circumstances aforesaid, the petitioner cannot be said to have criminal rashness or negligence, thus he is entitled for the benefit of doubt as two views were deducible from the evidence on record."

9. Reliance is also placed upon judgment of this Court in **Gurcharan Singh versus State of Himachal Pradesh** reported in 1990 (2) ACJ 598, relevant paragraphs of which are reproduced here-in-below:-

"14. Adverting to the facts of this case, it is in evidence that the truck in question was loaded with fertilizer weighing 90 quintals. Obviously, it cannot be said that the speed of the vehicle was very fast. Secondly, it is a State Highway and not a National Highway. Therefore, the speed on this account as well cannot be considered to be high.

"15. Coming to the statements of witnesses on this aspect, it has been stated that the truck was moving in high speed but it has not been said as to what that speed actually was. To say that a vehicle was moving in a high speed is neither a proper and legal evidence on high speed nor in any way indicates thereby the rashness on the part of the driver. The prosecution should have been exact on this aspect as speed of the vehicle is an essential point to be seen and proved in a case under Section 304-A of the Indian Penal Code. Further, there are no skid marks which eliminate the evidence of high speed of the vehicle. In addition to this, it has been stated by the witnesses that the vehicle stopped at a distance of 50 feet from the place of accident. This appears to be exaggerated. However, it is not a long distance looking to the two points; viz, the first impact of the accident and the last tyres of the vehicle and the total length of the body of the truck in question. If seen from these angles, the distance stated by the witnesses cannot be considered to be very long and thus an indication of high speed. The version of

> the petitioner that he blew the horn near about the place of curve which frightened the child, cannot be considered to be without substance. This can otherwise be reasonably inferred that the petitioner would have blown the horn on seeing the child on the road as it is in evidence that the child had come on the pucca portion of the road while there is no evidence as to whether the witnesses, more particularly, Ghanshyam, PW7, Chander Kanta, PW8, mother, and a few other witnesses were there at that particular time. Rather the depositions of these witnesses indicate that they were coming from some village lane which was joining the main road in question. Children of this age, usually crafty by temperament, move faster than the parents and are in advance of them while walking. This appears to have happened in the present case. Minute examination of the circumstances of this case and the evidence brought on the record, discloses that the deceased had reached the pucca portion of the road much before the arrival of his parents and the witnesses. That is why in their deposition they have said that the child had been run over by the truck. On the other hand, the petitioner has stated that horn by him and started crossing the road which could not be seen by him and the result was the accident and the death of the child. In case some pedestrians suddenly cross a road, the driver of the vehicle cannot save the pedestrian, however slow he may be driving the vehicle. In such a situation he cannot be held negligent; rather it appears that the parents of the child were negligent in not taking proper care of the child and allowed him to come alone to the road while they were somewhere behind and they could have rushed to pull back the child before the approaching vehicle came in contact with him as it is in their depositions that the truck driver was at a distance coming at a high speed and in case the child wanted to cross the road, it could do so within the time it reached at the place of the accident. How the accident has actually taken place, has not been clearly and comprehensively stated by any of the witnesses. They appear to have been prejudiced by the act of the driver. Their versions are, therefore, coloured by the ultimate act of the petitioner and the fact that the child had been finished."

10. In the case at hand, there is none to state that at the time of the accident, motorcycle was being driven rashly and negligently, rather very factum of the accident on the date of the alleged incident on the spot given in

the final report is doubtful because nobody from that area ever reported the matter with regard to accident. Had petitioner after having suffered injuries given statement to the police with regard to his having suffered in the accident in the area concerned, things would have been different, but it is admitted case that neither statement of the petitioner was ever recorded nor any person from the area, where accident took place lodged complaint. Mere finding of motorcycle on the place of the accident may not be sufficient to conclude the guilt of the petitioner under Sections 279, 337 and 338 of IPC, especially when there is no evidence with regard to rash and negligent driving and injury, if any, caused to the persons walking or standing on the road.

11. Needless to say, high court while exercising power under Section 482 Cr.PC can quash the proceedings, which are ultimately likely to be failed on account of lack of evidence. In the case at hand, evidence collected on record, if perused in its entirety, nowhere suggests that prosecution would be able to prove the act of rash and negligent driving of the petitioner and as such, no fruitful purpose would be served by putting the petitioner to the ordeal of the protracted trial, which is otherwise likely fail.

12. Hon'ble Apex Court in judgment titled ***State of Haryana and others vs. Bhajan Lal and others, 1992 Supp (1) SCC 335*** has held that the High Court is entitled to quash a proceeding, 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. Relevant para is being reproduced herein below:-

> "7....In the exercise of this wholesome power, the High Court is entitled to quash a proceeding 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. The saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose which is that a court proceeding ought not to be permitted to degenerate into a

> weapon of harassment or persecution. In a criminal case, the veiled object behind a lame prosecution, the very nature of the material on which the structure of the prosecution rests and the like would justify the High Court in quashing the proceeding in the interest of justice. The ends of justice are higher than the ends of mere law though justice has got to be administered according to laws made by the legislature. The compelling necessity for making these observations is that without a proper realisation of the object and purpose of the provision which seeks to save the 5183 inherent powers of the High Court to do justice, between the State and its subjects, it would be impossible to appreciate the width and contours of that salient jurisdiction."

13. Subsequently, Hon'ble Apex Court in **Vineet Kumar and Ors. v. State of U.P. and Anr.**, while considering the scope of interference under Sections 397 Cr.PC and 482 Cr.PC, by the High Courts, has held that High Court is entitled to quash a proceeding, 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 proceedings ought to quashed. The Hon'ble Apex Court has further held that the saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose i.e. a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. In the aforesaid case, the Hon'ble Apex Court laid down that seven categories, where power can be exercised under Section 482 Cr.PC, as enumerated in **Bhajan Lal** (supra), i.e. where a criminal proceeding is manifestly attended with malafides 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.

14. In view of the detailed discussion made herein above and law taken into consideration, there appears to be sufficient ground for this Court to exercise its inherent jurisdiction under Section 482 Cr.P.C, for quashing of

FIR and consequent criminal proceedings against the petitioner, to prevent abuse of process of law and to prevent unnecessary harassment to the petitioner, against whom there is no evidence to connect him with the commission of offences as incorporated in the FIR. Otherwise also, continuance of the criminal proceedings against the petitioner in the present case would be a sheer wastage of time of the learned trial Court and the same would amount to subjecting the petitioner to unnecessary and protracted ordeal of trial, which is bound to culminate in acquittal. If the evidentiary material collected on record to prove the guilt of the petitioner is perused in its entirety, there is no sufficient material to connect the petitioner with the offence alleged to have been committed by him. To the contrary, if on the basis of material adduced on record by the investigating agency, trial is allowed to continue, great prejudice would be caused to the petitioner and same would amount to sheer abuse of process of law.

15. Consequently, in view of the detailed discussion made herein above as well as law laid down by the Hon'ble Apex Court, this Court finds merit in the present petition and as such same is allowed and FIR No. 106 of 2021 dated 21.10.2021, under Sections 279 and 337 of IPC, registered with Police Station Shimla East, District Shimla H.P. as well as consequent proceedings i.e. Cr.Case No. 592 of 2021, titled Saurabh Sharma v. State of H.P. pending before the learned Additional Chief Judicial Magistrate-I, Shimla, Himachal Pradesh, are hereby quashed and set-aside and petitioner is acquitted of the charges framed against him in the aforesaid FIR. Accordingly, present petition is disposed of, so also pending applications, if any.

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

Chaman Lal .....Petitioner.

Versus

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

For the petitioner : Mr. Arjun Lall, Advocate.
For the respondent : Mr. Hemant Vaid, Additional Advocate General.

Cr. MP (M) No.1694 of 2022
Decided on: 20.12.2022

Code of Criminal Procedure, 1973- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances Act, 1985-** Sections 15, 25, 29- **Indian Penal Code, 1860-** Section 420- Recovery of poppy-straws weighing 50 Kg 308 grams- Commercial quantity- **Held-** Keeping in view the quantity of the contraband and other materials placed before the court it is not a fit case for enlarging petitioner on bail- Bail petition dismissed. (Para 20)

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge.

Petitioner has approached this Court seeking bail under Section 439 Code of Criminal Procedure (in short 'Cr.P.C.'), in FIR No.60 of 2022, dated 17.4.2022, registered in Police Station Banjar, District Kullu H.P., under Sections 15, 25, 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act') and Section 420 of the Indian Penal Code (hereinafter referred to as 'IPC').

2. Status report stands filed and record was also made available.

3. As per the status report, on 17.4.2022 at about 4:30 a.m, SHO, Police Station Banjar, going from Batahar Chowk Banjar towards Devhari, alongwith companion Police Officials, noticed that a car coming from opposite direction was not facilitating pass to a truck going ahead of police vehicle and thus

truck driver had to stop his truck on the road, whereupon Police Official alongwith SHO, except driver, came out of the police vehicle. On noticing the police in the headlight of the vehicle, car driver moved back his car in a fast speed in reverse gear and because of narrow and hilly road, hit his vehicle with the hill on the left side of the road. Thereafter, he came out of the car and ran towards Devhari forest. Another person was sitting on left front seat of the car. For suspicion about having some illegal articles in possession, person sitting on the left front seat of the car was apprehended and driver of car was tried to be chased, but due to darkness, he could not be chased and Police Official, who went behind him, came back to the spot after about one hour. Truck driver was associated, as a witness, who disclosed his name, as Mukthiar Ali. Person over powered from the car disclosed his name as Vijay Kumar alongwith his address and name of driver who fled from the spot as Gurpreet Singh with his address with further statement that car belongs to Gurpreet Singh and he had run away alongwith key of the car. On checking, no document of the vehicle was found, however, in the dickey of car, two bags containing *chura post*/poppy husk/poppy straw was recovered. On weighing, total 50 Kg 308 grams poppy straw was found in bags.

4. Apart from bags containing poppy straw, number plates, having different numbers thereon other than the number reflected in the number plates fixed on the car, were also recovered from dickey of the car.

5. On casual inquiry, Vijay Kumar disclosed that he and Gurpreet Singh were residents of the same village and they had purchased poppy straw by spending money in equal shares.

6. By sending *rukka* to the Police Station, FIR was registered and investigation was carried on. On finding sufficient material, Vijay Kumar was arrested. Vijay Kumar further disclosed his mobile number as 7743074095, mobile number of Gurpreet Singh as 7347641054 and that of Chaman Kumar

as 8219775994, with further disclosure that they had purchased poppy straw from Chaman Lal (petitioner).

7. In the status report, it was disclosed by Vijay Kumar during his interrogation that he and Gurpeet Singh, residents of the same village, are having their houses nearby to each other and both are habitual of consuming poppy straw in Punjab, some truck driver had given them mobile number of the owner of Panasra *dhaba* in District Kullu, with reference that he can provide poppy straw to them, thereupon they contacted Chaman Lal on his mobile number and who asked them to know Panarsa whereupon on 15.5.2022, during evening they started from Panasra, in a car of Gurpreet Singh and for asking about road of Panarsa, they had called Chaman Lal for 7-8 times and on 16.4.2022, when they reached near Panarsa four lane, Chaman Lal came to receive them on the road and took them in his *dhaba* where they had taken tea and meal for providing '*chura post*' amounting to Rs.35,000/- (17500/17500 rupees), in the denominations, 70 notes of rupees five hundred were given to Chaman Lal and Chaman Lal asked to came Deori bridge and he went ahead to them and again for asking the inquiry, they made calls to Chaman Lal, at a distance of 300 meters from Deori bridge near bushes at a secluded place Chaman Lal handed over two bags at about 10:30 p.m. which were loaded by them in dickey of car and both of them slept in car, it was further disclosed that number plate of vehicle was fake whereas number of the car was same, in the morning they started running towards journey, but intercepted by the police in the manner, as stated supra.

8. On obtaining CDR and CAF of concerned service Provider Company, it was found that Vijay Kumar and Chaman Lal had numerous talks from their mobile phones on 16.4.2022 till 10:39 pm, they had various talks on 15.4.2022 at 5:58 pm. At that time, location of Chaman Lal was at Kota Dhar whereas at 6:50 am location of Vijay Kumar was at Ramdhan Tower in village Udhanwal Balachor Nawashehar and at 5:58 pm, Manish Kumar Tower in

village Sanyarli in Himachal Pradesh. Thereafter, they had talked on 15.4.2022 from 9:22 pm to 10:33 pm and at that time, location of Chaman Lal from 9:22 pm to 10:20 pm was within tower Kota Dhar and thereafter, at 10:27 pm within Tower Dalip Singh Sotodar and thereafter within Tower of Gulab Singh village Phalana, whereas Tower location of Vijay Kumar from 9:22 pm to 10:30 pm was within Tower Karan Singh Rupi Palace Mandi, Bimla Devi Tower village Jawani Ropa, Ved Parkash Tower in village Tanrarum Tehsil Aut, District Manali, Gulab Singh Tower in village Phalana District Kullu, Alam Chand Tower village Khamradha and lastly within Gulab Singh Tower in village Phalana.

9. Learned counsel for petitioner submits that petitioner has been arrested on the basis of disclosure statement of co-accused and call details, whereas there is no recovery either of contraband or of amount alleged to have been paid by main accused Chaman Lal and source of contraband, as claimed by the prosecution that was a *Nepali* person, has not been placed on record and there is no detail of that *Nepali* person.

10. On 16.4.2022, during mobile talks, location of Chaman Lal was within Tower Kota Dhar, Gulab Singh, Alam Chand, Narender Bhardwaj situated in District Kullu, whereas Tower location of petitioner at 10:10 a.m, was within Gulab Singh Tower and 12:09 p.m within Tower Tilak Raj village Cholohoti in District Mandi, Dalip Singh tower in District Mandi and Tilak Raj Tower in District Mandi. Lastly, their location from 9:23 p.m to 10:39 p.m was in Tower Gulab Singh, Narender Bhardwaj and Ranjeet Singh. situated in District Kullu and this Tower location was identical to Tower location of Chaman Lal.

11. In view of the aforesaid material on record, it has been submitted by learned Additional Advocate General that in present case, Chaman Lal has not been implicated only on the basis of disclosure statement and call details record, but also further disclosure of Tower location of other accused and Chaman Lal, substantiated disclosure statement of co-accused regarding their

movement, meeting with petitioner and the same location at the time of alleged supply of contraband by Chaman Lal to Vijay Kumar and Gurpreet Singh.

12. Learned Additional Advocate General submits that at the time of his arrest Chaman Lal had disclosed that he had paid some money to *Nepali* person whose name and address was not known to him, but he was having acquaintance, as the said *Nepali* used to visit his *dhaba* occasionally and other amount has been spent by Chaman Lal and, therefore, for having no details of *Nepali* and for no recovery of any amount from the petitioner cannot be made basis for enlarging petitioner on bail.

13. Learned Additional Advocate General, referring judgment of a three-Judges Bench of the Supreme Court, passed on 19.07.2022, in ***Narcotics Control Bureau vs. Mohit Aggarwal***, has contended that period of detention cannot be a ground for enlarging the petitioner on bail.

14. Learned counsel for petitioner has submitted that judgment of Mohit Aggarwal's case is not applicable in the present case, as no recovery in furtherance of disclosure statement of co-accused is there whereas learned Additional Advocate General submits that there is sufficient material in addition to disclosure statement and call details record to indicate that petitioner is involved in commission of offence.

15. It has been submitted by learned Additional Advocate General that there is no other relation between petitioner and main accused and there is no explanation for having eight calls on 15.4.2022 and 14 calls on 16.4.2022 except as stated in disclosure statement made by co-accused and the said fact coupled with Tower location, prosecution case is substantiated and thus, petitioner is not entitled for bail.

16. Learned counsel for petitioner has referred pronouncement of this Court in ***Cr. MP (M) No.586 of 2022*** titled ***Mohan Kumar vs. State of Himachal Pradesh,*** decided on 3rd June, 2022, whereas accused for having been found *charas* 1.07 kgs was enlarged on bail on the ground that recovered

contraband was slightly more than the minimum commercial quantity provided, under the Act.

17. Learned Additional Advocate General submits that in Mohan Singh's case, it is not only the quantity, but the period of detention it was one year and ten months was also a consideration coupled with the quantity of contraband whereas in the present case, petitioner has been arrested on 21.4.2022 i.e. about only seven months ago and, therefore, he is not entitled to claim parity of Mohan Singh's case (supra.).

18. Learned counsel for petitioner has submitted that in case this Court does not find appropriate to enlarge on bail, at this stage, he may be granted liberty to approach the Court again.

19. Needless to say that an accused has a right to file successive bail application, as permissible under law, and no liberty of this Court is necessary for filing such bail application either in this Court or in the Court of Sessions Judge/Special Judge having jurisdiction to decide the same.

20. Without commenting upon merits of rival contentions of the parties, considering the material placed before me and also parameters and factors necessary to be considered at the time of adjudication of bail application, therefore, I do not find it a fit case for enlarging the petitioner on bail at this stage. Accordingly, petition is dismissed.

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

Petition stands disposed of in the aforesaid terms.

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

Pardeep Kumar ....Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

For the petitioner :Mr. Bhupinder Ahuja, Advocate.
For the respondent :Mr. Desh Raj Thakur, Additional Advocate General with Mr. Narender Thakur, Deputy Advocate General.

Cr.MP(M) No. 2311 of 2022
Reserved on:14.12.2022
Decided on :22.12.2022

Code of Criminal Procedure, 1973- Section 439 **Narcotic Drugs and Psychotropic Substances Act, 1985-** Sections 20, 25 and 37- Recovery of 1.340 Kg Charas- Commercial quantity- Trial pending- **Held-** Not even half of prosecution witnesses have been examined- Constitutional guarantee of expeditious trial cannot be diluted by applying rigors of Section 37 in perpetuity- Bail petition allowed. (Para 18)

Cases referred:

Abdul Majeed Lone Vs. Union Territory of Jammu and Kashmir(Special Leave to Appeal (Cr.L.) No. 3961 of 2022;

Chitta Biswas @ Subhas Vs. The State of West Bengal, (Criminal Appeal No.(s) 245 of 2020;

Gopal Krishna Patra @ Gopalrusma Vs. Union of India (Cr. Appeal No. 1169 of 2022),;

Mahmood Kurdeya Vs. Narcotic Control Bureau (2022) 3 RCR (Criminal) 906;

Nitish Adhikary @ Bapan Vs.The State of West Bengal (Special Leave to Appeal (Cr.L.) No (s). 5769 of 2022;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

Petitioner is an accused in case FIR No. 05/2020, dated 30.01.2020, registered under Sections 20 & 25 of Narcotic Drugs and Psychotropic Substances, Act (for short 'ND&PS' Act), at Police Station State, CID Bharari, Shimla, H.P.

2. Petitioner is facing trial for offences under Section 20 and 25 of ND&PS Act in pursuance to challan filed by respondent. The allegation against petitioner is that he was an occupant of a Car bearing No. HP65A-7500, from which 1.340 Kgs of '*Charas'* was recovered.

3. Previously, vide order dated 29.04.2022, passed in Cr.MP(M) No. 796 of 2022, a Co-ordinate Bench of this Court had allowed a temporary bail to the petitioner keeping in view the ailment of his mother. Petitioner had surrendered on expiry of the period of liberty allowed in his favour.

4. Petitioner has now prayed for grant of bail on the ground that his constitutional right of expeditious disposal of trial has been infringed. As per petitioner, he is in custody for almost two years now and the trial has not concluded, rather, it is progressing at snails pace.

5. In its status report dated 05.12.2022, respondent has submitted that the prosecution has cited seventeen witnesses in support of its case. The statements of eight witnesses have already been recorded. Three of the remaining witnesses have now been summoned for 27.02.2023 for examination before learned Special Judge.

6. Learned Additional Advocate General has opposed the prayer of the petitioner, on the ground that Section 37 of ND&PS Act, has application in the facts of the case and merely, on the ground of delay in conclusion of trial, petitioner cannot be released on bail.

7. I have heard learned counsel for the petitioner as well as learned Additional Advocate General and have also gone through the status report.

8. The fetters placed by Section 37 of ND&PS Act, evidently have been instrumental in denial of right of bail to the petitioner in the instant case till date. The question that arises for consideration is, can the provisions of Section 37 of the Act, be construed to have same efficacy, throughout the pendency of trial, notwithstanding, the period of custody of the accused, especially, when it is weighed against his fundamental right to have expeditious disposal of trial?

9. As is suggested by the contents of status report not even half of prosecution witnesses have been examined till date despite the fact that petitioner is in custody since 29.01.2020. In the considered view of this Court, the Constitutional guarantee of expeditious trial cannot be diluted by applying the rigors of Section 37 of ND&PS Act in perpetuity.

10. Recently, in a number of cases, under-trials for offences involving commercial quantity of contraband under ND &PS Act have been allowed the liberty of bail by Hon'ble Supreme Court only on the ground that they have been incarcerated for prolonged durations.

11. In ***Mahmood Kurdeya*** Vs. ***Narcotic Control Bureau (2022) 3 RCR (Criminal) 906***, Hon'ble Supreme Court has held as under:-

> *"6.What persuades us to pass an order in favour of the appellant is the fact that despite the rigors of Section 37 of the said Act, in the present case though charge sheet was filed on 23.09.2018 even the charges have not been framed nor trial has commenced."*

12. In ***Nitish Adhikary @ Bapan*** Vs.***The State of West Bengal (Special Leave to Appeal (Cr.L.) No (s). 5769 of 2022,*** decided on 01.08.2022, Hon'ble Supreme Court has held as under:-

> *"During the course of the hearing, we are informed that the petitioner has undergone custody for a period of 01 year and 07 months as on 09.06.2022. The trial is at a preliminary stage, as only one witness has been examined. The petitioner does not have any criminal antecedents.*

Taking into consideration the period of sentence undergone by the petitioner and all the attending circumstances but without expressing any views in the merits of the case, we are inclined to grant bail to the petitioner."

13. In ***Gopal Krishna Patra @ Gopalrusma*** Vs. ***Union of India (Cr. Appeal No. 1169 of 2022),*** decided on 05.08.2022,Hon'ble Supreme Court has held as under:-

" The appellant is in custody since 18.06.2020 in connection with crime registered as NCB Crime No. 02/2020 in respect of offences punishable under Sections 8,20,27-AA, 28 read with 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985

The application seeking relief of bail having been rejected, the instant appeal has been filed.

We have heard Mr. Ashok Kumar Panda, learned Senior Advocate in support of the appeal and Mr. Sanjay Jain, learned Additional Solicitor General for the respondent.

Considering the fact and circumstances on record and the length of custody undergone by the appellant, in our view the case for bail is made out."

14. In ***Chitta Biswas @ Subhas*** *Vs.* ***The State of West Bengal, (Criminal Appeal No.(s) 245 of 2020,*** decided on 07.02.2020, it has been held as under:-

"The appellant was arrested on 21.07.2018 and continues to be custody. It appears that out of 10 witnesses cited to be examined in support of the case of prosecution four witnesses have already been examined in the trial.

Without expressing any opinion on the merits or demerits of the rival submissions and considering the facts and circumstances on record, in our view, case for bail is made out."

15. In ***Abdul Majeed Lone*** Vs. ***Union Territory of Jammu and Kashmir(Special Leave to Appeal (Cr.L.) No. 3961 of 2022***, decided on 01.08.2022, it has been held as under:-

> *"Having regard to the fact that the petitioner is reported to be in jail since 1-3-2020 and has suffered incarceration for over 2 years and 5 months and there being no likelihood of completion of trial in the near future, which fact cannot be controverted by the learned counsel appearing for the UT, we are inclined to enlarge the petitioner on bail.".*

16. In addition, different Co-ordinate Benches of this Court have also followed precedent to grant bail to the accused in ND&PS Act, on the ground of prolonged pre-trial incarceration. Reference can be made to order dated 28.07.2022, passed in Cr.MP(M) No. 1255 of 2022, order dated 01.12.2022, passed in Cr.MP(M) No. 2271 of 2022 and order dated 04.11.2022, passed in Cr.MP(M) No. 2273 of 2022.

17. Reverting to the facts of the case, the petitioner is in custody since 29.01.2020 and the facts suggest that the trial is not likely to be concluded in near future. There is nothing on record to suggest that the delay in trial is attributable to the petitioner.

18. Keeping in view the facts of the case and also the above noted precedents, the bail petition is allowed and petitioner is ordered to be released on bail in case FIR No. 05/2020, dated 30.01.2020, registered under Sections 20 & 25 of ND&PS Act, at Police Station State, CID Bharari, Shimla, H.P., on his furnishing personal bond in the sum of Rs. 1,00,000/- 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.

19. 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.

Narabahadur @ Naresh ....Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

For the petitioner :Mr. Bhupinder Ahuja, Advocate.
For the respondent : Mr. Desh Raj Thakur, Additional Advocate General with Mr. Narender Thakur, Deputy Advocate General.

Cr.MP(M) No. 2640 of 2022
Reserved on:14.12.2022
Decided on:22.12.2022

Code of Criminal Procedure, 1973- Section 439 **Narcotic Drugs and Psychotropic Substances Act, 1985-** Sections 20, 37- Recovery of 1.50 kg Charas- Trial pending- Prosecution evidence still in progress despite the fact that petitioner is in custody- **Held-** Constitution guarantee of expeditious trial cannot be diluted by applying rigors of Section 37- Grant of bail in NDPS on the ground of prolonged pre-trial incarceration- Trial not likely to conclude in future- Bail Petition allowed. (Paras 8, 15 to 17)

Cases referred:

Abdul Majeed Lone Vs. Union Territory of Jammu and Kashmir(Special Leave to Appeal (Cr.L.) No. 3961 of 2022;

Chitta Biswas @ Subhas Vs. The State of West Bengal, (Criminal Appeal No.(s) 245 of 2020;

Gopal Krishna Patra @ Gopalrusma Vs. Union of India (Cr. Appeal No. 1169 of 2022),;

Mahmood Kurdeya Vs. Narcotic Control Bureau (2022) 3 RCR (Criminal) 906;

Nitish Adhikary @ Bapan Vs.The State of West Bengal (Special Leave to Appeal (Cr.L.) No (s). 5769 of 2022;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

Petitioner is an accused in case FIR No. 265/2020, dated 14.09.2020, registered under Sections 20 of Narcotic Drugs and Psychotropic Substances, Act (for short 'ND&PS' Act), at Police Station Kullu, District Kullu, H.P. Petitioner is in custody since 14.09.2020.

2. Petitioner is facing trial for offences under Section 20 of ND&PS Act in pursuance to challan filed by respondent. The allegation against petitioner is that on 14.09.2020, at about 2:45 pm near Sangnapul, he was found carrying a bag in his left hand, from which 1.50 Kgs of '*Charas*' was recovered.

3. Petitioner has now prayed for grant of bail on the ground that his constitutional right of expeditious disposal of trial has been infringed. As per petitioner, he is in custody for more than one year three months and the trial has not concluded, rather, it is progressing at snail's pace.

4. In its status report dated 12.12.2022, respondent has submitted that PW-1 and PW-14 have now been summoned for 13.01.2023 for examination before learned Special Judge.

5. Learned Additional Advocate General has opposed the prayer of the petitioner, on the ground that Section 37 of ND&PS Act, has application in the facts of the case and merely, on the ground of delay in conclusion of trial, petitioner cannot be released on bail.

6. I have heard learned counsel for the petitioner as well as learned Additional Advocate General and have also gone through the status report.

7 The fetters placed by Section 37 of ND&PS Act, evidently have been instrumental in denial of right of bail to the petitioner in the instant case till date. The question that arises for consideration is, can the provision of Section 37 of the Act, be construed to have same efficacy throughout the pendency of trial, notwithstanding, the period of custody of the accused,

especially, when it is weighed against his fundamental right to have expeditious disposal of trial.

8. As is suggested by the contents of status report, recording of prosecution evidence is still in progress despite the fact that petitioner is in custody since 14.09.2020. In the considered view of this Court, the Constitutional guarantee of expeditious trial cannot be diluted by applying the rigors of Section 37 of ND&Ps Act in perpetuity.

9. Recently, in a number of cases, under-trials for offences involving commercial quantity of contraband under ND&PS Act have been allowed the liberty of bail by Hon'ble Supreme Court only on the ground that they have been incarcerated for prolonged durations.

10. In ***Mahmood Kurdeya*** Vs. ***Narcotic Control Bureau (2022) 3 RCR (Criminal) 906***, Hon'ble Supreme Court has held as under:-

> *"6.What persuades us to pass an order in favour of the appellant is the fact that despite the rigors of Section 37 of the said Act, in the present case though charge sheet was filed on 23.09.2018 even the charges have not been framed nor trial has commenced."*

11. In ***Nitish Adhikary @ Bapan*** Vs.***The State of West Bengal (Special Leave to Appeal (Cr.L.) No (s). 5769 of 2022,*** decided on 01.08.2022, Hon'ble Supreme Court has held as under:-

> *"During the course of the hearing, we are informed that the petitioner has undergone custody for a period of 01 year and 07 months as on 09.06.2022. The trial is at a preliminary stage, as only one witness has been examined. The petitioner does not have any criminal antecedents.*
>
> *Taking into consideration the period of sentence undergone by the petitioner and all the attending circumstances but without expressing any views in the merits of the case, we are inclined to grant bail to the petitioner."*

12. In ***Gopal Krishna Patra @ Gopalrusma*** Vs. ***Union of India (Cr. Appeal No. 1169 of 2022),*** decided on 05.08.2022, Hon'ble Supreme Court has held as under:-

> *" The appellant is in custody since 18.06.2020 in connection with crime registered as NCB Crime No. 02/2020 in respect of offences punishable under Sections 8,20,27-AA, 28 read with 29 of the Narcotic Drugs and Psychotropic Substances Act, 1098.*
>
> *The application seeking relief of bail having been rejected, the instant appeal has been fled.*
>
> *We have heard Mr. Ashok Kumar Panda, learned Senior Advocate in support of the appeal and Mr. Sanjay Jain, learned Additional Solicitor General for the respondent.*
>
> *Considering the fact and circumstances on record and the length of custody undergone by the appellant, in our view the case for bail is made out."*

13. In ***Chitta Biswas @ Subhas*** *Vs.* ***The State of West Bengal, (Criminal Appeal No.(s) 245 of 2020,*** decided on 07.02.2020, it has been held as under:-

> *"The appellant was arrested on 21.07.2018 and continues to be custody. It appears that out of 10 witnesses cited to be examined in support of the case of prosecution four witnesses have already been examined in the trial.*
>
> *Without expressing any opinion on the merits or demerits of the rival submission and considering the facts and circumstances on record, in our view, case for bail is made out."*

14. In ***Abdul Majeed Lone*** Vs. ***Union Territory of Jammu and Kashmir(Special Leave to Appeal (Cr.L.) No. 3961 of 2022***, decided on 01.08.2022, it has been held as under:-

"Having regard to the fact that the petitioner is reported to be in jail since 1-3-2020 and has suffered incarceration for over 2 years and 5 months and there being no likelihood of completion of trial in the near future, which fact cannot be controverted by the learned counsel appearing for the UT, we are inclined to enlarge the petitioner on bail.".

15. In addition, different Co-ordinate Benches of this Court have also followed precedent to grant bail to the accused in ND&PS Act, on the ground of prolonged pre-trial incarceration. Reference can be made to order dated 28.07.2022, passed in Cr.MP(M) No. 1255 of 2022, order dated 01.12.2022, passed in Cr.MP(M) No. 2271 of 2022 and order dated 04.11.2022, passed in Cr.MP(M) No. 2273 of 2022.

16. Reverting to the facts of the case, the petitioner is in custody since 14.09.2020 and the facts suggest that the trial is not likely to be concluded in near future. There is nothing on record to suggest that delay in trial is attributable to the petitioner.

17. Keeping in view the facts of the case and also the above noted precedents, the bail petition is allowed and petitioner is ordered to be released on bail in case FIR No. 265/2020, dated 14.09.2020, registered under Sections 20 of ND&PS Act, at Police Station Kullu, District Kullu, H.P., on his furnishing personal bond in the sum of Rs. 1,00,000/- 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.

18. 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 AJAY MOHAN GOEL, J.

Sh. Baldev Deshta ....Petitioner.

Vs.

State of H.P. and another .....Respondents.

For the petitioner: Mr. V.S. Chauhan, Senior Advocate, with Mr. Rajul Chauhan, Advocate.

For the respondents: Mr. Anup Rattan, Advocate General, with M/s Dinesh Thakur, Sanjeev Sood, Additional Advocate Generals and Mr. Amit Kumar Dhumal, Deputy Advocate General, for respondent No. 1.

Mr. Vinay Kuthiala, Senior Advocate, with Mr. Diwan Singh Negi, Advocate, for respondent No. 2.

Criminal Revision No. 274 of 2022

Decided on: 21.12.2022

Code of Criminal Procedure, 1973- Section 397 **Indian Penal Code, 1860-** Sections 341, 353, 332, 504, 506 **HPMSP and MS Act, 2017**- Section 3- It is the allegation of the complainant that while he was serving as a Medical Officer in Civil Hospital at Rohru, his Car was stopped by the accused, who thereafter opened the passengers' door and initially hurled abuses at him and thereafter physically assaulted him- **Held-** Section 353 of Indian Penal Code, 1860 is not attracted- Driving the car cannot be said to be per se performing an act in the execution of his duty- Alleged assault was not to deter a public servant from discharging his duties- Trial court directed to proceed regarding remaining offences in accordance with law- Petition partly allowed. (Para 14)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

Cr. MP No. 1960 of 2022

Mr. DiwanNegi, learned counsel has put in appearance on behalf of proposed respondent No. 2 and on his instructions, Mr. Vinay Kuthiala, learned Senior Advocate has also appeared on behalf of the said respondent.

2. Heard. In view of the averments made in the application, the same is allowed and Dr. Kartikeya is ordered to be impleaded as respondent No. 2 in the petition. Registry is directed to carry out necessary corrections in the memo of parties. The application stands disposed of.

Criminal Revision No. 274 of 2022

3. By way of this petition, the petitioner has challenged order, dated 07.04.2022, passed by the Court of learned Additional Chief Judicial Magistrate, Court No. 1, Rohru, District Shimla in Case No. 9 of 2021, titled *as State Vs. BaldevDeshta,* in terms whereof, the application filed under Section 239 of the Code of Criminal Procedure Code by the petitioner for his discharge has been dismissed and the Court has proceeded to frame charges against the petitioner for commission of offences punishable under Sections 341, 353, 332, 504 and 506 of the Indian Penal Code.

4. Brief facts necessary for the adjudication of present petition are that an FIR was registered against the petitioner on the basis of a complaint filed by respondent No. 2, on the ground that respondent No. 2 was a doctor posted at Civil Hospital, Rohru and on 17.08.2020 at around 11:20 a.m., when the complainant was going to retrieve his belongings, as he was posted in COVID Care Centre for the next seven days and, thus, could not have left the premises, while driving his vehicle, he was stopped by the petitioner/accused, who alleged that the complainant was indulging in rash driving. Thereafter, the accused opened the passenger side door and abused and threatened the complainant. According to the complainant, as the accused was not closing the door of the Car and was continuing to abuse him,

he gotout of the Car to calm the accused, but the accused continuedthreatening him. Thereafter, he pushed the complainant and hit the complainant multiple times on his face, as a result, the complainant suffered injuries. It is on this count that the FIR was lodged. After lodging of the FIR, the investigation was carried by the Police and final report in terms of Section 173 of the Code of Criminal Procedure was filed before the learned Court below, in terms whereof, the accused was stated to have had committed offences punishable under Sections 341, 353, 332, 504 and 506 of the Indian Penal Code and Section 3 of the HPMSP and MS Act, 2017. After filing of this final report, the petitioner/accused preferred an application under Section 239 of the Code of Criminal Procedure praying for his discharge, *inter alia*, on the ground that the allegations levelled against him were completely false and he stood falsely implicated in the case just for questioning the complainant for rash and negligent driving. It was further the contention of the accused that he had neither obstructed the complainant from performing his official duties nor he had breached any provisions of the HPMSP and MS Act, 2017.

5. In terms of the impugned order, the application of the petitioner has been disposed of by the learned Trial Court by holding that though the accused was entitled to be discharged for commission of any crime under Section 3 of the HPMSP and MS Act, 2017, however, the Courtthereafter has proceeded to frame charges against the accused for commission of offences punishable under Sections 341, 353, 332, 504 and 506 of the Indian Penal Code.

6. Feeling aggrieved, the petitioner has filed the present criminal revision petition.

7. Learned Senior Counsel for the petitioner has argued that the order passed by the learned Trial Court, in terms whereof, the Court has observed that it has to proceed to frame the charges against the petitioner for commission of offences punishable under Sections 341, 353, 332, 504 and

506 of the Indian Penal Code is not sustainable in the eyes of law, as learned Court has erred in not appreciating that there was not even an iota of material which has come on record in the course of investigation that the alleged act of the complainant was with the intent of deterring the complainant from performing his official duties. Learned Senior Counsel has submitted that even if the case of the complainant is to be taken at its face value, then also atleast the provisions of Section 353 of the Indian Penal Code were not attracted at all and this extremely important aspect of the matter has also been ignored by the learned Court. Accordingly, a prayer has been made that the application be allowed and the impugned order be set aside and the prayer of the petitioner for discharge be granted.

8. Learned Advocate General has submitted before the Court that there is no infirmity in the order passed by the learned Trial Court, for the reason that as the contents of the complaint are self speaking that the incident took place while the complainant was on duty, that too, during COVID-19 pandemic, therefore, the present petition being devoid of any merit is liable to be dismissed.

9. Learned Senior Counsel appearing for respondent No. 2 has argued that it is not in dispute that at the relevant time, respondent No. 2 indeed was on official duty andas the incident took place while complainant was on duty and the accused obstructed the complainant from performing his official duties, therefore, the order passed by the learned Trial Court suffers from no infirmity and accordingly, the present petition being devoid of any merit be dismissed.

10. I have heard learned Senior Counsel for the petitioner as also learned Advocate General and learned Senior Counsel for respondent No. 2.

11. The facts which led to the registration of FIR have already been quoted by me hereinabove and the same are not being repeated for the sake of brevity. Suffice it to say that it is the allegation of the complainant that while

serving as a Medical Officer in Civil Hospital at Rohru, his Car was stopped by the accused, who thereafter opened the passengers' door and initially hurled abuses at him and thereafter physically assaulted him. Whether or not there is merit in the allegations which have been levelled against the petitioner, as mentioned hereinabove, is not being commented by the Court, as that of course is a matter of trial. As some incident did take place between the petitioner and complainant, therefore, the Court is refraining from making any observation with regard to the provisions of Sections 341, 332, 504 and 506 of the Indian Penal Code.

12. However, as far as the provisions of Section 353 of the Indian Penal Code are concerned, *ex facie,* this Court is of the considered view that this Section was not attracted even on the face of the contents of the FIR. Before proceeding further, it is necessary to refer to the provisions of Section 353 of the Indian Penal Code, which provides as under:-

> *"**353. Assault or criminal force to deter public servant from discharge of his duty**.- Whoever assaults or uses criminal force to any person being a public servant in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."*

13. Thus, a perusal of the bare statutory provisions of Section 353 of the Indian Penal Code demonstrates that this Section comes into play when someone assaults or uses criminal force against a person, who is a public servant in the execution of his duty as public servant or with intent to prevent or deter that person from discharging his duty as such public servant etc. In the present case, even as per the complainant, when the accused purportedly stopped the Car of the complainant, the accused questioned the complainant

for alleged rash driving. This means that at the relevant time, the accused was driving his vehicle.The complainant being a doctor, may be was going to the hospital.But,driving the Car cannot be said to be *per se*performing an act in the execution of his duty. In other words, it is not as if the complainant was performing or discharging his duty as a Medical Officer when some alleged act was committed by the accused, result whereof was that the complainant was obstructed from performing his duties. Similarly, it is not the case of the complainant that the accused committed the alleged act with the *mens rea* to prevent or deter the complainant from reaching the place where he was to perform his duty as a Medical Officer. That being the case, this Court is of the considered view that the provisions of Section 353 of the Indian Penal Code *ex facie* were not attracted, as the alleged assault or criminal force was not to deter the public servant from discharging his duties.

14. Accordingly, in view of the above findings, this petition is partly allowed and it is held that the petitioner is liable to be discharged for alleged commission of offence punishable under Section 353 of the Indian Penal Code. Ordered accordingly. As far as the remaining offences are concerned, learned Trial Court is directed to proceed with the matter in accordance with law and appropriate charges, if required, may be framed in terms of the report furnished before the said Court under Section 173 of the Code of Criminal Procedure. The petition is disposed of in above terms.

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

Tara Pati ....Petitioner

Versus

Smt. Mamta Malhotra

.... Respondent

For the petitioner :Mr. Sumeet Raj Sharma, Advocate.
For the Respondent :Mr. Devender K. Sharma, Advocate.

Cr.MMO No.674 of 2022
Decided on: 30.11.2022

Code of Criminal Procedure, 1973- Sections 482, 311 **Negotiable Instruments Act, 1881-** Section 138- Inherent powers- Dishonour of cheque- Insufficient funds- Application by the appellant/accused for re-examination of the complainant has been dismissed by Chief Judicial Magistrate- **Held-** Filing of application was an abuse of process of law- Appellant was given opportunity to lead the evidence- Provisions of Section 311 Cr.P.C. cannot be permitted to be abused by either party to fill the lacunae in their case- Order upheld- Petition dismissed. (Paras 8, 9, 10)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition, filed under Section 482 of the Criminal Procedure Code (hereinafter to be referred as 'Cr.P.C.'), the petitioner has challenged order dated 14.06.2022, passed by the Court of learned Chief Judicial Magistrate, Mandi, District Mandi, H.P., in terms whereof, an application filed under Section 311 of the Cr.P.C. by the applicant/accused for re-examination of the complainant has been dismissed.

2. Brief facts necessary for the adjudication of the present petition are as under:-

A complaint under Section 138 of the Negotiable Instruments Act has been filed by the respondent herein against the present petitioner, on the ground that a cheque issued by the petitioner to the respondent/complainant for an amount of Rs.1,10,000/-, dated 09.06.2011, in discharge of her legal liability, when presented for being honoured, was dishonoured on account of 'insufficient funds'. The complaint was filed as far back as in the month of July, 2011. During the pendency of these proceedings, the application was filed by the petitioner herein under Section 91 of the Cr.P.C. read with Section 311 of Cr.P.C. for recalling the complainant in the witness box for her cross-examination on the grounds mentioned therein. The application was dismissed by learned Trial Court and petition preferred against the said dismissal before this Court also met the same fate. While dismissing the petition preferred by the present petitioner earlier before this Court, i.e. Cr.MMO No.4 of 2018, this Court in terms of its order dated 10.05.2018, *inter alia*, observed that in the cross-examination of the complainant's witnesses as conducted by the petitioner, there was not even a slightest whisper that there was some writing executed on 13.03.2011 between the parties as was subsequently being sought to be produced from the complainant in terms of the application filed under Section 311 of the Cr.P.C. This Court further observed that even if it was assumed that the document was misplaced as alleged by the accused, then also nothing prevented the party from cross-examining the witnesses regarding the facts that had led to the execution of the document. On these basis, it was held that the petitioner was not entitled to the benefits of the provisions of Section 311 of the Criminal Procedure Code and the same was dismissed.

3. After dismissal of this application, another application was filed by the petitioner again under the provisions of Section 311 of the Cr.P.C., seeking re-examination of the complainant now *inter alia* on the ground that the petitioner wanted to re-examine the complainant as new facts had come into existence to the effect that document dated 13.03.2011 stood executed

between the complainant and the accused regarding completion of work and the cheque No.061559, drawn upon State Bank of India, which document was signed by the parties and copy thereof was already filed alongwith the earlier application preferred by the petitioner under Section 311 of the Cr.P.C.

4. In terms of impugned order dated 14.06.2022, this application has also been dismissed by learned Court below by holding that as an earlier application with similar prayer was dismissed by learned Trial Court and the order was upheld by the High Court, hence, the subsequent application having been filed at the stage of defence evidence was nothing but a mode to delay further proceedings in the case. Learned Trial Court also observed that prayer of the petitioner to produce alleged document before this Court was earlier declined which order was upheld by the High Court and the filing of the application was nothing but a mode to delay the proceedings. By returning these findings, the application stood dismissed with costs.

5. Learned counsel for the petitioner has argued that whereas earlier, the prayer of the petitioner was for re-examination of the complainant alongwith issuance of a direction to the complainant to produce original receipt, now the petitioner wanted to further cross-examine the complainant with regard to receipt of said document which was in possession of the petitioner. He further argued that this extremely important aspect of the matter has been overlooked by learned Court below, which renders the impugned order to be bad in law. Accordingly, a prayer has been made that the present petition be allowed by setting aside the order and by ordering re-examination of the complainant.

6. The petition has been resisted by learned counsel for the respondent, *inter alia*, on the ground that filing of the subsequent application after the rejection of an earlier one preferred under Section 311 of the Cr.P.C. was nothing but an abuse of the process of law and there was no perversity with the findings returned by learned Court below in terms of order dated

14.06.2022, as it was a matter of record that a similar application filed by the petitioner earlier was dismissed by learned Trial Court and the order of dismissal was upheld by the High Court. He further submitted that intent of the petitioner is to delay the adjudication of the complaint which was filed as far back as in the year 2011, therefore, the present petition deserves to be dismissed with costs.

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

8. To say the least, the conduct of the petitioner indeed is deplorable, as not even *prima facie*, but *ex facie*, it is evident that filing of the application which has resulted in the passing of the impugned order was nothing but an abuse of the process of law. It is borne out from the record that the earlier application under Section 311 of the Cr.P.C. read with Section 91 thereof was filed by the petitioner after repeated opportunities to lead defence evidence. In these circumstances, learned Trial Court not only dismissed the application so preferred but also closed the evidence of the petitioner. This Court while upholding the order passed by learned Trial Court, in terms whereof, the application under Section 311 of the Cr.P.C. read with Section 91 of Cr.P.C. was dismissed, gave opportunity to the petitioner to lead evidence. However, rather than leading complete evidence, the complainant again filed an application under Section 311 of the Cr.P.C., seeking further cross-examination of the complainant by putting old wine into new bottle and by twisting the facts, whereas fact of the matter remains that reasoning for seeking further cross-examination of the complainant *per se* was same and similar. The Court is making this observation for the reason that when the petitioner as is stated in the application was in possession of the photocopy of the document concerned, then it is not understood as to why the complainant was not confronted with the same at the trial when the complainant presented

herself for cross-examination. The contention of learned counsel that at that time this photocopy was not in the possession of the petitioner, does not holds any water because it has not come-forth from the petitioner as to how she actually came into possession of the photocopy thereof. Besides this, this Court is of the considered view that the provisions of Section 311 of the Cr.P.C. which confer upon the Court the power to summon material witness etc. cannot be permitted to be abused by either party to prolong the litigation or to fill the lacunae in their case. This provision can be resorted to only if the conditions prescribed in Section 311 of the Cr.P.C. are fulfilled and not otherwise.

9. In the present case, it cannot be said that the application filed under Section 311 of the Cr.P.C. was fulfilling the ingredients of said statutory provision and the intent of the applicant of filing the application after being unsuccessful in a similar application preferred earlier, was nothing but an abuse of the process of law.

10. Accordingly, as this Court does not finds any perversity in the order impugned and further as this Court does not finds any merit in the present petition, the same is dismissed. Pending miscellaneous applications, if any, stand disposed of.

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

Between:

RAHUL HUDDON (BUNTY), S/O SH. J.P. HUDDON, C/o VERTA BAR & RESTURANT, RAMPUR BUSHAIR, DISTT. SHIMLA.
ALSO PROP. M/S SANA ORCHARD, VILLAGE SANAIE, P.O. DHANSA, TEHSIL RAMPUR, BUSHAIR, DISTT. SHIMLA. H.P.

....PETITIONER/ACCUSED.

(BY MR. B.N. SHARMA AND MS. MAMTA K. BHATWAN, ADVOCATES)

AND

M/S ADS DHALLI, SHIMLA HAVING ITS OFFICE AT NAND BHAWAN, NEW FLOWER DALE CHHOTTA SHIMLA-2 THROUGH ITS PARTNER SH. ANIL KAPARATE, S/O SH. NAND LAL.

....COMPLAINANT/RESPONDENT.

(NONE FOR THE RESPONDENT)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No.89 of 2022
Decided on: 11.10.2022

Code of Criminal Procedure, 1973- Section 482- Inherent powers- Quashing of orders passed by Additional Chief Judicial Magistrate- **Negotiable Instruments Act, 1881-** Sections 138, 143 A- Petitioner was directed to deposit 20% of cheque amount as interim compensation within 60 days of the date of the order- **Held-** Interim compensation cannot be said to be a bad direction- Alleged inability of the petitioner to comply with the direction passed by the learned Trial Court cannot *per se* render the order to be bad in law- order upheld- Petition Dismissed. (Paras 5, 6)

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

J U D G M E N T

By way of this petition, filed under Section 482 of the Code of Criminal Code, the petitioner seeks quashing of order dated 19.02.2021, passed by the Court of learned Additional Chief Judicial Magistrate, Court No.2, Shimla, District Shimla, H.P., in Complaint No.1961-3 of 14/12, titled M/s ADS Dhalli, Shimla Versus Sh. Rahul Huddon (Bunty), filed by the respondent herein against the present petitioner under Section 138 of the Negotiable Instruments Act, 1881, in terms whereof, the accused i.e. the petitioner herein has been directed by the learned Court below to deposit 20% of the cheque amount as interim compensation within sixty days as from the date of passing of the order.

2. Learned counsel for the petitioner has primarily argued that the impugned order is not sustainable in the eyes of law, for the reason that as the cheque amount is huge and as the petitioner is not in a position to comply with the direction so issued by the learned Court below, therefore, the same needs to be quashed and set aside. No other point was urged.

3. Having carefully gone through the order passed by the learned Court below, which stands impugned by way of this petition and after taking into consideration the submissions which have been made by learned counsel for the petitioner, this Court is of the considered view that the present petition deserves dismissal.

4. Section 143A of the Negotiable Instruments Act provides for payment of interim compensation. Sub-section (2) thereof provides that interim compensation under sub-section (1) shall not exceed 20% of the amount of cheque. It is not the contention of the petitioner that the order of interim compensation has been passed by the learned Trial Court in violation

of the provisions of sub-section (1) of Section 143A. That being the case, the direction which has been passed by the learned Trial Court, in terms whereof, the petitioner herein has been directed to deposit 20% of the cheque amount as interim compensation, cannot be said to be a bad direction, because this direction has been passed by the learned Court below in exercise of powers conferred upon it by the provisions of the statute itself.

5. Coming to the contention of learned counsel for the petitioner that the impugned order is liable to be set aside as the petitioner is not in a position to deposit the said amount, all that this Court can observe is that alleged inability of the petitioner to comply with the direction passed by the learned Trial Court cannot *per se* render the order to be bad in law so as to entitle the petitioner to invoke the extra ordinary jurisdiction of this Court, so conferred upon it under Section 482 of the Code of Criminal Procedure.

6. Accordingly, in view of the above discussion, as this Court does not finds any merit in the present petition, the same is dismissed, so also the pending miscellaneous applications, if any.

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

Naresh Chauhan & others. …Petitioners.

Versus

State of H.P. …Respondent.

For the Petitioners. Mr.Ashwani Dhiman, Advocate.

For the Respondent: Mr.Hemant Vaid, Additional Advocate General.

Cr.MMO No. 835 of 2022
Decided on: 20.12.2022

Code of Criminal Procedure, 1973- Section 482- Inherent powers- Quashing of FIR- **Indian Penal Code, 1860-** Sections 341 and 143- Petitioners alongwith others took out benches from shops and placed them in the middle of road in front of Hatehwari Jewellers and stopped movement of pedestrians a well as vehicles- They have not sought any permission for expressing their resentment either from local administration nor have they informed regarding this- **Held-** Ingredients of wrongful restraint are missing so as to establish that there was wrongful restraint to any person- Section 339 IPC is not attracted- no sufficient material on record to proceed further in the trial for alleged commission of offence- Quashed- Petition allowed. (Paras 14, 15, 16)

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Petitioners have approached this Court for quashing of FIR No. 4 of 2019, dated 4.1.2019, registered in Police Station, Dhalli, District Shimla, H.P. under Sections 341 and 143 of the Indian Penal Code (for short "IPC").

2. Response/status report stands filed. Record was also made available by respondent-State.

3. As per status report, FIR has been registered on 4.1.2019 on the basis of rukka sent by H.C. Lalit Kumar Incharge Police Chowki, Sanjauli, through Honorary Lady Head Constable Lata, to SHO, Police Station, Dhalli for registration of FIR, stating therein that on that day, since 4:00 A.M. due to leakage/overflow of water from Municipal Corporation water tank located in front of shop of Hateshwari Jewellers, water and mud had clogged in the shop of Hateshwari Jewellers, adjacent shops and in the rooms of tenants located on lower side, and in this regard affected house and shop owners were informing concerned officers of Municipal Corporation repeatedly, but no preventive or remedial measures were taken by concerned Officers, whereupon petitioners alongwith others took out benches from shops and put them on the middle of road in front of Hatehwari Jewellers and stopped movement of pedestrians a well as vehicles, and petitioners were leading the crowd gathered on the spot and were provoking them to restrain the public path/road. They have not sought any permission for expressing their resentment either from local administration nor have they informed regarding this. Expressing opinion that act of petitioners was attracting commission of offence under Sections 341 and 143 of IPC, request was made in Rukka to register FIR against petitioners.

4. After receiving rukka, FIR was registered and investigation was carried out. Investigating Officer concluded that petitioners have committed an offence under Sections 341 and 143 of IPC and, therefore, challan was prepared against them and presented in the court on 10.5.2019, which is pending adjudication in the Court of Judicial Magistrate First Class, Court No. 4, Shimla.

5. Sections 143 and 341 of IPC read as under:-

> *"143. Punishment.—Whoever is a member of an unlawful assembly, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.*

> *341. Punishment for wrongful restraint.—Whoever wrongfully restrains any person shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both."*

6. Section 341 IPC provides punishment for wrongful restraint and "wrongful restraint" has been defined under Section 339 of IPC, which read as under:-

> *"339. Wrongful restraint.—Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person."*

7. Section 143 IPC provides punishment for member of an unlawful assembly. 'Unlawful assembly' has been defined under Section 141 IPC, which reads as under:-

> *"141. Unlawful assembly.—An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is—*
> *First — To overawe by criminal force, or show of criminal force, the Central or any State Government or Parliament or the Legislature of any State, or any public servant in the exercise of the lawful power of such public servant; or*
> *Second — To resist the execution of any law, or of any legal process; or*
> *Third — To commit any mischief or criminal trespass, or other offence; or*
> *Fourth — By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or*
> *Fifth — By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.*
> *Explanation.—An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly."*

8. For punishment under Section 143 IPC, a person must be member of unlawful assembly and to constitute "unlawful assembly" ingredients either of five circumstances, as defined under Section 141 IPC, must be present. Perusal of Section 141 IPC makes it clear that assembly of five or more persons shall be unlawful assembly for commission of some unlawful act as defined in this Section.

9. It has been alleged that petitioners have committed an offence causing wrongful restraint. For commission of offence of wrongful restraint, as provided under Section 339 IPC there must be voluntary obstruction to any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed. Therefore, for commission of offence of wrongful restraint, there must be a person who is obstructed from proceeding any direction. Existence/presence of person having right to proceed in particular direction, in which obstruction has been caused, is an essential ingredient for wrongful restraint. Where there is no person who has been prevented from proceeding in any direction, having right to proceed in such direction, there cannot be any obstruction to any person and when there is no obstruction to any person, there cannot be any wrongful restraint to any person.

10. Petitioners have placed on record statements of witnesses which have been relied upon by the prosecution in the challan to substantiate the accusation against the petitioners. Witness Head Constable Prakash Chand has stated that he was informed by vehicle owners coming from Cemetery side about obstruction of path by some persons by putting benches on the road with further statement that vehicles from both sides were being prevented from crossing, whereupon he transmitted the said information through his mobile to Police Chowki Sanjauli, whereafter he alongwith Constable Manjeet Singh rushed to the spot for clearing the traffic. According to him, the road remained obstructed for about one hour. But he has not named or pointed

out any person, who was prevented by voluntary obstruction by the petitioners from proceeding in any direction either on foot or in his vehicle. Witnesses Constable Manjeet Singh, Constable Neeraj Kumar, Constable Sunil Kumar, Ashwani Sood, Satya Kaundal, HC Om Prakash and LHHC Lata, in their respective statements recorded under Section 161 Cr.P.C., have failed to point out any person who was prevented by the petitioners, so as to attract provisions of Section 339 of IPC. Though it has been stated by some of witnesses that path was obstructed, but who was prevented is not evident from the material on record. It is not the case of the prosecution that either of witness was obstructed by petitioners.

11. Witness Satya Kaundal and Ashwani Sood, in their statements, have stated that petitioners and others were provoked to put benches on the road as for inaction on the part of Municipal Corporation officials/officers by ignoring repeated complaints, their shops and houses were flooded with mud and water causing loss, inconvenience and annoyance to them. It has further come on record in statements of witnesses that after arrival of concerned officers/officials on spot, benches were removed from the road by the petitioners.

12. It has been stated by Head Constable Lalit Kumar that petitioners alongwith others put benches on the road and obstructed the path of persons crossing thereby, but there is not even a single person claiming his right to proceed, alleging obstruction by petitioners to prevent him from proceeding in any direction. There is vague reference that pedestrians and vehicles were obstructed from moving/crossing the road, but not even a single pedestrian or vehicle owner/driver has been cited as a victim and witness whose movement was obstructed and prevented by the petitioners, who had a right to proceed through the road obstructed by the petitioners.

13. In light of such evidence on record, I afraid to accept plea of respondent-State that obstruction, if any, caused by petitioners was voluntary without any cause and was attracting provision of Section 339 IPC.

14. In present case, ingredients of wrongful restraint are missing so as to establish that there was wrongful restraint to any person. Therefore, Section 339 IPC is not attracted and, hence, there cannot be any punishment for Section 341 IPC which provides punishment for wrongful restraint as, there is no wrongful restraint as defined in Section 339 IPC. In absence of sufficient material to prima facie establish or even to suspect commission of offence under Section 339 IPC, the assembly of petitioners and others cannot be termed as an unlawful assembly for want of commission of any offence by the assembly, as defined under Section 141 IPC.

15. In view of above discussion, it is evident that there is lack of presence of ingredient to attract "wrongful restraint", as defined under Section 339 IPC and thus to attract definition of "unlawful assembly" as defined under Section 141 IPC, in the complaint, evidence gathered and challan presented in the Court. Therefore, I am of the considered opinion that there is no sufficient material on record to proceed further in the trial for alleged commission of offence punishable under Sections 341 and 143 of IPC. Therefore, I find merit in the petition. Accordingly, FIR No. 4 of 2019, dated 4.1.2019 registered in Police Station, Dhalli, District Shimla, H.P. and consequential proceedings arising thereto are quashed and set aside.

16. The petition is allowed and disposed of, in aforesaid terms.

17. Parties are 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, passing of order may be verified from Website of the High Court.

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

Duni Chand ....Petitioner/accused.

Versus

Sh. Amar Chand .... Respondent/complainant.

For the petitioner : Mr. H.S. Rangra, Advocate.

For the Respondent : Mr. Rajul Chauhan, Advocate.

Cr.MMO No.353 of 2022
Decided on: 13.12.2022

Code of Criminal Procedure, 1973- Sections 482, 311- Inherent power- **Negotiable Instruments Act, 1881-** Section 138- Dishonour of cheque- Trial pending- Application under section 311 Cr.P.C rejected on the ground that sufficient opportunities provided to the accused to lead evidence- Not assigned any cogent reason for not filing the application at an earlier stage- **Held-** Accused failed to lead his complete evidence despite more than sufficient opportunities having been granted to him- Abuse of process of law to delay the proceedings- No infirmity with the order impugned- Petition dismissed. (Paras 7, 8, 9)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition, the petitioner has challenged order dated 04.03.2022, passed by the Court of learned Judicial Magistrate, 1st Class, Manali, Distt. Kullu, H.P., in terms whereof an application filed under Section 311 of the Criminal Procedure Code, with a prayer to allow the applicant to place on record the documents appended therein, has been dismissed.

2. I have heard learned counsel for the parties and have gone through the impugned order.

3. The respondent herein has filed a complaint against the petitioner under Section 138 of the Negotiable Instruments Act. This complaint was filed in the year 2016 and is still pending adjudication. After the statement of the accused was recorded under Section 313 of the Criminal Procedure Code and after seven opportunities were granted to him to lead his evidence, he failed to lead complete evidence and thereafter when the matter was being listed for final hearing, an application stood filed by the accused under Section 311 of the Criminal Procedure Code, copy whereof is appended with the petition as Annexure P-4. The prayer made in the application was to the effect that the applicant intended to place on record the record of Civil Suit No.96 of 2016, titled Duni Chand Versus Budhi Prakash and others, as the production of the said record alongwith documents was essential for the decision of the complaint filed under Section 138 of the Negotiable Instruments Act.

4. This application has been rejected by learned Court below, on the ground that perusal of the record demonstrated that sufficient opportunities were provided to accused to lead evidence and despite seven opportunities having been provided, he failed to lead his entire evidence and now when the matter was at the stage of arguments, the application stood filed and further the accused had not assigned any cogent reason for not filing the application to place on record the documents at the earlier stage. Learned Court below also observed that the accused could not convince the Court as to how the documents were necessary for the just decision of the case and on these basis, the application was dismissed.

5. Section 311 of the Criminal Procedure Code provides that any Court may at any stage of any inquiry, trial or other proceedings under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined and the Court shall summon and examine or recall

and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

6. First of all, this Court fails to understand that in the teeth of statutory language of Section 311 of the Criminal Procedure Code, how the application to place on record the documents pertaining to the Civil Suit referred therein was maintainable. To be more precise, Section 311 of the Criminal Procedure Code, confers upon the Court the power to summon material witness or examine person present and the same does not envisages the power to allow a party to place on record the documents as was the prayer made in the application. Otherwise also, it being a matter of record that after recording of statement of the accused under Section 313 of the Criminal Procedure Code, seven opportunities were granted to him to lead his evidence and as he had failed to lead his complete evidence despite more than sufficient opportunities having been granted to him, apparently the filing of the application was nothing but an abuse of the process of law to delay the proceedings.

7. A careful perusal of the application otherwise also demonstrates that there is not even a whisper therein, as to what prevented the accused to move an appropriate application to bring on record the documents which were intended to be placed on record by way of application subsequently filed at the relevant time or during the course when opportunity was granted to him to lead evidence.

8. In this view of the matter, as this Court does not finds any merit in the present petition and further as the Court does not finds any infirmity with the order impugned, the same is dismissed.

9. Pending miscellaneous applications, if any, stands disposed of. Interim order, if any, stands vacated.

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

Virender Singh Jaswal ....Petitioner.

Versus

Sunita Devi .... Respondent.

For the petitioner : Mr. Sanjeev Kumar Suri, Advocate.
For the Respondent : M/s Mukul Sood and Het Ram Thakur, Advocates.

Cr.MMO No.552 of 2022
Decided on: 07.12.2022

Code of Criminal Procedure, 1973- Section 482- Inherent power- **Negotiable Instruments Act, 1881-** Section 145 (2)- Petitioner/accused seeking leave to cross-examine the complainant dismissed by the trial court- **Held-** Trial court has defeated statutory right of the accused- Impugned order is perverse- Quashed and set aside- Petition allowed. (Para 6)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition, filed under Section 482 of the Criminal Procedure Code, the petitioner has challenged order dated 03.04.2019, passed by learned Trial Court, in terms whereof, an application filed under Section 145 (2) of the Negotiable Instruments Act by the petitioner herein, who is the accused before learned Trial Court, seeking leave of the Court to cross-examine the complainant, has been dismissed.

2. I have heard learned counsel for the parties and have carefully gone through the order impugned.

3. The impugned order on the face of it is a perverse order. Learned Court below has dismissed the application which was filed under Section 145

(2) of the Negotiable Instruments Act by the present petitioner, by returning findings contrary to the statute. Section 145 of the Negotiable Instruments Act reads as under:-

> ***"145. Evidence on affidavit.-***
> *(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the evidence of the complainant may be given by him on affidavit and may, subject to all just exceptions be read in evidence in any enquiry, trial or other proceeding under the said Code.*
> *(2) The Court may, if it thinks fit, and shall, on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as to the facts contained therein."*

4. Sub-section (2) thereof contemplates that the Court may, if it thinks fit, and **'shall',** on the application of the prosecution or the accused, summon and examine any person giving evidence on affidavit as on the facts contained therein. The language of Section 145 (2) of the Negotiable Instruments Act is explicit that whereas, on one hand, the Court may if it thinks fit, summon and examine any person giving evidence on affidavit as to the facts contained therein, but it "**shall**" summon and examine any person giving evidence on affidavit as to the facts contained therein, if an application to this effect is filed by the prosecution or the accused.

5. In the present case, in the light of such application having been preferred by the accused, this Court fails to understand as to where the discretion was vested upon learned Trial Court to have had refused the request of the accused to examine the complainant. While dismissing the application, learned Trial Court has in fact defeated the statutory right of the accused. Ordinarily also, the examination-in-chief, be it oral or by way of affidavit, has no significance unless the opposite party gets an opportunity to cross-examine the witness. Whether or not, the party avails that opportunity is a separate issue, however, the opposite party cannot be denied such opportunity and in the present case as the petitioner had done everything

which he was legally supposed to do to cross-examine the complainant, dismissal of his application by learned Trial Court otherwise is a bad order.

6. Accordingly, as the impugned order is perverse and does violence to the statutory language of Section 145 of the Negotiable Instruments Act, this petition is allowed and the impugned order is quashed and set aside. Learned Trial Court is called upon to give an opportunity to the present petitioner to cross-examine the complainant. However, taking into consideration the fact that the impugned order was passed as far back as on 03.04.2019 and the present petition was preferred by the petitioner after a lapse of more than three years, the petitioner is burdened with costs of Rs.20,000/-, which shall be paid by the petitioner to the respondent herein, i.e. the complainant. It is made clear that the payment of costs shall be a condition precedent for giving effect to the order which has been passed by the Court today and in case the petitioner fails to pay the said costs to the respondent, then no opportunity will be given to the petitioner. The costs shall be paid by the petitioner to the respondent/complainant by way of a Bank Draft. The parties through counsel to appear before learned Court below on 02.01.2023, on the said date, next date will be given by learned Court below for cross-examination of the complainant as also for payment of the costs.

7. Petition stands disposed of, so also the pending miscellaneous applications, if any. Interim order, if any, stands vacated.

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

Cr.MP(M) No. 2523 of 2022
Usha Chauhan ...Petitioner

Versus

State of H.P. ....Respondent

Cr.MP(M) No. 2524 of 2022
Sachin Chauhan ...Petitioner

Versus

State of H.P. ....Respondent

For the Petitioner(s): Mr. Y.P. Sood, Advocate.
For the Respondent(s): Mr. Raju Ram Rahi, Deputy Advocate General.

Cr.MP(M) Nos. 2523 & 2524 of 2022
Decided on: 22.12.2022

Code of Criminal Procedure, 1973- Section 438- Pre-arrest bail- **Indian Penal Code, 1860-** Section 498-A, 506(ii) read with 34, 406- FIR lodged by the complainant as a counterblast in continuation of litigation pending- **Held-** No fruitful purpose shall be served by rejecting the bail application- Bail petition allowed. (Paras 7 to 12)

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

Since both petitions arise out of the same FIR, the same are consolidated and disposed of together in order to avoid repetition and for the sake of convenience.

2. Petitioners have approached this Court seeking anticipatory bail in case FIR No. 25 of 2022, dated 19.11.2022, registered in Women Police Station BCS Shimla, District Shimla, under Sections 498-A, 506(ii) read with Section 34 of Indian Penal Code (in short 'IPC').

3 Status reports stand filed. Record was also made available.

4. Complainant in present petition is Sania Chauahn who is wife of petitioner Sachin Chauhan and daughter-in-law of petitioner Usha Chauhan. Learned counsel for petitioners has placed on record the report of Head Constable Police Station Sadar Shimla with respect to in complaint filed by Sania Chauhan in Police Station Sadar Shimla and Daily Diary GD Entry No.29 dated 27.9.2022 regarding the complaints filed by petitioner Usha Chauhan against Sania Chauhan in Police Station Chopal.

5. Learned counsel for petitioners submits that relations of husband and wife, i.e. complainant and petitioner Sachin Chauhan are not cordial since long and multiple complaints have been filed by complainant with police including complaint filed under Domestic Violence Act and she is residing in a flat located in Verma Apartments, Jakhu Shimla which has been purchased by petitioner Sachin and complainant has obtained ex-parte injunction order from dispossessing her from the flat whereas petitioner has also lodged a complaint against complainant in Police Station Sadar regarding forcible entry of Sania Chauhan in the said apartment and it has been further stated that in these circumstances, present FIR has been lodged by Sania Chauhan in Women Police Station BCS Shimla, as a counter blast which is in continuation of litigation pending between parties for bitter relations between complainant and her in-laws including her husband Sachin.

6. As per status report, complainant made a complaint to Women Police Station on 6.10.2022 whereafter both sides were summoned to Police Station and endeavour was made for amicable settlement and at that time victim had sought time to think over the matter but on 19.11.2022 she came

to Police Station and asserted for registering FIR against her husband and in-laws whereupon FIR in present case has been registered. It has been further stated that petitioners have joined the investigation and victim is claiming that her Istridhan including ornaments and other articles, was with her in-laws whereas petitioners are denying the same and therefore, Section 406 IPC has been added in FIR. It has been contended on behalf of petitioners that complainant Sania Chauhan has captured flat belonging to them.

7 Taking into consideration entire facts and circumstances but without commenting upon merits of rival contentions of parties, and considering the facts and circumstances narrated in prosecution story as well as other material placed before me and also taking note of the factors and parameters, required to be considered at the time of adjudication of bail application, as propounded in various pronouncements of the Courts including the Supreme Court, I do not find that any fruitful purpose shall be served by rejecting the bail applications filed by petitioners. Accordingly, the petitioners are ordered to be released on bail, subject to furnishing personal bond in the sum of Rs.30,000/- each with one surety each in the like amount to the satisfaction of the trial Court/Chief Judicial Magistrate within two weeks from today, subject to the following conditions:-

(i) That the petitioners shall make themselves available during investigation as well as the trial on each and every date 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 him from disclosing such facts to Court or to any police officer or tamper with the evidence. They shall not, in any manner, try to overawe or influence or intimidate the prosecution witnesses;

(iii) That petitioners shall not obstruct the smooth progress of the investigation as well as trial;

(iv) That petitioners shall not jump over the bail and shall inform, in writing, regarding change of address, land line

number and/or mobile number, if any, in advance, to concerned Police Station.

(v) That the petitioners shall not commit the offence similar to the offence to which they are accused or suspected or the commission of which they are suspected.

(vi) That petitioners shall not misuse their liberty in any manner.

(vii) That the petitioners shall not leave India without prior permission of Court;

(viii) In the event of repetition of commission of offence, bail granted in present case shall be liable to be cancelled on taking appropriate steps by prosecution/Police.

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

9. In case the petitioners violate any condition imposed upon them, their bail shall be liable to be cancelled. In such eventuality, prosecution may approach the competent Court of law for cancellation of bail in accordance with law.

10. Learned trial Court is directed to comply with the directions issued by the High Court, vide communication No. HHC/VIG/Misc.Instructions/93-IV.7139 dated 18.3.2013.

11 Any observation made in this order shall not affect the merits of case in any manner and will strictly confine for the disposal of this bail application filed under Section 438 of Code of Criminal Procedure 1973.

12. 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, they may verify the order from the High Court website or otherwise.

Petitions stand disposed of.

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

Gagandeep Singh ....Petitioner.

Versus

State of Himachal Pradesh .... Respondent.

For the petitioner : Ms. Reeta Hingmang, Advocate.

For the Respondent :M/s Sumesh Raj, Dinesh Thakur, Arvind Sharma, Additional Advocates General.

Cr.MP(M) No.2455 of 2022
Decided on: 05.12.2022

Code of Criminal Procedure, 1973- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances Act, 1985-** Sections 20, 29, 61 and 85, 37- Contraband in possession of four-five occupants of vehicle- Recovery of 1.236 kg Charas- Commercial quantity- Petitioner/Accused contented that petitioner accompanied the driver of vehicle upon driver's insistence and has been wrongly implicated- Trial pending- **Held-** Provisions of Section 37 NDPS come into play- Petitioner along with other accused prima facie demonstrates that there was a common intent on the part of all the accused in commission of the crime- No reasonable grounds that petitioner is not guilty- Bail petition dismissed. (Paras 10, 11, 12)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition, a prayer has been made for release of the petitioner on bail, in F.I.R. No.76 of 2022. dated 11.03.2022, registered against him at Police Station Nalagarh, District Solan, H.P., under Sections 20, 29, 61 and 85 of the Narcotic Drug & Psychotropic Substances Act (hereinafter to be referred as 'NDPS Act', 1985.

2. The case of the prosecution is that on 11.03.2022, a police party headed by Inspector Mohinder Singh, received information that a taxi bearing registration No.CH-02 AA-3733 was on its way from Kullu. There were about four/five occupants in the vehicle and the occupants of the car were near Baglaher Bridge where they were in the course of finding persons to whom the contraband which was in their possession could be sold. As per the prosecution, the police party was informed that in case the vehicle alongwith persons could be apprehended then large quantity of contraband could be recovered. This information was received by the police party at around 1.30 a.m. It is further the case of the prosecution that after completing codal formalities, a raiding party was constituted and when the said party reached Baglaher Bridge at Ravindra-Nalagarh-Swarghat Road, it found the vehicle parked. The raiding party apprehended the vehicle and after giving their introduction they asked the driver to show his particulars who disclosed the same. Other occupants also disclosed their identification which included the present petitioner. In the course of search, Charas weighing 1.236 kg was recovered from a bag which was kept inside the car above the hand break. Upon recovery of the said contraband, after completion of necessary formalities the accused were arrested including the present petitioner.

3. Learned counsel for the petitioner submitted that the petitioner is innocent and has been wrongly implicated by the prosecution in the matter. Learned counsel submitted that the petitioner happened to be known to the driver of the vehicle and on his insistence, a few days before the alleged contraband was recovered, the petitioner had accompanied the driver of the vehicle alongwith couple of passengers to Manikaran in District Kullu, H.P. and thereafter, they had proceeded to Kullu and were on their way back from Kullu to Ambala, when the car was apprehended. She further argued that all the other occupants of the vehicle were strangers, as far as petitioner is concerned. He has no connection with them. He was not aware about the

contents of the bag from which the alleged contraband was recovered. In these circumstances, she submitted that as the petitioner is innocent and further as the contraband otherwise has not been recovered from conscious possession of the petitioner, this petition be allowed and the petitioner be ordered to be released on bail.

4. The petition is opposed by learned Additional Advocate General, *inter alia*, on the ground that in terms of the investigation, all the accused with common intent had gone to District Kullu, H.P. to purchase the contraband. They had reached Manikaran on the evening of 09.03.2022. They had all stayed together and after procuring the contraband while on their way back, they were all apprehended by the police in possession of 1.236 kg of charas, which is a commercial quantity. Learned Additional Advocate General further argued that as the contraband recovered from the accused is of commercial quantity, therefore, provisions of Section 37 of the NDPS Act are attracted and in these circumstances, the present petition is liable to be dismissed because the fact of the matter is that the petitioner was one of the occupants of the vehicle from which the contraband was recovered and it is not as if he had boarded the vehicle a few kilometers from the spot where the same was apprehended. As the investigation had revealed, all the occupants of the car had gone to District Kullu together and they were on their way back from Kullu and were together when they were apprehended by the police party. Accordingly, a prayer has been made that the present petition be dismissed.

5. I have heard learned counsel for the parties and have gone through the petition as well as the status report.

6. Whether or not, the petitioner is guilty of the offence, of course is a matter of trial. As per the prosecution, the contraband which has been recovered from the car in which the petitioner was travelling alongwith other co-accused is 1.263 kg, Meaning thereby that this is a commercial quantity

and in this view of the fact, but natural, the provisions of Section 37 of the NDPS Act come into play.

7. In view of what has been argued by learned counsel for the parties, as also learned Additional Advocate General, at this stage, this Court cannot record its satisfaction that there are reasonable grounds for believing that the petitioner is not guilty of the offence which is alleged to have been committed by him.

8. Hon'ble Supreme Court in *Narcotic Control Bureau* Vs. *Mohit Aggarwal, Criminal Appeal Nos. 1001-1002 of 2022 (Arising out of Petitions for Special Leave to Appeal (Crl.) No. 6128 of 2021)*, while discussing the provisions of Section 37 of the NDPS Act, has been pleased to hold that at the stage of examining an application for bail, in the context of provisions of Section 37 of the NDPS Act, the Court is not required to record a finding that the accused person is not guilty and the Court is also not expected to weigh the evidence for arriving at a finding as to whether the accused has committed an offence under the provisions of NDPS Act or not. The entire exercise as the Court is expected to undertake at said stage is for the limited purpose for releasing him on bail and the focus is on the availability of reasonable ground for believing that the accused is not guilty of the offences, he has been charged with.

9. In *Union of India (NCB) ETC* Versus *Khalil Uddin Etc. 2022 LiveLaw (SC) 878*, Hon'ble Supreme Court has been pleased to hold that in its considered view in the face of mandate of Section 37 of the NDPS Act, the High Court could not and ought not to have released the accused therein on bail in view of the fact that large quantity of contraband was found in the car in which the petitioner was travelling.

10. In the present case, the petitioner was arrested alongwith other accused while travelling in a car, from which commercial quantity of contraband was recovered. The contention of the petitioner that he is

innocent, at this stage, is not substantiated from anything on record and to the contrary, the status report demonstrates that he was along with other accused, which *prima facie* demonstrates that there was a common intent on the part of all the accused in the commission of the crime.

11. Therefore, as already mentioned hereinabove, this Court is not in a position to record its satisfaction that there are reasonable grounds to believe that the petitioner is not guilty of the offences alleged to have been committed by him.

12. Accordingly, as this Court is not satisfied that there is any ground for ordering release of the present petitioner, this petition is dismissed. It is made clear that these observations are only for the purpose of adjudication of the present petition and the same shall not influence the course of the trial.

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

Onkar Sharma ....Petitioner.

Versus

The State of Himachal Pradesh & others .... Respondents.

For the petitioner : Mr. B.L. Soni, Advocate.

For the Respondents : M/s Dinesh Thakur, Sanjeev Sood, Additional Advocates General, with Mr. Amit Kumar Dhumal, Deputy Advocate General, for respondent No.1-State.
Mr. Surender Sharma, Advocate, for respondent No.2.
Mr. Onkar Jairath, Advocate, for respondent No.3.
Mr. Lokender Pal Thakur, Senior Panel Counsel, for respondent No.4.

Cr. Revision No.180 of 2021
Decided on: 20.12.2022

Code of Criminal Procedure, 1973- Sections 397, 401, 125 **Family Courts Act, 1984-** Section 19(4)- Court awarded an amount of Rs. 2000/- per month as interim maintenance in favour of father- **Held-** With regard to payment of interim maintenance affidavits of disclosure of assets and liabilities shall be filed by both parties- Learned Court below has not adhered to the said directions issued by the Hon'ble Supreme Court of India- The directions being mandatory, the Courts are bound to both adhere to them as well as implement them- Not disputed during arguments- This Court is not interfering with the order passed by Ld. Court below- Petition dismissed. (Paras 7, 8, 9)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this petition, the petitioner has assailed the order passed by learned Principal Judge, Family Court, Bilaspur, H.P., dated 25.03.2021, which reads as under:-

> "*It is stated by the respondent present in the Court that he is getting pension of Rs.14,000/- per month, as he retired from Army in the year 2019. Keeping in view the facts and circumstances of the case and in view of the averments made by the respondent in the reply, the Court is of the opinion that Rs.2,000/- per month is sufficient as interim maintenance to the petitioner. Hence, he petitioner is awarded with interim maintenance to the tune of Rs.2,000/- per month from February, 2019 onwards. The application for interim maintenance disposed of accordingly. Papers of this application be tagged with main petition after due completion.*"

2. Brief facts necessary for the adjudication of the present petition are that an application has been preferred under Section 125 of the Criminal Procedure Code, by the respondent against the petitioner, for grant of maintenance allowance. The respondent/applicant is father of the petitioner. During the pendency of the application under Section 125 of the Cr.P.C., in terms of the impugned order, learned Court below has awarded an amount of Rs.2,000/- per month from February, 2019 onwards as interim maintenance in favour of father in view of the fact that the income of the son was Rs.14,000/- per month in terms of the pension being received by him.

3. Learned counsel for the petitioner has argued that the impugned order is not sustainable in the eyes of law as while passing the impugned order, learned Court below has erred in ignoring the mandate as has been laid down by Hon'ble Supreme Court of India in *Rajneesh* Versus *Neha and another*, *(2021) 2 Supreme Court Cases 324*, in terms whereof, before the payment of interim maintenance, the affidavits of disclosure of Assets and

Liabilities have to be mandatorily filed by both the parties in all the maintenance proceedings inconsonance with the enclosures I, II and III of the judgment. Learned counsel argued that the judgment of Hon'ble Supreme Court was pronounced on 04.11.2020. In terms of para-134 of the same, Hon'ble Supreme Court had directed the Secretary General of Supreme Court of India to communicate the judgment to the Registrars of all the High Courts, who in turn were directed to circulate the judgments to all the District Courts in the States and it was further ordered that the judgment shall be displayed on the Website of all the District Courts/Family Courts/Courts of Judicial Magistrate for awareness and implementation. Learned counsel has submitted that the impugned order having been passed on 25.03.2021 ought to have had complied with the judgment of Hon'ble supreme Court and no interim maintenance could have been awarded without calling upon the parties to submit the affidavits of Disclosure of Assets and Liabilities and as in the present case, learned Family Court failed to adhere to the said principles laid down by Hon'ble Supreme Court, therefore, the impugned order is bad and liable to be set aside.

4. Learned counsel for the respondents has submitted that taking into consideration the fact that only an amount of Rs.2,000/- has been awarded by learned Court below as interim maintenance to the father, who presently happens to be around seventy two years old, the order calls for no interference, as the petitioner has failed to display as to how any prejudice has been caused to him by the non filing of the affidavits of Disclosure of Assets and Liabilities, because it is not the case of the petitioner herein that the father was having sufficient means to maintain himself. Accordingly, he prayed that the present petition be dismissed.

5. In rebuttal, learned counsel for the petitioner has submitted that prejudice indeed has been caused to the petitioner, because the petitioner had disclosed before learned Family Court the assets of his father which were not

taken into consideration by learned Court below nor was the law laid down by Hon'ble Supreme Court.

6. I have heard learned counsel for the parties and have gone through the impugned order.

7. Hon'ble Supreme Court of Inida in *Rajneesh Versus Neha and another* (supra) has been pleased to lay down complete Guidelines with regard to the adjudication of the maintenance applications. As has been rightly pointed out by learned counsel for the petitioner, in para-129 of the judgment, Hon'ble Supreme Court has been pleased to hold that with regard to payment of interim maintenance, affidavits of Disclosure of Assets and Liabilities annexed as Annexures I, II and III alongwith the judgment as may be applicable, shall be filed by both the parties in all maintenance proceedings including pending proceedings before the Courts mentioned therein. It appears that while passing the order with regard to the grant of interim maintenance, learned Court below has not adhered to the said directions issued by Hon'ble Supreme Court of India. The directions being mandatory, the Courts are bound to both adhere to them as well as implement them. Any dereliction in this regard by the Courts concerned, obviously does violence to the judgment passed by Hon'ble Supreme Court both in letter as well as spirit.

8. This Court is of the considered view that the judgment of Hon'ble Supreme Court should again be brought into the notice of all the Districts Courts/Family Courts/Courts of Judicial Magistrate in the State of Himachal Pradesh, so that the same can be implemented in letter and spirit and accordingly, learned Registrar General of the High Court of Himachal Pradesh is instructed to ensure that the judgment is again communicated to all the District Courts in the State, with further direction to learned District Judges to circulate the copies thereof to learned Family Courts as also the Courts of learned Judicial Magistrate, both for awareness as well as implementation. In

addition, the same be also displayed on the website of all the District Courts/ Family Courts/ Courts of Judicial Magistrate for awareness as also implementation. All the learned Courts concerned to ensure that compliance of the judgment of the Hon'ble Court is reflected in the order/ judgment and the order/ judgment has to be a reasoned and speaking order.

9. Coming to the facts of present case, as it has not been disputed during the course of arguments that the petitioner who happens to be the son of the respondent, is getting pension of Rs.14,000/- per month and further, as a measure of interim maintenance, only an amount of Rs.2,000/- has been awarded by learned Court below in favour of the aged father, this Court is not interfering with the order passed by learned Court below, but it is ordered that while deciding the application filed under Section 125 of the Criminal Procedure Code finally, the principles laid down by Hon'ble Supreme Court in *Rajneesh Versus Neha and another* (supra) shall be adhered to by learned Court below in letter and spirit.

10. Petition stands disposed of in above terms. Pending miscellaneous applications, if any, also stand disposed of.

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

Between:
PAWAN KUMAR SON OF SHRI BASANT; RESIDENT OF VILLAGE GALOTE, P.O. CHANGAR, TEHSIL AND DISTRICT HAMIRPUR, H.P.

....PETITIONER.

(BY MR.VINOD CHAUHAN, ADVOCATE)

AND

DINESH KUMAR SON OF SHRI PAWAN KUMAR RESIDENT OF VILLAGE GALOTE, P.O. CHANGAR, TEHSIL AND DISTRICT HAMIRPUR, HP, THROUGH HIS NEXT FRIEND HIS MOTHER SMT. BIMLA DEVI.

....RESPONDENT.

(BY MR.JAGMOHAN SINGH CHANDEL, ADVOCATE)

CRIMINAL REVISION
No.217 of 2021
Decided on: 02.11.2022

Code of Criminal Procedure, 1973- Sections 397, 401, 125- Learned Family Court granted maintenance of Rs. 15,000/- per month to the applicant i.e. son of the petitioner- Challenged that the award was on a higher side stating that the petitioner has superannuated- **Held-** Proceedings were not initiated against the petitioner after retirement- It is apparent and evident that entire money was spent by the petitioner after he was aware of the order passed by Learned Court- To evade the honouring of the order passed- Reduction of the award amount to Rs. 12000/- per month- Petition dismissed. (Paras 7, 9)

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

J U D G M E N T

In terms of the last order, affidavit has been filed by the petitioner. A perusal of the same demonstrates that it is mentioned therein

that after the retirement of the petitioner form BBMB, Nangal Township, District Rupnagar (Punjab), he received an amount of Rs.37,03,467/- in all from BBMB and out of this he has spent an amount of Rs.25,00,000/- on the renovation of old residential house, purchase of car and part thereof has been given to his sons, namely Amit Kumar and Sumit Kumar to earn their livelihood. It is further stated in the affidavit that petitioner is drawing a pension of Rs.32,156/- per month. He is paying installment of Rs.10,000/- per month of the car loan.

2. The Revision Petition has been filed by the petitioner against the order passed by the Court of learned Principal Judge, Family Court, Hamirpur, H.P., in a petition preferred by the respondent herein under Section 125 of Criminal Procedure Code for grant of maintenance, in terms whereof, learned Family Court has granted maintenance allowance of Rs.15,000/- from the date of filing of the petition to the applicant therein. The applicant happens to be the son of the present petitioner.

3. Learned counsel for the petitioner has argued that amount of maintenance as has been ordered by the learned Court below is on the higher side and probably, learned Court was influenced of the fact that the petitioner was in job when the matter was heard by it and it erred in not appreciating that as the petitioner stood retired as on the date when the order was announced, the Award was on the higher side. On this count, prayer has been made by learned counsel for the petitioner to set aside the impugned order.

4. The petition is opposed by learned counsel for the respondent who has argued that in view of the fact that the petitioner was having substantive means at his disposal, learned Court below rightly held the respondent herein to be entitle to maintenance of Rs.15,000/- per month. He has further submitted that the son is about thirteen-fourteen years old and it is otherwise also the duty of the father to look after his child and therefore, the order passed by the learned Court below calls for no interference.

5. I have heard learned counsel for parties and have gone through the order passed by the learned Court below.

6. A perusal of the order demonstrates that the petition under Section 125 of Criminal Procedure Code was preferred by the minor child through mother against the present petitioner on 06.06.2017. The petition was decided on 29.07.2021 by the learned Court below and petitioner is stated to have superannuated from service on 30.06.2021.

7. This Court is of the considered view that as it is not a case where the proceedings were initiated against the petitioner after his retirement or that the petitioner was taken by surprise by the order which was passed by the learned Court below. Therefore, the grounds which have been agitated by learned counsel for the petitioner while assailing the impugned order are not sustainable. Admittedly, the petitioner knew that he was facing proceedings under Section 125 of Criminal Procedure Code and these proceedings were pending since the year 2017. Simply because the final decision was rendered thereupon by learned Court below about twenty nine days post superannuation of the petitioner, this does not renders the order to be *per se* bad in law as has been urged by learned counsel for the petitioner. In fact, the affidavit which has been filed by the petitioner in terms of the directions which were passed by this Court on 19.04.2022, it is apparent and evident that the petitioner was in hurry to do away with the money which he received from his employer post superannuation and the reason seems to be obvious that he wanted to evade the honouring of the order passed by the learned Trial Court which stands assailed by way of this Revision Petition. This observation is being made by the Court in view of the fact that as the petitioner is stated to have superannuated on 30.06.2021 and the order passed by learned Family Court is dated 29.07.2021, if it is to be assumed that the petitioner had by the time the order was announced, spent almost all that he got post superannuation from BBMB, then obviously he did away with this money

within twenty nine days as from the day when he retired. However, after his superannuation as by no stretch of imagination the petitioner would have had received his entire retiral benefits within fifteen or twenty days, thereafter, it is apparent and evident that this entire money was spent by the petitioner after he was aware of the order that was passed by learned Family Court. Otherwise also, as is evident from the affidavit filed by the petitioner, as his family members including his other sons are well settled and not dependent upon the petitioner, therefore, out of the pension which is now being received by him, he can discharge the payment of maintenance allowance which has been ordered by learned Family Court.

8. At this stage, learned counsel for the petitioner submits that keeping in view the fact that the petitioner has superannuated, some indulgence be shown by the Court.

9. This Revision Petition is disposed of by though otherwise maintaining the findings which have been returned by learned Family Court, but by reducing the Award amount from Rs.15,000/- to Rs.12,000/- per month, but with effect from today, meaning thereby that the petitioner will pay the maintenance allowance to the respondent at the rate as has been granted by learned Family Court till the month of October, 2022 and as from the month of November, 2022 onwards, Rs.12,000/- per month. Pending miscellaneous, applications, if any, also stand disposed of.

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

Between:
AVTAR SINGH SON OF SHRI MADAN LAL, RESIDENT OF VILLAGE KHARA, TEHSIL PAONTA SAHIB, DISTRICT SIRMAUR, H.P.

....PETITIONER.

(BY MR. BIMAL GUPTA, SENIOR ADVOCATE, WITH MS. KUSUM CHAUDHARY, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

....RESPONDENT.

(M/s SUMESH RAJ, DINESH THAKUR AND SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, WITH MR. AMIT KUMAR DHUMAL, DEPUTY ADVOCATE GENERAL)

CRIMINAL REVISION
No.197 of 2012
Decided on: 13.10.2022

Code of Criminal Procedure, 1973- Section 397 **Punjab Excise Act, 1914-** Section 61-1(a) **Motor Vehicle Act-** Section 181- 60 bottles of illicit liquor recovered from scooter of accused- Convicted by Judicial Magistrate First Class- Conviction upheld by Appellate Court- **Held-** Discrepancy/lacunae in the case of prosecution has been dealt with in a completely slipshod manner by both Learned Courts below- Prosecution not able to prove its case beyond reasonable doubt- Conviction is bad in law- Acquitted- Petition allowed. (Paras 7, 11, 12, 13)

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 Revision Petition, the petitioner has challenged judgment/order dated 05.05.2010/11.05.2010, passed by the Court of learned Judicial Magistrate, 1st Class, Court No.1, Paonta Sahib, District Sirmaur, H.P., in Criminal Case No.19/3 of 2007, titled The State of Himachal Pradesh Versus Avtar Singh, in terms whereof the petitioner was convicted for the commission of offence punishable under Section 61-1(a) of Punjab Excise Act as applicable to the State of H.P. and under Section 181 of Motor Vehicles Act and was sentenced to undergo simple imprisonment for a period of three months and to pay a fine of Rs.3000/- and in case of default, to further undergo simple imprisonment for a period of one month for the commission of offence punishable under Section 181 of Motor Vehicles Act and to pay a fine of Rs.300/- and in case of default, to undergo simple imprisonment for a period of seven days, as also judgment dated 31.08.2012, passed by the Court of learned Sessions Judge, Sirmaur, District at Nahan, H.P., in Criminal Appeal No.17-Cr.A/10 of 2010, titled Avtar Singh Versus State of Himachal Pradesh, in terms whereof, the appeal preferred by present petitioner against the judgment of conviction passed by the learned Trial Court was dismissed.

2. The case of the prosecution was that on 16.10.2006, at about 8:15 a.m., a police party headed by PW-8 ASI Tara Chand, comprising of Constable Arun Kumar and HHG Sher Nawab (PW-8), was present at place known as Khara. The police party was there in a routine patrol duty, where it received secret information that petitioner Avtar Singh was carrying liquor in his scooter and he was coming from lower side of Khara Forest. Upon receipt of this information, police party went towards Lower Khara Forest side and PW-1 Dhani Ram was associated by the police party as independent witness. A Naka was led on the road and at about 8:45 a.m., petitioner Avtar Singh, who reached at the Naka point on a scooter bearing registration No.HP-17-5358, was stopped and his scooter was searched. The search of the scooter resulted in the recovery of one plastic bag, which was kept near the foot

brake. Inside this plastic bag, one rubber tube containing illicit liquor was recovered. Thereafter, from the front and side dickey of the scooter, on search, one rubber tube each also containing illicit liquor were recovered. The rubber tube, which was recovered from the plastic bag was found to be containing 40 bottles of illicit liquor, whereas other two tubes were found to be containing 20 bottles each of illicit liquor. Further, as per the prosecution, one bottle each was drawn from three tubes as sample and thereafter, entire case property was sealed with seal bearing impression 'T', which was entrusted to PW-1 Dhani Ram after drawing specimen of seal Ext.PW8/A. The case property was taken into possession vide seizure memo Ext.PW1/A, which was witnessed by PW-1 Dhani Ram, PW-2 HHG Sher Nawab and also Constable Arun Kumar. Ruka Ext.PW8/B was drawn by ASI Tara Chand (PW-8) and the same was sent to Police Station Paonta Sahib, on the basis of which FIR Ext.PW8/C was registered. The case property was, thereafter, deposited by PW-8 ASI Tara Chand with PW-7 ASI Raghubir Singh in the Malkhana of Police Station Paonta Sahib, on 06.10.2016. PW-7 ASI Raghubir Singh, thereafter, sent the sample to Chemical Test Laboratory, Kandaghat, on 16.10.2016, through PW-6 Constable Naresh Kumar. The Chemical Examiner, Chemical Test Laboratory, Kandaghat vide report Ext.PW8/H opined that contents of all the three sample bottles were that of illicit liquor. Further, as per the prosecution, in the course of investigation the petitioner could not produce his Driving Licence and therefore, Section 181 of the Motor Vehicles Act was also added. After completion of investigation, Charge Sheet was filed against the petitioner in the learned Trial Court. As a *prima facie* case was found against the accused/petitioner, therefore, charges were framed against him and he pleaded not guilty and claimed trial. Learned Trial Court convicted the petitioner as has already been stated by me hereinabove and the judgment of conviction was upheld in appeal by the learned Appellate Court.

3. Feeling aggrieved, the petitioner has filed the present petition.

4. I have heard learned counsel for the parties and have gone through the record of the case as well as judgments passed by both the learned Courts below.

5. Record demonstrates that in order to prove its case, the prosecution examined eight witnesses, whereas one witness was examined by the accused in defence. As per the case of the prosecution, the police party which recovered the illicit liquor from the scooter being plied by the present petitioner, was comprising of ASI Tara Chand, Constable Arun Kumar and HHG Sher Newab. Incidently, though ASI Tara Chand and HHG Sher Newab were examined by the prosecution as PW-8 and PW-2, respectively, but Constable Arun Kumar was not examined by the prosecution and record demonstrates that he was given up being a repetitive witness. The only independent witness, PW-1 Dhani Ram was declared as hostile as he did not support the version of the prosecution and thus the version of the prosecution was based on the testimonies of PW-2 HHG Sher Nawab and PW-8 ASI Tara Chand. Both the learned Courts below held that the factum of PW-1 Dhani Ram, who was an independent witness, not supporting the version of prosecution story and denying recovery of the illicit liquor from the scooter being plied by the petitioner was of no affect, as the case of the prosecution stood duly proved by the testimonies of PW-2 HHG Sher Nawab and PW-8 ASI Tara Chand by observing that this witness, i.e. PW-1 Dhani Ram, admitted his signatures on the recovery memo Ext.PW1/A and there was nothing in his statement to demonstrate that said signatures of his on the recovery memo were obtained by the police by force. Learned Courts also observed that as the independent witness was an educated person, therefore, it could not be believed that in case no recovery was affected by the police in his presence, he would have had appended his signatures on the recovery memo without any protest. On these basis, learned Courts below came to the conclusion that testimony of this witness was not truthful and the same could not be placed

reliance upon. Learned Courts also held that there was a complete chain of link evidence in the case. The case property remained intact and was not tampered with till the time the samples were tested in the Laboratory and the report of the Chemical Examiner Ext.PW8/H demonstrated that the seals on the case property were found intact and the same tallied with the specimen of the seals sent, separately. Learned Courts below also held that the testimony of PW-8 ASI Tara Chand proved that on demand made by him, accused person failed to produce his Driving Licence and therefore, the accused was also guilty of violating the provisions of Motor Vehicles Act.

6. Primarily, by assigning these reasons, the accused was convicted by both the learned Courts below.

7. This Court is of the considered view that the findings which have been returned by both the learned Courts below while holding that the prosecution was able to prove its case beyond reasonable doubt and that the petitioner was in fact guilty of the charges levelled against him are perverse findings. The case of the prosecution as has been mentioned hereinabove, was that after the liquor was recovered from three tyre tubes, one bottle was drawn from each tube as sample and thereafter, entire case property was sealed with seal impression 'T', which was entrusted to PW-1 Dhani Ram after drawing specimen of seal Ext.PW8/A. Now, as this Court has already mentioned hereinabove, PW-1 Dhani Ram did not support the case of the prosecution and he was declared as a hostile witness. He has in fact, in the course of his cross-examination denied all the suggestions which were put to him to the effect that indeed the recovery of illicit liquor from the tubes was affected by the police party in his presence. Now, as per the case of the prosecution, the seal bearing impression 'T', with which entire case property was sealed, was entrusted to PW-1 Dhani Ram. Record demonstrates that the seal was never produced before the Court. The alleged recovery of liquor was made from three tubes as per the prosecution, i.e. three rubber tubes which

were exhibited as Ext.P1 to Ext.P3. A close scrutiny of the statements of the prosecution witnesses, more specifically PW-2 Sher Newab and PW-8 ASI Tara Chand demonstrates that the rubber tubes which were produced in the Court as Ext.P1 to Ext.P3, which were allegedly recovered from the scooter being plied by the present petitioner, from which illicit liquor was further recovered, were not carrying any identity chips alleged to be affixed upon them by the Investigating Officer at the relevant time. This important discrepancy/lacunae in the case of the prosecution has been dealt with in a completely slipshod manner by both the learned Courts below. Learned Trial Court brushed aside this important aspect of the matter by returning the findings that though it was true that the chits as alleged were not there upon the case property, i.e. rubber tubes Ext.P1 to Ext.P3, but witnesses PW-2 and PW-8 were very specific that the rubber tubes Ext.P1 to Ext.P3 were the same which came to be recovered from the accused. While returning these findings, learned Courts below erred in not appreciating that PW-2 and PW-8 were interested witnesses as they were members of the party, which had allegedly effected the recovery of the liquor from the scooter being plied by the petitioner and further, the only independent witness who was associated purportedly by the prosecution had not supported its case.

8. At this stage, it is relevant to take note of the judgment of Hon'ble Coordinate Bench of this Court, i.e. *Amandeep Singh* Versus *State of H.P.*, *2010 SCC OnLine 2529*, in which Hon'ble Coordinate Bench while dealing with a case wherein the facts were quite akin to the facts of the present case, was pleased to hold as under:-

> "*9. Two vital factors had to be established by the prosecution. One is seizure of illicit liquor and second is the production of those of the sampled bottles from which the samples were drawn. There is no evidence on record and it has also not been proved on the basis of oral statements of witnesses as to where the seal which was in physical existence and possession of PW1 Chaman Lal has gone. No explanation has come forth on this count. No effort*

has been made to produce the seal in Court. So far as the statement of PW1 Chaman Lal is concerned, no sample of liquor or any seal of the seized liquor has been produced and proved in Court. The bottles from which the samples were taken have also not been proved in court. Learned trial Court as also the Appellate Court had presumed as a matter of fact that what the witnesses have stated is the correct state of affairs without considering that facts were to be proved from documents which admittedly existed but were not produced in Court. There is no presumption in law that oral evidence can over rider documentary proof. The existence of seal can be proved by its production. The Court cannot presume that the sample was kept in safe custody, more especially when such fact is established by a written document namely register (s) and certificate in Register No.21, which is not produced. What the prosecution tried to prove remains unclear. Merely saying that liquor was seized is insufficient without establishing its quantity and safe keeping. Even if PW1 is to be believed his statement does not corroborate the prosecution so far as the seizure of country liquor is concerned. His presence on the spot also remains a mystery. The case of the prosecution is that he was coming from Solan to Kandaghat, but PW6 Sewa Singh says that he accompanied the SHO. But leaving his aside, the liquor, which constitutes the corpus delicti, has not been established on record; therefore, the finding of conviction against the petitioners cannot be sustained. This does not require appreciation of evidence but only consideration of that part of the prosecution case which was required to be established by them.

10. Learned counsel appearing for the petitioner then places reliance on a judgment of this court in ***State of H.P. v. Gurcharan Singh, Latest HLJ 2008 (HP) 745,*** *holding that liquor which was seized, having not been produced in Court, an adverse inference requires to be drawn against the prosecution. The Court holds that*

"6. ***Apart from the above noticed contradictions, the prosecution did not produce the liquor allegedly recovered from the respondent. Its failure to produce the liquor renders it liable to adverse inference to the effect that no liquor, as alleged, was recovered from the respondents***."

9. To similar effects are two other judgments of the Hon'ble Coordinate Bench of this Court, i.e. (a) *State of Himachal Pradesh* Versus

Ram Prakash, 1996 SCC OnLine HP 143, in which Hon'ble Coordinate Bench of this Court was pleased to hold as under:-

> "*6. Besides, the necessary link evidence in the present case is missing. The prosecution has not been able to produce the entire link evidence to remove the doubts that the sample and the remaining part of the contents were not tampered with from the time of its seizure till it reached the office of chemical examiner. Somuchso though the rubber tube is alleged to have been sealed by the Investigating Officer in a gunny bag after its recovery, surprisingly enough when it was produced in the court, the same was found to be un-sealed. It did not contain any identification mark. The Investigating Officer while appearing as P.W.1 admitted that in the absence of identification mark or seal mark thereon he is not in a position to state that the rubber tube was recovered in this case.*"

b) *State of H.P.* Versus *Mean Singh*, *1999 S OnLine HP 138*, relevant portion whereof reads as under:-

> " *13. This is case of the prosecution that the illicit liquor contained in the tube was kept in a gunny bag and a slip (chip) signed by him and other recovery witnesses and seal 'A' were affixed thereto. The alleged recovered illicit liquor has been produced in evidence as Ex.P1. PW-2 Balak Ram and PW-3 Kalyan Singh both have identified Ex.P-1 as the recovered incriminating case property. However, it is admitted by both of them that Ex.P-1 did not contain the slip (chit) which was signed by recovery witnesses and affixed to the gunny bag nor does the gunny bag contain any identifying mark. PW-2 Balak Ram has further stated that even the affixed seal Impression was not available on the case property Ext.P-1. It cannot, therefore, be believed that Ex.P-1 is what had allegedly been recovered from the accused.*"

10. In this view of the matter, as it was not proved before the Court that Ext.P1 to Ext.P3 were in fact the same rubber tubes which were recovered by the prosecution from the scooter being plied by the petitioner, this Court is of the considered view that entire case of the prosecution stood demolished and this extremely important aspect of the matter was ignored by the learned Trial Court as also by the learned Appellate Court, which renders

the judgment of conviction passed by both the learned Courts below as bad in law.

11. Therefore, from what has been discussed hereinabove, it can be safely concluded that the prosecution was not able to prove its case before the learned Courts below beyond reasonable doubt, as neither any effort was made by the prosecution to produce the seal with which the entire case property was sealed before the learned Trial Court, nor Ext.P1 to Ext.P3 which purportedly were the rubber tubes recovered from the petitioner in which the illicit liquor was kept, were found to be carrying identity chips alleged to have been affixed upon them by the Investigating Officer at the relevant time.

12. On account of the reasoning assigned hereinabove, the present Revision Petition succeeds, as far as the order of conviction passed against the petitioner by the learned Trial Court, as affirmed by the learned Appellate Court is concerned pertaining to the commission of offences under Section 61-1(a) of Punjab Excise Act, 1914, as applicable to the State of H.P. However, this Court is not interfering with the judgment of conviction which has been recorded against the petitioner by the learned Trial Court, as affirmed by the learned Appellate Court under the provisions of Motor Vehicles Act.

13. The petitioner is accordingly, acquitted for the commission of offences punishable under Section 61-1(a) of Punjab Excise Act as applicable to the State of H.P. The amount of fine, which has been deposited by the petitioner qua the said offence, is ordered to be released in his favour as per rules. Record of the learned Trial Court be returned back forthwith. Bail bonds, if any, furnished by the petitioner stand discharged.

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

Chet Ram ....Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

For the petitioner :Mr. Yashveer Singh Rathore, Advocate.

For the respondent :Mr. Desh Raj Thakur, Additional Advocate General with Mr. Narender Thakur, Deputy Advocate General.

Cr.MP(M) No. 2570 of 2022
Decided on: 23.12.2022

Code of Criminal Procedure, 1973- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances Act, 1985-** Sections 20, 37- Recovered a bag containing 5.679 KiloGrams of Charas from accused- Commercial quantity- **Held-** Constitutional guarantee of expeditious trial cannot be diluted by applying the rigors of Section 37 NDPS- Trial not likely to conclude in near future- Bail petition allowed. (Paras 16, 17)

Cases referred:

Abdul Majeed Lone Vs. Union Territory of Jammu and Kashmir(Special Leave to Appeal (Cr.L.) No. 3961 of 2022;

Chitta Biswas @ Subhas Vs. The State of West Bengal, (Criminal Appeal No.(s) 245 of 2020;

Gopal Krishna Patra @ Gopalrusma Vs. Union of India (Cr. Appeal No. 1169 of 2022);

Mahmood Kurdeya Vs. Narcotic Control Bureau (2022) 3 RCR (Criminal) 906;

Nitish Adhikary @ Bapan Vs.The State of West Bengal (Special Leave to Appeal (Cr.L.) No (s). 5769 of 2022;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

Petitioner is an accused in case FIR No. 267/2019, dated 20.11.2019, registered under Section 20 of Narcotic Drugs and Psychotropic Substances, Act (for short 'ND&PS' Act), at Police Station Bhuntar, District Kullu, H.P. Petitioner is in custody since 20.11.2019.

2. Petitioner is facing trial for offences under Section 20 of ND&PS Act in pursuance to challan filed by respondent. The allegation against petitioner is that on 20.11.2019, at about 8:15 am near Gram Panchayat Gara Parli, he was found carrying a bag in his right hand, from which 5.679 Kgs of '*Charas*' was recovered.

3. Petitioner has now prayed for grant of bail on the ground that his constitutional right of expeditious disposal of trial has been infringed. As per petitioner, he is in custody more than three years now and the trial has not concluded, rather, it is progressing at snails pace.

4. In its status report dated 07.12.2022, respondent has submitted that PW-1 and PW-2 have now been summoned for 04.03.2023 for examination before learned Special Judge.

5. Learned Additional Advocate General has opposed the prayer of the petitioner, on the ground that Section 37 of ND&PS Act, has application in the facts of the case and merely, on the ground of delay in conclusion of trial, petitioner cannot be released on bail.

6. I have heard learned counsel for the petitioner as well as learned Additional Advocate General and have also gone through the status report.

7. The fetters placed by Section 37 of ND&PS Act, evidently have been instrumental in denial of right of bail to the petitioner in the instant case till date. The question that arises for consideration is, can the provisions of Section 37 of the Act, be construed to have same efficacy, throughout the pendency of trial, notwithstanding, the period of custody of

the accused, especially, when it is weighed against his fundamental right to have expeditious disposal of trial?

8. It is submitted by learned counsel for the petitioner that till date only eight witnesses have been examined and ten more witnesses remain to be examined, despite the fact that petitioner is in custody since 20.11.2019. In the considered view of this Court, the Constitutional guarantee of expeditious trial cannot be diluted by applying the rigors of Section 37 of ND&PS Act in perpetuity.

9. Recently, in a number of cases, under-trials for offences involving commercial quantity of contraband under ND&PS Act have been allowed the liberty of bail by Hon'ble Supreme Court only on the ground that they have been incarcerated for prolonged durations.

10. In ***Mahmood Kurdeya*** Vs. ***Narcotic Control Bureau (2022) 3 RCR (Criminal) 906***, Hon'ble Supreme Court has held as under:-

> *"6.What persuades us to pass an order in favour of the appellant is the fact that despite the rigors of Section 37 of the said Act, in the present case though charge sheet was filed on 23.09.2018 even the charges have not been framed nor trial has commenced."*

11. In ***Nitish Adhikary @ Bapan*** Vs.***The State of West Bengal (Special Leave to Appeal (Cr.L.) No (s). 5769 of 2022,*** decided on 01.08.2022, Hon'ble Supreme Court has held as under:-

> *"During the course of the hearing, we are informed that the petitioner has undergone custody for a period of 01 year and 07 months as on 09.06.2022. The trial is at a preliminary stage, as only one witness has been examined. The petitioner does not have any criminal antecedents.*
>
> *Taking into consideration the period of sentence undergone by the petitioner and all the attending circumstances but without expressing any views in the merits of the case, we are inclined to grant bail to the petitioner."*

12. In ***Gopal Krishna Patra @ Gopalrusma*** Vs. ***Union of India (Cr. Appeal No. 1169 of 2022),*** decided on 05.08.2022,Hon'ble Supreme Court has held as under:-

> *" The appellant is in custody since 18.06.2020 in connection with crime registered as NCB Crime No. 02/2020 in respect of offences punishable under Sections 8,20,27-AA, 28 read with 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985*
>
> *The application seeking relief of bail having been rejected, the instant appeal has been filed.*
>
> *We have heard Mr. Ashok Kumar Panda, learned Senior Advocate in support of the appeal and Mr. Sanjay Jain, learned Additional Solicitor General for the respondent.*
>
> *Considering the fact and circumstances on record and the length of custody undergone by the appellant, in our view the case for bail is made out."*

13. In ***Chitta Biswas @ Subhas*** *Vs.* ***The State of West Bengal, (Criminal Appeal No.(s) 245 of 2020,*** decided on 07.02.2020, it has been held as under:-

> *"The appellant was arrested on 21.07.2018 and continues to be custody. It appears that out of 10 witnesses cited to be examined in support of the case of prosecution four witnesses have already been examined in the trial.*
>
> *Without expressing any opinion on the merits or demerits of the rival submissions and considering the facts and circumstances on record, in our view, case for bail is made out."*

14. In ***Abdul Majeed Lone*** Vs. ***Union Territory of Jammu and Kashmir(Special Leave to Appeal (Cr.L.) No. 3961 of 2022***, decided on 01.08.2022, it has been held as under:-

> *"Having regard to the fact that the petitioner is reported to be in jail since 1-3-2020 and has suffered incarceration for over 2 years and 5 months and there being no likelihood of completion of trial in the near future, which fact cannot be controverted by the learned counsel appearing for the UT, we are inclined to enlarge the petitioner on bail.".*

15. In addition, different Co-ordinate Benches of this Court have also followed precedent to grant bail to the accused in ND&PS Act, on the ground of prolonged pre-trial incarceration. Reference can be made to order dated 28.07.2022, passed in Cr.MP(M) No. 1255 of 2022, order dated 01.12.2022, passed in Cr.MP(M) No. 2271 of 2022 and order dated 04.11.2022, passed in Cr.MP(M) No. 2273 of 2022.

16. Reverting to the facts of the case, the petitioner is in custody since 20.11.2019 and the facts suggest that the trial is not likely to be concluded in near future. There is nothing on record to suggest that the delay in trial is attributable to the petitioner.

17. Keeping in view the facts of the case and also the above noted precedents, the bail petition is allowed and petitioner is ordered to be released on bail in case FIR No. 267/2019, dated 20.11.2019, registered under Section 20 of ND&PS, Act, at Police Station Bhuntar, District Kullu, H.P., on his furnishing personal bond in the sum of Rs. 1,00,000/- 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.

18. 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.

Ajay Kumar .....Petitioner

Versus

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

For the petitioner: Mr.N.K. Thakur, Senior Advocate, with Mr. Divya Raj Singh, Advocate.

For the respondent: Mr. Narender Thakur, Deputy Advocate General.

Cr.MP(M) No. 2298 of 2022
Reserved on: 23.12.2022
Decided on: 26.12.2022

Code of Criminal Procedure, 1973- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances Act, 1985-** Section 21- Recovered 6.05 Grams heroin from the petitioner- Petitioner is stated to be involved in 4 other NDPS cases- Habitual offender- **Held-** Quantity with which the petitioner has been apprehended by police everytime suggests that he himself is a victim of drug abuse, as quantity cannot be reasonably be said to be possessed for commerce or trade- Pretrial incarceration is not the rule- Trial not likely to be concluded shortly- Keeping in view the balance between the rights of the petitioner and gravity of offence- Bail petition allowed. (Paras 6, 8, 11)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

By way of instant petition, a prayer has been made to release the petitioner on bail in case registered vide FIR No. 125 of 2022, dated 3.8.2022, at Police Station, Damtal, District Kangra, H.P. under Section 21 of the Narcotic Drugs and Psychotropic Substances, Act(for short, "ND&PS" Act).

2. Petitioner is in custody since 02.08.2022. It is alleged that 6.05 grams of heroin (Chitta) was recovered from his conscious possession.

3. From the status report filed on behalf of the respondent, it is revealed that after completion of investigation, challan has been presented against the petitioner on 26.9.2022. Petitioner is stated to be involved in four other cases under the ND&PS Act. The details of all such cases have been provided as under:

"(i) Case FIR No.148/2018, dated 10.6.2018, under Section 21-61-85 of ND&PS Act, P.S. Indora. Recovery 3.66 gm. Heroin/chitta.

(ii) Case FIR No. 167/2019, dated 10.12.2019, under Section 21-61-85 of ND&PS Act, P.S. Damtal. Recovery 6.32 gm. Heroin/chitta.

(iii) Case FIR No. 67/2020, dated 27.7.2020, under Section 21-61-85 of ND&PS Act, P.S. Damtal. Recovery 6.70 gm. Heroin/chitta.

(iv) Case FIR No. 51/2022, dated 22.3.2022, under Section 21-61-85 of ND&PS Act, P.S. Damtal. Recovery 4.08 gm. Heroin/chitta."

The plea of the petitioner has been contested on the ground that he is a habitual offender and in case released on bail, will again indulge in similar activities.

4. On the other hand, it has been contended on behalf of the petitioner that he is of young age and has been a victim of drug abuse. It has been submitted that the petitioner was undergoing rehabilitation process, but his relapse landed him in the present case. Today, Sh.Yashwinder Pal S/o Sh. Rajinder Pal, is also present in the court, who was identified by the counsel for the petitioner. Sh. Yashwinder Pal, disclosed that the petitioner was his real brother and was addicted to I.V. Drug Abuse. He further submitted that he is ready and willing to take care of his brother by providing all means for rehabilitation and medical treatment. It is further disclosed that petitioner is married and has two children, who are totally dependent upon him.

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

6. Noticeably, in all the previous cases, as detailed above, the quantity of heroin recovered from the petitioner is either small quantity or marginally more than small quantity. Same is the nature of instant case. As per the notification issued by the Central Government specifying the small and commercial quantity, the heroin is mentioned at serial No. 56 of the Table. Upto 5 grams of heroin, is small quantity and from 5 grams to 250 grams, is intermediate quantity. The quantity with which the petitioner has been apprehended by the police every time, suggests that the petitioner himself is a victim of drug abuse, as the quantity recovered cannot be reasonably said to be possessed for commerce or trade.

7. Undoubtedly, the possession of intermediate quantity of heroin, attracts severe punishment as it is considered to be a heinous offence, nonetheless, its social implication cannot be undermined especially keeping in view the age group in which the petitioner is. The contention raised by learned counsel for the petitioner that petitioner requires rehabilitation, medical care as also the care by the family members does not appear to be without substance. The fact that the brother of petitioner has come-forth to offer all help to petitioner also strengthens the contention so raised on behalf of the petitioner.

8. Petitioner has already been in custody in the present case almost for about five months. His further incarceration may not be in the interest of justice, as no fruitful purpose is likely to be served, rather it may prove to be an impediment in rehabilitation of the petitioner and his cure from the disease in which he had been enroped. Pre-trial incarceration is not the rule and the prayer for grant of bail is to be decided keeping in view the facts and circumstances of each specific case.

9. The petitioner is permanent resident of Village and Post Office Channi, Tehsil Indora, District Kangra, H.P. and in order to secure the

purpose of grant of bail to the petitioner, appropriate conditions can be imposed.

10. It is not the case of the respondent that in case of release of petitioner on bail, he will be able to tamper with the prosecution evidence or to defeat or delay the fair trial.

11. The challan has already been presented, but it is not likely that the trial of the petitioner will be concluded shortly. Keeping in view the balance between the rights of the petitioner and the gravity of crime and also keeping in mind the peculiar facts of the case, the prayer made in the petition is allowed. The petitioner is ordered to be released on bail in case registered vide FIR No. 125 of 2022, dated 3.8.2022, at Police Station, Damtal, District Kangra, H.P. under Section 21 of the ND&PS Act, on his furnishing personal bond in the sum of Rs.1,00,000/- (Rupees One lac) with one surety in the like amount, to the satisfaction of learned trial Court. This order is, however, subject to the following conditions: -

i) That the petitioner shall regularly attend the trial of the case before learned trial Court and shall not cause any delay in its conclusion.

ii) That the 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) That the petitioner shall be liable for immediate arrest in the instant case in the event of petitioner violating the conditions of this bail.

iv) That the petitioner shall not leave India without the prior permission of the trial Court till completion of trial.

12. Any observation made in this order 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 MR. JUSTICE SATYEN VAIDYA, J.

Nihal Singh ...Petitioner.

Versus

State of H.P. ...Respondent

For the petitioner : Mr. Jeevesh Sharma, Advocate.
For the respondent : Mr. Narender Thakur, Dy. A.G.

Cr.MP(M) No. 2684 of 2022
Decided on : 26.12.2022

Code of Criminal Procedure, 1973- Section 438- Pre-arrest bail- **Narcotic Drugs and Psychotropic Substances Act, 1985-** Sections 20, 29- Recovered 744 Grams of charas- Apprehension of petitioner's arrest as recently he came to know that police had implicated him falsely in the case- **Held-** The facts of present case do not warrant pre-trial incarceration of the petitioner- There is no likelihood of his absconding or fleeing from the course of justice- Bail petition allowed. (Paras 12, 13, 14)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge:

By way of instant petition, petitioner has prayed for grant of pre-arrest bail in case FIR No. 18 of 2022 dated 13.3.2022, registered under Sections 20 and 29 of the Narcotic Drugs & Psychotropic Substance Act (for short "the Act) at Police Station, Kandaghat, District Solan, H.P.

2. The petitioner was admitted to interim bail on 7.12.2022, whereater he has joined the investigation.

3. Brief facts necessary for adjudication of petition are that as per police case, during intervening night of 12.3.2022/13.3.2022 at about 1.10 pm, police patrol party recovered 744 grams of charas from one Mandeep Kumar, son of Sh. Puran Chand near Kandaghat, District Solan, H.P. The said Mandeep Kumar was arrested after registration of the case and during his

interrogation, it was discovered that the contraband was sold to Mandeep Kumar by petitioner in the instant case.

4. During investigation, police found the exchange of mobile phone calls from the mobile of Mandeep Kumar with mobile No. 787692-20527 and such number was found to have been issued in the name of wife of petitioner. Mandeep Kumar also allegedly disclosed to the police that he had withdrawn Rs. 20,000/- from ATM at Anni in District Kullu and had paid the said amount to the petitioner.

5. In its status report, it is submitted by the respondent that the petitioner had been evading the arrest during investigation of the case and despite various efforts by police, he could not be found.

6. On the other hand, petitioner has submitted that his implication in the case is false. He works as a Meson and had throughout been in his native village. No one had come to inquire from him. It has been contended on behalf of the petitioner that the petitioner is a law abiding citizen and has no criminal antecedent and has roots in the society. He has approached this Court only on apprehension of his arrest as recently, he came to know that the police had implicated him falsely in the case. Petitioner has undertaken to abide all the terms and conditions as may be imposed against him.

7. Challan against Mandeep Kumar has already been filed in the Court. As per case of respondent, supplementary challan against petitioner is in the process on being filed.

8. I have heard learned counsel for the parties and have also gone through the record carefully.

8. The allegation against the petitioner is that he had sold the contraband to Mandeep Kumar at his native village in District Kullu. It is further alleged that petitioner had received a sum of Rs. 20,000/- from Madeep Kumar. The exchange of mobile phone calls between Mandeep Kumar and petitioner is also alleged. Thus, the implication of petitioner in the case is

with the aid of Section 29 of the NDPS Act. It is a case of recovery of intermediate quantity of charas, therefore, the rigors of Section 37 of the Act will not apply.

9. This Court after perusing the record of police file had found that after April, 2020, no serious effort was made to nab the petitioner.

10. The statement of co-accused implicating the petitioner by itself is not admissible in evidence. Merely because the police has found some evidence of withdraw of money by Mandeep Kumar from ATM at Anni is not sufficient to infer that money was paid to the petitioner. The exchange of phone calls is a subject matter of trial and cannot be used to the impediment of petitioner at this stage.

11. The investigation of the case is already complete and the petitioner is not required for custodial interrogation. The challan against co-accused has already been presented and supplementary challan against petitioner is stated to be under preparation.

12. The aforesaid facts have been taken into consideration only for prima-facie assessment of seriousness and gravity of allegations against petitioner. The allegations against the petitioner are to be proved during trial. In my considered view, the facts of present case do not warrant pre-trial incarceration of the petitioner.

13. The petitioner is permanent resident of Village Kot, Post Office Khanag, Tehsil Anni, District Kullu, H.P. and there is no likelihood of his absconding or fleeing from the course of justice. In order to secure fair and expeditious trial, appropriate conditions can be imposed against the petitioner. Even otherwise, it is not the case of the respondent that the release of petitioner on bail will in any manner hamper or prejudice the trial of the case.

14. In view of peculiar facts and circumstances of the case, petition is allowed and in the event of arrest of the petitioner in case FIR No. 18 of

2022 dated 13.3.2022, registered under Sections 20 and 20 of the Narcotic Drugs & Psychotropic Substance Act at Police Station, Kandaghat, District Solan, H.P., he shall be released on bail, on his furnishing personal bond in the sum of Rs. 50,000/- with one surety in the like amount, to the satisfaction of Investigating Officer/Arresting Officer. This order shall, however, be subject to the following conditions: -

i) That the petitioner shall join the investigation as and when required to do so.
ii) That the petitioner shall not tamper with the prosecution evidence in any manner whatsoever.
iii) 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;
iv) That breach of any of the bail condition by the petitioner shall entail cancellation of the bail.
v) That the petitioner shall not leave India without prior permission of the Court.

15. 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 MR. JUSTICE SATYEN VAIDYA, J.

Cr.R. No. 18 of 2013
Pradeep Kumar and ors. ....Petitioners.

Versus

State of H.P. ...Respondent.

Cr.R. No. 19 of 2013
Hans Raj and ors. .....Petitioners

Versus

State of Himachal Pradesh ...Respondent.

For the petitioners	:	Mr. R.L. Chaudahry and Mr. H.R. Sidhu, Advocates.
For the respondent	:	Mr. Desh Raj Thakur, Additional Advocate General.
For the complainants	:	Mr. L.S. Mehta, Advocate.

Cr. Revision No. 18 of 2013
a/w Cr.R.No.19 of 2013
Decided on: 26.12.2022

Code of Criminal Procedure, 1973- Section 397 - **Indian Penal Code, 1860-** Sections 325, 323, 341- Appeal against conviction by the Judicial Magistrate First Class dismissed by Appellate Court- Compromise effected between the parties to quash the FIR- **Held-** In non-heinous offences or where the offences are of private nature, the criminal proceedings can be annulled irrespective of the fact that the trial has concluded or appeal stands dismissed against conviction- Conviction quashed- Acquitted of all charges- Petition allowed. (Paras 9, 11)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge *(Oral)*

Both these petitions are being decided by a common order for the reason that both these petitions arise from the same judgment of conviction recorded by learned Trial Court. Two different sets of convicted persons had preferred two separate appeals before the learned Appellate Court and therefore, on the dismissal of such appeals, two separate revision petitions came to be filed before this Court.

2. Petitioners were convicted for offences under Sections 325, 323 and 341 of Indian Penal Code by learned Judicial Magistrate First Class, Court No. 3, Hamirpur, H.P., vide judgment dated 31.07.2012. The maximum sentence imposed upon each of them is to undergo simple imprisonment for six months for commission of offence under Section 325 of IPC. Two sets of appeal preferred by the petitioners herein were dismissed by learned Appellate Court on 21.12.2012. Thereafter, these revision petitions were filed before this Court and were pending adjudication

3. Petitioners have approached the Court, now by way of Cr.MP. No. 3752 of 2022 in Cr.R. No. 18 of 2013 and Cr.MP No. 3753 of 2022 in Cr.R. No. 19 of 2013, with a prayer to place on record compromise effected between the parties and to quash FIR No. 288 of 2006 and all consequential criminal proceedings arising therefrom including the judgment of conviction as noticed above.

4. Petitioners as well as victims/complainants namely Sanjay Kumar, Subhash Chand and Rajinder Kumar, are present in the Court today. A joint statement of victims/complainants has been recorded. They have stated that the matter stands compromised with the petitioners, vide compromise deed dated 03.11.2022, a copy of which has been placed on record as Annexure A-1. It has been submitted by them that the petitioners have shown remorse and repentance and in view of such conduct of petitioners and also the fact that they have been engaged in the

prosecution/litigation for the last about sixteen years, the victims/complainants have decided to put an end to the litigation with a purpose to maintain peace in future.

5. The joint statement of all the petitioners in Cr.R. No. 18 and 19 of 2013 has also been recorded. They have endorsed the facts narrated by the victims/complainants in their statement to be correct. They have further verified the contents of compromise Annexure A-1 and have undertaken to abide by its terms in future with a purpose to maintain peace.

6. The facts of the case reveal that the injuries suffered by the victims/complainants were personal to them and also were private in nature. It was a private dispute between the parties and the manner in which the incident had occurred cannot be said to have depraving effect on the society at large.

7. The parties have stated that they belong to the same area and with the intervention of relatives and common friends they have decided to put an end to all their past disputes.

8. The nature of offences involved in the instant case cannot be termed to be very heinous offences. The final outcome of these petitions may not have any adverse effect on the interest of society as a whole. On the other hand, the steps taken by the parties should be welcomed as their efforts will be helpful in maintaining peace and harmony in the society.

9. In non-heinous offences or where the offences are of private nature, the criminal proceedings can be annulled irrespective of the fact that the trial has concluded or appeal stands dismissed against conviction. It has been so held by the Hon'ble Supreme Court vide judgment dated 29.09.2021 passed in Criminal Appeals No.1489 and 1488 of 2012. The relevant extract from the aforesaid judgment can be gainfully reproduced as under:-

> *"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. (2014) 6 SCC 466 and State of Madhya Pradesh Vs. Laxmi Narayan & Ors. (2019) 5 SCC 688.

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."

10. Reverting to the facts of the case, I am of considered view that the grant of prayer made by way of Cr.MP. No. 3752 of 2022 and Cr.MP No. 3753 of 2022 will be in consonance with the mandate of law as expounded by Hon'ble Supreme Court in above referred judgment.

11. Keeping in view the facts and circumstances of the case, both the petitions are allowed. FIR No 288 of 2006, dated 16.08.2006, is ordered to be quashed. Accordingly, judgment of conviction and sentence order dated 31.07.2012, passed by learned Judicial Magistrate First Class, Court No. 3, Hamirpur, H.P. in Case No.85-II of 2006 and also the judgment dated 21.12.2012, passed by learned Additional Sessions Judge, Fast Track Court, Hamirpur, H.P., in Criminal Appeals No. 27 and 28 of 2012, are set aside. Petitioners in both the petitions are acquitted of all the charges.

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

Dabe Ram

.....PETITIONER

Versus

State of Himachal Pradesh

....RESPONDENT

For the Petitioner : Mr. Sudhir Thakur, Senior Advocate, with Mr. Karun Negi, Advocte.

For the Respondent **:** Mr. Hemant Vaid, Additional Advocate General

CRIMINAL MISC. PETITION (MAIN)
No.2272 OF 2022
Decided on:26.12.2022

Code of Criminal Procedure, 1973- Section 438- Pre-arrest bail- **Narcotic Drugs and Psychotropic Substances Act, 1985-** Sections 20, 29, 42(2), 52A- Recovered 1.26 Kgs of Cannabis- Commercial quantity- **Held-** Petitioner failed to make out a case for grant of anticipatory bail- Bail petition dismissed. (Paras 22, 23)

The following judgment of the Court was delivered:

O R D E R

Petitioner has approached this Court seeking bail under Section 438 Code of Criminal Procedure (in short 'Cr.P.C.'), in FIR No.31 of 2022, dated 13.02.2022, registered in Police Station Sadar Solan, District Solan, H.P., under Sections 20 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act').

2. Status report stands filed. Record, alongwith Call Detail Record, also made available.

3. Prosecution case is that on 13.02.2022, at about 7.00 p.m. ASI Sanjeev Kumar, Incharge of Special Investigation Unit (SIU), Solan, near Dohri

Diwar bifurcation of Subathu road, received a reliable information, from trustworthy informer, that a Magma Grey coloured Swift Car bearing registration No.HP-64B-3404 was coming from Subathu to Solan with charas having two occupants, namely, Govind Thakur and Radha Devi, who are doing business of sale and purchase of charas in the said vehicle.

4. As, during time spent for obtaining warrant for search, there was possibility of disappearance of the contraband, ASI prepared information under Section 42(2) of NDPS Act on the spot and sent it through Supervisory Officer of SIU, Solan through Constable Hemant Kumar at 7.15 p.m. and thereafter, he alongwith police officials went in search and Nakkaa Bandi towards Subathu road etc. and laid a Nakka at Ghatti, near Shiv Temple at 7.25 p.m. and telephonically informed the Ward Member, Pawan Kumar of Gram Panchayat Dangri, about the circumstances.

5. At about 7.45 p.m. above referred vehicle came with two occupants i.e. a boy and a girl, from Subathu side and car was stopped. At that time, Ward Member Pawan Kuamr alongwith independent witness Geeta Sharma also came on the spot. By complying procedure of search and seizure, car was searched in presence of independent witnesses, wherefrom, a carry bag, hidden below the driver seat, containing round black coloured substance, was recovered. On the basis of experience, on smelling, and as also disclosed by the occupants of the car, it was identified as cannabis, which was 1.26 kilograms. Same was taken into possession and seized as per prescribed procedure and, thereafter, after registration of FIR by sending Rukka, occupants of car were arrested.

6. By complying provisions of Section 52A of NDPS Act, 70 grams charas was taken out as a sample from the recovered contraband. State Forensic Science Laboratory (SFSL) on the basis of analysis confirmed recovered contraband as charas.

7. During interrogation, Govind Thakur disclosed that he, on 12.02.2022 went alongwith co-accused Radha Devi towards Kullu, and from an interior Village, they procured charas from petitioner-Dabe Ram.

8. Call Detail Records (CDRs) of Govind Thakur was obtained and on perusal whereof, it has been found that since the night of 12.02.2022 till 13.02.2022, Govind Thakur was in regular contact with petitioner-Dabe Ram. Thereafter, CDRs and Customer Acquisition Form (CAF) of petitioner-Dabe Ram were obtained. Mobile number was found in the name of petitioner-Dabe Ram linked with his Aadhar Card.

9. On 05.03.2022, police party went in search of petitioner-Dabe Ram, but neither he nor any other member of his family was found in his house and house was found locked. They all were hiding them due to fear of police. Search memo was prepared in presence of Ward Member Pawan Kumar.

10. On the basis of CAF and photograph on Aadhar Card Govind Thakur identified petitioner Dabe Ram as the same person from whom he had purchased charas in his house at Barogi. House of petitioner-Dabe Ram is situated at a distance of 10 kilometers on a link road from Bhunter to Manikaran road at an interior place.

11. After obtaining interim bail petitioner-Dabe Ram had joined investigation on 01.07.2022 and as per prosecution, he has not disclosed anything, rather denying selling of charas by him to Govind Thakur with explanation that he is a Carpenter and his family earn livelihood from agriculture and Orchard and they are residing in a joint family. Further that at about 6-7 months ago, he came in contact of Govind Thakur in a Fair at Karsog and at that time, a girl was there alongwith him and thereafter, whenever Govind Thakur used to come to Kullu and Manikaran, he used to meet him and they shared mobile numbers and had been talking with each other.

12. It has further been stated by learned counsel for the petitioner that Govind Thakur was contacting Dabe Ram on 12.03.2022 for staying in his house alongwith a girl, but petitioner did not agree for that and except that there was no other conversation or dealing of the petitioner with Govind Thakur. According to Dabe Ram, Govind Thakur was informing him about his visit to Kullu alongwith girl.

13. As per prosecution case, call detail reflects that on 12.02.2022 Govind Thakur started contacting petitioner-Dabe Ram at 02:31:03 a.m. and thereafter he had talks with him at 02.35:11 a.m. for 2005 seconds and thereafter, at 03:08:36 a.m., 03:10:12 a.m., 09:36:58 a.m., 21:53:52 p.m., 22:42:36 p.m., and 22:55:24 p.m., and on 13.02.2022 at 01:52:18 a.m. he sent message to petitioner-Dabe Ram and, in turn, petitioner-Dabe Ram sent him messages at 01:52:46 a.m. and 01:52:48 a.m. and, thereafter, Govind Thakur sent him another message at 02:27:09 a.m. and had a telephonic call at 02:29:56 a.m. and last call was made by him at 10:32:12 a.m. on 13.12.2022. Further that this detail has been corroborated with call detail of petitioner Dabe Ram. On 14.02.2022 at 00:03:23 a.m. and 10:24:47 a.m. messages were sent from the mobile phone of Govind Thakur to the mobile phone of petitioner-Dabe Ram.

14. It is further case of the prosecution that on 12.02.2022 at 02:31:03 a.m. location of Govind Thakur was at near Vardhman Chowk, Baddi and from 09:36:58 a.m. till 10:34:47 a.m. he was at Baddi. But at 9.53 p.m. on 12.02.2022 his location was at Gulab Singh, son of late Sh.Tikam Ram, Village Phalana, P.O. Sachani, Tehsil Bhunter, Tehsil Bhunter, District Kullu, H.P. During midnight between 12th and 13th, on 13.02.2022, at 01:52:18 a.m. to 02:29:56 a.m. his location was under Tower at Village Shirshu, Tehsil Bhunter, District Kullu, H.P. and at 10:32:12 a.m. on 13.02.2022, he was in Village Chadyana, Tehsil Sadar, District Mandi, H.P.

15. It is further case of prosecution that on 12.02.2022 from 02:31:03 a.m. up to 10:34:46 a.m. petitioner was in Village Shirshu, District Kullu, H.P. and at 21:53:52 p.m. to 10:41:36 p.m. he was in Village Bradha in District Kullu. At 10:55:24 he was in Village Chadhai in District Kullu, H.P. From 01:52:19 a.m. to 02:29:56 a.m. he was in Village Shirshoo and at that time Govind Thakur was also under the same Tower meaning thereby that they were nearby each other and leading to the inference that at that time they had met each other which was probable time of procuring charas by Govind Thakur from Dabe Ram.

16. It is case of the petitioner that petitioner and Govind Thakur were never together at the same time and petitioner has been falsely implicated, who has no past criminal history and has also not been named in FIR and the calls made by Govind Thakur were for arranging room and he was desiring to stay in the house of the petitioner-Dabe Ram and as Dabe Ram had noticed that both Govind Thakur and his companion girl were under intoxication, therefore, he refused to arrange the room for them or to allow them to stay in his house and in case petitioner-Dabe Ram and Govind Thakur had been together, there was no occasion for petitioner-Dabe Ram to make a call to him and to send messages and further that petitioner-Dabe Ram has joined investigation and is cooperating Investigating Agency and there is no direct or indirect evidence against him.

17. Learned counsel for the petitioner has referred order dated 10.01.2022 passed by Supreme Court in Special Leave to Appeal (Crl.) No.242 of 2022, titled as *State by (NCB) Bengaluru vs. Pallulabid Ahamad Arimutta & another*, wherein taking note of earlier judgment passed by the Supreme Court in *Tofan Singh vs. State of Tamil Nadu, (2021) 4 SCC 1,* Supreme Court has upheld grant of bail to the accused persons, who were arrayed as accused and arrested on the basis of disclosure statement of co-accused only, but without

having any admissible evidence against them except the disclosure statement of co-accused and Call Detail Records (CDRs).

18. By referring the aforesaid judgment in ***Lallulabid Ahamad Arimutta's case,*** it has been submitted on behalf of the petitioner that in present case also petitioner-Dabe Ram has falsely been implicated, only on the basis of statement of co-accused and CDRs and, therefore, in view of pronouncement of the Supreme Court, he deserves to be enlarged on bail.

19. Learned Additional Advocate General has submitted that petitioner has not been implicated only on the basis of disclosure statement of co-accused and CDRs, but for hiding himself immediately after arrest of Govind Thakur and during this period, he kept his mobile phone switched off and CDRs not only establish talks between Govind Thakur and petitioner but also indicate meeting of Govind Thakur and present petitioner at one place during midnight/odd hours, journey of Govind Thakur from Baddi to the petitioner's place and his return journey immediately thereafter from the place of the petitioner to Solan and, therefore, there are material circumstances other than CDRs and disclosure statement of co-accused, indicating involvement of the petitioner.

20. Learned counsel for the petitioner has submitted that cardinal principle of criminal jurisprudence is that 'bail is rule and jail is exception' and keeping in view the right of personal liberty guaranteed under Article 21 of the Constitution of India, coupled with presumption of innocence of an accused, petitioner is entitled for bail.

21. It has been contended by learned Additional Advocate General that in present case amount of Charas recovered is of commercial quantity of 1.260 kgs and for considering the provisions of Section 37 of the NDPS Act and the period of detention of the petitioner, vis-à-vis pace of the trial, it cannot be said that right to personal liberty of the petitioner is being infringed without any reasonable cause. It has been further submitted that the

petitioner has been found involved in commission of offence under the NDPS Act, which is harming not only the individuals but also well being of the society and the nation at large and further that there is a presumption against the accused provided under Sections 35 and 54 of the NDPS Act. Therefore, learned Additional Advocate General has opposed the grant of bail.

22. Without commenting upon merits of the case, but taking into consideration material placed before me and rival contention 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 anticipatory bail.

23. In view of above, the petition is dismissed being devoid of any merit.

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

The petition stands disposed of.

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

Between

DR. AJAY KUMAR GUPTA

.....PETITIONER

(BY SHRI KASHMIR SINGH THAKUR, ADOVCATE)

AND

State of Himachal Pradesh ....RESPONDENT

(BY SHRI HEMANT VAID, ADDITIONAL ADVOCATE GENERAL)

CRIMINAL MISC. PETITION (MAIN)
No.2382 OF 2022
Decided on: 09.12.2022

Code of Criminal Procedure, 1973- Section 438- Pre-arrest Bail- **Prevention of Corruption (Amendment) Act, 1918**- Sections 7 and 8- **Held-** Considering the nature and gravity of the offence and the factors and parameters to be considered at the time of adjudicating an application for anticipatory bail- balancing the personal interest vis-à-vis public interest no case for grant of anticipatory bail is made out- Petition dismissed. (Para 24)

Cases referred:

Mangal Singh Negi v. Central Bureau of Investigation, 2021(2) Shim. LC 860;
Manoranjana Sinh alias Gupta v. Central Bureau of Investigation, (2017) 5 SCC 218 (219);
P. Chidambaram v. Directorate of Enforcement, (2019) 9 SCC 24;

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Petitioner has approached this Court, invoking provisions of Section 438 of the Code of Criminal Procedure (for short 'Cr.P.C.'), seeking anticipatory bail in case FIR No.4 of 2022, dated 22.9.2022, registered in

Police Station State Vigilance and Anti Corruption Bureau, Shimla (for short 'SV&ACB'), under Sections 7 & 8 of the Prevention of Corruption (Amendment) Act, 1918 (for short 'PC Act').

2. Status report stands filed. Record was also made available.

3. Prosecution case is that report of conversation between one Balram and Dr. Ajay Kumar Gupta (petitioner), the then Director of Health Services, Himachal Pradesh, prepared by Inquiry Officer, Deputy Superintendent of Police, SV&ACB, SIU Shimla, was sent to the Government for according necessary permission to register a regular case against Dr. Ajay Kumar Gupta. Vide communication dated 17.9.2022, necessary permission was received from Special Secretary (Personnel) to the Government of Himachal Pradesh and, accordingly, FIR No.4 of 2022 has been registered in Police Station SV&ACB, Shimla.

4. According to Status Report, during investigation of FIR No.4 of 2020, dated 20.5.2020, registered under Sections 7 & 8 of PC Act, in Police Station SV&ACB, Shimla, conversations/call recordings between Mobile Number 9872495807 (saved in the name of Balram) and Dr. Ajay Kumar Gupta, were retrieved by State Forensic Science Laboratory from Mobile Phone of Dr. Ajay Kumar Gupta, among other conversations, which suggested offer and acceptance of bribery/criminal misconduct/misconduct on the part of public servant. Details surfaced from the conversation/ call records/documents indicated that for purchase of equipment/machine by the Health Department of Himachal Pradesh, share/cut-money was offered and received by Dr.Ajay Kumar Gupta and Balram at the rate of `85,000/- per machine and, for five machines, the amount of Bribe was `4,25,000/-, out of which an amount of `18,000/- was to be deducted as expenditure and, in the aforesaid amount, 80% amount was to be given to Dr. Ajay Kumar Gupta and 20% to Balram and, as per conversation, both of them calculated the share/cut-money payable to Dr. Ajay Kumar Gupta as `3,36,000/-, but finally

Dr. Ajay Kumar Gupta demanded `3,40,000/- from Balram by informing Balram that `3,40,000/- be deposited in State Bank of India (SBI) Account, and through Whatsapp dated 17.4.2020, an image of handwritten details of Account maintained in the name of Smt. Renu Bala (sister-in-law of Dr. Ajay Kumar Gupta), in SBI Branch Ambala Cantt, were transmitted by Dr. Ajay Kumar Gupta to Balram.

5. It has been further stated in Status Report that on 9.4.2020, Director of Health Services sanctioned `30,01,600/- in favour of M/s Kroma Systems Company for purchasing five ABG Machines and the same was deposited/transferred in the Account of the Company maintained in ICICI Bank Branch in Sector 45C Burail, Chandigarh. It has further come in evidence that Balram was having Account in the name of NIT Simran Diagnostics, being maintained with Canara Bank, and amounts of `95,000/- and `13,44,452/- were transferred by M/s Kroma Systems Company to M/s NIT Simran Diagnostics, on 15.4.2020. On 17.5.2020, an amount of `3,40,000/- was transferred from Balram's Account to SBI Account being maintained by Mrs. Renu Bala referred supra.

6. It is further stated in the Status Report that in the conversation retrieved from the Mobile Phone of Dr. Ajay Kumar Gupta, there are talks for negotiating the rate of Thermal Scanners and for determining cut-money wherein Balram had been assuring to pay `1,500/- per unit to Dr. Ajay Kumar Gupta.

7. It is also case of the Investigating Agency that in conversation dated 17.4.2020, Dr. Ajay Kumar Gupta had informed Balram about sending Account Number of Renu Bala to Balram through Whatsapp Message, with further advice to fill the Account Number carefully and to make a call immediately after completion of transaction. On 17.4.2020, in another conversation, Balram informed Dr. Ajay Kumar Gupta that he had seen the Whatsapp and will call accordingly.

8. As per Status Report, from the record of SBI, it is substantiated that on 17.4.2020, an amount of `3,40,000/- was transferred to Account of Renu Bala, and it has also transpired from Bank record that Renu Bala had transferred back `1,00,000/- on 11.7.2020, `1,10,000/- on 11.8.2020 to the Account of M/s NIT Simran Diagnostics.

9. It has been pointed out on behalf of respondent that the aforesaid amount was transferred after registration of earlier case, i.e. FIR No.4 of 2020, dated 20.5.2020, registered against Dr. Ajay Kumar Gupta (petitioner) who was Director of Health Services at that time.

10. It has been further stated in the Status Report that an application has been filed by Investigating Agency for taking voice sample of Dr. Ajay Kumar Gupta, but he is resisting to give voice sample by objecting the contents of application. The said application is pending before Special Judge (Forest), Shimla.

11. It has been stated in the Status Report that during surge of COVID-19 pandemic cases in the country, large number of people were hospitalized for oxygen treatment in Emergency and there was deficiency of ABG Machines in the hospitals and, therefore, the Health Department of Himachal Pradesh purchased the ABG Machines to address the pandemic. It has been further stated that in such crisis, it was expected of the public servants at higher level, like Dr. Ajay Kumar Gupta, to be more sincere to maintain transparency and fairness in dealing with purchase of machines during Pandemic, but Dr. Ajay Kumar Gupta failed to do so, and it is evident from material on record that he demanded and accepted bribe for facilitating a firm.

12. Learned counsel for the petitioner has submitted that Renu Bala is God-sister of Balram and transfer of money by Balram to Renu Bala was on request of Renu Bala as she was in need of money and lateron she refunded the same as has also come on record in the Status Report. The said amount

or Account has nothing to do with the petitioner. It has been further submitted that Mobile Phone of petitioner has already been sent to SFSL Junga, in FIR No.4 of 2020, about one year ago and there was no conversation between Balram and the petitioner and further that voice sample of the petitioner is already with the police and available in SFSL Junga and, therefore, there is no need to take voice samples. It has also been stated that Investigating Agency has no material to substantiate the link between Dr. Ajay Kumar Gupta and Balram.

13. It has been submitted on behalf of the petitioner that entire record of the Department is with the police and the petitioner has retired in the year 2020 and, therefore, he has no control over the documents/record and there is no possibility of tampering with the evidence or record by him. Further that, Bank record is with the Bank upon which petitioner has no control.

14. It has further been submitted on behalf of the petitioner that nothing has been received by the petitioner from the supplier-Company or Balram and further that petitioner has joined the investigation and is rendering full cooperation to the Investigating Agency and he is ready to give voice sample also.

15. It has been further submitted that custodial interrogation of the petitioner is not required as entire case of prosecution is based upon documentary and other evidence of such nature that petitioner would not be able to tamper it, and further that petitioner is a Senior Citizen and present case has been registered against him under pressure.

16. With aforesaid submissions, learned counsel has prayed for enlargement of the petitioner on anticipatory bail.

17. Learned counsel for the petitioner has placed reliance on a judgment passed by the Supreme Court in ***Manoranjana Sinh alias Gupta***

***v. Central Bureau of Investigation*, (2017) 5 SCC 218 (219),** to substantiate the claim to enlarge the petitioner on bail:

> "16. This Court in *Sanjay Chandra v. Central Bureau of Investigation*, (2012) 1 SCC 40, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person would stand his trial when called upon and that the courts owe more than verbal respect to the principle that punishment begins after conviction and that every man is deemed to be innocent until duly tried and found guilty. It was underlined that the object of bail is neither punitive nor preventive. This Court sounded a caveat that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of a conduct whether an accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson. It was enunciated that since the jurisdiction to grant bail to an accused pending trial or in appeal against conviction is discretionary in nature, it has to be exercised with care and caution by balancing the valuable right of liberty of an individual and the interest of the society in general. It was elucidated that the seriousness of the charge, is no doubt one of the relevant considerations while examining the application of bail but it was not only the test or the factor and that grant or denial of such privilege, is regulated to a large extent by the facts and circumstances of each particular case. That detention in custody of under-trial prisoners for an indefinite period would amount to violation of Article 21 of the Constitution was highlighted."

18. Learned Additional Advocate General has submitted that claim of the petitioner that Renu Bala is God-sister of Balram is falsified from the fact that the Account Number of Renu Bala was sent by Dr. Ajay Kumar Gupta to Balram by sending an image of the handwritten document, through Whatsapp Messaging, and in case Renu Bala was God-sister of Balram, there was no occasion for Balram to ask or to have Account Number of his God-sister from Dr. Ajay Kumar Gupta. He has further submitted that it is an admitted fact

that Renu Bala is sister-in-law of Dr. Ajay Kumar Gupta. It has been further submitted that conversation between Balram and Dr. Ajay Kumar Gupta was for `3,40,000/- as cut-money and deposit of the same amount in the Account Number supplied by Dr. Ajay Kumar Gupta substantiates relation with the conversation and the transaction. It has been further submitted that though it is claimed on behalf of petitioner that he is ready to give voice sample, but it is a fact that despite filing of an application by the Investigating Agency, petitioner has not given any voice sample.

19. It has further been submitted that during COVID-19 crisis, the very existence of human race was at stake and, therefore, it was expected from everyone, particularly responsible and higher Officers that they shall act with fairness, honesty and transparently in purchasing life saving equipments and reposing such faith on higher Officers, the Government also gave free hand to purchase medical equipments for serving the public at large but Dr. Ajay Kumar Gupta has been found involved in commission of crime which, in the facts and the circumstances of the present case, is amounting to commission of heinous crime.

20. It has also been submitted by the learned Additional Advocate General that investigation is at initial stage and keeping in view the nature of offence committed by the petitioner and impact of grant of bail, in such situation, on the society, petitioner is not entitled for anticipatory bail.

21. It has been further stated by learned Additional Advocate General that judgment in ***Manoranjana Sinh alias Gupta's*** case supra is related to an application filed for regular bail, under Section 439 Cr.P.C., and the parameters for consideration in both petitions, i.e. Section 438 Cr.P.C. and Section 439 Cr.P.C., are substantially different and, therefore, in view of the material placed on record, as explained in the Status Report, he has prayed for dismissal of the bail application.

22. In ***P. Chidambaram v. Directorate of Enforcement***, **(2019) 9 SCC 24,** the Supreme Court has observed as under:

> **"*Grant of anticipatory bail in exceptional cases***
>
> **69.** Ordinarily, arrest is a part of procedure of the investigation to secure not only the presence of the accused but several other purposes. Power under Section 438 CrPC is an extraordinary power and the same has to be exercised sparingly. The privilege of the pre-arrest bail should be granted only in exceptional cases. The judicial discretion conferred upon the court has to be properly exercised after application of mind as to the nature and gravity of the accusation; possibility of applicant fleeing justice and other factors to decide whether it is a fit case for grant of anticipatory bail. Grant of anticipatory bail to some extent interferes in the sphere of investigation of an offence and hence, the court must be circumspect while exercising such power for grant of anticipatory bail. Anticipatory bail is not to be granted as a matter of rule and it has to be granted only when the court is convinced that exceptional circumstances exist to resort to that extraordinary remedy.
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> **70.** On behalf of the appellant, much arguments were advanced contending that anticipatory bail is a facet of Article 21 of the Constitution of India. It was contended that unless custodial interrogation is warranted, in the facts and circumstances of the case, denial of anticipatory bail would amount to denial of the right conferred upon the appellant under Article 21 of the Constitution of India.
>
> **71.** Article 21 of the Constitution of India states that no person shall be deprived of his life or personal liberty except according to procedure prescribed by law. However, the power conferred by Article 21 of the Constitution of India is not unfettered and is qualified by the later part of the Article i.e. "....except according to a procedure prescribed by law." In *State of M.P. and another v. Ram Kishna Balothia*, (1995) 3 SCC 221, the Supreme Court held that the right of anticipatory bail is not a part of Article 21 of the Constitution of India and held as under: (SCC p.226, para 7)
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> > "7. .....We find it difficult to accept the contention that Section 438 of the Code of Criminal Procedure is an

integral part of Article 21. In the first place, there was no provision similar to Section 438 in the old Criminal Procedure Code. The Law Commission in its 41st Report recommended introduction of a provision for grant of anticipatory bail. It observed:

'We agree that this would be a useful advantage. Though we must add that it is in very exceptional cases that such power should be exercised.'

In the light of this recommendation, Section 438 was incorporated, for the first time, in the Criminal Procedure Code of 1973. Looking to the cautious recommendation of the Law Commission, the power to grant anticipatory bail is conferred only on a Court of Session or the High Court. *Also, anticipatory bail cannot be granted as a matter of right. It is essentially a statutory right conferred long after the coming into force of the Constitution. It cannot be considered as an essential ingredient of Article 21 of the Constitution. And its non-application to a certain special category of offences cannot be considered as violative of Article 21*." (emphasis supplied)

72. We are conscious of the fact that the legislative intent behind the introduction of Section 438 Cr.P.C. is to safeguard the individual's personal liberty and to protect him from the possibility of being humiliated and from being subjected to unnecessary police custody. However, the court must also keep in view that a criminal offence is not just an offence against an individual, rather the larger societal interest is at stake. Therefore, a delicate balance is required to be established between the two rights - safeguarding the personal liberty of an individual and the societal interest. It cannot be said that refusal to grant anticipatory bail would amount to denial of the rights conferred upon the appellant under Article 21 of the Constitution of India.

73. The learned Solicitor General has submitted that depending upon the facts of each case, it is for the investigating agency to confront the accused with the material, only when the accused is in custody. It was submitted that the statutory right under Section 19 of PMLA has an in-built safeguard against arbitrary exercise of power of arrest by the investigating officer.

Submitting that custodial interrogation is a recognised mode of interrogation which is not only permissible but has been held to be more effective, the learned Solicitor General placed reliance upon *State v. Anil Sharma*, (1997) 7 SCC 187; *Sudhir v. State of Maharashtra*, (2016) 1 SCC 146; and *Directorate of Enforcement v. Hassan Ali Khan*, (2011) 12 SCC 684.

74. Ordinarily, arrest is a part of the process of the investigation intended to secure several purposes. There may be circumstances in which the accused may provide information leading to discovery of material facts and relevant information. Grant of anticipatory bail may hamper the investigation. Pre-arrest bail is to strike a balance between the individual's right to personal freedom and the right of the investigating agency to interrogate the accused as to the material so far collected and to collect more information which may lead to recovery of relevant information. In *State v. Anil Sharma*, (1997) 7 SCC 187, the Supreme Court held as under: (SCC p.189, para 6)

> "6. We find force in the submission of the CBI that custodial interrogation is qualitatively more elicitation-oriented than questioning a suspect who is well ensconced with a favourable order under Section 438 of the Code. In a case like this effective interrogation of a suspected person is of tremendous advantage in disinterring many useful informations and also materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third-degree methods need not be countenanced, for, such an argument can be advanced by all accused in all criminal cases. The Court has to presume that responsible police officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders."

75. Observing that the arrest is a part of the investigation intended to secure several purposes, in *Adri Dharan Das v. State*

of W.B., (2005) 4 SCC 303, it was held as under: (SCC p.313, para 19)

> "19. Ordinarily, arrest is a part of the process of investigation intended to secure several purposes. The accused may have to be questioned in detail regarding various facets of motive, preparation, commission and aftermath of the crime and the connection of other persons, if any, in the crime. There may be circumstances in which the accused may provide information leading to discovery of material facts. It may be necessary to curtail his freedom in order to enable the investigation to proceed without hindrance and to protect witnesses and persons connected with the victim of the crime, to prevent his disappearance, to maintain law and order in the locality. For these or other reasons, arrest may become an inevitable part of the process of investigation. The legality of the proposed arrest cannot be gone into in an application under Section 438 of the Code. The role of the investigator is well defined and the jurisdictional scope of interference by the court in the process of investigation is limited. The court ordinarily will not interfere with the investigation of a crime or with the arrest of the accused in a cognizable offence. An interim order restraining arrest, if passed while dealing with an application under Section 438 of the Code will amount to interference in the investigation, which cannot, at any rate, be done under Section 438 of the Code."

76. In *Siddharam Satlingappa Mhetre v. State of Maharashtra*, (2011) 1 SCC 694, the Supreme Court laid down the factors and parameters to be considered while dealing with anticipatory bail. It was held that the nature and the gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made and that the court must evaluate the available material against the accused very carefully. It was also held that the court should also consider whether the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.

77. After referring to *Siddharam Satlingappa Mhetre* and other judgments and observing that anticipatory bail can be granted only in exceptional circumstances, in *Jai Prakash Singh v. State*

of Bihar, (2012) 4 SCC 379, the Supreme Court held as under: (SCC p.386, para 19)

> "19. Parameters for grant of anticipatory bail in a serious offence are required to be satisfied and further while granting such relief, the court must record the reasons therefor. Anticipatory bail can be granted only in exceptional circumstances where the court is prima facie of the view that the applicant has falsely been enroped in the crime and would not misuse his liberty. (See *D.K. Ganesh Babu v. P.T. Manokaran*, (2007) 4 SCC 434, *State of Maharashtra v. Mohd. Sajid Husain Mohd. S. Husain*, (2008) 1 SCC 213 and *Union of India v. Padam Narain Aggarwal*, (2008) 13 SCC 305.)"**"**

Economic offences

78. Power under Section 438 Cr.P.C. being an extraordinary remedy, has to be exercised sparingly; more so, in cases of economic offences. Economic offences stand as a different class as they affect the economic fabric of the society. In *Directorate of Enforcement v. Ashok Kumar Jain*, (1998) 2 SCC 105, it was held that in economic offences, the accused is not entitled to anticipatory bail.

79. The learned Solicitor General submitted that the "Scheduled offence" and "offence of money laundering" are independent of each other and PMLA being a special enactment applicable to the offence of money laundering is not a fit case for grant of anticipatory bail. The learned Solicitor General submitted that money laundering being an economic offence committed with much planning and deliberate design poses a serious threat to the nation's economy and financial integrity and in order to unearth the laundering and trail of money, custodial interrogation of the appellant is necessary.

80. Observing that economic offence is committed with deliberate design with an eye on personal profit regardless to the consequence to the community, in *State of Gujarat v. Mohanlal Jitamalji Porwal and others*, (1987) 2 SCC 364, it was held as under:-

> "5. .....The entire community is aggrieved if the economic offenders who ruin the economy of the State are not brought to book. A murder may be committed in the heat of moment upon passions being aroused. An economic offence is committed with cool calculation and deliberate design with an eye on personal profit regardless of the consequence to the community. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the community in the system to administer justice in an even- handed manner without fear of criticism from the quarters which view white collar crimes with a permissive eye unmindful of the damage done to the national economy and national interest....."

81. Observing that economic offences constitute a class apart and need to be visited with different approach in the matter of bail, in *Y.S. Jagan Mohan Reddy v. CBI*, (2013) 7 SCC 439, the Supreme Court held as under:-

> "34. *Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offences having deep-rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country*.
>
> 35. While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations."

82. Referring to *Dukhishyam Benupani, Assistant Director, Enforcement Directorate (FERA) v. Arun Kumar Bajoria*, (1998) 1 SCC 52, in *Enforcement Officer, Ted, Bombay v. Bher Chand Tikaji Bora and others*, (1999) 5 SCC 720, while hearing an appeal by the Enforcement Directorate against the order of the

> Single Judge of the Bombay High Court granting anticipatory bail to the respondent thereon, the Supreme Court set aside the order of the Single Judge granting anticipatory bail.
>
> 83. Grant of anticipatory bail at the stage of investigation may frustrate the investigating agency in interrogating the accused and in collecting the useful information and also the materials which might have been concealed. Success in such interrogation would elude if the accused knows that he is protected by the order of the court. Grant of anticipatory bail, particularly in economic offences would definitely hamper the effective investigation. Having regard to the materials said to have been collected by the respondent- Enforcement Directorate and considering the stage of the investigation, we are of the view that it is not a fit case to grant anticipatory bail."

23. In ***Mangal Singh Negi v. Central Bureau of Investigation,*** reported in **2021(2) Shim. LC 860 : 2021(2) Him L.R. (HC) 917,** this Court observed as under:

> "19. Provisions related to information to the Police and their powers to investigate have been incorporated in Sections 154 to 176 contained in Chapter-XII of the Code of Criminal Procedure ('Cr.P.C.' for short).
>
> 20. Section 156 Cr.P.C. empowers Police Officer to investigate in cognizable offences without order of the Magistrate and Section 157 prescribes procedure for investigation, which also provides that when an Officer Incharge of a Police Station has reason to suspect the commission of an offence, which he is empowered to investigate under Section 156, he, after sending a report to the Magistrate, shall proceed in person or shall depute one of his subordinate Officers as prescribed in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender.
>
> 21. Chapter V of the Cr.P.C. deals with provisions related to arrest of persons, wherein Section 41 also, inter alia, provides that any Police Officer may, without an order from Magistrate, and without a warrant, arrest any person against whom reasonable complaint has been made or credible information has

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

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

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

24. Initially, provision for granting Anticipatory Bail by the court was not in the Cr.P.C., but on the recommendation of the Law commission of India in its 41st Report, the Commission had pointed out necessity for introducing a set provision in the Cr.P.C. enabling the High Court and Court of Session to grant

Anticipatory Bail, mainly because sometimes influential persons try to implicate their rivals in false cases for the purpose of disgracing them or for other purposes by getting them detained in jail for some days. It was also observed by the Commission that with the accentuation of political rivalry, this tendency was showing signs and steady increase and further that where there are reasonable grounds for holding that the person accused of an offence is not likely to abscond or otherwise misuse his liberty, while on bail, there seems no justification to require him to submit to custody, remain in prison for some days and then apply for bail. On the basis of these recommendations, provision of Section 438 Cr.P.C. was included in Cr.P.C. as an antidote for preventing arrest and detention in false case. Therefore, interpretation of Section 438 Cr.P.C., in larger public interest, has been done by the Courts by reading it with Article 21 of the Constitution of India to keep arbitrary and unreasonable limitations on personal liberty at bay. The essence of mandate of Article 21 of the Constitution of India is the basic concept of Section 438 Cr.P.C.

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

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

and also in other pronouncements referred by learned counsel for CBI.

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

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

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

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

24. Without commenting upon the merits of the rival contentions, but taking into consideration nature and gravity of offence, initial stage of investigation, and the factors and parameters to be considered at the time of adjudicating an application for anticipatory bail, as propounded by the Courts, including the Supreme Court, balancing the personal interest vis-à-vis public interest, I am of the opinion that no case for grant of anticipatory bail is made out.

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

Hence, in view of the above discussion, the bail petition is dismissed and disposed of.

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

Jeet Ram ....Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

For the petitioner :Mr. Rakesh Kumar Chaudhary, Advocate.
For the respondent :Mr. Narender Thakur, Deputy Advocate General.

Cr.MP(M) No. 2657 of 2022
Reserved on: 23.12.2022
Decided on : 26.12.2022

Code of Criminal Procedure, 1973- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances Act, 1985-** Sections 20, 29 and 37- Recovered 3 Kg 382 Grams of Cannabis (Charas) from the personal search of the person during routine checking in a bus, who had purchased the contraband from the petitioner- Regular telephonic conversation between the petitioner and the said person- **Held-** Prosecution witnesses are still being examined while the petitioner is in custody- Constitutional guarantee of expeditious trial cannot be diluted by applying the rigors of Section 37 NDPS- Precedent to grant bail to the accused in ND&PS Act, on the ground of prolonged pre-trial incarceration has been followed as precedence by Coordinate bench of this court- Bail petition allowed. (Para 18)

Cases referred:

Abdul Majeed Lone Vs. Union Territory of Jammu and Kashmir(Special Leave to Appeal (Cr.L.) No. 3961 of 2022;

Chitta Biswas @ Subhas Vs. The State of West Bengal, (Criminal Appeal No.(s) 245 of 2020;

Gopal Krishna Patra @ Gopalrusma Vs. Union of India (Cr. Appeal No. 1169 of 2022),;

Mahmood Kurdeya Vs. Narcotic Control Bureau (2022) 3 RCR (Criminal) 906;

Nitish Adhikary @ Bapan Vs.The State of West Bengal (Special Leave to Appeal (Cr.L.) No (s). 5769 of 2022;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

Petitioner is an accused in case FIR No. 204/2019, dated 29.09.2019, registered under Sections 20 & 29 of Narcotic Drugs and Psychotropic Substances, Act (for short 'ND&PS' Act), 1985, at Police Station, Bhuntar, District Kullu, H.P.. Petitioner is in custody since 06.10.2019.

2. Petitioner is facing trial for offences under Section 20 of ND&PS Act in pursuance to challan filed by respondent. The allegation against petitioner is that 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, H.P. 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 was 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.

3. Previously also petitioner approached this Court more than once for grant of bail, but every time his plea was rejected primarily on the grounds that the rigors of Section 37 of ND&PS Act were applicable and petitioner was involved in another case under the ND&PS Act. The last such order was passed on 09.05.2022 by this Court in Cr.MP(M) No. 811/2022. Though, the present one is another successive bail application, yet the same cannot be rejected on the basis of previously passed orders as it is being considered on the ground of violation of constitutional guarantee available to the petitioner with respect to speedy trial.

4. Petitioner has now prayed for grant of bail on the ground that his constitutional right of expeditious disposal of trial has been infringed. As

per petitioner, he is in custody for more than three years now and the trial has not concluded, rather, it is progressing at snail's pace.

5. It has been disclosed on behalf of the petitioner that the prosecution has cited twenty witnesses in support of its case. Twelve witnesses have already been examined. Two witnesses have been given up. Six witnesses remain to be examined.

6. Learned Deputy Advocate General has opposed the prayer of the petitioner, on the ground that Section 37 of ND&PS Act, has application in the facts of the case and merely, on the ground of delay in conclusion of trial, petitioner cannot be released on bail.

7. I have heard learned counsel for the petitioner as well as learned Deputy Advocate General and have also gone through the status report.

8. The fetters placed by Section 37 of ND&PS Act, evidently have been instrumental in denial of right of bail to the petitioner in the instant case till date. The question that arises for consideration is, can the provisions of Section 37 of the Act, be construed to have same efficacy, throughout the pendency of trial, notwithstanding, the period of custody of the accused, especially, when it is weighed against his fundamental right to have expeditious disposal of trial?

9. As is suggested by the contents of status prosecution witnesses are still being examined despite the fact that petitioner is in custody since 06.10.2019. In the considered view of this Court, the Constitutional guarantee of expeditious trial cannot be diluted by applying the rigors of Section 37 of ND&PS Act in perpetuity.

10. Recently, in a number of cases, under-trials for offences involving commercial quantity of contraband under ND &PS Act have been allowed the liberty of bail by Hon'ble Supreme Court only on the ground that they have been incarcerated for prolonged durations.

11. In ***Mahmood Kurdeya*** Vs. ***Narcotic Control Bureau (2022) 3 RCR (Criminal) 906***, Hon'ble Supreme Court has held as under:-

> *"6.What persuades us to pass an order in favour of the appellant is the fact that despite the rigors of Section 37 of the said Act, in the present case though charge sheet was filed on 23.09.2018 even the charges have not been framed nor trial has commenced."*

12. In ***Nitish Adhikary @ Bapan*** Vs.***The State of West Bengal (Special Leave to Appeal (Cr.L.) No (s). 5769 of 2022,*** decided on 01.08.2022, Hon'ble Supreme Court has held as under:-

> *"During the course of the hearing, we are informed that the petitioner has undergone custody for a period of 01 year and 07 months as on 09.06.2022. The trial is at a preliminary stage, as only one witness has been examined. The petitioner does not have any criminal antecedents.*
>
> *Taking into consideration the period of sentence undergone by the petitioner and all the attending circumstances but without expressing any views in the merits of the case, we are inclined to grant bail to the petitioner."*

13. In ***Gopal Krishna Patra @ Gopalrusma*** Vs. ***Union of India (Cr. Appeal No. 1169 of 2022),*** decided on 05.08.2022,Hon'ble Supreme Court has held as under:-

> *" The appellant is in custody since 18.06.2020 in connection with crime registered as NCB Crime No. 02/2020 in respect of offences punishable under Sections 8,20,27-AA, 28 read with 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985*
>
> *The application seeking relief of bail having been rejected, the instant appeal has been filed.*
>
> *We have heard Mr. Ashok Kumar Panda, learned Senior Advocate in support of the appeal and Mr. Sanjay Jain, learned Additional Solicitor General for the respondent.*

> *Considering the fact and circumstances on record and the length of custody undergone by the appellant, in our view the case for bail is made out."*

14. In ***Chitta Biswas @ Subhas*** *Vs.* ***The State of West Bengal, (Criminal Appeal No.(s) 245 of 2020,*** decided on 07.02.2020, it has been held as under:-

> *"The appellant was arrested on 21.07.2018 and continues to be custody. It appears that out of 10 witnesses cited to be examined in support of the case of prosecution four witnesses have already been examined in the trial.*
>
> *Without expressing any opinion on the merits or demerits of the rival submissions and considering the facts and circumstances on record, in our view, case for bail is made out."*

15. In ***Abdul Majeed Lone*** Vs. ***Union Territory of Jammu and Kashmir(Special Leave to Appeal (Cr.L.) No. 3961 of 2022***, decided on 01.08.2022, it has been held as under:-

> *"Having regard to the fact that the petitioner is reported to be in jail since 1-3-2020 and has suffered incarceration for over 2 years and 5 months and there being no likelihood of completion of trial in the near future, which fact cannot be controverted by the learned counsel appearing for the UT, we are inclined to enlarge the petitioner on bail.".*

16. In addition, different Co-ordinate Benches of this Court have also followed precedent to grant bail to the accused in ND&PS Act, on the ground of prolonged pre-trial incarceration. Reference can be made to order dated 28.07.2022, passed in Cr.MP(M) No. 1255 of 2022, order dated 01.12.2022, passed in Cr.MP(M) No. 2271 of 2022 and order dated 04.11.2022, passed in Cr.MP(M) No. 2273 of 2022.

17. Reverting to the facts of the case, the petitioner is in custody since 06.10.2019 and the facts suggest that the trial is not likely to be

concluded in near future. There is nothing on record to suggest that the delay in trial is attributable to the petitioner.

18. Keeping in view the facts of the case and also the above noted precedents, the bail petition is allowed and petitioner is ordered to be released on bail in case FIR No. 204/2019, dated 29.09.2019, registered under Sections 20 and 29 of ND&PS Act,1985, at Police Station, Bhuntar, District Kullu, H.P.. on his furnishing personal bond in the sum of Rs. 1,00,000/- 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.

19. 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 VIVEK SINGH THAKUR, J.

State of Himachal Pradesh ...Petitioner.

Versus

Deepak Rai ..Respondent.

For the Petitioner: Mr.Hemant Vaid, Additional Advocate General.
For the Respondent: Mr.N.S. Chandel, Senior Advocate, alongwith Mr.Vinod Gupta, Advocate.

Cr.MMO No.362 of 2020
Decided on: 27.12.2022

Code of Criminal Procedure, 1973- Sections 91, 482- Inherent power- **Narcotic Drugs and Psychotropic Substances Act, 1985-** Sections 18 and 20- Application by petitioner for directing the office of Superintendent of Police (Leave Reserved) to preserve CCTV footages of locations mentioned in application and Call Detail Records (CDRs) with locations of mobile phone numbers for the period detailed in the application through concerned service provider- Application allowed by Ld. Special Judge- **Held-** Accused is required to be provided fair opportunity to prove his or her innocence- application under Section 91 Cr.P.C. can be made at any stage of the trial- apparent that documents/material asked to be preserved and summoned in the Court as "desirable and necessary" for the purpose of fair and transparent trial- Order upheld- Petition dismissed. (Paras 6, 8)

Cases referred:

Ishwar Dass vs. The State of Himachal Pradesh, ILR 2018 (II) HP 530;
State of Himachal Pradesh vs. Manohar Lal, ILR 2019 (IV) HP 1263/2020 (1) Him.L.R (HC) 468;
State of Orissa vs. Debendra Nath Padhi, (2005) 1 SCC 568;
V.K. Sasujaka vs. State Rep. by Superintendent, (2012) 9 SCC 771;

The following judgment of the Court was delivered:

Vivek Singh Thakur, J (oral)

25. By way of instant petition, petitioner-State has approached this Court, assailing order dated 05.08.2020, passed by Special Judge, Nalagarh, District Solan, H.P., in Crl.Misc. Application No.120-NL/4 of 2020, titled as *Deepak Rai vs. State of H.P. & another,* filed by accused Deepak Rai under Section 91 of the Code of Criminal Procedure (hereinafter referred to as 'Cr.PC') in the trial pending adjudication in FIR No.230 of 2020 dated 23.07.2020 registered under Sections 18 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act'), in Police Station Nalagarh, Police District Baddi, H.P., for directing the office of Superintendent of Police (Leave Reserved) to preserve CCTV footages of locations mentioned in application and Call Detail Records (CDRs) alongwith locations of mobile phone numbers and to preserve CCTV footage of places, mentioned in the application for the period detailed in the application, and to produce the same in the Court.

26. I have heard learned Additional Advocate General as well as learned arguing counsel for the respondent and have also gone through impugned order as well as record produced during hearing of the petition.

27. Special Judge Nalagarh has directed the Superintendent of Police, Police District Baddi, to get preserved CCTV footage of from CCTV cameras installed on places mentioned in the application filed by Deepak Rai, through concerned service providers and also to furnish CDRs with location of mobile number detailed in the application through concerned service provider.

28. It is settled that accused is required to be afforded fair opportunity to prove his or her innocence and application under Section 91 Cr.P.C. can be made at any stage of the trial and scope of Section 91 Cr.P.C. cannot be restricted only to documents on which prosecution relies and filing of this application cannot be restricted to the stage contemplated in Section 233 and 243 of Cr.P.C., but this Section empowers the Court to ensure production of any document or other thing "necessary or desirable" for the

purpose of any investigation, inquiry, trial or other proceedings under the Code by issuing summon or written order to those in possession of such materials.

29. Keeping in view the defence taken by accused persons in the main case, it is apparent that documents/material asked to be preserved and summoned in the Court is "desirable and necessary" for the purpose of fair and transparent trial.

30. Impugned order is in consonance with ratio of pronouncements of the Supreme Court including ***V.K. Sasujaka vs. State Rep. by Superintendent, (2012) 9 SCC 771;*** and ***State of Orissa vs. Debendra Nath Padhi, (2005) 1 SCC 568,*** and pronouncements of this High Court in ***State of Himachal Pradesh vs. Manohar Lal, ILR 2019 (IV) HP 1263/2020 (1) Him.L.R (HC) 468; Ishwar Dass vs. The State of Himachal Pradesh, ILR 2018 (II) HP 530,*** following the judgments passed by the Supreme Court.

31. Therefore, I do not find any illegality, irregularity or perversity in the order passed by the Special judge Nalagarh, District Solan, H.P., directing the State through Superintendent of Police, Police District Baddi, to preserve the record as detailed in the application filed under Section 91 Cr.P.C. by Deepak Rai.

32. In view of above, present petition is dismissed being devoid of merit, so also pending application(s), if any.

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

Mukesh Kumar .....Appellant

Versus

State of H.P. ...Respondent

For the appellant: Mr. Jagan Nath, Advocate.
For the respondents: Mr. Ajay Vaidya, Sr. Addl. A.G with Mr. Vinod Thakur, Addl. A.G., Mr. Bhupinder Thakur, Dy. A.G and Mr. Rajat Chauhan, Law Officer.

Cr. Appeal No. 321 of 2021
Reserved on: 03.11.2022
Decided on: 27.12. 2022

Code of Criminal Procedure, 1973- Section 374 - **Indian Penal Code, 1860-** Section 376 - **Protection of Children from Sexual Offences Act, 2012-** Section 4- Judgment of conviction passed by Learned Special Judge Fast Track Court- **Held-** The prosecution has to prove the case against the accused beyond any shadow of doubt- No conviction can be based merely on the basis of Section 29 of the POCSO Act- Conviction set aside- Appeal Allowed. (Paras 65, 66)

Cases referred:

Anil alias Anthony Arikswamy Joseph vs. State of Maharashtra (2014) 4 SCC 69;

Manoj and others vs. State of Madhya Pradesh 2022(9);

Mukesh and another vs. State (NCT of Delhi) and others, (2017) 6 SCC 1;

Pattu Rajan vs. State of Tamilnadu (2019) 4 SCC 771;

The following judgment of the Court was delivered:

Virender Singh, Judge

Appellant Mukesh Kumar has filed the present appeal under Section 374 of the Code of Criminal Procedure against the judgment of

conviction/order of sentence dated 18.10.2021 passed by the learned Special Judge, Fast Track Court (POCSO), Mandi, District Mandi, H.P. (hereinafter referred to as the 'learned trial Court').

2. By way of the judgment of conviction and order of sentence, as referred to hereinabove, the learned trial Court has convicted the appellant (hereinafter referred to as the 'accused') for the commission of offence punishable under Section 376 of the Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the 'POCSO Act') and sentenced him to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.5,000/- and in default of payment of fine, to further undergo rigorous imprisonment for six months under Section 376 IPC and imprisonment for seven years and to pay a fine of Rs.5,000/- and in default of payment of fine to further undergo imprisonment for six months under Section 4 of the POCSO Act. The learned trial Court has also ordered that both the sentences shall run concurrently.

3. Brief facts, leadings to the filing of the present appeal, before this Court, may be summed up as under:-

On 25.02.2015, the child victim along-with her parents appeared before the police and moved an application disclosing therein that she is undergoing training of Computer Application, in multimedia institution, situated near school at place 'X'. On 23.02.2015, according to her version, as contained in the application, as usual, she was on her way to the institute. Since she was late, as such, she could not board the bus and was on the way to the institute on foot. In the meanwhile, accused, who is previously known to child victim, met her and offered her to give lift. Firstly, child victim has shown her reluctance but, later on, she took lift from the accused. The accused, instead of moving straightaway towards the institute allegedly took her to a hotel, on the pretext of having some refreshment. The accused took her to a hotel at Barmana, where, the accused had offered a drink to her. On

the next day, at about 6.00 a.m. when, the child victim regained her consciousness, then, she found herself and the accused, in an objectionable condition. According to her, the said room was in fact, at control gate Sundernagar. Thereafter, at the instance of the accused, the child victim had worn her clothes. At about 7.15 a.m. the uncle of the child victim found her and thereafter, the child victim had gone to her house. On 24.02.2015, on the repeated insistence of her parents, the child victim had narrated the entire incident to them.

4. On the basis of above facts, the child victim had prayed to the police to take action against the accused.

5. Upon this, the police machinery swung into motion and the FIR under Sections 363, 328, 376 IPC read with Section 4 of the POCSO Act has been registered.

6. The child victim was medico legally examined at Civil Hospital and the physical evidence was collected and preserved by the doctor.

7. The accused was arrested on 25.02.2015 at about 7.30 p.m. He was also medico legally examined. During the investigation, the accused identified the room, where, he had done the act, which has been alleged against him by the child victim in the complaint to the police.

8. After the completion of investigation and after receiving the report from the FSL, the Police has filed the challan under Section 363, 376, 328 IPC read with Section 4 of the POCSO Act against the accused.

9. During the investigation, the blood samples of child victim and accused for DNA profiling were also collected by the doctor concerned and the same were also sent to FSL for DNA profiling. After receiving the report, the police filed the supplementary report placing on record the report of FSL.

10. After complying with the provisions of Section 207 Cr.P.C, the learned trial Court found a *prima-facie* case against the accused for the

commission of the offences punishable under Section 363, 328, 376 IPC read with Section 4 of the POCSO Act.

11. Consequently, the accused has been charge sheeted accordingly and the charges, so framed, were put to the accused. He has pleaded not guilty and claimed to be tried.

12. Since, the accused has not pleaded guilty, as such, the prosecution has been directed to adduce evidence to substantiate the charges framed against the accused.

13. Consequently, the prosecution has examined as many as 22 witnesses.

14. After the closure of the prosecution evidence, the entire incriminating evidence, appearing against the accused, was put to him, in his statement, recorded under Section 313 Cr.P.C.

15. The accused has denied the entire prosecution case, by taking the simplictor defence of innocence and false implication.

16. However, the accused has not opted to lead any evidence in defence.

17. Thereafter, the learned trial Court, after hearing the learned Public Prosecutor and the learned defence counsel has convicted the accused, for the commission of offences punishable under Section 376 IPC and under Section 4 of the POCSO Act and sentenced him, as referred to hereinabove.

18. Feeling aggrieved and dissatisfied with the impugned judgment of conviction and order of sentence, the accused has preferred the present appeal before this Court, assailing the judgment of conviction and order of sentence on the ground that the learned trial Court has not considered the fact that the prosecution has miserably failed to prove the case against the accused beyond any shadow of doubt.

19. Findings have been assailed on the ground that there is no direct evidence against the accused as the star witnesses of the prosecution i.e. the

child victim has not supported the case of the prosecution and even her parents had also not supported the case of the prosecution. The prosecution story has further been assailed on the ground that it has been proved, in this case, that the child victim was more than 18 years of age, as admitted by the child victim herself in her deposition recorded in the Court.

20. On the basis of the above grounds, Mr. Jagan Nath, learned counsel appearing for the accused has prayed that the appeal may kindly be accepted by acquitting the accused from the offences, for which, he has been convicted, in this case, by the learned trial Court.

21. Per contra, Mr. Ajay Vaidya, learned Senior Additional Advocate General assisted by Mr. Vinod Thakur, learned Additional Advocate General has opposed the prayer, so made by the learned counsel for the appellant, on the ground that the learned trial Court has rightly considered the evidence, in its right perspective and the judgment of conviction and order of sentence, is based upon the positive evidence adduced by the prosecution before the learned trial Court. Hence, a prayer has been made to dismiss the appeal.

22. In order to decide the matter, it would be just and appropriate for this Court to discuss the evidence adduced by the prosecution to prove the charges against the accused.

23. PW-1 Kusum Lata is the Headmistress of the school and issued the school leaving certificate of the child victim Ext.PW-1/A. The child victim was admitted in the school on 05.04.2012, however, according to her cross-examination, there is no entry in the register about the fact that when the child victim was admitted in the school. She has further deposed that the records submitted by her, in the Court, have been verified with the admission form.

24. PW-2 Naresh Kumar is the Panchayat Secretary. He has issued the birth certificate Ext.PW-2/A. This witness has not entered the relevant entries in the birth and death register.

25. PW-3 is the father of the child victim. According to him on 23.02.2015, when the child victim had not returned back, then, on the next day, he along-with his brother and son had started searching for the child victim. The brother of this witness has gone to Chatrokri Chowk, Sundernagar and he had brought back the child victim to the home. On inquiry, the child victim disclosed to this witness that she had gone to her sister's house. He has categorically deposed that the child victim has not disclosed that the accused had kidnapped her.

25.1. Since this witness has resiled from his earlier statement made before the police, as such, on the request made by the learned Public Prosecutor, this witness has been declared hostile by the learned trial Court and the learned Public Prosecutor has been permitted to cross-examine this witness. Despite of the best efforts made by the learned Public Prosecutor, nothing material could be elicited from his cross-examination except his admission over the documents Ext.PW-3/A, Ext.PW-3/B and Ext.PW-2/C.

25.2. In the further cross-examination by the learned counsel for the accused, this witness has also deposed that the date of birth of the child victim was got registered by his father in the Panchayat. He has also sided with the accused by deposing that the date of birth was got recorded on the basis of the guess-work. Ext.PW-2/C was signed by him. On the day, when this witness has appeared in the witness box, he has given the age of the child victim as more than 19 years.

26. Mother of the child victim has been examined as PW-4. She has also followed the footsteps of her husband, as such, like her husband, she has also been declared hostile and despite of the best efforts made by the learned Public Prosecutor nothing material could be elicited from her cross-examination. Interestingly, like her husband, she has also given the age of the child victim more than 19 years on the day when, she has appeared in the witness box.

27. PW-5 is the child victim. On 6.8.2016, she has given her aged as 19 years. She, in her examination-in-chief itself had exonerated the accused from the charges leveled against him by stating that nobody had kidnapped her or sexually assaulted her.

27.1. Learned Public Prosecutor has only succeed in obtaining her admission qua her signatures over the memos Ext.PW-5/A and Ext.PW-3/A as well as her signatures over her statement recorded under Section 164 Cr.P.C Ext.PW-5/B.

27.2 According to her deposition in the cross-examination by the learned Public Prosecutor, the statement under Section 164 Cr.P.C which was videographed, was given, at the instance of the police.

27.3. In cross-examination by the learned counsel for the accused, she has reiterated the stand that she had given the statement under Section 164 Cr.P.C at the instance of the police and she has given her age as more than 19 years.

28. PW-8 Chuni Lal was working as Manager in Lake View Paying Guest House, Sundernagar. He has been called in the witness box by the prosecution to prove that on 23.02.2015, he has made the entry, in the relevant register of the Guest House, regarding the stay of the accused with the child victim. However, he has also not supported the prosecution case and has also been declared hostile. Learned Public Prosecutor could not elicit anything material from his cross-examination, for which, any help could be taken by prosecution.

29. PW-9 Khem Chand on 27.02.2015 was associated, in the investigation of the case. In his presence, child victim had identified the bed sheet, in one of the rooms of the Guest House, which was taken into possession vide memo Ext. PW-3/A. The police had also taken into possession the document of the relevant entry in the guest register vide memo Ext.PW-3/B.

30. PW-10 Sethi Ram is the owner of the Lake View Paying Guest House, Sundernagar and has employed Chuni Lal as its Manager. On 27.02.2015, this witness has handed over the visitor's register of the Guest House, which was taken into possession vide memo Ext. PW-3/B. He has proved the visitor's register as Ext.PW-10/A and relevant entry vide Ext.PW-10/B of guests staying in room No. 105 on 23.02.2015. During investigation, the police had also taken into possession bed sheet Ext.P-2. According to this witness, entries Ext. PW-10/A were not made by him, however, the same were entered by Chuni Lal.

31. PW-13 Netar Singh had videographed the process of recording the statement of the child victim and has prepared the DVD's Ext.PW-13/A and Ext. PW-13/B, which were handed over to the police. The videography was conducted by this witness, at the instance of the police.

32. PW-15 Dr. Suchi Sharma has medico legally examined the child victim on 25.02.2015 on the application of the police Ext.PW-15/A. According to this witness, the child victim had given the history of penetration. This witness had preserved the samples of endovaginal swab, endocervical swab, nail clippings, slide from vagina, anal swab, clothes, pubic hair and slide from endocervix and sealed the same and handed over to the police. After receipt of the receipt of FSL report Ext. P-X on 23.04.2015, this witness had deposed that human semen was detected on the shirt, salwar and vaginal swab of the victim. On the basis of above facts, she has given that the possibility of sexual intercourse, in this case, cannot be ruled-out. She has proved the MLC Ext.PW-15/B. She has duly identified the wearing apparels of the child victim as well as the samples, in which, she had put the physical evidence collected by her during the medico legal examination of the child victim.

32.1. As per cross-examination of this witness, the child victim was brought by the police for her medical examination. The child victim was not previously known to this witness. According to this witness, the child victim

was of good general health and had obtained puberty at the age of 14 years. According to her, there is possibility of injury on the private part of the victim, in case of sexual intercourse, however, she has qualified her statement, by stating that the child victim was produced before her, after two days of the sexual assault, as such, the possibility of healing of minor injury, cannot be ruled-out. She has admitted that she had not found any injury, on the person of the child victim, at the time of her medical examination.

33. PW-18 Dr. Suraj Bhardwaj on 27.02.2015 had obtained the blood samples of accused on the FTA cards and he had also prepared the identification form Ext. PW-18/A. The accused was identified by S.I. Kalyan Singh.

34. PW-22 Sh. Gaurav Sharma, the then Additional Chief Judicial Magistrate, Sundernagar had proved the statement of the child victim Ext. PW-5/B. This witness had recorded her version Ext. PW-22/A.

35. PW-11 HC Puran Chand was posted as MHC. On 25.02.2015, SI Kalyan Singh has deposited case property to this witness which was registered in the Malkhana register at Serial No.993. The abstract of Malkhana register is Ext.PW-11/C. Similarly, on 27.02.2015, SI Kalyan Singh has handed over the case property to this witness which he had entered in the Malkhana register at Serial No. 993. The abstract of Malkhana register is Ext.PW-11/C. He has also deposited one motor cycle No. HP-31A-9189 along-with its key to this witness. He has further deposed the manner in which the case property was handed over to him. This witness has forwarded the case property to FSL, Junga except the FTA card of the child victim and the motor cycle through HHC Naresh Kumar No. 105 for depositing the same to RFSL, Mandi vide R.C. No. 56 of 2015 on 3.3.2015. After receiving the report of chemical analysis on 27.05.2015, the case property as well as FTA card of the victim vide R.C. No. 133 of 2015, the same were handed over to HHC Ashwani Kumar for depositing the same to FSL, Junga for DNA profiling.

36. PW-12 HHC Naresh Kumar took the case property, which was handed over to him on 03.03.2015 to RFSL, Mandi which, he had deposited the same with the authorities of RFSL, Mandi.

37. PW-14 Sh. Madan Dhiman, had got registered the FIR Ext.PW-14/A on the application Ext.PW-5/A of the father of the child victim. The investigation was then handed over to SI Kalyan Singh. This witness has also prepared the challan.

38. PW-20 SI Kalyan Singh has investigated the case after the registration of the FIR. He has deposed about the manner, in which, he has conducted the investigation. Rest of the witnesses are police officials, related to the link evidence.

39. PW-16 HHC Ashwani Kumar on 27.05.2015 had taken the case property which was given to him as per RC Ext. PW-11/G to SFSL, Junga.

40. PW-17 HHC Pal Singh brought the result Ext. P-Y alongwith the case property from SFSL, Junga.

41. PW-19 LHC Shanta took the child victim to civil hospital on 25.02.2015 for her medico legally examination. The Medical Officer had handed over the MLC and the preserved samples to her. The MLC was handed over by her to the I.O. whereas, preserved sealed samples to MHC Police Station.

42. PW-20 SI Kalyan Singh had conducted the investigation, when, the investigation was entrusted to him. The child victim was sent to hospital for her medical examination. After the medical examination, LHC Shanta had handed over the MLC Ext. PW-16/A, sealed parcels Ext. P-A and Ext.P-B alongwith the sample seal to this witness and he had further handed over the same to MHC. Although this witness has deposed about the manner, in which, the investigation was conducted by him, however, only his deposition qua receipt of the FTA cards and the case property is to be discussed. By moving application Ext.PW-18/A, this witness has got collected the blood

samples of the accused for DNA profiling on FTA card, which were handed over to this witness by the Medical Officer, which, he has deposited with the Malkhana. On 21.05.2015, this witness, by moving application Ext. PW-20/J, before the Medical Officer had obtained the blood samples on FTA cards of the child victim. These samples were supplied to him, in a sealed condition, which, he had deposited with MHC. He has prepared the supplementary challan, after receipt of report Ext. P-Y.

43. PW-21 Dr. Akant Kaushal collected the blood samples of the child victim on FTA card and later on, that FTA card was handed over to the police, in a sealed condition, along-with specimen seal impression.

44. This is the entire evidence, which has been led by the prosecution in this case.

45. In this case, the star witnesses, which have been examined by the prosecution to substantiate the charges framed against the accused, turned hostile. The complainant, at one point of time, had leveled specific allegations against the accused about the manner, in which, he had enticed away, kidnapped the daughter of this witness and about the fact that he had ravished her, but, for the reasons best known to him, when appeared, in the witness, has not supported the case of the prosecution. Whatsoever he has deposed, in the cross-examination, by the learned Public Prosecutor and by the learned counsel for the accused, by virtue of the said deposition, he has rather supported the case of the accused.

46. Similar is the stand taken by the child victim. At one point of time, she had given details, about the manner, in which, the accused had taken her away from the custody of her parents and the manner, in which, she had been ravished by the accused, but, when appeared in the witness box, she has not only destroyed the case of the prosecution, but also made futile attempt to deposed that whatsoever, she has stated in her statement recorded under Section 164 Cr.P.C before the Magistrate, was deposed, at the instance

of the police. In other words, it can be said that she has leveled allegations against the police that at their insistence, she had leveled the allegations against the accused, in her statement recorded under Section 164 Cr.P.C. Despite of the best efforts made by the learned Public Prosecutor, nothing material could be elicited from her, from which, any help could be taken by the prosecution to improve its case.

47. The perusal of judgment passed by the learned trial Court clearly shows that the judgment of conviction has been passed on the DNA report Ex. P-Y, after relying upon the presumption as provided under Section 29 of the POCSO Act.

48. As stated above, all the star witnesses including the child victim as well as her father and mother had not supported the case of the prosecution. Rather, they have resiled from their statements given to the police. Although, the learned trial Court has given ample opportunity to the learned Public Prosecutor to cross-examine the above three witnesses by declaring them hostile and despite of the best efforts made by the learned Public Prosecutor, nothing material could be elicited from them.

49. In such a situation, the only question, which remains to be decided by this Court is whether the conviction can be based upon the DNA report only.

50. The legislature, in its wisdom, has inserted Section 53A and Section 164A of the Cr.P.C by the Act 25 of 2005 w.e.f. 23.06.2006. Sections 53A and Section 164A of the Cr.P.C are reproduced as under:-

> **"[53A. Examination of a person accused of rape by medical practitioner**.- (1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the

radius of sixteen kilometers from the place where the offence has been committed by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely;-

(i) the name and address of the accused and of the person by whom he was brought,

(ii) the age of the accused,

(iii) marks of injury, if any, on the person of the accused,

(iv) the description of material taken from the person of the accused for DNA profiling, and".

(v) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in the report.

(5) The registered medical practitioner shall, without delay, forward the report of the investigating officer, who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of Sub-Section (5) of that section.]"

"[**164A. Medical examination of the victim of rape**.-(1) Where, during the stage when an offence of committing rape or attempt to commit rape is under investigation, it is proposed to get the person of the woman with whom rape is alleged or attempted to have been committed or attempted, examined by a medical expert, such examination shall be conducted by a registered medical practitioner employed in a hospital run by the Government or a local authority and in the absence of such a practitioner, by any other registered medical practitioner, with the consent of such woman or of a person competent to give such consent on her behalf and such woman shall be sent to such registered medical practitioner within twenty-four hours from the time of receiving the information relating to the commission of such offence.

(2) The registered medical practitioner, to whom such woman is sent shall, without delay, examine her person and prepare a report of his examination giving the following particulars, namely:-

(i) the name and address of the woman and of the person by whom she was brought;

(ii) the age of the woman;

(iii) **the description of material taken from the person of the woman for DNA profiling;**

(iv) marks of injury, if any, on the person of the woman;

(v) general mental condition of the woman; and

(vi) other material particulars in reasonable detail,

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The report shall specifically record that the consent of the woman or of the person competent, to give such consent on her behalf to such examination had been obtained.

(5) The exact time of commencement and completion of the examination shall also be noted in the report.

(6) The registered medical practitioner shall, without delay forward the report to the investigating officer who shall forward it to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of Sub-Section (5) of that section.
(7) Nothing in this section shall be construed as rendering lawful any examination without the consent of the woman or of any person competent to give such consent on her behalf."

51. Apart from collecting the other physical evidence, as referred above, the police, during the investigation had also collected the blood samples for DNA profiling. The DNA report is Ext. P-Y.

52. The scope of DNA test has elaborately been discussed by the Hon'ble Apex Court in case titled as ***Anil alias Anthony Arikswamy Joseph*** vs. ***State of Maharashtra (2014) 4 SCC 69***. The relevant paragraph 18 of the same is reproduced as under:-

> *"18. Deoxyribonucleic acid, or DNA, is a molecule that encodes the genetic information in all living organisms. DNA genotype can be obtained from any biological material such as bone, blood, semen, saliva, hair, skin, etc. Now, for several years, DNA profile has also shown a tremendous impact on forensic investigation. Generally, when DNA profile of a sample found at the scene of crime matches with DNA profile of the suspect, it can generally be concluded that both samples have the same biological origin. DNA profile is valid and reliable, but variance in a particular result depends on the quality control and quality procedure in the laboratory. (self emphasis supplied)*

53. The procedure, which is to be adopted for collecting the samples as well as the precautions, which are to be taken for conducting the DNA test has elaborately been discussed by the Hon'ble Apex Court in case titled as ***Mukesh and another*** vs. ***State (NCT of Delhi) and others, (2017) 6 SCC 1***. The relevant paragraphs No. 211 to 228 of the same are reproduced as under:-

> "211. DNA is the abbreviation of Deoxyribo Nucleic Acid. It is the basic genetic material in all human body cells. It is not contained in red blood corpuscles. It is, however, present in white corpuscles. It carries the genetic code. DNA structure determines human character, behaviour and body characteristics. DNA profiles are encrypted sets of numbers that reflect a person's DNA makeup which, in forensics, is used to identify human beings. DNA is a complex molecule. It has a double helix structure which can be compared with a twisted rope 'ladder'.
>
> 212. The nature and characteristics of DNA had been succinctly explained by Lord Justice Phillips in Regina v. Alan James Doheny & Gary Adams[83]. In the above case, the accused were convicted relying on results obtained by comparing DNA profiles obtained from a stain left at the scene of the crime with DNA profiles obtained from a sample of blood provided by the appellant. In the above context, with regard to DNA, the following was stated by Lord Justice Phillips:

"Deoxyribonucleic acid, or DNA, consists of long ribbon-like molecules, the chromosomes, 46 of which lie tightly coiled in nearly every cell of the body. These chromosomes – 23 provided from the mother and 23 from the father at conception, form the genetic blueprint of the body. Different sections of DNA have different identifiable and discrete characteristics. When a criminal leaves a stain of blood or semen at the scene of the crime it may prove possible to extract from that crime stain sufficient sections of DNA to enable a comparison to be made with the same sections extracted from a sample of blood provided by the suspect. This process is complex and we could not hope to describe it more clearly or succintly than did Lord Taylor C.J. in the case of Deen (transcript: December 21, 1993), so we shall gratefully adopt his description.

> "The process of DNA profiling starts with DNA being extracted from the crime stain and also from a sample taken from the suspect. In each case the DNA is cut into smaller lengths by specific enzymes. The fragments produced are sorted according to size by a process of electrophoresis. This involves placing the fragments in a gel and drawing them electromagnetically along a track through the gel. The fragments with smaller molecular weight travel further than the heavier ones. The pattern thus created is transferred from the gel onto a membrane. Radioactive DNA probes, taken from elsewhere, which bind with the sequences of most interest in the sample DNA are then applied. After the excess of the DNA probe is washed off, an X-ray film is placed over the membrane to record the band pattern. This produces an auto radiograph which can be photographed. When the crime stain DNA and the sample DNA from the suspect have been run in separate tracks through the gel, the resultant auto-radiographs can be compared. The two DNA profiles can then be said either to match or not.""

213. In the United States, in an early case Frye v. United States[84], it was laid down that scientific evidence is admissible only if the principle on which it is based is substantially established to have general acceptance in the field to which it belonged. The US Supreme Court reversed the above formulation in Daubert v. Merrell Dow Pharmaceuticals, Inc.[85] stating thus:

> "Although the Frye decision itself focused exclusively on "novel" scientific techniques, we do not read the requirements of Rule

> 702 to apply specially or exclusively to unconventional evidence. Of course, well- established propositions are less likely to be challenged than those that are novel, and they are more handily defended. Indeed, theories that are so firmly established as to have attained the status of scientific law, such as the laws of thermodynamics, properly are subject to judicial notice under Fed.Rule Evid. 201.
>
> This is not to say that judicial interpretation, as opposed to adjudicative fact finding, does not share basic characteristics of the scientific endeavor: "The work of a judge is in one sense enduring and in another ephemeral… In the endless process of testing and retesting, there is a constant rejection of the dross and a constant retention of whatever is pure and sound and fine." B.Cardozo, The nature of the Judicial Process 178, 179 (1921)."

214. The principle was summarized by Blackmun, J., as follows: "To summarize: "general acceptance" is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence—especially Rule 702—do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.

> The inquiries of the District Court and the Court of Appeals focused almost exclusively on "general acceptance," as gauged by publication and the decisions of other courts. Accordingly, the judgment of the Court of Appeals is vacated and the case is remanded for further proceedings consistent with this opinion."

After the above judgment, the DNA Test has been frequently applied in the United States of America.

215. In District Attorney's Office for the Third Judicial District et al. v. William G. Osborne[86], Chief Justice Roberts of the Supreme Court of United States, while referring to the DNA Test, stated as follows:

> "DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the

potential to significantly improve both the criminal justice system and police investigative practices. The Federal Government and the States have recognized this, and have developed special approaches to ensure that this evidentiary tool can be effectively incorporated into established criminal procedure-usually but not always through legislation.

Modern DNA testing can provide powerful new evidence unlike anything known before. Since its first use in criminal investigations in the mid- 1980s, there have been several major advances in DNA technology, culminating in STR technology. It is now often possible to determine whether a biological tissue matches a suspect with near certainty. While of course many criminal trials proceed without any forensic and scientific testing at all, there is no technology comparable to DNA testing for matching tissues when such evidence is at issue."

216. DNA technology as a part of Forensic Science and scientific discipline not only provides guidance to investigation but also supplies the Court accrued information about the tending features of identification of criminals. The recent advancement in modern biological research has regularized Forensic Science resulting in radical help in the administration of justice. In our country also like several other developed and developing countries, DNA evidence is being increasingly relied upon by courts. After the amendment in the Criminal Procedure Code by the insertion of Section 53A by Act 25 of 2005, DNA profiling has now become a part of the statutory scheme. Section 53A relates to the examination of a person accused of rape by a medical practitioner.

217. Similarly, under Section 164A inserted by Act 25 of 2005, for medical examination of the victim of rape, the description of material taken from the person of the woman for DNA profiling is must. Section 53A sub-section (2) as well as Section 164(A) sub-section (2) are to the following effect:

"Section 53A. ***Examination of person accused of rape by Medical Practitioner***.-(1) … … … …

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare

a report of his examination giving the following particulars, namely:-

(i) the name and address of the accused and of the person by whom he was brought,

(ii) the age of the accused,

(iii) marks of injury, if any, on the person of the accused,

(iv) the description of material taken from the person of the accused for DNA profiling, and

(v) other material particulars in reasonable detail.

Section 164A. Medical Examination of the victim of rape.-

(1) … … … …

(2) The registered medical practitioner, to whom such woman is sent, shall, without delay, examine her person and prepare a report of his examination giving the following particulars, namely:-

(i) the name and address of the woman and of the person by whom she was brought;

(ii) the age of the woman;

(iii) the description of material taken from the person of the woman for DNA profiling;

(iv) marks of injury, if any, on the person of the woman;

(v) general mental condition of the woman; and

(vi) other material particulars in reasonable detail."

218. This Court had the occasion to consider various aspects of DNA profiling and DNA reports. K.T. Thomas, J. in Kamti Devi (Smt.) and another v. Poshi Ram[87], observed:

> "10. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. ..."

219. In Pantangi Balarama Venkata Ganesh v. State of Andhra Pradesh[88], a two-Judge Bench had explained as to what is DNA in the following manner:

> "41. Submission of Mr Sachar that the report of DNA should not be relied upon, cannot be accepted. What is DNA? It means:
>
> > "Deoxyribonucleic acid, which is found in the chromosomes of the cells of living beings is the blueprint of an individual. DNA decides the characteristics of the person such as the colour of the skin, type of hair, nails and so on. Using this genetic fingerprinting, identification of an individual is done like in the traditional method of identifying fingerprints of offenders. The identification is hundred per cent precise, experts opine." There cannot be any doubt whatsoever that there is a need of quality control. Precautions are required to be taken to ensure preparation of high molecular weight DNA, complete digestion of the samples with appropriate enzymes, and perfect transfer and hybridization of the blot to obtain distinct bands with appropriate control. (See article of Lalji Singh, Centre for Cellular and Molecular Biology, Hyderabad in DNA profiling and its applications.) But in this case there is nothing to show that such precautions were not taken.
>
> 42. Indisputably, the evidence of the experts is admissible in evidence in terms of Section 45 of the Evidence Act, 1872. In cross-examination, PW 46 had stated as under:
>
> > "If the DNA fingerprint of a person matches with that of a sample, it means that the sample has come from that person only. The probability of two persons except identical twins having the same DNA fingerprint is around 1 in 30 billion world population."

220. In Santosh Kumar Singh v. State Through CBI[89], which was a case of a young girl who was raped and murdered, the DNA reports were relied upon by the High Court which were approved by this Court and it was held thus:

> "71. We feel that the trial court was not justified in rejecting the DNA report, as nothing adverse could be pointed out against the two experts who had submitted it. We must, therefore, accept the DNA report as being scientifically accurate and an exact science as held by this Court in Kamti Devi v. Poshi Ram (supra). In arriving at its conclusions the trial court was also influenced by the fact that the semen swabs and slides and the blood samples of the appellant had not been kept in proper custody and had been tampered with, as already indicated above. We are of the opinion that the trial court was in error on this score. We, accordingly, endorse the conclusions of the High Court on Circumstance 9."

221. In Inspector of Police, Tamil Nadu v. John David[90], a young boy studying in MBBS Course was brutally murdered by his senior. The torso and head were recovered from different places which were identified by the father of the deceased. For confirming the said facts, the blood samples of the father and mother of the deceased were taken which were subject to DNA test. From the DNA, the identification of the deceased was proved. Paragraph 60 of the decision is reproduced below:

> "60. … The said fact was also proved from the DNA test conducted by PW 77. PW 77 had compared the tissues taken from the severed head, torso and limbs and on scientific analysis he has found that the same gene found in the blood of PW1 and Baby Ponnusamy was found in the recovered parts of the body and that therefore they should belong to the only missing son of PW1."

222. In Krishan Kumar Malik v. State of Haryana[91], in a gang rape case when the prosecution did not conduct DNA test or analysis and matching of semen of the appellant-accused with that found on the undergarments of the prosecutrix, this Court held that after the incorporation of Section 53- A in CrPC, it has become necessary for the prosecution to go in for DNA test in such type of cases. The relevant paragraph is reproduced below:

> "44. Now, after the incorporation of Section 53-A in the Cr.P.C w.e.f 23.06.2006, brought to our notice by the learned counsel for the respondent State, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in CrPC the prosecution could have still restored to this procedure of getting the DNA test or analysis and matching of semen of the appellant with that found on the undergarments of the prosecutrix to make it a foolproof case, but they did not do so, thus they must face the consequences."

223. In Surendra Koli v. State of Uttar Pradesh and others[92], the appellant, a serial killer, was awarded death sentence which was confirmed by the High Court. While confirming the death sentence, this Court relied on the result of the DNA test conducted on the part of the body of the deceased girl. Para 12 is reproduced below:-

> "12. The DNA test of Rimpa by CDFD, a pioneer institute in Hyderabad matched with that of blood of her parents and brother. The doctors at AIIMS have put the parts of the deceased girls which have been recovered by the doctors of AIIMS together. These bodies have been recovered in the presence of the doctors of AIIMS at the pointing out by the accused Surendra Koli. Thus, recovery is admissible under Section 27 of the Evidence Act."

224. In Mohammed Ajmal Mohammad Amir Kasab alias Abu Mujahid v. State of Maharashtra[93], the accused was awarded death sentence on charges of killing large number of innocent persons on 26th November, 2008 at Bombay. The accused with others had come from Pakistan using a boat 'Kuber' and several articles were recovered from 'Kuber'. The stains of sweat, saliva and other bodily secretions on those articles were subjected to DNA test and the DNA test matched with several accused. The Court observed:

> "333. It is seen above that among the articles recovered from Kuber were a number of blankets, shawls and many other items of clothing. The stains of sweat, saliva and other bodily secretions on those articles were subjected to DNA profiling and, excepting Imran Babar (deceased Accused 2), Abdul Rahman Bada (deceased Accused 5), Fahadullah (deceased Accused 7)

> and Shoaib (deceased Accused 9), the rest of six accused were connected with various articles found and recovered from the Kuber. The appellant's DNA matched the DNA profile from a sweat stain detected on one of the jackets. A chart showing the matching of the DNA of the different accused with DNA profiles from stains on different articles found and recovered from the Kuber is annexed at the end of the judgment as Schedule III."

225. In Sandeep v. State of Uttar Pradesh[94], the facts related to the murder of pregnant paramour/girlfriend and unborn child of the accused. The DNA report confirmed that the appellant was the father of the unborn child. The Court, relying on the DNA report, stated as follows:

> "67. In the light of the said expert evidence of the Junior Scientific Officer it is too late in the day for the appellant Sandeep to contend that improper preservation of the foetus would have resulted in a wrong report to the effect that the accused Sandeep was found to be the biological father of the foetus received from the deceased Jyoti. As the said submission is not supported by any relevant material on record and as the appellant was not able to substantiate the said argument with any other supporting material, we do not find any substance in the said submission. The circumstance, namely, the report of DNA in having concluded that accused Sandeep was the biological father of the recovered foetus of Jyoti was one other relevant circumstance to prove the guilt of the said accused."

226. In Rajkumar v. State of Madhya Pradesh[95], the Court was dealing with a case of rape and murder of a 14 year old girl. The DNA report established the presence of semen of the appellant in the vaginal swab of the prosecutrix. The conviction was recorded relying on the DNA report. In the said context, the following was stated:

> "8. The deceased was 14 years of age and a student in VIth standard which was proved from the school register and the statement of her father Iknis Jojo (PW1). Her age has also been mentioned in the FIR as 14 years. So far as medical evidence is concerned, it was mentioned that the deceased prosecutrix was about 16 years of age. So far as the analysis report of the material sent and the DNA report is concerned, it revealed that semen of the appellant was found on the vaginal swab of the

> deceased. The clothes of the deceased were also found having appellant's semen spots. The hair which were found near the place of occurrence were found to be that of the appellant."

227. In Nandlal Wasudeo Badwaik v. Lata Nandlal Badwaik and another[96], the appellant, father of the child born to his wife, questioned the paternity of the child on the ground that she did not stay with him for the last two years. The Court directed for DNA test. The DNA result opined that the appellant was not the biological father of the child. The Court also had the occasion to consider Section 112 of the Evidence Act which raises a presumption that birth during marriage is conclusive proof of legitimacy. The Court relied on the DNA test holding the DNA test to be scientifically accurate. The pertinent observations are extracted below:

> "19. The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the appellant to bear the fatherhood of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardised as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. "Truth must triumph" is the hallmark of justice.
>
> 20. As regards the authority of this Court in Kamti Devi, this Court on appreciation of evidence came to the conclusion that the husband had no opportunity whatsoever to have liaison with the wife. There was no DNA test held in the case. In the said background i.e. non-access of the husband to the wife, this Court held that the result of DNA test "is not enough to escape from the conclusiveness of Section 112 of the Act." The judgment has to be understood in the factual scenario of the said case. The said judgment has not held that DNA test is to be ignored. In fact, this Court has taken note of the fact that DNA test is scientifically accurate. We hasten to add that in none of the cases referred to above, this Court confronted with a situation in which a DNA test report, in fact, was available and was in conflict with the presumption of conclusive proof of legitimacy of the child under Section 112 of the Evidence Act.

> In view of what we have observed above, these judgments in no way advance the case of the respondents."

> 228. From the aforesaid authorities, it is quite clear that DNA report deserves to be accepted unless it is absolutely dented and for non- acceptance of the same, it is to be established that there had been no quality control or quality assurance. If the sampling is proper and if there is no evidence as to tampering of samples, the DNA test report is to be accepted."

(self emphasis supplied)

54. The Hon'ble Apex Court, in a recent decision in case titled as ***Pattu Rajan*** vs. ***State of Tamilnadu (2019) 4 SCC 771*** has again discussed the evidentiary value of the DNA report, in the light of the provisions of Section 45 of the Evidence Act. The relevant paragraphs No. 49 to 52 of the same are reproduced as under:-

> "49. One cannot lose sight of the fact that DNA evidence is also in the nature of opinion evidence as envisaged in Section 45 of the Indian Evidence Act. Undoubtedly, an expert giving evidence before the Court plays a crucial role, especially since the entire purpose and object of opinion evidence is to aid the Court in forming its opinion on questions concerning foreign law, science, art, etc., on which the Court might not have the technical expertise to form an opinion on its own. In criminal cases, such questions may pertain to aspects such as ballistics, fingerprint matching, handwriting comparison, and even DNA testing or superimposition techniques, as seen in the instant case.
>
> 50. The role of an expert witness rendering opinion evidence before the Court may be explained by referring to the following observations of this Court in Ramesh Chandra Agrawal v. Regency Hospital Limited & Ors:
>
> > "16. The law of evidence is designed to ensure that the court considers only that evidence which will enable it to reach a reliable conclusion. The first and foremost requirement for an expert evidence to be admissible is that it is necessary to hear the expert evidence. The test is that the matter is outside the

knowledge and experience of the lay person. Thus, there is a need to hear an expert opinion where there is a medical issue to be settled. The scientific question involved is assumed to be not within the court's knowledge. Thus cases where the science involved, is highly specialized and perhaps even esoteric, the central role of an expert cannot be disputed..."

(emphasis supplied)

51. Undoubtedly, it is the duty of an expert witness to assist the Court effectively by furnishing it with the relevant report based on his expertise along with his reasons, so that the Court may form its independent judgment by assessing such materials and reasons furnished by the expert for coming to an appropriate conclusion. Be that as it may, it cannot be forgotten that opinion evidence is advisory in nature, and the Court is not bound by the evidence of the experts. (See The State (Delhi Adminstration) v. Pali Ram, (1979) 2 SCC 158; State of H.P. v. Jai Lal & Ors., (1999) 7 SCC 280; Baso Prasad & Ors. v. State of Bihar, (2006) 13 SCC 65; Ramesh Chandra Agrawal v. Regency Hospital Ltd. & Ors. (supra); Malay Kumar Ganguly v. Dr. Sukumar Mukherjee & Ors., (2010) 2 SCC (Cri) 299).

52. Like all other opinion evidence, the probative value accorded to DNA evidence also varies from case to case, depending on facts and circumstances and the weight accorded to other evidence on record, whether contrary or corroborative. This is all the more important to remember, given that even though the accuracy of DNA evidence may be increasing with the advancement of science and technology with every passing day, thereby making it more and more reliable, we have not yet reached a juncture where it may be said to be infallible. Thus, it cannot be said that the absence of DNA evidence would lead to an adverse inference against a party, especially in the presence of other cogent and reliable evidence on record in favour of such party."

(self emphasis supplied)

55. The Hon'ble Apex Court in a recent decision in a case titled as ***Manoj and others*** vs. ***State of Madhya Pradesh 2022(9)*** scale has elaborately discussed the evidentiary value of the DNA report and the procedure for collecting the samples. The relevant paragraphs No. 134 to 141 of the same are reproduced as under:-

> 134. During the hearing, an article published by the Central Forensic Science Laboratory, Kolkata40 was relied upon. The relevant extracts of the article are reproduced below:
>
> "Deoxyribonucleic acid (DNA} is genetic material present in the nuclei of cells of living organisms. An average human body is composed of about 100 trillion of cells. DNA is present in the nucleus of cell as double helix, supercoiled to form chromosomes along with Intercalated proteins. Twenty- three pairs of chromosomes present In each nucleated cells and an individual Inherits 23 chromosomes from mother and 23 from father transmitted through the ova and sperm respectively. At the time of each cell division, chromosomes replicate and one set goes to each daughter cell. All Information about Internal organisation, physical characteristics, and physiological functions of the body is encoded in DNA molecules in a language (sequence) of alphabets of four nucleotides or bases: Adenine (A), Guanine (G}, Thymine (T} and Cytosine (C) along with sugar- phosphate backbone. A human haploid cell contains 3 billion bases approx. All cells of the body have exactly same DNA but it varies from individual to Individual in the sequence of nucleotides. Mitochondrial DNA (mtDNA} found in large number of copies in the mitochondria is circular, double stranded, 16,569 base pair in length and shows maternal inheritance. It is particularly useful in the study of people related through the maternal line. Also being in large number of copies than nuclear DNA, it can be used in the analysis of degraded samples. Similarly, the Y chromosome shows paternal inheritance and is employed to trace the male lineage and resolve DNA from males in sexual assault mixtures. Only 0.1 %

of DNA (about 3 million bases} differs from one person to another. Forensic DNA Scientists analyse only few variable regions to generate a DNA profile of an individual to compare with biological clue materials or control samples.

.....

DNA Profiling Methodology

DNA profile is generated from the body fluids, stains, and other biological specimen recovered from evidence and the results are compared with the results obtained from reference samples. Thus, a link among victim(s) and/or suspect(s) with one another or with crime scene can be established. DNA Profiling Is a complex process of analyses of some highly variable regions of DNA. The variable areas of DNA are termed Genetic Markers. The current genetic markers of choice for forensic purposes are Short Tandem Repeats (STRs). Analysis of a set of 15 STRs employing Automated DNA Sequencer gives a DNA Profile unique to an Individual (except monozygotic twin). Similarly, STRs present on Y chromosome (Y- STR) can also be used in sexual assault cases or determining paternal lineage. In cases of sexual assaults, Y-STRs are helpful in detection of male profile even in the presence of high level of female portion or in case of azoo11permic or vasectomized" male. Cases In which DNA had undergone 40 DNA profiling in Justice Delivery System, Central Forensic Science Laboratory, Directorate of Forensic Science, Kolkata (2007). environmental stress and biochemical degradation, min lSTRs can be used for over routine STR because of shorter amplicon size.

DNA Profiling is a complicated process and each sequential step involved in generating a profile can vary depending on the facilities available In the laboratory. The analysis principles, however, remain similar, which include:

1. isolation, purification & quantitation of DNA

2. amplification of selected genetic markers

3. visualising the fragments and genotyping

4. statistical analysis & interpretation.

In mt DNA analysis, variations in Hypervariable Region I & II (HVR I & II) are detected by sequencing and comparing results with control samples:....

Statistical Analysis

Atypical DNA case involves comparison of evidence samples, such as semen from a rape, and known or reference samples, such as a blood sample from a suspect. Generally, there are three possible outcomes of profile comparison:

1) Match: If the DNA profiles obtained from the two samples are indistinguishable, they are said to have matched.

2) Exclusion: If the comparison of profiles shows differences, it can only be explained by the two samples originating from different sources.

3) Inconclusive: The data does not support a conclusion Of the three possible outcomes, only the "match" between samples needs to be supported by statistical calculation. Statistics attempt to provide meaning to the match. The match statistics are usually provided as an estimate of the Random Match Probability (RMP) or in other words, the frequency of the particular DNA profile in a population.

   In case of paternity/maternity testing, exclusion at more than two loci is considered exclusion. An allowance of 1 or 2 loci possible mutations should be taken Into consideration while reporting a match.

> Paternity of Maternity Indices and Likelihood Ratios are calculated further to support the match.
>
> ***Collection and Preservation of Evidence***
>
> If DNA evidence is not properly documented, collected, packaged, and preserved, It will not meet the legal and scientific requirements for admissibility in. a court of law. Because extremely small samples of DNA can be used as evidence, greater attention to contamination issues is necessary while locating, collecting, and preserving DNA evidence can be contaminated when DNA from another source gets mixed with DNA relevant to the case. This can happen when someone sneezes or coughs over the evidence or touches his/her mouth, nose, or other part of the face and then touches area that may contain the DNA to be tested. The exhibits having biological specimen, which can establish link among victim(s), suspect(s), scene of crime for solving the case should be Identified, preserved, packed and sent for DNA Profiling." (self emphasis supplied)

135. In an earlier judgment, R v Dohoney & Adams41 the UK Court of Appeal laid down the following guidelines concerning the procedure for introducing DNA evidence in trials: (1) the scientist should adduce the evidence of the DNA 41 1997 (1) Crl App Rep 369 comparisons together with his calculations of the random occurrence ratio; (2) whenever such evidence is to be adduced, the Crown (prosecution) should serve upon the defence details as to how the calculations have been carried out, which are sufficient for the defence to scrutinise the basis of the calculations; (3) the Forensic Science Service should make available to a defence expert, if requested, the databases upon which the calculations have been based.

136. The Law Commission of India in its report42, observed as follows:

> "DNA evidence involves comparison between genetic material thought to come from the person whose identity is in issue and a sample of genetic material from a known person. If the samples do not 'match', then this will prove a lack of identity between the known person and the person from whom the unknown sample originated. If the samples match, that does not mean the identity is conclusively proved. Rather, an expert will be able to derive from a database of DNA samples, an approximate number reflecting how often a similar DNA "profile" or "fingerprint" is found. It may be, for example, that the relevant profile is found in 1 person in every 100,000: This is described as the 'random occurrence ratio' (Phipson 1999).
>
> Thus, DNA may be more useful for purposes of investigation but not for raising any presumption of identity in a court of law."

137. In Dharam Deo Yadav v. State of UP43 this court discussed the reliability of DNA evidence in a criminal trial, and held as follows:

> "The DNA stands for deoxyribonucleic acid, which is the biological blueprint of every life. DNA is made-up of a double standard structure consisting of a deoxyribose sugar and phosphate backbone, cross-linked with two types of nucleic acids referred to as adenine and guanine, purines and thymine and cytosine pyrimidines.....DNA usually can be obtained from any biological material such as blood, semen, saliva, hair, skin, bones, etc. The question as to whether DNA tests are virtually infallible may be a moot question, but the fact remains that such test has come to stay and is being used extensively in the investigation of crimes and the Court often accepts the views of the experts, especially when cases rest on circumstantial evidence. More than half a century, samples of human DNA began to be used in the criminal justice system. Of course, debate lingers over the safeguards that should be required in testing samples and in presenting the evidence in Court. DNA profile, however, is consistently held to be valid and reliable,

but of course, it depends on the quality control and quality assurance procedures in the laboratory." 42 185th Report, on Review of the Indian Evidence Act, 2003 43 (2015) 5 SCC 509.

138. The US Supreme Court, in District Attorney's Office for the Third Judicial District v. Osborne, 44 dealt with a post-conviction claim to access evidence, at the behest of the convict, who wished to prove his innocence, through new DNA techniques. It was observed, in the context of the facts, that "Modern DNA testing can provide powerful new evidence unlike anything known before. Since its first use in criminal investigations in the mid-1980s, there have been several major advances in DNA technology, culminating in STR technology. It is now often possible to determine whether a biological tissue matches a suspect with near certainty. While of course many criminal trials proceed without any forensic and scientific testing at all, there is no technology comparable to DNA testing for matching tissues when such evidence is at issue. DNA testing has exonerated wrongly convicted people, and has confirmed the convictions of many others."

139. Several decisions of this court - Pantangi Balarama Venkata Ganesh v. State of Andhra Pradesh45, Santosh Kumar Singh v. State Through CBI 46, Inspector of Police, Tamil Nadu v. John David 47, Krishan Kumar Malik v. State of Haryana48, Surendra Koli v. State of Uttar Pradesh & Ors 49, and Sandeep v. State of Uttar Pradesh50, Rajkumar v. State of Madhya Pradesh51 and Mukesh & Ors. v. State for NCT of Delhi & Ors. 52 have dealt with the increasing importance of DNA evidence. This court has also emphasized the need for assuring quality control, about the samples, as well as the technique for testing- in Anil v. State of Maharashtra53 "7. Deoxyribonucleic acid, or DNA, is a molecule that encodes the genetic information in all living organisms. DNA genotype can be obtained from any biological material such as bone, blood, semen, saliva, hair, skin, etc. Now, for several years, DNA profile has also shown a tremendous impact on forensic investigation. Generally, when DNA profile of a sample found at the scene of crime matches with DNA profile of

the suspect, it can generally be concluded that both samples have the same biological origin. DNA profile is valid and reliable, 44 557 U.S. 52 (2009) 45 (2009) 14 SCC 607 46 (2010) 9 SCC 747 47 (2011) 5 SCC 509 48 (2011) 7 SCC 130 49 (2011) 4 SCC 80 50 (2012) 6 SCC 107 51 (2014) 5 SCC 353 52 (2017) 6 SCC 1 53 (2014) 4 SCC 69 but variance in a particular result depends on the quality control and quality procedure in the laboratory."

140. This court, in one of its recent decisions - Pattu Rajan v. The State of Tamil Nadu54, considered the value and weight to be attached to a DNA report:

> "33. Like all other opinion evidence, the probative value accorded to DNA evidence also varies from case to case, depending on facts and circumstances and the weight accorded to other evidence on record, whether contrary or corroborative. This is all the more important to remember, given that even though the accuracy of DNA evidence may be increasing with the advancement of science and technology with every passing day, thereby making it more and more reliable, we have not yet reached a juncture where it may be said to be infallible. Thus, it cannot be said that the absence of DNA evidence would lead to an adverse inference against a party, especially in the presence of other cogent and reliable evidence on record in favour of such party."

141. This court, therefore, has relied on DNA reports, in the past, where the guilt of an accused was sought to be established. Notably, the reliance, was to corroborate. This court highlighted the need to ensure quality in the testing and eliminate the possibility of contamination of evidence; it also held that being an opinion, the probative value of such evidence has to vary from case to case." (Self emphasis supplied).

56. It is the basic principle of criminal jurisprudence that the accused is presumed to be innocent until and unless his guilt is proved by the prosecution by leading the cogent and convincing evidence. The prosecution is duty bound to prove the guilt of the accused beyond any shadow of doubt.

In other words, it can be said that the onus to prove the guilt of the accused beyond any shadow of doubt is always upon the prosecution.

57. In view of the decision of the Hon'ble Apex Court as referred above, it was for the prosecution to prove by leading the cogent, convincing and positive evidence, that all the precautions, as referred above, were taken by it. This fact is necessary for the prosecution as the entire process of collecting the blood samples for DNA profiling in controlled and done by the human agencies i.e. doctors and the Investigating officers. Every step to preserve the sample from manipulation/contamination has to be proved as absence of those steps may cause prejudice to the accused.

58. The prosecution, in the present case, has to prove the guilt of the accused by leading oral as well as scientific evidence. The learned trial Court has convicted the accused on the basis of the DNA report as well as the on the basis of presumption under Section 29 of the POCSO. The report of DNA Ext. P-Y has simply been tendered in evidence. It has been held by the Hon'ble Apex Court in *Pattu Rajan's* case supra (para 49) that the DNA evidence, is in the nature of opinion evidence as per Section 45 of the Indian Evidence Act. This view has again been reiterated in the *Manoj's* case cited supra, wherein, it has been held that the evidence in the shape of DNA report is "an opinion" and also held that the probative value of such evidence has to vary from case to case. The science of DNA is at a developing stage, as such, it will be risky to solely rely upon the DNA report Ext. P-Y in the absence of any substantive piece of evidence. The positive evidence regarding the fact that all the precautions have been taken by the doctors as well as by the police officials regarding the preservations of the DNA samples.

59. Judging the facts and circumstances of the present case, now this Court has to discuss the manner, in which the DNA samples were drawn by the police during the investigation of the case. The blood sample of accused Mukesh was collected by PW-18 Dr. Suraj Bhardwaj. He has simply

deposed that he had obtained the blood sample of accused Mukesh on FTA card to whom he had identified in the Court when appeared in the witness box on the basis of photographs affixed on identification form Ext. PW-18/A. The accused before taking the sample of blood was identified by SI Kalyan Singh. His statement is totally silent qua the fact that after obtaining the blood sample on FTA card, he put those cards in envelop and handed over the same, in a sealed condition to the I.O. He also remained silent about the procedure, if any, taken by him before and after taking the sample, what to talk about any precaution taken during the process of obtaining such sample. The Investigating Officer has also not deposed that PW-18 had given the blood sample of accused on FTA card in a sealed envelop to him.

60. In the cases, where the strict punishment has been provided by the law, it is obligatory upon the prosecution to prove by leading the positive evidence that every precaution has been taken to keep the FTA card, upon which, the blood samples of the accused were allegedly obtained by PW-18 in a safe condition right from obtaining the blood samples till the same is submitted by the police to the authorities at FSL, Junga for DNA profiling. In the absence of the positive evidence, nothing can be presumed.

61. The other material evidence regarding the obtaining of blood samples of child victim is PW-21 Dr. Akant Kaushal. Like PW-18, this witness has deposed that after obtaining the blood sample of the child victim on the FTA card, he had put the same in a sealed parcel and handed over the same to the I.O. for further transmitting the same to FSL, Junga for DNA profiling. However, he has not deposed the specimen of seal by which, he had sealed the parcel. In the absence of deposition by PW-18 and PW-21, this Court is not inclined to attach any probative value to the statement of MHC who has deposed about the manner in which, he had kept the samples in Malkhana and further transmitted the same to the FSL, Junga for DNA profiling. For the sake of repetition, both these witnesses i.e. PW-18 and PW-21 have not

deposed even about the alleged sealing process conducted by them, what to talk about the precautions to be taken as per the decision of the Hon'ble Apex Court in '*Manoj*' case cited supra.

62. It has rightly been pointed out by the learned counsel appearing for the accused that much relied document Ext. P-Y is containing the averments which are contrary to the deposition of the doctor PW-18, who had collected the blood sample of the accused on FTA card. As per reference given in the report, the parcel 3, which was stated to be containing the FTA card containing the blood sample of the accused, when received in the laboratory was found sealed with three seals of seal 'A'. The blood sample of the accused was collected by PW-18 Dr. Suraj Bhardwaj on FTA card. There is no whisper in his deposition that the parcel containing the FTA card was ever sealed by him, what to talk about deposing that the same was sealed with three seals of seal 'A'. This witness has not deposed that he had handed over the FTA card containing the blood samples of the accused to SI Kalyan Singh in a sealed condition. Even otherwise, SI Kalyan Singh while appearing in the witness box as PW-20 has not deposed that the doctor had handed over the blood samples of the accused on FTA card for DNA profiling in a sealed cover, then the averments made in the report Ext. P-Y regarding the sealing of the parcels with three seals of 'A' is not liable to be accepted as a gospel truth.

63. Neither PW-18 nor PW-21 have deposed about the manner, in which, they had collected the blood samples of the accused and the child victim. Before accepting the report Ext. P-Y, it was incumbent upon the prosecution to prove on record, by way of positive evidence that every precaution at the time of collecting the blood samples. It is for the prosecution to rule-out the possibility of the samples being contaminated. In the absence of evidence how the samples were collected as well as the fact that the sample of the blood of the accused on FTA card was not handed over to the police in a

sealed condition, it will not be safe to rely upon the report Ext. P-Y, in this case.

64. The star witnesses of the prosecution have turned hostile and the manner, in which, the blood samples of the accused were collected by PW-18 Dr. Suraj Bhardwaj, the evidentiary value of the report Ext. P-Y comes under the cloud of suspicion and it would not be safe for this Court to rely upon said report.

65. In view of the above, there was no occasion for the learned trial Court to draw a presumption under Section 29 of the POCSO Act as for drawing such a presumption, firstly, the prosecution has to prove the case, against the accused beyond any shadow of doubt, as the initial burden to prove the guilt of the accused always remain on the prosecution and no conviction can be based merely on the basis of Section 29 of the POCSO Act, as such, the judgment of conviction passed by the learned trial Court does not sustain in the judicial scrutiny by this Court.

66. Consequently, the appeal is allowed by setting aside the impugned judgment of conviction. The accused, who is in judicial custody, is ordered to be set free forthwith, if not required in any other case.

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

1. Cr.M.P.(M) No. 1162 of 2022

Deepak Rai ...Petitioner.

Versus

The State of Himachal Pradesh ..Respondent.

2. Cr.M.P.(M) No. 1707 of 2022

Gurnam Singh alias Gogi ...Petitioner.

Versus

The State of Himachal Pradesh ..Respondent.

For the Petitioners: Mr.N.S. Chandel, Senior Advocate, alongwith Mr.Vinod Gupta, Advocate in both petititions.

For the Respondent: Mr. Hemant Vaid, Additional Advocate General.

Cr.M.P(M) Nos.1162 & 1707 of 2022
Decided on: 28.12.2022

Code of Criminal Procedure, 1973- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances Act, 1985-** Sections 28 and 29- Recovered a plastic bag containing 3.048 kilograms opium kept near the gear lever of the car- It is contended that accused persons have been implicated falsely by showing recovery of contraband which was never recovered from them or their car, but was planted by SIU Team- **Held-** Taking into account the factors and parameters required to be considered at the time of adjudication of bail application as propounded by the Courts- Bail Petition allowed.(Para 31, 32)

Cases referred:

Narcotics Control Bureau Vs. Mohit Aggarwal, 2022 SCC Online SC 891;
Satinder Kumar Antil Vs. Bureau of Investigation, (2022) 10 SCC 51;

The following judgment of the Court was delivered:

Vivek Singh Thakur, J (oral)

Petitioners, invoking provisions of Section 439 Code of Criminal Procedure (in short 'Cr.P.C.') have approached this Court to enlarge them on bail in case FIR No. 230 of 2020, dated 23.07.2020, registered in Police Station Nalagarh, District Solan, H.P., under Sections 218 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act').

20. Status report stands filed. record was also made available.

21. Petitioners have also referred certain documents related to application submitted by Deepak Rai, filed on 04.08.2020 under Section 91 of Cr.P.C. for summoning/producing CCTV footage of cameras of certain areas of Nalagarh and mobile phone locations of numbers of police team, who, as per prosecution case, apprehended the petitioners alongwith contraband. Reference has also been made to the complaints/ applications made by wife of Gurnam Singh alias Gogi (petitioner in Cr.M.P.(M) No.1707 of 2022) to Chairperson Himachal Pradesh Human Rights Commission at Shimla and Director General of Police, Himachal Pradesh in November 2020.

33. Record reveals that application filed under Section 91 of Cr.P.C., by Deepak Rai was allowed by Special Judge, Solan, vide order dated 05.08.2020, passed in Crl. Misc. Application No.120-NL/4 of 2020, titled as *Deepak Rai vs. State of H.P. & another,* directing the Superintendent of Police, Police District Baddi, H.P., to preserve CCTV footage of CCTV cameras installed at places mentioned in the application through concerned service providers and to furnish Call Detail Records (CDRs) location of mobile numbers details given in the application through concerned service provider.

34. Respondent-State had assailed aforesaid order dated 05.08.2020 by filing Cr. Revision No.362 of 2020, titled as *State of H.P. vs. Deepak Raj,* which stands dismissed on 27.12.2022.

35. As per prosecution case, on the basis of Rukka sent by ASI Gopal Singh, Incharge Special Investigating Unit (SIU) Baddi, FIR No.230 of 2020 was registered on 23.07.2020 in Police Station Nalagarh, stating therein that on 22.07.2020 ASI Gopal Singh alongwith police officials was present at Nangal Bus Stand in Nalagarh. At 8.20 p.m. he received a reliable information through a faithful informer that Gurnam Singh alias Gogi is involved in business of selling and purchasing opium alongwith Deepak Rai and at that time, both of them were present, in their car bearing registration No.HP-12M-7070 at lower Nangal near Siddhivinayak Company on the side of road, with intention to sell opium and on the spot huge quantity of opium could be recovered from them. Information was concrete and reliable and there was possibility of disappearance of evidence or accused persons. Therefore, information was reduced into writing under Section 42(2) and was sent to the office of Sub Divisional Police Officer (SDPO) Nalagarh and police party headed by ASI Gopal Singh rushed to the spot. One Ram Pal, who met police party on the way was also associated with the raiding party after telling him about information received from the informer. On reaching at the spot, aforesaid car HP-12M-7070 was found parked on the right side of the road with two persons sitting on the front seats. Both occupants of car were overpowered by ASI Gopal Singh with the help of accompanying police officials and their names and addresses were inquired. Person sitting on the driver seat disclosed his name Deepak Rai. Whereas, another person disclosed his name Gurnam Singh alias Gogi and they disclosed their parentage, age and addresses. Both of them were informed about information received by the police and their written consent for search was obtained and SDPO was requested telephonically to come on the spot, who came on the spot at about

9.40 p.m. Thereafter, following prescribed procedure car was searched and personal search of both of them was also conducted. During search a plastic bag containing 3.048 kilograms opium was found kept near gear liver of the car. Contraband was identified as opium by smelling and on the basis of experience. Accused persons also disclosed it as opium. Contraband was taken into possession and seized by following procedure.

36. After registration of FIR, petitioners were arrested at 2.30 a.m. on 23.07.2020 and investigation was carried on and since then, after remaining in police custody, they are in judicial custody.

37. It is further case of the prosecution that during interrogation aforesaid two accused persons disclosed that they had purchased recovered contraband from local residents of Nalagarh namely Shishya Pal alias Munna resident of Dattowal and Shyam Singh resident of Rajpura. In CDRs there was evidence of talks of accused persons with these two persons and, therefore, they were summoned and interrogated.

38. As per police case, during interrogation, it surfaced that Shyam Singh had given his Truck to Deepal Rai for plying it on contract, but Deepak Rai did not pay the installment of loan and parked the Truck with some Transporter at Gauhati and, on this count, there was dispute between Shyam Singh and Deepak Rai. Shishya Pal disclosed that he had lended money amounting to `1,50,000/- to Gurnam Singh alias Gogi long ago and Gurnam Singh paid back `1,50,000/-, but was not paying balance amount of `25,000/-. Shyam Singh and Shishya Pal alias Munna stick to their stand that their talks with Gurnam Singh and Deepak Rai were in connection with aforesaid disputes and reasons, but not for supply or receiving of contraband recovered by the police from two accused.

39. As per police case involvement of Shishya Pal and Shyam Singh was not found in the case.

40. Challan was prepared on 08.09.2020 and was presented in the Court of Special Judge on 09.11.2020.

41. In its application filed under Section 91 of Cr.P.C. as well as complaint submitted to Chairperson H.P. Human Rights Commission at Shimla and Director General of Police, H.P., it is stand on behalf of accused persons that they have been implicated falsely by showing recovery of contraband which was never recovered from them or their car, but was planted by SIU Team and to substantiate his plea they have referred CCTV footage of private parties of certain road of different areas of Nalagarh alongwith timing thereon indicating that on 22.07.2020 petitioners were roaming in the Town in vehicle together with police officials, police vehicles and vehicle of petitioners which can be seen moving together on the same road, and in some CCTV footages/photographs vehicle of petitioners are being driven by police. Whereas, sometimes 'petitioners' have been found sitting in the vehicle of police. The police officials were none else but the members of team of SIU Baddi Nalagarh, who claimed to have apprehended petitioners alongwith 3.048 kilograms opium at lower Nangal. To substantiate the aforesaid plea petitioners had filed application through Deepak Rai (petitioner) in the Trial Court for providing/summoning CTV footages of various spots of Nalagarh area and CDR location of mobile number of SIU Team which has been allowed and Revision Petition preferred by the State has also been dismissed on 27.12.2022.

42. In sequel to complaints submitted by Kamlesh wife of Gurnam Singh to Chairpersons of H.P. Human Rights Commission and Director General of Police, H.P. a fact finding report was prepared and submitted by Superintendent of Police, Police District Baddi, wherein, it was concluded that there was no violation of Protection of Human Rights, Act, 1993. Fact finding report was based on inquiry conducted by Deputy Superintendent of Police (Leave Reserve) Baddi, Police District Baddi, H.P.

43. In its report Deputy Superintendent of Police, referring statement of ASI Gopal Singh, has submitted that SIU Team Baddi, on the basis of information from informer had tried to purchase opium from Deepak Rai by becoming dummy customers, but Deepak Rai and Gurnam Singh kept on wandering here and there alongwith dummy customers of SIU Team and informer in the places like Chowkiwala, Chuhuwal, Nalagarh and Ghansot etc. on the pretext of providing opium, but near Dattowal they refused to supply opium, probably smelling that members of SIU Team were dummy customers and, thereafter, police party came to the area of Nangal where, at 8.20 p.m. they received information, referred supra, and in furtherance thereto, both petitioners were apprehended as narrated in the status report recorded hereinabove.

44. Learned Additional Advocate General has also placed reliance upon Daily Diary Report No.3 dated 22.07.2020 of SIU Baddi, recorded regarding his departure alongwith police party in the area of Police Station Nalagarh and also Rapat No.4 dated 23.07.2020 of SIU Baddi, recorded regarding arrival of police party at 7.00 a.m., wherein it has also been recorded that during patrolling ASI Gopal Singh received information from informer about involvement of Gurnam Singh and Deepak Rai in illegal business of selling opium, whereupon, ASI Gopal Singh alongwith informer and SIU Team members had approached both of them by purporting them customers and both of them had agreed to supply opium at Sattewal. Whereupon, ASI Gopal Singh had arranged two vehicles HP-03C-2077 and HP-12N-6915 and reached at Sattewal and both accused persons came there in vehicle HP-12M-7070 and, thereafter, both of them took dummy customers i.e. SIU Team members and informer to Chowkiwala, Nalagarh, Ghansot, Chuhuwal etc. for supplying opium, but lastly they refused to supply opium. Further that, thereafter, ASI Gopal Singh alongwith officials was present near Nangal Bus Stand and after receiving information as recorded in FIR No.230 of

2020 had completed the proceedings and all these facts were informed to the higher officers through telephonic information.

45. Respondent-State has also relied upon general details of General Diary recorded on various dates with respect to working and checking of CCTV cameras installed at various places in Nalagarh area and it has been claimed that most of these CCTV cameras were not working on 22.07.2022/23.07.2020.

46. Learned counsel for the petitioner has submitted that in Rapat No.3 dated 22.07.2020 of SIU Baddi, only departure of the police party has been mentioned. Further that, Rapat No.4 of 23.07.2020 of Daily Diary Report has been recorded regarding arrival of the police party in Police Station and change of date, but in the said Daily Diary Report, a story of receiving information, approaching both petitioners by SIU and informer as dummy customers and roaming of SIU Team and informer alongwith petitioners in three vehicles has been introduced, but no such information regarding dummy customer story has been mentioned in the Rukka sent for registration of FIR. He has further submitted that these reports are concocted and fabricated as no such register has been produced or available or kept by SIU which is independent of Register being maintained in the Police Station. Further that, now every proceeding of the Police Station and recording of Daily Diary Report is done in Computers. Whereas, these Report Nos.3 and 4 have been recorded by hand and there is no reason explained for recording these two reports on plain papers or Register instead of recording the same in Computers. Whereas, other Daily Diary Reports, except Daily Diary Reports related to out of order CCTV cameras and roaming with accused persons in Nalagarh area, placed on record, have been recorded in Computers. It has been submitted by learned counsel for the petitioners that these reports have been fabricated after filing of application by Deepak Rai on 04.08.2020 as well as after filing complaint by wife of Gurnam Singh with Chairperson of H.P.

Human Rights Commission and Director General of Police, H.P. as neither in challan nor anywhere else, prior to filing of application by Deepak Rai and wife of Gurnam Singh, there is any reference of dummy customer story is there as concocted in Rapat No.4 referred supra.

47. Learned counsel for the petitioner has submitted that veracity of prosecution case is demolished by the fact that in Rukka, FIR as well as in challan, it has been stated by ASI Gopal Singh that on reaching on the spot, on the basis of information received at 8.20 p.m., two person(s) were found sitting in the car on front seat and their names and addresses were inquired. He has submitted that if both petitioners were alongwith SIU Team since morning as claimed in Rapat No.4 and in statement of ASI Gopal Singh recorded in December 2020 during inquiry by Deputy Superintendent of Police, then there was no occasion for ASI Gopal Singh to record that two persons were found sitting in the car and their names were inquired as not only SIU was well acquainted with identity of petitioners, but petitioners were also familiar to the SIU as all of them were roaming together in Nalagarh area since morning. It has further been submitted that apart from roaming together on 22.07.2020 for whole day, some members of SIU were local persons and petitioners were also residents of local area and having relative in common villages, they were known to each other. Therefore, he has submitted that story of roaming in the Town since morning by posing them customers has been concocted to cover loophole, but it has further falsified the claim of prosecution regarding the manner in which recovery of opium has been claimed in the FIR.

48. Learned Additional Advocate General has submitted that there is no enmity between SIU Team and the petitioners, so as to cause SIU team to implicate the petitioners falsely that too with huge commercial quantity of opium and further that, issues raised by the petitioners herein shall be assessed and evaluated by the Trial Court on conclusion of trial at the time of

passing final judgment, and for quantum of opium recovered and nature of the offence which is damaging entire Nation, prayer for enlarging the petitioners on bail has been opposed.

49. Learned counsel for the petitioners has submitted that quantity of alleged recovered contraband in present case is about 3 kilograms. Whereas, commercial quantity of opium starts from 2.5 kilograms and, therefore, quantity claimed to have been recovered is leaning towards minimum commercial quantity of opium of 2.5 kilograms. Whereas, petitioners are behind the bars since last about more than 2 years 5 months and trial is going on slow pace. Whereas, case is still at the stage of recording evidence and till date only 4 witnesses out of total 22 witnesses have been examined and last witness was examined on 25.08.2021 and next date in the trial is fixed for 28.01.2023 and there is no likelihood of completion of trial in near future and, therefore, also petitioners are entitled to be enlarged on bail.

50. Learned counsel for the petitioners, to substantiate plea for bail, on this count, has referred pronouncement of the order dated 1.8.2022 passed by the Supreme Court in a petition for ***Special Leave to Appeal (Crl.) No. 3961 of 2022, titled as Abdul Majeed Lone Vs. Union of Territory of Jammu and Kashmir***, wherein petitioner facing trial for having been found in possession of 1100 grams commercial quantity of charas was enlarged on bail for suffering incarceration for over 2 years and 5, months observing that there was no likelihood of completion of trial in near future; and order dated 12.10.2020, passed by Three Judges' Bench of the Supreme Court, in ***Criminal Appeal No.668 of 2020, titled as Amit Singh Moni vs. State of Himachal Pradesh***, whereby petitioner therein, facing trial for recovery of 3.285 kilograms charas from a vehicle, alongwith four other persons, was enlarged on bail for having been in detention of 2 years and 7 months, as till then out of 14 witnesses, 7 witnesses were yet to be examined and last witness

was examined in February 2020 and, thereafter, there was no further progress in the trial.

51. Learned counsel for the petitioners has referred pronouncements the Supreme Court in ***Nitish Adhikary @ Bapan v. The state of West Bengal, Special Leave to Appeal (Crl.) No.5769 of 2022, decided on 1.8.2022***, whereby the accused under Sections 21(c) and 37 of NDPS Act was ordered to be enlarged on bail after detention of 1 year and 7 months, observing that the trial was at a preliminary stage.

52. Learned counsel for the petitioners has placed reliance on order dated 7.2.2020 passed by the Supreme Court in ***Criminal Appeal No. 245 of 2020, titled as Chitta Biswas Alias Subhas Vs. The State of West Bengal***, whereby accused having found in possession of Codeine mixture above commercial quantity, was enlarged on bail after 1 year 7 months, at the stage of trial when out of 10 witnesses, 4 witnesses have been examined in the trial.

53. Reliance has also been placed on order dated 10.11.2021, passed by the Supreme Court in ***Special Leave to Appeal (Criminal) No. 5187 of 2021, titled as Kulwant Singh v. The State of Punjab***, whereby accused after detention of more than 2 years, was enlarged on bail despite the fact that recovered contraband was of commercial quantity, for prayer to grant of bail was on the ground of advanced age of petitioner, period of custody undergone by him and the fact that trial would take time to conclude.

54. Learned counsel for the petitioners has also placed reliance upon order dated 7.12.2021, passed by the Supreme Court in ***Criminal Appeal No. 1570 of 2021, titled as Mahmod Kurdeya Vs. Narcotics Control Bureau***, whereby petitioner apprehended with thousands of tablets of Tramadol X-225, was enlarged on bail. In this case, quantity of drug recovered was more than 50 Kilograms. However, in this case bail was granted by taking into consideration the fact that charge-sheet was field on 23.9.2018 and thereafter

even charges had not been framed nor trial had commenced till grant of bail to the petitioner, whereas manufacturer who sold the drug to the accused had been granted bail.

55. Learned counsel for the petitioners has also placed reliance on order dated 22.8.2022 passed by the Supreme Court in ***Special Leave to Appeal (Crl.) No. 5530 of 2022 titled as Mohammad Salman Hanif Shaikh Vs. The State of Gujarat***, whereby Supreme Court has enlarged the petitioner therein on bail only on the ground that he had spend about two years in custody and conclusion of trial would have taken sometime.

56. Reliance has also been placed on order dated 5.8.2022 passed in ***Criminal Appeal No. 1169 of 2022, titled as Gopal Krishan Patra alias Gopalrusma Vs. Union of India***, whereby the Supreme Court has enlarged the petitioner on bail, considering the custody of 1 year 7 months undergone by him, in a case involving offence punishable under Sections 8, 20, 27(a), 28 and 29 of NDPS Act.

57. Learned counsel for the petitioners has also referred order dated 28th July, 2022, passed by Co-ordinate Bench of this Court, in ***Cr.M.P. (M) No. 1255 of 2022 titled as Puran Chand Vs. State of H.P.,*** wherein a person, arrested for having possession of 1.996 Kilograms of charas, was enlarged on bail for length of custody of more than 2 years 9 months.

58. Learned counsel for the petitioners has also placed reliance upon order dated 4.11.2022 passed by Co-ordinate Bench of this Court in ***Cr.M.P. (M) No. 2273 of 2022, titled Madan Lal Vs. State of H.P.,*** wherein accused arrested on 27.12.2019, for having found in possession of 1.695 Kilograms of charas, was enlarged on bail for non completion of trial as accused had suffered detention of 2 years 10 months.

59. Learned Additional Advocate General referring order passed by the Supreme Court, dated 19.7.2022 in ***Narcotics Control Bureau Vs. Mohit Aggarwal, 2022 SCC Online SC 891: AIR 2022 SC 3444***, has contended

that period of detention cannot be a ground for enlarging the petitioners on bail.

60. Learned counsel appearing for the petitioner submit that in ***Mohit Aggarwal's case*** huge quantity of 20 Kilograms of Tramadol, against minimum commercial quantity of 250 grams, was recovered, whereas in present case recovered quantity is little more than commercial quantity. It has been further contended that the Supreme Court in order dated 11.7.2022 in case titled as ***Satinder Kumar Antil Vs. Bureau of Investigation, (2022) 10 SCC 51***, has observed that period of detention is also a relevant factor for considering the bail application alongwith other factors.

61. Learned counsel for the petitioners have submitted that petitioners are ready to furnish sureties and to abide by any conditions imposed by the court for enlarging the petitioners on bail for ensuring their presence during trial.

62. Taking into consideration the entire facts and circumstances, but without commenting on merits thereon and taking into account factors and parameters required to be considered at the time of adjudication of bail application as propounded by the Courts, including the Supreme Court, I am of the considered opinion that at this stage petitioners may be enlarged on bail.

63. Accordingly, present petitions are allowed and petitioners are ordered to be enlarged on bail, subject to their furnishing personal bonds in the sum of `2,00,000/- each with one surety each in the like amount, to the satisfaction of trial Court/Special Judge and upon such further conditions as may be deemed fit and proper by the trial Court, including the conditions enumerated hereinafter, so as to assure presence of the petitioner at the time of trial:-

(i) That the petitioners shall make themselves available to the Police or any other Investigating Agency or Court in the present case 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 him/her from disclosing such facts to Court or to any police officer or tamper with the evidence. They shall not, in any manner, try to overawe or influence or intimidate the prosecution witnesses;

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

(iv) that the petitioners shall not commit the offence similar to the offence to which they are accused or suspected;

(v) that the petitioners shall not misuse their liberty in any manner;

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

(vii) that in case petitioners indulges in repetition of similar offence(s) then, their bail shall be liable to be cancelled on taking appropriate steps by prosecution;

(viii) that the petitioners shall keep on informing about the change in address, landline number and/or mobile number, if any, for their availability to Police and/or during trial; and

(ix) the petitioners shall not leave India without permission of the Court.

64. It will be open to the prosecution to apply for imposing and/or to the trial Court to impose any other condition on the petitioners, enlarged on bail, as deemed necessary in the facts and circumstances of the case and in the interest of justice and thereupon, it will also be open to the trial Court to

impose any other or further condition on the petitioner as it may deem necessary in the interest of justice.

65. In case the petitioners violate any conditions imposed upon them, their bail shall be liable to be cancelled. In such eventuality, prosecution may approach the competent Court of law for cancellation of bail, in accordance with law.

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

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

68. The parties are permitted to produce copy of order downloaded from the High Court website and trial Court shall not insist for certified copy of the order, however, if required, passing of order can be verified from the High Court website or otherwise.

The petitions stand disposed of in the aforesaid terms.

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

Satinder Giri & another ...Petitioners.

Versus

State of H.P. ..Respondent.

For the Petitioners: Mr.O.C. Sharma, Advocate.

For the Respondent: Mr. Hemant Vaid, Additional Advocate General.

Cr.MMO No.3 of 2021

Date of Decision: 29.12.2022

Code of Criminal Procedure, 1973- Sections 482, 311- Inherent powers- **Indian Penal Code, 1860-** Sections 452, 302, 341- Application filed by petitioner for examining witness- Dismissal order passed by Learned Additional Session Judge- **Held-** Petitioner may be granted an opportunity to examine the witness- Order set aside- Petition allowed. (Para 12)

Cases referred:

Kalyani Baskar (Mrs.) v. M.S. Sampoornam (Mrs.), (2007) 2 SCC 258;
Manju Devi vs. State of Rajasthan and another, (2019) 6 SCC 203;
Natasha Singh vs. Central Bureau of Investigation (State), (2013) 5 SCC 741;
Sudevanand v. State through C.B.I., (2012) 3 SCC 387;
Talab Haji Hussain v. Madhukar Purshottam Mondkar & Anr., AIR 1958 SC 376;
Vijay Kumar v. State of U.P. & Anr., (2011) 8 SCC 136;
Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors., (2004) 4 SCC 158;

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

Petitioner has approached this Court assailing impugned order dated 07.11.2020, passed by Additional Sessions Judge, Nalagarh, District Solan, H.P., in Trial No.224 of 2016, titled as *State of H.P. vs. Satinder Giri & another,* whereby an application filed by petitioner, under Section 311 of the

Code of Criminal Procedure (hereinafter referred to as 'Cr.PC') for examining the witness, has been dismissed.

2. Petitioner is facing trial being charge sheeted under Sections 452, 302 and 341 of the Indian Penal Code (in short 'IPC').

3. Additional Sessions Judge has rejected the application of the petitioner on the ground that witness proposed to be examined is real brother of the petitioner and he was cited as a prosecution witness in the challan regarding recovery of articles from the spot and his statement was not relevant at belated stage as petitioner-accused was granted opportunity to lead evidence in defence twice, but no witness was desired to be produced by him. It was further concluded by Additional Sessions Judge that application had been filed only to delay trial and, thus, application was dismissed.

4. It is apparent from the record that evidence of the prosecution was closed on 26.09.2019. Statement of accused persons, including the petitioner, under Section 313 Cr.P.C., were recorded on 24.10.2019, wherein no defence witness was intended to be examined by the petitioner-accused persons. Case was listed for arguments, but on 02.01.2020 prosecution filed an application under Sections 173(8) and 311 Cr.P.C., to file FSL Report regarding DNA profiling. The said application was allowed by granting opportunity to accused persons including petitioner to rebut the evidence. Thereafter, statement of accused persons including petitioner was again recorded under Section 313 Cr.P.C., regarding new facts/evidence brought on record and at that time also no defence evidence was led by the accused persons. However, application under Section 311 Cr.P.C. was filed on behalf of the petitioner on 23.09.2020, by intending to examine witness Mohinder Giri on certain points.

5. It is also noticeable that Mohinder Giri was cited as a witness by the prosecution in the final report submitted under Section 173 Cr.P.C., but he was not examined and was given up by the prosecution.

6. Learned Additional Advocate General has opposed prayer made in the petition, for the reasons cited by Additional Sessions Judge for rejecting the application.

7. Learned counsel for the petitioner, to substantiate his plea to allow the petition, has referred pronouncement of the Supreme Court in ***Natasha Singh vs. Central Bureau of Investigation (State), (2013) 5 SCC 741,*** by referring following paragraphs:-

> "16. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same. (Vide: ***Talab Haji Hussain v. Madhukar Purshottam Mondkar & Anr., AIR 1958 SC 376***; ***Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors., (2004) 4 SCC 158***; ***Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors., (2006) 3 SCC 374***; ***Kalyani Baskar (Mrs.) v. M.S. Sampoornam (Mrs.), (2007) 2 SCC 258***; ***Vijay Kumar v. State of U.P. & Anr., (2011) 8 SCC 136***; and ***Sudevanand v. State through C.B.I., (2012) 3 SCC 387).***
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> 20. Undoubtedly, an application filed under Section 311 Cr.P.C. must be allowed if fresh evidence is being produced to facilitate a just decision, however, in the instant case, the learned Trial Court prejudged the evidence of the witness sought to be examined by the appellant, and thereby cause grave and material prejudice to the appellant as regards her defence, which tantamounts to a flagrant violation of the principles of law governing the production of such evidence in keeping with

> the provisions of Section 311 Cr.P.C. By doing so, the Trial Court reached the conclusion that the production of such evidence by the defence was not essential to facilitate a just decision of the case. Such an assumption is wholly misconceived, and is not tenable in law as the accused has every right to adduce evidence in rebuttal of the evidence brought on record by the prosecution. The court must examine whether such additional evidence is necessary to facilitate a just and proper decision of the case. The examination of the hand-writing expert may therefore be necessary to rebut the evidence of Rabi Lal Thapa (PW.40), and a request made for his examination ought not to have been rejected on the sole ground that the opinion of the hand-writing expert would not be conclusive. In such a situation, the only issue that ought to have been considered by the courts below, is whether the evidence proposed to be adduced was relevant or not. Identical is the position regarding the panchnama witness, and the court is justified in weighing evidence, only and only once the same has been laid before it and brought on record. Mr. B.B. Sharma, thus, may be in a position to depose with respect to whether the documents alleged to have been found, or to have been seized, were actually recovered or not, and therefore, from the point of view of the appellant, his examination might prove to be essential and imperative for facilitating a just decision of the case."

8. Learned counsel for the petitioner has also placed reliance on ***Manju Devi vs. State of Rajasthan and another, (2019) 6 SCC 203,*** by referring following paragraphs:-

> 8. Having given thoughtful consideration to the rival submissions and having examined record with reference to the law applicable, we find it difficult to approve the orders impugned; and it appears just and proper that the application moved in this matter under Section 311 CrPC be allowed with direction to the Trial Court to ensure that the testimony of the doctor conducting first post-mortem comes on record.
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> 9. Section 311 CrPC reads as under:-
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> > "311. **Power to summon material witness, or examine person present**: - Any Court may, at any stage of any inquiry, trial or other proceeding under this

> Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case"

10. It needs hardly any emphasis that the discretionary powers like those under Section 311 CrPC are essentially intended to ensure that every necessary and appropriate measure is taken by the Court to keep the record straight and to clear any ambiguity in so far as the evidence is concerned as also to ensure that no prejudice is caused to anyone. The principles underlying Section 311 CrPC and amplitude of the powers of the Court thereunder have been explained by this Court in several decisions 1. ***In Natasha Singh v. CBI (State) : (2013) 5 SCC 741,*** though the application for examination of witnesses was filed by the accused but, on the principles relating to the exercise of powers under Section 311, this Court observed, inter alia, as under:-

> "8. Section 311 CrPC empowers the court to summon a material witness, or to examine a person present at "any stage" of "any enquiry", or "trial", or "any other proceedings" under CrPC, or to summon any person as a witness, or to recall and re-examine any person who has already been examined if his evidence appears to it, to be essential to the arrival of a just decision of the case. Undoubtedly, the CrPC has conferred a very wide discretionary power upon the court in this respect, but such a discretion is to be exercised judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings. The court is competent to exercise such power even suo motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case.
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> *** *** **"
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> 15. The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper

> proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 CrPC must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 CrPC must therefore, be invoked by the court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection. The very use of words such as "any Court", "at any stage", or "or any enquiry, trial or other proceedings", "any person" and "any such person" clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.""
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> 13. Though it is expected that the trial of a sessions case should proceed with reasonable expedition and pendency of such a matter for about 8-9 years is not desirable but then, the length/duration of a case cannot displace the basic requirement of ensuring the just decision after taking all the necessary and material evidence on record. In other words, the age of a case, by itself, cannot be decisive of the matter when a prayer is made for examination of a material witness."

9. It has been contended on behalf of the petitioner that Mohinder Giri is a cited witness of the prosecution and petitioner is not introducing any

new witness, and relative or brother of the petitioner cannot be held to be incompetent witness for relation with the accused, particularly when prosecution itself has cited him as a witness. It has also been contended that even interested witnesses are permissible to be examined, though with rider that their deposition shall be scrutinized with care and caution for having interest to tilt the case according to their interest.

10. It has been further contended on behalf of the petitioner that Mohinder Giri is a witness to the documents which have been exhibited as Ex.PW.10/A and Ex.PW.15/A, but he has not been examined by the prosecution by giving up his examination as a witness and, thus, denial of prayer to examine the said witness would amount to unfair trial, as fair trial includes grant of fair and proper opportunities to a person concerned to lead evidence. It has been contended that plea of the State that application has been filed to delay the trial is not sustainable particularly when State itself had filed an application under Section 311 Cr.P.C. when case was listed for arguments and the said application was allowed.

11. Petitioner is facing trial for an offence wherein he can be sentenced for imprisonment of life or with capital punishment. Taking into consideration ratio of law referred in aforesaid pronouncements of the Supreme Court and facts and circumstances of the present case, I am of the opinion that petitioner may be granted an opportunity to examine witness Mohinder Giri, as prayed, on his behalf.

12. In view of above, petition is allowed and order dated 07.11.2020, passed by Additional Sessions Judge, Nalagarh, District Solan, in Trial No.224 of 2016, titled as *State of H.P. vs. Satinder Giri and another,* is set aside and application filed by the petitioner under Section 311 Cr.P.C., is allowed. Parties are directed to appear before the trial Court on 07.01.2022 and trial Court is directed to fix a date thereafter, for production and examination of witness as proposed in the application and, thereafter, to conclude the trial as

expeditiously as possible without causing any further delay. Needless to say that prosecution will be entitled to cross-examine the witness and to exercise its right as permissible under law.

13. Petition stands disposed of in aforesaid terms, so also pending application(s), if any.

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

Naresh Kumar and ors.

....Petitioners

Versus

State of H.P. and ors.

...Respondents

For the petitioners : Mr. Guna Nand Verma, Advocate.
For respondents No.1to3: Mr. Desh Raj, Thakur, Additional Advocate General.
For respondent No.4 : Mr. I.S. Chandel, Advocate.

Cr.MMO No. : 31 of 2021
Reserved on : 20.12.2022
Decided on : 30.12.2022

Code of Criminal Procedure, 1973- Section 482- Inherent power- Quashing of FIR- **Indian Penal Code, 1860-** Sections 448, 323, 325 and 34- Two cross FIRs regarding the dispute that had arisen with respect to the possession of Shop no. 13- Allegations of forcible dispossession and infliction of injuries- **Held-** FIR not meant to contain all the details- Only recording of information in respect of the cognizable offence- FIR Cannot be quashed- No merit- Petition dismissed. (Paras 10, 11)

Cases referred:

Kaptain Singh Vs. State of Uttar Pradesh and others (2021) 9 SCC 35;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

Heard.

2. By way of instant petition, petitioners have prayed for following substantive reliefs:-

> 1. *That the FIR No. 23, dated 05.02.2017, Annexure P-1, registered with Police Station Theog, Distt. Shimla, H.P. against the present petitioners under Section 448, 323, 325 and Section 34 of IPC and all further proceedings including*

judicial proceedings, if any, arising out of it may be quashed and set aside.

2. *That in alternate Annexure P-1 qua petitioner No.3 be quashed and set aside being not present at place of occurrence and was under training of Patwari at Kasauli during that period in view of the annexure P- in the end of justice and fair play.*

3. *That respondent No. 1 may be directed to take proper disciplinary action and other appropriate criminal proceedings against the official respondents especially respondent No. 3 for misusing their official powers in contravention of the law of the land and for further unduly harassing and intimidating the petitioners and further for subjecting the petitioners to wrongful confinement and illegal prosecution.*

4. *That the respondent State may be directed to institute appropriate criminal proceedings against all the private respondents for the illegal act and conduct committed by the said respondents as mentioned in the petitioners.*

5. *That the respondents may be directed to grant suitable compensation to the petitioners from the pockets of erring officials for which the petitioners had to suffer on account of illegal acts and conduct of the respondent.*

3. Brief facts necessary for adjudication of the petition are that two cross FIRs bearing Nos. 22/2017 and 23/2017 came to be registered at Police Station Theog, District Shimla, H.P. on 05.02.2017. In FIR No. 22/2017, petitioner No.1 was the complainant and in FIR No. 23/2017, respondent No. 4 was the complainant. The dispute had arisen with respect to possession of Shop No.13, Vegetable Market, Theog. Both the sides had levelled cross allegations. On one hand, petitioner No. 1 claimed possession on the shop in question, on the other, respondent No. 4 claimed the same to be in his possession. The allegations of forcible dispossession and infliction of injuries were also levelled against each other.

4. Petitioners have prayed for quashing of FIR No. 23/2017, on the grounds that the same was false. Their possession on the Shop No.13 situated in Vegetable Market, Theog, was established. The FIR had been lodged against them by police in connivance with respondent No. 4. It has further been submitted on behalf of the petitioners that petitioner No. 3 was undergoing training on the date of alleged occurrence at Kasauli and was not present on the spot. Petitioner No. 2 is stated to be handicapped. It has further been alleged that FIR No. 22/2017 recorded at the instance of petitioner No. 1 has been investigated and cancellation report has been presented by the police in the Court.

5. It is revealed from the replies filed on behalf of the respondents that after investigation in FIR No. 23/2017, police found *prima facie* case against petitioners and challan was presented. Petitioners were charged and prosecution evidence is in the process being recorded.

6. The instant petition was filed by the petitioners on 15.01.2021. Noticeably, in para-8(v), petitioners themselves have averred that respondent No. 4 and his wife had been examined as prosecution witnesses before the date of filing of instant petition. Meaning thereby that petitioners were aware about the fact that the Court was already seized of the matter. It had framed the charge against the petitioners after taking cognizance. Still, no factual foundation was laid in the petition to challenge the material collected by the Investigating Agency during investigation as also the order passed by learned Judicial Magistrate First Class, whereby the cognizance was taken and subsequently charges were framed. Petitioners have in their entire petition raised objections with respect to the falsity of the facts, on the basis of which, FIR No. 23/2017 was registered.

7. Record reveals that the petitioners has not placed on record even the order passed by learned Judicial Magistrate First Class, whereby the cognizance was taken. The order framing the charge has also not been placed

on record. Though, a prayer has been made to quash further proceedings including judicial proceedings, if any, arising out of FIR No. 23/2017, but petition is completely silent, as to on what basis, subsequent proceedings are sought to be quashed without laying any challenge thereto in accordance with law.

8. In above noticed circumstances, the contents of FIR No. 23/2017 losses much significance. FIR is not meant to contain all the details. It is only recording of information in respect of the cognizable offence. The contents of FIR can only be skeleton narration of facts. It is only after investigation that the police arrives at some conclusion as to existence of a case against the accused or otherwise.

9. In ***Kaptain Singh*** *Vs.* ***State of Uttar Pradesh and others (2021) 9 SCC 35***, the Apex Court has held as under:-

> *9.1 At the outset, it is required to be noted that in the present case the High Court in exercise of powers under Section 482 Cr.P.C. has quashed the criminal proceedings for the offences under Sections147, 148, 149, 406, 329 and 386 of IPC. It is required to be noted that when the High Court in exercise of powers under Section 482 Cr.P.C. quashed the criminal proceedings, by the time the Investigating Officer after recording the statement of the witnesses, statement of the complainant and collecting the evidence from the incident place and after taking statement of the independent witnesses and even statement of the accused persons, has filed the charge-sheet before the Learned Magistrate for the offences under Sections147, 148, 149, 406, 329 and 386 of IPC and even the learned Magistrate also took the cognizance. From the impugned judgment and order passed by the High Court, it does not appear that the High Court took into consideration the material collected during the investigation/inquiry and even the statements recorded. If the petition under Section 482 Cr.P.C. was at the stage of FIR in that case the allegations in the FIR/Complaint only are required to be considered and whether a*

cognizable offence is disclosed or not is required to be considered. However, thereafter when the statements are recorded, evidence is collected and the charge-sheet is filed after conclusion of the investigation/inquiry the matter stands on different footing and the Court is required to consider the material/evidence collected during the investigation. Even at this stage also, as observed and held by this Court in catena of decisions, the High Court is not required to go into the merits of the allegations and/or enter into the merits of the case as if the High Court is exercising the appellate jurisdiction and/or conducting the trial. As held by this Court in the case of Dineshbhai Chandubhai Patel (Supra) in order to examine as to whether factual contents of FIR disclose any cognizable offence or not, the High Court cannot act like the Investigating agency nor can exercise the powers like an Appellate Court. It is further observed and held that question is required to be examined keeping in view, the contents of FIR and prima facie material, if any, requiring no proof. At such stage, the High Court cannot appreciate evidence nor can it draw its own inferences from contents of FIR and material relied on. It is further observed it is more so, when the material relied on is disputed. It is further observed that in such a situation, it becomes the job of the Investigating Authority at such stage to probe and then of the Court to examine questions once the charge-sheet is filed along with such material as to how far and to what extent reliance can be placed on such material.

9.2 In the case of Dhruvaram Murlidhar Sonar (Supra) after considering the decisions of this Court in Bhajan Lal (Supra), it is held by this Court that exercise of powers under Section 482 Cr.P.C. to quash the proceedings is an exception and not a rule. It is further observed that inherent jurisdiction under Section 482 Cr.P.C. though wide is to be exercised sparingly, carefully and with caution, only when such exercise is justified by tests specifically laid down in section itself. It is further observed that appreciation of evidence is not permissible at the stage of quashing of proceedings in exercise of powers under Section 482 Cr.P.C. Similar view has been expressed by this Court in the

case of Arvind Khanna (Supra), Managipet (Supra) and in the case of XYZ (Supra), referred to hereinabove.

9.3 Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand, we are of the opinion that the High Court has exceeded its jurisdiction in quashing the criminal proceedings in exercise of powers under Section 482 Cr.P.C.

10. The High Court has failed to appreciate and consider the fact that there are very serious triable issues/allegations which are required to be gone into and considered at the time of trial. The High Court has lost sight of crucial aspects which have emerged during the course of the investigation. The High Court has failed to appreciate and consider the fact that the document i.e. a joint notarized affidavit of Mamta Gupta – Accused No.2 and Munni Devi under which according to Accused no.2 - Ms. Mamta Gupta, Rs.25 lakhs was paid and the possession was transferred to her itself is seriously disputed. It is required to be noted that in the registered agreement to sell dated 27.10.2010, the sale consideration is stated to be Rs.25 lakhs and with no reference to payment of Rs.25 lakhs to Ms. Munni Devi and no reference to handing over the possession. However, in the joint notarized affidavit of the same date i.e., 27.10.2010 sale consideration is stated to be Rs.35 lakhs out of which Rs.25 lakhs is alleged to have been paid and there is a reference to transfer of possession to Accused No.2. Whether Rs.25 lakhs has been paid or not the accused have to establish during the trial, because the accused are relying upon the said document and payment of Rs.25 lakhs as mentioned in the joint notarized affidavit dated 27.10.2010. It is also required to be considered that the first agreement to sell in which Rs.25 lakhs is stated to be sale consideration and there is reference to the payment of Rs.10 lakhs by cheques. It is a registered document. The aforesaid are all triable issues/allegations which are required to be considered at the time of trial. The High Court has failed to notice and/or consider the material collected during the investigation.

10. Keeping in view the above noticed dictum that FIR in question cannot be quashed, at this stage, in absence of any specific challenge to the investigation conducted by police and also orders passed by Court of Competent jurisdiction, whereby firstly, cognizance was taken and thereafter, the charges were framed. During the course of hearing, the Court was informed by learned counsel for respondent No. 4 that most of the prosecution witnesses have already been examined in the case. This Court while exercising jurisdiction under Section 482 of Cr.P.C will not hold any inquiry into the factual aspect of the matter. The facts alleged in the petition and also canvassed on behalf of the petitioners by learned counsel representing him are subject of trial and hence, cannot be gone into by this Court, at this stage.

11. In view of above discussion, there is no merit in this petition and the same is accordingly dismissed.

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

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

Jaipal Negi alias Johnny .....Petitioner

Versus

State of Himachal Pradesh .....Respondent

For the petitioner: Mr. Ajay Singh Rana, Advocate.
For the respondent: Mr. Desh Raj Thakur, Addl. A.G., with Mr. Narender Thakur, Dy. A.G.

Cr. M.P.(M) No. 2635 of 2022
Reserved on: 21.12.2022
Decided on: 27.12.2022

Code of Criminal Procedure, 1973- Section 439- Bail- **Indian Penal Code, 1860-** Sections 341, 323, 325, 307, 506 and 34- Ground taken of being falsely implicated- Allegations against petitioner are yet to be proved- **Held-** Petitioner cannot be allowed to be kept in custody for indeterminate period- No past criminal history- Bail Petition allowed. (Paras 8, 9,11)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge.

Petitioner is in judicial custody since 14.05.2022, in case registered vide FIR No. 55 of 2022, dated 02.04.2022, at Police Station, Manpura, Police District Baddi, H.P. under Sections 341, 323, 325, 307, 506 and 34 of IPC.

2. Petitioner has prayed for grant of bail under Section 439 Cr.P.C. on the ground that he has been falsely implicated in the case. As per petitioner, he has not committed any offence much less the offence alleged against him. It is also contended on behalf of petitioner that he has no past criminal history. Petitioner has been implicated for ulterior purposes.

Petitioner is stated to be permanent resident of Village Theda, P.S.Manpura, Tehsil Baddi, District Solan, H.P. It has been undertaken by petitioner that he will abide by all the terms and conditions as may be imposed against him.

3. Status report has been filed on behalf of the respondent. It is revealed that the case was registered against petitioner and his co-accused on the basis of a written complaint submitted by the complainant Sh. Om Pal to the police alleging inter alia that the said Sh. Om Pal alongwith injured Bhajan Lal and another person named Ravinder Singh were standing near their fields when the petitioner alongwith his co-accused namely Sanju stopped there and the petitioner inflicted a blow on the head of Bhajan Lal with a sickle (Drat). On 5th May, 2022, case summary in respect of injured Bhajan Lal was received from PGI, Chandigarh and the injury received by him was described as "dangerous to life and with sharp weapon". Accordingly, Sections 325 and 307 of IPC were incorporated in the case and thereafter on 14.5.2022, the petitioner and his co-accused were arrested. As per status report, the investigation is complete and challan has been filed.

4. I have heard learned counsel for the parties and have also gone through the records of the case carefully.

5. It is contended on behalf of learned counsel for the petitioner that the genesis of the case has been suppressed by the police with ulterior purposes. He pointed out that in the MLC dated 01.04.2022 the Medical Officer has recorded the history of blunt blow with wooden stick and the source of such information is stated to be the attendant of the patient. In the same document, the name of Sh. Om Pal is written as friend of the injured. On the strength of such content of MLC, it has been submitted that in MLC, the complainant Sh. Om Pal had given a different history, whereas, while making the complaint to the police, he gave a different version. In MLC, the weapon of offence was mentioned as stick, whereas in the written complaint to the police, the weapon was stated to be a sickle. Learned counsel for the

petitioner further submitted that the sickle taken in possession by the police during investigation was provided to them by the complainant himself and on its scientific examination, no blood stained was found on it.

6. Though while deciding the application for bail, this Court is not to scan the material collected by the Investigating Agency minutely, but the same can always be looked into for assessing the seriousness and gravity of allegations against petitioner.

7. Taking notice of the contentions raised on behalf of the petitioner and after going through the records, it cannot be said that the contentions so raised are without any basis. There is a clear discrepancy between the version given by the complainant to the Medical Officer than the version given to the police. In complaint, the complainant had also mentioned the presence of third person with the petitioner and co-accused Sanju, but during investigation, no such third person has been connected with the offence. The allegations against petitioner are yet to be proved.

8. Petitioner is already in custody for the last about seven months. The trial has not yet been begun. It is likely that the trial will not be concluded within short period. Keeping in view of attending circumstances, petitioner cannot be allowed to be kept in custody for indeterminate period. Pre-trial incarceration otherwise is not the rule.

9. There is no past criminal history attributed to the petitioner. He is permanent resident of Village Theda, P.S.Manpura, Tehsil Baddi, District Solan, H.P. and there is no likelihood of his absconding or fleeing from the course of justice.

10. The respondent has not expressed any apprehension that in case of release of petitioner on bail, the trial of the case will be prejudicially affected. The co-accused of the petitioner is already on bail.

11. In view of peculiar facts and circumstances of the case, petition is allowed and the petitioner is ordered to be released on bail in case FIR No.

55 of 2022, dated 02.04.2022, registered at Police Station, Manpura, Police District Baddi, H.P. under Sections 341, 323, 325, 307, 506 and 34 of IPC, on his furnishing personal bond in the sum of Rs. 25,000/- 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)That the petitioner shall appear before learned trial Court on each and every date and shall not delay the trial.
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 breach of any of the bail condition by the petitioner shall entail cancellation of the bail.
iv) That the petitioner shall not leave India without prior permission of the Court.

12. 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.

The petition stands disposed of.

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

Amit .....Petitioner

Versus

State of Himachal Pradesh .....Respondent

For the petitioner: Mr.K. S. Gill, Advocate.
For the respondent: Mr. Desh Raj Thakur, Addl. A.G., with Mr. Narender Thakur, Dy. A.G.

Cr. M.P.(M) No. 2767 of 2022
Reserved on: 27.12.2022
Decided on: 30.12.2022

Code of Criminal Procedure, 1973- Section 439- Bail- **Indian Penal Code, 1860-** Sections 363, 366-A, 376 - **Protection of Children from Sexual Offences Act, 2012-**Section 4-Petitioner raised plea of violation of right and personal liberty- Petitioner has been in custody for more than two years- **Held-** Antecedents of petitioner are doubtful- May also be difficult to secure presence of petitioner for early disposal of trial- Bail petition dismissed. (Paras 8, 10)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge.

Petitioner is an accused of commission of offences under Sections 363, 366-A, 376 of IPC and Section 4 of the Protection of Children from Sexual Offences Act (for short, "POCSO" Act), registered vide FIR No. 60 of 2020, dated 29.07.2020 at Police Station, Pachhad, District Sirmaur, H.P. He is facing trial before learned Special Judge, Sirmaur District at Nahan.

2. The case was registered vide FIR No. 60 of 2020 on the complaint of the father of the victim. It was alleged that the victim was aged about 16 years and 2 months old, when the alleged offence was committed. Petitioner is accused of having taken the victim out of the guardianship of her parents

without their consent for purposes of marrying her and had thereafter committed rape on her. As per allegations made in the complaint, on 29.07.2020, the petitioner had taken the victim from her native village via Delhi to Meerut to his house, where, as per victim, the rape was committed upon her. It is further alleged against petitioner that he was already married. The prosecution has already examined 11, out of the total 24 cited witnesses.

3. Petitioner has prayed for grant of bail on the ground that he has been in custody for the last more than two years. The trial is not likely to be concluded in near future. Petitioner has, thus, raised the plea of violation of his right to life and personal liberty. As per petitioner, he is entitled for speedy trial, which right has been denied to him. Further, the petitioner has contended that he is innocent and has committed no offence.

4. I have heard learned counsel for the parties and have also gone through the case file carefully.

5. Learned Special Judge has already framed charges against the petitioner, for commission of offences under Sections 363, 366-A, 376 of IPC and Section 4 of the POCSO Act, after application of mind. The order so passed by learned Special Judge has remained un-assailed. In view of this, it will be too far-fetched to say that prima-facie material does not exist against the petitioner.

6. Petitioner undoubtedly is accused of a very serious and heinous offence. The victim was about 16 years of age at the time of commission of offence, whereas, the petitioner was aged about 28 years. Petitioner is stated to be already married. In such circumstances, petitioner cannot be said to have any plausible explanation for his conduct.

7. The offence, if proved against petitioner, may attract severe punishments against him. It has also been brought on record that after commission of offences in question, within a short span, he was involved in a case of theft at Delhi and was arrested there. The custody of petitioner was got

transferred from Delhi by the Himachal Police for the purpose of investigation of FIR in question. Thus, the antecedents of petitioner are doubtful.

8. The concern of this Court at this stage is to secure fair and expeditious trial of the case. With doubtful antecedents of petitioner, it cannot be said that he will not affect the fair trial of the case after his release. The prosecution evidence is still in the process of being recorded and in the event of release of petitioner on bail at this stage, he may try to win-over and influence the prosecution witnesses. In view of aforesaid backdrop, it may also be difficult to secure the presence of the petitioner for early disposal of the trial.

9. No doubt, petitioner is in custody for about two years. It also cannot be disputed that petitioner has a right of speedy trial, however, it cannot be forgotten that the conclusion of trial depends on many factors and sometimes such factors are beyond anybody's control. The offence in this case was committed in July, 2020, whereafter, it was a period when every aspect of life was affected by COVID-19 pandemic. It's after effects continued for quite a long period. In this view of the matter, it cannot be said that the trial has been unduly delayed.

10. Keeping in view the entirety of the facts and circumstances of the case, the petition is dismissed.

11. 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 MR. JUSTICE TARLOK SINGH CHAUHAN, J. AND HON'BLE MR. JUSTICE VIRENDER SINGH, J.

Vijay Kumar Kaul .....Petitioner

Versus

Managing Director, Himachal Pradesh State Forest Development Corporation, Ltd. and others.

...Respondents

For the petitioner: Mr. V.B. Verma, Advocate.
For the respondents: Mr. Vinod Thakur, Advocate.

CWP No. 5050 of 2022
Decided on: 28.12. 2022

Constitution of India, 1950- Article 226- Release of balance amount of gratuity and retiral benefits with interest at the rate of 12% per annum- **Held-** Respondents directed to file a supplementary affidavit which indicated that the recoveries sought to be affected against petitioner are solely on the basis of the audit objections- Petition allowed with directions. (Paras 5, 6)

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge. (Oral)

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

"I. That a writ in the nature of Mandamus or any other appropriate writ, order or directions may kindly be issued directing the respondents to release the balance amount of gratuity and retiral benefits i.e. leave encashment to the Petitioner.

II. That the Writ in the nature of Mandamus or any other appropriate writ, order or directions may kindly be issued directing the

respondents to release all the retiral and pensionary benefits with interest at the rate of 12% per annum from the date of his retirement.

2. It is not in dispute that total amount due to the petitioner on account of his superannuation i.e. gratuity and leave encashment comes to Rs. 17,24,840/-. However, according to the respondents, an amount of Rs.16,11,186/- is recoverable from the petitioner on account of various recoveries required to be made and the same have been given as under:-

"i) Recovery of Rs. 8, 81,068/- on account of personal vehicle loan from the Kangra Central Co-operative Bank, Kotwali Bazar 2022 Dharamshala, District Kangra, HP. That on 03-02-2005, DDO/Divisional Manager, Una gave an undertaking on the request of petitioner for this loan. The petitioner failed to deposit the installments of car loan. However, the said amount has been released to the petitioner alongwith interest amounting to Rs. 96,183/- in compliance to Hon'ble High Court orders dated 30-12-2020 in CWP No. 4578/2020 mentioned supra.

ii) That as per the Audit Para No.7/2011-12 an amount of Rs. 5, 42,000/- is due against the petitioner. The said recovery has been raised by DFO Dharamshala for unauthorized retention of Govt. accommodation and non- charging of penal rent. The DFO Dharamshala was requested to provide NOC for release of retiral benefits to the petitioner, however DFO Dharamshala vide letter dated 21-09-2021 has intimated that NOC to this effect, cannot be given. A copy of letter dated 21-09-2021 is appended herewith as Annexure R-2. However, the petitioner requested to DM Dharamshala to release the amount of this recovery due to his financial position and further intimatedthat in case of any controversy the Respondent can withheld the amount arising from the enhancement of gratuity due to revision of pay scale from 01-01-2016. In view of the same Rs. 5, 00,000/- was released to the petitioner on 01-08-2022.

iv) That as per the Audit Para No.13/2004-05, recovery of Rs. 36,218 on account of wrongly allowing benefit under assured career progression scheme and as per the Audit Para No. 12/2004-05, another recovery amounting to Rs.1,34,000/- for misappropriation of Corporation's money is pending against the petitioner.

v) That recovery of Rs. 10400/- on account of shortage of 8000 bricks and recovery of Rs. 7500/- alongwith interest on account of imprest advance given to the petitioner is due and recoverable from him."

3. As regards the balance amount of Rs. 1,13,654/-, the same stands released in favour of the petitioner.

4. When petition came up for hearing before this Court on 01.11.2022, it was noticed that the respondents while filing reply have not at all replied the grounds 12(A) to 12(I) taken in the petition and accordingly, the respondents are directed to file a supplementary affidavit.

5. The respondents have now filed the supplementary affidavit which goes to indicate that the recoveries sought to be effected against the petitioner are solely on the basis of the audit objections. If that be so, obviously, it was for the Department to have satisfied the authorities by meeting out the objections so raised, more particularly, when the petitioner had not been associated muchless granted a opportunity of putting forth his version. It is petitioner, who alone, has been adversely affected because of the audit objections and yet he has not been offered any opportunity of hearing before ordering the recoveries. Clearly, the order has resulted in evil and civil consequences, which cannot withstand the judicial scrutiny.

6. In such view of the matter, the instant petition is allowed and the respondents are directed to issue a notice and also supply the adverse material and thereafter call for the objections from the petitioner and on receipt of the same, decide the matter, more particularly, the one relating to audit objections afresh, in accordance with law.

7. The writ petition is disposed of in the aforesaid terms. Pending applications, if any, also stand disposed of.

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

Mittar Bhushan ...Petitioner.

Versus

Amar Chand Negi & another ..Respondents

For the Petitioner: Mr.Virender Singh Chauhan, Senior Advocate, alongwith Mr.Ajay Singh Kashyap, Advocate.
For the Respondents: Mr. Ram Murti Bisht, Advocate.

Civil Revision No.101 of 2022
Decided on: 28.11.2022

Code of Civil Procedure, 1908- Sections 115, 47- Petitioner has assailed the order passed by Senior Civil Judge dismissing the objection petition for claiming preferential right as provided under Section 22 Indian Succesion Act- Third party has no right to file objection under Section 47 CPC- **Held**- No merit in present petition- Petition dismissed.

Cases referred:

Ashutosh Chaturvedi vs. Prano Devi alias Parani Devi & others, (2008) 15 SCC 610;

Valliyil Sreedevi Amma vs. Subhadra Devi & others, AIR 1976, Kerala 19;

The following judgment of the Court was delivered:

Vivek Singh Thakur, J (oral)

Petitioner, by way of present petition, has assailed order dated 19.05.2022, passed by Senior Civil Judge, Kullu, District Kullu, H.P., in Objection Petition No.361 of 2021, preferred in Execution Petition No.103 of 2014, titled as *Mittar Bhushan vs. Amar Chand Negi & another.*

2. Respondent No.1-Amar Chand Negi, in furtherance to agreement to sell executed by seller respondent No.2-Jhabe Ram, had filed suit for

Specific Performance of Agreement, which was decreed on 26.05.2004 and the said judgment and decree was upheld up till Supreme Court. Thereafter, Amar Chand Negi, filed Execution Petition No.103 of 2014, titled as *Amar Chand Negi vs. Jhabe Ram etc.,* which is pending before Senior Civil Judge, Kullu.

3. During pendency of Execution Petition, Mittar Bhushan petitioner preferred Objection under Section 47 of the Code Civil Procedure (in short 'CPC') claiming that being a co-sharer he had preferential right over the suit land under Section 22 of the Indian Succession Act. In objection, he offered payment of sale consideration alongwith interest, but reserving his right to file suit under Section 22 of the Indian Succession Act.

4. Learned counsel for the petitioner has argued that being a co-sharer in the property, objector has preferential right to purchase the same and, therefore, before entering into an agreement to sell with Decree Holder Amar Chand Negi, Judgment Debtor-Jhabe Ram should have offered sale of the property to his co-sharer for having their preferential right as provided in Section 22 of the Indian Succession Act and thus, the Objector has a right to file Objection Petition, for claiming his preferential right, and, therefore, Senior Civil Judge by dismissing the Objection has committed illegality, material irregularity and mistake in law.

5. Learned counsel for the Decree Holder has submitted that execution of judgment and decree, which has attained finality up till the Supreme Court, cannot be avoided and stalled for advancing claim by Objector under Section 22 of the Indian Succession Act, who is not party to the suit, and appropriate course for the Objector, to claim any right over the suit property if any, available under law, was to file an appropriate suit for claiming such right.

6. Learned counsel for the Decree Holder-respondent No.1 has relied upon pronouncement of the Supreme Court in ***Valliyil Sreedevi Amma***

vs. Subhadra Devi and others, reported in ***AIR 1976, Kerala 19,*** which has been referred and approved by the Supreme Court in its judgment passed in ***Ashutosh Chaturvedi vs. Prano Devi alias Parani Devi and others, (2008) 15 SCC 610.***

7. The Supreme Court in ***Ashutosh Chaturvedi's case*** has observed as under:-

> "19. The decision of the Kerala High Court also provides for a right upon a co-sharer to file a suit for enforcing such a right, stating : (Valliyil Sreedevi Amma vs. Subhadra Devi, AIR 1976 Kerala 19)
>
> > "6....The object of sub-section (1) as we understand it is that in cases where by virtue of intestate succession under the Act any interest in immovable property has devolved upon two or more heirs specified in Class I of the Schedule and any one of such heirs proposes to transfer his interest in the property the other heirs should have a preferential right to acquire the interest which is so proposed to be transferred. The said intention of Parliament can be effectuated only if we consider the section as conferring an enforceable right on the heirs other than the one who proposes to transfer his interest. The section confers on such co-heirs a preferential right to acquire the interest which is proposed to be transferred by the other co-heir. In case the proposed transfer is effected by one of the co-heirs in violation of the right conferred on his co-heirs by sub-section (1) the latter cannot certainly be without a remedy because every legal right must necessarily carry with it a remedy for enforcing the same. The remedy of the non-alienating co-heirs, in such circumstances, will, in our opinion, be to seek the intervention of the Court to enable them to acquire the right which has been transferred away by the other co-heir in violation of sub-section (1) of Section 22. In as much as the section does not provide any special procedure for seeking the said remedy, the ordinary procedure for enforcement of any civil right has to be resorted to by the co-heirs who wish to enforce their rights under Section 22(1); in other words the remedy is by way of a regular civil suit before the competent court. Where the properties have been already alienated in favour of strangers there is all the more

> reason why there should be a full and fair adjudication of the entire matter in a suit tried before a competent civil Court because various factual questions are bound to arise for determination in such a suit wherein the principal issue would be whether the transfer complained of was effected in violation of sub-section (1) of Section 22. The main purpose of such a suit instituted by the co-heir will necessarily be the enforcement of the right conferred by Section 22(1) of the Act. The question of invalidity of the transfer effected by the other co-heir in favour of strangers becomes relevant in such an action as an incidental matter which has necessarily to be gone into for the purpose of determining whether the plaintiff is entitled to the relief sought by him against his co- heirs in enforcement of the right conferred by Section 22(1)."
>
> 20. The only remedy which was, thus, available to the appellant might be to file a suit.... ... ..."

8. Petitioner was not party to the suit. The judgment and decree sought to be executed by the Decree Holder is a judgment and decree between Decree Holder-respondent No.1 and Judgment Debtor-respondent No.2. Section 47 CPC confers power upon the Court to adjudicate and determine all the questions arising between the parties to the suit in which decree was passed, or their representatives deriving title from them, but relating to the execution, discharge or satisfaction of the decree. Reading of bare provisions of Section 47 CPC, clearly contemplates that third party has no right to file Objection under Section 47 CPC. Therefore, remedy for redressal of grievance of the petitioner, if any, lies somewhere else.

9. I have gone through the impugned order and for the reasons assigned therein and discussion hereinabove, I find no merit in present petition and the same is dismissed. Needless to say that interim protection granted to the petitioner also stands vacated.

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

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

Gulzari (now deceased) through LRs. ...Appellants/Applicants

Versus

Chuni Lal and others. ...Respondents/non-applicants.

For the Appellant. Mr.R.L. Chaudhary, Advocate.

For the Respondents: Mr.Ashok Kumar, Advocate, for non-applicants/respondents No. 1 to 4.

Non-applicant/respondent No. 5 is stated to have expired and deleted.

Non-applicants/respondents No. 8(a) to 8(c) ex parte vide order dated 30.9.2022.

Non-applicants/respondents No. 6, 7, 9 to 15, 16(a), 16(b), 16(c), 17 to 20 are ex parte vide order dated 27.9.2021

CMP (M) No. 886 of 2020
Decided on: 29.11.2022

Limitation Act, 1908- Section 5- Condonation of delay in filing regular second appeal against judgment passed by Additional District Judge- Delay of 5 years and 12 days in filing the appeal- Limitation period had already expired- **Held-** Appears that deceased had accepted the impugned judgment- No merit- Petition dismissed. (Para 5)

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge (Oral)

This application has been filed for condonation of delay in filing Regular Second Appeal against judgment and decree dated 27.11.2014 passed

by Additional District Judge (II), Mandi in Civil Appeal No. 775 of 2013, titled as Chuni Lal and others Vs. Gulzari Lal, whereby reversing judgment and decree dated 26.4.2013 passed by Civil Judge (Senior Division) Court No. 2 Mandi, suit of plaintiffs Chuni Lal and others has been decreed.

2. Registry has reported that there is delay of 5 years and 12 days in filing the appeal.

3. The appeal has been proposed to be filed by son of defendant Gulzari on the ground that he was not aware about the litigation in reference and he came to know about it only after the death of his father Gulzari Lal and, therefore, he has preferred appeal alongwith this application for condonation of delay.

4. Plaintiffs in present case on 29.10.2009 had filed Civil Suit for declaration, which was dismissed vide judgment and decree dated 26.4.2013, whereupon plaintiffs had preferred Civil Appeal No. 775 of 2013, which was allowed and the suit was decreed vide judgment and decree dated 27.11.2014 to the extent that entry showing Gulzari Lal in possession of suit land as non-occupancy tenant against ½ share of Sadhu S/o Chhajju, was liable to be deleted being declared illegal and in his place legal heirs of Sadhu son of Chhajju were held entitled for that as non-occupancy tenants to the extent of ½ share and suit of plaintiffs was also decreed for permanent prohibitory injunction by restraining Gulzari Lal, permanently from interfering in peaceful possession of suit land.

5. Gulzari Lal expired on 9.3.2018, i.e. about 3 ½ years after passing of judgment and decree in this Civil Appeal. Limitation period had already expired during life time of Gulzari Lal. Now, after death of Gulzari Lal, his legal heir cannot claim for condonation of delay on the ground that during life time of Gulzari Lal he was not aware about the litigation. It is not a case where respondent was not served and/or respondent was unrepresented for no lapse on his part. In present case Gulzari Lal had contested the suit as

well as appeal and he did not assail impugned judgment and decree passed in Civil Appeal. The ground taken for condonation of delay amounts to taking a plea that delay in filing the appeal has been caused because father of applicant, Gulzari Lal was alive. Such a plea can never be permitted as legal heir enters into the shoes of predecessor-in-interest who in present case is father. Gulzari Lal was alive for more than 3 years after passing of judgment and decree in appeal and there is no reason on record for not filing the appeal by Gulzari Lal, rather it appears that Gulzari had accepted the impugned judgment and being satisfied with the judgment and decree, he did not assail it and now after his death his legal heir/son cannot claim right to file appeal by stating that he was not made aware by Gulzari Lalabout the litigation.

With aforesaid observations, I do not find any merit in the application and the same is dismissed.

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

Bindu Bala ...Petitioner

Versus

State of H.P. & others ...Respondents

For the petitioner : Mr. Kush Sharma, Advocate.

For the respondent(s) : Mr. Anup Rattan, Advocate General with Mr. VinodThakur and Mr. Shiv Pal Manahans, AdditionalAdvocate Generals, for therespondents-State. Mr. B.Nandan Vashishta,Advocate, for respondent No.3.Mr. Angrej Kapoor, Advocate, for respondent No.4

CWPOA No.6256 of 2020
Decided on :30.12.2022

Constitution of India, 1950- Article 226- Quashing of Recruitment and Promotion Rules for the post of JBT Class III or in alternative amendment of the Clause 7 of the Rules-Selection process be kept in abeyance till necessary incorporation qua the minimum qualification- Issue still pending before the Hon'ble Apex Court- Petition disposed off with directions to abide by outcome of decision rendered by Hon'ble Supreme Court. (Para 3)

The following judgment of the Court was delivered:

Per Tarlok Singh Chauhan, Judge (oral):

The instant petitions have been filed forgrant of the following substantive reliefs:-

> "i) That impugned Recruitment & Promotion Rues for the post of J.B.T. Class III(Non Gazetted) 2017, i.e. Annexure A-3 may kindly be quashed and set aside or in alternative the clause 7 of the

> Recruitment & Promotion Rules for the post of J.B.T. Class III (Non Gazetted) 2017 may kindly be amended in pursuance to the qualification as being prescribed and amended vide notification dated 28.6.2018 (Annexure A-4) i.e. "Graduation with atleast 50% marks and Bechelor of Education (B.Ed).
> ii) That impugned notification dated 5.12.2018 i.e. Annexure A-6 and impugned selection process vide advertisement dated 19.12.2019 i.e. Annexure A-9 may very kindly be kept in abeyance qua the post of JBT Teachers till the necessary incorporation qua the minimum qualification in clause 7 of the Recruitment & Promotion Rules for the post of J.B.T. Class III (Non-Gazetted), 2017 or in alternative the respondents be directed to allow the applicants to participate in the said selection process."

2. The issue in question is covered by the judgment rendered by a Division Bench of this Court in CWPOA No. 6251 of 2020, titled as, 'Vinod Kumar and others versus State of H.P. & others', alongwith connected matters, decided on 26.11.2021. However, the issue in question is still pending before the Hon'ble Supreme Court as well as before this Court in Review Petition.

3. Accordingly, we deem it appropriate to dispose of the present petition by directing that the fate of this petition will abide by the outcome of the decision rendered by Hon'ble Supreme Court and also by the outcome of the decision in Review Petition, to be rendered by this Court. Ordered accordingly.

4. The pending application(s), if any, are also disposed of.

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

Mrs. Vijeta Sharma ....Petitioner.

Versus

State of Himachal Pradesh and others ...Respondents.

For the petitioner: Mr. Arush Matlotia, Advocate.
For the respondents: Mr. Ajay Vaidya, Senior Additional Advocate General, for respondents No. 1 to 4.

Respondents No. 5 to 10 are *ex parte.*

CWPOA No. 4714 of 2019
Decided on: 01.12.2022

Constitution of India, 1950- Article 226- Appointment to the post of ASHA worker- Grievance of the petitioner is that undue advantage has been conferred upon the near and dear ones due to which incorrect marks for qualification stood awarded to the selected candidates- **Held-** Petition allowed with directions to selection committee to reassess the merit of candidates. (Para 6)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of present writ petition, the petitioner has, *inter alia,* prayed for the following reliefs:-

> *"(i) That the entire record pertaining to the instant case may kindly be summoned and subjected to scrutiny by this Court.*
> *(ii) That the present petition may very kindly be allowed with cost and this Hon'ble Court be pleased to issue a writ in the nature of certiorari to quash the appointments of respondent Nos. 5 to 9.*

(iii) That the interview committee be directed by a writ in the nature of mandamus, to award 5 marks for her qualification as done in the case of similar situated persons and offer her appointment to the post of ASHA worker with all consequential benefits."

2. The case of the petitioner is that respondent No. 1, in terms of Annexure P-1, dated 19th October, 2013, issued instructions for the selection of ASHA workers to the Deputy Commissioners in the State of Himachal Pradesh as also the Chief Medical Officers of the State. In terms thereof, a Selection Committee was constituted for the selection of ASHA workers under Health Block Gangath, Tehsil Nurpur, District Kangra, H.P. Respondent No. 3 was the Chairman of the said Committee, whereas respondents No. 4 and 5 were the Members thereof. The petitioner appeared before the Interview Committee on 15th July, 2014. However, after result of the aforesaid selection was declared by the respondents, it was revealed that the petitioner had not been selected for the post of ASHA worker under the said Health Block. In these circumstances, the petitioner applied for certain information under the Right to Information Act on 7th November, 2014. The information was received by the petitioner in the month of November/December, 2014 and after perusing the same, which included the result sheet of the interview which was conducted on 15th July, 2014, the petitioner discovered that in order to confer undue advantage upon the near and dear ones, incorrect marks for qualifications stood awarded to the selected candidates, including respondent No. 8. As per the petitioner, grant of incorrect marks for qualification to the selected candidates and non-grant of correct marks thereof to the petitioner has resulted in great injustice to the petitioner. To illustrate this fact, the petitioner has stated in Para-8 of the petition that whereas the petitioner, whose qualification was 10+2, was given four marks by the Interview

Committee, another candidate, i.e., respondent No. 9, whose qualification was only middle pass, was also given four marks.

3. During the course of hearing of this case, on 16th November, 2021, the State was directed to produce the record of the selected candidates, including their respective qualifications at the time when they applied for the post in question. Thereafter, when the matter was listed on 7th December, 2021, the following order was passed:-

> *"In terms of the last order passed, learned Senior Additional Advocate General has produced the relevant record pertaining to the petitioner as well as the selected candidate. There is no satisfactory answer which has come forth from the Department as to how for possessing different qualifications, similar marks stand allotted to the petitioner and private respondent as the qualification possessed by the private respondent is lower than that possessed by the petitioner.*
>
> *Be that as it may, before the matter is heard any further, learned Senior Additional Advocate General to inform the Court as to whether there is any station where the petitioner can be prospectively accommodated. Learned Senior Additional Advocate General to have instructions in this regard without prejudice to the contentions raised by the State in this case.*
>
> *List on 27th December, 2021."*

4. Record was subsequently also requisitioned by this Court in terms of order dated 21st September, 2022 and the same was again produced before the Court on 4th November, 2022. The matter was thereafter heard on 23rd November, 2022 for some time and was listed for continuation on 28th November, 2022. On the said date, as the matter could not be heard, as the Court time was over, therefore, the matter was listed for today. In terms of instructions Annexure P-1, the minimum education qualification for applying to the post in question was middle pass. Upon perusal of the record, as the Court discovered that rather than assessing the eligibility of the candidates on the basis of their qualification by applying some *pro rata* method vis-a-vis a

lower qualification and a higher qualification, the Selection Committee had, without due application of mind, granted marks for educational qualification to a candidate by applying the same yardstick, ignoring the fact as to whether the respective marks were secured by the candidate in 8th Class, 10th Class or 10+2 Class.

5. Faced with this situation, learned Additional Advocate General, on the last date of hearing had stated that he will inquire into the matter. Today, learned Senior Additional Advocate General apprised the Court that in fact in terms of the instructions issued by the State, there is no provision that the marks obtained by the candidate in education qualification were to be considered by the Interview Committee for selection of candidates. In the present case, as per him, as there was tie between the candidates, therefore, the Interview Committee formed its own criteria and granted marks to a candidate on the basis of total marks obtained by that candidate in the highest qualification acquired by him. However, no distinction was maintained in lower and higher qualification. This Court is of the considered view that this criteria which was adopted by the Selection Committee is highly arbitrary and discriminatory. This is for the reason that if a Selection Committee is assessing the merit of three candidates, one of which is 8th pass, another is 10th pass and the 3rd is 10+2 pass, then if 8th pass candidate has secured 70% marks and 10th pass has secured 60% marks and similarly if 10+2 pass candidate has secured 55% marks out of the total marks which can be allotted to a candidate, then 8th pass candidate cannot be given advantage by giving him 7 marks for educational qualification out of 10 marks and similarly 10th pass candidate cannot be given 6 marks out of 10 and 10+2 pass cannot be given 5 marks out of 10, because 10+2 qualification, undisputedly, is higher qualification to matriculation qualification and similarly both 10+2 and 10th qualifications are higher to 8th pass qualification. Therefore, while assessing the merit of the candidates, the Selection Committee has to grant

advantage to a candidate possessing higher qualification. A candidate with less qualification cannot steal march over higher qualified candidate.

6. Be that as it may, taking into consideration the fact that as the instructions otherwise do not contain the provision for assessment of merit of a candidate on the basis of marks secured in educational qualification for being eligible for the post in issue, therefore, this writ petition is disposed of with the direction that the Selection Committee shall re-assess the merit of the candidates on the basis of *viva voce,* which was conducted by the said Selection Committee and the merit will be re-drawn by ignoring the marks which have been obtained by the candidates in the educational qualification possessed by them. In case of tie, the Committee can recommend offer of appointment to a candidate, who either is elder in age or is a widow or a divorcee or separated, as the case may be. Let the needful be done by the Committee within a period of four weeks from today. Till then, the candidates, who have been appointed shall be permitted to continue to perform their duties. Miscellaneous applications, if any, also stand disposed of.

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

Bharat Bhushan Shah ...Petitioner

Versus

H.P. Staff Selection Commission,Hamirpur & another ....Respondents

For the Petitioner: Mr. Vikas Rajput, Advocate.
For the Respondent: Mr. Sanjeev Kumar Motta, Advocate for respondent No.1.
Mr. Shashi Shirshoo, Advocate for respondent No.2.

CWPOA No. 201 of 2019
Decided on: 29.11.2022

Constitution of India, 1950- Article 226- Quashing and setting aside of the selection process to the post of Jr. Programmer S-1 Level- Petitioner claims to be eligible for appointment to the post in terms of R & P Rules and Advertisement- Grievance of the petitioner is that respondent/commission did not verify the eligibility of candidates before conducting written test- **Held-** Omission and commission on the part of respondent including ineligible candidates is illogical, irrational, unreasonable and arbitrary- Respondent directed accordingly- Petition allowed. (Paras 13, 14, 15)

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

Petitioner has approached this Court for quashing and setting aside the selection process conducted by respondent No.1 Commission to the post of Junior Programmer S-1 Level (on contract basis) with prayer to direct respondent No.1-Commission to interview the petitioner for the said post being eligible and qualified in the said selection process. An alternative prayer has

also been made for direction to respondents to fill-up the remaining vacant posts from amongst left out eligible candidates, who had already scored minimum qualifying marks in written test held on 27.12.2017, and are in merit.

2 In present case, in furtherance to requisition sent by respondent No.2 Power Corporation, respondent No.1 Commission vide Advertisement No. 32-2/2016 dated 20th May, 2016, advertised four posts, in General (UR) category, of Junior Programmer S-1 Level (on contract basis) at Sr. No. 32 by prescribing eligibility criteria in the Advertisement.

3 It is the claim of petitioner that he is an eligible candidate for appointment to the post of Junior Programmer S-1 Level in terms of R&P Rules and Advertisement. Whereas, learned counsel for respondent No.1 has contended that eligibility of petitioner has not been evaluated yet as he was not called for evaluation for not being in first 12 candidates in written examination by applying ratio of 1:3 for calling the candidates for evaluation interview to fill-up 4 posts.

4 It is undisputed that in response to Advertisement, 245 candidates had applied to the post of Junior Programmer S-1 Level, out of which candidature of 70 candidate was cancelled due to non-deposit of requisite fee and remaining 175 candidates including the petitioner were admitted provisionally to sit in the objective type written screening test. However, 152 remained absent and only 23 candidates appeared in written test and their result was declared on 27th January, 2018 and out of them, first 12 candidates were called for evaluation, and as petitioner was at Sr. No. 13, therefore, he was not called for interview/evaluation.

5 It is also an admitted fact that out of 12, only 8 candidates appeared in interview and out of 8 candidates, 7 candidates were not possessing requisite experience and therefore, candidature of those 7

candidates was rejected and only one candidate was found eligible and he was selected, recommended and appointed as Junior Programmer S-1 Level.

6 Grievance of petitioner is that respondent-Commission did not verify the eligibility of candidates before conducting written test and even before or after declaration of result of written test held on 28.12.2017, which resulted into calling of ineligible candidates for evaluation/interview of first 12 candidates in merit of written test causing adverse impact on interest of petitioner as he was at Sr. No. 13 of merit list and in case of exclusion of ineligible candidates before calling for evaluation/interview, petitioner would have definitely been called for interview and would have been considered and keeping in view his merit, he would have been selected for appointment.

7 It has been contended on behalf of petitioner that procedure adopted in selection process by respondent-Commission is faulty causing harm to the interest of eligible candidates who are entitled to be called for evaluation/interview but for inclusion and consideration of ineligible candidates amongst other eligible candidates for calling in interview, at the cost of interest of eligible candidates, not only the eligible candidates are deprived from consideration, selection and appointment but concerned Department also suffers loss for not receiving recommendations of request number of selectees for filling-up all vacancies of posts requisitioned to be filled-in by that department.

8 Learned counsel for respondent-Commission submits that Commission has conducted the selection process in accordance with Rules of Business adopted by and as applicable to respondent-Commission. It has been further submitted by learned counsel for respondent-Commission that applications were invited through On-line mode and therefore, there was no occasion for respondent-Commission to check and verify the eligibility of candidates before evaluation which has taken place after declaration of result of written examination and during evaluation of first 12 candidates in merit. It

has been further submitted on behalf of respondent-Commission that in merit of written test, petitioner was at Sr. No. 13 i.e. after first 12 candidates required to be called for evaluation/ interview and there is no provision for calling next candidates in case any candidate out of called 12 candidates is found ineligible and therefore, petitioner could not be called for evaluation for want of such provision in the Rules of Business of Commission.

9 Purpose of conducting written test/screening test in a selection process is for choosing and picking meritorious candidates by shortlisting large number of applicants so as to facilitate selection of the best candidate(s) out of persons in merit in the ratio of 1:3 by calling them for interview. In case, ineligible candidates are permitted to be included in the ratio of 1:3, then it is a farce exercise rather an eye-wash claiming selection of one by considering three meritorious candidates as selection of one person by considering him amongst ineligible candidates is a selection by default but not on the basis of merit amongst eligible candidates in the ratio of 1:3. Further, like in present case, by adopting such faulty procedure there shall be possibility of non-availability of meritorious eligible candidates for appointment to all advertised posts. Therefore, it is a matter of common sense and prudence that final evaluation of meritorious candidates in the ratio of 1:3 should be amongst eligible candidates in merit but not including of ineligible candidates as inclusionineligible candidates in evaluation would frustrate the very purpose of selection process to choose the best one amongst eligible candidates called for interview in the ratio of 1:3.

10 Plea of respondent Commission that claim of candidates in On-line application was relied upon is no excuse for calling ineligible candidate(s) for evaluation/interview at the cost of right of and depriving from evaluation eligible candidates having qualified the written test. Instead of accepting shortcomings in Rule of Business and proposing and undertaking necessary steps to improve the same, respondent-Commission has resisted the petition

by justifying its illogical, unreasonable, irrational and arbitrary process and Rule of Business. It appears that respondent-Commission is ill-equipped and there is no will to improve the system or to make efforts for providing a prudent and plausible Rule of Business by making arrangements, like developing or installing the software, to evaluate the eligibility, if not before written and screening examination but at least before shortlisting the candidates in the ratio of 1:3 for fair selection of meritorious eligible candidates to the post advertised.

11 It is a matter of knowledge that in various Institutions involved in selection process and also in departments inviting tenders for various development works, eligibility is evaluated on the basis of On-line application by considering documents uploaded therewith. Respondent- Commission is also expected to invite applications in same fashion with direction to upload requisite certificates establishing essential qualification and experience etc. along with applications in their On-line application and eligibility of candidates can be determined by applying filter, as available in computer softwares, before written examination and if not at that stage, then before shortlisting the candidates in 1:3 ratio or to develop any other software/process/method to avoid a situation like present case.

12 In a system/procedure being adopted by respondent-Commission, there is probability of possibility that all candidates shortlisted in the ratio of 1:3 may be ineligible candidates resulting into frustration of entire selection process. Therefore, scrutiny of eligibility must be done before shortlisting of candidates in the ratio of 1:3.

13 In view of above discussion, omission and commission on the part of respondent-Commission including ineligible candidates in shortlisting the candidates in the ratio of 1:3 is illogical, irrational, unreasonable and arbitrary. Therefore, respondent-Commission is restrained from adopting and continuing such practice with direction to carry out necessary amendment in

the Rule of Business and/or selection process adopted, providing evaluation of eligibility of candidates at least before shortlisting them for final evaluation in the ratio of 1:3 on the basis of merit in written/screening test. Needful be done on or before 31st January,2023.

14 No doubt, no candidate has a vested right to be appointed who participates in selection process and even selected on the basis of merit. But for not considering and appointing such candidate, there must be justifiable, non-arbitrary reason and the post cannot be kept vacant without any plausible reason but only for faulty selection process, adopted by respondent Commission, considering ineligible candidates for shortlisting the candidates for evaluation at the cost of right of eligible candidates, to be considered and appointed.

15 As evident from material placed on record, petitioner was talking amongst candidates to be called for evaluation in the ratio of 1:3 after excluding the ineligible candidates even after consideration of those who did not participate in evaluation process. Therefore, if scrutiny of eligibility would have been done before evaluation process, the petitioner would have been definitely shortlisted amongst the candidates called for evaluation on shortlisting the candidates in the ratio of 1:3. In aforesaid circumstances, respondent Commission is also directed to determine eligibility of candidates in waiting and undertake the evaluation process for remaining three posts by shortlisting candidates in the ratio of 1:3 amongst eligible meritorious candidates on the basis of their eligibility and merit in written/screening test. Needful be done on or before 10th January, 2023 by completing process and making recommendations of eligible meritorious candidates for appointment by respondent No.2.

Petition is allowed and disposed of in aforesaid terms along with pending miscellaneous application(s), if any.

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

National Insurance Company Limited ….Appellant.

Vs.

Shri Mohar and others …..Respondents.

For the appellant M/s Ajay Kochhar and Vivek Sharma, Advocates.

For the respondents: Mr. H.S. Rangra, Advocate, for respondents No. 1 and 2.
Mr. SurinderSaklani, Advocate, for respondents No. 3 to 8.

FAO No. 4232 of 2013
Date of Decision: 01.12.2022

Motor Vehicles Act, 1988- Sections 166, 173- Appeal challenging award passed by Learned MACT-II for grant of compensation to claimants- **Held-** Findings of the Ld. Tribunal are correct and duly borne out from record- No merit- Appeal dismissed. (Paras 14, 15)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral)*:*

By way of this appeal, the appellant-Insurance Company has challenged award, dated 25.06.2013, passed by the learned Motor Accident Claims Tribunal (II), Mandi, District Mandi, H.P. in Claim Petition No. 59 of 2010, titled as *Smt. Dundi Devi and others Vs. Sh. Mohar and others*, in terms whereof, the Claim Petition filed under Section 166 of the Motor Vehicles Act for grant of compensation by the claimants therein was disposed of by the learned Tribunal by holding the claimants to be entitled for compensation to the tune of Rs.4,09,000/- alongwith interest at the rate of 7.5% per annum

from the date of filing of the petition till its realization in equal share. It was further directed by the learned Tribunal that respondent No. 3 therein, i.e., the present appellant/Insurance Company was to indemnify respondents No. 1 and 2 before the learned Tribunal.

2. Brief facts necessary for the adjudication of the present appeal are that a Claim Petition was filed by the claimants*, inter alia*, on the ground that on 23.10.2010, Shri Tulsi Ram, husband of claimant No. 1, father of claimants No. 2 to 4 and son of claimants No. 5 and 6 was travelling in a Tipper bearing registration No. HP-66-1497. He was employed in the said Tipper as a Conductor. The vehicle was on its way from Balu to Nagwain and when the same reachedvillage Chahridhar (*Nalla*) at around 8/8:30 p.m., the driver of the same, i.e., respondent No. 2 before the learned Tribunal, who was driving the vehicle in a rash and negligent manner, could not control the same and as a result thereof, the vehicle fell down after striking with the *parapet* of the road towards the lower hill side about 300-400 metres down from the road. As a result of the said accident, Shri Tulsi Ram sustained multiple grievous injuries and fracture, on account of which, he died on the spot. According to the claimants, the deceased was a young man aged 28 years and he was hale and hearty at the time when the accident took place. He was working as a Conductor with the ill-fated vehicle and was getting salary of Rs.150/- per day and also diet money of Rs.75/- per day. In addition, he was also doing agricultural work. The salary of the deceased from his profession as per the claimants, in all, was Rs.6750/- per month and in addition, he was also earning an amount of Rs.5000/- per month from agriculture work. Accordingly, compensation to the tune of Rs.20,00,000/- was sought by the claimants from the respondents.

3. The claim petition was contested by respondents No. 1 and 2 before the learned Tribunal, i.e., owner and driver of the ill-fated vehicle, *inter alia,* on the ground that factum of the occurrence of the accident was not in

dispute, but the same took place on account of mechanical defect which developed in the vehicle as "*Jhulla*" of the front wheel broke down, which resulted in the accident. The income of the deceased, as alleged by the claimants was denied and it was stated that the vehicle in issue was duly insured with the Insurance Company, i.e., respondent No. 3 before the learned Tribunal

4. The Insurance Company besides taking preliminary objection that the vehicle was not insured with it, also took the plea that the vehicle was being plied in breach of the terms and conditions of the Insurance Policy and further that the driver of the vehicle was not holding a valid and effective driving licence at the time of accident. It was further the stand of the Insurance Company that in the FIR which was lodged after the accident, the name of the driver was mentioned as Prem Singh, whereas in the Claim Petition, it was Rewati Ram, who was shown as the Driver of the ill-fated vehicle. It was also the stand of the Insurance Company that the deceased was not engaged as a Conductor on the ill-fated vehicle, but was a gratuitous passenger and he was being shown as a Conductor just to grab the insurance funds.

5. On the basis of pleadings of the parties, learned Tribunal framed the following issues:

> *"1. Whether Tulsi Ram had died in a Motor Vehicle accident involving the vehicle bearing registration No. HP-66-1497? OPP*
> *2. Whether the respondent No. 2 was driving the vehicle in a rash and negligent manner which caused the accident? OPP*
> *3. Whether the petitioner is entitled to the compensation to the extent of Rs.20,00,000/-, if so from whom? OPP*
> *4. Whether the accident had taken place due to mechanical defect? OPR.*
> *5. Whether the vehicle was being driven in violations of the terms and conditions of the Insurance Policy? OPR.*
> *6. Whether the respondent No. 2 was not holding valid and effective driving licence at the time of the accident. OPR.*
> *7. Relief.*

6. On the basis of evidence adduced by the respective parties in support of their respective claims, the following findings were returned by learned Tribunal on the issues so framed:

"Issue No. 1: Yes.
Issue No. 2: Yes.
Issue No. 3: Partly Yes.
Issue No.4: No.
Issue No. 5: No.
Issue No. 6: No.
Relief: The petition is allowed as per operative part of the Award."

7. Feeling aggrieved, the Insurance Company has filed the present appeal assailing the award.

8. Learned counsel for the petitioner has argued that the award under challenge is perverse and not sustainable in the eyes of law, as the learned Tribunal has erred in not appreciating that Shri Rewati Ram, who was impleaded as respondent No. 2 before the learned Tribunal was in fact not the person driving the vehicle and it was one Shri Prem Singh, who was driving the vehicle in question at the time of accident. Learned counsel submitted that the reason as to why the name of the Driver has been changed is obvious as it appears that said Prem Singh was not possessing any licence to drive the vehicle in issue and therefore, to get rid of the liability which otherwise was to be fastened upon the owner and the driver of the Vehicle, the name of the Driver was wrongly reflected as Rewati Ram in the Claim Petition, as the claim petition in fact was filed as a matter of collusion between the claimants and the owner of the vehicle. Learned counsel also submitted that the findings which have been returned by the learned Tribunal to the effect that the vehicle was not being plied in violation of the terms and conditions of the Insurance Policy are also perverse findings and on these two counts, it has been prayed that the appeal be allowed and award under challenge be set aside.

9. Mr. SurinderSaklani, learned counsel for the claimants has submitted that there is no connivance between the claimants and the respondent-owner, as alleged by learned counsel for the appellants and in fact the name of Prem Singh was wrongly mentioned in the FIR and the same was not entered in the FIR at the behest of claimants. He further submitted that otherwise also it is a matter of record that the criminal proceedings for rash and negligent driving were initiated against Rewati Ram and accordingly, Rewati Ram was rightly impleaded as a party respondent in the Claim Petition in his capacity as a Driver of the vehicle, as in fact, it was Rewati Ram, who was driving the vehicle at the time when the accident took place. He also argued that otherwise also the findings which have been returned by the learned Tribunal are clearly borne out from the pleadings as well as evidence on record and in the absence of there being any perversity in the same, the present appeal being devoid of any merit is liable to be dismissed.

10. Mr. H.S. Rangra, learned counsel for the owner as well as Driver has submitted that it is clearly borne out from the record of learned Tribunal that the Claim Petition was duly contested by the said respondents before the learned Tribunal and further it was Rewati Ram, who was driving the vehicle in issue at the time when the unfortunate accident took place and the mentioning of one Prem Singh as a Driver in the FIR was just an erroneous act. He further submitted that the ill-fated vehicle was duly insured when the accident took place and in this view of the matter, as the learned Tribunal had fastened the liability to compensate the claimants upon the owner and the driver of the vehicle, the liability was correctly shifted upon the Insurance Company, because the ill-fated vehicle at the relevant time was duly insured with the Insurance Company.

11. I have heard learned counsel for the parties and have also gone through the award under challenge as well as the record of the case.

12. A perusal of the award passed by the learned Tribunal demonstrates that while deciding Issue No. 2, in Para-18 thereof, it has dealt with the issue as to whether the vehicle at the time of accident was driven by Prem Singh or respondent No. 2, Sh. Rewati Ram. Learned Tribunal held that after the accident took place and after lodging of the FIR, when the matter was investigated by the Investigating Officer, it was found that the vehicle in issue was driven by respondent No. 2 Rewati Ram. Learned Tribunal further held that there is an admission on the part of said respondent, who entered into the witness box as RW-2 that at the time when the accident took place, he was driving the vehicle in issue and further there was a criminal case pending against him on account of rash and negligent driving of the vehicle in issue. In this paragraph, learned Tribunal further held that though the plea of accident having taken place on account of mechanical defect was taken by the owner of the vehicle, but no report of mechanic was placed on record, from which it could be inferred that there was any mechanical defect in the vehicle resulting in the accident.

13. During the course of arguments, learned counsel for the appellant could not demonstrate from the record that RW-2 in fact had not admitted that he was driving the vehicle in issue at the time of accident or that there was no criminal case pending against him on account of rash and negligent driving of the ill-fated vehicle. Therefore, in this view of the matter, it could not be said that the findings which had been returned by the learned Tribunal that it was respondent Sh. Rewati Ram, who was driving the vehicle in issue, were perverse findings and were not borne out from the record of the case.

14. Now, coming to the issue that the vehicle was driven in violation of the terms and conditions of the Insurance Policy, while deciding Issue No. 5, learned Tribunal has held that there was on record the Driving Licenceas also the Route Permit and copy of Registration Certificate as well as Insurance

Policy, which demonstrated that not only the driver was having a valid Driving Licence to drive the vehicle in issue, but the vehicle was duly insured at the time when the accident took place. A perusal of the record demonstrates that the Insurance Policy was exhibited as Ex. RW1/C and Driving Licence of Rewati Ram was exhibited as Ex. RX. It could not be demonstrated from the record that as on the date when the accident took place, the vehicle was not duly insured and that Rewati Ram was not possessing a valid Driving Licence to drive the vehicle or the owner was not having a Route Permit to ply the vehicle. Therefore, the findings which have been returned by the learned Tribunal are correct findings, as the same are duly brone out from the record.

15. In view of the above discussions, as there is no merit in the present appeal, the same is dismissed, so also pending miscellaneous applications, if any.

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

Dr. Richa Salwan .....Petitioner.

Versus

Dr. Yashwant Singh Parmar University of Horticulture and Forestry and others

.....Respondents.

For the Petitioner : Mr. Sanjeev Bhushan, Senior Advocate with Mr. Rajesh Kumar, Advocate.

For the Respondents : Mr. Avinash Jaryal, Advocate, for respondent No.1.

CWP No. 7205 of 2022
Reserved on : 30.11.2022
Decided on: 06.12.2022

Constitution of India, 1950- Article 226-Grievance of the petitioner is that the appointment and posting has been effected due to favoritism- **Held-** Law with regard to the transfer of an employee is the prerogative of the employer- Respondent has gone out of way to accommodate respondent no.2 and eventually ended up in discriminating the petitioner and was done with malafide intention- Transfer order quashed and set-aside- Petition allowed. (Para 19)

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

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

> "That appropriate writ, order or direction may very kindly be issued and impugned order (Annexure P-3) dated 11.10.2022 may very kindly be quashed and set aside, with further directions to the respondents to allow the petitioner to

continue serving in the College of Horticulture and Forestry, Neri, District Hamirpur, in the interest of law and justice."

2. The respondent-University advertised various posts of Assistant Professor in the year 2018 and the petitioner was appointed as Assistant Professor (Microbiology) and thereafter posted in the College of Horticulture and Forestry, Neri, District Hamirpur initially on contract basis on 05.11.2018 and after completion of the requisite period, her services were regularized from 01.01.2022.

3. On the other hand, respondent Nos. 2 and 3 are working with the respondent-University on contract basis and appointed as such in the year 2021. Respondent No.2 after her appointment was posted in Government College of Horticulture and Forestry, Thunag, District Mandi, against a vacant post. But, the fact of the matter is that respondent No.2 worked at Thunag only for four months and thereafter vide order dated 01.01.2022 was sent on deputation in the department of Basic Sciences in the University main campus at Nauni. Here also, it needs to be noticed that even though this deputation was only for two months, however, she continued serving at Nauni. Whereas, respondent No.3, who too was appointed on contract basis in the year 2021 was posted in the department of Basic Sciences at Nauni, Solan.

4. According to the petitioner, it was simply in order to accommodate both respondent Nos. 2 and 3, respondent-University issued an order dated 11.10.2022 whereby respondent No.2, who had been working without any post in the main campus at Nauni and her salary was being drawn from College of Horticulture and Forestry, Thunag, has now actually been retained at the main campus at Nauni, whereas, respondent No.3 has conveniently been adjusted at College of Horticulture and Forestry, Neri, District Hamirpur.

5. It is the specific case of the petitioner that the order of transfer has neither been passed in administrative exigency nor in public interest, but

simply, in order to accommodate respondent Nos. 2 and 3 and the same is nothing but an act of favourtism in favour of respondent Nos. 2 and 3.

6. None has appeared on behalf of private respondents despite service.

7. As regards respondent-University, it has sought to justify its action by claiming that as per terms and conditions of appointment order and regularization orders of the petitioner issued from time to time, she is liable to be posted anywhere in the territorial jurisdiction of the University and has, therefore, rightly been transferred to the College of Horticulture and Forestry, Thunag, District Mandi, H.P. The respondent-University has further relied upon the provisions contained in statute 3.1(2)(iv) which reads as under:-

> "to transfer personnel from one post to another or to transfer posts from one scheme to another in the interest of the University without adversely affecting the service conditions; and Sr. No.3 of the schedule of delegation of administrative powers approved by the Board of Management"

8. As regards respondent No.2, the University has tried to justify its action by claiming that the posting of the said respondent to the main campus was on the ground that presently classes of B.Sc. (Horticulture) and B.Sc. (Forestry) are running in the College and there is only one course related to Microbiology being taught to the students. Whereas, besides B.Sc. (Horticulture) and B.Sc. (Forestry), full fledged courses related to Microbiology to the postgraduate students are taught in the main campus. Since, there was only one teacher to teach the said courses in the main campus, therefore, the teaching work was suffering badly. Therefore, respondent No.2 was initially transferred to the main campus for a period of two months vide order dated 01.01.2022, however, the said transfer/deputation was cancelled on 13.01.2022. But, thereafter, keeping in view the exigency of teaching work in the main campus, respondent No.2 was deputed in the main campus for a

period of six months vide order dated 01.02.2022 which was later extended to another period of six months vide order dated 20.07.2022.

9. Similarly, respondent No.3 was appointed to the post of Assistant Professor (Microbiology) vide office order dated 30.01.2021 and posted in the department of Basic Sciences, main campus and joined as such on 02.03.2021. It is claimed that it is only an assumption of the petitioner that this was a maladjustment of respondent No.2, whereas, the teaching load at the main campus is suffering more than the one at Thunag.

10. We have heard the learned counsel for the parties and have gone through the material placed on record.

11. The law with regard to transfer of an employee is more than settled. Who is to be transferred and when is to be transferred is the sole prerogative of the employer. The Court can interfere only in case there is violation of any statutory rules or when the act is malafide and the orders have been passed for extraneous considerations.

12. No doubt, the administrative transfers are the prerogative of the department concerned and the competent authorities are the best persons to assess and act accordingly. However, the competent authorities have to act in the interest of public and in the event of any illegality or some personal motive, then alone, the employee can approach the Court of law for appropriate remedy. In other words, if an order of transfer is issued with a malafide intention or in violation of the statutory provisions, then a writ petition can be entertained.

13. The power of transfer must be exercised only bonafidely and reasonably which should be exercised in public interest. If the exercise of power is based on extraneous consideration, without any factual background, foundation or for achieving an alien purpose or an oblique motive, it would amount to malafide and colourable exercise of power. A transfer is mala fide when it is made not for a professed purpose, such as in normal course or in

public or administrative interest or in the exigencies of service but for other purpose than is to accommodate another person for undisclosed reasons, cannot be sustained.

14. For, it is more than settled that the basic principle of rule of law and good administration, that even administrative actions should be just and proper. An order of transfer is to satisfy the test of Articles 14 and 16 of the Constitution otherwise the same will be treated as arbitrary. Judicial review of the order of transfer is permissible when the order is made on irrelevant considerations. Even when the order of transfer which otherwise appears to be innocuous on its face is passed on extraneous consideration, then the Court is competent to go into the matter to find out the real foundation of transfer. The Court is competent to ascertain whether the order of transfer passed is bonafide or not.

15. It is not in dispute that the Government had newly opened a College of Horticulture and Forestry at Thunag, District Mandi and in order to fill-up the posts there had issued advertisement and thereafter pursuant to the said advertisement made appointments at Thunag including the one of respondent No.2. But, the fact of the matter is that immediately after four months of her appointment which was for the College at Thunag, respondent No. 2 was called back to the main campus and was never sent back to Thunag which is relatively a backward area as compared to the main campus at Nauni.

16. We have no hesitation to conclude that it is only with a view to illegally accommodate respondent No.2, who for some strange reasons happened to be a blue-eyed.

17. The respondent-University has gone out of the way to accommodate respondent No.2 and eventually ended up in discriminating the petitioner by posting her at Thunag for extraneous consideration or else there had been no reason why respondent No.2 was called back shortly

within four months of her appointment to the main campus that too only for a period of two months, as is evident from the order dated 01.01.2022. Even though the transfer/ deputation was cancelled vide order dated 13.01.2022, yet respondent No.2 was deputed in the Basic Sciences (Main Campus) initially for a period of six months vide order dated 01.02.2022 which again was thereafter extended for another period of six months. What thereafter necessitated the transfer of the petitioner against respondent No.2, whose appointment was for Thunag and then to transfer the petitioner to Thunag, is not forthcoming.

18. The entire exercise undertaken by respondent No.1 was to accommodate respondent No.2 out of way and thereby discriminating the petitioner which smacks not only of an arbitrariness, but also malafides in the action of respondent No.1. The entire exercise as undertaken by respondent No.1 in accommodating respondent No.2 is based on extraneous consideration and has been done with a malafide intention.

19. In view of the aforesaid discussion and for the reasons stated above, we find merit in this petition and the same is accordingly allowed. The impugned order of transfer dated 11.10.2022 (Annexure P-3) is quashed and set aside.

20. Pending application(s), if any, also stands disposed of.

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

Prem Raj

.....Petitioner

Versus

The Himachal Pradesh Tourism Development Corporation and another.

.....Respondents.

For the petitioner: Mr. Nishant Khidtta, Advocate.

For the respondents: Mr. S.S. Panta, Advocate.

CWP No. : 859 of 2021
Reserved on : 09.11.2022
Decided on : 05.12..2022

Constitution of India, 1950 - Article 226- Fixation order with all consequential benefits including the arrear of salary with interest- Prayer is that the respondents be directed to grant wages/salary/leave kind due to the petitioner- **Held-** Petitioner held entitled to all service benefits- Petition allowed. (Para 16)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

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

> i) That the impugned orders dated 07.08.2019 (Annexure P-5), 28.09.2019 (Annexure P-6) and order dated 07.08.2020 (Annexure P-9) may kindly be quashed and set-aside.
>
> ii) That writ in the nature of mandamus may kindly be issued directing the respondents to grant wages/salary/leave kind due such as casual leaves, medical leave and earned leave to the petitioner w.e.f. 31.08.2010 with all consequential benefits in consequence to the award passed by the learned Labour Court on 31.08.2010 and further respondents may be directed to pass the fixation order w.e.f. 20.01.2009 with

all consequential benefits including the arrear of salary with interest throughout.

2. The petitioner was engaged as beldar on daily wage basis by respondent No.1 on 18.04.1997 and worked as such till 30.04.1998. With effect from 01.05.1998 the designation of the petitioner was changed to Junior Draughtsman. He continued to work in such capacity till 18.03.2000, on which date the services of the petitioner were terminated.

3. Petitioner raised an industrial dispute. The appropriate Government referred the dispute for adjudication of the Industrial Tribunal-cum-Labour Court, Shimla (for short, "The Tribunal"). Learned Labour Court decided the reference in favour of the petitioner and passed the award dated 31.08.2010 in Reference No. 64 of 2005 in the following terms:

> *"As a sequel to my findings on the aforesaid issues, the claim of the petitioner is allowed and it is ordered that he (petitioner) be reinstated in service, with seniority and continuity but without back wages, from the date of his termination i.e. 8.3.2000. Consequently, the reference stands answered in favour of the petitioner and against the respondents. Let a copy of this award be sent to the appropriate Government for publication in official gazette. File, after completion be consigned to records."*

4. The upshot of the award clearly was that petitioner was to be reinstated and his reinstatement was to entail seniority and continuity in service, only back wages were denied to the petitioner.

5. The respondent assailed the aforesaid award before this Court by way of CWP No.4441 of 2011. A co-ordinate Bench of this Court upheld the award passed by learned Tribunal while dismissing the writ petition filed by the respondent. The respondent further assailed the judgment passed by learned Single Judge of this Court before a Division Bench by way of LPA No. 10 of 2019, which was also dismissed on 11.03.2019.

6. On 16.05.2019, respondent No.1 ordered the engagement of petitioner as Junior Draughtsman on daily wage basis with immediate effect.

It was specifically noted that seniority of petitioner, in terms of the judgment passed by a Division Bench of this Court, would be decided separately. On 07.08.2019, respondent No.1 issued an office order whereby the services of the petitioner were ordered to be regularized w.e.f. 17.01.2009 on notional basis (without financial benefits) and on actual basis (with financial benefits) from the date of his joining. Consequent to aforesaid orders, the pay of the petitioner was fixed vide office order dated 28.09.2019.

7. The petitioner had to avail leave w.e.f. 13.08.2019 to 20.06.2020 on account of serious ailment of his son which ultimately proved fatal. Vide Annexure P-9, office order dated 07.08.2020, respondent No.1 accorded ex-post-facto sanction for leave of 313 days as extra-ordinary leave without pay.

8. The grievance raised by the petitioner by way of instant petition is that the order dated 07.08.20019 (Annexure P-5) whereby his services have been regularized retrospectively on notional basis w.e.f.17.01.2009, is wrong, illegal and arbitrary. Vide award dated 31.08.2010, the petitioner had become entitled to continue in job from the date of his illegal retrenchment and such continuation was to have benefits of continuity and seniority in service as if the petitioner had continuously worked. The contention of petitioner is that he cannot be penalized for no fault of his. Had the award passed by learned Tribunal been implemented by the respondent immediately, petitioner would have earned his salary and other service benefits, from time to time, from which he has remained divested due to reason of pending litigation at the instance of respondents. He further contends that consequent fixation of pay vide office order dated 28.09.2019, Annexure P-6, is also wrong and illegal. It is further alleged that office order dated 07.08.2020, Annexure P-9, is also harsh and arbitrary as the petitioner is entitled for his regularization w.e.f. 17.01.2009 on actual basis and in that event sufficient leave would stand credited to his leave account and as such, he was entitled to sanction of such leave.

9. On the other hand, learned counsel for the respondents has submitted that the petitioner accepted the office orders Annexures P-4 and P-5 and joined without any reservation, as such, he is not entitled to raise the issues subsequently.

10. I have heard learned counsel for the parties and have also gone through the records of the case carefully.

11. The learned Tribunal had clearly held that the termination of the services of petitioner were against law and accordingly, the petitioner was granted the relief of reinstatement from the date of his retrenchment alongwith continuity in service and seniority. The clear import of aforesaid award is that the petitioner would be deemed to be in continuous service since the initial date of his engagement. He has been mandated to be conferred all the benefits of continuity and seniority except back wages. The award passed by learned Tribunal has been upheld by learned Single Judge of this Court and then by a Division Bench vide judgment dated 11.03.2019 passed in LPA No. 10 of 2019.

12. Petitioner was not re-engaged by the respondents immediately after passing of award at their own peril. Merely because the litigation, that too, at the instance of respondents continued for considerable long period cannot be held to be a factor to dis-entitle the petitioner from all actual benefits, which he would have got had he been re-engaged in compliance to the award dated 31.08.2010 passed by learned Tribunal.

13. The respondents cannot derive benefits of their own wrong. There is nothing on record to suggest that petitioner had remained gainfully employed during all these years. On his re-engagement, petitioner has joined, which prima-facie evidences the fact of his unemployment.

14. The respondents cannot be allowed to say that since the re-engagement of petitioner was ordered without back wages, the decision of respondents to grant him regularization notionally, was justified. The

petitioner was denied back wages only for the period that had elapsed between the date of his retrenchment and the date of award. Therefore, the petitioner would definitely be entitled for all financial benefits w.e.f. the date of award i.e. 31.08.2010.

15. The contention of learned counsel for the respondents that petitioner after accepting his re-engagement without reservation is not entitled to raise issue subsequently deserves to be rejected. The petitioner had no option but to join. Merely because he had not reserved his right while joining, does not mean that he had given up his rights available to him in accordance with law. In view of the fact that the petitioner is held to be entitled to actual financial benefits from the date of award and all other service benefits from 17.01.2009, the petitioner has also become entitled to paid leave in accordance with the service rules applicable in respondent No. 1-Corporation.

16. In light of above discussion, petition is allowed. Office orders dated 07.08.2019 (Annexure P-5), 28.09.2019 (Annexure P-6) and order dated 07.08.2020 (Annexure P-9) are quashed and set-aside. The petitioner is held entitled to all service benefits on actual basis from 17.01.2009 and on monetary benefits on actual basis w.e.f. the date of passing of award i.e. 31.08.2010. The respondents are directed to re-fix the salary of petitioner accordingly and pay the entire arrears to the petitioner within six weeks from the date of passing of the judgment. The respondents are further directed to credit the leave of 313 days availed by the petitioner w.e.f. 13.08.2019 to 20.06.2020 to the leave of kind due to him.

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

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

Narender Kumar .....Petitioner

Versus

The Himachal Pradesh Tourism Development Corporation and another.
.....Respondents.

For the petitioner: Mr. Nishant Khidtta, Advocate.
For the respondents: Mr. S.S. Panta, Advocate.

CWP No. : 1112 of 2021
Reserved on : 09.11.2022
Decided on : 05.12.2022

Constitution of India, 1950 - Article 226- Prayer is that respondents be directed to grant wage/salary to the petitioner with all consequential benefits in consequence of the award passed by the Learned Labour Court- The petitioner was granted relief of reinstatement from the date of retrenchment- Mandated to be conferred all benefits of continuity and seniority except back wages- Petitioner was not re-engaged immediately after passing of award at respondents' own peril- Cannot derive benefits of their own wrong- **Held-** Petitioner entitled to all service benefits- Respondents are directed to re-fix the salary of petitioner and pay entire arrears-Petition allowed. (Paras 12, 13, 14, 15)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

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

> i) That the impugned order dated 09.03.2020 (Annexure P-8), order dated 07.08.2019 (Annexure P-5) and order dated 28.09.2019 (Annexure P-6) may kindly be quashed and set-aside.
>
> ii) That writ in the nature of mandamus may kindly be issued directing the respondents to grant wages/salary to the petitioner w.e.f. 31.11.2009 with all consequential benefits in consequence to the award passed by the learned Labour Court on 30.11.2009 and further

> respondents may be directed to pass the fixation order w.e.f. 20.01.2009 with all consequential benefits including the arrear of salary with interest throughout.

2. The petitioner was engaged as beldar on daily wage basis by respondent No.1 on 14.05.1997 and worked as such till 30.04.1998. With effect from 01.05.1998 the designation of the petitioner was changed to Junior Draughtsman. He continued to work in such capacity till 08.03.2000, on which date the services of the petitioner were terminated.

3. Petitioner raised an industrial dispute. The appropriate Government referred the dispute for adjudication of the Industrial Tribunal-cum-Labour Court, Shimla (for short, "The Tribunal"). Learned Labour Court decided the reference in favour of the petitioner and passed the award dated 30.11.2009 in Reference No. 121 of 2004 in the following terms:

> *"As a sequel to my above discussion and findings on issue Nos. 1 to 3, the claim of the petitioner succeeds and is hereby allowed and the petitioner is ordered to be reinstated in service forthwith with seniority and continuity from the date of his illegal termination. However, the petitioner is not entitled to back wages as he has not placed any material on record to substantiate that he was not gainfully employed after his termination. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion, be consigned to records."*

4. The upshot of the award clearly was that petitioner was to be reinstated and his reinstatement was to entail seniority and continuity in service, only back wages were denied to the petitioner.

5. The respondent assailed the aforesaid award before this Court by way of CWP No.1627 of 2010. A co-ordinate Bench of this Court upheld the award passed by learned Tribunal while dismissing the writ petition filed by the respondent. The respondent further assailed the judgment passed by

learned Single Judge of this Court before a Division Bench by way of LPA No. 193 of 2016, which was also dismissed on 11.03.2019.

6. On 16.05.2019, respondent No.1 ordered the engagement of petitioner as Junior Draughtsman on daily wage basis with immediate effect. It was specifically noted that seniority of petitioner, in terms of the judgment passed by a Division Bench of this Court, would be decided separately. On 07.08.2019, respondent No.1 issued an office order whereby the services of the petitioner were ordered to be regularized w.e.f. 17.01.2009 on notional basis (without financial benefits) and on actual basis (with financial benefits) from the date of his joining. Consequent to aforesaid orders, the pay of the petitioner was fixed vide office order dated 28.09.2019 (Annexure P-6).

7. The grievance raised by the petitioner by way of instant petition is that the order dated 07.08.20019 (Annexure P-5) whereby his services have been regularized retrospectively on notional basis w.e.f.17.01.2009, is wrong, illegal and arbitrary. Vide award dated 30.11.2009, the petitioner had become entitled to continue in job from the date of his illegal retrenchment and such continuation was to have benefits of continuity and seniority in service as if the petitioner had continuously worked. The contention of petitioner is that he cannot be penalized for no fault of his. Had the award passed by learned Tribunal been implemented by the respondent immediately, petitioner would have earned his salary and other service benefits, from time to time, from which he has remained divested due to reason of pending litigation at the instance of respondents. He further contends that consequent fixation of pay vide office order dated 28.09.2019, Annexure P-6, is also wrong and illegal. It is further alleged that office order dated 09.03.2020, Annexure P-8, is also non-speaking and no reasons have been spelled out while rejecting the claim of the petitioner.

8. On the other hand, learned counsel for the respondents has submitted that the petitioner accepted the office orders Annexures P-4 and P-

5 and joined without any reservation, as such, he is not entitled to raise the issues subsequently.

9. I have heard learned counsel for the parties and have also gone through the records of the case carefully.

10. The learned Tribunal had clearly held that the termination of the services of petitioner were against law and accordingly, the petitioner was granted the relief of reinstatement from the date of his retrenchment alongwith continuity in service and seniority. The clear import of aforesaid award is that the petitioner would be deemed to be in continuous service since the initial date of his engagement. He has been mandated to be conferred all the benefits of continuity and seniority except back wages. The award passed by learned Tribunal has been upheld by learned Single Judge of this Court and then by a Division Bench vide judgment dated 11.03.2019 passed in LPA No. 193 of 2016.

11. Petitioner was not re-engaged by the respondents immediately after passing of award at their own peril. Merely because the litigation, that too, at the instance of respondents continued for considerable long period cannot be held to be a factor to dis-entitle the petitioner from all actual benefits, which he would have got had he been re-engaged in compliance to the award dated 30.11.2009 passed by learned Tribunal.

12. The respondents cannot derive benefits of their own wrong. There is nothing on record to suggest that petitioner had remained gainfully employed during all these years. On his re-engagement, petitioner has joined, which prima-facie evidences the fact of his unemployment.

13. The respondents cannot be allowed to say that since the re-engagement of petitioner was ordered without back wages, the decision of respondents to grant him regularization notionally, was justified. The petitioner was denied back wages only for the period that had elapsed between the date of his retrenchment and the date of award. Therefore, the

petitioner would definitely be entitled for all financial benefits w.e.f. the date of award i.e. 30.11.2009.

14. The contention of learned counsel for the respondents that petitioner after accepting his re-engagement without reservation is not entitled to raise issue subsequently deserves to be rejected. The petitioner had no option but to join. Merely because he had not reserved his right while joining, does not mean that he had given up his rights available to him in accordance with law. In view of the fact that the petitioner is held to be entitled to actual financial benefits from the date of award and all other service benefits from 17.01.2009, the petitioner has also become entitled to paid leave in accordance with the service rules applicable in respondent No. 1-Corporation.

15. In light of above discussion, petition is allowed. Office orders dated 07.08.2019 (Annexure P-5), 28.09.2019 (Annexure P-6) and order dated 09.03.2020 (Annexure P-8) are quashed and set-aside. The petitioner is held entitled to all service benefits on actual basis from 17.01.2009 and monetary benefits on actual basis w.e.f. the date of passing of award i.e. 30.11.2009. The respondents are directed to re-fix the salary of petitioner accordingly and pay the entire arrears to the petitioner within six weeks from the date of passing of the judgment.

16. The petition stands disposed of in the aforesaid terms, so also the pending miscellaneous application(s), if any.

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

M/s R.K. Construction Co. .....Appellant.

Versus

The State of H.P. and another .....Respondents.

For the appellant: Mr.J.S. Bhogal, Senior Advocate, with Mr. T.S. Bhogal, Advocate.

For the respondents: Mr. Desh Raj Thakur, Additional Advocate General.

RSA No. 351 of 2016
Reserved on: 23.11.2022
Decided on: 08.12.2022

Code of Civil Procedure, 1908- Section 100 - **Limitation Act, 1908-** Section 14- Judgment passed by Learned Additional District Judge affirming the judgment passed by the Civil Judge has been assailed- It is contended that both courts failed to appreciate the arbitration agreement in its right perspective- **Held-** Judgment upheld- All ingredients of Section 14(1) Limitation Act were available and plaintiff was clearly entitled to the benefit of said provision- Not barred by limitation- There was no proof regarding the enhancement of the costs of material or the labour wages- Reversal of findings on issue no.3- Appeal dismissed. (Para 22)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

By way of instant Regular Second Appeal, judgment and decree dated 03.03.2016, passed by learned Additional District Judge (II), Shimla, H.P. in Civil Appeal No.16-S/13 of 2015 affirming judgment and decree dated 28.06.2014 passed by learned Civil Judge (Senior Division), Shimla, H.P. in Civil Suit No. 31/1 of 2011/2009, has been assailed.

2. On 10.08.2016, the appeal was admitted for hearing on following substantial questions of law:

(i) Whether the findings of the learned Courts below are perverse and without considering the provisions of taking preliminary objections at the initial stage and limitation?

(ii) Whether the learned Courts below have failed to appreciate the arbitration agreement in its true perspective and the conclusions arrived at by the learned Courts below are perverse?

3. The parties hereinafter shall be referred to by the same status as they held before the learned trial Court. The appellant herein was the plaintiff and the respondents herein were the defendants.

4. Plaintiff sued defendants for recovery of Rs.9,00,000/- with interest *pendente lite* and future at the rate of 24% per annum. The suit was filed on the premise that plaintiff had executed the work of construction of new MLA Hostel at Vidhan Sabha "Block-P", in pursuance to contract awarded to him by the defendants. Though the completion of work was delayed, but the defendants had acquiesced by allowing extension of time. Plaintiff had raised certain claims against the defendants and had invoked the arbitration clause of the work contract. The Arbitrator had passed an award in his favour under various heads including a sum of Rs.3,80,217/- on account of price escalation under clause 10-C of the agreement. The respondents had preferred objections, under Section 34 of the Arbitration and Conciliation Act, 1996, before this Court. All other claims of plaintiff were upheld except the aforesaid claim of Rs. 3,80,217/- on the ground that Clause 10-C of the agreement between the parties was outside the scope of the Arbitrator's jurisdiction.

5. Plaintiff, thus filed the suit for the above stated amount of Rs.3,80,217/- alongwith interest at the rate of Rs.24% per annum. The suit amount was, accordingly, calculated at Rs.9,00,000/-

6. The suit was contested by the defendants on the grounds that the claim under Clause 10-C of the agreement, submitted by the plaintiff,

could not be entertained and admitted by the defendants as the claim had been preferred by the plaintiff without any detailed documentary evidence.

7. Learned trial Court framed the following issues:-

1. Whether the plaintiff is entitled for the recovery of suit amount as alleged? OPP
2. Whether the suit of the plaintiff is not maintainable? OPD
3. Whether the suit of the plaintiff is time barred? OPD
4. Relief.

8. Issue No.1 was decided in negative and all other issues were decided in affirmative. The suit of the plaintiff was accordingly dismissed. Learned trial Court held that the plaintiff had failed to prove the facts necessary for supporting his claim under Clause 10-C of agreement. In addition, the claim of the plaintiff was held to be barred by limitation.

9. The case of plaintiff met the same fate in first appeal. Learned lower appellate Court dismissed the appeal vide impugned judgment and decree. It was concurrently held that the plaintiff had failed to establish his claim under Clause 10-C of the agreement.

10. I have heard learned counsel for the parties and have also gone through the records of the case carefully.

11. It is not in dispute that the completion of work got delayed, however, the extension of time was allowed by the defendants. Plaintiff preferred a claim, before the Arbitrator, on account of price escalation under Clause 10-C of the agreement. The Arbitrator awarded a sum of Rs.3,80,217/- for price escalation. Since, learned Single Judge of this Court had set-aside the award passed by the Arbitrator to the extent it allowed the claim of price escalation, plaintiff claimed the said amount alongwith interest by way of an independent suit for recovery.

12. Learned Senior Advocate representing plaintiff contended that the findings returned by courts below on issue number 3, as framed by

learned trial court, were perverse being against the facts established on record. The contention so raised is not without substance.

13. Plaintiff had specifically averred that cause of action had also arisen in its favour after the claim under clause 10-C of agreement was held by this Court to be outside Arbitrator's jurisdiction. It had further been submitted that since plaintiff had been bonafide pursuing the remedy before the arbitral tribunal, as such the period spent between date of commencement of arbitration proceedings till the date of passing of judgment by learned Single Judge of this Court was liable to be excluded while computing the period of limitation. The defendants did not specifically or by implication respond to such a plea raised by the plaintiff.

14. Learned Courts below while deciding issue No.3, completely ignored the plea so raised by the plaintiff. The fact of the matter is that issue No.3 was decided against plaintiff by learned trial Court without detailing any reason whatsoever. Similarly, learned appellate Court had also affirmed the findings on issue No.3 without any discussion.

15. Section 14 of the Limitation Act, reads as under:

> "**14**. Exclusion of time of proceeding bona fide in court without jurisdiction. —
>
> (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.
>
> (2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court

which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.

Explanation.—For the purposes of this section,—

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction."

16. Sub Section (1) of Section 14 of the Limitation Act, provides for exclusion of time in computing the period of limitation for any suit, which the plaintiff has spent in prosecuting, with due diligence, another civil proceeding. Provided, however, such proceedings relate to the same matter in issue and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

17. It is not in dispute that the plaintiff in the first instance had raised the claim, with respect to same subject matter which is in issue in the instant case, before the Arbitrator. Such claim of the plaintiff, though, was allowed by the Arbitrator, but the Arbitrator's award to that extent was set aside *vide* judgment dated 31.07.2008 passed by learned Single Judge of this Court in Arbitration Case No. 21 of 2004 on the ground that Arbitrator lacked jurisdiction to decide claim under clause 10-C of the agreement. As noticed above, the averments, with respect to due diligence and good faith, made in the plaint had remained uncontroverted. Thus, all the ingredients for

application of sub section (1) of Section 14 of the Indian Limitation Act were available and the plaintiff was clearly entitled to the benefit of the said provision of law. In these circumstances, the suit of plaintiff could not be held to be barred by limitation. The first substantial question of law is decided accordingly.

18. The claim of plaintiff for suit amount was based on the alleged entitlement of plaintiff for additional amount on account of escalation in costs as per Clause 10-C of the agreement. Both the Courts below after taking notice of Clause 10-C of agreement and have rightly rejected the claim of plaintiff on merits. In order to succeed in claim under Clause 10-C of the agreement certain pre-requisites are required to be fulfilled and proved. It is required to be proved that during the progress of the works, price of material(s) incorporated in the works and liable to be purchased by the contractor and/or the wages of labour increased and such increase exceeded 10% of the price and/or wages prevailing at the time of acceptance of the tender and further the contractor thereupon had paid the increased costs of material and/or wages etc. to the labour.

19. Reverting to the facts of the case, the plaintiff had miserably failed to plead and prove aforesaid necessary ingredients. There was no proof regarding the enhancement of the costs of material and/or the labour wages. The plaintiff also failed to place on record any material to prove that he in fact had incurred enhanced costs. Further, there was no proof that the plaintiff had submitted his claim under Section 10-C of the agreement to the competent authority, who could decide on the issue of grant of increased amount to the contractor.

20. Thus, the concurrent findings of fact recorded by both the Courts below cannot be faulted with. Rather, such findings are borne from the material on record.

21. Learned Senior Counsel representing the plaintiff had further contended that defendants had admitted before the Arbitrator that the amount of enhanced costs was Rs.4,03,200/-. The contention so raised on behalf of the plaintiff also deserves to be rejected for the reason that no such admission has been proved on record by bringing necessary evidence to such effect. Moreover, the plaintiff cannot draw any advantage of the alleged admission as the award, if any, based on such admission, has been set-aside by learned Single Judge of this Court by holding the claim under Clause 10-C to be not arbitrable. Substantial question of law No.2 is decided accordingly.

22. In result, the instant appeal fails. Judgment and decree dated 03.03.2016, passed by learned Additional District Judge (II), Shimla, H.P. in Civil Appeal No.16-S/13 of 2015 affirming judgment and decree dated 28.06.2014 passed by learned Civil Judge (Senior Division), Shimla, H.P. in Civil Suit No. 31/1 of 2011/2009, is further affirmed, subject, however, to the reversal of findings on issue No.3.

23. The appeal and all pending miscellaneous application(s), if any, are accordingly disposed of.

BEFORE HON'BLE MR. JUSTICE A.A. SAYED, C.J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Mr. Divyaish Singh Chouhan ....Petitioner

Versus

State of Himachal Pradesh & Ors. ....Respondents

For the petitioner : Mr. Lovneesh Kanwar, Advocate.
For the respondents: Mr. Ajay Vaidya, Sr. Additional Advocate General, for respondent Nos.1 and 2.
Mr. Dinesh Thakur, Advocate, for respondent No.3.
Mr. K.D. Shreedhar, Sr. Advocate with Ms. Sneh Bhimta, Advocate, for respondent Nos.4 and 5.
Mr. Tara Singh Chauhan, Advocate, for respondent No.6.
Mr. Ajay Kumar Dhiman, Advocate, for respondent No.7.

CWP No.2415/2022
Decided on:08.12.2022

Constitution of India, 1950- Article 226- Prayer of petitioner is for upgradation of his MBBS course seat from management quota to HP State quota (SC) Category- Grievance of the petitioner is that before upgradation of MBBS seats of three candidates from Management quota to HP Quota petitioner was also required to be shifted and upgraded from Management quota to HP Quota (SC) Category- **Held-** Neither the petitioner nor respondent no.7 participated in the mop-up round of counseling- Since these two candidates didn't surrender their seats, these seats were not displayed as vacant for the mop-up round- The process of admissions also stood concluded since long- No merit in claim- Petition dismissed. (Para 5)

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, J.

Petitioner seeks a direction to the respondents to re-draw the merit for admission to the MBBS course in the mop-up round of counselling held on 25.03.2022 against the seats of H.P. State Quota. In essence, the prayer of the petitioner is for up-gradation of his MBBS course seat from Management Quota to H.P. State Quota (Scheduled Cast) category in respondent No.5-Maharishi Markandeshwar Medical College and Hospital, Kumarhatti, District Solan.

2. **Following facts** are not in dispute:-

2(i) Petitioner appeared in NEET-undergraduate-2021 examination held for the academic session 2021-2022 and secured 407 marks therein. Respondent No.3 issued common/centralized counselling prospectus in December 2021 inviting applications for undergraduate Medical/Dental Courses for admissions based on merit of NEET-UG-2021. The petitioner participated in the counselling. In the State merit-list issued by respondent No.3, he secured 1568th rank.

2(ii) Petitioner remained unsuccessful in the first round of counselling, result of which was declared on 2.2.2022. Provisional seat allotment during second round of counselling was notified on 4.3.2022. Name of the petitioner with 1568th rank was reflected at Serial No.243. He was provisionally allotted Scheduled Cast category seat in H.P. Quota in respondent No.5-college. Ms. Pragati Panwar (respondent No.7) with 929th rank figured at Serial No.194 in this list. She was provisionally allotted General category seat in H.P. Quota in respondent No.5-college. Petitioner and Ms. Pragati Panwar, both belonged to Scheduled Caste (SC) category.

2(iii) Final seat allotment of second round of counselling was notified on 8.3.2022. In this list, one Mr. Raghav Singh with 815th rank figured at Serial No.179. He was allotted General category seat in H.P. Quota in respondent No.5-college. Resultantly, Ms. Pragati Panwar with 929th rank got shifted to serial No.198 in H.P. Quota Scheduled Caste category seat in

respondent No.5-college. Consequently, the petitioner was allotted Management Quota seat (General) in respondent No-5-college. The allotment letter for MBBS/BDS Course Session 2021-22 was issued to the petitioner on 08.03.2022. The petitioner took admission in Management Quota (General) seat in respondent No.5-college and deposited the requisite fee.

2(iv) On 23.3.2022 respondent No.3 displayed vacancy position for mop-up round of counselling in respondent No.5-college. There were total 244 vacant seats out of which 4 were in H.P. Quota. In these 4 seats falling to H.P Quota, three were meant for General and one for the Scheduled Tribe categories. Mop-up round of counselling was held 25.3.2022. Three students namely Ms. Arundhati Sharma (rank 1025), Ms. Shalini Mankotia (rank 1179) and Mr. Mrigank Sood (rank 1199) belonging to General Category and admitted in management quota in second round of counselling, participated and were considered in the mop-up round of counselling against the available seats in H.P. Quota (General) category. Their status was up-graded from Management quota (allotted to them in second round of counselling) to H.P. Quota (General) against the available seats in the mop-up round.

2(v) The grievance of the petitioner is that before up-gradation of MBBS seats of the aforesaid three candidates i.e. Ms. Arundhati Sharma, Ms. Shalini Mankotia and Mr. Mrigank Sood (respondent No.6) from Management Quota to H.P. Quota (General), the respondents were required to consider up-gradation of seat held by Ms. Pragati Panwar from H.P. Quota (SC) category to H.P. Quota (General) category against one out of the available three seats. That Ms. Pragati Panwar in view of her over all merit above the aforesaid three candidates was required to be shifted from H.P. Quota (SC) category to H.P. Quota (General) category in the mop-up round. Consequently, the petitioner was also required to be shifted and up-graded from Management Quota to H.P. Quota (SC) category i.e. the seat which would have become available after

shifting of Ms. Pragati Panwar. This course has not been adopted by the respondents, hence the writ petition.

3. Contentions

Learned counsel for the petitioner contends that the respondents have not adhered to the provisions of prospectus during the mop-up round of counselling. Clause 9(i) of the prospectus clearly mandated that reserved category candidate, if selected by virtue of his General Combined merit under un-reserved category shall not exhaust the seat reserved for the reserved category subject to fulfillment of eligibility criteria as prescribed for un-reserved category. Therefore, on availability of three seats for H.P. Quota (General Category) in the mop-up round of counselling, Ms. Pragati Panwar with 929th rank, who was allotted H.P. Quota (SC) seat at Serial No.198 during second round of counselling was required to be shifted to the available seat of H.P. Quota (General Category). Such shifting would not have caused any prejudice to Ms. Pragati Panwar. As a chain reaction of shifting of seat of Ms. Pragati Panwar, the H.P. Quota (SC) seat held by her would have fallen vacant and petitioner belonging to Scheduled Caste category was entitled to be allotted the seat vacated by her.

On behalf of the respondents, submissions were made that their actions were within four corners of the provisions of the common/centralized counselling prospectus for undergraduate Medical/Dental Courses for admission session 2021-22. It was submitted that Ms. Pragati Panwar was admitted under H.P. Quota (SC) category during second round of counselling, hence, was not eligible to participate in the mop-up round. She did not even participate in the mop-up round of counselling. Therefore, there was no occasion for the respondents to shift her from H.P. Quota (SC) seat to H.P. Quota (General Category) seat in the mop-up round.

4. Observations

We have heard learned counsel for the parties and considered the material available on record.

4(i) In this petition, we are concerned with allotment of seats in MBBS/BDS Courses for academic session 2021-22 in respondent No.5-private medical college in the mop-up round of counselling. Total 150 seats were to be filled up in this college in all, out of which 38 (25%) were in State Quota and 112 (75%) were meant for Management Quota. 17 out of total 38 seats in State Quota were reserved including 6 meant for Scheduled Caste category.

4(ii) Part-III of the Prospectus -2021 is with the heading 'Distribution of Seats and Admission Criteria'. Clause 9(i) of this part relied upon by the petitioner reads as under:-

> "9(i) All the candidates under Group-A & B will have to apply amongst their own categories. The candidates of reserved categories (except children of J&K migrants, children of Tibetan Refugees and NRI), if selected, by virtue of their General Combined merit under Group-B (Unreserved) shall not exhaust the seats reserved for the reserved categories subject fulfillment of eligibility criteria as prescribed for un-reserved category. However, the allotment of seats will be made college-wise depending upon the merit-cum-choice of the candidate(s) for the concerned college.
>
> Provided further that the reserved category candidates shall be entitled to admission on the basis of their own category merit as per option of the college for taking admission, where a specified number of seats have been kept reserved for them, when all the seats under Unreserved category by virtue of General Combined merit are filled-up in the respective Medical/Dental Colleges, as the case, may be."

Candidates belonging to reserved categories fall in 'Group A' whereas 'Group B' pertains to unreserved category.

Part VIII of the Prospectus-2021 goes with the heading 'Counselling Schedule and Admission Procedure'. Clause-3 of this part,

relevant for deciding the issue raised by the petitioner, is extracted hereinafter:-

> "3. After completion of 1st & 2nd round of counselling, the schedule for Mop-up round of counselling shall be issued by the University and the online counselling form shall be made available on the University website www.amruhp.ac.in. Candidates who are eligible for participating in the mop up round of online counselling are required to fill up fresh choices/preferences of course, college and quota in the online application form within stipulated period for provisional allocation against vacant seats alongwith requisite amount as prescribed for token amount of fee, as applicable. If candidate is satisfied with his/her seat allocated during the previous rounds of online counselling, he/she is not required to participate in the subsequent round of online counselling. No inter-se-shifting from one Government Medical College to another Medical College shall be allowed during the mop-up Round of Counselling as per MCI/NMC guidelines. However, shifting for up-gradation of course and quota from private Dental Colleges to Govt. Dental College and Govt./Private Dental Colleges to MMMC. Solan and Govt. Dental College/MMMC, Solan to Govt. Medical Colleges in order of merit-cum-choices/preferences of the course, college & quota shall be allowed.
>
> Note: (i) Candidates who had not participated/allocated seats in the 1st & 2nd rounds of counselling can also participate in the mop-up round(s) of counselling as per their AMRU merit Rank.
>
> (ii) Candidates are advised to remain in touch with the AMRU websites regularly for any change in the counselling/admission process as well as latest updating upto the last closing date of admission and University shall in no way be responsible for non-communication on this account. For any query, please contact on Tel.No. 01905-243967, 292102."

Conjoint reading of above clauses makes it clear that if a candidate is satisfied with the seat alloted to him in any round of counselling, he is not required to participate in the subsequent round of counselling. It becomes evident from the prospectus, that if a reserved category candidate

gets admitted against an unreserved seat on the basis of his merit then he shall not exhaust the point meant for reserve category. This, however, cannot be interpreted to mean that those candidates, who stand admitted in previous rounds of counselling against particular seats/quota & are not interested in surrendering the seats allotted to them and do not participate in subsequent rounds of counselling, can be automatically shifted by the respondents in subsequent rounds of counselling to the available seats in order to make way for up-gradation of seats held by others. A point exhausted by a candidate in any round of counselling would not be declared vacant unless the candidate occupying that point is either up-graded or leaves the process of counselling by surrendering his seat. If a candidate is satisfied with the seat allotted to him, he need not then participate in the subsequent round of counselling. In such situation, seat of that candidate, who has not participated in the subsequent round of counselling, is not vacant or available for allocation in the subsequent round of counselling. The vacancy is created either because of non-allocation of seat or the candidate not taking admission on the allocated seat. Vacancy position is accordingly displayed and the vacant points are filled up in the subsequent round of counselling. Clause 9(i) is to be followed during allocation of vacant seats & not otherwise.

4(iii) In the instant case, the petitioner and Ms. Pragati Panwar (respondent No.7) belonged to Scheduled Caste category. The petitioner with State merit rank No. 1568 remained unsuccessful in the first round of counselling. During second round of counselling, he was allotted Management Quota (General) seat in respondent No.5-private medical college. Ms. Pragati Panwar (respondent No.7) with 929th rank in the State Merit list, was alloted H.P. Quota (Scheduled Caste category) seat in respondent No.5-college. Ms. Pragati Panwar was satisfied with the allocation of seat. She did not participate in the subsequent mop-up round of counselling. In fact, alongwith reply filed by respondent No.3, a letter written by Ms. Pragati Panwar to

respondent No.5-college has been placed on record stating therein that she was not interested in converting her seat from State Quota (Scheduled Caste) to State Quota (General). Ms. Pragati Panwar, who had already been alloted H.P. Quota (SC) seat during second round of counselling could not be forced to surrender her seat and participate in the mop-up round of counselling for taking a chance to convert her seat from State Quota (SC) to State Quota (General). The roster point meant for H.P. Quota (SC) stood exhausted by the admission of Ms. Pragati Panwar at this roster point during second round of counelling. This point was not available during mop-up round. The petitioner could not be adjusted against a roster point that was not available in the mop-up round as that point was consumed by respondent No.7 in second round of counselling.

4(iv) Petitioner had been allotted management quota seat in respondent No.5-private medical college in the second round of counselling. He had even deposited requisite fee and took admission on 10.03.2022. Ms. Pragati Panwar (respondent No.7) was allotted H.P. Quota (SC) category seat in the second round of counselling in respondent No.5-college. She also took admission & deposited requisite fee. Neither the petitioner nor respondent No.7 participated in the mop-up round of counselling. Since these two candidates did not surrender their seats, these seats were not displayed as vacant or available seats for the mop-up round. Thus, seat of H.P. Quota (SC) category was not available in the mop-up round. Vacancy position cannot re-adjusted by the respondents on their own in every round of counselling. Clause 9(i) is to be followed only during allocation of vacant seats. Once the seat occupied by Ms. Pragati Panwar (respondent No.7) was not available in the mop-up round, once the seat occupied by the petitioner was not available in the mop-up round, when Ms. Pragati Panwar & petitioner did not participate in the mop-up round of counselling, there was no question of applying Clause 9(i) of Part VIII of the prospectus for forcibly shifting Ms.

Pragati Panwar from H.P. Quota (SC) seat to H.P. Quota (General) seat. Hence, the seat of HP Quota (SC) category was not available in the mop-up round of counselling. Petitioner could not be allotted the seat occupied by Ms. Pragati Panwar. The process of admissions also stood concluded since long.

5. For all the foregoing reasons, we do not find any merit in the claim of the petitioner for upgradation of his MBBS course seat in respondent No.5-private medical college from Management Quota to H.P. Quota (SC) category. The writ petition is accordingly dismissed. Pending miscellaneous applications, if any shall also stand disposed of.

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

Suresh Kumar Sharma ...Petitioner.

Versus

H.P. State Electricity Board & Ors. ....Respondents.

For the Petitioner: Mr. Peeyush Verma, Advocate.
For the Respondents: Mr. T.S. Chauhan, Advocate.

CWP No. 1330 of 2021
Reserved on: 29.11. 2022
Decided on :12.12. 2022

Constitution of India, 1950- Article 226- Petitioner filed the present petition aggrieved against order/communication by respondent 3 whereby the pay of petitioner was reduced and recovery of Rs. 3,06,022/- was affected- **Held-** Refixation of pay of petitioner is held to be bad in law- Respondents directed to review and restore the pay as it was before re-fixation- Petition allowed. (Para 14)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge.

Aggrieved against the order/communication dated 31.12.2019 Annexure P-1 and office order dated 27.01.2020 Annexure P-2 issued by respondent No.3, whereby the pay of petitioner was reduced and recovery to the tune of Rs.3,06,022/- was effected, the petitioner has approached this Court for following substantive reliefs:-

> *"(i) That the order/communication dated 31.12.2019, Annexure P-1, which directed re-fixation of the pay of the petitioner and recovery of alleged overpayment, after the passing of the judgment in CWP-T No. 773 of 2008 and pursuant office order dated 27.01.2020, Annexure P-2, issued by respondent No.3 whereby the pay of the petitioner was reduced/refixed w.e.f. 08.04.1997 and recovery of the alleged over payment*

was directed and resultant pension fixation and recovery of Rs.3,06,022/-, may kindly be quashed and set aside.

ii) That the respondents may kindly be directed to return the illegally recovered sum of Rs.3,06,022/- alongwith interest @12% per annum and further to refix the salary and the pension of the petitioner without any illegal deduction and the reduced amount of pension paid to the petitioner alongwith interest @12% per annum."

2. Petitioner was initially appointed as Clerk on daily wages in the year 1982. His services were regularized w.e.f 07.02.1992. Petitioner was promoted as Senior Assistant in the year 2007.

3. Petitioner qualified Masters Degree in Sociology in the year 1996-97. The respondent-board vide notification dated 21.05.1984 and 25.02.1987 had decided to allowed benefit of two advance increments to an incumbent who would improve the educational qualification during service. *Vide* order dated 01.05.1997, petitioner was also granted benefit of two advance increments. Petitioner started getting salary with two advance increments.

4. On 10.08.2007, an order was issued by respondents, whereby the benefit of two advance increments allowed in favour of petitioner was withdrawn on the ground that the petitioner was not eligible. Petitioner made representations to the respondents, but without any result. Thereafter, the petitioner approached this Court by way of CWP-T No. 773 of 2008. Vide judgment dated 15.03.2010, the orders dated 10.08.2007 and 22.02.2008, impugned therein, were quashed. However, the respondents were granted liberty to proceed against the petitioner in accordance with law. Thereafter, respondent kept silent till 31.12.2019, when letter Annexure P-1, was issued directing the re-fixation of the pay of petitioner and recovery of overpaid amount from him. Later, office order dated 27.01.2020, Annexure P-2 was also issued implementing the earlier letter Annexure P-1. Petitioner was to superannuate on 31.01.2020. Accordingly, a sum of Rs.3,06,022/- was

withheld from the gratuity of petitioner and the pension of the petitioner was worked out on the re-fixed pay.

5. The petitioner has pressed into service judgment passed by Division Bench of this Court in CWPOA No. 3145 of 2019, decided on 24.03.2022 along with connected matters, whereby certain situations have been culled out in which the recoveries from government employees have been held to be impermissible.

6. On the other hand, the respondents have contested the claim of petitioner. It is submitted on behalf of the respondents that re-fixation of pay and recovery cannot be said to be bad in law on account of delay. It is also submitted that in view of the judgment passed by this Court in CWP-T No. 773 of 2008, petitioner was not entitled to raise the same issue again. Respondents have also placed reliance upon the judgment passed by Hon'ble Supreme Court in the case of Chandi Prasad Uniyal & Ors. vs. State of Uttarkhand & Ors., decided on 17th August, 2012 bearing Civil Appeal No. 5899 of 2012.

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

8. Perusal of judgment dated 15.03.2010 passed in CWP-T No. 773 of 2008 by learned Single Judge of this Court reveals that the orders/letters dated 10.08.2007 and 22.02.2008 were quashed and set aside. The respondents had sought to withdraw the benefit of two advanced increments, earlier allowed in favour of the petitioner, vide aforesaid letters dated 10.08.2007 and 22.02.2008. It was noticed by learned Single Judge that the petitioner had not been heard before issuance of the impugned letters, whereas he ought to have been heard before the decision was taken to withdraw the benefit of two advanced increments. Placing reliance upon judgment passed by the Hon'ble Supreme Court in Syed Abdul Qadir and others versus State of Bihar & Others, (2009)3SCC 475, the aforesaid

impugned orders were quashed and set aside. However, liberty was reserved to the respondents to proceed with the matter in accordance with law.

9. None of the parties assailed the aforesaid judgment which eventually attained the finality.

10. Respondents remained silent thereafter and till about few days before the date of superannuation of petitioner. Letter Annexure P-1 was issued on 31.12.2019 and the impugned office order Annexure P-2 was issued on 27.01.2020. Petitioner was to superannuate on 31.01.2020.

11. As noticed above, the Division Bench of this Court after considering the law on the subject including Chandi Prasad Unial (*supra)*, passed the judgment on 24.03.2022 in ***CWPOA No.3145 of 2019, S.S. Chaudhary vs. State and others***, and culled out certain situations in which recoveries from government employee be held to be impermissible in the manner as under:-

> *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 overweigh 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 gudielines 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."

12. It is not in dispute that the petitioner belonged to Class-III services. Thus, his case will be squarely covered under clause (I) of para 35 of the judgment referred above. Additionally, the belated recovery from petitioner is also squarely covered by clause (ii) and clause (iii) of the para-35 of the aforesaid judgment. In view of this, the recovery of Rs.3,06,022/- effected from petitioner by withholding his gratuity to that extent is bad in law and cannot be sustained.

13. Further, as regards, the legality and validity of the orders on the basis of which the pay of petitioner has been re-fixed and consequent recovery has been effected, suffice it to say that all such orders were quashed and set

aside by this Court while deciding CWP-T No. 773 of 2008 and one of the grounds was that orders had been passed at the back of the petitioner without affording him opportunity of being heard. Despite said judgment, again respondents passed the impugned orders Annexure P-1 and Annexure P-2 without compliance of principle of natural justice. For such reason, the impugned orders cannot be sustained.

14. In the light of above discussion, the instant petition is allowed. Consequently, order/communication dated 31.12.2019, Annexure P-1 and office order dated 27.01.2020, Annexure P-2 are quashed and set aside. The re-fixation of pay of petitioner affected in pursuance to aforesaid orders Annexures P-1 and P-2 is held to be bad in law and the respondents are directed review and restore the pay of petitioner as it was before re-fixation. Further, the respondents are also directed to refund the amount of Rs.3,06,022/- withheld from the gratuity of the petitioner and also to re-fix the pension of petitioner accordingly. Needful in terms of this judgment be done within six weeks from the date of passing of this judgment.

15. The petition is accordingly disposed of so also the pending application(s), if any.

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

Surjeet Singh ...Petitioner.

Versus

State of H.P. & another ...Respondent

For the petitioner : Mr. Ramesh Kaundal, Advocate.
For the respondents : Mr. Desh Raj Thakur, Addl. A.G. with Mr. Narender Thakur, Dy. A.G.

CWPOA No. 4065 of 2020
Reserved on 29.11.2022
Decided on :12.12.2022

Constitution of India, 1950- Article 226- Petitioner applied for sanction of study leave from 1995-1996 (177 days in total) but his request was rejected- Petitioner has assailed the rejection of his request for grant of study leave and has also sought grant of higher pay scale of lecturer school cadre- **Held-** The petitioner did not fulfil the condition under Rule 50(5)(i) CCA (Leave) Rules 1972- Claim suffers from delay and laches- No merit- Petition dismissed. (Paras 10, 11)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge:

By way of instant petition, petitioner has prayed for the following substantive relief:-

> *"i). That the impugned rejection letter dated 12.9.2001 Annexure A-5, letter dated 4.6.2002, Annexure A-7 and letter dated 11.12.2017, Annexure A-10 may kindly be quashed and set aside.*
>
> *ii) That the respondents may kindly be directed to sanction study leave to the applicant for the period 9.8.1995 to 27.3.1996 and also to release the pay for this period.*
>
> *iii) That the respondents may kindly be directed to grant the higher pay scale of Lecturer School Cadre at par with other similarly situated DPEs who were allowed the same after judgment dated 21.7.2016 (Annexure A-6) of this Hon'ble Tribunal."*

2. Brief facts necessary for adjudication of petition are that the petitioner was initially appointed as Physical Education Teacher (PET) on adhoc/tenure basis in Education Department of the State and had joined as such on 3.10.1987. His services were regularized w.e.f. 1.4.1994.

3. Respondent No.1 vide order dated 17.5.1995 had permitted the petitioner to undergo MPEd Training during the sessions 1995-96 subject, however, to the condition that petitioner was to apply for leave due and admissible to him under the rules to cover the period of his absence from duty to undergo the said training.

4. Petitioner completed the MPEd training and for such purpose remained absent from duty w.e.f. 8.9.1995 to 19.10.1995 and 16.11.1995 to 29.3.1996 for total 177 days. Petitioner applied for sanction of study leave for the aforesaid period but his request was rejected by respondent No.1 and was communicated to the petitioner vide letter dated 12.9.2001. Petitioner again represented to respondent No.2 but his representation met with the same fate and vide communication dated 4.6.2002, petitioner was intimated about rejection of his request.

5. Petitioner accepted the aforesaid rejection and did not assail the same. Petitioner was one of the applicants in T.A. No. 4641 of 2015, titled as Lalit Chauhan & others vs. State of H.P. & others, decided by the erstwhile H.P. State Administrative Tribunal vide order dated 21.7.2016. A direction was issued to the respondents therein to grant higher scale of School Lecturer to all the applicants therein w.e.f. 1.6.2008 with all consequential benefits. During the implementation of aforesaid judgment, it was found that the case of petitioner was rejected by respondents with the observation that earned leave availed by him to undertake the MPEd had not been mentioned in his service book. On the basis of such observation of respondents, petitioner approached the erstwhile Tribunal by filing O.A. No. 1251 of 2018, which after

abolition of the Tribunal came to be transferred to this Court and was registered as CWPOA No. 4065 of 2020 i.e. the instant petition.

6. Petitioner has assailed the rejection of his request for grant of study leave and communicated to him vide letter dated 12.9.2001 (Annexure A-5) and 4.6.2002 (Annexure A-7). In addition, he has also sought direction to the respondents to sanction study leave in his favour and also to grant higher pay scale of Lecturer School Cadre, in terms of judgment dated 21.7.2016.

7. Respondent No.2 has contested the claim of the petitioner by alleging that petitioner was not entitled to study leave as he had not completed five years of regular service at the relevant time. As per respondents, the services of petitioner were regularized w.e.f. 1.4.1994 and in such circumstances, regulare service of the petitioner was much shorter than the required five years to make him eligible for study leave. The absence of 177 days w.e.f. 8.9.1995 to 19.10.1995 and 16.11.1995 to 29.3.1996 was stated to have been regularized as extra ordinary leave (without pay and without break in service).

8. During the proceedings of instant petition, respondents have placed on record office order dated 27.4.2019, issued by respondent Non.2, whereby the absence of petitioner for the aforesaid period of 177 days was regularized as extra ordinary leave (without pay and without break in service) and necessary directions were issued to release all due and admissible benefits of revised pay fixation to the petitioner. The petitioner has not denied such fact situation, rather in the rejoinder filed on his behalf, it has been admitted that the respondents had released the benefit of higher pay to the petitioner in accordance with judgment in TA No. 4641 of 2015. In view of such development, the third relief, as prayed for by petitioner has become infructuous. Even otherwise, such relief could not be claimed by petitioner by way of instant petition and the order passed by the erstwhile Tribunal in T.A.

No. 4641 of 2015 could be executed by seeking recourse to appropriate remedy under law.

9. As regards the other reliefs sought by petitioner, in my considered view, the petitioner cannot be held entitled. Rule 50 (5)(i) of CCA (Leave) Rules 1972 provides as under:-

> *"50(5)(i)-study leave may be granted to a government servant who has satisfactorily completed period of probation and has rendered not less than five years regular continuous service including period of probation under the government".*

10. Admittedly, petitioner did not fulfill the aforesaid condition. His services were regularized on 1.4.1994 and had undergone the MPEd training during 1995-96 sessions. Since the petitioner was ineligible for study leave, no right can be said to be vested in him so as to enforce it by seeking direction from this Court.

11. The claim of the petitioner otherwise also suffers from delay and laches. The respondents had rejected his request for grant of study leave in the year 2001-02. The cause of action, if any, to assail such rejection had accrued to the petitioner at that relevant time. Petitioner did not assail the rejection of his request and at belated stage preferred Original Application before the erstwhile Tribunal in the year 2018. Non implementation of order passed in T.A. No. 4641 of 2015 could not have provided a fresh cause of action to petitioner. The claim regarding non implementation of order passed by learned Tribunal in T.A. No. 4641 of 2015 was not justiciable separately, save and except by filing execution for implementation of such order. Merely because non implementation of said order was indirect result of non sanctioning of study leave in favour of the petitioner, it cannot be said to have afforded to petitioner a fresh cause of action to assail rejection to his request for study leave communicated to him in the year 2001-02.

12. In light of above discussion, 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 SATYEN VAIDYA, J.

Chuni Lal ...Appellant

Versus

Ajay Kumar ...Respondent

For the appellant : Mr. Ashok Chaudhary, Advocate.
For the respondent : Mr. Ajay Kumar Dhiman, Advocate.

RSA No. 625 of 2009
Reserved on:24.11.2022
Decided on:12.12.2022

Code of Civil Procedure, 1908- Section 100- Appellant has assailed judgment and decree passed by Learned District Judge affirming the judgment and decree passed by Ld. Civil Judge (Jr. Division)- Plaintiff filed a suit seeking relief of possession of suit land on the premise that plaintiff was recorded as one of the co-owners of suit land and possession over the same of defendant was without any right, title or interest- **Held-** Suit of plaintiff decreed by Learned Trial Court and such decree affirmed by the Learned Lower Appellate Court only on the presumptive value of the revenue entries- Judgment set aside- Appeal allowed. (Paras 10, 11, 13)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge:

CMP No. 4436 of 2015

By way of instant application, the applicant/appellant has prayed for placing on record copy of order dated 7.2.2013, passed by Land Reforms Officer in case titled Chuni Lal vs. Om Prakash and copy of "Jamabandi" for the year 2009-10 in respect of Khasra No. 507. Noticeably, the application for additional evidence was filed in the year 2015 but despite opportunities, respondent did not file any reply to the application.

2. The applicant/appellant has sought to place on record certified copy of order dated 7.2.2013, passed by Assistant Collector-cum-Land Reforms Officer, Jawali, District Kangra, H.P. in proceedings between the same parties which are before this Court in the instant appeal. In addition, a copy of Jamabandi for the year 2009-10 pertaining to suit land has also been sought to be produced, in the remarks column of which, an entry has been reflected to have been incorporated in pursuance to order dated 7.2.2013, passed by Assistant Collector-cum-Land Reforms Officer, Jawali, District Kangra. Both these documents are relevant and necessary for adjudication of the instant appeal, hence the application is allowed and both the above mentioned documents are taken on record in evidence. Since both the documents are per-se admissible, no formal proof is required.

RSA No. 625 of 2009

By way of instant appeal, appellant has assailed judgment and decree dated 5.11.2009, passed by the learned District Judge (1), Kangra at Dharmshala, H.P. in Civil Appeal No. 80-J/08, whereby judgment and decree dated 2.6.2008, passed by learned Civil Judge (Jr. Division), Jawali, District Kangra, in Civil Suit No. 116/04, was affirmed.

2. Parties hereafter shall be referred by the same status as they held before learned trial Court. Respondent herein was the plaintiff and appellant herein was the defendant.

3. The facts necessary for adjudication of the instant appeal are that the plaintiff filed a suit seeking relief of possession of suit land, comprised in Khasra No. 507, measuring 0-19-44 hects., situated in Mohal Dhasoli-Shikli, Mauza Dhasoli, Tehsil Jawali, District Kangra, H.P., on the premise that plaintiff was recorded as one of the co-owners of suit land and the possession of defendant over the same was without any right, title or interest. On the other hand, defendant alleged that the suit land comprised in Khasra No. 507 was part of old Khasra No. 247. Defendant further claimed that he was

inducted as a tenant by the predecessor-in-interest of plaintiff in the entire area of land earlier comprised in Khasra Nos. 246 and 247. On coming into force of H.P. Tenancy of Land Reforms Act, the defendant acquired title over the same, save and except the portions of land resumed by land owners. As per defendant, mutation No. 340 dated 25.7.1981 was attested and at the time of such attestation, the proprietary rights were conferred upon the defendant only in respect of Khasra No. 246 and part of Khasra No. 247, whereas the mutation should have been sanctioned qua the whole of the land comprised in Khasra Nos. 246 and 247. Thus, entry of "*Kabiz*" of defendant in Khasra No. 507 in post settlement revenue records was termed to be wrong and illegal. Defendant had further averred in the written statement that he had already taken recourse to legal proceedings for correction of entries and the matter was *sub-judice* before revenue authorities.

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

> "1. Whether the plaintiff is entitled for vacant possession of the suit land, as alleged? OPP.
>
> 2. Whether the defendant has become owner of the suit land after the enforcement of H.P. Tenancy and Land Reforms Act? OPD.
>
> 3. Whether the plaintiff is stopped by his act and conduct from filing the present suit, as alleged? OPD
>
> 4. Whether the suit of the plaintiff is not maintainable in the present form? OPD
>
> 5. Relief."

Issue No.1 was decided in affirmative and remaining issues were decided in negative and the suit of the plaintiff was decreed and a decree of possession was passed in favour of plaintiff in respect of the suit land comprised in Khasra No. 507.

5. Defendant filed appeal before learned Lower Appellate Court under Section 96 of CPC but he remained unsuccessful, hence the present appeal.

6. Vide order dated 25.3.2010, the appeal of defendant has been admitted by this Court on the following substantial questions of law:-

> "1. Whether the learned courts below have failed to appreciate the evidence on the record particularly Ext. D-1, copy of Jamabandi for the year 1975-76 wherein the appellant is the tenant over the suit land comprising old Khasra Nos. 246 and 247.
> 2. Whether the impugned judgment and decree is contrary to the mandatory provisions particularly Section 104 of the H.P. Tenancy and Land Reforms Act whereby the propriety rights over the suit land have not been conferred upon the appellant qua the suit land on the operation of H.P. Tenancy and Land Reforms Act."

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

8. Document Ext. D-1, Jamabandi for the year 1975-76 reveals that the defendant was recorded as a tenant under predecessor-in-interest of plaintiff and other co-owners in respect of entire area of Khasra Nos. 246 and 247. Ext. D-2 is a copy of mutation No. 340, by virtue of which, the proprietary rights acquired by defendant were recorded in the records of rights. Mutation order dated 25.3.1981 Ext D-2 reveals that the plaintiff was ordered to be recorded as owner in possession of Khasra Nos. 246 and 247 Min, corresponding to latest Khasra No. 454, measuring 0-70-50 hects. Accordingly, the subsequent revenue entries were carried in subsequent Jamabandies.

9. Both the courts below have proceeded to decree the suit in favour of plaintiff on the premise that the presumption of truth was attached to the revenue entries and the defendant was simply holding the possession of suit land and was so recorded in the revenue records. Since the suit of plaintiff

was on the basis of title, he was held entitled to possession of the suit land from defendant. Both the learned courts below placed reliance on the contents of mutation order and the subsequent entries in records of rights by attaching the presumptive value.

10. It had been the case of defendant throughout that the bifurcation of old Khasra No. 247 at the time of mutation was wrong and illegal and he was holding the entire land comprised in Khasra No. 247 (old) as tenant and accordingly, the proprietary rights in entire said land had vested in him on coming into force of H.P. Tenancy of Land Reforms Act. Defendant had also specifically averred that he had taken the recourse to legal proceedings under the provisions of H.P. Land Revenue Act and H.P. Tenancy of Land Reforms Act for correction of revenue entries. However, both the courts below had ignored such fact. Thus, the suit of the plaintiff was decreed by learned trial Court and such decree was affirmed by learned Lower Appellate Court only on the presumptive value of revenue entries.

11. The appeal of defendant before learned Lower Appellate Court was decided on 5.11.2009. It is after said decision and during the pendency of instant appeal that the application of defendant before competent revenue authorities for correction of entries was decided on 7.2.2013 and a copy of which is now brought on record by virtue of allowance of CMP No. 4436 of 2015. Perusal of said order reveals that the revenue entry was ordered to be corrected vide aforesaid order. The suit land was ordered to be recorded in possession of defendant as a tenant. Accordingly, mutation No. 275 was attested and in the remarks column of Jamabandi for the year 2009-10, the defendant has been shown as tenant in Khasra No. 507. As a necessary consequence, the defendant will be deemed to have acquired proprietary rights under the H.P. Tenancy and Land Reforms Act. In this manner, the better title of defendant over the suit land has been proved. Noticeably, the plaintiff did not contest the averments made in CMP No. 4436 of 2015 in which the

defendant had specifically pleaded that order dated 7.2.2013, passed by Assistant Collector-cum-Land Reforms Officer, Jawali had attained finality as none of the parties had challenged the same. Even otherwise, the application of defendant for producing additional evidence in the shape of aforesaid order and Jamabandi remained pending since 2015 and nothing contrary has been shown on behalf of plaintiff throughout such period.

12. Order dated 7.2.2013, passed by Assistant Collector-cum-Land Reforms Officer is an order, passed by the authority having jurisdiction to pass such order. Therefore, such order has already been given effect in the revenue records, which carries presumption of truth unless rebutted. As noticed above, there is no rebuttal to such fact, which stands proved on record.

13. Substantial questions of law are answered accordingly in light of above discussion, and the appeal of the defendant is allowed. Judgment and decree dated 5.11.2009, passed by the learned District Judge (1), Kangra at Dharmshala, H.P. in Civil Appeal No. 80-J/08, whereby judgment and decree dated 2.6.2008, passed by learned Civil Judge (Jr. Division), Jawali, district Kangra, in Civil Suit No. 116/04, was affirmed, is set aside and the suit of the plaintiff is ordered to be dismissed with no orders as to cost. Decree Sheet be prepared.

Records of the learned courts below be returned forthwith.

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

Chandan Moudgil

...Petitione

Versus

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

For the petitioner : Mr. Abhishek Thakur, Advocate, vice Mr. Kush Sharma, Advocate.

For the respondents: Mr. Desh Raj Thakur, Addl. A.G. with Mr. Narender Thakur, Dy. A.G. and Mr. Manoj Bagga, Asstt. Advocate General.

CWP No. 2360 of 2019
Reserved on: 29.11.2022
Decided on:12.12.2022

Constitution of India, 1908- Article 226- Finance Department of the Government withdrew the earlier decision of granting benefit of increment by counting adhoc service followed by regular service- As a result of such decision of the Government, at much belated stage i.e. in the year 2019 orders were issued for recovery of a sum of Rs. 2,33,517/- from the petitioner- **Held-** The recovery has been sought to be made after more than five years of its disbursement- It can be seen that the mother of the petitioner had died and petitioner was appointed on compassionate grounds- The recovery at such belated stage will otherwise be iniquitous and harsh- Orders set-aside- Petition allowed. (Paras 8, 9)

Cases referred:

State of Punjab and others vs. Rafiq Masih (White Washer) and others (2015) 4 SCC 334 (2);

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

Aggrieved against the orders dated 22.02.2019 (Annexure P-8) and 16.08.2019 (Annexure P-9), issued by respondent No.3, whereby the

recovery of Rs.2,33,517/- has been sought to be effected from the petitioner, the instant petition has been filed for following substantive reliefs:

i) Issue a writ of certiorari to quash impugned order dated 22.02.2019 and 16.08.2019 i.e. Annexure P-8 and Annexure P-9.

ii) Issue a writ of mandamus directing the respondent authorities not to implement impugned orders dated 22.02.2019 and 16.08.2019 i.e. Annexure P-8 and Annexure P-9.

2. The mother of petitioner was initially appointed as Instructor Stenography (Hindi) on adhoc basis vide office order dated 01.12.1986 and was posted at ITI, Paonta Sahib, District Sirmaur, H.P. Her services were regularized in the pay scale of Rs.1650-2925 w.e.f. 04.03.1995.

3. The State Government vide letter dated 15.03.2011 had accorded its approval and communicated that the judgment passed by this Court in CWP(T) No. 7712 of 2008, in the matter of Paras Ram vs. State of H.P. and another had attained finality after dismissal of SLP, therefore, all similarly situated officials were entitled for counting of adhoc service before regularization for the purpose of annual increments. The mother of petitioner was also conferred the benefit of annual increments in terms of the aforesaid decision of the State Government.

4. Before the arrears could be disbursed, the mother of petitioner died. Petitioner was appointed as Clerk on compassionate ground and was paid the arrears in the year 2012.

5. By a subsequent decision of the Finance Department of the Government, earlier decision of granting benefit of increment by counting adhoc service followed by regular service was withdrawn. As a result of such decision of the Government, the impugned Annexures P-8 and P-9 were issued at much belated stage i.e. in the year 2019 seeking recovery of a sum of Rs. 2,33,517/- from the petitioner.

6. Petitioner has sought the aid of judgment passed by a Division Bench of this Court on 24.03.2022 in CWPOA No. 3145 of 2019, titled S.S. Chaudhary vs. State of H.P. and others, alongwith connected matters, wherein, following the principles laid down in the case of ***State of Punjab and others*** vs. ***Rafiq Masih (White Washer) and others (2015) 4 SCC 334 (2)***, certain situations have been culled out in which the recovery of amount from a Government employee has been held to be impermissible. The Hon'ble Division Bench of this Court has held as under:

> *"**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 overweigh 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."*

7. Noticeably, the instant petition CWP No.2360 of 2019 was also connected with CWPOA No. 3145 of 2019, in which the aforesaid judgment was passed.

8. The mother of petitioner belonged to Class-III service of the State Government. Moreover, the recovery has been sought to be made after more than five years of its disbursement. Thus, the present case is squarely covered under Clauses (i) and (iii) of para-35 of the aforesaid noted judgment (supra). In addition, it can be seen that the mother of the petitioner had died and petitioner was appointed on compassionate grounds. The recovery at such belated stage will otherwise be iniquitous and harsh.

9. Thus, in light of above discussion, the case of the petitioner is squarely covered by the judgment passed by a Division Bench of this Court in CWPOA No.3145 of 2019 and the respondents cannot recover the amount as sought by them vide Annexures P-8 and P-9. Accordingly, letters dated 22.02.2019 (Annexure P-8) and 16.08.2019 (Annexure P-9) are quashed and set-aside.

10. The petition stands disposed of in the aforesaid terms, so also the pending miscellaneous application(s), if any.

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

Mohan Singh Thakur .....Petitioner

Versus

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

For the Petitioner: Mr. Dalip K. Sharma, Advocate.
For the Respondents: Ms. Ritta Goswami, Additional Advocate General with Mr. Ram Lal Thakur, Assistant Advocate General, for respondents No.1 and 2.
Mr. Navlesh Verma, Advocate, for respondent No.3.
Mr. Y.P. Sood, Advocate, for respondent No.4.

CWP No.3258 of 2020
Decided on: 09.12.2022

Constitution of India, 1950- Article 226- **Recruitment & Promotion Rules Promotion**- Clause 10 - Promotion to the post of Assistant Director (Archives)- The grievance of the petitioner is that even though he had completed requisite number of years of service as Technical Assistant (Archives), yet his case had not been considered for promotion to the post of Assistant Director (Archives) by the respondents- **Held-** The petitioner had undergone a training course of one and a half month, i.e. w.e.f. 16.02.2009 to 31.03.2009, from the School of Archival Studies, National Archives of India, New Delhi- His training course cannot be equated to that of diploma- No material put forth by petitioner- No merit- Petition dismissed. (Para 5(iii))

Cases referred:

Chandan Banerjee & Ors. VS Krishna Prosad Ghosh & Ors. (2021) 11 SCALE 80;

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge

The petitioner seeks writ of mandamus for promoting him to the post of Assistant Director (Archives). He has also prayed for direction to the respondents not to promote private respondents No.3 and 4 as Assistant Director (Archives). Another relief prayed for is that Clause 7(a)(ii) of the

Recruitment & Promotion Rules, 2012 for the post of Assistant Director (Archives) be declared null and void.

2. **Admitted factual position** is that:-

2(i). The petitioner was appointed as Junior Technical Assistant in the year 1998. He was promoted to the post of Technical Assistant (Archives) in the year 2015. Further promotion from the post of Technical Assistant (Archives) is to the post of Assistant Director (Archives).

2(ii). Recruitment & Promotion Rules for the post of Assistant Director (Archives), Class-I (Gazetted) (in short '2007 R&P Rules') in the Department of Language, Art & Culture, Himachal Pradesh were framed vide notification dated 15.01.2007 (Annexure P-1). As per Clause 10 of these rules, the single cadre post of Assistant Director (Archives) was to be filled-up 100% by promotion, failing which by direct recruitment or on contract basis. In terms of Clause 7 of these R&P Rules, essential educational qualifications for direct recruits were (i) M.A. Second division in Modern History from recognized University; and (ii) Diploma in Archives. In terms of Clause 8 of these rules, the educational qualifications required for direct recruits were not applicable in case of promotees. Clause 11 of the Rules mandated that promotion to the post of Assistant Director (Archives) could be made from amongst the Technical Assistant (Archives) having nine years' regular service or regular combined with continuous ad hoc service rendered, if any, in the grade, failing which by promotion from amongst the Technical Assistant (Archives) with 12 years regular service or regular combined with continuous ad hoc service combined as Technical Assistant (Archives) and Junior Technical Assistant (Archives).

2(iii). 2007 R&P Rules were repealed in the year 2012. Vide notification dated 24.08.2012, new R&P Rules for the post of Assistant Director (Archives) came into force. In terms of these 2012 R&P Rules, the single cadre post of Assistant Director (Archives) was to be filled up 100% by promotion, failing

which by direct recruitment on regular basis or by direct recruitment on contract basis, failing both on secondment basis. The minimum essential qualifications required for direct recruits remained the same as were under the 2007 R&P Rules, i.e. M.A. Second Division in Modern History and Diploma in Archives. As per Clause 8 of these rules, the educational qualifications prescribed for the direct recruits were also applicable in the case of promotees.

2(iv). 2012 R&P Rules for the post of Assistant Director (Archives) were repealed vide notification dated 07.04.2017 and new rules were promulgated. In terms of the 2017 R&P Rules, the single cadre post of Assistant Director (Archives) was to be filled-up 100% by promotion, failing which by direct recruitment on regular basis or by recruitment on contract basis. In terms of Clauses 7 and 8 of these rules, the educational qualifications prescribed for direct recruitment were to apply in case of promotees also.

2(v). The petitioner has Degree of M.A. in Modern History with second division. While working as Junior Technical Assistant, the petitioner attended one and a half month training course (w.e.f. 16.02.2009 to 31.03.2009) in Archives Management from School of Archival Studies, National Archives of India, New Delhi. The training certificate dated 11.06.2009 has been placed on record as Annexure P-5.

3. The grievance of the petitioner is that even though he had completed requisite number of years of service as Technical Assistant (Archives), yet his case had not been considered for promotion to the post of Assistant Director (Archives) by the respondents. That short term training in the field of Archives Management undertaken by the petitioner was in order to meet out the requirement as per Clause 7 of the R&P Rules for promotion to the post of Assistant Director (Archives).

On the basis of above factual position, the petitioner has preferred this writ petition, in essence, seeking his promotion to the post of Assistant Director (Archives) and for declaring Clause 7(a)(ii) of the R&P Rules,

2012 for the post of Assistant Director (Archives) as null and void. The relief clause of the petition runs as under:-

> *"a) That Writ of Mandamus may kindly be issued directing the respondents to promote the petitioners to the post of Assistant Director.*
> *b) That the respondent may further be restrained from promoting the respondent No.3 and 4 as Assistant Director (Archives) from the category of research assistant in case any person have been appointed during the pendency of writ petition prior to promotion of petitioner their appointment may kindly be declared as null and void.*
> *c) That the eligibility criteria as mentioned in the Recruitment and Promotion Rules Annexure P-2 as mentioned clause (7)a(ii) may be declared as null and void and the certificate obtained by the petitioner be considered for all intents and purposes for the promotion."*

During hearing of the case, learned counsel for the petitioner submitted that private respondents No.3 and 4 stand promoted to the post of Assistant Director (Language) and Assistant Director (Publication) on 01.09.2020 and 21.08.2020, respectively. Learned counsel for the petitioner also stated that he is under instructions not to press the case against promotions of private respondents No.3 and 4 and that he would confine his submissions only concerning petitioner's promotion to the post of Assistant Director (Archives).

4. Contentions:-

4(i). Learned counsel for the petitioner contended that the petitioner is Postgraduate and has a training certificate in Archives Management. In 2007 R&P Rules, there was no requirement of any diploma(Archives) for promotion to the post of Assistant Director (Archives). By inserting this requirement in 2012 and 2017 R&P Rules, the petitioner has been deprived from getting promotion, causing him irreparable loss and injury. Learned counsel for the petitioner also submitted that the training certificate obtained by the petitioner should be considered akin to the diploma required under the

R&P Rules for promotion to the post of Assistant Director (Archives), more particularly, when no duration of the diploma has been prescribed in the R&P Rules.

4(ii). Learned Additional Advocate General submitted that under the R&P Rules, the post of Assistant Director (Archives) is to be filled-up by way of promotion of eligible persons from the feeder category. Possession of Diploma in Archives is one of the eligibility conditions. The petitioner does not satisfy this condition, hence, he does not fulfil the requisite criteria for promotion to the post in question.

5. Observations:-

5(i). In the writ petition, challenge is only to Clause 7(a)(ii) of the 2012 R&P Rules for promotion to the post of Assistant Director (Archives). The events have overtaken themselves. 2012 R&P Rules are no longer in force. They were repealed on 07.04.2017. New R&P Rules for the post of Assistant Director (Archives) came into force w.e.f. 07.04.2017. There is no challenge in the petition to 2017 R&P Rules, which otherwise have been placed on record as Annexure P-4.

5(ii). Under the 2012 R&P Rules as well as 2017 R&P Rules, the post of Assistant Director (Archives) is to be filled-up 100% by way of promotion from the persons belonging to feeder category. Petitioner though belongs to the feeder category mentioned in Rule 11 of these rules, however, he does not fulfil the educational qualifications required for promotion. The educational qualification required for direct recruits under Clause 7 of the Rules has been made applicable in case of promotions in terms of Clause 8. One of the educational qualifications required is possession of Diploma in Archives from a recognized University/Institute. The petition though lays challenge to incorporation of this condition under the rules, however, no legal grounds for challenging the same have forth come. The only point put forth by learned counsel for the petitioner is that incorporation of educational qualifications in

case of promotions has jeopardized the petitioner's chances for further promotion. I am afraid such contention will not advance the case of the petitioner.

In ***(2021) 11 SCALE 80, Chandan Banerjee & Ors. VS Krishna Prosad Ghosh & Ors.***, Hon'ble Apex Court considered plethora of judicial precedents and summarized the law as under:-

> *"26. The principles which emerge from the above line of precedents can be summarized as follows:*
>
> *(i) Classification between persons must not produce artificial inequalities.The classification must be founded on a reasonable basis and must bear nexus to the object and purpose sought to be achieved to pass the muster of Articles 14 and 16;*
>
> *(ii) Judicial review in matters of classification is limited to a determination of whether the classification is reasonable and bears a nexus to the object sought to be achieved. Courts cannot indulge in a mathematical evaluation of the basis of classification or replace the wisdom of the legislature or its delegate with their own;*
>
> ***(iii) Generally speaking, educational qualification is a valid ground for classification between persons of the same class in matters of promotion and is not violative of Articles 14 and 16 of the Constitution;***
>
> ***(iv) Persons drawn from different sources and integrated into a common class can be differentiated on grounds of educational qualification for the purpose of promotion, where this bears a nexus with the efficiency required in the promotional post;***
>
> ***(v) Educational qualification may be used for introducing quotas for promotion for a certain class of persons; or may even be used to restrict promotion entirely to one class, to the exclusion of others;***
>
> ***(vi) Educational qualification may be used as a criterion for classification for promotion to increase administrative efficiency at the higher posts; and***
>
> *(vii) However, a classification made on grounds of educational qualification should bear nexus to the purpose of the classification or the extent of differences in qualifications."*

Educational qualification has beenrecognized as a valid criterion for classification for promotion to increase administrative efficiency at the higher posts. It will also be appropriate to refer to a Division Bench judgment of this Court dated 12.11.2020 rendered in a bunch of writ petitions with lead case ***CWP No.1515 of 2019***, titled ***Parkash Chand Versus State of H.P. and others***, wherein Recruitment & Promotion Rules for the post of Forest Guard had undergone amendment. The petitioner therein raised the grievance that he was illegally not being considered for promotion to the post of Forest Guard because he was a matriculate and that the respondents cannot deny him promotion on the basis of amended rules. The Division Bench held as under:-

> *"9. The grievance of the petitioner Parkash Chand is that he has illegally not been considered for promotion to the post of Forest Guard only because he is matriculate, whereas, as per the Rules, he can acquire the qualification within three years and moreover, the respondents cannot deny the petitioner's promotion on the basis of amended Rules.*
>
> *10. This petitioner further claimed that he was fully eligible for promotion in the year 2012 when there was no amendment in the Recruitment and Promotion Rules and only matriculates were eligible for promotion. Now, therefore the impugned action of the respondents ignoring the candidature of the petitioner is wrong and illegal and the petitioner deserves to be promoted as Forest Guard, as he is senior to one Dinesh Kumar.*
>
> *11. We have heard learned counsel for the parties and have gone through the material available on records.*
>
> *12. At the outset, it needs to be observed that in P.U. Joshi and others vs. Accountant General, Ahmadabad and others (2003) 2 SCC 632), the Hon'ble Supreme Court held as under:*
>
> > *"10……Questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of policy is within the exclusive discretion and jurisdiction of the State, subject, of course, to the limitations or restrictions envisaged in the Constitution of India and it is not for the*

statutory tribunals, at any rate, to direct the Government to have a particular method of recruitment or eligibility criteria or avenues of promotion or impose itself by substituting its views for that of the State.

Similarly, it is well open and within the competency of the State to change the rules relating to a service and alter or amend and vary by addition/subtraction the qualifications, eligibility criteria and other conditions of service including avenues of promotion, from time to time,as the administrative exigencies may need or necessitate. Likewise, the State by appropriate rules is entitled to amalgamate departments or bifurcate departments into more and constitute different categories of posts or cadres by undertaking further classification, bifurcation or amalgamation as well as reconstitute and restructure the pattern and cadres/categories of service, as may be required from time to time by abolishing the existing cadres/posts and creating new cadres/posts. There is no right in any employee of the State to claim that rules governing conditions of his service should be forever the same as the one when he entered service for all purposes and except for ensuring or safeguarding rights or benefits already earned, acquired or accrued at a particular point of time, a government servant has no right to challenge the authority of the State to amend, alter and bring into force new rules relating to even an existing service."

13. *In Official Liquidator vs. Dayanand and others (2008) 10 SCC 1), the Hon'ble Supreme Court held as under:*

"59. The creation and abolition of posts, formation and structuring/restricting of cadres, prescribing the source and mode of recruitment and qualifications and criteria of selection, etc. are matters which fall within the exclusive domain of the employer. Although the decision of the employer to create or abolish posts or cadres or to prescribe the source or mode of recruitment and laying down the qualification, etc. is not immune from judicial review, the Court will always be extremely cautious and circumspect in tinkering with the exercise of discretion by the employer. The Court cannot sit in appeal over the judgment of the employer and ordain that a particular post or number of posts be created or filled by a particular mode of recruitment. The power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary

to any constitutional or statutory provisions or is patently arbitrary or vitiated by malafides."

14. *In Chandigarh Administration through the Director Public Instructions (Colleges) Chandigarh vs. Usha Kheterpal Wale and others (2011) 9 SCC 645), the Hon'ble Supreme Court held as under:*

"22. It is now well settled that it is for the rulemaking authority or the appointing authority to prescribe the mode of selection and minimum qualification for any recruitment. The courts and tribunals can neither prescribe the qualifications nor entrench upon the power of the authority concerned so long as the qualifications prescribed by the employer is reasonably relevant and has a rational nexus with the functions and duties attached to the post and are not violative of any provision of the Constitution, statute and rules. (See J. Ranga Swamy v. Govt. of A.P. and P.U. Joshi v. Accountant General). In the absence of any rules, under Article 309 or statute, the appellant had the power to appoint under its general power of administration and prescribe such eligibility criteria as it is considered to be necessary and reasonable. Therefore, it cannot be said that the prescription of Phd is unreasonable."

15. *In State of Gujarat and others vs. Arvindkumar T. Tiwari and another (2012) 9 SCC 545), the Hon'ble Supreme Court held as under:*

"10. The appointing authority is competent to fix a higher score for selection, than the one required to be attained for mere eligibility, but by way of its natural corollary, it cannot be taken to mean that eligibility/norms fixed by the statute or rules can be relaxed for this purpose to the extent that, the same may be lower than the ones fixed by the statute. In a particular case, where it is so required, relaxation of even educational qualification(s) may be permissible, provided that the rules empower the authority to relax such eligibility in general, or with regard to an individual case or class of cases of undue hardship. However, the said power should be exercised for justifiable reasons and it must not be exercised arbitrarily, only to favour an individual. The power to relax the recruitment rules or any other rule made by the State Government/Authority is conferred upon the Government/Authority to meet any emergent situation where injustice might have been caused or, is likely to be caused to any person or class of persons or, where the working of the

said rules might have become impossible. (Vide: State of Haryana v. Subhash Chandra Marwaha, J.C. Yadav v. State of Haryana, and Ashok Kumar Uppal v. State of J & K.)

11. The courts and tribunal do not have the power to issue direction to make appointment by way of granting relaxation of eligibility or in contravention thereof. In State of M.P. & Anr. v. Dharam Bir, this Court while dealing with a similar issue rejected the plea of humanitarian grounds and held as under: (SCC p. 175, para 31)

> *"31..... The courts as also the tribunal have no power to override the mandatory provisions of the Rules on sympathetic consideration that a person, though not possessing the essential educational qualifications, should be allowed to continue on the post merely on the basis of his experience. Such an order would amount to altering or amending the statutory provisions made by the Government under Article 309 of the Constitution."*

12. Fixing eligibility for a particular post or even for admission to a course falls within the exclusive domain of the legislature/executive and cannot be the subject matter of judicial review, unless found to be arbitrary, unreasonable or has been fixed without keeping in mind the nature of service, for which appointments are to be made, or has no rational nexus with the object(s) sought to be achieved by the statute. Such eligibility can be changed even for the purpose of promotion,unilaterally and the person seeking such promotion cannot raise the grievance that he should be governed only by the rules existing, when he joined service. In the matter of appointments, the authority concerned has unfettered powers so far as the procedural aspects are concerned, but it must meet the requirement of eligibility etc. The court should therefore, refrain from interfering, unless the appointments so made, or the rejection of a candidature is found to have been done at the cost of 'fair play', 'good conscious' and 'equity'. (Vide: State of J & K v. Shiv Ram Sharma and Praveen Singh v. State of Punjab.)

14. A person who does not possess the requisite qualification cannot even apply for recruitment for the reason that his appointment would be contrary to the statutory rules is, and would therefore, be void in law. Lacking eligibility for the post cannot be cured at any stage and appointing such a person would amount to serious illegibility and not mere irregularity. Such a person cannot approach the court for any

relief for the reason that he does not have a right which can be enforced through court. (See: Prit Singh v. S.K. Mangal and Pramod Kumar v. U.P. Secondary Education Services Commission.)"

18. *It is the case of petitioner Parkash Chand himself that he is simply matriculate and has not acquired 10+2 qualification within three years or upto the cut of date i.e. 31.12.2017 and is therefore not entitled to be considered much less promoted to the post of Forest Guard.*

19. *In view of the aforesaid discussions and for the reasons stated hereinabove, we find no merit in the petitions filed by the petitioner Parkash Chand being CWP No. 1515 of 2019 and CWPOA No. 6741 of 2020 and the same are dismissed."*

In view of the settled legal position that questions relating to constitution, pattern, nomenclature of posts, cadres, categories, their creation/abolition, prescription of qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of policy within the exclusive discretion and jurisdiction of the State, subject, of course to the limitations or restrictions envisaged in the Constitution, it is not for the Court to substitute its views for that of State in that regard.

5(iii). It is again to be noticed that the petitioner even otherwise has not laid any challenge to the 2017 R&P Rules. 2012 R&P Rules challenged by the petitioner in the instant case though stand repealed, yet they were in force till 2017, whereas the instant petition challenging the same was filed by the petitioner on 27.08.2020, i.e. 8 years after their coming into force. Insofar as the contention of the petitioner for considering his short-term training certificate akin to the diploma required under the R&P Rules for promotion to the post of Assistant Director (Archives) is concerned, the same is also without any substance. The R&P Rules require Diploma in Archives from any recognized University/Institute. The petitioner had undergone a training course of one and a half month, i.e. w.e.f. 16.02.2009 to 31.03.2009, from the

School of Archival Studies, National Archives of India, New Delhi. His training course cannot be equated to that of diploma. The petitioner has not put forth any material to demonstrate that the training course undertaken by him for a period of one and a half month can be treated as similar to the Diploma in Archives.

For all the aforesaid reasons, I find no merit in the instant petition and the same is accordingly dismissed alongwith pending miscellaneous application(s), if any.

At this stage, learned counsel for the petitioner states that the petitioner also intends to avail Clause 18 of the Recruitment & Promotion Rules, 2017 pertaining to Power of the State Government for relaxation of Rules in his case to seek promotion to the post of Assistant Director (Archives). It goes without saying that it is for the petitioner to move appropriate authority in that regard and for the authority to take decision on such matter.

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

Brijesh Kumar ...Petitioner

Versus

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

2. <u>CWPOA No. 124 of 2019</u>
Kulbhushan ...Petitioner

Versus

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

For the petitioner(s) : Mr. Adarsh K. Vashista, Advocate.
For the respondents: Mr. Desh Raj Thakur, Addl. A.G. with Mr. Manoj Singh Bagga, Asstt. Advocate General.

CWPOA No. 93 of 2019
a/w CWPOA No. 124 of 2019
Reserved on: 29.11.2022
Decided on: 12.12.2022

Constitution of India, 1950- Article 226- In both these petitions, petitioners have sought identical relief i.e. quashing of letter dated 23.10.2018received by the petitioners where the respondents have afforded an opportunity to the petitioners to present their oral or written version against the proposed action of the respondents regarding the withdrawal of benefit of revision of pay scale from the petitioner- **Held-** The prayer made by them by way of instant petitions is pre-mature- Petitioners shall be at liberty to submit their response to correspondence dated 23.10.2018- Petition dismissed. (Paras 9, 10)

The following judgment of the Court was delivered:

<u>Satyen Vaidya, Judge</u>

In both these petitions, petitioners have sought identical relief i.e. quashing of letter dated 23.10.2018, Annexure A-7, individually received

by both the petitioners from the Executive Engineer, I&PH Division, Palampur, District Kangra, H.P. whereby both of them have been asked to present their respective cases before the said authority.

2. Brief background is that the petitioner in CWPOA No. 93 of 2019 was initially appointed as Work Inspector on daily wage basis in the year 1987 and his services were regularized w.e.f. 01.01.1997. Petitioner was allowed the pay scale of Rs.1500-2100 at the time of regularization which was further revised to Rs.5000-8100. Vide office order dated 21.04.2006, respondents conveyed the withdrawal of benefit of revision of pay scale from the petitioner.

3. Petitioner approached the erstwhile H.P. State Administrative Tribunal against the office order dated 21.04.2006. The original application of the petitioner was transferred to this Court and was registered as CWP(T) No. 13683 of 2008. The said petition was decided by a Division Bench of this Court vide judgment dated 18.11.2009 in following terms:

> *"The petitioner was granted the pay scale of Rs.5000-8100 w.e.f. 1.1.1997 vide office order Annexure A-3. However, the same was withdrawn vide Annexure A-4 dated 21st April, 2006. Admittedly, the petitioner has not been heard before the issuance of Annexure A-4. The petitioner has been visited with civil and evil consequences. Consequently, Annexure A-4 dated 21st April, 2006 is quashed and set-aside. However, liberty is reserved to the respondents to proceed with the matter in accordance with law. Accordingly, the writ petition stands disposed of."*

4. Petitioner in CWPOA No. 124 of 2019 had also approached this Court with identical facts. His petition was registered as CWP(T) No.13688 of 2008 and was decided by a Division Bench of this Court on 18.11.2009 in same terms as CWP(T) No. 13683 of 2008.

5. Perusal of orders passed by a Division Bench of this Court in CWP(T) No. 13683 of 2008 and CWP(T) No. 13688 of 2008 reveal that the office order dated 21.04.2006 was quashed and set-aside only on the technical ground that the petitioners were not heard before the issuance of said office order, which had consequence of visiting petitioner with civil and evil

consequences. However, liberty was reserved to the respondents to proceed with the matter in accordance with law.

6. Admittedly, these orders attained finality and were not challenged by either of the parties.

7. The impugned annexure i.e. correspondence dated 23.10.2018, Annexure P-7, received by the petitioners in both the instant cases reveal that now the respondents have afforded an opportunity to the petitioners to present their oral or written version against the proposed action of the respondents.

8. The petitioners have placed reliance on a judgment passed by a Division Bench of this Court on 24.03.2022 in CWPOA No.3145 of 2019 and other connected matters, whereunder certain parameters have been prescribed under which the employer in the public employment is held not entitled to recover the amount from the employee in certain given situations.

9. Keeping in view the fact that no recovery has yet been sought from the petitioners. The prayer made by them by way of instant petitions is pre-mature. Petitioners are at liberty to respond to the correspondence dated 23.10.2018, Annexure A-7, in accordance with law, which may include their assertion on the basis of aforesaid judgment passed in CWPOA No. 3145 of 2019.

10. In view of above discussion, both the petitions are disposed of with the observations that petitioners shall be at liberty to submit their response to correspondence dated 23.10.2018, Annexure A-7, and take all grounds therein available to them in accordance with law. The competent authority i.e. respondent No.4, is directed to decide the matter after affording due opportunity to the petitioners to represent their case and also by taking into consideration the applicability of judgment passed by a Division Bench of this Court in CWPOA No.3145 of 2019.

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

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

Bihari Lal ...Petitioner

Versus

State of H.P. and others …Respondents

2. CWPOA No. 5461of 2020

Ashok Kumar ...Petitioner

Versus

State of H.P. and others …Respondents

For the petitioner(s) : Mr. P.P.Chauhan, Advocate.
For the respondents: Mr. Desh Raj Thakur, Addl. A.G. with Mr. Manoj Bagga, Asstt. Advocate General.

CWPOA No. 5459 of 2020
a/w CWPOA No.5461 of 2020
Reserved on: 29.11.2022
Decided on: 12.12.2022

Constitution of India, 1950- Article 226- In both these petitions, petitioners have sought identical relief i.e. quashing of letter dated 03.10.2018 whereby both of them were asked to refund the excess amount found to be recoverable from them after re-fixation of their respective salaries- **Held-** The recovery sought to be made from petitioners after more than five years of its disbursement- The recovery at such belated stage will otherwise be iniquitous and harsh- Letter dated 03.10.2018 in both the cases quashed and set-aside- Petition allowed. (Paras 8, 9)

Cases referred:

State of Punjab and others vs. Rafiq Masih (White Washer) and others (2015) 4 SCC 334 (2);

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

In both these petitions, petitioners have sought identical relief i.e. quashing of letter dated 03.10.2018 (Annexure A-1), individually received by both the petitioners from the Executive Engineer, Shimla Division No.1, HPPWD, Shimla, whereby both of them were asked to refund the excess amount found to be recoverable from them after re-fixation of their respective salaries.

2. In the case of petitioner in CWPOA No. 5459 of 2020, a sum of Rs.50,217/- was sought to be recovered and in the case of petitioner in CWPOA No.5461 of 2020, a sum of Rs.47,225/- was sought to be recovered.

3. Petitioner in CWPOA No. 5459 of 2020 was initially appointed as Mason on 01.01.1994 and the petitioner in CWPOA No. 5461 of 2020 was appointed as Work Inspector w.e.f.01.01.1998. Both were given placements in the first stage as Technician Grade-II and thereafter as Technician Grade-I.

4. The petitioners were entitled for benefits of Assured Career Progression Scheme (for short. 'ACPS') on completion of 8, 16, 24 and 32 years of service. The State, subsequently introduced another ACPS whereby the incumbents were given the benefits on completion of 4, 9, 14 years of service in the same cadre. Petitioner in CWPOA No. 5459 of 2020 was given the benefit of ACPS after 9 years of service and petitioner in CWPOA No. 5461 of 2020 was given such benefit after 8 years of service. These benefits were granted to the petitioners before 20.11.2013.

5. The respondents, vide impugned order dated 03.10.2018 (Annexure A-1) ordered the withdrawal of the benefits of ACPS earlier granted to the petitioners.

6. Simultaneously, the recovery of excess amount paid to the petitioners were also directed, as noticed above.

7. Petitioners have also sought the aid of judgment passed by a Division Bench of this Court on 24.03.2022 in CWPOA No. 3145 of 2019, titled S.S. Chaudhary vs. State of H.P. and others, alongwith connected matters,

wherein, following the principles laid down in the case of ***State of Punjab and others*** vs. ***Rafiq Masih (White Washer) and others (2015) 4 SCC 334 (2)***, certain situations have been culled out in which the recovery of amount from a Government employee has been held to be impermissible. The Hon'ble Division Bench of this Court has held as under:

> *"**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 overweigh 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."*

8. It is not denied that the petitioners belong to Class-III service of the State Government. Moreover, the recovery has been sought to be made from them after more than five years of its disbursement. In such view of the matter, their case is squarely covered under Clauses (i) and (iii) of para-35 of the aforesaid noted judgment (supra). The recovery at such belated stage will otherwise be iniquitous and harsh.

9. In view of above discussion, letter dated 03.10.2018 (Annexure A-1) issued by respondent No.3 in both the cases are quashed and set-aside.

10. The petitions stand disposed of in the aforesaid terms, so also the pending miscellaneous application(s), if any.

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

Sh. Rajinder Singh Thakur ....Appellant.

Versus

Smt. Basant Kala and others ...Respondents.

For the appellant : Mr. S.M. Goel, Advocate.
For respondents No.1&2 : Mr. Naresh Sharma, Advocate.
For respondent No.3 : Mr. Raman Jamalta, Advocate.
For respondent No.4 : Mr. Lalit K. Sharma, Advocate.

FAO No.:508 of 2016
Reserved on:24.11.2022
Decided on :12.12.2022

Motor Vehicles Act, 1988- Sections 166, 173- Appellant has assailed award passed by learned Motor Accidents Claim Tribunal whereby the insurer has been exonerated and appellant/insured has been fastened with liability to pay the compensation- **Held-** The insurer has not discharged the burden of proof regarding allegation of fake license- Absolutely no evidence on record to prove the fact that the driving license was not genuine- Award set-aside- Petition allowed. (Paras 11, 13)

Cases referred:

National Insurance Company Ltd. Vs. Geeta Bhatt and ors. 2008 ACJ 1498;
National Insurance Co. Ltd. Vs. Swaran Singh and others (2004) 3 SCC 297;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

Appellant has assailed award dated 03.05.2016, passed by learned Motor Accidents Claim Tribunal, Kinnaur at Rampur Bushahar in MAC No. 0100081/2013, whereby the insurer has been exonerated and appellant/insured has been fastened with liability to pay the compensation.

2. The claimants (respondents No. 1 and 2 herein), filed petition under Section 166 of the Motor Vehicle Act, 1988 (for short, "the Act") *inter-alia* claiming compensation on account of death of their son as result of rash and negligent driving of driver (respondent No. 3 herein) while driving Tipper No. HP-06A-01230, owned by insured (appellant herein). The insurer (respondent No. 4 herein) was also impleaded as necessary party. Learned Motor Accidents Claims Tribunal (for short 'Tribunal'), vide impugned award allowed the petition of claimants and granted them compensation to the tune of Rs. 19,52,360/- along with interest @ 6% per annum from the date of filing of the appeal. The insurer has been exonerated and the liability to satisfy the award has been fastened upon the insured.

3. The facts necessary for adjudication of appeal are that the insurer in its reply filed before learned Tribunal had taken a specific objection to the effect that the driver was not holding a valid driving license at the time of accident. On the basis of such objection issue No. 6 was framed as under:-

> ***"Whether respondent No. 2 was not having a valid and effected driving license to drive the vehicle at relevant time? OPR-3."***

4. Learned Tribunal decided issue No.6 in affirmative and as a result thereof exonerated the insurer from liability to indemnify the insured. Learned Tribunal relied upon the statement of RW-1, Rajesh Kumar, who had been engaged as an investigator by the insurer. In addition, reliance was placed upon the contents of application under RTI (Ext. RW1/B) moved by RW-1 and response to such application (Ext.RW-1/C) given by District Transport Officer, Motor Vehicles Department, Wokha Nagaland. Cognizance was also taken of certain communications received by learned Tribunal from the office of District Transport Officer, Wokha Nagaland in response to summons issued to such office for production of record.

5. Appellant/insured has taken strong exception to the findings recorded by learned Tribunal on issue No. 6 on the ground that such findings are perverse being not supported by any legal evidence. It has been contended that learned Tribunal had no jurisdiction to presume the fact that license held by the driver was fake.

6. I have heard learned counsel for the parties and have also gone through the record of the case.

7. It is settled proposition of law that onus to prove exception is on the insurer. Reference can be made to the following extract from the judgment passed by Hon'ble Supreme Court in ***National Insurance Co. Ltd.*** *Vs.* ***Swaran Singh and others*** reported in ***(2004) 3 SCC 297***:-

> *'66. A bare perusal of the provisions of Section 149 of the Act leads to only one conclusion that usual rule is that once the assured proved that the accident is covered by the compulsory insurance clause, it is for the insurer to prove that it comes within an exception.*
>
> *67. In MacGillivray on Insurance Law it is stated:*
>
> *"25-82 Burden of Proof: Difficulties may arise in connection with the burden of proving that the facts of any particular case fall within this exception. The usual rule is that once the assured has proved that the case comes within the general risk, it is for the insurers to prove that it comes within an exception. It has therefore been suggested in some American decisions that, where the insurers prove only that the assured exposed himself to danger and there is no evidence to show why he did so, they cannot succeed, because they have not proved that his behaviour was voluntary or that the danger was unnecessary. Since an extremely heavy burden is imposed on the insurers if they have to prove the state of mind of the assured, it has been suggested in Canadian decisions that the court should presume that the assured acted voluntarily and that, where he does an apparently dangerous and foolish act, such danger was unnecessary, until the contrary is shown. In practical terms, therefore, the onus does in fact lie on the claimant to explain the conduct of the assured where there is not apparent reason for exposing himself to an obvious danger."*

68. In Rukmani and Others vs. New India Assurance Co. Ltd. and Others [1999 ACJ 171], this Court while upholding the defences available to the insurer to the effect that vehicle in question was not being driven by a person holding a licence, held that the burden of the insurer would not be discharged when the evidence which was brought on record was that the Inspector of Police in his examination in chief merely stated,

> *"My enquiry revealed that the respondent No.1 did not produce the licence to drive the abovesaid scooter. The respondent No.1 even after my demand did not submit the licence since he was not having it."*

69. The proposition of law is no longer res integra that the person who alleges breach must prove the same. The insurance company is, thus, required to establish the said breach by cogent evidence. In the event, the insurance company fails to prove that there has been breach of conditions of policy on the part of the insured, the insurance company cannot be absolved of its liability. (See Sohan Lal Passi (supra)."

8. Thus, it was solely upon the insurer to discharge the burden of proof regarding allegation of fake license. It was not a case that the driver of offending vehicle was not having any license at all. The insurer itself had taken into consideration a driving license belonging to the driver of the offending vehicle.

9. The question arises whether the insurer had discharged the burden. In my considered view, the answer has to be in negative, for the reasons as detailed hereafter.

10. RW-1, the investigator of insurer, by way of his evidence affidavit stated that he had submitted application under RTI Act and had received a response from District Transport Officer, Wokha Nagaland. He tendered on record both the documents as Ext. RW1/A and RW1/B. The mode adopted by the insurer to prove the fact was not in accordance with law. A fact can be proved either by oral or documentary evidence. In the case in hand, the fact that the license held by driver was not genuine could be proved by production of the original record of the concerned Licensing Authority, which purportedly had issued such license. It is only where the primary evidence is

not available, secondary evidence is permissible. It was not a case where the primary evidence was not available. Thus, alleged response from the Licensing Authority Ext. RW1/C could not be considered as legal evidence to prove the fact. Even otherwise, it was nowhere mentioned in Ext. RW1/C that the license was not issued by concerned Licensing Authority. The only remark was "***record not found***". From such remark the inference as drawn by learned Tribunal was not warranted.

11. Similar will the position in respect of the correspondence received by the office of learned Tribunal from Licensing Authority at Wokha Nagaland. The contents of the letters issued by District Transport Officer, Wokha Nagaland in response to summons issued to such authority to produce evidence cannot be the substitute of legal evidence. In judicial proceedings, the fact cannot be said to have proved except by proof on the basis of legal evidence. In such view of the matter, learned Tribunal has clearly erred in placing reliance upon aforesaid documents. In absence of such material, there was absolutely no evidence on record to prove the fact that the driving license was not genuine.

12. Learned counsel for the insurer placed reliance on judgment passed by Hon'ble Supreme Court in ***National Insurance Company Ltd.*** *Vs.* ***Geeta Bhatt and ors.*** reported in ***2008 ACJ 1498*** to assert that in the identical fact situation Hon'ble Supreme Court had assumed the driving license of driver as a fake one. However, the contention so raised on behalf of the insurer deserves to be rejected for the reason that in the facts of that case the investigator himself had visited the office of Licensing Authority and had inspected the record register. In the instant case, the investigator has not stated so. In fact, RW-1 has not stated that he had even visited the office of Licensing Authority at Wokha Nagaland. His statement is only to the effect that he had submitted application Ext. RW1/B and had received response

Ext. RW1/C. In such circumstances, the insurer cannot derive any benefit from the above referred judgment.

13. In light of above discussion, I have no hesitation to set-aside the findings returned by learned Tribunal on issue No. 6. The impugned award is set-aside to the above extent. It is held that insurer has failed to prove the breach of terms of policy and thus, is liable to indemnify the insured in respect of payment of compensation to the claimants.

14. The appeal is accordingly disposed of, so also the pending miscellaneous application, if any.

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

Ashwani Kumar … Petitioner

Versus

State of Himachal Pradesh and others … Respondents

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

For the respondents: Mr. Sumesh Raj, Dinesh Thakur and Sanjeev Sood, Additional Advocate Generals, with Mr. Amit Kumar Dhumal, Deputy Advocate General, for respondents No. 1 to 3.
Mr. Rajiv Rai, Advocate for respondent No. 4.

CWP No. 5772 of 2021
Decided on: 25.11.2022

Constitution of India, 1950- Article 226- Prayer of the Petitioner is that a writ in the nature of mandamus may kindly be issued directing respondent No.1 to accord the permission forthwith to adopt the Recruitment and Promotion Rules for the post of Superintendent Grade-I; to promote the petitioner to the post of Superintendent Grade-I with effect from 01.03.2021 when the petitioner had become eligible for promotion with all consequential benefits- **Held-** Issuance of a direction to the respondents that the petitioner be considered for promotion against the post of Superintendent Grade-I- Petition allowed with directions. (Para 12)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this present writ petition, petitioner has prayed for the following substantive reliefs:

i). That a writ in the nature of mandamus may kindly be issued directing respondent No.1 to accord the permission forthwith to adopt the Recruitment and Promotion Rules for the post the post of Superintendent Grade-I as applicable to the Government of Himachal Pradesh employees and further to fill up the post;
ii) That the writ in the nature of mandamus may kindly be issued directing the respondent No.3 to promote the petitioner to the post of Superintendent Grade-I with effect from 01.03.2021 when the petitioner had become eligible for promotion with all consequential benefits such as seniority, increment, arrears and interest @ 9% per annum may kindly be ordered to be paid on the arrears from the date the same fell due till its realization and justice be done."

2. The case of the petitioner is that he was appointed as a Clerk, on daily wage basis, with respondent No.4-Trust, in terms of Annexure-A1, dated 22nd of December, 1998. His services were regularized as a Clerk w.e.f. 10.07.1996. Thereafter, he was promoted against the post of Senior Assistant and further to the post of Superintendent Grade-II, on ad hoc basis, vide Annexure P-3. The petitioner was promoted against the post of Superintendent Grade-II on regular basis w.e.f. 01.01.2018. The contention of the petitioner is that the next promotional post from the post of Superintendent Grade-II is that of Superintendent Grade-I, however, in the absence of there being any Recruitment and Promotion Rules in the Trust, governing promotion to the said post, the petitioner despite having completed the requisite number of years for being eligible for promotion to the post of Superintendent Grade-I, in terms of the Recruitment and Promotion Rules, which are generally prevailing in the State of Himachal Pradesh, is being denied promotion for want of the Recruitment and Promotion Rules. It is further the contention of the petitioner that in the respondent-Trust, one Junior Engineer, namely, Sh. Prem Chand Sharma, was promoted to the post of Assistant Engineer despite the fact that there were no Recruitment and Promotion Rules existing with the respondent-

Trust with regard to promotion to the said post but by applying the analogy of the Recruitment and Promotion Rules prevailing in the other departments of the Government of Himachal Pradesh, where there exist the posts of Junior Engineer as also the Assistant Engineer.

3. Mr. J.L. Bhardwaj, learned counsel for the petitioner has argued that when the Junior Engineer serving in respondent- Trust could have been promoted by applying the Recruitment and Promotion Rules, which are prevailing in the other departments of the Government of Himachal Pradesh, then, the same yardstick had to be applied to the petitioner also and as the rules in vogue are that a Superintendent Grade-II is eligible for promotion against the post of Superintendent Grade-I after completion of three years of service as such, a mandamus be issued to the respondents to promote him against the post of Superintendent Grade-I w.e.f 01.01.2021.

4. The petition is resisted by the respondent-State *inter alia* on the ground that as Recruitment and Promotion Rules for promotion to the post of Superintendent Grade-I were yet not framed and were under consideration, therefore, the petition was not maintainable and the same was liable to be dismissed.

5. Leaned Additional Advocate General, on the basis of reply filed to the petition, has submitted that the matter with regard to the framing of Recruitment and Promotion Rules for the post of Superintendent Grade-I in the establishment of respondent No.4-Trust, was under consideration with the Government and as far as the analogy of a Junior Engineer having been promoted to the post of Assistant Engineer was concerned, this was done in lieu of the urgency to fill up the vacant post of Assistant Engineer as the job of Assistant Engineer is purely technical in nature and the services of Assistant Engineer were required in the respondent-Trust for execution of the work having been undertaken by the Trust. The stand of respondent No.4 is also

the same as that of the respondent-State and the same is not being repeated for the sake of brevity.

6. During the pendency of these proceedings, on 10th November, 2022, the Court had passed the following order:

> *"Instructions in terms of order dated 14.10.2022, have been imparted to learned Additional Advocate General who has handed over a copy thereof to the Court, which is ordered to be taken on record. A perusal of said instructions demonstrates that the stand of the respondents-State is that the Temple Trust has sent a proposal/recommendations to amend the service Bye Laws, for approval of the government on 7th August, 2022 and the promotion to the post of Superintendent Grade-1, can be considered after approval of the said Bye Laws.*
>
> *Mr. J.L. Bhardwaj, learned Counsel for the petitioner has submitted that in terms of Annexure P-6, additional posts, including the post of Assistant Engineer (Civil), was created in the respondent-Trust which post was to be filled in by way of promotion. Though till date, the Trust has not framed any service conditions or promotion rules for filling up the said post, yet, a Junior Engineer has been promoted against said post, by invoking the conditions of Recruitment and Promotion Rules which are prevailing in departments of the State Government qua the post of Assistant Engineer. He has further submitted that whereas the post of Assistant Engineer was created in the year 2018, the post of Superintendent Grade-1 was created in the year 2016, yet, the same analogy was not applied by the respondents for filling up the post of Superintendent Grade-1 by way of promotion, which act of the respondents is arbitrary and discriminatory.*
>
> *Faced with this situation, learned Additional Advocate General submitted that hearing of the case be adjourned for next week to enable him to confirm this aspect of the matter. As prayed for list, on 16.11.2022. On the said date, the case shall be heard finally on merit."*

7. Thereafter, when this case was listed on 22nd of November 2022, the Court passed the following orde:

> *"Learned Additional Advocate General on the basis of instructions so imparted, apprised the Court*

that the Recruitment & Promotion Rules for the post of Superintendent Grade1 stand framed.
Be that as it may, the case is ordered to be listed on 25.11.2022, by which date, learned Additional Advocate General to have instructions in terms of order dated 10.11.2022."

8. Today, on the strength of the instructions, which have been imparted by the officers of the respondents, the Court stands informed that though Sh. Prem Chand Sharma, Junior Engineer (Civil), was promoted as Assistant Engineer on 1st August, 2018, but it was his after completion of 29 years of service as Junior Engineer. Similarly, it further has been informed to the Court on the basis of the said instructions that one Sh. Mohinder Singh, Draughtsman was also promoted to the post of Head Draughtsman on 1st of August, 2018, but this was also done as Sh. Mohinder Singh had completed 27 years of service as a Draughtsman.

9. Learned Additional Advocate General has further apprised the Court that the Deputy Commissioner-cum-Commissioner Temple Trust has informed that whereas the Chief Commissioner Temple-cum-Secretary (LAC), Government of H.P. in terms of letter dated 31st October, 2022, has accorded approval for adoption of Recruitment and Promotion Rules of Superintendent Grade-I of H.P. Government for Sh. Naina Devi Ji, Temple Trust, District Bilaspur H.P. and whereas Temple Trust is undertaking the completion of all codal formalities in respect of promotion of the petitioner to the post of Superintendent Grade-I at the earliest, however, in the meanwhile the Government of Himachal Pradesh vide Notification dated 14th October, 2022, has taken over Sh. Shakti Senior Secondary School, Sh. Naina Devi Ji alongwith staff posted in the said School, and therefore, the petitioner, who is presently posted in the School, will now have to opt as to whether he wants to get absorbed with the Education Department as Superintendent Grade-II or

whether he wants to gain the promotion against the post of Superintendent Grade-I in respondent No.4-Trust.

10. Having heard learned counsel for the parties and having gone through the pleadings as well as documents appended therewith, as also instructions which have been imparted by the officers concerned, though this Court is of the considered view that no mandamus can be issued that the petitioner be promoted against the post of Superintendent Grade-I immediately after competition of three years of service as Superintendent Grade-II, however, now in view of the fact that decision has been taken for adoption of Recruitment and Promotion Rules of the post of Superintendent Grade-I of the Government of Hiamchal Pradesh for respondent No.4-Trust, it is incumbent upon respondent No.4 to confer this promotion upon the petitioner without any further delay. As far as the absorption of the petitioner in the Department of Education is concerned, at this juncture, when delay in his promotion, but obvious, is on account of the non-decisiveness by the respondents with regard to the framing/adoption of the Recruitment and Promotion Rules qua the post of Superintendent Grade-I, this omission on the part of the respondents cannot act to the deterrence of the petitioner.

11. Accordingly, this writ petition is disposed of by issuance of a direction to the respondents that after completion of all codal formalities, the case of the petitioner be considered for promotion against the post of Superintendent Grade-I latest by 2nd December, 2022, and if found eligible for promotion, then let said promotion be conferred upon the petitioner forthwith, and thereafter, if the petitioner gives his option, then, he be absorbed in the Department of Education, as Superintendent Grade-I.

12. With these observations, the writ petition is disposed of. Pending miscellaneous application(s), if any, also stand disposed of accordingly.

13. As prayed for instruction dated 24th November, 2022 issued by SDM (Sh. Naina Devi Ji) cum-Chairman Temple Trust, Sh. Naina Deviji to Sh. Rajiv Rai Advocate and another one issued by Deputy Commissioner-cum-Commissioner (Temple), Temple Trust, Shree Naina Deviji, District Bilaspur, H.P. of the same date shall form part of the record.

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

Smt. Sanju Devi ....Petitioner.

Versus

State of H.P. through Secretary, Social Justice and Empowerment and others

...Respondents.

For the petitioner : Mr. Mukul Sood, Advocate.
For the respondents: M/s Sumesh Raj , Dinesh Thakur and Sanjeev Sood, Addl. AGs with Mr. Amit Kumar Dhumal, Deputy AG.

CWP No. 895 of 2017
Decided on: 07.12.2022

Constitution of India, 1950-Article 226- Prayer made that the respondents may be directed to appoint the petitioner as anganwadi worker and give other consequential benefits and to quash the order passed by the Ld. Deputy Commissioner allowing the appeal of respondent to set-aside the appointment of the petitioner- **Held-** The Deputy Commissioner concerned has correctly set aside the appointment of the petitioner as she was recommended for appointment against the post in issue in violation of the provisions of the advertisement and as also notification- The contention of the petitioner has no legs to stand on- No merit- Order upheld- Petition dismissed. (Paras 14, 15)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

CMP No. 12746 of 2022 with CMP(M) No. 1226 of 2022

By way of these two applications, a prayer has been made for restoration of the main writ petition by recalling order dated 02.03.2020, vide

which, the main writ petition was dismissed in default and for *condonation* of delay in filing the application.

2. Having heard learned Counsel for the applicant as well as learned Additional Advocate General, this Court is of the considered view that it will be in the interest of justice, in case, these applications are allowed and after condoning the delay, the applicant/petitioner is allowed to make submissions on merit. Ordered accordingly. Order dated 02.03.2020 is recalled and the petition is ordered to be restored to its original number. Delay in filing the application is condoned. The applications stand disposed of accordingly.

CWP No. 895 of 2017

3. With the consent of the parties, the case is heard and is being disposed of today itself.

4. By way of this writ petition, the petitioner has prayed for the following substantive reliefs:-

> *"A. That writ of mandamus or any other appropriate writ may kindly be issued and the respondents may be directed to appoint the petitioner as anganwadi worker and other consequential benefits.*
> *B. That writ of mandamus or any other appropriate writ may kindly be issued to quash the Annexure P-5, i.e. the order passed by the Ld. Deputy Commissioner in Case No. 7/8 of 2016 whereby he had allowed the appeal of Respondent No. 5 and set aside the appointment of the petitioner."*

5. The facts necessary for the adjudication of the present petition are in a very narrow compass. Selection process was initiated by the department concerned for appointment of Aanganwari Worker in Aanganwari Centre, Chakkan, Tehsil Baddi, District Solan. Interviews for the post were held on 09.08.2016. The petitioner alongwith respondent No. 5, who has been proceeded against *ex parte* and other candidates, participated in the process of selection. The petitioner was selected by the department as Aanganwari Worker for Aanganwari Centre in issue.

6. The appointment of the petitioner was challenged by way of an appeal, as is envisaged in the policy concerned by the private respondent before the Deputy Commissioner, Solan. The appeal was instituted on 19th August, 2016, within the period of 15 days, as is prescribed in the scheme/policy. In terms of order dated 30.03.2017, passed by Deputy Commissioner, Solan, appointment of the petitioner was set aside and feeling aggrieved, the petitioner has preferred the present writ petition.

7. Mr. Mukul Sood, learned Counsel for the petitioner, though by placing reliance upon Annexure R-1, appended with the reply filed by the respondents, has argued that a perusal thereof would demonstrate that contemplation therein was with regard to the frozen list of families and the same has to be construed as family of the petitioner *de hors* the fact whether the petitioner had contracted marriage on the said date or not (but this Court is of the considered view that the said submission of learned Counsel for the petitioner is meritless). Learned Counsel also argued that notification dated 29th February, 2016, could not have been applied retrospectively and therefore also, the order passed by the Deputy Commissioner is not sustainable in the eyes of law. As per learned Counsel for the petitioner, as notification dated 29.02.2016, was issued after the marriage of the petitioner on 25.02.2016, therefore, she was duly eligible, having become a member of the family of her husband before the issuance of notification, and therefore also, order passed by learned Deputy Commissioner is not legally sustainable. He has further argued that otherwise also, eligibility of a candidate is to be seen as on the date of advertisement and it is not in dispute that as on the said date, she was the member of family of her husband Shri Pradeep Kumar. Accordingly, he prays that the impugned order be set aside and petition be allowed.

8. Learned Deputy Advocate General, by referring to the reply filed by the respondent-Department has submitted that the order passed by learned Deputy Commissioner cannot be faulted with for the reason that the

petitioner has failed to establish her ordinary residence in one of the feeder areas of the Aanganwari Centre concerned before the Appellate Authority and further as in terms of notification dated 29.02.2016, the eligibility criteria was to be on the basis of definition of family/frozen list of members of the families as it was on 1st January of the recruitment year, therefore also, there is no infirmity in the order passed by learned Deputy Commissioner as the petitioner admittedly was not a member of the family of her husband as on 01.01.2016.

9. I have heard learned Counsel for the parties as well as learned Additional Advocate General and also gone through the pleadings as well as documents appended therewith.

10. A perusal of the order passed by learned Deputy Commissioner, Solan, demonstrates that the appointment of the petitioner was set aside on the ground that in terms of the scheme, which governed the appointment of Aanganwari Workers and Aanganwari Helpers, the candidate ought to be an ordinary resident of feeder area as on 01.01.2016 and should be a member of the family as per the frozen list of families as on 01.01.2016. However, in the case in hand, the petitioner was married to Shri Pradeep Kumar, who in fact was the resident of the feeder area of the Aanganwari Centre concerned, in the month of February, 2016 and she became a member of the family of her husband as per Parivar Register of the Gram Panchayat, in which, village Chakkan is located, on 15.03.2016. Learned Deputy Commissioner, thus held that as the petitioner was not the member of the family of Shri Pradeep Kumar as on the cut-of-date, i.e. 01.01.2016 or before said date, therefore, she was not entitled for being considered to be appointed as an Aanganwari Worker in Aanganwari Centre, Chakkan, as before her marriage, the petitioner was neither an ordinary resident of the feeder area of the Aanganwari Centre concerned nor she was the member of the family of Shri

Pradeep Kumar. On these grounds, the appointment of the petitioner has been set aside by learned Deputy Commissioner.

11. The post in issue admittedly was advertised vide Annexure P-1, dated 30th June, 2016. It was mentioned in the advertisement that in order to be eligible to apply for the post in issue, the candidate concerned was to *inter alia* fulfill the following eligibility criteria: (a) the candidate ought to be an ordinary resident of the feeder area of the Aanganwari Centre concerned as on 01.01.2016 and the separation of the family must have taken place before 01.01.2016; (b) age of the candidate as on 01.01.2016 should be between 21 to 45 years; (c) the candidate must possess the minimum qualification of 10+2 or equivalent and if no candidate was available from the feeder area with said qualification, then the qualification was to be reduced in terms thereof; and (d) the annual income of the family of the applicant should not be more than 35,000/-, duly certified by the officer referred to in the advertisement. Thus the advertisement itself was self speaking that in order to be eligible to apply to the post in issue, the candidate ought to be an ordinary resident of the feeder area of the Aanganwari Centre concerned as on 01.01.2016.

12. Now in this backdrop, if one peruses notification dated 29th February, 2016, the same demonstrates that it was stated in Column No. 5 thereof, which relates to advertisement of vacancies that the frozen list of families would be as on 1st January of the recruitment year and same will be displayed on the Notice Boards of all offices referred to therein to enable eligible women members of these families to apply for posts/vacancies. Incidentally, there is no challenge in the present petition to the said condition of the notification.

13. Be that as it may, as it is not in dispute that the petitioner as on 01.01.2016 was not an ordinary resident of feeder area of the Aanganwari Centre concerned and further as it is not much in dispute that the petitioner was married to a resident of feeder area of the Aangainwari Centre concerned,

on 25.02.2016, this Court is of the considered view that until and unless, the petitioner was fulfilling the eligibility criteria contemplated in notification dated 29th February, 2016, read harmoniously with the advertisement Annexure P-1, she could not have applied for the post in issue. The submission of learned Counsel for the petitioner that the notification was not having effect upon the petitioner as she was married on 25.02.2016, is without merit for the reason that it is not the date of marriage, which determines the eligibility of a candidate in terms of the advertisement as well as notification dated 29th February, 2016 as the determination was on the basis of frozen list of members of the families as on 1st January of the recruitment year, which year in the present case is 2016 and the cut of date thus is 01.01.2016.

14. The respondent-Department in fact has not applied notification dated 29th February, 2016, retrospectively as argued and the Deputy Commissioner concerned has correctly set aside the appointment of the petitioner as she was recommended for appointment against the post in issue in violation of the provisions of the advertisement and as also notification dated 29.02.2016. Further contention of learned Counsel for the petitioner that the status of the family of her husband as it was on 01.01.2016 independently ought to have been taken into consideration *de hors* the fact that as to whether the petitioner on the said date was married or not is also without merit for the simple reason that until and unless, the petitioner, as on the date in issue i.e. 01.01.2016, either was independently fulfilling the eligibility criteria or on the strength of her marriage etc. had gained eligibility, by no stretch of imagination, she could have been considered eligible for appointment against the post in issue. In other words, the status of the family of husband of the petitioner as on 01.01.2016 in the absence of the petitioner being a member of that family was immaterial.

15. As far as the assessment of the eligibility of the petitioner is concerned and when the cut-of-date for determining the frozen list of families in its wisdom was stated to be 1st January of the recruitment year by the department concerned, then the eligibility but natural has to be assessed on the touchstone of said date and not on the touchstone of date of marriage or on the touchstone of date of issuance of advertisement. Though, it is not much in dispute that eligibility of a candidate ordinarily has to be seen as on the last date of receipt of applications as per advertisement but then the same principle applies where advertisement *per se* is silent with regard to the date of eligibility of a candidate. In the present case, the advertisement itself contained the date to be 1st January, 2016, and therefore, the contention of learned Counsel for the petitioner that eligibility ought to have been taken into consideration as from the date of advertisement has no legs to stand upon.

Accordingly, in view of above discussion, as this Court does not finds any infirmity with the impugned order, this petition being devoid of merit is dismissed. Pending miscellaneous application(s), if any, also stand disposed of accordingly.

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

Ujager Singh ....Petitioner.

Versus

State of H.P. through Secretary, Irrigation and Public Health & others

...Respondents.

For the petitioner	:	Mr. Ramakant Sharma, Advocate.
For the respondents	:	M/s Sumesh Raj and Dinesh Thakur, Addl. AGs with Mr. Amit Kumar Dhumal, Deputy AG, Advocate.

CWP No. 2070 of 2020
Decided on: 06.12.2022

Constitution of India, 1950- Article 226- Denial of promotion to the post of pump operator- The petitioner was not promoted to the said post purportedly for want of experience certificate- **Held-** Averments, as are contained in the affidavit filed by Superintending Engineer proves that the petitioner was fulfilling the condition of 5 years experience of working- non-consideration of the petitioner, for want of experience certificate by the DPC is bad in law- Petition allowed with directions. (Paras 6, 7)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this writ petition, the petitioner has prayed for the following substantive relief:-

> *"1. That the Office Order dated 3.5.2019, at Annexure P-4, may kindly be quashed and set aside and the petitioner may kindly be held entitled for promotion to the post of Pump Operator w.e.f. the date persons junior to him have been promoted after convening the Review DPC, with all consequential service benefits."*

2. When this case was listed before the Court on 23.02.2022, the following order was passed:-

> *"CMP No.15642 of 2021*
>
> *For the reasons stated therein, the application is allowed and the petition is taken up for consideration, as prayed, for today itself.*
>
> *CWP No.2070 of 2020*
>
> *Heard for some time. The petitioner is aggrieved by the factum of his being denied promotion to the post of Pump Operator, whereas according to him, persons junior to him from the feeder category, stood promoted against the said post prior to him. Response filed by the Department to the petition demonstrates that the petitioner was not considered by the Departmental Promotion Committee held in the year 2012 as well as in the year 2017 for want of submission of Experience Certificate by the petitioner. This Court is of the considered view that onus to submit Experience Certificate cannot be shifted upon the incumbent who is in the zone of consideration in departmental promotion and that too, for promotion from the post of class-IV to class-III post. This data should be available with the Department itself and same should be placed before the Departmental Promotion Committee for its perusal for ascertaining as to whether the incumbent in the zone of consideration is fulfilling the eligibility criteria for the promotion or not. It is more so necessary keeping in view the fact that the post of Pump Operator is a non-selection post. In these circumstances, before the matter is heard further, learned Additional Advocate General is directed to file an affidavit of the Superintending Engineer concerned, vide which the details of the service particulars of the petitioner be submitted, meaning thereby as to when he joined the service and subsequently when was he placed as a work charge employee/male regular employee. It should also be spelt out in the affidavit as to whether the petitioner worked with the pump motors and electrical accessories and if so, then for what period.*
>
> *Let, needful be done within a period of four weeks as prayed for. List on 31.3.2022."*

3. In response thereto, an affidavit has been filed by the Superintending Engineer, Jal Shakti Vibhag, Circle Dharamshala, District Kangra, H.P., relevant portion whereof reads as under:-

> *"2. That it is submitted that the petitioner was engaged on daily waged basis as Helper w.e.f. 1.5.1988 under JSV Sub Division, Dehra now JS Sub Division, Jawalamukhi under JSV Division, Dehra. He has been regularized on w.e.f. 1.4.1998 vide Executive Engineer, JSV Division, Dehra vide office order dated 23.7.1999. The petitioner has been working as a Helper in Pump House of LWSS Jawalamukhi Town Well No. 3 w.e.f. 1.4.1998.*
> *3. That JSV Division, Dehra remained under the control of various circles i.e. JSV Circle, Nurpur and Hamirpur. Presently JSV Division Dehra is under the jurisdiction of JSV Circle, Dharamshala. Each circle had promoted class IV workers to the post of Class-III vide DPCs held from time to time, but each and every time, but the petitioner was not considered for promotion to class-III category for want of experience certificate.*
> *4. That it is further submitted that during 9/2012 helpers/beldars were promoted to the post of Pump Operators by the Superintending Engineer, IPH circle, Hamirpur, but no juniors to the applicant had been promoted as Pump Operators.*
> *5. That as per experience certificate issued by t he Assistant Engineer, Jal Shakti Sub-Division Jawalamukhi (copy enclosed as Annexure R-II) the petitioner had been working as Helper under Pump House of LWSS Jawalamukhi Town Well No.3 and running motors w.e.f. 1.4.1998 under Jawalamukhi Sub Division and Division Dehra. It is pertinent to mention here that the petitioner has been promoted as Pump Operator vide order dated 4.9.2020. "*

4. The Recruitment and Promotion Rules to the post of Pump Operator are on record. A perusal thereof demonstrates that the post *inter alia* is to be filled in by way of promotion from amongst work Charged Helper/Pump Attendant, having 8 years regular service as work charged, including 5 years experience in working with pump motors and electrical accessories.

5. The petitioner was appointed as helper in the year 1988 on daily wage basis and his services are stated to be regularized as such in the year 1998. Otherwise also, it was not much in dispute that when DPC was held for promotions to the post of Pump Operators, the petitioner was not promoted to the said post purportedly for want of experience certificate.

6. This Court is of the considered view that the averments, as are contained in the affidavit dated 26.03.2022 filed by Superintending Engineer, relevant portion whereof stands quoted hereinabove, clearly demonstrates that the petitioner has been working as Helper in Pump House LWSS Jawalamukhi Town Well No. 3 w.e.f. 1st of April, 1998 and further he has been running motors w.e.f. 01.04.1988 and w.e.f. 01.04.1998 under Jawalamukhi Sub Division and Division Dehra. This proves that the petitioner was fulfilling the condition of 5 years experience of working etc. both in the year 2012 and 2017, which therefore, renders non-consideration of the petitioner, for want of experience certificate by the DPC, to be bad in law.

7. Accordingly, this writ petition is disposed of with the direction that let a review DPC be held for the year 2012 for promotion to the post of Pump Operators and if necessary for the year 2017 and the case of the petitioner be reconsidered for promotion against the post of Pump Operator, on the strength of experience, as has been spelled out in the latest affidavit filed by the authority concerned and the petitioner be promoted, if found fit for promotion, in case, any person junior to him from the feeder category, has been promoted against the post of Pump Operator, then the petitioner be also promoted with effect from the same date, with all consequences, including seniority but with the rider that monetary consequences shall be confined to three years as from the date of filing of the writ petition or the date of promotion, whichever is later. Needful shall be done within a period of eight weeks.

The writ petition stands disposed of in above terms, so also pending miscellaneous application(s), if any.

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

Yashwant Singh ....Petitioner.

Versus

H.P. State Electricity Board Limited and another

...Respondents.

For the petitioner : Mr. J.L. Bhardwaj, Advocate.
For the respondents :Mr.Tara Singh Chauhan, Advocate.

CWP No. 2283 of 2022
Decided on: 15.11.2022

Constitution of India, 1950- Article 226- **CCS (CC&A) Rules, 1965**- Rule 14- Enquiry against the petitioner under Rule 14 of the CCS (CC&A) Rules, 1965- The disciplinary authority has imposed penalty of reduction of pay of the petitioner- Prayer of the petitioner is that the impugned order be quashed and directions be issued to refund the amount of recovery made from the salary of the petitioner- **Held-** The response filed by the petitioner to the enquiry report was not considered by the disciplinary authority at the time of passing of the impugned order- Grave miscarriage of justice to the petitioner- Order quashed and set-aside- Petition allowed with directions and costs. (Para 15)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

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

i) That a writ in the nature of certiorari may kindly be issued for quashing the impugned order dated 06.12.2021 issued by Respondent-Board vide Annexure P-15.

ii) *That a writ in the nature of mandamus may kindly be issued directing the Respondent-Board to refund the amount of recovery made from the salary of the petitioner in pursuance of the impugned order dated 06.12.2021*

alongwith interest @ 12% per annum from the date the amount has been started recovering that is w.e.f. January, 2022, till actual refund made to the petitioner and justice be done."

2. Brief facts necessary of the adjudication of the present petition are that the petitioner is stated to be serving as Junior Engineer with the respondent-Board. A memorandum was issued to the petitioner dated 15.03.2019, Annexure P-11, on behalf of the disciplinary authority by the Executive Director (Personnel) of the respondent-Board, in which it was mentioned that the respondent-Board proposed to hold an enquiry against the petitioner under Rule 14 of the CCS (CC&A) Rules, 1965. It was further mentioned in the said memorandum that a statement of imputations of misconduct or misbehavior in support of each article of charge was also enclosed, as well as a list of documents and a list of witnesses, on the strength of which articles of charge were to be proved, was also enclosed. The petitioner was called upon by the respondent-Board to submit his reply within 10 days and he was also instructed that if he does not submits his written statement of defence on or before the specified time period, or does not appear in person with his defence or otherwise fails or refuse to comply with the provisions of Rule-14 of the CCS (CC&A) Rules, 1965, the enquiring authority may hold the enquiry against him *ex parte*. In brief, misconduct alleged against the petitioner was that while working as Junior Engineer, Electrical Sub Division No. III, HPSEBL, Solan, he failed to maintain absolute integrity and devotion to duty as he allowed unauthorized installment of energy meters on the works of M/s G.R. Infra Project Ltd., on 05.06.2017, without valid SCO by the Assistant Engineer. Further, as per the statement of imputation of misconduct or misbehavior, the petitioner was alleged to have exceeded his authority by releasing the connection to M/s G.R. Infra Private Limited and he also committed dereliction in performance of official duty by not conducting timely inspection of the energy meter consumption.

3. Reply to the memorandum of article of charges was filed by the petitioner in terms of the Annexure P-12 denying the charges. As the disciplinary authority was not satisfied with the reply which was filed to the memorandum by the petitioner, accordingly, Enquiry Officer was appointed and enquiry was held in the matter. The enquiry report which was submitted by the Enquiry Officer was forwarded to the petitioner vide Annexure P-13, dated 09.09.2021, in terms whereof the petitioner was given an opportunity to make his representation, if any, against the inquiry report, within a period of 15 days as from the date of issuance of the notice. According to the petitioner, he submitted his response to this notice vide Annexure P-14, dated 7th October, 2021. It was mentioned in the opening paragraph of Annexure P-14 that the petitioner acknowledges the receipt of notice dated 9th September, 2021, received by him on 24th September, 2021 and he accordingly, submitted his reply thereto dated 7th October, 2021. This was followed by issuance of Annexure P-15 i.e. order dated 6th December, 2021, in terms whereof the disciplinary authority has imposed penalty of reduction of pay of the petitioner by five stages from Rs.14,240/- to Rs.12,100/- + Rs.4350/- grade pay in the pay band of Rs.10,900-34800 for a period of five years from the date of issuance of orders with the direction that during the period of reduction, he will not earn increments and reduction will have the effect of postponing future increments.

4. Feeling aggrieved, the petitioner has approached this Court by way of present writ petition.

5. Mr. Jia Lal Bhardwaj, learned counsel for the petitioner, has submitted that the impugned order which has been passed by the disciplinary authority is liable to be set aside on the short count that this order was passed by the disciplinary authority without taking into consideration the response which was filed by the petitioner to the enquiry report, which has resulted in grave miscarriage of justice to the petitioner, as his contentions

against the enquiry report were not considered by the disciplinary authority despite the fact that the response was available with the disciplinary authority at the time when the impugned order was passed.

6. Learned counsel for the petitioner has argued that a perusal of the impugned order (Annexure P-15) itself demonstrates that it is self speaking that despite the response to the enquiry report being available with the disciplinary authority, yet, the same was ignored by it on the ground that the same was not submitted by the petitioner within the stipulated time period. Learned counsel submitted that as the notice itself was received by the petitioner on 24th September, 2021, therefore, but natural, the time for submitting the response has to be construed from the said date and not from the date of issuance of the memorandum. He further submitted that *de hors* this fact, once the disciplinary authority was having the response which was filed by the petitioner to the enquiry report, ignoring the same and that too, on a hyper technical ground that the same was not filed within the time prescribed in it, itself has smacks of legal mala fides because under the provisions of CCS (CC&A) Rules, there is no bar that if the response is not received by the disciplinary authority within the prescribed time period, then the disciplinary authority cannot consider the same at the time of passing the order in the disciplinary proceedings. On this count, learned counsel has submitted that the present petition be allowed and the impugned order be quashed and set aside.

7. The petition is opposed by the respondent-Board *inter alia* on the ground that the plea of the petitioner on the basis of which the petition has been filed is totally baseless as the reply which was filed by the petitioner to the enquiry report was duly appreciated and considered by the disciplinary authority at the time of passing of the final order.

8. Leaned counsel for the respondent has taken the Court through order Annexure P-15 and after relying upon the same, he has submitted that

the second page of the order, which has been passed by the disciplinary authority, is self speaking that the written statement of defence which was filed by the delinquent employee, was considered by the disciplinary authority and as per the learned counsel, this averment finds mention in the impugned order on more than one occasion. Accordingly, it has been argued that it is incorrect on the part of the petitioner to suggest that the response filed to the enquiry report was not considered by the disciplinary authority at the time of passing of impugned order Annexure P-15. On these bases, a prayer for dismissal of the petition has been made.

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

10. The moot issue before this Court is twofold, (a) whether the disciplinary authority could have had ignored the response which was filed by the petitioner to the inquiry report, even if it is assumed for the sake of arguments that the same was not filed by the petitioner within the period contemplated in the show cause notice and (b) whether the contention of the respondent-Board that the response which was filed by the petitioner to the inquiry report, was duly considered by the disciplinary authority, is correct or contrary to the record.

11. The Court will first answer the first issue. As already mentioned hereinabove, after the issuance of the memorandum and after receipt of the reply of the petitioner thereto, as the disciplinary authority was not satisfied with the response of the petitioner, accordingly, it decided to initiate disciplinary proceedings against the petitioner. An Enquiry Officer was appointed and inquiry was conducted. The Enquiry Officer after completion of enquiry, submitted his report and this report was forwarded by the disciplinary authority, in terms of provisions of Rule 15 of the CCS (CC&A) Rules, to the petitioner, calling upon him to submit his response thereto. This notice is appended with the petition as Annexure P-13. It is dated 9th

September, 2021. A perusal of this notice demonstrates that it was mentioned therein that after holding the enquiry against the petitioner, the enquiry report stood submitted by the enquiry officer and the same was being forwarded to the petitioner alongwith the notice, with an opportunity being afforded to him to submit his response thereto within a period of 15 days from the date of issuance of this notice, failing which it shall be presumed that the petitioner has nothing to state in his defence and appropriate action, as deemed fit, shall follow. The response which was filed by the petitioner to the enquiry report is appended with the petition as Annexure P-14. This response is dated 7th October, 2021 and as already mentioned hereinabove also in the very opening paragraph of this particular Annexure, it was mentioned that the petitioner had received notice Annexure P-13, dated 9th September 2021, on 24th September, 2021, and as the enquiry report submitted by the officer was not maintainable, he was submitting response thereto parawise.

12. The reference to Annexure P-14 is made in para-21 of the writ petition and therein the petitioner has expressly mentioned that the petitioner received the copy of notice dated 9.9.2021, alongwith which an enquiry was enclosed, only on 24th September, 2021, and as per the notice, representation to the enquiry report was to be furnished by the petitioner within a period of 15 days as from the date of issuance of notice which admittedly was received by the petitioner on 24th September, 2021 and he submitted a detailed response thereto in terms of Annexure P-14 dated 07.10.2021. A perusal of para-21 of the reply which has been filed by the respondent-Board demonstrates that the factum of notice dated 09.09.2021, having been received by the petitioner on 24.09.2021, has not been denied. That being the case, this Court is of the considered view that the myopic construction of the notice by the respondent-Board that response thereto had to be filed by the petitioner within the period of 15 days as provided in the show cause notice is not sustainable in law. Assuming that the notice was received by the

petitioner after 15 days as from the date of issuance thereof, then, it is to be presumed that the petitioner in fact had lost the right to file reply thereto? The answer obviously has to be in the negative. Now in the backdrop of what has been discussed, this Court has no hesitation in holding that as notice dated 9th September, 2021, was received by the petitioner on 24th September, 2021 and admittedly the response to the enquiry report thereafter was filed within 15 days as from the date of receipt of said notice, the disciplinary authority was duty bound to have had considered the response so filed and thereafter, taken a view with regard to punishment, if any, to be imposed upon the petitioner or not. At this stage, this Court would like to make an observation that in the larger interest of justice, even if the disciplinary authority had received the response to the enquiry report after the lapse of time mentioned in the notice, but before the decision was taken on the issue by the disciplinary authority, then also, interest of justice demanded that the response should have been to be taken into consideration by the disciplinary authority before passing the final order in the matter because there is no bar in terms of the provisions of CCS (CC&A) Rules in general and Rule 15 thereof in particular that reply to the enquiry report, if filed after the lapse of time prescribed in the notice, cannot be taken into consideration by the disciplinary authority. Therefore, passing of the impugned order by the disciplinary authority by ignoring the response which was filed by the delinquent employee to the enquiry report is not sustainable in the eyes of law and the impugned order is liable to be set aside on this count alone.

13. Now this Court will answer the second issue which has been framed by this Court, i.e. *whether the contention of the respondent-Board that the response which was filed by the petitioner to the inquiry report was duly considered by the disciplinary authority*, is correct or not. The Court is shocked and surprised that this contention was made before the Court, which is contrary to the contents of the impugned order Annexure P-15. The relevant

extract of the order, which expressly states that the reply filed by the petitioner to the enquiry report was not considered by the disciplinary authority as it was received after the date prescribed in the same, is quoted herein below:-

> *"And whereas, Sh. Yashwant Thakur, Junior Engineer, has not submitted the reply against inquiry report within stipulated period as per condition of notice."*

14. In the teeth of contents of the impugned order which have been quoted hereinabove, the contention of the respondent-Board that the reply which was filed by the petitioner to the enquiry report was considered by it, does not holds any water. The Court reiterates that it is not as if it is mentioned in the impugned order that though the reply which was filed to the enquiry report was not received within the prescribed period, yet it was considered. The language is explicit and very very clear that the petitioner had not submitted the reply against the enquiry report within stipulated period as per condition of the notice. Thereafter, there is nothing in the impugned order from which it could be inferred that indeed the reply, which was filed by the petitioner to the enquiry report, was in fact considered by the disciplinary authority while passing the impugned order. The reference of learned Counsel for the petitioner to the portion of the impugned order wherein it is mentioned that the written statement of defence filed by the petitioner was taken into consideration is misleading as statement of defence is no substitute for the response which was filed by the petitioner to the enquiry report for the reasons that this written statement of defence etc. are of pre-enquiry stages and after the enquiry report was filed by the Enquiring Officer, the provisions of Rule 15 of the CCS (CC&A) Rules, 1965, come into application. The right to file response to the enquiry report is a right which is enshrined under CCS(CC&A) Rules and this right cannot be infringed in the mode and manner in which it was done by the respondent-Board in the present case and this Court in fact concurs with the contention which has been raised by learned

Counsel for the petitioner that there are smacks of legal mala fides in the present case.

15. Accordingly, this petition succeeds and the impugned order is quashed and set aside on the ground that the response which was filed by the petitioner to the enquiry report was not considered by the disciplinary authority at the time of passing of the impugned order, which has resulted in grave miscarriage of justice to the petitioner because technically he has been condemned unheard by the disciplinary authority. The disciplinary authority shall pass a fresh order in the case, after taking into consideration the response filed by the petitioner. Cost of Rs.2.00 Lac is imposed upon the respondent-Board for trying to mislead the Court and raising arguments against the record. Out of the same, Rs.1.00 Lac shall be deposited with Himachal Pradesh High Court Bar Association and Rs. 1.00 Lac be paid to the petitioner.

It goes without saying that the order, which shall be passed by the disciplinary authority, has to be a reasoned and speaking order. Pending miscellaneous application(s), if any, also stand disposed of accordingly.

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

Dr. Lokinder Pal Sharma ....Petitioner.

Versus

State of Himachal Pradesh and others ...Respondents.

For the petitioner : Mr. Rajiv Jiwan, Senior Advocate with M/s Y.K. Thakur and Hitender Verma, Advocates.

For the respondents : Mr. Ajay Vaidya, Senior Additional Advocate General.

CWPOA No. 307 of 2019
Decided on: 01.12.2022

Constitution of India, 1950- Article 226- Prayer of the petitioner is that the services rendered by the petitioner on contract basis before regularization of his services, be counted for the purpose of calculating pensionary benefits- **Held-** Entire service rendered by the petitioner on contract basis has been treated by the department to be in continuity for all other purposes- Petitioner at least is entitled to his pension on the basis of entire length of service rendered with the department as Medical Officer- Petition allowed- Mandamus issued. (Paras 5, 6)

Cases referred:

D.R. Chauhan vs. State of Himachal Pradesh and others, 2010(2) Him. L.R. 1076;

Narbada Devi vs. State of H.P. and others, 2011 (1) Him.L.R. (DB) 191;

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

The short controversy involved in the present petition is as to whether the services rendered by the petitioner on contract basis before he

was regularized as a Medical Officer w.e.f. 05.03.2007, should be counted for the purpose of calculating pensionary benefits or not.

2. Mr. Rajiv Jiwan, learned Senior Counsel appearing for the petitioner, submitted that the petitioner was initially engaged as a Medical Officer, on contract basis, on the basis of a walk-in-interview w.e.f. 19.05.2000. He further submitted that at the relevant time when the petitioner was appointed as such on contract basis, the Medical Officers were being recruited by the department on the basis of walk-in-interviews only and it is not as if certain Medical Officers were recruited through Public Service Commission and others were appointed through walk-in-interviews. At the time when the petitioner was appointed as Medical Officer on contract basis, he was fully eligible to be appointed against the post in issue as he was possessing all the requisite qualifications, in terms of the Recruitment and Promotion Rules in vogue, for appointment to the post of Medical Officer. Learned Senior Counsel further submitted that right from the day of his initial appointment on contract basis, the petitioner was being paid the regular pay scale of a Medical Officer. Learned Senior Counsel has drawn the attention of the Court to Annexure P-7, dated 11.06.2009, issued by Principal Secretary (Health) to the Government of Himachal Pradesh and has apprised the Court that after the initial appointment of the petitioner on contract basis, he had qualified the test to undergo Post Graduation Degree course in the year 2001 from Indira Gandhi Medical College, Shimla, itself as a direct candidate. Though, the petitioner submitted his resignation but the same was rejected by the department and accordingly, immediately after completion of the Post Graduation, the petitioner was allowed to re-join the services as a Medical Officer (Specialist), though on *adhoc* basis, w.e.f. 02.09.2003 and he continued to serve as such till his regularization as a Medical Officer on 05.03.2007. Learned Senior Counsel further submitted that in terms of order (Annexure P-7), dated 11.06.2009, the entire service rendered by him w.e.f.

19.05.2000, i.e. the date of his initial appointment on contract basis, was taken into consideration for the purpose of conferment of benefits of ACP scheme etc. Learned Senior Counsel further submitted that as of now, the services rendered by the petitioner on contract basis/*adhoc* basis w.e.f. 19.05.2000 to 04.03.2007, have not been taken into consideration by the department for the purpose of conferment of seniority and pensionary benefits. He submitted that as far as seniority from the date of appointment on contract basis is concerned, the petitioner is forgoing that right of his and is praying that this petition be allowed by ordering that the service rendered by the petitioner on contract/*ad hoc* basis w.e.f. 19.05.2000 to 04.03.2007 be reckoned by the department for the purpose of computing pensionary benefits. Learned Senior Counsel has relied upon the judgment passed by a Coordinate Bench of this Court in **D.R. Chauhan** vs. **State of Himachal Pradesh and others**, decided on 22.06.2010, reported in 2010(2) Him. L.R. 1076 and submitted that by placing reliance upon the judgment of Hon'ble Supreme Court in H.S. Vankani and others vs. State of Gujrat and others, AIR 2010 Supreme Court 1714, this Court was pleased to direct the respondents therein to count the period of *adhoc* service rendered by the petitioner therein but for the purpose of computing pensionary benefits only. Learned Senior Counsel has also drawn the attention of this Court to the judgment of Hon'ble Division Bench of this Court in **Narbada Devi vs. State of H.P. and others**, reported in 2011 (1) Him.L.R. (DB) 191, and stated that in this case also, the Hon'ble Division Bench was pleased to hold that there was no justification in not counting the period of service rendered by an employee on temporary or officiating basis, as qualifying service for the purpose of pension etc. provided said service is without any interruption and is followed by regularization. Learned Senior Counsel has also relied upon the judgment passed by Hon'ble Division Bench of this Court in **Veena Devi vs. Himachal Pradesh State Electricity Board Ltd and another**, in CWP No.5400 of 2014, decided on

21.11.2014, in which, the Hon'ble Division Bench of this Court has been pleased to hold that the petitioners therein were entitled to have the services rendered by them on contract basis, counted for the purpose of qualifying service for pensionary benefits.

3. The prayer of the petitioner is opposed by learned Senior Additional Advocate General on the ground that as the initial appointment of the petitioner on contract basis was not in terms of Recruitment and Promotion Rules, therefore, the petitioner is not entitled for counting said service for the purpose of pensionary benefits. Though, it has not been denied that the services rendered by the petitioner on contract/*adhoc* basis, have been taken into consideration by the respondents for the purpose of grant of benefits of ACPS etc. but the stand of the department is that the benefits which have been granted to the petitioner of service on contract basis, cannot be made a ground for counting that period for the purpose of calculating the pensionary benefits also. Accordingly, a request has been made that as there is no merit in the present petition, the same be dismissed.

4. I have heard learned Counsel for the parties and also gone through the relevant pleadings.

5. The limited prayer that has been made by the petitioner is that the services which have been rendered by the petitioner on contract basis before regularization of his services, be counted for the purpose of calculating pensionary benefits. During the course of arguments, it could not be disputed that at the time when the petitioner was appointed on contract basis, the recruitment of Medical Officers was being made through walk-in-interviews only and it is not as if only the petitioner was appointed through the process of walk-in-interview. In fact, recruitment of all Medical Officers was being made by following the said norm of recruitment only. Why so, the question is best left to the State to answer. This Court is of the considered view that as Recruitment and Promotion Rules were available with the State, then the fact

that it opted for recruitment of Medical Officers on contract basis through walk-in-interview, demonstrates a conscious decision of the State Government not to follow the process of the Recruitment and Promotion Rules, may be for the reasons that there was paucity of Medical Officers in the State. The contention of learned Senior Counsel for the petitioner that after his appointment as Medical Officer on contract basis, the petitioner was being paid the regular pay scale of the post of Medical Officer, is also not disputed by the State. It is a matter of record that the entire service rendered by the petitioner on contract basis has been treated by the department to be in continuity for all other purposes. That being the case, this Court is of the considered view that as there is no substantive difference between the nature of service rendered by a Medical Officer to the department, be it on contract basis or *adhoc* basis and after regularization, then not counting the service rendered on contract basis or *adhoc* basis as a Medical Officer appointed through walk-in-interview process, which is followed by regularization, for the purpose of pensionary benefits, is discriminatory because the petitioner at least is entitled to his pension on the basis of entire length of service which he renders with the department as Medical Officer. The case law referred to hereinabove also is to this effect only.

6. Accordingly, in view of the above discussion, this writ petition is allowed and a mandamus is issued to the respondents to count the service rendered by the petitioner on contract basis/*adhoc* basis in continuity with service rendered by him on regular basis as Medical Officer while determining his pensionary benefits.

The writ petition stands disposed of in above terms, so also pending miscellaneous application(s), if any.

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

Chander Mani ....Appellant.

Versus

Sh. Narpat (now deceased) through his Legal Heirs

...Respondents.

For the appellant : Mr. G.R. Palsra, Advocate.
For the respondents : Mr. Vinod Thakur, Advocate.

RSA No. 77 of 2007
Decided on: 14.11.2022

Code of Civil Procedure, 1908- Section 100- Regular second appeal- The appellant has challenged the judgment and decree passed by the Court of learned District Judge declaring the Will dated 10-09-1989 to have not been validly executed by Nokhu in favour of the defendant- Held- All facts clearly demonstrate that the Will was shrouded with extreme suspicious circumstances- No merit- Appeal dismissed. (Para 12)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this regular second appeal, the appellant has challenged the judgment and decree passed by the Court of learned District Judge, Mandi, in Civil Appeal No. 93 of 2005, titled as Sh. Narpat vs. Sh. Chandermani and another, dated 02.01.2007, in terms whereof, the learned Appellate Court while setting aside the judgment and decree passed by the learned Trial Court, decreed the suit of the plaintiff in the following terms:-

> *"As a sequel to my findings on point No. 1 above, the appeal is accepted and the judgment and decree under appeal are set aside. Consequently the suit of the plaintiff is decreed. The will dated 10.02.1989 is declared to have not been validly executed by Nokhu in favour of the defendant and plaintiff being successor of Nokhu is entitled to the suit property under Hindu Succession Act*

and the possession of the suit land comprised in khewat Khatauni No. 82/19 measuring 9-9-14 bighas situated in village Janed, illaqua Pachhihar, Tehsil Sadar, District Mandi, H.P. including the house be delivered to the plaintiff and proforma defendants."

2. Brief facts necessary for the adjudication of the present appeal are as under:-

Respondent/plaintiff, namely, Narpat (hereinafter to be referred as 'the plaintiff' for convenience) filed a suit for declaration and possession as also for the consequential relief to the effect that he and proforma defendant No. 2 were co-owners of the estate of Nokhu and the defendant who is altogether a stranger, was employed as a Lineman in the Telecom Department. The defendant happened to be posted in the area of the plaintiff on account of his job and he accordingly got acquainted with the elder brother of Nokhu. Elder brother of Nokhu was Karam Singh who pre-deceased Nokhu. Karam Singh left behind his wife Meera Devi, who also pre-deceased Nokhu. After the death of Karam Singh, the suit property was inherited by his widow and after her demise, the same devolved upon Nokhu Ram. Nokhu was deaf and dumb and was not having sound disposing mind and was being looked after by the plaintiff after the death of elder brother of Nokhu. A litigation was instituted against the defendant by Nokhu through plaintiff for permanent prohibitory injunction, which continued till the month of September, 1998 and on 24th September, 1998, the same was dismissed as defendant had produced, after the death of Nokhu, a registered Will, purported to have been executed by Nokhu in favour of the defendant. After the dismissal of the case, defendant took over forcible possession of the suit property under the garb of said false and forged Will. As per the plaintiff, the defendant was not having any right, title or interest over the suit property and it was the plaintiff and proforma defendant No. 2 who were to inherit the entire estate of Nokhu but due to said fictitious and forged Will dated 10.02.1989, which was attested on the same day, the defendant took forcible possession of the suit property.

Nokhu had died on 15.03.1998. It was further the case of the plaintiff that the defendant from the very beginning was making successive applications for correction of revenue entries, which all were contested both by Meera Devi and Nokhu, however, the defendant succeeded in his illegal designs by producing the forged Will of Nokhu after his death and was trying to have the suit land mutated in his favour on the basis of the said Will. As Nokhu was deaf and dumb and was having no discretion or disposing state of mind and was being looked after by the plaintiff, therefore, the purported Will was false and fictitious as Nokhu was not a fit person to make a Will. It was also alleged that deceased Nokhu was neither ever looked after by the defendant nor there was any occasion for the defendant to look after him. As per the plaintiff, the Will was not executed by Nokhu at all and thumb impression etc. upon it was not in fact that of Nokhu. As per the plaintiff, the defendant was requested many a times to have the Will cancelled but as he did not do so, hence the suit.

3. The suit was resisted by the defendant *inter alia* on the ground that he was not a stranger and was having every right, title or interest over the suit land. As per the defendant, Karam Singh gave the suit property to the defendant for cultivation as a tenant. The defendant had also made a cow-shed upon it and made the land cultivable. He admitted that Karam Singh and Meera Devi died issueless but denied that Nokhu was deaf and dumb. According to the defendant, Nokhu was having problem of stammering and he was having sound disposing mind and was well aware as to what was good for him and what was bad. It was denied by the defendant that the Will was a result of fraud or the same was a fictitious Will. It was also denied that possession of the suit land was taken forcibly by the defendant as alleged. As per the defendant, the Will was voluntarily executed by Nokhu out of his own free will. It was admitted by the defendant that he had made successive applications for correction of revenue entries against Meera Devi and Nokhu.

It was also stated in the written statement that the defendant had made an application for correction of revenue entries against Nokhu dated 25.07.1986, which was allowed by Assistant Collector 2nd Grade on 30.06.1987. Plaintiff filed an appeal against that order which was accepted. The defendant filed revision before the Court of Divisional Commissioner. The matter went up to the Court of Financial Commissioner and from there, the same was remanded back to Collector Mandi, but therein, the plaintiff made a statement that as he had filed a civil suit, therefore, he did not want to contest the appeal. As per the defendant, the plaintiff was therefore stopped by the principle of *res judicata* to again raise this issue by way of the civil suit. According to the defendant, he was looking after not only Nokhu but his brother Karam Singh also and it was denied that thumb impression upon the Will was of someone else and not of Nokhu.

4. On the basis of pleadings of the parties, learned Trial Court framed the following Issues:-

1. *Whether the Will dated 10.02.1989 is a false, fictitious and forged. If so, its effects? OPP*
2. *Whether the plaintiff and proforma defendant are successors of deceased Nokhu as alleged? OPP*
3. *If issues No. 1 and 2 proved in affirmative, whether the plaintiff is entitled for the decree of possession as prayed for? OPP*
4. *Whether the suit of the plaintiff is barred by principle of resjudicata as alleged? OPD*
5. *Whether the defendant was inducted tenant over the suit land by Sh. Karan Singh as alleged? If so, its effects? OPD*
6. *Relief.*

5. On the basis of pleadings and evidence led by the parties in support of their respective cases, the Issues so framed were answered by the learned Trial Court as under:-

Issue No. 1:	*No.*
Issue No. 2:	*Redundant.*
Issue No. 3:	*No.*
Issue No. 4:	*No.*
Issue No. 5:	*Redundant.*

Relief : The suit of the plaintiff is dismissed with no order as to cost as per my operative portion of the judgment.

6. The suit was dismissed by the learned Trial Court by *inter alia* returning the findings that in fact from the evidence on record, it clearly stood proved by the defendant that the Will was duly executed. Learned Court further held that onus to prove that the Will was forged and fictitious document was upon the plaintiff and plaintiff only stated that deceased Nokhu was deaf and dumb at the time of making the Will and was not of sound disposing mind but this was not proved by the plaintiff by leading cogent and convincing evidence on record. Learned Court held that although the plaintiff placed on record the certificate issued by CMO, Mandi, but a perusal of the same demonstrated that it was mentioned therein that Nokhu was suffering from only speech disarticulation and he was not deaf, however, said CMO was also not examined by the plaintiff. Learned Court held that the defendant had examined Doctor who has stated that Nokhu was not deaf and dumb, rather he used to stammer. In his opinion, deafness and dumbness are only physical incapacities, which never in any manner proved unsoundness of mind, which has to be proved by leading cogent and convincing evidence on record, which onus was not discharged by the plaintiff. On the basis of these findings, the suit was dismissed by the learned Trial Court.

7. In appeal, these findings have been reversed. Learned Appellate Court while setting aside the judgment and decree passed by the learned Trial Court has held that it was clear from the perusal of Ext. D-3, i.e. order passed by the Divisional Commissioner, Mandi, dated 31.07.1989, that relationship between Nokhu and defendant was not cordial and the Court cannot ignore the fact that the previous litigation was filed by Nokhu against the defendant, through his next friend, i.e. the plaintiff, regarding the same

suit land. Learned Appellate Court also observed that the correction application was seriously contested by both the parties and the matter was ultimately taken to the Court of Financial Commissioner, who accepted the recommendations of the Divisional Commissioner vide order Ext. D-5. Learned Appellate Court observed that if Nokhu was having cordial relations with the defendant, then, there was no occasion for Nokhu to contest the appeal/revision which were filed by the defendant before the Collector, Divisional Commissioner and Financial Commissioner. Learned Appellate Court observed that the filing of the appeal/revision as well as previous litigation was suggestive of the fact that relations between Nokhu and the defendant were far from being cordial. Learned Appellate Court also held that learned Counsel for the defendant could not explain said circumstances during the course of arguments. Learned Appellate Court observed that DW5 Dina Nath, who was the person who identified Nokhu before the Sub Registar, Mandi, had admitted that he had not represented Nokhu as an Advocate in correction applications. Learned Appellate Court also held that Rameshwar (DW-6) was not aware about the relationship of Nokhu and the plaintiff and there was nothing in his testimony as to in what manner the Sub Registrar asked testator Nokhu regarding execution of the Will since Nokhu was mentally retarded, as was clear from the observations made by the Court in the previous suit. Learned Appellate Court also observed that the onus was very heavy upon the Sub Registrar as well as marginal witness so as to ascertain the true nature of the document being executed by Nokhu and testimony of these witnesses demonstrated that it was this witness who had taken Nokhu to the house of Dina Nath (DW-5). Learned Appellate Court observed that it was highly improbable that the defendant was not in the knowledge of the Will Ext. DW4/A nor had accompanied Nokhu to the office of the Sub Registrar when the evidence on record suggested that Nokhu was suffering from speech disarticulation etc. It held that rather it was the case of

the defendant that he had taken Nokhu to Dr. D.K. Arora (DW-1) for his medical examination and it was really strange that when cases were pending between Nokhu and defendant, how Nokhu was taken to Dr. Arora by the defendant. It was nowhere the case of the defendant that before the death of Nokhu, relations between the defendant and Nokhu became cordial, which were earlier strained on account of filing of the cases. Learned Appellate Court observed that learned Trial Court while considering the question of due execution of the Will had heavily relied upon the testimony of Dina Nath (DW-5), Pune Ram (DW-4) and Rameshwar (DW-6) but lost sight of important fact that Nokhu was not a normal person and in the previous case, he was held to be mentally retarded and also a deaf and dumb person. Learned Appellate Court held that even a deaf and dumb person can execute a Will but the law enjoins that the contents of the Will and nature of the document must be explained to the testator. Learned Appellate Court also held that pedigree table Ext. PC proved the relationship of the plaintiff with testator Nokhu, wherein Meera Devi is recorded as widow of Karam Singh and Karam Singh is recorded as son of Thaliya. Plaintiff Narpat is recorded as son of Jassa and Jassa and Thaliya were recorded as brothers, which demonstrated that plaintiff and Nokhu had common ancestors. Learned Appellate Court also held that the plaintiff in order to prove his case had examined himself as PW-1 and made a detailed statement in support of his case and clearly stated that Nokhu was deaf and dumb and was mentally retarded and was being looked after by the plaintiff and he had not executed any Will in favour of the defendant during his lifetime. Learned Appellate Court observed that the plaintiff was subjected to scurrilous cross examination but there was hardly anything in his testimony to support the case of the defendant. Learned Court also observed that taking into consideration the statement of PW-2 Sota Ram, who had deposed in the Court about the physical and mental state of Nokhu, the onus to prove the due execution of the Will was upon the defendant, who

was the propounder of the Will Ext. DW-4/A and the evidence of the plaintiff is not of much importance except the question of testamentary capacity and suspicious circumstances shrouding the execution of the Will. Learned Appellate Court also held that learned Trial Court had not returned any finding on issue No. 5, which issue pertained to the fact as to whether the defendant was inducted as tenant over the suit land by Karam Singh, predecessor of Nokhu. Learned Appellate Court also held that the learned Trial Court had ignored the observations which were made by the Divisional Commissioner in his order dated 31.07.1989 that the question of Nokhu being deaf and dumb was to be decided first and appropriate guardian was to be appointed for defending the case on behalf of Nokhu in case he is found to be not in a position to defend his interest properly. Learned Appellate Court also held that the Trial Court had not even framed proper issues in the case and in fact the onus to prove due execution of the Will is always upon the propounder of the Will. The Court also held that it was settled law, as was held by Hon'ble Supreme Court, that where no issue was framed on the question which arises out of the pleadings of the parties and parties have led their entire evidence on all the pleas raised by them, they cannot be permitted to urge at the conclusion of the proceedings or in appeal that they were taken by surprise by non-framing of a particular issue when each of them had already exhausted their evidence. On the basis of aforesaid findings, learned Appellate Court set aside the judgment and decree passed by the learned Trial Court and decreed the suit of the plaintiff.

8. Feeling aggrieved, the defendant filed this appeal, which was admitted on 14.06.2007 on substantial questions of law No. 1 and 2, which read as under:-

> *"(1) Whether the 1st Appellate Court has misread, misinterpreted and misconstrued the oral as well as documentary evidence of the parties especially Will Ext. DW-4/A, statement of DW-4, DW-5 and*

DW-6, which has resulted into grab failure and miscarriage of justice to the appellant?
(2) Whether taking of active part by the propounder while making the Will is a suspicious circumstance of Will?"

9. I have heard learned Counsel for the parties and also gone through the judgments and decrees passed by learned Courts below as well as record of the case.

10. I will deal with both the substantial questions of law separately.

Substantial Question of Law No. 1:-

11. The findings which have been recorded by learned Appellate Court with regard to Will Ext. DW-4/A as well as the veracity of statements of DW-4, DW-5 and DW-6, have been referred to by me in detail hereinabove. A perusal of the findings which have been so returned by learned Appellate Court when compared with the testimony of said three witnesses and the mode and manner in which they have deposed is suggestive of the fact that there was neither any misinterpretation nor any misconstruction of the Will in question. In fact, a perusal of the statements made by DW-4, DW-5 and DW-6 demonstrates that none of these witnesses was able to convince the Court as to why they were made a party to the purported execution of the Will by Nokhu. This fact when seen with the factum of Nokhu purportedly being deaf and dumb, obviously casts a duty upon the Court to be circumspect with regard to the consideration of the statements of these three witnesses so as to come to the conclusion that the Will was executed in accordance with law or not and the findings which have been returned in this regard by the learned Appellate Court are the correct findings as the learned Court has appreciated the statements of these three witnesses in the peculiar facts of this case wherein the executor of the Will was stated to be a deaf and dumb person. On the other hand, learned Trial Court erred in not doing so. This Court is conscious of the fact that consistent stand of defendant was that Nokhu was not deaf and dumb but this Court is satisfied that there is ample evidence on

record from which inference can be drawn by the Court that Nokhu was not only having the problem of stammering but he was also deaf and dumb. This was also evident from the fact that earlier suit instituted against the present appellant by Nokhu was filed by him through his next friend, i.e. the plaintiff. This is also evident from the fact that the applications which were filed by the defendant against Nokhu for correction of revenue entries, filing of which applications has been admitted by the defendant, were also contested by Nokhu Ram through his next friend, i.e. the plaintiff. This is further evident from the fact, as has been observed by learned Appellate Court also that if Nokhu Ram was a person having sound statement of mind, then nothing prevented him to bring this fact either to the knowledge of Civil Court in the previous suit or the revenue authorities in proceedings which were pending. Nothing prevented Nokhu Ram to have had made a statement either before the Court or the revenue authorities that he had not authorized the plaintiff to pursue his case but fact of the matter remains that this was not done by Nokhu Ram either before the Court of law or before the revenue authorities and the litigations between Nokhu Ram and the appellant were defended by Nokhu Ram through the plaintiff. Accordingly in the light of what has been discussed hereinabove, this Court is convinced that the learned Appellate Court has not misinterpreted or misconstrued the oral as well as documentary evidence led by the parties especially Will Ext. DW-4/A or the statements of DW-4, DW-5 and DW-6. This Court also concurs with the findings which have been returned by learned Appellate Court that in fact there was no occasion for the appellant to have had taken Nokhu for his medical examination in the teeth of litigations which ware pending between them and no prudent person would have otherwise accompanied his adversary to a

Doctor so as to ascertain his physical state of mind. The very fact that Nokhu accompanied the appellant for his medical examination and that too at the

time when there were litigations pending between them is also suggestive of the fact that Nokhu was not able to understand as to what was good for him and what was bad for him. This substantial question of law is answered accordingly.

Substantial Question of Law No. 2:-

12. In order to answer this substantial question of law, it is relevant to refer to the cross examination of the appellant. Appellant/defendant entered the witness box as DW2. In his cross examination, he denied the suggestion that at the time of the execution of the Will, he had made some fictitious person available to have the Will executed, rather he self stated that he was not present at the time of execution of the Will and that he came to know about the execution of the Will only after the death of Nokhu. Said statement of the defendant, if put in different words, means that the defendant played no role in the execution of the Will executed by Nokhu and execution of the Will in his favour was not in the knowledge of defendant and he acquired its knowledge after the death of Nokhu. The scribe of the Will entered the witness box as DW-5. He deposed in the Court that he had scribed the Will as was desired by Nokhu Ram. He further stated that Nokhu Ram used to stammer but otherwise he was alright and was understanding his good and bad. He also deposed in his examination-in-chief that he was practicing as a Lawyer and he knew Nokhu quite well. However, in his cross examination, he stated that he had not represented Nokhu in any of the matters and further he came to know about Nokhu Ram only because of the cases which were going on about his 'Girdawri'. One of the marginal witness, Sh. Rameshwar, has entered the witness box as DW-6. He stated in the Court that the Will was scribed by Dina Nath, Lawyer, on the asking of Nokhu and thereafter the Will was read over to Nokhu who after affirming the same to be correct appended his thumb impression upon the same. This witness stated that thereafter he and marginal witness appended their signatures upon the

Will. In his cross examination, this witness deposed that there was a distance of 2 to 2 ½ kms. between his house and house of Nokhu and Nokhu Ram had called him the same day for witnessing the Will. He deposed that they went to the house of Dina Nath (DW-5) with Nokhu. He denied that Nokhu was deaf and dumb. Now a scrutiny of the statements of DW-5 and DW-6 demonstrates that both these witnesses have deposed in one voice that the Will was scribed on the asking of Nokhu. In this backdrop, it is necessary to go through the statement of DW-4 Punna Ram, who was serving as Sub Registrar at the time when the Will was registered. Whereas this witness denied in the Court that Nokhu was deaf and dumb and he reiterated the case of the appellant/defendant that Nokhu only stammered in the course of speaking but then he was confronted with his report Ext. 2, which was an inquiry conducted by said witness in the course of an application filed by the appellant for correction of revenue record, in which this very officer has recorded in his order dated 30.06.1997 that Nokhu was *Thatha* and could only understand by signs and gestures. Well, if Nokhu could understand by signs and gestures only, then the statements of both DW-5 and DW-6 that the Will was scribed, as per verbal instructions of Nokhu, are *prima facie* incorrect and false. None of these witnesses have deposed in the Court that the Will was scribed by interpreting the signs and gestures of Nokhu and that the scribe of the Will otherwise understood the signs and gestures of deaf and dumb persons so as to write down the Will scribed by such a person. All these facts clearly demonstrate that the Will was shrouded with extreme suspicious circumstances, especially keeping in view the mental and physical condition of the executor of the Will. Though the case of the appellant has been that the he has not participated in the execution of the Will at all, but as the Court can safely conclude that Nokhu Ram was not mentally or physically in a condition to either engage a Lawyer to scribe the Will or gather witnesses to witness the Will, all this but natural appears to have been done by the appellant as the

Will was executed in his favour. Therefore, preparation of the Will is writ large at the behest of the beneficiary of the same and the Will, in these circumstances, becomes highly suspicious. This substantial question of law is answered accordingly.

In view of above discussion, as this Court does not finds any merit in the present appeal, the same is accordingly dismissed. Pending miscellaneous application(s), if any, also stand disposed of accordingly.

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

Dharam Chand Thakur and others ....Petitioners.

Vs.

Shri Gambhir Singh

.....Respondent.

For the petitioners: Mr. TejasviVerma, Advocate.
For the respondent: Nemo.

Civil Revision No. 204 of 2022
Date of Decision: 12.12.2022

Code of Civil Procedure, 1908- 115, Order VII Rule 11- **Himachal Pradesh Urban Rent Control Act, 1987**- The petitioner has challenged order passed by the Court of learned Civil Judge dismissing an application filed under Order VII, Rule 11 of the Code of Civil Procedure by the petitioners- Held- No infirmity in the impugned order- A suit by the tenant against the landlord praying for injunction against illegal dispossession can be filed only before a Civil Court and the tenant has no remedy in these circumstances under the provisions of the Himachal Pradesh Urban Rent Control Act- Dismissed in limine. (Paras 2, 4)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition,the petitioner has challenged order, dated 12.10.2022, passed by the Court of learned Civil Judge, Manali, District Kullu, H.P. in Civil Suit No. 87/2021, titled as *Shri Gambhir Singh Vs. Shri Dharam Chand Thakur and others,* in terms whereof, an application filed under Order VII, Rule 11 of the Code of Civil Procedure by the petitioners herein has been dismissed.

2. Having heard learned counsel for the petitioners and having perused the impugned order, this Court is of the considered view that as there

is no infirmity in the impugned order, therefore, the present petition deserves to be dismissed in *limine*. The Court is making this observation for the reason that the record demonstrates that respondent-tenant has filed a suit for permanent prohibitory injunction against the present petitioners for restraining them from unlawful interference/threats and dispossession of the plaintiff from the suit premises, which is a shop. An application under Order VII, Rule 11 of the Code of Civil Procedure was filed by the petitioners herein before the learned Trial Court with the plea that the suit seeking relief of permanent prohibitory injunction by the tenant on the allegation that the landlord was forcibly dispossessing him was not maintainable, as the suit was barred by the provisions of the Himachal Pradesh Urban Rent Control Act, 1987. The application has been dismissed by the learned Trial Court by *inter alia* holding that as it was not in dispute that the plaintiff indeed was the tenant of the demised premises and the petitioners herein were owners thereof, therefore, in these circumstances, the bar of the provisions of the Himachal Pradesh Urban Rent Control Act would have come into operation had the landlords filed a suit against the tenant seeking his eviction, but here it was the tenant who had sought a decree of injunction against the landlords, which was not hit by the provisions of the Pradesh Urban Rent Control Act. 3.

This Court is of the considered view that the findings so returned by the learned Court below are correct findings, because there is no provision in the Himachal Pradesh Urban Rent Control Act, in terms whereof, there is any statutory bar that a tenant, feeling threatened by the landlord vis-à-vis being illegally dispossessed from the demised premises, cannot approach a Civil Court. This Court is not even remotely suggesting as to whether the grievance with which the tenant has approached the learned Civil Court has merit or not. The issue, but obvious, has to be decided by the Court concerned on merit, however, it cannot be said, as has been urged by learned counsel for the petitioners that the suit filed by the tenant is not

maintainable. This Court is of the considered view that a suit by the tenant against the landlord praying for injunction against illegal dispossession can be filed only before a Civil Court and the tenant has no remedy in these circumstances under the provisions of the Himachal Pradesh Urban Rent Control Act. However, simply because a tenant has filed such a suit before the Civil Court, the same otherwise cannot operate as a bar as far as the landlord is concerned, who can still file a petition for eviction of the tenant from the demised premises, in terms of the Himachal Pradesh Urban Rent Control Act.

4. Accordingly, as this Court finds no infirmity in the impugned order, this petition being devoid of any merit is dismissed, so also pending miscellaneous applications, if any.

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

Girdhari Lal Verma ...Petitioner.

Versus

State of H.P. & another ...Respondents

For the petitioner : Mr. Lovneesh Kanwar, Advocate.
For the respondents : Mr. Desh Raj Thakur, Addl. A.G. with Mr. Narender Thakur, Dy. A.G., for respondent No.1.
Mr. Virbahadur Verma, Advocate, for respondent No.2.

CWPOA No. 3729 of 2020
Reserved on 6.12.2022
Decided on : 14.12.2022

Constitution of India, 1950- Article 226- **H.P. Board of School Education Act** – Section 23- Prayer of petitioner is that he be promoted as Joint Secretary on regular or on ad-hoc basis and the respondents may be directed to give benefit of higher pay fixation- Held- mere existence of post or vacancy does not confer any right on the incumbents in the feeder category to claim promotion- The claim to ad-hoc promotion on behalf of the petitioner is also not tenable for the reason that there could be no anticipation regarding approval or finalization of R & P Regulations merely because the draft regulations had been prepared- No merit- Petition dismissed. (Paras 11, 13)

Cases referred:

Vimal Kumari v. State of Haryana (1998) 4 SCC 114;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge:

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

> *"i). That the orders dated 21.3.2017, vide Annexure A-18, denying consideration and resultant promotion to the*

applicant as a Joint Secretary in the respondent-Board, may kindly be quashed and set aside forthwith;

ii) That the respondent No.1 may be directed to consider and then to promote the applicant as Joint Secretary on regular or on ad-hoc basis (whichever is beneficial) from due dates w.e.f. 16.8.2014 when case was recommended/ forwarded by the respondent Board to Govt. for ad-hoc promotion) or w.e.f. 25.9.2014 (Department of Personnel gave its approval for ad-hoc promotion to respondent No.1) or w.e.f. 30.9.2014 (date of retirement of applicant) which is beneficial, as per the past practice borne out from Annexure A-26 or even otherwise, with all consequential benefits, forthwith.

iii) That the respondents may be directed to give benefit of higher pay fixation on promotion as Joint Secretary on regular or ad-hoc basis, from due date as in relief (ii) above, and to give benefit of higher pay fixation for all revised retiral benefits including monthly pension w.e.f. 1.10.2014 till May 2017 and thereafter with all consequential benefits forthwith;

iv) That the denial of consideration and the resultant promotion as Joint Secretary, either on ad-hoc or on regular basis from due dates as in relief (ii) above, may kindly be held as discriminatory, arbitrary malafide, violative of OM's and Law and violative of Articles 14 and 16 of the Constitution of India, forthwith"

2. Brief facts necessary for adjudication are as under:

2.1 Petitioner was initially appointed as clerk in respondent No.2 Board on regular basis w.e.f. 2.4.1976. From time-to-time petitioner earned promotions to the post of Senior Assistant, Section Officer, Assistant Secretary and lastly as Deputy Secretary w.e.f. 4.2.2013. Petitioner joined as Deputy Secretary on 16.2.2013 and retired from said post on 30.9.2014.

2.2 There were two posts of Joint Secretaries in respondent No.2 Board. Though the Service Committee of respondent No.2 had placed before the Board, draft R & P Regulations for the post of

Joint Secretary on 5.6.2013 but R & P Regulations for said post came into effect on 28.7.2015.

2.3 In absence of R & P Regulations, the post of Joint Secretary, till 2009, was being filled up from the feeder category of Deputy Secretaries on *ad-hoc* basis by application of principle of seniority-cum-fitness.

2.4 As per Draft R & P Regulations, the post of Joint Secretary was to be filled up from incumbents, who had rendered 30 years of service in the respondent No.2 Board, out of which, five years of combined service regular/*ad-hoc* was required as Section Officer, Assistant Secretary and Deputy Secretary in the Board and further atleast one year service was required as Deputy Secretary.

3. Petitioner has sought above noted reliefs by making assertions as under:

3.1 As per draft regulations, he had become eligible for being considered for promotion to the post of Joint Secretary on 16.2.2014, when he had rendered one year of service as Deputy Secretary.

3.2 Respondent No.2 Board recommended/ forwarded the case of petitioner to respondent No.1 for approval for promoting him as Joint Secretary on 16.8.2014. The matter remained pending at various levels and finally on 25.9.2014, the Department of Personnel allowed respondent No.2 Board to fill up the available vacant posts of Joint Secretary, as per law.

3.3 The aforesaid approval reached in the office of respondent No.2 after retirement of petitioner. Therefore, the petitioner retired without being considered for the post of Joint Secretary.

3.4 On 14.4.2016, respondent No.2 promoted S/Sh. Vijay Kumar and Chaman Lal as Joint Secretaries. Petitioner represented to the respondents to consider and grant the resultant promotion to the petitioner as Joint Secretary on *ad-hoc* or on regular basis or even on notional basis from due date.

3.5 The claim of petitioner was rejected by respondents vide order dated 21.3.2017, on the grounds *firstly* that till the date of retirement of petitioner, there was no approval for filling up the

post of joint secretary and *secondly*, R & P Regulations for the said post were not in existence.

4. Aggrieved against aforesaid rejection, petitioner approached the erstwhile H.P. State Administrative Tribunal by filing O.A. No. 47 of 2017. On abolition of the State Administrative Tribunal, aforesaid O.A. came to be transferred to this Court and was registered as CWPOA No. 3729 of 2020 i.e. the instant petition.

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

6. The first question that arises for consideration is whether the petitioner had acquired any right to be promoted to the next higher post of Joint Secretary?

7. The answer is in negative for the reason that mere existence of post or vacancy does not confer any right on the incumbents in the feeder category to claim promotion. Only right of consideration for promotion exists. However, in the given facts of the case, even such right cannot be held to have existed in favour of petitioner in absence of R & P Regulations for the post of Joint Secretary in respondent No.2 Board till the date of retirement of petitioner.

8. Noticeably, only draft regulations had been framed and were pending for approval by competent authority. Learned Counsel for petitioner has contended that petitioner was entitled to promotion even on the basis of draft regulations. In support of such contention, he placed reliance on following extract from the judgment passed by Hon'ble Supreme Court in **Vimal Kumari v. State of Haryana** reported in ***(1998) 4 SCC 114*.**

> ***"6.*** *The Draft Rules were prepared in 1983 and since then they have not been enforced. It is, no doubt, open to the Government to regulate the service conditions of the employees for whom the Rules are made by those Rules even in their "draft stage" provided there is clear intention on the part of the Government to enforce those Rules in the near future. Recourse to such Draft*

Rules is permissible only for the interregnum to meet any emergent situation. But if the intention was not to enforce or notify the Rules at all, as is evident in the instant case, recourse to "Draft Rules" cannot be taken. Such Draft Rules cannot be treated to be Rules made under Article 309 of the Constitution and cannot legally exclude the operation of any existing executive or administrative instruction on the subjects covered by the Draft Rules nor can such Draft Rules exclude the jurisdiction of the Government, or for that matter, any other authority, including the appointing authority, from issuing the executive instructions for regulating the conditions of service of the employees working under them.

7. *In the instant case, as pointed out above, the Draft Rules were prepared in 1983. They have been lying in a nascent state since then. In the meantime, many promotions, including that of the appellant were made on the basis of "seniority" which, in the absence of any Rule made under Article 309, could be legally adopted as the reasonable basis for promotion. Seniority having thus been adopted as the criteria for making promotion on the post of Superintendent could not have been displaced by the Draft Rules and the High Court could not have invoked any provision of those Draft Rules which have been lying frozen at their embryonic stage for more than ten years.*

8. *In the absence of any decision of the State Government that so long as the Draft Rules were not notified, the service conditions of the appellant or the respondent and their other colleagues would be regulated by the "Draft Rules" prepared in 1983, it was not open either to the Government or to any other authority, nor was it open to the High Court, while disposing of the writ petition, to invoke any of the provisions of those Rules particularly as the Government has not come out with any explanation why the Rules, though prepared in 1983, have not been notified for the long period of more than a decade. The delay, or rather inaction, is startling".*

9. In my considered view, petitioner is not benefited by seeking reliance on aforesaid judgment. Petitioner has not laid any factual turf for deriving such benefit. Even otherwise, in the fact situation of instant case there is nothing to suggest that respondents intended to grant promotion to the post of Joint Secretary on the basis of draft regulations. Even otherwise

the benefit, if any, under draft rules can be granted at the option of employer that too for meeting the emergent requirements. The draft rules cannot generally form basis of cause of action for the employee.

10. It is contended on behalf of the petitioner that his case was recommended for promotion by respondent No.2 Board on 16.8.2014 vide Annexure A-10. Perusal of said document reveals that the Secretary of respondent No.2 Board had proposed the *ad-hoc* promotion of petitioner along with another incumbent to the post of Joint Secretary being the senior most officers in the cadre of Deputy Secretaries. In response, respondent No.1 had conveyed to respondent No.2 Board that the post of Joint Secretaries should be filled up in accordance with Section 23 of the H.P. Board of School Education Act. However, these documents did not reflect the intent of Respondents to promote petitioner as Joint Secretary on the basis of draft regulations.

11. The claim to *ad-hoc* promotion on behalf of the petitioner is also not tenable for the reason that there could be no anticipation regarding approval or finalization of R & P Regulations merely because the draft regulations had been prepared. There had to be clear intention on the part of the respondents to enforce those draft Regulations in the near future, which cannot be inferred from the material on record.

12. Petitioner can also not claim right to *ad-hoc* promotion simply on the basis of practice allegedly adopted by the respondent Board till 2009.

13. In light of above discussion, there is no merit in the instant petition and the same is accordingly dismissed. Pending application(s), if any, also stand disposed of.

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

Monoj Kumar and others .... Petitioners.

Vs.

State of Himachal Pradesh .....Respondents.

For the petitioners: Mr.Vishal Bindra, Advocate.
For the respondent: M/s Sumesh Raj, Dinesh Thakur and Sanjeev Sood, Additional Advocate Generals.

Cr. MMO No. 196 of 2022
Date of Decision: 28.12.2022

Code of Criminal Procedure, 1973- Sections 482, 309, 91- Inherent powers- **Indian Evidence Act, 1872-** Section 114-**Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 20, 25 and 29- Quashing of FIR- The prayer of the petitioners for issuance of a direction to supply the entire CDR of the Police Officials was rejected by the learned Trial Court- **Held-** The same would compromise the right of privacy of the Investigating Officer, as also it will lead to a possibility of disclosure of information relatable to commission of offence- No merit- Petition dismissed. (Para 7)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral):

By way of this petition filed under Section 482 of the Code of Criminal Procedure, 1973, the petitioner has prayed for quashing of FIR No. 11/2021, dated 18.02.2021, registered under Sections 20, 25 & 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 at Police Station Swarghat, District Bilaspur, H.P., *inter alia*, on the grounds that in terms of the reply filed by the Investigating Officer to the application filed under Section 91 read with Section 309(2) of the Code of Criminal Procedure &

114(g) of the Indian Evidence Act by the accused and decision thereupon by the Trial Court, the trial stands vitiated and, therefore, the present petition be allowed by quashing the FIR as well as the trial in issue.

2. Learned counsel for the petitioner has argued that during the pendency of the proceedings, i.e., the trial going on before the learned Court below, petitioner No. 2-Sachin Kumar filed an application under Section 91 read with Section 309(2) of the Code of Criminal Procedure & 114(g) of the Indian Evidence Act for issuance of a direction to the Police Officials to submit/file their mobile number details which they were carrying at the time of investigation and arrest, to enable the petitioners to get the CDR/Cellular records of the same, with further direction to the Mobile/Cellular Service Provider, i.e., JIO Himachal to preserve the call detail record of Mobile No. 82199-29572 of the alleged independent witness-Parveen Kumar and to submit the CDR/Cellular record before the learned Court, to enable the petitioners to use the aforesaid record for the purpose of cross-examination of the witnesses and for defence witnesses. In response thereto, as has been submitted by learned counsel for the petitioners, a reply was filed by the Investigating Officer. This reply is on record at Page No.-35 of the Paper-book as Annexure P-4. As per the reply, the prayer of the petitioners was opposed, *inter alia*, on the ground that in case the CDR of number of the Investigating Officer was procured, the same would amount to interference in his privacy and would violate his fundamental right, as is enshrined under Article 21 of the Constitution of India and further call details will also disclose the source of getting information regarding commission of crime and other offences.

3. The application was disposed of by the learned Court below in terms of order, dated 30.11.2021 (Annexure A-5). As per learned counsel for the petitioners, the findings which have been returned by the learned Trial Court in Para-4 thereof clearly demonstrate that the process was vitiated and, therefore, a prayer has been made for quashing of FIR in question.

4. Having heard learned counsel for the petitioners as also learned Additional Advocate General and having perused the pleadings as well as the documents appended with the petition, more so, the order passed by the learned Court below dated 30.11.2021, this Court is of the considered view that there is no merit in the present petition. Para-4 of the order which has been heavily relied upon by learned counsel for the petitioners, seeking quashing of FIR reads as under:-

> *"4. This Court also finds that in view of the Para Nos. 4 to 6 of application, applicant/accused simply wants the tower location. Therefore, nonsupply of call details will not only save the rights of privacy when there is no crime alleged against them/police officials and independent witness, the supply of CDR of police will also be lead to a possibility of disclosure of information related to commission of offence even other than the present one, which police officials is duty bound and cannot be compelled to say whence he/they got it (Section 125 of the Indian Evidence Act 1872)."*

5. A perusal of the findings which have been returned by the learned Court below in Para-4 read together with Para-5 of the same demonstrates that the prayer of the petitioners for issuance of a direction to supply the entire CDR of the Police Officials was rejected by the learned Trial Court. In fact, what the learned Trial Court has observed in Para-4 is that in case the prayer of the petitioners is exceeded to, then the same would compromise the right of privacy of the Investigating Officer, as also it will lead to a possibility of disclosure of information relatable to commission of offence, even other than the present one. This order has attained finality, as it has not been challenged by the petitioners.

6. This Court is of the considered view that besides the interpretation which has been given by this Court hereinabove qua Para-4 of the order passed by the learned Trial Court, no other interpretation is possible and the contention of learned counsel for the petitioners that in fact the

findings returned in this Para are in favour of the petitioners and the same vitiates the trial, is not accepted by the Court. How this order can be construed to be as the one from which it can be inferred that the trial stands vitiated is beyond the comprehension of this Court. In fact, the order is being completely misread by the petitioners.

7. Accordingly, as this Court does not find that on the strength of the observations made in Para-4 of the order being relied upon by learned counsel for the petitioners any case is made out for quashing of FIR as also Trial before the learned Trial Court, the petition being devoid of any merit is dismissed.

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

Suraj Singh ....Petitioner

Versus

State of Himachal Pradesh ...Respondent.

For the petitioner : Mr. K.B. Khajuria, Advocate.

For the respondent :Mr.Desh Raj Thakur, Additional Advocate General with Mr. Narender Thakur, Deputy Advocate General.

Cr. MP(M) No. 2544 of 2022
Decided on: 23.12.2022

Code of Criminal Procedure, 1973- Section 439- Bail- Narcotic Drugs and Psychotropic Substances, Act- Sections 20, 37- Recovery of 1.344 Kgs Charas from the person of the accused- In custody since 9-11-2019- **Held-** Constitutional guarantee of expeditious trial cannot be diluted by applying the rigors of Section 37 of ND&PS Act in perpetuity- Trial is not likely to be concluded in near future- Bail Petition allowed. (Paras 16, 17)

Cases referred:

Abdul Majeed Lone Vs. Union Territory of Jammu and Kashmir(Special Leave to Appeal (Cr.L.) No. 3961 of 2022;

Chitta Biswas @ Subhas Vs. The State of West Bengal, (Criminal Appeal No.(s) 245 of 2020;

Gopal Krishna Patra @ Gopalrusma Vs. Union of India (Cr. Appeal No. 1169 of 2022),;

Mahmood Kurdeya Vs. Narcotic Control Bureau (2022) 3 RCR (Criminal) 906;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

Petitioner is an accused in case FIR No. 122/2019, dated 09.11.2019, registered under Section 20 of Narcotic Drugs and Psychotropic Substances, Act (for short 'ND&PS' Act), at Police Station, Padhar, District Mandi, H.P. Petitioner is in custody since 09.11.2019.

2. Petitioner is facing trial for offences under Section 20 of ND&PS Act in pursuance to challan filed by respondent. The allegation against petitioner is thaton 09.11.2019, at about 1:00 pm near Fagni, he was found carrying a blue colour bag in his right hand, from which 1.344 Kgs of '*Charas*' was recovered.

3. Petitioner has now prayed for grant of bail on the ground that his constitutional right of expeditious disposal of trial has been infringed. As per petitioner, he is in custody for more than three years now and the trial has not concluded, rather, it is progressing at snails pace.

4. In its status report dated 09.12.2022, respondent has submitted that the prosecution has cited eighteen witnesses in support of its case. Six witnesses remain to be examined.

5. Learned Additional Advocate General has opposed the prayer of the petitioner, on the ground thatSection37ofND&PSAct,hasapplicationin the facts of the case and merely, on the ground of delay in conclusion of trial, petitioner cannot be released on bail.

6. I have heard learned counsel for the petitioner as well as learned Additional Advocate General and have also gone through the status report.

7. The fetters placed by Section 37 of ND&PS Act, evidently have been instrumental in denial of right of bail to the petitioner in the instant case till date. The question that arises for consideration is, can the provisions of Section 37 of the Act, be construed to have same efficacy, through out the pendency of trial, notwithstanding, the period of custody of the accused, especially, when it is weighed against this fundamental right to have expeditious disposal of trial?

8. As is suggested by the contents of status prosecution witnesses are still being examined despite the fact that petitioner is in custody since 09.11.2019. In the considered view of this Court, the Constitutional guarantee of Expeditious trial can not be diluted by applying the rigors of Section37of ND&PS Act in perpetuity.

9. Recently, in a number of cases, under-trials for offences involving commercial quantity of contraband under ND&PS Act have been allowed the liberty of bail by Hon'ble Supreme Court only on the ground that they have been incarcerated for prolonged durations.

10. In ***Mahmood Kurdeya*** Vs. ***Narcotic Control Bureau (2022) 3 RCR (Criminal) 906***,Hon'ble Supreme Court has held as under:-

> *"6.What persuades us to pass an order in favour of the appellant is the fact that despite the rigors of Section 37of the said Act, in the present case thoughchargesheetwasfiledon23.09.2018even the charges have not been framed nor trial has commenced."*

11. In ***Nitish Adhikary @ Bapan*** Vs.***The State of West Bengal (Special Leave to Appeal(Cr.L.) No (s). 5769 of 2022,***decided on 01.08.2022, Hon'ble Supreme Court has held as under:-

> *"During the course of the hearing, we are informed that the petitioner has undergone custody for a period of 01 year and 07 months as on 09.06.2022. The trial is at a preliminary stage, as only one witness has been examined. The petitioner does not have any criminal antecedents.*
>
> *Taking into consideration the period of sentence undergone by the petitioner and all the attending circumstances but without expressing any views in the merits of the case, we are inclined to grant bail to the petitioner."*

12. In ***Gopal Krishna Patra @ Gopalrusma*** Vs. ***Union of India (Cr. Appeal No. 1169 of 2022),*** decidedon05.08.2022,Hon'bleSupremeCourthasheld as under:-

> *" The appellant is in custody since 18.06.2020 in connection with crime registered as NCB Crime No. 02/2020 in respect of offences punishable under Sections 8,20,27-AA, 28 read with 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985*
>
> *The application seeking relief of bail having been rejected, the instant appeal has been filed.*
>
> *We have heard Mr. Ashok Kumar Panda, learned Senior Advocate in supportof the appeal and Mr. Sanjay Jain, learnedAdditional Solicitor General for the respondent.*
>
> *Considering the fact and circumstances on record and the length of custody undergone by the appellant, in our view the case for bail is made out.*"

13. In ***Chitta Biswas @ Subhas****Vs.****The State of West Bengal,(Criminal Appeal No.(s) 245of 2020,***decided on 07.02.2020, it has been held as under:-

> *"The appellant was arrested on 21.07.2018 and continues to be custody. It appears that out of 10 witnesses cited to be examined in support of the case of prosecution four witnesses have already been examined in the trial.*
>
> *Without expressing any opinion on the merits or demerits of the rival submissions and considering the facts and circumstances on record, in our view, case for bail is made out."*

14. In ***Abdul Majeed Lone*** Vs. ***Union Territory of Jammu and Kashmir(Special Leave to Appeal (Cr.L.) No. 3961 of 2022***, decided on 01.08.2022, it has been held as under:-

> *"Having regard to the fact that the petitioner is reported to be in jail since 1-3-2020 and has suffered incarceration for over 2 years and5months and there being no likelihood of completion of trial in the near future, which fact cannot be controverted by the learned counsel appearing for the UT, we are inclined to enlarge the petitioner on bail.".*

15. In addition, different Co-ordinate Benches of this Court have also followed precedent to grant bail to the accused in ND&PS Act, on the ground of prolonged pre-trial incarceration. Reference can be made to order dated 28.07.2022, passed in Cr.MP(M) No. 1255 of 2022, order dated 01.12.2022, passed in Cr.MP(M) No. 2271 of 2022 and order dated 04.11.2022, passed in Cr.MP(M)No. 2273 of 2022.

16. Reverting to the facts of the case, the

petitioner isin custody since 09.11.2019 and the facts suggest that the trial is not likely to be concluded in near future. There is nothing on record to suggest that the delay in trial is attributable to the petitioner.

17. Keeping in view the facts of the case and also the above noted precedents, the bail petition is allowed and petitioner is ordered to be released on bail in case FIR No. 122/2019, dated 09.11.2019, registered under Section 20 of ND&PS, Act,at Police Station Padhar, District Mandi, H.P. on his furnishing personal bond in the sum of Rs. 1,00,000/-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 shallbe liablefor 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.*

18. 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 AJAY MOHAN GOEL, J.

Between:-

SANJEEV KUMAR VERMA SON OF SHRI ONKAR CHAND VERMA, AGED YEARS, RESIDENT OF VILLAGE SERI (WARD NO. 3), POST OFFICE NADAUN, DISTRICT HAMIRPUR, HIMACHAL PRADESH.

…….APPELLANT

(BY MR. KULWANT SINGH GILL, ADVOCATE)

AND

MANOJ KUMAR SON OF SHRI THAKUR DASS, RESIDENT OF VILLAGE KOT, TAPPA KOHLA, POST OFFICE AND TEHSIL NADAUN, DISTRICT HAMIRPUR, HIMACHAL PRADESH PROPRIETOR M/S HCL POINT, MIDDLE BAZAR, NADAUN, DISTRICT HAMIRPUR, HIMACHAL PRADESH.

……..RESPONDENT

(BY MR. ARUN KUMAR, ADVOCATE)

CRIMINAL APPEAL
No. 196 of 2021
Decided on:31.10.2022

Code of Criminal Procedure, 1973- Section 378-Appeal against dismissal- **Negotiable Instruments Act, 1881-** Section 138- Dishonour of cheque with remarks "exceed arrangements"- Appellant assails the judgment passed by the Court of learned Additional Chief Judicial Magistrate whereof the complaint filed by the present appellant under Section 138 of the Negotiable Instruments Act has been dismissed- **Held-** Complainant was not able to prove the fact that the alleged cheque of Rs.2,07,000/- issued to him by the accused was in fact encashed by him- the accused not merely denied the existence of a debt, he also adduced evidence and that too cogent evidence to rebut the presumption- No merit- Appeal Dismissed.

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 appeal, the appellant assails the judgment passed by the Court of learned Additional Chief Judicial Magistrate, Nadaun, District Hamirpur, H.P. in Criminal Complaint No. 171-I/2015, titled as Sanjeev Kumar Verma vs. Manoj Kumar, dated 04.01.2020, in terms whereof the complaint filed by the present appellant under Section 138 of the Negotiable Instruments Act has been dismissed.

2. Brief facts necessary for the adjudication of the present appeal are that a complaint was preferred by the appellant under Section 138 of the Negotiable Instruments Act on the grounds that on 30th September, 2015, accused requested the complainant to extend financial help so as to meet urgent requirement of his business. In view of the cordial relations that existed between the parties, the complainant paid an amount of Rs. 3,000/- in cash to the accused and issued a bearer cheque No.447862, in the sum of Rs.2,07,000/-, payable at KCC Bank Limited, Nadaun, in favour of the accused. The cheque was got encashed by the accused. When the complainant was in dire need of money, he demanded the amount and the accused in order to discharge his legal liability, issued cheque Ext. CW1/B, in the sum of Rs.2,10,000/- in favour of the complainant, payable from his account. The cheque of accused when presented for its being honoured, was dishonoured by the bank concerned with remarks "Exceed Arrangements". Thereafter, a legal notice was issued by the complainant to the accused, calling upon the accused to make good the payment of the cheque amount within the statutory period but as the same was not done, hence the complaint.

3. This complaint has been dismissed by the learned Court below *inter alia* by returning the findings that in the peculiar facts of the case, on the basis of the evidence on record, the accused had succeeded in rebutting

the presumption in terms of the provisions of Sections 118 and 139 of the Negotiable Instruments Act by creating reasonable doubt about having received the amount of Rs.2,07,000/- through cheque Ext. DW1/B. While arriving at the said conclusion, learned Trial Court observed that the accused had filed an application in which he alleged that the complainant never issued any cheque to the accused as was claimed by the complainant, i.e. Ext. DW1/B. Neither, as per the accused, he presented any cheque issued by the complainant to him for encashment in the bank and nor did he receive any payment on the basis of said cheque. It was the complainant who presented the cheque in the bank after forging the signatures of the accused and received an amount of Rs.2,07,000/-. The accused had applied for comparison of his signatures as they existed in Cheque Ext. CW1/B and Cheque Ext. DW1/B which was allowed by the Court and the signatures were sent for comparison to Regional Forensic Science Laboratory, Dharamshala, and forensic report was obtained. The report demonstrated that the sample and admitted signatures of the accused were not matching with the signatures over Cheque Ext. DW1/B which was allegedly issued by the complainant to the accused for lending an amount of Rs. 2,07,000/- on 30.09.2015. On these bases, learned Trial Court held that it was clear from the forensic report that accused had not presented the cheque Ext. DW1/B and received payment from the bank. Learned Court also held that the complainant was not able to prove that accused in fact had presented the cheque Ext. DW1/B and received the payment from SBI, Nadaun and this fact made the story of the complainant doubtful. Learned Court further held that as the accused had not received the payment of the cheque Ext.DW1/B, therefore, there was no question of issuing any cheque, i.e. Ext. CW1/B for its repayment. Learned Court thus held that the defense was able to probablise that cheque Ext. CW1/B was given as security which was misused by the

complainant against the accused. By returning these findings, the complaint has been dismissed.

4. Learned Counsel for the appellant has vehemently argued that the judgment passed by learned Court below is not sustainable in the eyes of law for the reason that while dismissing the complaint, learned Court erred in not appreciating that it was not deciding a suit for recovery but was deciding a complaint filed under Section 138 of the Negotiable Instruments Act to substantiate his contention. Learned Counsel relied upon the judgment passed by Hon'ble Supreme Court of India in *Uttam Ram* vs. *Devinder Singh Hudan and Another*, (2019) 10 Supreme Court Cases 287. Accordingly, learned Counsel for the appellant submitted that the judgment passed by learned Trial Court deserves to be set aside and the complaint needs to be adjudicated afresh.

5. Learned Counsel for the respondent while defending the judgment passed by learned Trial Court has argued that there is no perversity with the judgment as it clearly stood borne out from the record of the case that the alleged cheque purportedly issued by the complainant to the accused, was never presented by the accused for its encashment and further as the complainant was not able to substantiate that an amount of Rs.2,07,000/- was in fact paid to the accused or received by him in lieu of issuance of that cheque, the findings which were returned by learned Trial Court are correct findings which do not call for any interference. Learned Counsel further submitted that in fact filing of the complaint under Section 138 of the Negotiable Instruments Act by the complainant against the accused was nothing but abuse of process of law and learned Trial Court has rightly struck down this mischief of the complainant by dismissing the complaint. Accordingly, a prayer has been made for dismissal of the appeal.

6. I have heard learned Counsel for the parties and also carefully gone through the judgment passed by learned Trial Court as well as record of the case, which was requisitioned by the Court.

7. A perusal of the record of learned Trial Court demonstrates that in para-1 of the complaint, it was clearly and categorically mentioned by the complainant that on 30th September, 2015, accused had requested the complainant to extend financial help so as to meet urgent requirement in his business and owing to cordial relations and earlier dealings, the complainant made payment of Rs. 3,000/- from his pocket and issued bearer cheque No. 447862, in the sum of Rs.2,07.000/-, payable at KCC Bank Ltd. Nadaun, H.P. pertaining to the account of the complainant. It is further averred in this paragraph that the accused got the cheque encashed from the bank and statement of account showing said withdrawal was being appended with the complainant as Annexure C-1. A perusal of the record demonstrates that this statement of account Annexure C-1, which as per the complainant, purportedly demonstrated that an amount of Rs.2,07,000/- was received by the accused by way of encashment of the said cheque was not a exhibited document on record. Though learned Counsel for the appellant in the course of arguments has tried to reason out as to why said documents could not be got exhibited but fact of the matter is that the same is not an exhibited document.

8. Record further demonstrates that an application was filed under Section 45 of the Indian Evidence Act by the accused before learned Trial Court praying for comparison of admitted signatures of the accused on cheque bearing No. 594325, Ext. CW1/B (i.e. the cheque exhibited by the complainant on record to demonstrate that the cheque issued by the accused in favour of the complainant to meet out the liability which he owed to the complainant when presented was dishonoured) with the purported signatures of accused on cheque Ext. DW1/B, which was the cheque exhibited by the

accused purportedly issued in his favour by the complainant which as per the complainant was got encashed by the accused. In this application, vide order dated 12.03.2019, learned Trial Court passed an order that as the accused has disputed his signatures over cheque Ext. DW1/B and as the signatures of the accused on the backside of cheque Ext. DW1/B were *prima facie* different from the signatures on Cheque Ext. CW1/B, therefore, in order to explicate the matter, admitted signatures of the accused over Cheque Ext. CW1/B were required to be compared with the disputed signatures of the accused on the back side of the cheque Ext. DW1/B. Accordingly, the accused was directed to remain present in the Court in order to give sample signatures under the supervision of the Court on 29.04.2019. Thereafter on 29.04.2019, after obtaining specimen signatures, the questioned signatures of the accused alongwith admitted signatures were sent to Regional Forensic Science Laboratory, Kangra, at Dharamshala, for comparison. Deputy Director of Regional Forensic Science Laboratory, Kangra at Dharmashala, was called upon to compare the aforesaid signatures and hand writing and submit his report. The report of the RFSL dated 15.7.2019 is on record and a perusal of the same demonstrates that the same is to the effect that the person who wrote blue enclosed signatures and writings stamped and marked as S-1 to S-15, S-5A, A-1, A-2 did not write the red enclosed signatures similarly stamped and marked as Q-1 and Q-2, which were the questioned signatures. Now in the backdrop of what has been discussed hereinabove, if one peruses the judgment passed by learned Trial Court, the only inference which can be drawn is that the findings which have been returned by learned Trial Court while holding that the purported signatures of the accused on the backside of the cheque Ext. DW1/B were not the signatures of the accused, are the correct findings and are duly borne out from the record of the case. The Court reiterates that as the very foundation of the case of the complainant was the issuance of the cheque by him for an amount of Rs.2,07,000/-, which as per

him was duly encashed by the accused, this foundation having been shaken by the evidence which was produced by the accused on record and further on the basis of report of the Forensic Expert, the dismissal of the complaint by learned Trial Court, was the correct conclusion as the complainant was not able to prove the fact that the alleged cheque of Rs.2,07,000/- issued by him to the accused was in fact encashed by him. Learned Trial Court rightly held that in these circumstances, there was no occasion for the accused to have had issued a cheque amounting to Rs.2,10,000/- allegedly in lieu of repayment of the said amount and this substantiated the case and the defense of the accused that the cheque was issued as a security which was misused by the complainant. At this stage, it is relevant to refer to the judgment of Hon'ble Supreme Court being relied upon by learned Counsel for the appellant. Learned Counsel has primarily argued, after relying upon para 20 of the said judgment, that the Hon'ble Supreme Court has clearly and categorically held that mere denial of existence of debt will not serve any purpose, however, the accused may adduce evidence to rebut the presumption. As per the learned Counsel, this extremely important aspect of the matter was ignored by learned Trial Court while dismissing the complaint filed by the complainant under Section 138 of the Negotiable Instruments Act because denial of existence of a debt, did not entail the dismissal of the complaint. Having carefully perused the said judgment, this Court is of the view that the law, as has been laid down by Hon'ble Supreme Court referred to by learned Counsel for the appellant, is of no assistance to the appellant for the reason that in the present case, the accused not merely denied the existence of a debt, he also adduced evidence and that too cogent evidence to rebut the presumption. Once the presumption stood rebutted, then, learned Trial Court cannot be said to have had erred in dismissing the complaint.

Accordingly, in view of above discussion, as there is no merit in the present appeal, the same is accordingly dismissed. Pending miscellaneous application(s), if any, also stand disposed of accordingly.

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

National Insurance Company Limited ....Appellant.

Vs.

Sh. Raman Kumar and others .....Respondents.

FAO No. 200 of 2019

National Insurance Company Limited .....Appellant.

Vs.

Smt. Maya Devi and others ....Respondents.

FAO No. 201 of 2019

National Insurance Company Limited .....Appellant.

Vs.

Smt. Santokhi Devi and others ....Respondents.

FAO No. 202 of 2019

National Insurance Company Limited .....Appellant.

Vs.

Sh. Jaswinder Singh and others ....Respondents.

FAO No. 199 of 2019

For the appellant Mr. Jagdish Thakur, Advocate.

For the respondents: M/s Suneet Goel and Mohit Sharma, Advocates, for respondents No. 1 to 3.

Mr. Bhim Raj Sharma, Advocate, vice Mr. Y.P. S. Dhaulta, Advocate, for respondent No. 4.

Mr. Basant Pal Thakur, Advocate, for respondent No. 5.

FAO No. 200 of 2019

For the appellant Mr. Jagdish Thakur, Advocate.
For the respondents: M/s Suneet Goel and Mohit Sharma, Advocates, for respondent No. 1.
Mr. Bhim Raj Sharma, Advocate, vice Mr. Y.P. S. Dhaulta, Advocate, for respondent No. 2.

Mr. Basant Pal Thakur, Advocate, for respondent No. 3.

FAO No. 201 of 2019

For the appellant Mr. Jagdish Thakur, Advocate.
For the respondents: M/s Suneet Goel and Mohit Sharma, Advocates, for respondents No. 1 to 4.
Mr. Bhim Raj Sharma, Advocate, vice Mr. Y.P. S. Dhaulta, Advocate, for respondent No. 5.

Mr. Basant Pal Thakur, Advocate, for respondent No. 6.

FAO No. 202 of 2019

For the appellant Mr. Jagdish Thakur, Advocate.

For the respondents: M/s Suneet Goel and Mohit Sharma, Advocates, for respondent No. 1.

Mr. Bhim Raj Sharma, Advocate, vice Mr. Y.P. S. Dhaulta, Advocate, for respondent No. 2.

Mr. Basant Pal Thakur, Advocate, for respondent No. 3.

FAO No. 199 of 2019
a/w FAO Nos. 200, 201
and 202 of 2019
Date of Decision: 13.12.2022

Motor Vehicles Act, 1988- Section 173- Indian Penal Code, 1860- Sections 279, 337 and 304-A- Insurance company has preferred the appeals against the compensation awarded to the claimants by the Learned Tribunal- **Held-** This Court has no hesitation in holding that the Insurance Company produced no material on record from which it could have been inferred that the accident took place on account of contributory negligence of both the drivers of the ill-fated vehicles- No document on record from which it can be inferred as to what was the educational qualification of the deceased and if he indeed was possessing some specialized qualification as a Mechanic etc.- Slightly difficult to believe the fact that in terms of the appointment letter the deceased indeed was engaged as a Mechanic on monthly wages of Rs.20,000/-- Award under FAO 201 of 2019 modified and awards under other appeals remain as it is- Petition partly allowed. (Para 18)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral):

With the consent of the parties, all these four appeals are being disposed of by this common judgment.

2. Brief facts necessary for the adjudication of these appeals are as under:-

Indica Car bearing registration No. DL-3CAX-3731 being driven by Shri Jaswant Singh was involved in an accident with Truck bearing registration No. HP-12D-5657 on the night of 09.04.2015 at about 10:15 p.m. near Digvijay Hotel at Village Bhud, Tehsil Baddi, District Solan, H.P. on National Highway 21A. In this accident, owner and driver of the car, namely, Shri Jaswant Singh as well as his wife Ms. Baljeet Kaur alongwith two minor nephews of Jaswant Singh, namely, Master Raju Saini and Master Deepak Saini lost their lives. FIR No. 67/15, dated 19.04.2015 was registered under Sections 279, 337 and 304-A of the Indian Penal Code at Police Station Baddi, District Solan, H.P. Four Claim Petitions were preferred before the Motor Accidents Claims Tribunal-I, Solan, H.P., arising out of the said accident. Details of the four Claim Petitions which were preferred by the claimants are as under:-

A. **MAC Petition No. 15-NL/2 of 2015, titled as Smt. Santokhi Devi and others Vs. Shri Gurdeep Singh and others**

3. This Claim Petition was filed by the claimants seeking compensation to the tune of Rs.53,00,000/- on account of death of Shri Jaswant Singh, son of claimant No. 1 and father of claimants No. 2 to 4. In terms of the averments made in the Claim Petition, the deceased at the time of his death was employed as a Mechanic with M/s Saini Boring Company, Kharuni on a monthly salary of Rs.20,000/- and was also supplementing his income from agriculture to the tune of Rs.20,000/- per month. The Claim Petition was allowed by the learned Tribunal in the following terms:-

> *"39. In the light of what has been discussed hereinabove while recording findings on issues supra, the claim petition is allowed against respondent Nos. 1 and 2 and they are liable to pay compensation amount to the tune of Rs.38,95,000/- (Rupees*

thirty eight lacs ninety five thousands only) to the petitioners/claimants. The award shall further carry an interest @6% per annum from the date of filing of this petition till the realization/deposit of the amount. Since the vehicle in question, i.e., Truck No. HP-12D-5657 was duly insured with respondent No. 3, i.e., National Insurance Company Limited as per copy insurance certificate Ex. R4, therefore, the compensation assessed hereinabove is to be indemnified by respondent No. 3 being the insurer. The litigation expenses are quantified at Rs.10,000/-. The respondent No. 3 shall deposit the compensation amount alongwith interest and costs with this Tribunal within two months. Interim compensation awarded under Section 140 of Motor Vehicles Act shall be reduced from the aforesaid amount. The amount of compensation awarded shall be apportioned by the petitioners in equal proportion."

B. <u>MAC Petition No. 14-NL/2 of 2015, titled as Sh. Raman Kumar and others Vs. Shri Gurdeep Singh and others</u>

4. This Claim Petition was filed by the claimants seeking compensation to the tune of Rs.25,00,000/- on account of death of their mother, who was stated to be employed as a Peon with M/s Saini Boring Company, Kharuni on a monthly salary of Rs.6,000/- and was further stated to be supplementing her income from agriculture to the tune of Rs.10,000/- per month. The Claim Petition was allowed by the learned Tribunal in the following terms:-

"39. In the light of what has been discussed hereinabove while recording findings on issues supra, the claim petition is allowed against respondent Nos. 1 and 2 and they are liable to pay compensation amount to the tune of Rs.11,90,000/- (Rupees eleven lacs ninety thousands only) to the petitioners/claimants. The award shall further carry an interest @6% per annum from the date of filing of this petition till the realization/deposit of the amount. Since the vehicle in question, i.e., Truck No. HP-12D-5657 was duly insured with respondent No. 3, i.e., National Insurance Company Limited as per copy insurance certificate Ex. R4, therefore, the compensation assessed hereinabove is to be indemnified by respondent No. 3 being the insurer. The litigation expenses are quantified at Rs.10,000/-. The respondent No. 3

shall deposit the compensation amount alongwith interest and costs with this Tribunal within two months. Interim compensation awarded under Section 140 of Motor Vehicles Act shall be reduced from the aforesaid amount. The amount of compensation awarded shall be apportioned by the petitioners in equal proportion."

C. MAC Petition No. 12-NL/2 of 2015, titled as Sh. Jaswinder Singh Vs. Shri Gurdeep Singh and others & MAC Petition No. 13-NL/2 of 2015, titled as Smt. Maya Devi Vs. Shri Gurdeep Singh and others

5. In terms of these Claim Petitions, the claimants sought compensation to the tune of Rs.25,00,000/- each, on account of death of their minor children, namely, Deepak Saini (Dipu) aged 12 years and Raju Saini aged 9 years. These Claim Petitions were disposed of by the learned Tribunal in the following terms:-

"39. In the light of what has been discussed hereinabove while recording findings on issues supra, both the claim petitions are allowed against respondent Nos. 1 and 2 and they are liable to pay compensation amount to the tune of Rs.8,00,000/- to the petitioners/claimants. The award shall further carry an interest @6% per annum from the date of filing of this petition till the realization/deposit of the amount. Since the vehicle in question, i.e., Truck No. HP-12D-5657 was duly insured with respondent No. 3, i.e., National Insurance Company Limited as per copy insurance certificate Ex. R4, therefore, the compensation assessed hereinabove is to be indemnified by respondent No. 3 being the insurer. The litigation expenses are quantified at Rs.10,000/- each. The respondent No. 3 shall deposit the compensation amount alongwith interest and costs with this Tribunal within two months. Interim compensation awarded under Section 140 of Motor Vehicles Act shall be reduced from the aforesaid amount. Out of the award amount, the petitioner Maya Devi shall be entitled to 60% and the petitioner Jaswinder Singh shall be entitled to the remaining 40% of the award amount."

6. Feeling aggrieved, the Insurance Company has preferred these four appeals. The Court will first deal with the appeals which have been

preferred by the Insurance Company against the award of compensation to the claimants in the petitions preferred on account of death of minor children, namely, Deepak Saini (Dipu) aged 12 years and Raju Saini aged 9 years.

7. The award of compensation on account of death of minor children has primarily been contested by learned counsel for the Insurance Company on the ground that learned Tribunal while disposing of the Claim Petition has erred in not appreciating that it was a clear cut case of contributory negligence. Learned counsel has thus submitted that the award in issue is liable to be set aside and the findings which have been returned by the learned Tribunal in the Claim Petitions relatable to the death of minor children with regard to Issue No. 1 need interference.

8. I have heard learned counsel for the parties and have carefully gone through the record of the learned Tribunal.

9. This Court is of the considered view that the award passed by the learned Tribunal in the Claim Petitions preferred by the parents of the deceased minor children calls for no interference. Record of the learned Tribunal demonstrates that whereas to prove their case, the claimants examined four witnesses, only one witness was examined by the respondent therein. This witness happened to be one Shri Parmod Kumar. Shri Parmod Kumar, who was Criminal Ahlmad in the Court of learned Judicial Magistrate 1st Class (II), Nalagarh produced before the learned Tribunal the case file pertaining to the case arising out of the trial originating from FIR No. 67/2015, dated 19.04.2015. In fact, a careful perusal of the record file demonstrates that the Investigating Officer of the FIR was not examined by the Insurance Company to prove before the learned Tribunal that there was contributory negligence of the Drivers of both the vehicles, which resulted in the unfortunate accident. In other words, there is no evidence on record worth its name produced by the Insurance Company from which it can be inferred

that driver of the Indica Car also contributed in the occurrence of the accident. In this view of the matter, this Court has no hesitation in holding that the Insurance Company produced no material on record from which it could have been inferred either by the learned Trial Court or by this Court that the accident took place on account of contributory negligence of both the drivers of the ill-fated vehicles.

10. Now, coming to the quantum of compensation as has been awarded by the learned Tribunal in these two Claim Petitions, this Court is of the considered view that the award besides being pragmatic, is also reasonable and calls for no interference, at least at the behest of the Insurance Company. Therefore, the appeals which have been filed by the Insurance Company, i.e., FAO No. 200 of 2019 and FAO No. 202 of 2019 are being dismissed in view of the above observations.

11. As far as FAO No. 199 of 2019 which arises out of the award pronounced in MAC Petition No. 14-NL/2 of 2015 is concerned, learned counsel for the appellant has argued that the award passed by the learned Tribunal is not sustainable in the eyes of law for the reason that income certificate on the basis of which the award has been announced by the learned Tribunal is not worth any credence and in fact the so called employer was relative of the deceased and, therefore, a false income certificate was prepared to gain compensation. In addition, learned counsel has reiterated his contention that learned Tribunal has erred in not appreciating the aspect of contributory negligence. As this point already stands answered by this Court hereinabove, therefore, for the sake of brevity, the Court is not making any observation upon the same. Suffice it to say that this plea of contributory negligence in the present appeal is worth not of any merit, in view of the observations made hereinabove.

12. Further, a perusal of the award passed by the learned Tribunal demonstrates that the quantum so assessed by the learned Tribunal, as payable upon death of late Baljeet Kaur to her children is as under:-

The monthly income of the deceased was taken by the Tribunal to be Rs.6000/- and addition of 40% was given to her actual income while computing future prospects. Thus, the monthly income was over all assessed to be Rs.8400/- per month. Thereafter, 1/3rd amount has been deducted by the learned Tribunal towards personal expenses of the deceased and monthly income for the purpose of quantum has been arrived at Rs.5600/- and as age of the deceased at the time of accident was 35 years, accordingly, multiplier of 16 has been applied. Now, it is not much in dispute that the age of the deceased at the time of death was indeed 35 years. Reverting to the contention of learned counsel for the appellant-Company that the income certificate, on which reliance has been placed by the learned Tribunal to assess the income of the deceased was false, all that this Court can observe is that even if it is to be assumed that the deceased was not engaged as a Peon by Darshan Singh, then also, multifarious works which a lady performs, otherwise also, in terms of the law laid down by the Hon'ble Supreme Court, leads this Court to hold that in view of the age of the lady and in view of her family background as also age of her children, it can be easily concluded that her contribution towards her family could not be assessed to be less than Rs.6000/- per month. Otherwise also, as the income certificate that has been given by the employer is for Rs.6,000/- per month, meaning thereby that the lady was earning about Rs.200/- per day being engaged as a Peon, the same also cannot otherwise can be said to be an exaggerated salary mentioned in the appointment letter. This Court concurs with the submission made by learned counsel for the respondents that veracity of the appointment letter has not been proved to be otherwise by the Insurance Company.

Accordingly, in view of what has been observed hereinabove, this Court finds no reason to interfere with the award passed by the learned Tribunal in MAC Petition No. 14-NL/2 of 2015 and FAO No. 199 of 2019 is accordingly dismissed.

13. Now, this Court will deal with FAO No. 201 of 2019. The appellant-Company herein is aggrieved by the award of Rs.38,95,000/- by the learned Tribunal in favour of the respondents-Claimants, which amount has been awarded by the learned Tribunal on account of death of Shri Jaswant Singh. Learned counsel for the appellant has argued that the award passed by the learned Tribunal is perverse and this is evident from the fact that the age of the deceased has been taken by the learned Tribunal to be 38 years despite the fact that the Driving Licence of the deceased, which is on record clearly and explicitly demonstrates that the age of the deceased at the time of his death was 42 years, as his date of birth, as mentioned in the Driving Licence (Ex. PW-3/A) is 02.05.1973. Learned counsel for the appellant has further argued that in the present case also, the deceased has been shown to be the employee of M/s Saini Boring Company, Kharuni. He was stated to be earning Rs.20,000/- as a Mechanic. He further argued that the contention of the claimants has been accepted to be the gospel truth by the learned Tribunal without appreciating that there was no iota of evidence on record from which it could be inferred that the deceased indeed was engaged as a Mechanic with M/s Saini Boring Company, Kharuni. Learned counsel has submitted that none would engage someone as a Mechanic until and unless the person possessed some technical qualification to perform the job of a Mechanic and in the present case, nothing has been produced on record by the claimants from which it could be inferred that the deceased indeed was possessing some kind of diploma etc. to perform mechanical job. Learned counsel further submitted that the so called income certificate which has been relied upon by the learned Tribunal inspires no confidence, because it is a cyclostyle copy of

the certificate which was issued in favour of late wife of late Jaswant Singh by Shri Darshan Singh Saini, who incidentally happens to be the relative of the deceased. Learned counsel argued that learned Tribunal erred in not appreciating that the evidence was manufactured just to gain compensation under the provisions of the Motor Vehicles Act and accordingly he prayed that the present appeal be allowed and the award passed by the learned Tribunal be set aside.

14. The appeal is opposed by learned counsel for the claimants, *inter alia*, on the ground that there is no infirmity in the award passed by the learned Tribunal, as the same has been passed on the basis of evidence on record. Learned counsel has argued that except the bald assertions of the appellant-Company that the income certificate of the deceased was not inspiring confidence, nothing has been produced on record by the appellant-Company to demonstrate that the certificate was either false or manufactured certificate. Learned counsel further argued that as the employer of the deceased had entered into the witness box and as no question in the cross-examination was put to the employer that the deceased in fact was never engaged as a Mechanic by the employer, therefore, it does not lie in the mouth of the Insurance Company to now take up this plea in the appeal. Learned counsel has reiterated that compensation has been assessed by the learned Tribunal by applying correct factors and, therefore, the present appeal being devoid of any merit is liable to be dismissed.

15. Having heard learned counsel for the parties and having carefully gone through the award passed by the learned Tribunal as also record of the case, this Court is of the considered view that there is some merit in the contentions which have been raised by learned counsel for the appellant. As I have already mentioned hereinabove, the amount of compensation as was assessed by the learned Tribunal payable to the family of the deceased was Rs.38,95,000/-. This quantum has been arrived at by the

learned Tribunal by assessing the income of the deceased to be Rs.20,000/- per month. Upon this, addition of 40% has been given on account of future prospectus by the learned Tribunal by taking the age of the deceased at the time of accident to be 38 years. Multiplier has also been applied by the learned Tribunal by taking the age of the deceased to be 38 years at the time of accident.

16. Now, when one juxtaposes the findings which have been returned by the learned Tribunal in Para-34 of the award with Ex.PW3/B on record, one can safely conclude that the age of the deceased has been wrongly taken by the learned Tribunal to be 38 years. In terms of Driving Licence of the deceased, his date of birth was 2nd May, 1973. As the date of accident was 19.04.2015, therefore, but natural, the age of the deceased as on the date of accident was 42 years. That being the case, the award passed by the learned Tribunal needs modification to the extent that the quantum has to be assessed by taking the age of the deceased to be 42 years, which naturally would also alter the multiplier from 15 to 14 and the percentage of future prospectus would also be reduced from 40% to 25%. Ordered accordingly.

17. Now, as far as the issue of assessment of monthly salary of the deceased is concerned, one finds that there is on record as Ex. PW4/B, Appointment Letter, dated 01.04.2013, issued in favour of the deceased on behalf of M/s Saini Boring Company by its Proprietor Shri Darshan Singh Saini, which *inter alia* contains that the deceased was engaged by M/s Saini Boring Company, Kharuni, Tehsil Baddi, District Solan, H.P. w.e.f. 01.04.2013 at a monthly salary of Rs.20,000/-. Shri Darshan Singh Saini entered the witness box as PW-4. He stated in his examination-in-chief which was tendered by way of an affidavit that he was owner of Saini Boring Company and that he had engaged deceased Jaswant Singh w.e.f. 01.04.2013 as a Mechanic in his Company on monthly wages of Rs.20,000/-. In his cross-examination, he deposed that he had 16-17employees working in the

company and that he used to maintain their Attendance Register etc., but he had not brought the same to the Court. He also deposed in his cross-examination that he used to reflect the wages paid to his employees in his Income Tax Returns, but no document otherwise has been produced on record by him.

18. A careful perusal of the record further demonstrates that the claimants did not produce any evidence on record to substantiate as to what was the educational qualification of late Shri Jaswant Singh. In fact there is no document on record from which it can be inferred as to what was the educational qualification of the deceased and if he indeed was possessing some specialized qualification as a Mechanic etc., then what was that specialized qualification. Another fact which is bothering the judicial conscious of this Court is that in terms of the statement of the employer, if the deceased was engaged by him as a Mechanic w.e.f. 01.04.2013 on monthly wages of Rs.20,000/-, then why was there no increase in his salary as to the date when the said employee lost his life in the accident in question. Therefore, it is slightly difficult to believe the fact that in terms of the appointment letter Ex. PW4/B, the deceased indeed was engaged as a Mechanic on monthly wages of Rs.20,000/- w.e.f. 01.04.2013. Be that as it may, this Court further cannot lose sight of the fact that a young life has been lost in the accident. Be the deceased be 38 years or 42 years old at the time of accident, but the fact of the matter is that this person died in an accident.

As far as the issue of contributory negligence, as argued by the learned counsel for the appellant-Company is concerned, this Court has earlier answered this issue against the Insurance Company in above part of the judgment. Therefore, now the moot issue is as to what should be the reasonable assessment of income of the deceased, because it is not the case of the Insurance Company that the deceased was unemployed and not doing anything. Though it has been argued on behalf of the Insurance Company

that the so called employer of the deceased was closely related to the deceased, but there is no evidence on record to substantiate this fact. As the stand of the claimants, as has been substantiated by the Proprietor of the Saini Boring Company is that the deceased was engaged as a Mechanic, from this an inference can be drawn that the deceased was engaged to perform similar kind of a work *de hors* the fact as to whether he was possessing the qualification to do such an act or not. In this background, it would be safe to take the daily income of the deceased as in the year 2015 to be Rs.450/- per day. To sum up, as this Court is taking the monthly to be a gross income of Rs.14,000/- per month, on this, the Court allows 25% as future prospectus, which would come to Rs.3500/- monthly. Now, the total income of the deceased would come to Rs.17,500/-. From this, an amount of Rs.4375/- has to be deducted as personal expenses of the deceased and after making this deduction, the loss of dependency comes to Rs.13125/- and the annual income comes to Rs.13125x12=1,57,500/-, upon which, multiplier of 14 is to be applied and therefore, the loss of dependency to the family works out to Rs.1,57,500x14=22,05,000/-. The award under challenge is modified to this extent only. Rest of the award shall remain as it is. FAO No. 201 of 2019 stands disposed of accordingly. Miscellaneous applications, if any, also stand disposed of.

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

Roop Lal ....Appellant.

Vs.

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

RFA No. 306 of 2012

Naresh Kumar ...Appellant.

Vs.

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

For the appellants: M/s Y.P. Sood and Parveen Kumar, Advocates, in both the appeals.

For the respondents: M/s Dinesh Thakur and Sanjeev Sood, Additional Advocate Generals, with Mr. Amit Kumar Dhumal, Deputy Advocate General, for respondents No. 1 and 3/State in both the appeals.
Respondent No. 2 is *ex parte,* in both the appeals.

RFA No. 305 of 2012
a/w RFA No. 306 of 2012
Date of Decision: 22.12.2022

Land Acquisition Act, 1894- Section 18- **Code of Civil Procedure, 1908**- Order 41 Rule 27-Appeal against dismissal of reference petition and awards passed by Additional District Judge- **Held-** the land owners who have been granted compensation on the lower side cannot be deprived the benefit of subsequent adjudications- Awards modified and compensation enhanced- Appeals Allowed. (Paras 7, 10)

Cases referred:

Ashok Kumar Vs. State of Haryana (2016) 4 SCC 544;
Narendra and others Vs. State of Uttar Pradesh & others (2017) 9 SCC 426;

Ravindra & another Vs. Special Land Acquisition Officer, UKP, Bagalkot (2017) 11 SCC 495;

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

RFA No. 305 of 2012 a/w RFA No. 306 of 2012 a/w CMP No. 4972 of 2018 in RFA No. 305 of 2012 and CMP No. 5496 of 2018 in RFA No. 306 of 2012

As common issues of law and facts are involved in both these appeals, the same are being disposed of by a common judgment.

2. The appellants herein are aggrieved by the Awards, dated 03.01.2012, passed by the learned Additional District Judge, Fast Track Court, Shimla, H.P. in Land Reference RBT No. 28-S/4 of 2007/05, titled as *Shri Naresh Kumar Vs. The State of H.P. and others* and Land Reference RBT No. 29-S/4 of 2007/05, titled as *Shri Roop Lal Vs. The State of H.P. and others*, in terms whereof, the Reference Petitions filed by them were disposed of by the learned Reference Court in the following terms:-

> *"32. In view of findings given on issues No. 1 above, the reference petition is allowed partly and it has been held that the adequate compensation was not given to the petitioners, for their acquired land by the Land Acquisition Collector in the award and as such, they are held entitled for the compensation of acquired land which has been assessed by this Curt as Rs.1189/- per sq. meter irrespective of kind and classification of the land. In addition to this, the petitioners are also entitled to:-*
>
> *a) solatium @ 30% under Section 23(2) of Act on compensation assessed under Section 23(1) of the Act;*
>
> *b) additional compensation under Section 23(1-A) of the Act @ 12% per annum on the market value determined above from the date of publication of the notification under Section 4 of the Act, till date of award of Collector;*
>
> *c) interest @9% per annum on enhanced amount of compensation under Section 23(1), additional compensation under Section 23(1-A) and solatium under Section 23(2) of the Act*

from the date of notification under Section 4 of the Act for the first one year and thereafter, @ 15% per annum.

d) interest under Section 34 of the Act from the date of notification under Section 4 of the Act, if not paid, on the enhanced amount of compensation.

However, the amount of compensation if already paid shall be adjusted towards the amount of compensation. Reference is accordingly answered. Memo of costs be prepared. The file after completion, be consigned to record room."

3. The Reference Petitions arose out of the common Award No. 1/2003, dated 30.03.2005, passed by the Land Acquisition Collector-cum-Sub Divisional Officer (Civil), Shimla (Rural), H.P., which was passed on account of acquisition of land for the purpose of construction of Inter State Bus Stand (Phase-II) by the H.P. Bus Stand Management and Development Authority, for which, Notification under Section 4 read with provisions of Section 17(4) of the Land Acquisition Act was published on 25.06.2003, followed by issuance of Notification under Sections 6 and 7 of the Land Acquisition Act on 27.11.2003.

4. Learned counsel for the appellants has argued that the present appeals can be disposed of by awarding to the appellants compensation as has been assessed later on by the learned Reference Court in other Reference Petitions preferred before it under Section 18 of the Land Acquisition Act by the land owners, whose land was also acquired by the respondents for the same purpose and under the same Notification. Learned counsel for the appellants has referred to the applications filed under Section 41, Rule 27 of the Code of Civil Procedure and has submitted that the Awards in the present appeals were passed by the learned Reference Court on 03.01.2012, whereas, subsequent Awards reliance upon which is being placed by learned counsel for the appellants were announced by the learned Reference Court on 28.11.2014. He thus submitted that the additional evidence appended with the applications being necessary for the purpose of adjudication of the

appeals and further not earlier being with the appellants, as the Award was announced subsequently, be taken on record and the appeals be disposed of by granting compensation to the appellants, in terms of the compensation assessed by the learned Reference Court in the subsequent Reference proceedings. Learned counsel further submitted that as per his instructions, no appeal has been preferred against the latter Award, dated 28.11.2014 by the Himachal Pradesh Road Transport Corporation or the H.P. Bus Stand Management and Development Authority, though the land owners have approached this Court for enhancement of the Award.

5. Learned Additional Advocate General has submitted that there is no infirmity in the Awards passed by the learned Reference Court and in this view of the matter, the present appeals be dismissed. As far as the additional evidence intended to be produced on record by the appellants is concerned, learned Additional Advocate General has drawn the attention of the Court to the reply filed to the said applications, in which, the factum of subsequent Award having been passed has not been disputed. Learned Additional Advocate General has further submitted that the enhanced compensation, as is being sought by the appellants, cannot be granted to them. He also submitted that the applications have been filed at a belated stage, as the appeals were filed in the year 2012, whereas the applications were filed only in the year 2018.

6. I have heard learned counsel for the parties and have also gone through the Awards under challenge as well as the subsequent Awards passed by the learned Reference Court, appended with the applications filed under Order 41, Rule 27 of the Code of Civil Procedure.

7. It is not much in dispute that the subsequent Award pertains to the land, which was acquired by the respondents for the same purpose and under the same Notification. The appellants herein, in terms of the Awards under challenge, were granted compensation qua the acquired land

@Rs.1189/- per sq. mtrs. In terms of the subsequent Award passed by the learned Reference Court, the compensation has been assessed @Rs.4270/- per sq. mtrs. This Court is of the considered view that as the intent of the Land Acquisition Act, on one hand is to compulsorily acquire land for public purpose and on the other hand is to ensure that the land owner is adequately compensated, therefore, the land owners who have been granted compensation on the lower side cannot be deprived the benefit of subsequent adjudications, that may be made by the learned Reference Court, which are relatable not only to the same land, but also to the land acquired under the same Notification. In fact, a perusal of the provisions of the Land Acquisition Act, 1894 demonstrates that the intent of Section 28-A thereof is also the same. In other words, had the present appellants not even preferred Reference Petitions under Section 18 of the Land Acquisition Act, then also, in terms of the subsequent Award announced by the learned Reference Court on 28.11.2014, they had a legal right to seek said enhanced compensation by moving an appropriate application before the Collector concerned.

8. Hon'ble Supreme Court in ***Ravindra and another Vs. Special Land Acquisition Officer*, UKP, Bagalkot (2017) 11 Supreme Court Cases 495** was pleased to grant compensation to the appellants therein in terms of the compensation which was granted in respect of same acquisition to other villagers, which was on the higher side.

9. Similarly, in ***Narendra and others Vs. State of Uttar Pradesh and others* (2017) 9 Supreme Court Cases 426**, the Hon'ble Supreme Court has been pleased to reiterate the view earlier taken by the Hon'ble Supreme Court in ***Ashok Kumar Vs. State of Haryana* (2016) 4 SCC 544** that it was the duty of the Court to award just and fair compensation taking into consideration true market value and other relevant factors, irrespective of claim made by the landowner and there is no cap on the maximum rate of compensation that can be awarded by the Court and the Courts are not

restricted to awarding only that amount that has been claimed by the landowners/applicants in their application before it.

10. Accordingly, in view of the above observations, these appeals are allowed, so also the applications filed under Order 41, Rule 27 of the Code of Civil Procedure and the Awards passed by the learned Reference Court, which are under challenge by way of these appeals, are modified to the extent that the appellants are held entitled to enhanced compensation @Rs.4270/- per sq.mtrs. of the acquired land. The other statutory benefits as have been given by the learned Reference Court in favour of the appellants shall now be assessed on the basis of the enhanced amount of compensation, as has been granted by this Court. It is further ordered that the appellants will deposit the difference in the Court Fee within a period of eight weeks from today. The appellants shall also be entitled to costs of litigations. Miscellaneous applications, if any, also stand disposed of.

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

Tilak Raj Sharma and others ....Petitioners.

Versus

Himachal Pradesh State Electricity Board Limited and another ...Respondents.

For the petitioners: Mr. Sanjeev Bhushan, Senior Advocate, with Mr. Rakesh Chauhan, Advocate.
For the respondents: Ms. Ruma Kaushik, Advocate.

CWPOA No. 1069 of 2020
Decided on: 15.12.2022

Constitution of India, 1950- Article 226- promotion with all consequential benefits of pay, arrears and seniority etc- The grievance of the petitioners is that as the petitioners were rightly promoted in terms of order dated 21.06.2014 and the act of the respondent-Board of making their promotion effective 29.12.2015 is bad in law and they are entitled for promotion w.e.f. 21.06.2014 for all intents and purposes- **Held-** No fault of the petitioners, their promotions have been delayed- The act of the respondent-Board making promotion order of the petitioners effective w.e.f. 29.12.2015 is not sustainable in the eyes of law- Petition allowed with directions. (Paras 8, 9)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral):

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

> *"(i) That respondents may very kindly be directed to alter/modify Annexure A-5 dated 21.12.2015 with further directions that instead of operating the order with immediate effect the respondents be directed to promote the applicants w.e.f. 21.6.2014 which is the original date of the promotion with*

all consequential benefits of pay, arrears and seniority etc. alongwith interest at the rate of 9% per annum in the interest of law and justice."

2. The factual matrix involved in the present petition is in a very narrow compass. Petitioners No. 1 to 4 were promoted to the posts Assistant Accounts Officer on regular basis from the feeder post of Superintendent (Divisional Accounts) vide order, dated 21.06.2014 (Annexure A-1). On the same date, in a Writ Petition filed by one Smt. Pankaj Soni, who was serving with the respondent-Board as a Superintendent (Divisional Accounts), i.e., CWP No. 4276 of 2014, the High Court passed the following order:-

"... ....

CMP No. 9138 of 2014

Allowed and disposed of.

CWP No. 4276 of 2014

Notice. Mr. Raj Pal Thakur, learned Advocate appears and waives service of notice on behalf of respondents. Reply be filed within a period of two weeks.

CMP No. 9139 of 2014

Notice in the aforesaid terms. No further promotion shall be made on the basis of Annexure P-6, till further orders."

Annexure P-6 appended with the said writ petition was a copy of merit list, qua which Smt. Pankaj Soni was having grievance. After passing of the order by the High Court, the respondent-Board issued another order, dated 14.08.2014 (Annexure A-2), in terms whereof, the promotion order of the petitioners was ordered to be kept in abeyance. It is a matter of record that the writ petition filed by Smt. Pankaj Soni, after its transfer to the erstwhile Himachal Pradesh Administrative Tribunal, was dismissed on merit in terms of order, dated 23.12.2015, passed by the learned Tribunal in TA No. 4377 of 2015, titled as *Smt. Pankaj Soni Vs. Himachal Pradesh State Electricity Board Ltd. and others*. A copy of said judgment is available on record as Annexure A-4. After dismissal of the petition of Smt. Pankaj Soni, respondent-Board

issued order, dated 29.12.2015 (Annexure A-5), in terms whereof, the order vide which the promotion of the petitioners was kept in abeyance, was recalled and order of promotion of the petitioners dated 21.06.2014 was made operative with immediate effect. The grievance of the petitioners is that as the petitioners were rightly promoted in terms of order dated 21.06.2014 and as subsequently the petition which was filed by Smt. Pankaj Soni was dismissed on merit, therefore, the act of the respondent-Board of making their promotion effective in terms of Annexure A-5 w.e.f. 29.12.2015 is bad in law and they are entitled for promotion w.e.f. 21.06.2014 for all intents and purposes.

3. Learned Senior Counsel for the petitioners has argued that the petitioners herein were promoted in terms of order dated 21.06.2014. Pursuant thereto, the petitioners joined their duties against the promoted posts and fact of the matter is that they continued to discharge their duties against these posts during the pendency of the petition which was filed by Smt. Pankaj Soni. Learned Senior Counsel submitted that even after the issuance of order of putting the promotion order of the petitioners in abeyance, the work of promotional posts was extracted by the respondent-Department and this is not much in dispute. Learned Senior Counsel further submitted that in fact this is evident from Annexure A-3. Accordingly, he submitted that the act of the respondent-Board of giving effect to promotion of the petitioners against the posts of Assistant Accounts Officer from 29.12.2015 rather than 21.06.2014 is bad in law and the petition be allowed by directing the respondent-Board to treat the petitioners as having been promoted against the posts of Assistant Accounts Officer w.e.f. 21.06.2014 with all consequential benefits.

4. The stand of the respondent-Board is that the order, in terms whereof the promotion of the petitioners was kept in abeyance, was issued in compliance to the directions passed by the High Court and thereafter, when the petition filed by Smt. Pankaj Soni was dismissed on merit, immediately

the order of abeyance was recalled and the petitioners were rightly conferred promotions from prospective effect. Ms. Kaushik has submitted that though on facts it is not much in dispute that the petition filed by Smt. Pankaj Soni was dismissed on merit, but as there was an interim order passed by the Hon'ble Court in the case of Smt. Pankaj Soni and as respondent-Board was duty bound to comply with the said order, therefore, as interim order was passed by the High Court on the same date on which the order of promotion of the petitioners was passed, the same subsequently having been kept in abeyance could have been recalled only prospectively and thus, the same was correctly recalled by the respondent-Board and made effective prospectively. Accordingly, she submitted that as there is no merit in the petition, the same be dismissed.

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

6. It is clarified at this stage that though there are five petitioners in terms of the Memo of Parties, but learned Senior Counsel for the petitioners has submitted on instructions that the present petition has to be construed only on behalf of petitioners No. 1 to 4, as petitioner No. 5 appears to have been wrongly impleaded as a petitioner.

7. The petitioners were promoted against the posts of Assistant Accounts Officer on regular basis vide order, dated 21.06.2014. A perusal of the writ petition filed by Smt. Pankaj Soni which has been appended alongwith its reply by the respondent-Board as Annexure RA-1 demonstrates that initially the writ petition was filed against the respondent-Board and against its Chief Accounts Officer and there was no private respondent impleaded therein. Now, if one peruses order, dated 21.06.2014, which was passed by this Court in the writ petition filed by Smt. Pankaj Soni, its language was explicit that no further promotion shall be made on the basis of Annexure P-6 till further orders. This Court is of the considered view that as

promotion order of the petitioners already stood passed on 21.06.2014, therefore, this order could not have been construed to be an order passed by this Court, in terms whereof, the promotion of the petitioners had become otiose. In fact, the respondent-Board was restrained on 21.06.2014 from passing any further promotion order and as it is not the case of the respondent-Board that Annexure A-1 was passed by the Board after passing of interim order by the High Court in CWP No. 4276 of 2014, therefore, having kept the same in abeyance in terms of Annexure A-2 raises some question mark. However, as the same is not subject matter of the present petition, therefore, the Court is not making any further observation on this issue.

8. Be that as it may, fact of the matter is that petition filed by Smt. Pankaj Soni was ultimately dismissed by the learned Tribunal on merit. This means that whatever embargo was there vis-à-vis the promotion which was conferred upon the petitioners in terms of order, dated 21.06.2014 lost its efficacy once the petition of Smt. Pankaj Soni was dismissed on merit. Otherwise also, filing of the petition by Smt. Pankaj Soni could be treated to have had cast a shadow upon the promotions which were conferred upon the petitioners vide order dated 21.06.2014 and but obvious, now this promotion was subject to the adjudication of the petition filed by Smt. Pankaj Soni. Therefore, when the petition filed by Smt. Pankaj Soni was dismissed on merit, the shadow stood lifted and the order of promotion of the petitioners dated 21.06.2014 became effective again for all intents and purposes from the said date. In this background, this Court is of the considered view that Annexure A-5 passed by the respondent-Board making the same effective as from the date of issuance of Annexure A-5 is not sustainable in the eyes of law. The net result of this act of the respondent-Board is that for no fault of the petitioners, their promotions have been delayed by a period of almost 1 ½ years. Further, taking into consideration the fact, as is evident from Annexure A-3, dated 27.11.2016 that even after issuance of Annexure A-2, dated

14.08.2014, the petitioner continued to perform the duties of the posts against which they were promoted, in this light of the matter also, the act of the respondent-Board of making promotion order of the petitioners effective w.e.f. 29.12.2015 is not sustainable in the eyes of law. Therefore, this Court has no hesitation in holding the act of the respondent-Board of making the promotion conferred upon the petitioners vide Annexure A-1 operative w.e.f. 29.12.2015 vide Annexure A-5 as bad in the eyes of law.

9. Accordingly, this petition succeeds. Communication dated 29.12.2015 (Annexure A-5) is set aside to the extent that promotion conferred upon the petitioners w.e.f. 21.06.2014 has been made operative w.e.f. 29.12.2015 and the respondents are directed to treat the petitioners as having been promoted against the posts of Assistant Accounts Officer w.e.f. 21.06.2014 for all intents and purposes, with all consequential benefits. Petition stands disposed of, so also pending miscellaneous applications, if any.

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

Sh. Kamaljeet ....Petitioner.

Vs.

Municipal Corporation of Shimla .....Respondent.

For the petitioner: Mr. Kunal Verma, Advocate.
For the respondents: Ms. Rita Thakur, Advocate.

CWPOA No. 2823 of 2020
Date of Decision: 08.12.2022

Constitution of India, 1950-Articles 14, 226- Regularize the service of the petitioner as a Clerk and direction to pay wages accordingly- Held- The petitioner as a Peon on contract basis, the work of Diary & Dispatch was being extracted from him- the act of the respondent-Corporation of not regularizing the services of the petitioner against the post is arbitrary and discriminatory and violative of Article 14 of the Constitution of India- Petition allowed- Mandamus issued. (Paras 7, 8)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral):*

By way of this petition, the petitioner has, *inter alia* sought the following reliefs:-

> *"(a) Directing the respondent to regularize the service of the petitioner as a Clerk, in the office of Municipal Corporation, Shimla from the due date, i.e., since 2010.*
> *(b) Directing the respondents to pay the wages of a Clerk, in the office of Municipal Corporation, Shimla instead of Peon right since 2010 on the principles of equal pay for equal work, till the date of his regularization as a Clerk."*

2. The case of the petitioner is that initially he was appointed as a Peon on contract basis by the respondent-Corporation. Since his appointment as a Peon, he was assigned the clerical job of Diary & Dispatch, which he continued to perform. In the year 2012, his services were regularized as a Peon despite the fact that at the relevant time, though in papers, his designation was that of a Peon, but he actually was performing the clerical task at the desk of Diary & Dispatch. According to the petitioner, in view of the fact that right from his initial engagement, he actually was performing the clerical work of Diary & Dispatch and was possessing the requisite minimum qualification for being appointed against the post of a Clerk in the respondent-Corporation, the act of the respondent-Corporation of not regularizing his services as a Clerk, but regularizing his services as a Peon is bad in law.

3. Learned counsel for the petitioner has argued that the respondent-Corporation extracted the clerical work from the petitioner since his initial engagement by denying him the wages of a Clerk by paying him only wages of Peon. He further argued that even after his regularization as a Peon in the year 2012, the actual work being extracted from the petitioner by the Corporation is of Diary & Dispatch and this is evident from Annexure A-5, in terms whereof, the duties have been assigned to the Class-IV employees and the petitioner who is referred therein to be holding the post of Peon is stated to have been assigned the duty of Diary & Dispatch. Learned counsel has also drawn the attention of this Court to the information obtained by the petitioner under the Right to Information Act appended with the petition as Annexure A-6, dated 20.07.2017 and by referring to Sr. No. 2 therein, he has submitted that the information which was provided to the petitioner under the Right to Information Act is clear and categorical that right from the initial date of appointment of the petitioner as a Peon, the work of Diary & Dispatch was extracted from him. Learned counsel further submitted that in the case of similarly situated persons, this Court has issued directions to the respondent-

Corporation to regularize the employee against the post, work of which was being extracted from him after completion of seven years service in terms of the regularization Policy of the State Government and similar direction be passed in the present petition also.

4. The petition has been opposed by the respondent-Corporation, *inter alia,* on the ground that the petitioner was working as a Peon on contract basis in the Estate Branch of the respondent-Corporation since 2010 and he has no right to claim regularization against the post of Clerk in terms of the averments made in the petition. However, the factum of the petitioner having been recruited in the year 2002 (wrongly mentioned in the petition as 2000 as has been fairly submitted by learned counsel for the petitioner at the Bar) has not been denied in the reply by the respondent-Corporation.

5. Learned counsel for the respondent-Corporation, on the strength of the reply has submitted that as the petitioner was engaged as a Peon and his services have been regularized as a Peon, therefore, he has no right to claim regularization against the post of Clerk and he cannot equate his case with that of Roshan Lal. She further argued that otherwise also when the services of the petitioner were regularized as a Peon in the year 2012, he did not object to this and, therefore, he is now estopped from claiming the relief, as is sought by way of present petition.

6. I have heard learned counsel for the parties and have also gone through the respective pleadings and documents appended therewith.

7. Annexures appended with the petition clearly and categorically establish the fact that as from the date of appointment of the petitioner as a Peon on contract basis, the work of Diary & Dispatch was being extracted from him. This fact is not only evident from the information which was supplied to the petitioner under the Right to Information Act, i.e., communication, dated 20.07.2017 (Annexure A-6), but also from Annexure A/2 which is communication, dated 15.12.2010, addressed by the Assistant Commissioner,

Municipal Corporation, in which, it has been clearly mentioned that the petitioner, who was appointed as a Peon on contract basis, was in fact performing the duties of Diary & Dispatch. That being the case, the act of the respondent-Corporation of not regularizing the services of the petitioner against the post, work of which was actually being extracted from him by the Corporation from the date of his initial engagement, is arbitrary and discriminatory and, thus, violative of Article 14 of the Constitution of India. In fact, the respondent-Corporation by appointing the petitioner against the post of a contract Peon and thereafter extracting the work of a Clerk from him has indulged in practice of *"Begaar"*.

8. Incidentally, in a similar case, i.e., CWP No. 7988 of 2013, titled as *Roshan Lal Vs. Municipal Corporation and another*, wherein also, the petitioner who was engaged by the respondent-Corporation as a Peon, was found to have been discharging the duties of Munshi/Clerk, this Court while allowing the petition, directed the Corporation to consider the case of the petitioner for regularization against the post of Clerk upon completion of seven years service in terms of regularization Policy of the State Government. A copy of the judgment is also appended with the present petition as Annexure A-1. This Court has been informed that this judgment has been duly implemented by the respondent-Corporation. As this Court has already held the act of the respondent-Corporation of extracting work of the post of Clerk from the petitioner, who was engaged on contract basis as Peon and not regularizing his services later on as a Clerk to be bad in law, therefore, this writ petition is allowed by holding that the act of the respondent-Corporation of not regularizing the services of the petitioner against the post of Clerk and regularizing him against the post of Peon is not sustainable in law. Further, a writ of mandamus is issued to the respondent-Corporation to regularize the service of the petitioner as a Clerk, in terms of the regularization Policy of the State Government, which is being followed by the respondent-Corporation,

upon completion of seven years of service as from the date of his initial engagement as a Peon on contract basis. This regularization will also entail consequential benefits. However, the monetary benefits are restricted to three years as from the date of filing of the present petition.

With these observations, the petition stands disposed of, so also pending miscellaneous applications, if any.

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

Ramesh Chand ....Petitioner.

Versus

State of Himachal Pradesh and others ...Respondents.

For the petitioner: Mr. Adarsh K. Vashista, Advocate.

For the respondents: M/s Dinesh Thakur and Sanjeev Sood, Additional Advocate Generals, with Mr. Amit Kumar Dhumal, Deputy Advocate General.

CWPOA No. 5464 of 2020
Decided on: 21.12.2022

Constitution of India, 1950- Article 226- Quashing of recovery order and restoration of the increment allowed to the applicant after 8 years of service of TGT- **Held-** The Department in the year 2016 promoted the petitioner also to the post of Lecturer, though benefits were ordered to be notional as from the year 2008 up to the date when the petitioner was promoted as PGT- Recovery is uncalled for- Communication quashed and set-aside- Petition allowed. (Paras 7, 8)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge (Oral):

By way of this petition, the petitioner has, *inter alia,* prayed for the following reliefs:-

> *"(i) That the impugned order Annexure A-5, dated 23.4.2018 whereby recovery has been ordered against the applicant may kindly be ordered to be quashed and set aside.*

(ii) That the respondents may kindly be directed to restore the increment allowed to the applicant after 8 years of service of TGT w.e.f. February, 2008.
(iii) That the respondents may kindly be directed to restore the annual increment to the month of February in each year instead of July."

2. Heard learned counsel for the petitioner as also learned Additional Advocate General.

3. The case of the petitioner is that he was initially appointed as a Trained Graduate Teacher on 19th February, 1999 and posted as such at GSSS Bhakhra, District Bilaspur, H.P. Despite the fact that the persons junior to the petitioner were promoted to the post of Lecturer in the year 2008, the petitioner was ignored for the said promotion by the Department. He was promoted as Post Graduate Teacher vide office order, dated 22nd February, 2014 (Annexure A-2). As the petitioner was aggrieved by his non-consideration for promotion as from the year 2008, accordingly, he filed a representation with the Department. As the Department found the contention of the petitioner to be merit-worthy, accordingly, in terms of Annexure A-3, issued in the month of September, 2016, the petitioner was promoted as a Lecturer (School Cadre) in the relevant subject notionally w.e.f. 16.07.2008, i.e., the date when his juniors were promoted against the said posts. However, in terms of this communication, it was stated that actual benefits would be admissible as from the date of joining as PGT. The grievance of the petitioner is that thereafter vide communication, dated 23rd April, 2018 (Annexure A-5), recovery to the tune of Rs.61643/- has been worked out by the Department against the petitioner and the petitioner has been called upon to deposit the same with the office, which recovery as per the Department was on account of re-fixation of his pay, as a result of the petitioner being promoted against the post of Lecturer w.e.f. 2008.

4. Learned counsel for the petitioner has argued that besides the fact that the recovery order *per se* is bad in law as the petitioner could not be called upon to surrender the benefits which he gained as a result of actual performance of his duties as TGT, the order of recovery otherwise also is not sustainable in the eyes of law, because the petitioner being a Class-III employee, the recovery from him is barred in law in terms of the judgment of the Hon'ble Supreme Court in *State of Punjab and others Vs. Rafiq Masih (White Washer) and others* (2015) 4 SCC 334 (2), which judgment has been relied upon by the Hon'ble Division Bench of this Court in *S.S. Chaudhary Vs. State of H.P. and others*, 2022(2) Him. L.R. (DB) 954. Accordingly, a prayer has been made that the petition be allowed and Annexure A-5, dated 23rd April, 2018 be quashed and set aside.

5. The petition is resisted, *inter alia*, on the ground that seniority of the petitioner was rectified by the Director of Elementary Education on 05.07.2012. On the basis of his new seniority, the petitioner made a representation to respondent No. 2 for his promotion against the post of Lecturer and the petitioner was accordingly promoted to the said post w.e.f. 16.07.2008, i.e., the date when his juniors were promoted. As per learned Additional Advocate General, after promotion of the petitioner against the post of Lecturer (Political Science), all the benefits, which he got as TGT between 16.07.2008 to 22.02.2014 automatically stood withdrawn, as his pay as a Lecturer stood fixed w.e.f. 16.07.2008 and, therefore, Annexure A-5, dated 23.04.2018 was rightly issued by the Department, as excess emoluments drawn by the petitioner were liable to returned back to the Department. Accordingly, he submitted that as there is no merit in the petition, the same be dismissed.

6. I have heard learned counsel for the parties and have carefully gone through the pleadings and documents on record.

7. The factual matrix involved in the case has already been stated by me hereinabove. The moot issue involved in the petition is as to whether in the peculiar facts of the case, the respondent-Department is entitled for recovery of Rs.61643/- from the petitioner, in terms of Annexure A-5 or not? It is not in dispute that the recovery which is now being sought in terms of Annexure A-5, dated 23rd April, 2018 is with regard to the payments which were made to the petitioner while he was performing his duties as a TGT Teacher. It is not much in dispute that as it was a matter of record that persons junior to the petitioner were promoted to the post of Lecturer in the year 2008, therefore, the Department in the year 2016 promoted the petitioner also to the post of Lecturer, though benefits were ordered to be notional as from the year 2008 up to the date when the petitioner was promoted as PGT. In these circumstances, this Court is of the considered view that the recovery which has been ordered by the Department in terms of Annexure A-5 is totally uncalled for, because; (a) recovery is being sought of whatever the petitioner received in the course of performance of his duties as a Trained Graduate Teacher and delay, if any, in conferring promotion to the petitioner to the post of Lecturer was on account of the acts of omission of the Department; and (b) in terms of the law laid down by the Hon'ble Supreme Court in *Rafiq Masih's case (supra),* as has been followed by the Hon'ble Division Bench in *S.S Chaudhary's case (supra),* recovery by the employer from the employees belonging to Class-III and Class-IV service is impermissible in law. As the petitioner happens to be a Class-III employee, therefore, the recovery order is hit by the law declared by the Hon'ble Supreme Court in *Rafiq Masih's case (supra).* Therefore, Communication, dated 23rd April, 2018 (Annexure A-5) is not sustainable in the eyes of law.

8. Accordingly, in view of the above discussions, this petition is allowed. Communication, dated 23rd April, 2018 (Annexure A-5) is quashed and set aside and it is directed that no recovery will be effected by the

Department in terms of the impugned Order. Recovery, if any, effected from the petitioner be refunded back to him within a period of four weeks from today. No order as to costs. Miscellaneous applications, if any, also stand disposed of.

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

Ram Asra & Ors. …Petitioners

Versus

State of H.P. & others ….Respondents

For the petitioners: Mr. Adarsh K. Vashista, Advocate.

For the respondents: Ms. Ritta Goswami, Additional Advocate General, for respondents No.1 to 3.
Mr. Dinesh Banot, Advocate, for respondent Nos.4 to 7, 9, 11, 13 to 15.
None for respondent Nos. 8, 10 and 12 though served.

CWP No. 5647 of 2021
Decided on: 23.12.2022

Constitution of India, 1950- Article 226- The grievance of the petitioners is that the promotion panel prepared by the respondents-Department is not legal & valid as vacancies in question are meant for employees belonging to General Category and private respondents No.4 to 15 cannot be considered against the vacancies meant for General category – ***Held-*** Contention of the petitioners that the eligible officers in the feeder channel belonging to Scheduled Caste category should be considered for promotion only against reserve category posts and only against the roster points meant for that category sans merit- Petition dismissed. (Para 5(iv))

Cases referred:
P. Sheshadri Vs. Union of India (1995) 3 SCC 552;
R.K. Sabharwal & Ors Vs. State of Punjab (1995) 2 SCC 745;
Shyam Lal Vs. HPSEB 2012(3) ShimLC 1770;

The following judgment of the Court was delivered:

Jyotsna Rewal Dua , J

This writ petition has been filed for the grant of following substantive relief:-

> "(i) *That* a *writ in the nature of mandamus may kindly be issued for directing the Respondents to follow the reservation roster while carrying out promotion to the post of Block Elementary Education Officer in District Solan in the on-going promotions in pursuant to Annexure P-6, dated 19.8.2021 by offering 7th point* to SC *and 14th point to the ST category*."

2. The petitioners have pleaded that they were appointed as Junior Basic Trained Teachers (JBT) on tenure basis during the years 1988 and 1989. Their services were regularized on 23.03.1990. They were promoted as Centre Head Teachers on 16.09.2010. The next promotional avenue available from the post of Centre Head Teacher is to the post of Block Elementary Education Officer. The post of Block Elementary Education Officer is to be filled up 100% by way of promotion from the eligible persons in terms of the applicable Recruitment and Promotion Rules.

It has been stated by the petitioners that they were eligible for being considered for promotion to the post of Block Elementary Education Officer. The petitioners further submitted that private respondents No.4 to 15 were also recruited as Junior Basic Trained Teachers in the year 1989. These respondents were regularized in December 1989. These private respondents belong to Scheduled Caste Category.

3. **The case put-forth by the petitioners** is that the respondent-department is under obligation to follow 7 point roster for providing reservation to the Scheduled Caste category and 15 point roster for the Scheduled Tribes category. For filling in vacancies of Block Elementary Education Officer now available/going to be available in near future, the respondent-department has prepared a panel for promotion of eligible officers from the feeder channel, wherein private respondent Nos.4 to 15 have been

placed over and above the petitioners. The grievance of the petitioners is that the panel prepared by the respondents-department is not legal & valid as vacancies in question are meant for employees belonging to General Category and private respondents No.4 to 15 can not be considered against the vacancies meant for General category. They could be considered only against their own roster points meant for reserved category.

4. Respondents in their reply have clearly stated that respondents No.4 to 15 though belong to reserve categories, however, in the seniority list of Centre Head Teachers, they rank senior to the petitioners. Hence the private respondents were eligible for promotion as per their turn, even in General category by virtue of their higher seniority positions in the final seniority list.

5. Observations

5(i) The petitioners have not disputed the final seniority list of Centre Head Teachers, wherein respondents No.4 to 15 occupy higher seniority positions than enjoyed by the petitioners.

5(ii) In Civil Appeal No.3314/2010 (***Union of India & Ors. Vs. Gopal Meena & Ors)*** decided by the Hon'ble Apex Court on 10.08.2022, the Central Administrative Tribunal had ordered for separate zone of consideration for promotion of Scheduled Caste/Scheduled Tribe candidates. The orders were affirmed by the High Courts. Appeals were filed before the Hon'ble Apex Court by Union of India. The contention of the appellant was that there cannot be a separate zone of consideration for each category of the officials. The zone of consideration is in respect of the candidates falling in the seniority list. The candidates belonging to Scheduled Caste and Scheduled Tribe were given relaxation to extend zone of consideration up-to five times of vacancies. It was argued that effect of order passed by the High Court would be that all eligible candidates at whatever position in the seniority list, would fall within zone of consideration, though they may be lowest in the list. Whereas relying upon ***R.K. Sabharwal & Ors Vs. State of Punjab (1995) 2 SCC 745***, the

respondents pleaded that reservation has to be post based and roster points for Scheduled Tribes, should only be filled by Scheduled Tribes alone. Thus the contention was that by applying the principle of reservation, General category and reserved category have to be treated separately and without clubbing. There has to be separate zone for each category i.e. General, Scheduled Caste & Scheduled Tribe rather than the common seniority list, which is prevalent for determining zone of consideration for promotion.

Hon'ble the Apex Court noticed its previous pronouncements on the issue and also considered several office memorandums issued by the concerned departments on the subject which *inter-alia* stated that for regular promotions, zone of consideration is prescribed keeping in view the number of vacancies to be filled up. It was *inter-alia* held that while filling up vacancies by way of promotion on regular basis, a Departmental Promotion Committee is constituted and profile of candidates coming within zone of consideration is prepared. The impugned orders passed by the High Courts were set aside.

5(iii) In 2012(3) ShimLC 1770 ***(Shyam Lal Vs. HPSEB)***, after taking note of R.K. Sabharwal's case (supra) & (1995) 3 SCC 552 (***P. Sheshadri Vs. Union of India***), it was held that if the number of S.C candidates, who by their own merit, can be selected to general vacancies, class or even exceed the percentage of reserved candidates, it cannot be said that the reservation quota in S.C. quota stands filled. The entire selection is in addition to the reservation against the general category. Relevant paragraphs from the judgment read as under:-

> *"16. Once the number of posts reserved for being filled by reserved category candidates in a cadre, category or grade (unit for application of rule of reservation) are filled by the operation of roster, the object of rule of reservation should be deemed to have been achieved and thereafter the roster cannot be followed except to the extent indicated in para-5 of R.K. Sabharwal's case, aforesaid. While determining the said number, the candidates*

belonging to the reserved category but selected/promoted on their own merit (and not by virtue of rule of reservation) shall not be counted as reserved category candidates as also held in Union of India & Others versus Virpal Singh Chauhan and others 1995 6 SCC 684, Post Graduate Institute of Medical Eduction & Research. Chandigarh and others Vs. K.L. Narasimhan and another 1997 6 SCC 283 and also in Rajesh Kumar Daria Versus Rajasthan Public Service Commission & Others 2007 8 SCC 785.

17. To sum up, if the number of S.C. candidates, who by their own merit, can be selected to general vacancies, class or even exceeds the percentage of reserved candidates, it cannot be said that the reservation quota in S.C. quota stands filled. The entire selection is in addition to the reservation against the general category."

5(iv) Chapter 16 of Handbook on Personal Matters Volume-I prescribes zone of consideration of promotion of officers eligible in the feeder grade. It is an admitted factual position that all private respondents rank senior to the petitioners in the seniority list of Centre Head Teachers.

In view of above, the contention of the petitioners that the eligible officers in the feeder channel i.e. private respondents No.4 to 15 belonging to Scheduled Caste category should be considered for promotion only against reserve category posts and only against the roster points meant for that category sans merit. This writ petition is therefore dismissed. Pending miscellaneous applications, if any, also stand disposed of.

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

Between:
HIMACHAL PRADESH POWER CORPORATION LIMITED HAVING ITS REGISTERED OFFICE AT HIMFED BUILDING, BCS NEW SHIMLA-171009, H.P. THROUGH MANAGER, RENUKAJI DAM PROJECT, DADAHU, DISTRICT SIRMOUR, H.P.

....PETITIONER.

(BY MR. SHASHI SHIRSHOO, ADVOCATE)

AND

SHRI ARVIND KUMAR BANSAL, GOVERNMENT CONTRACTOR, 756/6 BARA CHOWK, NAHAN, TEHSIL NAHAN, DISTT. SIRMOUR, H.P.

....RESPONDENT.

(BY MR. SUNEET GOEL, ADVOCATE)

ARBITRATION CASE
No.100 of 2018
Reserved on:26.08.2022
Decided on: 31.10.2022

Arbitration and Conciliation Act, 1996- Section 34- The petitioner has assailed the Award passed by the sole Arbitrator in Arbitration Proceedings that learned Court misread and mis-appreciated the evidence on record and the findings which have been returned thereafter, therefore, are not sustainable in law- **Held-** Mandate under Section 34 of the Act is to respect the finality of the Arbitral Award, if this Court interferes with the Arbitral Award in the usual course on factual aspects as is done in the case of an appeal, then the same would defeat the commercial wisdom behind opting for alternative dispute resolution- Award upheld- Petition dismissed. (Paras 20, 21, 22)

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

J U D G M E N T

By way of this petition, filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter to referred as the '1996 Act'), the petitioner has assailed the Award passed by the sole Arbitrator in Arbitration Proceedings titled M/s Arvind Kumar Bansal Versus H.P. Power Corporation Ltd., dated 10.08.2018.

2. Brief facts necessary for the adjudication of the present petition are that the respondent/claimant was awarded the work of "construction of Office Building including providing and fixing water supply and sanitary fittings in HPPCL Colony at Dadahu for Renukaji Dam Project, Distt. Sirmour" vide General Manager Letter No.HPPCL/RDP/GM/W-1/09- 3374-81 dated 02.12.2009 for Rs.2,55,66,529.00 only (Rupees Two Crore Fifty Five Lac Sixty Six Thousand Five Hundred and Twenty Nine). The contract was entered into on 09.12.2009. The completion of the project was to be within eight months reckoned from fifteen days of issuance of the Award letter. As is made out from the Award under challenge, the claimant preferred the following claims for arbitration:-

"*1. Price escalation*	-	*Rs.50,58,398/-*
2. Difference in rates of extra substituted items at which actual payment made and those negotiated	-	*Rs.7,55,185/-*
3. Cost of Litigation	-	*No amount mentioned.*
4. Interest for pre-reference and pendente lite periods	-	*No related amount mentioned*"

3. The defence taken was submitted by the respondent before the Arbitrator and though the respondent did not make any specific counter-claim, yet through its reply, it sought compensation to the tune of Rs.12,59,498/- on account of loss suffered on account of continuing with the higher accommodation due to delay in completion of the work.

4. The claimant sought price escalation on the ground that work continued much beyond the stipulated period of eight months, *inter alia*, on account of the following grounds:-

a) Failure on the part of Respondent:
i) to honour reciprocal promises of providing design and drawings
ii) to provide encumbrance free site such as existing septic tank and sewer line in the site proposed for the structure, job of realigning was with some other contractor, who delayed executing the same.
iii) Requirement of dismantling type-II residential structure to remove hindrance, Action delayed by the Respondent.
b) Excavation of rocky strata encountered during execution, which had to be done without resorting to blasting work, and long haulage involved in dumping debris as no dumping site was specified.
c) Suspension of work for sometime on two occasions. Once due to the orders by NGT (National Green Tribunal) and again by Respondent himself.
d) Remoteness of the area in terms of availability of materials.
e) Frequent and substantial changes made in the originally planned building as is evidenced in various meetings, thus causing delay in execution.

5. Respondent denied the fact that the site was in remote area, as the site was in Dadahu town itself. It asserted that as per the general specifications and conditions, no special claims were to be entertained on account of difficulties arising due to the situation of site and further drawing, designs and instructions were duly provided to the claimant well in time. It was denied by the respondent that any progress of work was affected due to sewerage line and septic tank and according to the respondent, delay in completion of the building occurred on account of the ailment of the contractor. It was the specific stand of the contractor that as per the agreement, claim under Clause 10 CC thereof was not maintainable and the time extension which was granted to the claimant was on compassionate and

humanitarian grounds in view of serious illness of the claimant. The respondent also made a prayer to be compensated to the tune of Rs.12,59,498/- on account of the rent which was paid by the respondent for hiring office accommodation on account of delay in the execution of the project by the claimant. It was further the case of the respondent that the claim for difference in rates of substituted and extra items was imaginary, concocted and false and that the claimant had already been paid whatever was due to him from the respondent. It was denied that the respondent was entitled for any interest etc.

6. Learned Arbitral Tribunal held that after examining various aspects of the claim and the contentions of the respective parties, the claim was payable to the claimant. It held that the respondent during the administration of contract agreement had consistently agreed with the claimant about the hindrances being unavoidable and during the execution of the work, the respondent never attributed delay in the course of construction to the claimant. Learned Arbitral Tribunal also held that the time extension was not attributed to the claimant, though it was not argued as such by the respondent. Learned Arbitral Tribunal also held that the study of detail escalation amount revealed that even during the period for which the respondent was granted extension of time on the grounds of illness of contractor, the work done billing was for an amount of Rs.88, 85,496/-, i.e. 34.75% of the contract award amount, which demonstrated that even during the stated illness of the contractor, the execution of the work continued and substantial work was done. Learned Arbitral Tribunal also held that respondent had consented to the request of the contractor and approved the time extension on account of his illness between October, 2010 and June, 2011 and extension of time so granted was termed as unavoidable. It, thereafter held that nevertheless to be fair to the respondent, learned Arbitral Tribunal was allowing the claim of the claimant only to the extent of 84.5% of

the overall amount computed for price escalation by giving a reduction of 15.5%.

7. With regard to the claim on account of difference in amount for extra/substituted items paid on derived rates rather than those negotiated, learned Arbitral Tribunal held that it had examined the matter in light of terms of the contract and it considered that the contractor had submitted its own rates for extra and substituted items which the respondent did seem to have entertained, but which were felt to be on the higher side. Respondent asked the claimant to be present in his office on 22.11.2012 to settle the issue at the earliest and it appeared that the matter was discussed and rates negotiated on 22.11.2012. Learned Arbitral Tribunal also held that it was mentioned in letter dated 22.11.2012 that the claimant had Annexures-A & B of such items and mentioned thereon revised rates, however, no letter conveying rejection or acceptance from the respondent was on record and learned Arbitral Tribunal thus presumed that the rates having been settled after discussion on 22.11.2012. It further held that in the final bill dated 05.09.2014, the rates adopted were derived by the respondent under Clause-12 and not 12A, which the respondent in its submission claims to have been amicably settled, however, submission of the respondent deserved outright rejection as respondent did not produce any evidence of rejection of claimant's rates. Learned Arbitral Tribunal thereafter held that it agreed to the claim on difference in rates as shown in the computation sheet, however, it did not allow the items of moulding in steps and shelves as it found no mention of the same in any of the letter of the claimant. Nevertheless, the item of making grooves in plaster as not having been paid was allowed to be paid.

8. With regard to the cost of the arbitral proceedings, learned Arbitral Tribunal held that it was not awarding any amount under this claim. With regard to the claim for interest for pre-reference and pendent lite period @ 18% per annum, after taking into consideration the respective contentions

of the parties, learned Arbitral Tribunal held that the claimant had demanded pre-pendente lite interest claims alongwith interest and while finalizing the final bill of the contractor, dated 05.09.2014, no price escalation was paid by the respondent even though the work which was stipulated for completion by 16.08.2010 continued upto January, 2013. Learned Arbitral Tribunal also held that the final bill was finalized on 05.09.2014, i.e. after more than one year and seven months after the completion of the work which otherwise was accepted by the claimant under protest. Learned Arbitral Tribunal thus held that the payments for pre-pendente interest were due with regard to price escalation w.e.f. 22.12.2014 upto 22.02.2017 and with regard to amount of difference in rate, w.e.f. 05.09.2014 upto 22.02.2017.

9. With regard to the interest for pendent lite period, learned Arbitral Tribunal held that interest @ 15% per annum was fair and that pendent lite will be payable for the period from 23.02.2017 to 10.08.2018. The summary of Award and the compensation allowed to the respondent as is mentioned in the award, reads as under:-

7.4 Summary of Awards:

Part-1 Award in favour of the Claimant is summarized below:-

Claim No.	**Description**	**Amount of Principal Claim (`)**	**Amount of Award against Principal Claims (Rs.)**	**Interest Awarded against Principal Claims (Rs.)**	**Interest Computation at**
(1)	(2)	(3)	(4)	(5)	(6)
1	Claim on account of price escalation	50,58,398.00 (48,07,002.00 amended)	***40,61,917.00** *Annex a,b,c, d	Pre-pendente Lite Interest **13,22,071.00** Pendente Lite Interest	Appendix A1

				11,79,314.00 Total Interest **25,01,385.00**	
2.	Claim on account of difference in rates of extra/substituted items	7,55,184.00	****6,91,184.00** ** Annexe-e	Pre-Pendente Lite Interest **2,55,643.00** Pendent Lite Interest **2,07,394.00** Total Interest **4,63,037.00**	Appendix A2
		Total	**47,53,101.00**	**29,64,422.00**	
3.	Cost of Arbitration		Nil	Nil	
4.	Pre-Pendente Lite and Pendente Lite Interests		Under Claims 1 &2 (Column (5) above		
	Total	**Rs.47,53,101.00 +29,64,422.00= Rs. 77,17,523.00**			
	Rupees Seventy Seven Lac Seventeen Thousand Five Hundred Twenty Three only				

Part-2 Compensation allowed to the Respondent:

Sl. No.	**Description**	**Claimed Compensation (Rs.)**	**Compensation Awarded (Rs.)**	**Interest Awarded (Rs.)**
1	Rental amount for	12,59,498.00	**1,95,222.00**	Pendente Lite Interest (Note Demanded)

	hiring building			Nil
2.	Cost of Arbitration		**Nil**	Nil
	Counter Claim		Nil	
	Compensation Awarded		**Rs.** 1,95,222.00	
	Net Amount of award after accounting for Compensation		**Rs.** 75,22,300.00	

10. Learned counsel for the petitioner has argued that the Award under challenge is not sustainable, for the reasons that learned Arbitral Tribunal erred in not appreciating that the claimant could not have claimed any special claim on account of difficulties arising due to situation of the site in view of conditions of the contract and learned Arbitral Tribunal also erred in not appreciating that out of the total period of delay of 899 days, 362 days' delay was attributable to the ill-health of the claimant which was evident from Annexures R-3 to R-7. He also argued that the findings which were returned by learned Court qua claim No.2 were not sustainable being perverse, as it was within the knowledge of the claimant that he was seeking extension on account of ill-health and the rates which were settled between the parties subsequently were amicably settled, which aspect of the matter was also totally ignored by learned Arbitral Tribunal. On these counts, it has been prayed that the present petition be allowed and the Award under challenge be set aside. No other point was urged.

11. Defending the Award, learned counsel for the respondent has argued that the Award passed by learned Arbitral Tribunal is based upon correct appreciation of respective contentions of the parties as well as the evidence on record. Learned counsel further argued that the conclusions which have been arrived at by learned Arbitral Tribunal have been arrived after taking into consideration the respective claims of the parties and after

appreciating the evidence which was led by the parties with regard to their respective contentions and as it is settled law that the findings which are so returned by learned Arbitral Tribunal cannot be interfered under Section 34 of the 1996 Act, therefore, the petition deserves outright rejection. Learned counsel has also submitted that in fact the petitioner has not made out any case for interference under the limited window available under Section 34 of the 1996 Act and therefore also, the petition is liable to be dismissed. He has argued that the petitioner wants this Court to re-appreciate the evidence on record and arrive at its own conclusion with regard to the issues raised before learned Arbitral Tribunal which is not permissible in law. Accordingly, he has submitted that the present petition being devoid of any merit be dismissed.

12. Before the Court ventures into the adjudication of the present petition, it is necessary to refer as to what is the scope of interference by a Court with an Award under Section 34 of the 1996 Act. In terms of the law which has been repeatedly laid down by Hon'ble Supreme Court of India, the jurisdiction conferred on the Courts under Section 34 of the 1996 Act is stated to be fairly narrow and when it comes to the scope of an appeal under Section 37 of the Act, the jurisdiction of the Appellate Court in examining an order setting aside or refusing to set aside an Award is said to be all the more circumscribed.

13. In *MMTC Limited* Versus *Vedanta Limited, (2019) 4 Supreme Court Cases 163*, Hon'ble Supreme Court held that the position is well settled by now that the High Court does not sit in appeal over the arbitral award and may interfere on merits on the limited grounds provided under Section 34 (2)(b) (ii), i.e. if the award is against the public policy of India. Hon'ble Supreme Court held that as per the legal position clarified through decisions of Hon'ble Supreme Court prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, in turn, includes a violation of the Fundamental Policy of Indian Law, a violation of the interest of India, conflict

with justice or morality, and the existence of patent illegality in the arbitral award. Hon'ble Supreme Court further held that additionally, the concept of the "Fundamental Policy of Indian Law" would cover compliance with statutes and judicial precedents, adopting a judicial approach, compliance with the principles of natural justice, and Wednesbury reasonableness. Hon'ble Court has further held that 'patent illegality' it has been held to mean contravention of the substantive law of India, contravention of the 1996, Act and contravention of the terms of the contract.

14. In *K. Sugumar and Another* Versus *Hindustan Petroleum corporation Limited and Another, (2020) 12 Supreme Court Cases 539*, Hon'ble Supreme Court held that the contours of the powers of the Court under Section 34 of the Act are too well established to require any reiteration and even a bare reading of Section 34 of the Act indicates the highly constricted power of the Civil Court to interfere with an arbitral award. Hon'ble Court has further held that the reason for this is obvious as when parties have chosen to avail an alternative mechanism for dispute resolution, then they must be left to reconcile themselves to the wisdom of the decision of the arbitrator and the role of the Court should be restricted to the bare minimum. Interference will be justified only in cases of commission of misconduct by the arbitrator which can find manifestation in different forms including exercise of legal perversity by the arbitrator.

15. In *Dyna Technologies Private Limited* Versus *Crompton Greaves Limited, (2019) 20 Supreme Court Cases 1*, Hon'ble Supreme Court in Para-24 thereof has been pleased to hold as under:-

> *"24. There is no dispute that Section 34 of the Arbitration Act limits a challenge to an award only on the grounds provided therein or as interpreted by various Courts. We need to be cognizant of the fact that arbitral awards should not be interfered with in a casual and cavalier manner, unless the Court comes to a conclusion that the perversity of the award goes to the root of the matter without there being a possibility of alternative*

> *interpretation which may sustain the arbitral award. Section 34 is different in its approach and cannot be equated with a normal appellate jurisdiction. The mandate under Section 34 is to respect the finality of the arbitral award and the party autonomy to get their dispute adjudicated by an alternative forum as provided under the law. If the Courts were to interfere with the arbitral award in the usual course on factual aspects, then the commercial wisdom behind opting for alternate dispute resolution would stand frustrated.*"

16. Similarly, in *Parsa Kente Collieries Limited* Versus *Rajasthan Rajya Vidyut Utpadan Nigam Limited, (2019) 7 Supreme Court Cases 236*, Hon'ble Supreme Court has reiterated that construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do. Hon'ble Court further held that a possible view by the arbitrator on facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his arbitral award. Hon'ble Court has also held that an award based on little evidence or no evidence which does not measure up the quality to trained legal mind would not be held to be invalid on this score.

17. Similarly, in *Dyna Technologies Private Limited* (supra), Hon'ble Supreme Court also held that the Court should not interfere with an award merely because an alternative view on facts and interpretation of contract exists and the Courts need to be cautious and should defer to the view taken by the Arbitral Tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under Sectin 34 of the Arbitration Act.

18. After referring to all the judgment mentioned hereinabove, Hon'ble Supreme Court in *UHL Power Company Limited Versus State of Himachal Pradesh, (2022) 4 Supreme Court Cases 116*, while reiterating the

above mentioned legal position has reiterated that under Section 34 of the Act, the High Court cannot re-appreciate the findings returned by learned Arbitral Tribunal and take a different view in respect of interpretation of relevant clauses of the agreement governing the parties. Hon'ble Court has observed that the High Court cannot act as a Court of appeal and the powers conferred under Section 34 of the Act are fairly narrow.

19. Now, in the backdrop of what has been discussed hereinabove, if one peruses the Award under challenge, a perusal thereof demonstrates that learned Arbitral Tribunal while deciding the claim of the claimant, has taken into consideration the respective contentions of the parties. While deciding each and every claim, it has discussed the rival contentions of the parties, it has discussed the relevant evidence led by the parties in respective of their contentions and thereafter, returned its reasoning. In the earlier part of the judgment, I have stated at length the findings which were returned by learned Tribunal and same are not being repeated for the sake of brevity.

20. The thrust of the arguments of learned counsel for the petitioner as has been referred to hereinabove primarily was that learned Court misread and mis-appreciated the evidence on record and the findings which have been returned thereafter, therefore, are not sustainable in law. This Court is of the considered view that in light of the law as has been laid down by Hon'ble Supreme Court, referred to hereinabove, once this Court is satisfied that learned Arbitral Tribunal took into consideration the respective contentions of the parties, referred to the relevant documents relied upon by the parties, assigned reasons for arriving at the conclusion which have been arrived at, then the High Court cannot interfere with the Award so passed under Section 34 of the Act, because reappreciation of evidence by the High Court under Section 34 of the Act is not permissible in law. This Court reiterates that it is for the Arbitrator to construe the terms of the contract and he is the ultimate master of the quantity and quality of evidence being relied upon by the

parties. That being the case, now this Court cannot sit as an Appellate Court and re-appreciate the evidence on record and then apply its mind and return the findings as to whether the conclusions which have been arrived at by learned Arbitrator are correct or not. It is not the case of the petitioner that the Award is in conflict with justice or morality or that there is patent illegality writ large over it as the same is in violation of the statutes or judicial precedents.

21. After going through the Award under challenge, it cannot be said that the findings which have been returned by learned Arbitral Tribunal are such that no fair minded or reasonable person could return such findings. Similarly, as the mandate under Section 34 of the Act is to respect the finality of the Arbitral Award, then if this Court was to interfere with the Arbitral Award in the usual course on factual aspects as is done in the case of an appeal, then the same would defeat the commercial wisdom behind opting for alternative dispute resolution as has been held by Hon'ble Supreme Court in *Dyna Technologies Private Limited* (supra).

22. Accordingly, in view of the above discussion, as this Court is of the considered view that the petitioner has not been able to make out any case for interference therein in terms of Section 34 (2)(b)(ii)of the Act, the present petition being devoid of any merit is dismissed. Pending miscellaneous applications, if any, stand disposed of. Interim order, if any, stands vacated.

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

Veer Singh .....Petitioner

Versus

Leela Devi .....Respondent

For the Petitioner : Mr. Arvind Sharma, Advocate.
For the Respondent : Mr. Nishant Khidtta, Advocate.

CMPMO No. 293 of 2022
Reserved on: 20.12.2022
Decided on: 30.12.2022

Constitution of India, 1950- Article 227- **Himachal Pradesh Land Revenue Act, 1954** – Section 107- The grievance is that by impugned order direction has been issued to the SHO, Police Station (West), Shimla to ensure the implementation of injunction order dated 15.7.2021 in letter and spirit and for such purpose, the assistance of local Revenue Official/officials for identifying the suit land- **Held-** The impugned order to the extent it granted the liberty to the SHO to take assistance of local Revenue Official/officials for identifying the suit land cannot be sustained-With availability of the demarcation report with it, learned trial Court was not justified in abdicating its powers to the SHO or any Revenue Officer-Order set-aside- Petition allowed. (Paras 16, 17)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

Aggrieved against order dated 02.07.2022 passed by learned Senior Civil Judge, Court No.1, Shimla in CMA No. 1349 of 2022 in Civil Suit No. 86 of 2021, petitioner has approached this Court with a prayer to set-aside the impugned order.

2. Brief facts necessary for adjudication of the petition are that Civil Suit No. 86 of 2021, titled Leela Devi vs. Veer Singh and another, is pending disposal before learned Senior Civil Judge, Court No.1, Shimla.

Petitioner herein is the defendant and respondent herein is the plaintiff in above noted suit.

3. The suit of the plaintiff is for grant of decree for permanent prohibitory injunction restraining the defendant from interfering and encroaching upon her land specifically by raising construction of retaining wall thereon. The land in respect of which relief has been claimed is comprised in Khata Khatauni No.113/193, Khasra Nos. 1553/1267,1555/1268, 1275 and 1557/1276, total measuring 188-38 hectares, situated at Mohal Panjari, Patwar Circle, Tutikandi, Tehsil and District, Shimla, H.P.

4. Alongwith the suit, the plaintiff also prayed for interim injunction by seeking relief in the aforesaid terms.

5. The defendant has contested the suit by denying the allegation of plaintiff. It is denied on behalf of the defendant that he is trying to interfere in any manner in the land owned and possessed by the plaintiff. The specific stand of defendant is that whatever construction is being done by him, is on his own land.

6. On the application for interim injunction, learned trial Court passed an order dated 15.7.2021 and restrained the defendant as under:

> "11. On the other hand, if respondent No.1 is restrained from raising construction upon the suit land, no loss will be suffered by him as he has no right over the same, neither he claims any right upon the suit land. Thus, balance of convenience also exists in favour of the applicant. Being owner in possession of the suit land a prima-facie case also exists in his favour. Thus, application is allowed to the extent that respondent No.1 is restrained from raising construction of retaining wall or causing any interference upon the suit land comprised in 113/193, Khasra No. 1553/1267, 1275 and 1557/1276, measuring 100-32 hectares, situated at Mohal Panjari, Patwar Circle, Tutikandi, Tehsil and District Shimla. However, findings made herein above shall remain confined to the disposal of the

> present application and shall not have bearing on the merits of the main case. Application is decided accordingly, after its due completion be tagged with the main file."

7. During the pendency of the suit, plaintiff moved another application being CMA No.1349 of 2022 with the allegations that despite the order of interim injunction, being operative against defendant, the same was being openly violated. Accordingly, a prayer was made for police assistance in implementing the injunction order dated 15.7.2021.

8. The defendant contested the prayer of plaintiff so made in CMA No. 1349 of 2022. Learned trial Court decided the application and passed the impugned order dated 02.07.2022, the operative part of which is as under:

> "9. The contents of application are supported with affidavit. The applicant has also produced photographs showing progress in construction work. Thus, the material on record amply demonstrates that construction activity has been started on spot. Though, the respondent has taken the plea that he is not raising any construction over the suit land, however, keeping in view the fact that injunction has been granted by this Court and the applicant has filed an affidavit that the respondent is raising construction over the suit land, application seeking police assistance is allowed. Accordingly, SHO, P.S. West, is directed to ensure the implementation of injunction order dated 15.7.2021 in letter and spirit. The SHO is at liberty to take the assistance of local Revenue Official/Officials for identifying the suit land. Report be called for 20.8.2022. Let necessary reference be issued to the concerned SHO, forthwith. Application stands disposed of. After due completion, it be tagged with the main case file."

9. The grievance as raised by the petitioner before this Court is only to a limited portion of the impugned order whereby direction has been issued to the SHO, Police Station (West), Shimla to ensure the implementation of injunction order dated 15.7.2021 in letter and spirit and for such purpose, the assistance of local Revenue Official/officials for identifying the suit land.

10. I have heard learned counsel for the parties and have also gone through the records of the case carefully.

11. Learned counsel for the petitioner while assailing the impugned order has drawn the attention of this Court to the effect that there already exist two demarcation reports on the record of Civil Suit No. 86 of 2021. He contended that in the first instance, the demarcation was conducted by the Revenue Officer on the application of the plaintiff. The report of demarcation has been placed on record as Annexure P-7. Later, the plaintiff approached the learned trial Court by filing application under Order 26 Rule 9 of CPC for appointment of Local Commissioner to demarcate the disputed lands. The prayer of the plaintiff was allowed and demarcation was again conducted by the Revenue Officer/Local Commissioner. Thus, according to learned counsel for the petitioner, the respective boundaries of the properties of plaintiff and defendant have been ascertained more than once and there is no dispute as far as the identification of such boundaries is concerned.

12. The contention as raised on behalf of the petitioner, as noticed above, is substantiated on record. Annexure P-7 is the demarcation report prepared after conducting the demarcation on the application of plaintiff. Annexure P-10 is the second report of demarcation conducted by the Local Commissioner in pursuance to the order passed by learned trial Court.

13. In view of the fact that the demarcation has been conducted more than once, the plaintiff/ respondent should not have any misgiving about the boundaries of her property. In case the injunction order is being violated by the defendant or any other person, the same can easily be proved by pointing out towards the fixed boundary points of the respective properties of the parties as ascertained by the process of demarcation, from time to time.

14. The ascertainment of boundaries of the immoveable properties is the domain of the Revenue Officer in exercise of powers under Section 107 of

the Himachal Pradesh Land Revenue Act. Once, the demarcation is conducted by a competent Revenue Officer, fresh demarcation is not permissible, unless the earlier demarcation is set-aside in accordance with law.

15. Evidently, the plaintiff has not made challenge to any of the above noted demarcation reports. The report of demarcation placed on record by the Local Commissioner in pursuance to the orders passed by the learned trial Court, itself becomes a piece of evidence. Such evidence will be subject to scrutiny of learned trial Court at appropriate stage of the suit. Once, the demarcation reports are before learned trial Court as piece of evidence, its use can be made at appropriate stage for appropriate purposes. It is for the civil Court i.e. learned trial Court to decide on the evidentiary value of such reports. The disputed question as to whether there is violation of injunction order passed by the Court is also to be decided by learned trial Court in appropriate proceedings.

16. The power vested in learned trial Court under Section 151 of CPC, cannot be used beyond the scope justified by the context of dispute. The plaintiff came up with an allegation that interim injunction order granted by the learned trial Court was being violated. The defendant denied such allegation. Learned trial Court could pass the order to take the assistance of police in implementation of the order for limited purpose i.e. the police assistance could be allowed only to the justifiable extent. In view of the above observations, the impugned order to the extent it granted the liberty to the SHO to take assistance of local Revenue Official/officials for identifying the suit land cannot be sustained. Land can only be identified after demarcation and the demarcation is a quasi-judicial function and has serious consequence on the rights of the parties. With availability of the demarcation report with it, learned trial Court was not justified in abdicating its powers to the SHO or any Revenue Officer. The allowance of such practice will potentially cause

serious prejudice to the rights of parties which otherwise are subject to decision of the civil Court.

17. In view of above discussion, the petition is allowed. Impugned order dated 02.07.2022 passed by learned Senior Civil Judge, Court No.1, Shimla in CMA No. 1349 of 2022 in Civil Suit No. 86 of 2021, is set-aside to the extent it allowed the liberty to SHO, Police Station (West), Shimla to take assistance of local Revenue Official/officials for identifying the suit land.

18. The petition is disposed of accordingly, so also the pending application(s), if any.

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

Sarvan (since deceased) through his LRs Sh. Om Parkash and others
.....Petitioners

Versus

H.P. State Electricity Board Ltd. and others.
.....Respondents

For the Petitioner : Mr. Vipin Pandit, Advocate.
For the Respondents : Mr. Vishal Thakur, Advocate, vice
Mr. Vikrant Thakur, Advocate.

CMPMO No. 394 of 2022
Reserved on: 20.12.2022
Decided on: 30.12.2022

Constitution of India, 1950- Article 226- **Code of Civil Procedure, 1908-** Order 7 Rule 14(3)- Petitioner assailed the rejection of the application filed seeking leave of the court to file additional documents- **Held-** Prayer made by the plaintiffs before learned trial Court has rightly been rejected being belated- No merit- Petition dismissed. (Para 11)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

By way of instant petition, petitioner has assailed order dated 28.3.2022, passed by learned Civil Judge, Kasauli, District Solan, H.P. in Civil Suit No. 52/1 of 2015, whereby the application of petitioner under Order 7 Rule 14 (3) of the Code of Civil Procedure has been rejected.

2. Petitioners are the plaintiffs before the learned trial Court and the respondents are the defendants.

3. Plaintiffs have filed a suit for injunction against the defendants seeking to restrain them from causing interference in the suit property owned by the plaintiffs. It is alleged that the defendants are laying electricity

transmission line through the land of the plaintiffs and from above the trees standing thereon.

4. The suit is being contested by the defendants. The parties have already led their evidence. After closure of defendants' evidence, the plaintiffs filed an application under Order 7 Rule 14 (3) of CPC seeking leave of the Court to file additional documents. The plaintiffs submitted in the application that before the institution of the suit, a correspondence had been received from the defendants, the contents of which amounted to admission of defendants on the factum of existence of trees on the suit land. It was also submitted that even after filing of the suit, the defendants had issued a notice to the plaintiffs seeking permission to lope the tree branches over the suit land. The plaintiffs, thus, made request for placing on record the correspondence so received from defendants to prove the factum of existence of trees on the suit land.

5. The defendants contested the application by asserting that the application was moved at a belated stage only to linger on the proceedings of the suit. It was submitted that no correspondence was issued by the defendants as alleged in the application. It was further contended that the plaintiffs were not entitled for any injunction in view of the provisions of the Electricity Act, 2003, which authorise the defendants to lay transmission lines even over the private properties. According to defendants, the plaintiffs could be entitled to any other relief permissible in law in case they were able to prove any damage to suit property or the trees existing thereon.

6. I have heard learned counsel for the parties and have also gone through the records of the case carefully.

7. The stage of the suit is necessarily to be considered keeping in view the prayer made by the plaintiffs in their application under Order 7 Rule 14 (3) of CPC. The prayer so made is reproduced hereunder:

> *"It is, therefore, prayed that the submissions made above may kindly be considered and the application of the applicant may please be allowed and he may please be allowed to place on record the above said documents and prove the same accordingly keeping in view the detailed submissions made hereinabove in the interest of justice."*

8. It is evident from the above noted prayer that the plaintiffs not only wanted to place on record the documents detailed in the application, but also was seeking permission to prove the same. In a civil suit, placing on record of some documents without being proved in accordance with law will be a futile exercise.

9. The parties, in the instant case, have already led their evidence. The allowance of prayer of plaintiffs will necessary mean allowing him to lead additional evidence, which is impermissible in law after omission of Rule 17-A of Order 18 of the CPC, from statute book through an amendment, which came into effect in the year 2002. Even otherwise, plaintiffs had not made out any special case for allowing them to lead additional evidence by invoking inherent jurisdiction of the Civil Court.

10. As per plaintiffs, one of the document sought to be produced and proved by them, had its existence even prior to filing of the suit and another came into being during pendency thereof. As per the plaintiffs, these documents were issued by the defendants. That being so, the plaintiffs could have easily confronted the witnesses of defendants with such documents. It is not the case of plaintiffs that the documents were not available with them.

11. Thus, the prayer so made by the plaintiffs before learned trial Court has rightly been rejected being belated. In result, the petition is dismissed being without any merits.

Petition stands disposed of, so also the pending application(s), if any.

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

Jai Singh ...Petitioner.

Versus

Rajeev ...Respondent

2. CMPMO No. 540 of 2022

Jai Singh ...Petitioner

Versus

Kishori Lal ...Respondent

For the petitioner : Mr. Y.P. Sood, Advocate in both the petitions.

For the respondent : Mr. Arun Sehgal, Advocate in both the petitions.

CMPMO No. 182 of 2022
a/w CMPMO
No. 540 of 2022
Reserved on:13.12.2022
Decided on : 22.12.2022

Constitution of India, 1950- Article 227- **Code of Civil Procedure, 1908-** Order 43 Rule 1(r)-**Specific Relief Act**, **1963**- Sections 36, 41- Petitioner has assailed that the learned Appellate Court failed to appreciate the fact regarding recording of separate possession of co-sharers in the revenue records since long which prima-facie was proof of family arrangement/settlement /partition- **Held-** The conduct of plaintiffs smacks of some ulterior purpose than the assertion of any legal right- Learned Appellate Court erred in granting the injunction in favour of plaintiffs- Order set-aside- Petitions allowed. (Paras 22, 23)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge:

Both these petitions involve identical set of facts and questions of law, therefore, both the petitions are being decided by a common judgment.

1. CMPMO No. 182 of 2022 has arisen from an order which has its genesis in Civil Suit titled Rajeev vs. Jai Singh, pending before learned Senior Civil Judge, Court No.1, Rohru and CMPMO No. 540 of 2022 arises from an order having genesis in Civil Suit titled Kishori Lal vs. Jai Singh, pending before learned Civil Judge, Jubbal, Camp at Rohru, District Shimla, H.P.

2. Petitioner herein is defendant in both the suits. Respondents in these petitions are plaintiffs. Both plaintiffs are real brothers.

3. The plaintiffs have filed their respective suits against the defendant on the identical cause of action. Their grievance is that the land comprised in Khata-Khatauni No. 15 Min-56Min, Khasra No. 629/480, measuring 00-32-22 hectares in Chak Mandharli, Tehsil Rohru, District Shimla (for short "the suit land") is joint between the plaintiffs, defendant and other co-sharers. No partition has taken place. The suit land abuts the road and defendant had started raising construction thereon, which according to them was prejudicial to their rights.

4. Along with their respective suits, the plaintiffs also filed applications for interim injunction, restraining defendant from raising any construction on the suit land till final disposal of the suits. The applications for interim injunction filed by both the plaintiffs in their respective suits were dismissed by learned trial Courts. However, in separate appeals preferred by plaintiffs under Order 43 Rule 1 (r) CPC the orders passed by learned trial Courts have been reversed and interim injunction has been granted in favour of the plaintiffs and against the defendant, whereby the defendant has been restrained from raising construction on the suit land.

5. Aggrieved against the orders, passed by the learned Appellate Courts in respective appeals of the plaintiffs, defendant is before this Court by way of the instant petitions.

6. Defendant has assailed the impugned orders on the grounds that the learned Appellate Court has failed to appreciate the fact regarding recording of separate possession of co-sharers in the revenue records since long which prima-facie was proof of family arrangement/settlement /partition, as claimed by defendant. As per defendant, he has 1/6th share in the suit land. Though, the entire suit land was in his exclusive possession, he was raising construction on land, which was much less than his share. It has also been contended on behalf of the defendant that the impugned orders suffer from illegality in as much as the same have been passed without correctly assessing the facts of the case at the touch stone of established legal principles.

7. On the other hand, plaintiffs have supported the impugned orders. They have alleged that the suit land has special value as it abuts the road and in case the defendant is allowed to raise construction thereon, the rights of plaintiffs shall be prejudiced at the time of partition, which had already been sought by plaintiff Kishori Lal by filing an application under Section 123 of H.P. Land Revenue Act before the competent revenue court.

8. I have heard the learned counsel for the parties and have also gone through the record carefully.

9. Para-3 of the plaint instituted by plaintiff Rajeev reads as under:

> *"That the land of joint family/co-owners is situated in Revenue Chak Mandharli and is comprised in Khata No. 15, Khatuani No. 53 to 62 total 45 kittas measuring 10-74-86 hectares and Khata No. 14 Khatauni No. 50 to 52 total 4 kittas measuring 00-42-66 hectares and Khata No. 17 Khatauni No. 64 total 2 kitas measuring 00-02-80 hectares and Khata No. 16 Khatauni No. 63 1 kita measuring 00-01-86 hectares."*

10. Copy of jamabandi of the entire land comprised in Khata No. 15 is available in the record of CMPMO No. 540 of 2022. The total area in this khata is 10-74-86 hectares, corresponding to approximately 146 bighas.

Defendant has 1/6th share in the entire khata, which correspondence to approximately 25 bighas. The jamabandi also records separate possession of different co-owners and for such purpose separate khataunis have been recorded.

11. Plaintiff Rajeev has specifically mentioned in his plaint that on account of large family, branches of respective co-owners started living separately for the sake of convenience in the houses owned by joint family located on different locations. It has also been averred in the plaint filed by plaintiff Sh. Rajeev that different co-owners have raised construction on different parcels of land. Plaintiffs have tried to justify that such construction was with the consent of other co-owners.

12. Defendant in his written statement has submitted that about three decades back a family arrangement had taken place and according to which, the co-sharers were put in exclusive possession of separate parcels of land. It has further been contended that the family arrangement had taken effect and is evident from the long standing revenue entries. The defendant has asserted that the entire suit land has come to his share. In alternative he has submitted that the construction being raised by him is on an area which is less than his share even in the suit land.

13. Thus, on facts, it is not disputed that the co-owners including the parties to the suits have their separate possessions on separate parcels of land and they have also raised constructions of their respective houses/buildings.

14. Preventive relief of injunction is granted at the discretion of the Court. Section 36 of Specific Relief Act vests the courts with power to grant injunction at its discretion. Whereas perpetual injunction can be passed in terms of provisions of Section 41 of the Specific Relief Act. Temporary injunctions are governed by provisions of CPC. In order to succeed in getting the relief of injunction, one has to qualify three way test. He has to show

existence of prima-facie case, balance of convenience and irreparable loss in his favour. Thus, the courts while deciding the prayer for interim injunction have to assess the facts and circumstances of each case at the touch stone of aforesaid principles.

15. As noticed above, the question whether the land has already been partitioned or is yet to be partitioned is subject to final adjudication of the suit. The fact remains that the co-owners are holding their separate possession of separate parcels of land. Such arrangement is stated to be existing for about three decades and this fact has not been disputed by the plaintiffs. Another fact which is glaringly available on the record is that the suit land forms only a small portion of the entire joint land. The parties are having joint land in more than one khata. Even the khata, in which suit land is situated, has total area of 10-74-86 hectares. At the time of partition, the land in entire khata is to be taken into consideration and not in specific portion thereof. The equity between the co-sharers is settled by looking at the entire land vis-à-vis its location, value and potentiality etc.

16. It has also come on record that the construction being raised by defendant is on about 441 square meters. The defendant has the share equal to 17914 square meters in the entire khata. The allegation or apprehension of the plaintiffs that the construction being raised by defendant will prejudice their rights does not appear to be based on sound and legal reasoning. Though, the plaintiffs have tried to describe the suit land having higher value on the premise that it abuts the road, they have not described the potentiality of remaining joint land in the khata. It is not shown that on what basis the plaintiffs have drawn distinction between the suit land and remaining part of land in the khata. Even the suit land measures3,222 square meters and the defendant is raising construction on 441 square meters. A copy of field map available on record shows that defendant has started raising construction by covering 21 meters of suit land in length abutting the road. The field map

also reveals that the total length of the suit land abutting the road is approximately 120 meters. Viewed from that angle also, the defendant is not trying to cover the length of the suit land abutting the road more than his share.

17. In absence of any objective comparison of suit land with other parts of the land in joint khata, it cannot be assumed that the suit land is of special value to the plaintiffs. That being so, the plaintiffs in order to succeed in getting interim injunction against the defendant had to specifically plead and prima-facie satisfy the Court that some exclusivity was attached to that portion of suit land, which was being sought to be utilized by defendant by raising construction. It is not the case where the defendant is trying to exceed his share.

18. The fact that in past also different co-owners including the parties to suit have raised construction also weakens the case of plaintiffs. When plaintiffs had no objection when the co-owners had raised construction on different parts of the joint land in the same khata, they must come out with special reasons to raise objections against construction being raised by defendant. Another fact which cannot be ignored is that there is another structure on suit land being used as "Panchayat Ghar". At the time of its construction again there was no objection. Admittedly, no other co-owners have raised any objection to the construction being raised by defendant. The conduct of plaintiffs smacks of some ulterior purpose than the assertion of any legal right.

19. In the first instance, Kishori Lal filed suit. His interim application was dismissed by learned trial Court on 30.3.2022. Thereafter, on the identical cause of action, plaintiff Rajeev filed suit on 4.4.2022. Such conduct of plaintiffs is sufficient to question their bonafide.

20. Injunction being a discretionary and equitable relief, courts have to analyse the entire available material to assess the existence of prima-facie

case, irreparable loss and balance of convenience. Learned Appellate Court has failed to assess and analysis the above noticed relevant material and has erred in granting the injunction in favour of plaintiffs.

21. The photographs placed on record show that defendant has raised construction upto plinth level. By placing restraint on further construction till indeterminate period, defendant will not only be deprived from his right to have his house/building, he shall also be lead to financial loss as the construction prices are escalating day by day. In partition proceedings, the plaintiffs are not likely to loose all equities, keeping in view the largeness of the joint land.

22. Keeping in view the facts and circumstances of the case, both the petitions are allowed. Order dated 11.5.2022 in Civil Misc. Appeal No. 6-R/14 of 2022, passed by learned Additional District Judge (CBI Court), Shimla, District Shimla, H.P. Camp at Rohru and order dated 1.10.2022 in CMA No. 1-R/14 of 2022, passed by learned District Judge (Forests), Shimla, H.P. are set aside and the applications of plaintiffs in their respective suits for interim injunctions are dismissed.

23. Petitions are accordingly disposed of, so also pending miscellaneous application(s), if any.

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

Durga Dutt ....Petitioner.

Versus

Lok Prakash ...Respondent

For the petitioner : Mr. Parikshit Sharma, Advocate
For the respondent: Nemo

CMPMO No. 327 of 2022
Reserved on :21.12.2022
Decided on: 30.12.2022

Constitution of India, 1950- Article 226- **Code of Civil Procedure, 1908-** Section 10- Petition against the order allowing application of the defendant in said suit filed under Section 10 of the Code on the premise that the said Civil Suit was liable to be stayed in view of pendency of Counter Claim - **Held-** The necessary ingredient for application of Section 10 of the Code of Civil Procedure is clearly missing in the case and learned Senior Civil Judge, Kasauli has erred in passing the impugned order- Petition allowed. (Para 8)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

By way of instant petition, petitioner has assailed order dated 07.01.2022, passed by learned Senior Civil Judge, Kasauli in Civil Suit No. 385/1 of 2018, whereby application of the defendant in said suit filed under Section 10 of the Code of Civil Procedure has been allowed.

2. Petitioner herein had filed a Civil Suit No. 108/1 of 2012 in the Court of learned Senior Civil Judge, Kasauli in which Sh. Dharam Dutt was one of the defendant. The suit was subsequently withdrawn, however, a counter claim filed by Sh. Dharam Dutt in the said suit and registered as

Counter Claim No. 42/1 of 2015 is still continuing. Sh. Dharam Dutt is father of respondent herein. In Counter Claim No. 42/1 of 2015, Sh. Dharam Dutt is represented by respondent herein as his General Attorney.

3. Petitioner herein has filed another suit being No. 385-1 of 2018, titled Durga Dutt Vs. Lok Prakash, which is pending before learned Senior Civil Judge, Kasauli. Respondent herein is defendant in Civil Suit No. 385-1 of 2018. An application under Section 10 of the Code of Civil Procedure came to be filed in Civil Suit No. 385-1 of 2018 by respondent herein on the premise that the said Civil Suit was liable to be stayed in view of pendency of Counter Claim No. 42-1 of 2015.

4. Learned Senior Civil Judge has allowed the application of respondent herein vide impugned order and has ordered the Civil Suit No. 385-1 of 2018 to be stayed.

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

6. One of the mandatorily requirements for application of Section 10 of the Code of Civil Procedure is that both the suits should be between the same parties or the parties litigating under the same title. Admittedly, the Counter Claim No. 42-1 of 2015 has been filed by Sh. Dharam Dutt, who is father of respondent herein and in Civil Suit No. 385-1 of 2018, Sh. Dharam Dutt is not a party, rather, his son Sh. Lok Prakash i.e respondent herein is the defendant. Respondent herein is representing his father in Counter Claim No. 42-1 of 2015 only as his General Attorney. It being so, it cannot be said that the respondent herein is litigating in both the litigations under the same title. In Counter Claim No. 42-1 of 2015 respondent herein has not claimed any right in the property involved therein for himself, whereas in the Civil Suit No. 385-1 of 2018, he has claimed possession over the land comprised in Khasra Nos. 238 and 239 in his own right. Thus, the necessary ingredient for application of Section 10 of the Code of Civil

Procedure is clearly missing in the case and learned Senior Civil Judge, Kasauli has erred in passing the impugned order.

7. Without entering into the question regarding involvement of issues under both the litigations being directly and substantially the same, the instant petition is being disposed of only on the ground that Section 10 of the Code of Civil Procedure will not be applicable as the parties in both the litigations are different.

8. In view of above discussion, the petition is allowed. Order dated 07.01.2022, passed by learned Senior Civil Judge, Kasauli in Civil Suit No. 385/1 of 2018 is set-aside.

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

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

Surya Prakash ...Petitioner.

Versus

The Divisional Commissioner & another ...Respondents

For the petitioner : Mr. S.M. Goel & Mr. Vipul Sharda, Advocates.

For the respondent : Mr. Desh Raj Thakur, Addl. A.G. with Mr. Narender Thakur, Dy. A.G.

CMPMO No. 365 of 2022
Reserved on:5.12.2022
Decided on:14.12.2022

Constitution of India, 1950- Articles 227, 311- **CCS (CCA) Rules, 1965**- Rules 11 (vi), 14, 15, 23- The grievance of petitioner is against the vacation of the stay orders stating that impugned order suffers from illegality in as much as, the petitioner was not heard before passing such orders- Case of petitioner is that the Deputy Commissioner, Una being Disciplinary Authority had no *locus-standi* to approach the Appellate Authority i.e. the Commissioner for vacation/modification of order- **Held-** Penalty imposed on petitioner has come into effect without adjudication of the appeal of petitioner on merits- Adoption of such approach in exercise of quasi-judicial functions cannot be countenanced and needs deprecation- The Disciplinary Authority having performed its duties had no role to make submissions to convince the Appellate Authority about the merits of his decision- Order quashed- Petition allowed. (Paras 19, 20, 21)

Cases referred:

Associated Cement Companies Ltd. vs. P.N. Sharma & another AIR 1965, SC 1595;

Harinagar Sugar Mills Ltd. vs. Shyam Sunder Jhunjhunwala & others AIR 1961 SC 1669;

Ramesh Chandra Sankla& others vs Vikram Cement & others 2008 (14) SCC 58;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge:

Aggrieved against the order dated 11.7.2022, passed by Divisional Commissioner, Kangra Division at Dharmshala, (for short "the Commissioner") in Service Appeal No. 49 of 2022, the petitioner has approached this Court by invoking supervisory jurisdiction of this Court under Article 227 of the Constitution of India.

2. The facts are not disputed. Petitioner faced inquiry under Rule 14 of CCS (CCA) Rules, 1965 (for short the "Rules"). The Inquiry Officer held the charges proved against him. The Disciplinary Authority i.e. the Deputy Commissioner, Una imposed major penalty upon the petitioner under Rule 11 (vi) of the Rules. The post of petitioner has been ordered to be reduced from Kanungo to Patwari for a period of three years with immediate effect, vide order dated 10.3.2022 with further directions as under:-

> *"i) His pay will be reduced by stage from Rs. 20280 (Basic pay 16080+4200) to Rs. 18560 (Basic Pay 15360+3200) as per HPCS (RP) Rules 2009 for 03 years with effect from 10.3.2022 to 09.03.2025 with cumulative effect.*
>
> *ii) He will not earn annual increments during the period of reduction.*
>
> *iii) He will regain his original seniority in the higher post which has been assigned to him (as Kanungo) on expiry of above period."*

3. Aggrieved against the order dated 10.3.2022, passed by Disciplinary Authority, petitioner has approached the Appellate Authority i.e. The Commissioner by filing an appeal under Rule 23 of the Rules. Along with appeal, petitioner also preferred an application for staying the implementation of impugned order dated 10.3.2022, passed by Deputy Commissioner, Una. The appeal filed by petitioner is still pending before the Commissioner.

4. On 22.3.2022, Commissioner passed the following orders in the appeal as well as the application for interim relief, filed by the petitioner: -

"Whereas applicant/appellant Surya Prakash along with Counsel Sh. R.C. Seth has filed appeal against the order No. 1298-1301/DRO/SK dated 10th March, 2022 passed by the Deputy Commissioner Una. The appellant along with the main appeal has also filed application for staying the implementation of order under appeal.

I have heard the counsel for the applicant at length.

I am convinced with the arguments advances by the counsel therefore, the impugned order dated 10th March 2022 passed by the Deputy Commissioner Una is stayed till further orders.

Copy of order be sent to the Deputy Commissioner, Una."

5. Another subsequent order came to be passed by the Commissioner in the service appeal of petitioner on 11.7.2022 to the following effect:-

"Whereas Sh. Surya Prakash, applicant has filed service appeal in this office on 24.03.2022 against the order No. 1298-1301/DRO/SK dated 10.03.2022 passed by the Deputy Commissioner Una, which is pending in this office. He had also filed APPLICATION u/s 41 Rule 5 CP17C for staying the implementation of order No. 1298-1301/ DRO/ SK dated 10.03.2022 passed by the Deputy Commissioner, Una.

Whereas this office vide order dated 22.03.2022 stayed the above order passed by the Deputy Commissioner Una till further orders. Meanwhile the deputy Commissioner Una vide letter No. 2582 dated 26.05.2022 has submitted an application under Section 151 CPC for vacation of stay order dated 22.03.2022. In his application Deputy Commissioner has stated that Surya Prakash (the then Patwari) entered the Mutation No. 724 on basis of application submitted by only 9 persons out of 193 persons without any signature / consent of all the co-sharers and as such he has violated Section 135 of the H.P. Land Revenue Act & procedure laid down under the Chapter 14 of H.P. Land Records Manual. He has further submitted that the charges leveled against appellant sh. Surya Prakash were proved in the inquiry report submitted by the Inquiry Officer-cum- Additional Deputy Commissioner, Una and the act of the said official has been found to be in complete violation of CCS (Conduct) Rules, 1964), which is sufficient reason for vacation of stay order. The Deputy Commissioner, Una has also informed that action vide order dated

10.03.2022 has been taken after giving the official due opportunity of being heard and the official in question has been given punishment after following due procedure as laid down in CCS (CCA) Rules, 1964.

I, have gone through the contents of the application submitted by Deputy Commissioner Una and have considered the facts elaborated by him. Considering the facts placed by Deputy Commissioner Una I am of the view that this is a fit case to review the stay order in office dated 22.03.2022 is allowed. Stay order granted by this office in service appeal No. SA/49/2022 is withdrawn and stay stands vacated. However, the appeal of Sh. Surya Prakash is being considered separately on merit as per provision of CCS (CCA) Rules. Copy of this order be sent to Sh. Surya Prakash and Deputy Commissioner, Una for information and necessary action."

6. The grievance of petitioner is against aforesaid order dated 11.7.2022 on the ground that the impugned order suffers from illegality in as much as, the petitioner was not heard before passing such orders. It is further the case of petitioner that the Deputy Commissioner, Una being Disciplinary Authority had no *locus-standi* to approach the Appellate Authority i.e. the Commissioner for vacation/modification of order dated 2.3.2022.

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

8. Article 227 of the Constitution of India vests this Court with powers of superintendence over all Courts and Tribunals throughout the territories in relation to which, this Court can exercise jurisdiction. Before touching the merits of impugned order, it will be necessary to adjudicate ***whether this Court in exercise of aforesaid powers can rule upon the merits of an order, passed by an Appellate Authority vested with powers to hear service appeal under Rule 23 of the Rules***?

9. To ascertain as to whether an authority qualifies to be a Tribunal within the meaning of the term under Article 227 of the Constitution of India, it will be necessary to explore the nature and extent of power exercisable by

such authority authority by it. If the authority exercises quasi-judicial powers, it may qualify the test to be termed as Tribunal depending upon facts of each particular case.

10. The petitioner, undoubtedly, is holding the civil post under the State Government. Thus, he has protection of Articles 309 and 311 of the Constitution. Clause-2 of Article 311 specifically prohibits the dismissal, removal or reduction in rank of a member holding a civil post except after an inquiry. It is further provided a proviso that where it is proposed after such inquiry, to impose upon him any penalty, such penalty may be imposed on the basis of the evidence adduced during such inquiry. Article 309 of the Constitution empowers the State to make rules relating to the recruitment and the conditions of service of its employees.

11. The rules have been framed by the Central Government in pursuance to Articles 309 and 311 of the Constitution of India. State Government has adopted these rules in their applicability to its employees.

12. The procedure for inquiry contemplated under Article 311 of the Constitution is prescribed in Rule 14 of the Rules. The inquiry against the petitioner was also held under the aforesaid rules. The Disciplinary Authority has taken action on the inquiry report under Rule 15 of the Rules and has imposed major penalty as prescribed under Rule 11 (vi) of the Rules.

13. Under Rule 23 (ii), of the Rules the order passed by Disciplinary Authority i.e. Deputy Commissioner, Una in this case is appealable. The Appellate Authority is the Commissioner. Rule 27 of the Rules provides for procedure for consideration of appeals filed under Rule 23. Sub-rule (3) of Rule 27 specifically provides as under: -

> "(3) In an appeal against any other order specified in rule 23, the appellate authority shall consider all the circumstances of the case and make such orders as it may deem just and equitable".

Thus, the Appellate Authority has been vested with a discretion to consider all circumstances and thereafter to pass such orders as may be deemed "just and equitable".

14. The vestment of above discretion cannot be said to be absolute. The objectivity should form the foundation of such discretion. The above stated power, thus, entrusts the Appellate Authority with quasi-judicial function and in this view of the matter, adherence to the basic principles of judicial procedure and principle of natural justice become inherently vested.

15. A Constitution Bench of Hon'ble Supreme Court in the case of ***Harinagar Sugar Mills Ltd. vs. Shyam Sunder Jhunjhunwala & others*** reported in ***AIR 1961 SC 1669*** while discussing the proposition relating to the judicial functions of Government has observed as under:-

> *"The function that the Central Government performs under the Act and the Rules is to hear an appeal against the action of the Directors. For that purpose, a memorandum of appeal setting out the grounds has to be filed, and the Company, on notice, is required to make representations, if any, and so also the other side, and both sides are allowed to tender evidence to support their representations. The Central Government by its order then directs that the shares be registered or need not be registered. The Central Government is also empowered to include in its orders, directions as to payment of costs or otherwise. The function of the Central Government is curial and not executive. There is provision for a hearing and a decision on evidence, and that is indubitably a curial function.*
>
> *36. Now, in its functions Government often reaches decisions, but all decisions of Government cannot be regarded as those of a tribunal. Resolutions of Government may affect rights of parties, and yet, they may not be in the exercise of judicial power. Resolutions of Government may be amenable to writs under Arts. 32 and 226 in appropriate cases, but may not be subject to a direct appeal under Art. 136 as the decisions of a tribunal.* ***The position, however, changes when Government embarks upon curial functions, and proceeds to exercise judicial power and decide disputes. In these circumstances, it is legitimate to regard the officer who deals with the matter and even Government itself as a tribunal. The officer who decides,***

> ***may even be anonymous; but the decision is one of a tribunal, whether expressed in his name or in the name of the Central Government.*** *The word "tribunal" is a word of wide import, and the words "Court" and "tribunal" embrace within them the exercise of judicial power in all its forms. The decision of Government thus falls within the powers of this Court under Art. 136."*

16. It has thus been observed that if the Government embarks upon curial functions and proceeds to exercise judicial powers and decide disputes, in such circumstances, it is legitimate to refer the officer who deals with the matter as a "Tribunal". Hon'ble Supreme Court observed that the proceedings before the Tribunal are required to comply with rules in the interest of justice. They may not be bound by direction and technicality of rules of evidence but their decisions must be consistent with the principles of law. Noticeably, the term "Tribunal" referred to in aforesaid observations of Supreme Court, were indicative to Article 136 of the Constitution.

17. Reference can also be gainfully made to the Constitutional Bench of the Hon'ble Supreme Court in the matter of ***Associated Cement Companies Ltd***. vs. ***P.N. Sharma & another*** reported in ***AIR 1965, SC 1595***, in which the then Hon'ble Chief Justice speaking for the Bench observed as under:-

> *"25. It would thus be seen that in dealing with the question as to whether respondent No. 2, while it exercises its appellate power under Rule 6(6), is a tribunal under Art. 136(1), we must enquire whether respondent No. 2 has been clothed with the State's inherent judicial power to deal with disputes between parties and determine them on the merits fairly and objectively. That is the test which has been consistently applied by this Court in considering the question about the status of anybody or authority as a tribunal under Art. 136(1). Before we proceed to apply this test to respondent No. 2's status under R. 6(6), we think it is necessary to advert to one aspect of the matter which sometimes creates some confusion.*

26. We have referred to the three essential attributes of a sovereign State and indicated that one of these attributes is the legislative power and legislative function of the State, and we have also seen that in determining the status of an authority dealing with disputes, we have to enquire whether the power conferred on the said authority or body can be said to be judicial power conferred on it by the State by means of a statute or statutory rule. The use of the expression "judicial power" in this context proceeds on the well-recognised concept of political science that along with legislative and executive powers, judicial power vests in a sovereign State. In countries where rigid separation of powers has been effected by written Constitutions, the position is very different. Take, for instance, the Australian Constitution. Section 71 of the Commonwealth of Australia Constitution Act (63 & 64 Viet. Chapter 12) provides that the judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes. It is clear that the scheme of sections 71 to 80 which form part of Chapter III of the said Constitution, is that the judicial power of the State can be conferred only on courts recognised by the provisions of the said Chapter. In other words, it is not competent to the Legislature in Australia to confer judicial power properly so-called on anybody or authority other than or apart from the courts recognised by Ch. 111; and so, the use of the expression "judicial power" or its conferment in regard to tribunals which are not courts properly so-called, would under the Australian Constitution be wholly inappropriate. If any tribunals other than courts are established and power is given to them to <teal with and decide special disputes between the parties, the power which such tribunals would exercise cannot be described as judi- cial power, but would have to be called quasi-judicial power.

33. The question which we have to decide in the present appeal is whether the State Government is a tribunal when it exercises its authority under R. 6(5) or R. 6(6), No rules have been made prescribing the procedure which the State Government should follow in dealing with appeals under these two sub-rules, and there is no statutory provision conferring on the State Government any specific powers which are usually associated with the trial in courts and which are intended to help the court in reaching its

decisions. The requirements of procedure which is followed in courts and the possession of subsidiary powers which are given to courts to try the cases before them, are described as trappings of the courts, and so, it may be conceded that these trappings are not shown to exist in the case of the State Government which hears appeals under R. 6(5) and R. 6(6). But as we already stated, the consideration about the presence of all or some of the trappings of a court is really not decisive. The presence of some of the trappings may assist the determination of the question as to whether the power exercised by the authority which possesses the said trappings, is the judicial power of the State or not. The main and the basic test however, is whether the adjudicating power which a particular authority is empowered to exercise, has been conferred on it by a statute and can be described as a part of the State's inherent power exercised in discharging its judicial function. Applying this test, there can be no doubt that the power which the State Government exercises under R. 6(5) and R. 6(6) is a part of the State's judicial power. It has been conferred on the State Government by a statutory Rule and it can be exercised in respect of disputes between the management and its Welfare Officers. There is, in that sense, a lis; there is affirmation by one party and denial by another and the dispute necessarily involves the rights and obligations of the parties to it. The order which the State Government ultimately passes is described as its decision and it is made final and binding. Besides, it is an order passed on appeal. Having regard to these distinctive features of the power conferred on the State Government by R. 6(5) and R. 6(6), we feel no hesitation in holding that it is a Tribunal within the meaning of Art. *136(1)".*

Concurring with the judgment Hon'ble Justice R. S. Bachawat added and held as under: -

"43. The limitations as also the full amplitude of the meaning of the word "tribunal" are thus to be found on a consideration of Art. 136 in all its parts, with such aid as may be derived from other Articles of the Constitution. The context of Art. 136 and the constitutional background impose the limitation that the tribunal must be an adjudicating authority vested with the judicial power of the State. Barring this limitation, the word must receive a wide and liberal construction. The basic principle of Art. 136 is that if a litigant feels that injustice has been done by a Court or any other body charged with the administration of justice, there is one superior Court he may always approach and which, in its

discretion, may give him special leave to appeal so that justice may be done. The plenitude of the residuary appellate power under Art. 136 embraces within its scope all adjudicating authorities vested with the judicial power of the State, whether or not such authorities have the trappings of a Court.

44. An authority other than a Court may be vested by statute with judicial power in widely different circumstances, which it would be impossible and indeed inadvisable to attempt to define exhaustively. The proper thing is to examine each case as it arises, and to ascertain whether the powers vested in the authority can be truly described as judicial functions or judicial powers of the State. For the purpose of this case, it is sufficient to say that any outside authority empowered by the State to determine conclusively the rights of two or more contending parties with regard to any matter in controversy between them satisfies the test of an authority vested with the judicial powers of the State and may be regarded as a tribunal within the meaning of Art.136. Such a power of adjudication implies that the authority must act judicially and must determine the dispute by ascertainment of the relevant facts on the materials before it and by application of the relevant law to those facts. This test of a tribunal is not meant to be exhaustive, and it may be that other bodies not satisfying this test are also tribunals. In order to be a tribunal, it is essential that the power of adjudication must be derived from a statute or a statutory rule. An authority or body deriving its power of adjudication from an agreement of the parties, such as a private arbitrator or a tribunal acting under S. 10A of the Industrial Disputes Act, 1947, does not satisfy the test of a tribunal within Art. 136. It matters little that such a body or authority is vested with the trappings of a Court. The Arbitration Act, 1940 vests an arbitrator with some of the trappings of a Court, so also the Industrial Disputes Act, 1947 vests an authority acting under S. 10-A of the Act with many of such trappings, and yet, such bodies and authorities are not tribunals."

18. Thus, it becomes clear that the basic test to qualify as "Tribunal" is that it should be a body vested with judicial powers of the State. It has also been categorically held that the word Tribunal mentioned in Article 227 of the Constitution has the same meaning as in Article 136. In this view of the matter, the Commissioner while vested with power to hear service appeal

under the rules embarks upon judicial powers of the state and by implication performs quasi-judicial functions. Needless to say that the jurisdiction to discharge quasi-judicial functions inherently carries with it strict adherence to basic principles of judicial procedure.

19. Reverting to the facts of the case, perusal of impugned order clearly reveals that neither the petitioner was informed about the application, moved by the Deputy Commissioner, Una for vacation of interim stay order dated 22.3.2022, nor was he afforded any opportunity of being heard. Further, it is evident from the impugned order that the Commissioner had applied his mind to the merits of the case. In these circumstances, it was incumbent upon the Commissioner to have afforded the petitioner an opportunity of being heard. The consequence of impugned order is that the penalty imposed on petitioner has come into effect without adjudication of the appeal of petitioner on merits. Adoption of such approach in exercise of quasi-judicial functions cannot be countenanced and need deprecation.

20. Another contention of petitioner that the Disciplinary Authority i.e. Deputy Commissioner, Una had no *locus-standi* to pray for vacation of stay is also not without substance. The decision of Disciplinary Authority itself was before the Appellate Authority for adjudication. Article 311 of the Constitution and Rule 15 of the Rules specifically provides that the penalty can be imposed by the Disciplinary Authority on the basis of evidence available in inquiry, meaning thereby that imposition of penalty by Disciplinary Authority would not be a mechanical process. The merit of the factors taken into consideration by the Disciplinary Authority while imposing the penalty were still under adjudication. The Disciplinary Authority having performed its duties had no role to make submissions to convince the Appellate Authority about the merits of his decision. The manner, in which impugned proceedings have been conducted, clearly smears of biasness.

20. This Court's power under Article 227 is there to meet the interest of justice. Hon'ble Supreme Court in the matter of ***Ramesh Chandra Sankla& others vs Vikram Cement & others 2008 (14) SCC 58*** has held as under:-

> *"90 Now, it is well settled that jurisdiction of High Courts under Articles 226 and 227 is discretionary and equitable. Before more than half a century, the High Court of Allahabad in the leading case of Jodhey v. State, (AIR 1952 All 788 observed);*
>
> > *"10. ….There are no limits, fetters or restrictions placed on this power of superintendence in this clause and the purpose of this Article seems to be to make the High Court the custodian of all justice within the territorial limits of its jurisdiction and to arm it with a weapon that could be wielded for the purpose of seeing that justice is meted out fairly and properly by the bodies mentioned therein."*
> >
> > *(emphasis supplied)*
>
> *91. The power of superintendence under Article 227 of the Constitution conferred on every High Court over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction is very wide and discretionary in nature. It can be exercised ex debito justitiae, i.e. to meet the ends of justice. It is equitable in nature. While exercising supervisory jurisdiction, a High Court not only acts as a court of law but also as a court of equity. It is, therefore, power and also the duty of the Court to ensure that power of superintendence must `advance the ends of justice and uproot injustice.*"

21. In light of above discussion, impugned order dated 11.7.2022, passed by Divisional Commissioner, Kangra Division at Dharmshala, (for short "the Commissioner") in Service Appeal No. 49 of 2022 (Annexure P-5) is quashed and set aside. It is also deemed expedient in the interest of justice to direct the Appellate Authority to decide the service appeal of petitioner expeditiously and in any case not later than 31.1.2023. Pending applications, if any, also stand disposed of.

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

Between:
SARBJIT SINGH SON OF LATE SHRI PREM SINGH, R/O GURGAON (HARYANA) AT PRESENT OCCUPIED GURU NANAK MARKET, UPMOHAL GUMMA, SECTOR-3, PARWANOO, TEHSIL KASAULI, DISTRICT SOLAN, HP.

….PETITIONER.

(BY MR. PRATAP SINGH GOVERDHAN, ADVOCATE)

AND

SMT. HARBHAJAN KAUR W/O LATE SHRI PREM SINGH, R/O GURU NANAK MARKET UPMOHAL GUMMA, SECTOR-3 PARWANOO, TEHSIL KASAULI, DISTRICT SOLAN, HP.

….RESPONDENT.

(BY. MR. ARJUN K. LALL, ADVOCATE)

CIVIL MISC. PETITION MAIN (ORIGINAL)
No. 356 of 2022
Decided on: 03.11.2022

Constitution of India, 1950- Article 227- **Code of Civil Procedure, 1908-** Order 6 Rule 17- Petitioner assails order passed by Learned Senior Civil Judge rejecting application seeking amendment in the written statement- **Held-** In the absence of due diligence in the application the prayer made for amendment of written statement was *per se* barred- Order upheld- No merit- Petition dismissed. (Paras 16, 18)

This petition coming on for admission 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 assails order dated 06.07.2022, passed by the Court of learned Senior Civil Judge, Kasauli, District Solan, H.P., in Civil Miscellaneous Application No.91-6/2022, in Civil Suit No.142/1 of 2020, titled Smt. Harbhajan Kaur Versus Sarbjeet Singh, in terms whereof, an application filed under Order 6, Rule 17 of the Civil Procedure Code by the petitioner/defendant, seeking amendment in the written statement has been rejected.

2. Brief facts necessary for the adjudication of the present petition are that a suit for mandatory injunction and permanent prohibitory injunction has been filed by the respondent/plaintiff (hereinafter referred to as 'Plaintiff') against the petitioner/defendant (hereinafter referred to as 'defendant'). This Civil Suit was instituted in the month of November, 2020. The written statement to the same was filed by the defendant in the month of November, 2020 itself. The application seeking amendment in the written statement was filed by the defendant in the month of April, 2022, in terms whereof, the defendant prayed that in the course of preparing the case for cross-examination of the plaintiff, it transpired that complete description of the property was left from being described in the written statement and certain assertions of the defendant were also not made in the written statement mistakenly and inadvertently, which were crucial to decide the material controversy between the parties and on these grounds, proposed amendments were sought to be incorporated in the written statement. It was further averred in the application that the proposed amendments would go to the route of the case and shall clinch the controversy between the parties and as the plaintiff had concealed the material facts in the suit, therefore, the amendment was necessary. It was also pleaded in the application that proposed amendments were neither contrary to the plea earlier raised in the written statement nor inconsistent with it. The proposed amendments as per

the defendant would not change the nature and stand already taken, but would help the defendant to get justice and on these basis, a prayer was made for granting permission to the defendant to amend the written statement.

3. The application was opposed by the plaintiff, *inter alia*, on the ground that the plea of the defendant that in the written statement, certain assertions and facts stood mistakenly and inadvertently let out was incorrect and complete defence to the plaint stood taken by the defendant in the original written statement so filed. It was also mentioned in the reply that the defendant was concocting a false story just to grab the property of the plaintiff who was an aged lady. It was further denied in the reply that proposed amendments were necessary for the adjudication of the case and would clinch the controversy as alleged and it was submitted in the reply that the amendments, if allowed, would change the nature of the suit at a belated stage.

4. In terms of the order under challenge, the application so filed has been rejected by learned Trial Court, *inter alia*, on the ground that a perusal of the written statement filed demonstrates that whatever was proposed to be incorporated by way of amendment, in fact, was already averred in the written statement, which earlier stood filed and in these circumstances there was no reasonable and justifiable ground to allow the application.

5. Mr. Pratap Singh Goverdhan, learned counsel for the petitioner has argued that the impugned order is not sustainable in the eyes of law, for the reason that the learned Court below erred in not appreciating that as there were some inadvertent mistakes committed at the time of filing of the written statement, which discrepancies could be fatal as far as the petitioner is concerned, therefore, in these circumstances, in the interest of justice, learned Trial Court ought to have had allowed the application filed before it. Relying upon the judgment of Hon'ble Supreme Court of India in *Jai Jai Ram*

Manohar Lal Versus National Building Material Supply, Gurgaon, AIR 1969 Supreme Court 1267, learned counsel has submitted that it is settled law that the rules of procedure are intended to be handmaid to the administration of justice and a party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. Mr. Goverdhan, learned counsel, on the strength of this judgment has submitted that that the Court always gives leave to amend the pleadings of a party, unless it is satisfied that the party applying was acting mala fide, or that by his blunder, he had caused injury to his opponent which may not be compensated for by an order of costs and as there is absence of all these factors in the present case, therefore, in these circumstances, rejection of the application by the learned Trial Court is not sustainable in the eyes of law. Learned counsel further relied upon the judgment of Hon'ble Supreme Court in *Mahila Ramkali Devi and others* Versus *Nandram (dead) through Legal Representatives and Others*, *(2015) 13 Supreme Court Cases 132* and by referring to Para-20 onwards of this judgment, he has contended that Hon'ble Supreme Court has reiterated in this judgment also that the rules of procedure are intended to be handmaid to the administration of justice and a party cannot be refused just relief because of mistake, negligence, inadvertence or even infraction of rules of procedure.

6. Opposing the petition, Mr. Arjun K. Lall, learned counsel appearing for the respondent has argued that the application filed under Order 6, Rule 17 of Civil Procedure Code, seeking amendment of the written statement was *per se* not maintainable as the ingredients of Order 6, Rule 17 of Civil Procedure Code were not pleaded in the same. Mr. Lall has vehemently argued that it is settled law that in order to succeed a party seeking amendment in the pleadings besides satisfied the test that the amendment is necessary for the purpose of the adjudication of the lis, also has to satisfy the test of "due diligence" as is contained in the proviso to Order 6, Rule 17 of the

Civil Procedure Code and now it is settled law that until and unless a party demonstrates "due diligence", then even if the amendment being prayed for is necessary for the adjudication of the lis, the amendment cannot be granted, though as per him as far as the present case is concerned, the proposed amendments were not necessary for the purpose of adjudication of the case.

7. By placing reliance upon the language of Order 6, Rule 17 of Civil Procedure Code, Mr. Lall has argued that the statutory provision itself is very clear that after the trial has commenced, no application for amendment shall be allowed unless the Court comes to the conclusion in-spite of "due diligence", the party could not be raised the matter before the commencement of the trial. In support of his contention, learned counsel has relied upon the judgment of the Hon'ble Supreme Court in *Pandit Malhari Mahale* Versus *Monika Pandit Mahale and Others*, *(2020) 11 Supreme Court Cases 549*, in which Hon'ble Supreme Court in Para-6 to 8 onwards has held as under:-

> " *6. From the evidence on record, it does appear that evidence had begun and thereafter amendment application was filed. Without their being any finding by the Court as contemplated by Order VI Rule 16 proviso, the Court ought not to have allowed the amendment.*
>
> *7. In the present case, the Civil Judge has not returned any finding that the Court is satisfied that in spite of due diligence, the party could not have raised the matter before the commencement of trial. In Vidyabai & Ors. v. Padmalatha & Anr. [(2009) 2 SCC 409], this Court observed in para 19 as under:*
>
> > ***"19. It is primal duty of the Court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to Order 6 Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court's jurisdiction in a case of this nature is limited. Thus unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint."***

8. There being no finding by the Court that the Court is satisfied in spite of due diligence, the party could not introduce amendment before commencement of the trial, the order of the Trial Judge is unsustainable. The High Court has not adverted to the above aspect of the matter. In view of aforesaid, we allow the appeal and set aside the order of the High Court as well as of the Civil Judge, the amendment application stands dismissed.”

Learned counsel for the respondent has also relied upon the judgment of Hon’ble High Court of Delhi in *Rajesh Kumar Yadav and Another* Versus *Ganesh Singh Yadav*, *2022 SCC OnLine Del. 2445*, in which Hon’ble Delhi High Court while interpreting the provisions of Order 6, Rule 17 of Civil Procedure Code, has held as under:-

> “ ***12.*** *Order VI Rule 17 of the CPC:*
>
> *"**17. Amendment of pleadings**. - The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties :*
>
> *Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."*
>
> ***13.*** *The proviso to Order VI Rule 17 is clear and categorical. It engrafts a statutory proscription to allowing amendments after trial has commenced in the suit unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. In order to escape the rigour of the proviso, therefore, the party seeking to amend the plaint or the written statement would have to establish that (i) due diligence was exercised by it and (ii) despite exercise of due diligence, the party could not have raised the matter before commencement of trial. These are twin considerations, which are cumulatively required to be satisfied where amendment of pleadings is sought after trial commences.*
>
> ***14.*** *In the present case, the application seeking amendment does not even satisfy the first condition. A plea of due diligence is antithetical to a plea of error or negligence on the part of the Counsel. They cannot cohabit. One destroys the other. The*

> *submission, of the petitioners, in their amendment application, that the pleas being sought to be introduced by amendment were omitted in the written statement owing to negligence of the Counsel amounts to an explicit admission that there was want of due diligence. Once such an admission was made, no occasion arose to examine whether the second ingredient, requires satisfaction to escape the rigor of the proviso to Order VI Rule 17 of the CPC, was or was not pleaded. If there was want of due diligence at the time when the pleadings were originally drafted and filed, ipso facto, the proviso to Order VI Rule 17 would kick in, and the amendments would be barred*."

8. I have heard learned counsel for the parties and have gone through the impugned order as well as the pleadings on record.

9. The dispute in the present case is between mother and son. The plaintiff is the mother and the defendant is son. The suit, which has been preferred by the mother against the son, *inter alia*, is to the effect that the husband of the plaintiff, namely, Prem Singh was owner-in-possession of the suit property, which property during his lifetime was bequeathed by late husband of the plaintiff in her favour and after the death of her husband, she became owner-in- possession thereof and mutation of the property was also sanctioned in her favour. Further, as per the averments made in the plaint, the plaintiff has averred that she was residing in the suit property alongwith her younger daughter who is a special child and while in the month of March, 2020, she was visiting her eldest daughter, namely, Smt. Jasvinder Kaur at Panchkula with her younger daughter, due to sudden outbreak of COVID-19 Pandemic, she was forced to live with her eldest daughter alongwith her special child. Taking advantage of this fact, on 09.06.2020, in the absence of the plaintiff, defendant came from Gurgaon and forcibly entered in the house by breaking the door. The entry of the defendant in the suit property was without the permission of the plaintiff and when she asked the defendant to vacate the same, he twice sought time to do the needful, but as he did not vacate the premises, hence, the suit.

10. The defence taken by the son in the written statement is to the effect that father of the defendant, i.e. husband of the plaintiff, during his lifetime desired distribution of the self-acquired property, i.e. the suit property amongst his legal heirs and accordingly, he executed a Will which was duly registered on 26.05.2010. As per the defendant, in terms of the Will, the same relates only to shops and godown situated on the ground floor, first floor and second floor, but the same did not pertain to the house in question built up on the roof top and as such the defendant alongwith the plaintiff were co-sharers in the said house built up on the roof top and had a right to reside in the said house. It was further the stand of the defendant that the interest which was created in terms of the Will in favour of the plaintiff over the suit property by late Shri Ram Singh was for the lifetime of the plaintiff. On the basis of these pleadings, Issues were framed by the learned Trial Court on 21.08.2021 and thereafter the case was listed for recording the statements of the plaintiff's witnesses. The plaintiff tendered her statement by way of affidavit on 17.09.2021, as is evident from the zimini orders which have been made available to the Court by learned counsel for the parties and thereafter, the case was being listed for cross-examination of the plaintiff and the recording of statements of other witnesses of the plaintiff when the application was filed under Order 6, Rule 17 of the Civil Procedure Code by the defendant, seeking amendment in the written statement.

11. The above facts have been given by me just to highlight that the stage at which the application was filed was a stage where the trial had already commenced. Before proceeding further, it is necessary to refer to the provisions of Order 6, Rule 17 of the Civil Procedure Code as they stand today and as they stood at the time when the application was preferred by the defendant before learned Trial Court. Order 6, Rule 17 of the Civil Procedure Code provides that the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as

may be just and all such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties. The proviso to the said provision provides that no application for amendment shall be allowed after the trial has commenced unless the Court comes to the conclusion that in-spite of due diligence the party could not have raised the matter before commencement of the trial. The provision of Order 6, Rule 17 of the Civil Procedure Code referred to hereinabove exists as it is after the amendment which was incorporated in the Civil Procedure Code in the year 2002.

12. This Court is of the considered view that the provisions of Order 6, Rule 17 of the Civil Procedure Code as they stand today, though do confer the power to a Court at any stage of the proceedings to allow either party to alter or amend the pleadings in such manner and on such terms as may be just which are necessary for the purpose of determining the real question in controversy between the parties, but, before this power so vested in the Court is exercised by it, it has to test as to whether the party seeking such amendment, despite 'due diligence', could not have raised the matter before commencement of the trial which was now being intended to be incorporated by way of amendment.

13. Now, in the background of said statutory provision, if the Court peruses the application which was filed, seeking amendment of the written statement, a perusal thereof demonstrates that there is not even a whisper in the application vis-a-vis the exercise of 'due diligence' on the part of the applicant, despite which the proposed amendments could not be incorporated at the stage when the written statement was filed. To the contrary, Para-1 of the application mentions that at the time of preparing the case of cross-examination of the plaintiff, it transpired that complete description of property was left out from being described in the written statement and some assertions of the defendant were also left to be made in the written statement

mistakenly and inadvertently, which are very crucial to decide the matter in controversy between the parties. Thus, the inadvertence and mistake committed at the time of filing the written statement was the foundation of the application which was filed, seeking amendment in the written statement.

14. Hon'ble High Court of Delhi, in *Rajesh Kumar Yadav and Another* Versus *Ganesh Singh Yadav* (supra) has been pleased to hold that plea of "due diligence" is antithetical to a "plea of error" or "negligence" on the part of the counsel and they cannot cohabit. One destroys the other. Hon'ble Court thereafter went on to hold that the submission of the petitioners in their amendment application that the pleas being sought to be introduced by amendment were omitted in the written statement owning to negligence of the counsel amounts to an explicit admission that there was want of "due diligence" and once such an admission was made, no occasion arose to examine whether the second ingredient, requires satisfaction to escape the rigor of the proviso to Order 6, Rule 17 of the Civil Procedure Code was or was not pleaded. Hon'ble Court held that if there was want of due diligence at the time when the pleadings were originally drafted and filed *ifso facto* the proviso of Order 6, Rule 17 of the Civil Procedure Code would kick in and the amendments would be barred.

15. In the present case also, as has already been mentioned hereinabove, the foundation of the application filed under Order 6, Rule 17 of the Civil Procedure Code is "error", "inadvertence" and "mistake". Obviously, the same being antithetical to "due diligence". In the present case also, the proviso to Order 6, Rule 17 of the Civil Procedure Code kicks in and the amendments were *per se* barred. This Court reiterates that in terms of the proviso which exists in Order 6, Rule 17 of the Civil Procedure Code, in fact a duty is cast upon the Court to examine as to whether there was an exercise of "due diligence" on the part of the party which is seeking amendment and if the Court comes to the conclusion that yes, there was "due diligence" only,

then the Court would undertake the exercise as to whether the proposed amendments indeed are required to be allowed or not. However, if the Court comes to the conclusion that there was no due diligence on the part of the party then the second part need not be examined by the Court at all.

16. Therefore, in the absence of any pleading of due diligence in the application and further in the absence of due diligence otherwise being reflected from the averments which were made in the application, the prayer made for amendment of written statement was *per se* barred and could not have been allowed and therefore, the rejection of the same by learned Trial Court cannot be faulted with. Though, this Court is not oblivious to the fact that the application of the petitioner has not been rejected by learned Trial Court on the reasoning given hereinabove, however, as the application otherwise was neither maintainable nor it could have been allowed, therefore, dismissal of the same by learned Trial Court, may be by assigning some different reasons, calls for no interference.

17. As far as the judgments being relied upon by learned counsel for the petitioner are concerned, this Court concurs with him that it is settled law that rules of procedure are intended to be the handmaid to the administration of justice, but then it is also a settled law that procedure cannot be permitted to be abused at the behest of one party. As the application which was filed by the petitioner seeking amendment in the written statement was *per se* not maintainable as it was not satisfying the statutory ingredients of Order 6, Rule 17 of the Civil Procedure Code, therefore the judgments being relied upon by learned counsel for the petitioner are of no assistance to him, because in the said judgments Hon'ble Supreme Court has not held that amendment has to be allowed even if the other party fails to demonstrate due diligence.

18. Accordingly, in view of the observations made hereinabove, present petition being devoid of any merit is dismissed. Pending miscellaneous applications, if any, stand disposed of. Interim order, if any, stands vacated.

At this stage, learned counsel for the respondent has made a request that as the plaintiff is a senior citizen, learned Trial Court be directed to dispose of the Civil Suit within a time bound period. With regard to this prayer made, all that this Court can observe at this stage is that learned Trial Court shall make an endeavour to decide the case as expeditiously as possible, subject to the proper assistance rendered to it by the parties.

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

Bhagi Ram ....Petitioner

Versus

Ramesh Chand and others ...Respondents

For the petitioner :Mr. Vijender Katoch, Advocate.
For the respondents :Mr. Jagat Pal, Advocate.

Civil Revision No.144 of 2022
Reserved on: 06.12.2022
Decided on: 19.12.2022

Constitution of India, 1950- Article 226- Plaintiff has assailed the impugned order passed by learned District Judge vacating the injunction granted by Ld. Trial Court- **Held-** Merely because the resumption proceedings are pending before Revenue Court, the valuable rights of defendants over the suit land cannot be taken away- The balance of convenience and irreparable loss also is in favour of the defendants in comparison to the plaintiff- the order of injunction is an equitable and discretionary relief, no fault can be found with the impugned order passed by learned District Judge- Petition dismissed. (Paras 12, 14, 15)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge *(Oral)*

By way of instant petition, petitioner has assailed order dated 08.08.2022, passed by learned District Judge, Kangra at Dharamshala in C.M.A. No. 09-D/XIV/2022, whereby order dated 21.04.2022, passed by learned Senior Civil Judge, Dharamshala in C.M.A. No. 363 of 2021, has been modified by partly accepting the appeal of the respondents herein.

2. Parties hereinafter shall be referred to by the same status as they hold before learned Trial Court. Petitioner is the plaintiff and respondents are the defendants.

3. Brief facts necessary for adjudication of the petition are that land measuring 0-34-96 hectares comprised in old Khata No. 9, Khatauni No. 15, Khasra No. 268, vide jamabandi for the year 1971-72 was recorded in ownership of the plaintiff alongwith other co-owners and in possession of predecessor-in-interest of defendants namely Sh. Heeru as non-occupancy tenant. On coming into force of H.P. Tenancy and Land Reforms Act, 1972, plaintiff applied for resumption of land, out of old Khasra No. 268. The Land Reforms Officer allowed his resumption application to the extent of 0-04-34 hectares and such land is denoted by Khasra No. 432/268. Proprietary rights in rest of the land comprised in old Khasra No. 268 vested in the defendants and the same was described by Khasra Nos. 511/434/268 and 509/433/268. Mutations were accordingly attested and revenue records were updated.

4. Aggrieved against the resumption order passed by Land Reforms Officer, plaintiff had filed an appeal before District Collector, Kangra at Dharamshala, which was accepted and the matter was remanded back to Land Reforms Officer with the direction to decide afresh, vide order dated 24.11.2003. Defendants have assailed aforesaid order passed by District Collector, Kangra at Dharamshala, before Divisional Commissioner, Kangra and matter is stated to be still pending before said authority.

5. Plaintiff claimed injunction against defendants on the ground that the resumption proceedings had not attained finality and therefore, defendants had no right to use any portion of entire suit land. Alongwith the plaint, plaintiff also filed an application under Order 39 Rules 1 and 2 of Code of Civil Procedure, seeking relief in following terms:-

> *"It is, therefore, prayed that the respondents/defendants may pleased be restrained from changing the nature of the suit land, by raising any construction interfering in any manner whatsoever, cutting and removing the trees from the suit land comprised in Khata No. 12, Khatauni No. 36, Min.37 and 38, Khasra Nos. 432/268, 511/434/268 and 509/433/268 Kita 3 area measuring 0-31-36 hect. situated at Mohal Jhikali Oder Mauza Oder Tehsil Dharamshala District Kangra, H.P. vide Jamabandi 2018-19 till final disposal main suit by allowing the instant application in the interest of justice."*

6 Learned Trial Court allowed the application of the plaintiff for interim injunction and defendants were restrained from raising any construction on entire land comprised in new Khata No.12 and old Khata No. 9, Khasra No. 268 measuring 0-34-96 hectares in Mohal-Jhikali Oder, Mauja-Oder, Tehsil Dharamshala, District Kangra, H.P. Defendants filed an appeal under Order 43 Rule 1(r) of the Code of Civil Procedure, against order passed by learned Trial Court. Learned District Judge, vide impugned order partly allowed the appeal and vacated the injunction granted by learned Trial Court in so far as it pertains to land comprised in Khasra Nos. 509/433/268. Plaintiff has assailed the impugned order passed by learned District Judge, Kangra at Dharamshala by way of instant petition.

7. I have heard learned counsel for the parties and have also gone through the records of the case carefully.

8. Admittedly, plaintiff has no claim on entire suit land. By way of resumption proceedings, he is claiming only a share therein. Land Reforms Officer had already allowed his resumption application by allotting him a share in the suit land. His dissatisfaction with the order of Land Reforms Officer was only to the extent of the quantum of share.

9. Perusal of contents of plaint also does not reveal that plaintiff has staked claim on entire suit land. Plaintiff has approached learned Trial Court with vague averments that the defendants had threatened to cut trees

and raise construction on the suit land. Plaintiff has not averred that entire suit land was sought to be utilized by the defendants. The entire suit land consists of huge area of 0-34-96 hectares and it cannot be presumed that defendants would be raising construction on the entire area.

10. Preventive relief of injunction is a discretionary relief. In order to succeed in getting a decree of perpetual injunction, plaintiff has to establish his right. It is also trite law that the scope of interim injunction cannot be wider than the perpetual injunction to which plaintiff may be held entitled. Further, plaintiff has also to succeed in proving existence of an obligation in his favour and its beach by the defendants.

11. As noticed above, plaintiff can resume the part of the suit land. He has not been able to make out a case that the defendants are under obligation to preserve the entire suit land in its present state. Undisputedly, defendants have a substantial share in the suit land and the same also finds reflection in revenue record. For restraining the defendants from raising any construction over even on a part of suit land, plaintiff had to make out special case, in accordance with law.

12. In the given facts of the case, plaintiff cannot be said to have a *prima facie* case for injuncting the defendants from utilizing any part of the suit land. Merely because the resumption proceedings are pending before Revenue Court, the valuable rights of defendants over the suit land cannot be taken away. The order under challenge before Divisional Commissioner, Dharamshala, was passed in the year 2003 and after lapse of about 19 years, the proceedings have not been finally decided. The balance of convenience and irreparable loss also is in favour of the defendants in comparison to the plaintiff.

13. Defendants are satisfied with the impugned order, whereby they have been allowed to raise construction on Khasra Nos. 509/433/268, keeping in view the fact that defendant Ranjit Singh was intending to raise

construction of a house by taking benefit under **"Mukhyamantri Awas Yojna**", for which he has been sanctioned Rs. 1,50,000/- by the Competent Authority. Plaintiff has taken exception even to partial modification of order passed by learned District judge, Kangra at Dharamshala, H.P.

14. Keeping in view that the order of injunction is an equitable and discretionary relief, no fault can be found with the impugned order passed by learned District Judge, Dharamshala.

15. In result, there is no merit in this petition and the same is accordingly dismissed.

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

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

Swastik Wire Products .....Petitioner

Versus

Principal Commissioner of Income Tax
and others ...Respondents

For the petitioner: Mr. Vishal Mohan, Senior Advocate with Mr. Praveen Sharma and Mr. Aditya Sood, Advocates.

For the respondents: Mr. Vinay Kuthiala, Senior Advocate with Ms. Vandna Kuthiala, Advocate.

CWP No. 6472 of 2022
Reserved on : 21.12.2022
Decided on: 26.12.2022

Constitution of India, 1950- Article 226- **Income Tax Act, 1961-** Sections 143(1), 148A- The grievance of the petitioner is that Assessing Office proceeded to reject the reply and passed an order under Section 148A(d) of the Act-**Held-** The Assessing Officer has not passed a speaking order under Section 148A(d) and has not dealt with each and every objection in the reply submitted by the petitioner- violated the basic principles of natural justice- Petition allowed with directions. (Para 20)

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The petitioner is a partnership concern engaged in its business activities in Baddi. The petitioner is regularly assessed to income tax and had duly filed its return for the assessment year 2018-19 (impugned assessment

year). The said return was processed under Section 143(1) of the Income Tax Act, 1961 by the Central Processing Centre of respondent No.1, Bengaluru and order to this effect was also passed vide Annexure P-2. The respondents thereafter served upon the petitioner notice under Clause (b) of Section 148A of the Income Tax Act (for short 'the Act') on 19.03.022, asking the assessee/petitioner to show cause as to why case should not be reopened under Section 147 read with Section 148 of the Act.

2. A perusal of the show cause notice would go to reveal that the case was sought to be reopened on the following grounds:-

> *"a). That as per the learned Assessing Officer the firm ha sold mutual funds amounting to (which E Rs.8,13,63,000/- had not been declared in the income tax return a 13 income for the impugned assessment year.*
>
> *b) That the learned Assessing officer was of the view the assessee firm had interest in assets amounting Rs.18,07,73,000/- which had also not been offered for taxation.*
>
> *c) Last but not the least, the learned Assessing Officer being the respondent No.2 was of the view that assessee's firm had made foreign remittance which had not been declared in the return of income. The value of the foreign remittance amounting to Rs.78,29,747/- and in totality according to the learned Assessing Officer a sum of Rs.26,99,62,000/- had escaped assessment."*

3. The petitioner filed reply to the show cause notice dated 26.03.2022, wherein it had categorically been mentioned that neither the petitioner had sold any mutual funds, held interest in assets nor had made foreign remittance of Rs.78,29,747/- and as such it was vehemently denied that income to that extent had escaped assessment. The petitioner had not asked for supply of the documents whereby it had been inferred that the assessee had made aforementioned transactions. However, in the reply dated 26.03.2022, it was also stated by the petitioner that during the relevant assessment year, it had made the foreign remittance of Rs. 81,05,333/- (and

not of Rs. 78,29,747/-) which was already declared in the return of income filed and also, documentary evidences in support of its claim were duly filed before the ld. Assessing officer.

4. The Assessing Office proceeded to reject the reply and passed an order under Section 148A(d) of the Act, constraining the petitioner to file the instant petition.

5. The respondents have contested the petition by filing reply, wherein preliminary objections regarding maintainability of the petition, more particularly, on the ground of availability of the alternative remedy has been taken. In addition thereto, the respondents have sought to justify their action by claiming that the income of Rs. 26,99,62,000/-and had escaped notice and, therefore, the impugned notice had rightly been issued. The respondents have further sought to justify their claim on the ground that the notice under Section 148A(b) was issued on the basis of the information received in the online portal of the Income Tax Department i.e. "Insight Portal under High Risk/CRIU/VRU". According to the respondents, the petitioner had sold mutual funds amounting to Rs. 813.63 lakhs to different parties during the financial year 2017-18 relevant to assessment year 2018-19. The petitioner had interest in assets of firm or association of persons as a partner or member amounting to Rs.1807.73 lakhs and that an income of Rs. 29,99,62,000/- has escaped assessment.

6. We have heard learned counsel for the parties and have also gone through the material placed on record.

7. Section 148A of the Act reads as under:-

> **148A.** The Assessing Officer shall, before issuing any notice under section 148,—
> (*a*) conduct any enquiry, if required, with the prior approval of specified authority, with respect to the information which suggests that the income chargeable to tax has escaped assessment;
> (*b*) provide an opportunity of being heard to the assessee, [1]**[***]** by serving upon him a notice to show cause within such time, as may

be specified in the notice, being not less than seven days and but not exceeding thirty days from the date on which such notice is issued, or such time, as may be extended by him on the basis of an application in this behalf, as to why a notice under section 148 should not be issued on the basis of information which suggests that income chargeable to tax has escaped assessment in his case for the relevant assessment year and results of enquiry conducted, if any, as per clause (*a*);

(*c*) consider the reply of assessee furnished, if any, in response to the show-cause notice referred to in clause (*b*);

(*d*) decide, on the basis of material available on record including reply of the assessee, whether or not it is a fit case to issue a notice under section 148, by passing an order, with the prior approval of specified authority, within one month from the end of the month in which the reply referred to in clause (*c*) is received by him, or where no such reply is furnished, within one month from the end of the month in which time or extended time allowed to furnish a reply as per clause (*b*) expires:

Provided that the provisions of this section shall not apply in a case where,—

(*a*) a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A in the case of the assessee on or after the 1st day of April, 2021; or

(*b*) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any money, bullion, jewellery or other valuable article or thing, seized in a search under section 132 or requisitioned under section 132A, in the case of any other person on or after the 1st day of April, 2021, belongs to the assessee; or

(*c*) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any books of account or documents, seized in a search under section 132 or requisitioned under section 132A, in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, [2]**[***relate to, the assessee; or*

*(*d*) the Assessing Officer has received any information under the scheme notified under section 135A pertaining to income chargeable to tax escaping assessment for any assessment year in the case of the assessee.***]**

Explanation.—For the purposes of this section, specified authority means the specified authority referred to in section 151.]

8. At the outset, it needs to be noticed that Section 148A was incorporated so as to ensure that the there is proper application of mind by the authorities by passing a detailed, reasoned and a speaking order under Section 148A(d) of the Act, instead of passing a cryptic order in a mechanical manner. The Assessing Officer was expected to rebut each and every objection, reply and submissions with proper reasons. This is clearly evident from the new revised guidelines issued by the Central Board of Direct Taxes dated 01.08.2022, though the assessment in the case is prior to the issuance of such guidelines. Nonetheless, these guidelines would definitely work as a guideline and also an indicator as to why the same have been issued.

9. As observed above, the aforesaid guidelines are issued after the assessment, the same would in *stricto senso* not be applicable to the facts of the instant case.

10. Adverting to the facts, it would be noticed that notice under Clause (b) of Section 148A of the Act was served upon the petitioner, which reads as under:-

> Whereas have information which suggests that income chargeable to tax for the Assessment Year 2018-19 has escaped assessment within the meaning of section 147 of the Income-tax Act, 1961. The details of the information and enquiry, if conducted, are enclosed with this notice in Annexure-A.
>
> 2. You are required to show cause as to why, in view of the details contained in Annexure A, a notice section 148 of the Income Tax Act, 1961 should not be issued.
> 3. You may, to the extent technologically feasible, submit your response with supporting documents (if any) on the above mentioned issues electronically in 'e-proceeding facility through your account in e-filing portal at your convenience on or before 26/03/2022.
> 4. This notice is being issued after obtaining the prior approval of the PCIT, Chandigarh-1 accorded on date 19/03/2022 vide Reference No. 100000028876635.
>
> **Annexure**
>
> As per information received under RMS (Risk Management System for the F.Y. 2017-18 relevant to A.Y. 2018-19, under 'High Risk CRIU/VRU

information, the assessee M/s Swastik Wire Products, PAN-ABGFS3429J is engaged in the business of manufacturing. The Assessee has shown total taxable income of Rs. 813.62 lacs during the year under consideration as compared to Rs. 786.57 lacs shown in the previous year The assessee has sold Mutual funds amounting to Rs. 813.63 lacs to different persons during the year under consideration, interest held in assets of a firm or association of persons as a partner or member by the assessee has been shown at Rs. 1807.73 lacs Further, the assessee has shown Foreign remittances of Rs. 78.29. The details as well as source of such transactions call verification/clarification.

2. In view of the above facts, under the provisions of clause (b) of section 148A of the Income Tax Act, 1961, you are hereby provided an opportunity of being heard and asked to show cause as to why an amount of Rs.26,99,62,000/- should not be treated as income which has escaped assessment and notice u/s 148 of the Income Tax Act, 1961 may not be issued in your case on the basis of above referred information available in record for the A.Y. 2018-19. This show cause is being issued after requisite approval from the specified authority as per the provisions of section 11 of the Income Tax Act, 1961.

11. The respondents filed reply and the same is reproduced as under:-

1. As mentioned in the notice that "The assessee has sold Mutual funds amounting to Rs. 813.63 locs to different persons during the year under consideration"

In respect to the same we want to submit that the assessee has not sold mutual funds amounting to Rs. 813.63 Lacs during the relevant assessment year 2018-19. However, your goodself stated in the notice that sale of mutual funds of Rs. 813.63 lacs were made during the year under consideration. So, keeping in view of providing an opportunity of being heard and principal of natural justice, it is requested to your goodtself to kindly provide details of transactions as claimed by your goodsell of Rs. 813.63 lacs in the name of the assessee firm like any document to provide dates of each transactions and name of mutual fund held in the name of the assessee firm. bank account in the name of assessee which shows the amount of transaction etc. so that assessee's response can be Bled with your goodself-with respect to information provides.

2. Further, it is mentioned in the notice that "interest held in assets of a firm or association of persons as a partner or member by the assessee has been shown at Rs. 1897.73 lac

   In respect to the same we submit that the assessee firm does not have any interest in assets of a firm or association as a partner or member amouting to Rs. 1807.73 Lacs. However, your goodself stated in the notice that the assessee has interest held in assets of a firm or association of persons as a partner or member by the assessee has been shown at Rs. 1807/73 lacs. So. keeping in view of providing an opportunity of being heard and principal of natural justice, it is requested to your goodsell to kindly provide detalls of such interest held by the assessee firm as claimed by your goodself of Rs.1807.73 lacs Uke any document to provide the name of the firm or association in which the assessee is partner or member, date of acquisition of such interest, bank account which shows the transaction for purchase of such interest etc. so that assessee's response can be filed with your goodself with respect to Information provided.
3. Also it is mentioned in the notice that the assessee has made a foreign remittances of Rs. 78.28 in respect to the same, we want to submit that the assessee firm has not undertaken any foreign remittance of Rs. 78:29 as mentioned in the notice during the relevant assessment year 2018-19. However, it is submitted that assessee has imported Plant and machinery amounting to Rs. 81,05,333 during the relevant assessment year. So, foreign remittance of Rs 81,05,333 was made for purchase of such plant and machinery. It is further submitted that such remittance was made exclusively for business purpose and such transaction is properly entered in the books of accounts of the assessee. The assessee has also filed its ITR on the basis of such books of accounts. Documentary evidences to support such transaction are enclosed herewith.

   Hence, keeping in view the above mentioned points, it is submitted that above stated information did not pertain to the assessee firm. Since the information does not pertain to the assessee, so question of escapement of income for the relevant assessment year does not arise at all. So, it is requested to your goodself to kindly accept the same and drop the notice issued u/s 148A. However, if your goodself have any specific information like date of transaction, amount, name of mutual fund, name of country to which remittance has been made etc. kindly provide the same, so that we could file our response accordingly.

Hope you find the above information in order. Kindly apprise us in case of any queries.

12. The respondents still proceeded to issue an order under Clause (d) of Section 148A of the Act, wherein not only the contents of the earlier notice, but also the reply submitted by the petitioner were quoted in verbatim.

13. As regards the allegations of mutual funds, it was for the first time that the names of such persons were specified, as is evident from para 1 of the order, which reads as under:-

> "In consonance to the insight instructions No. 48 dated 24.02.2022, the information flagged through source of Insight Portal in accordance with the Risk Management strategy under the category "High Risk CRIU/VRU" has been received in respect of the assessee for the F.Y. 2017-18 as under:-

Nature of transaction	Source of information	Value
Sale of Mutual funds	Arun Kumar Jain, Rameshwar Dayal Jain/sameer Aggarwal, Yogender Kumar Jani	8,13,63,000/-
Interest in held in assets	Yogender Kumar Jain, Arun Kumar Jain	18,07,72,000/-
Foreign remittances	Oriental Bank Commerce	78,29,747/-

14. Had the respondents earlier referred to the names, obviously, the petitioner would have been in a better position to file its reply to the show cause. But that apart, it needs to be noticed that only reason given by the respondents for issuing the show cause notice by passing an order under Clause (d) of Section 148A is contained in para 3 thereof, which reads as under:-

> *"3. The submission filed by the assessee are neither relevant as per the show cause notice nor tenable due to the lack of any supporting evidence. Since the assessee has not fully or truly disclosed the sources of income amounting to Rs. 26,99,62,000/- during the previous year*

2017-18 relevant to AY. 2018-19 therefore, I have reasons to believe that the income to the extent of Rs. 26,99,62,000/- has escaped assessment for the Asstt.year 2018-19. Therefore, in this case I have reasons to believe that the income to the extent of Rs 26,99,62,000/- has escaped assessment for the A.Y 2018-19."

15. The Assessing Officer has virtually not considered the reply of the petitioner received in response to the show cause notice under Section 148A(b). That apart, the Assessing Officer has not passed a speaking order under Section 148A(d) and has not dealt with each and every objection in the reply submitted by the petitioner. In short, has violated not only the statutory provisions, but has also violated the basic principles of natural justice. Even the adverse material which needs to be referred, was not in the show cause notice thereby affording the proper opportunity of hearing to the petitioner.

16. In coming to such conclusion, we are fortified by the judgment of Delhi High Court in ***Best Buildwell (P.) Ltd.*** vs. ***Income Tax Officer***. The relevant paragraphs of the same are reproduced as under:-

"7. Having heard the counsel for parties, this Court is of the view that the impugned show cause notice as well as the impugned order under section 148A(d) of the Act are based on distinct and separate grounds.

8. The show cause notice primarily states that "it is seen that the Petitioner has made purchases from certain non-filers. However no details or any information of these entities was provided to the Petitioner. It is not understood as to how the Petitioner was to know which of the entities it dealt with were filers or non-filers!

9. Further, the impugned order states that a report was prepared against the Petitioner-company which concludes that the assessee had shown bogus purchases from bogus entities to suppress the profit of the company and reduce the tax liability during the years 2015-16 to 2020-21. However, no such report which forms the basis for the information on which the assessment was proposed

to be reopened had been provided to the Petitioner. In fact, there are no specific allegations in the show cause notice to which the Petitioner could file a reply.

10. Keeping in view the aforesaid, the impugned order dated 30th March, 2022 passed under section 148A(d) and notice dated 31st March, 2022 issued under section 148 of the Act are quashed and the Respondents are given liberty to furnish additional materials in support of the allegations made in the show cause notice dated 16th March, 2022 within three weeks including reports, if any. Thereafter, the Assessing Officer shall decide the matter in accordance with law. With the aforesaid directions, the present writ petition along with pending application stands disposed of. The rights and contentions of all the parties are left open."

17. In ***Divya Capital One (P.) Ltd*** vs. ***Assistant Commissioner of Income Tax***, the Court held as under:-

"NEW RE-ASSESSMENT SCHEME WAS INTRODUCED BY THE FINANCE ACT, 2021 WITH THE INTENT OF REDUCING LITIGATION AND TO PROMOTE EASE OF DOING BUSINESS

7. This Court is of the view that the new re-assessment scheme (vide amended sections 147 to 151 of the Act) was introduced by the Finance Act, 2021 with the intent of reducing litigation and to promote ease of doing business. In fact, the legislature brought in safeguards in the amended re-assessment scheme in accordance with the judgment of the Supreme Court in GKN Driveshafts (India) Ltd. v. ITO (2002) 125 Taxman 963120031 259 ITR 19 before any exercise of jurisdiction to initiate re-assessment proceedings under section 148 of the Act.

8. This Court is further of the view that under the amended provisions, the term "information" in Explanation 1 to section 148 cannot be lightly resorted to so as to re-open assessment. This information cannot be a ground to give unbridled powers to the Revenue. Whether it is "information to suggest under amended law or "reason to believe under erstwhile law the benchmark of "escapement of income

chargeable to tax" still remains the primary condition to be satisfied before invoking powers under section 147 of the Act. Merely because the Revenue-respondent classifies a fact already on record as "information" may vest it with the power to issue a notice of re-assessment under Section 148A(b) but would certainly not vest it with the power to issue a re-assessment notice under Section 148 post an order under Section 148A(d).”

18. It is because of such lapses on the part of the Assessing Officer while proceeding under Section 148A that the CBDT on 01.08.2022 had issued the following guidelines:-

1. In view of substitution of Section 147/148/149/151, amendments in Section 151A and insertion of Sections 148A in the Income-tax Act, 1961 (“Act”) vide Finance Act, 2021 and Finance Act, 2022, the procedure for issuance of notice under Section 148 stands amended. This has necessitated a revision of the existing guidelines on the subject issued vide F.No.247/140/2017-A&PC-1 dated 10.01.2018. In view of the above, in supersession of the earlier guidelines as referred above, the following new guidelines are hereby issued.

2. The salient features of Finance Act, 2021 and Finance Act, 2022 w.r.t. Section 148 to 151A ‘i.e. assessment/reassessment procedure of “Income Escaping Assessment” are as under:

2.1 Before issuing notice u/s 148, the Assessing Officer (AO) must observe the following procedures laid down u/s 148A except in certain categories of cases (specified in the proviso to section 148A):

i. Notice under section 148 can be issued only if there is an information with the assessing officer which suggest that income chargeable to tax has escaped assessment in the case of assessee for the relevant assessment year. Information has been defined as per Explanation 1 of Section 148 of the Act.

Explanation 1- *Information* with the AO which suggests that the income chargeable to tax has escaped assessment-

(i) *any information in the case of the assessee for the relevant assessment year in accordance with the risk management strategy formulated by the Board from time to time*;

(ii) any audit objection to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act; or

(iii) any information received under an agreement referred to in section 90 or section 90A of the Act; or

(iv) any information made available to the Assessing Officer under the scheme notified under section 135A; or

(v) any information which requires action in consequence of the order of a Tribunal or a Court

ii. Further, explanation 2 to section 148 provides the incidence where assessing officer shall be *deemed to have information*.

Explanation 2- where AO shall be deemed to have information suggesting escapement of income-

(i) *a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A, on or after the 1st day of April, 2021, in the case of the assessee; or*

(ii) *a survey is conducted under section 133A, other than under sub-section (2A) of that section, on or after the 1st day of April, 2021, in the case of the assessee; or*

iii) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner, that any money, bullion, jewellery or other valuable article or thing, seized or requisitioned under section 132 or section 132A in case of any other person on or after the 1st day of April, 2021, belongs to the assessee; or

(iv) the Assessing Officer is satisfied, with the prior approval of Principal Commissioner or Commissioner, that any books of account or documents, seized or requisitioned under section 132 or section 132A in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, relate to, the assessee, the Assessing Officer shall be deemed to have information which suggests that the income chargeable to tax has escaped assessment in the case of the assessee where the search is initiated or books of account, other documents or any assets are requisitioned or survey is conducted in the case of the assessee or money, bullion, jewellery or other valuable article or thing or books of account or documents are seized or requisitioned in case of any other person.

iii. Proviso' to section 148A provides that in the following category of cases the provisions of Section 148A shall not apply, if,

(a) a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A in the case of the assessee on or after the 1st day of April, 2021; or

(b) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any money, bullion, jewellery or other valuable article or thing, seized in a search under section 132 or requisitioned under section 132A, in the case of any other person on or after the 1st day of April, 2021, belongs to the assessee; or

(c) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any books of account or documents, seized in a search under section 132 or requisitioned under section 132A, in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, relate to, the assessee; or

(d) the Assessing Officer has received any information under the scheme notified under section 135A pertaining to income chargeable

to tax escaping assessment for any assessment year in the case of the assessee.

In other words, in above mentioned category of cases, notice under section 148 can be issued with the prior approval of specified authority without following the procedure mentioned in the section 148A.

iv. The "**specified authority**" for the seeking approval for conducting enquiry u/s 148A(a), passing order u/s 148A(d) and issuance of notice u/s 148 shall be:

Specified Authority for sanction for issue of notice u/s 148, 148A (a) and 148A (d)	**Time limit (Calculated from the end of the relevant AY)**
PCIT or PDIT or CIT or DIT (ref. Seetion 151(i))	Upto 3 years
PCCIT or PDGIT or where there is no PCCIT or PDGIT then approval from CCIT or DGIT (ref Section 151(ii))	More than 3 years but upto 10 years

v. Explanation 2 to section 148 of the Act provides that if a survey u/s 133A of the Act (other than under section 133A (2A)) was conducted in the case of the assessee on or after 1st April, 2021, the Assessing officer shall be deemed to have information which suggests that income chargeable to tax has escaped assessment. However, it is to clarify that the due procedure as prescribed u/s 148A needs to be followed in such cases also before issuing a notice u/s 148 of the (refer proviso to section 148A).

vi. The AO shall, if required, undertake enquiries on any "**information**" received/available with him which suggests that the income chargeable to tax has escaped assessment in a previous year only with the prior approval of "**specified authority**".

vii. If the result of enquiry/information available suggests that the income chargeable to tax has escaped assessment, the AO shall provide an opportunity of being heard to the assessee by issuing a show cause notice u/s

148A(b) of the Act. The said notice shall provide between 7 to 30 days' time to the assessee for submitting the reply. **A template of show cause notice is enclosed at Annexure-A1**

viii. If an assessee requests for a personal hearing, the same may be dealt with following the principle of natural Justice by giving a reasonable period for compliance of notice specifying the date of hearing.

ix. As per 3rd proviso to section 149, *for the purposes of computing the period of limitation as per this section, the time or extended time allowed to the assessee, as per show-cause notice issued under clause (b) of section 148A or the period during which the proceeding under section 148A is stayed by an order or injunction of any court, shall be excluded.*

x. Further, as per 4th proviso to section 149, *where immediately after the exclusion of the period referred to in the immediately preceding proviso (i.e. 3rd proviso), the period of limitation available to the Assessing Officer for passing an order under clause (d) of section 148A is less than seven days, such remaining period shall be extended to seven days and the period of limitation under this sub-section shall be deemed to be extended accordingly.*

xi. The AO has to consider the reply of assessee furnished, if any, in response to the show-cause notice referred to in clause (b) of section 148A before passing the order u/s 148A(d).

xii. The AO shall mandatorily pass a speaking order u/s 148A(d) in all cases with the 'prior approval of the specified authority' (**Annexure- A2**) for such order u/s. 148A (d), except in the cases covered in Para 2.1 (iii) above of these guidelines, irrespective of whether issuance of notice u/s 148 is being recommended or not. **A template of such order** u/s. 148A (d) **is enclosed at Annexure- A3**.

xiii. Once an order under clause (d) of section 148A has been passed, no further approval is required for issuance of notice u/s 148 by the AO, with effect from 1.4.2022.*

(*except for cases in which procedure under Section 148A is being applied for implementation of the Hon'ble Supreme Court's judgment in the case of UOI Vs. Ashish Agrawal (2022 SCC online SC 543) dated 4.5.2022 for which specific instruction dated 11.5.2022 has been issued.)

xiv. In the cases emanating out of Audit objection, AO has to ensure that extant instructions/ guidelines/ SOPs have been duly adhered with.

xv. The confidential information such as from FIU, foreign jurisdictions, LEAs etc would be governed by respective guidelines governing sharing of such

xvi. Information relevant to the case of the assessees' income escaping assessment must be provided and Information not relevant to the case of the assessee must be redacted.

2.2 Notices along with annexures shall be sent to assessee as follows-

Category of case	**Order/sanction document to be sent along with notice u/s 148**
Cases covered under para 2.1 (iii) above	● Notice u/s. 148 (Annexure B) and ● prior approval of specified authority u/s. 151 of the Income Tax Act (Annexure A2).
Other cases	● Notice u/s. 148 – (Annexure B), ● the Order u/s. 148A (d) – (Annexure A3) and ● approval of the specified authority for such order u/s 148A (d)- (Annexure A2)

(Proforma of above notices/orders are illustrative and suggestive in nature and may be modified suitably based on the facts and circumstances of the case, if required.)

3. For the purposes of assessment or reassessment or recomputation under section 147 read with section 148/ 148A, the Assessing Officer may assess or reassess the income in respect of any other issue, which has escaped assessment, and such other issue comes to his notice subsequently in the course of the proceedings u/s 147, irrespective of the fact that the provisions of section 148A have not been complied with, in respect of that issue.

4. The statutory timelines given in Section 149 for issue of notice specified shall not apply for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under this Act by way of appeal, reference or revision or by a Court in any proceeding under any other law.

5. As far as possible the Assessing officer to make endeavor that at the stage of compliance of provisions u/s 148A/ issuance of notice u/s 148, all issues even if spread over more than one assessment year may be taken up simultaneously e. information suggesting escapement of income relating to a particular assessee for more than one AY may be reopened at one go.

6. The Assessing officer, as far as possible, may dispose all such pending matters relating to passing of orders u/s 148A(d)/ issuance of notice u/s 148 on a continuous basis rather than towards close to time barring date. This will enable passing of reasoned orders. Supervisory authorities are hereby advised to keep an effective supervision and monitor the progress of disposal of these work on continuous basis.

7. The present guidelines are only indicative and not exhaustive. The AO may take suitable decision on a case-to-case basis for the situations not specifically covered in these guidelines. However, in doing so, he/she shall follow the general principles enunciated in these guidelines.

8. These guidelines are to be brought to the notice of all officers working under your jurisdiction for information and compliance.

19. No doubt, these guidelines had not been notified at the time of issuance of notice, nonetheless, we find that such guidelines only explain what is required of an Assessing Officer while complying with the provisions of Section 148A along-with its sub clauses i.e. Clauses a to d. The guidelines

otherwise also clearly state that these are only indicative and not exhaustive and the Assessing Officer may take suitable decision on a case to case basis qua the situations not specified in these guidelines.

20. Accordingly, in view of the aforesaid discussion and reasons stated, the present petition is allowed and the impugned order issued under Clause 8 of the Income Tax Act, 1961 (Annexure P-5) is quashed. The respondents are directed to furnish additional material in support of the allegations made in the notice dated 19.03.2022 (Annexure P-3) within four weeks, including the reports, if any. Thereafter, the Assessing Officer shall decide the matter in accordance with law.

21. The writ petition is disposed of in the aforesaid terms. Pending applications, if any, also stand disposed of.

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

Roshan Lal and others ...Petitioners

Versus

State of Himachal Pradesh and others ...Respondents

For the petitioners : Mr. R.K.Gautam, Senior Advocate with Mr. Jai Ram, Advocate.

For the respondents: Mr. Narender Thakur, Deputy Advocate General, for respondents No. 1 to 4.

Mr. Ajay Sharma, Senior Advocate with Mr. Atharv Sharma, Advocate, for respondent No.5.

CWP No. 2645 of 2016
Reserved on: 08.12.2022
Decided on: 19.12.2022

Constitution of India, 1950- Article 226- **Himachal Pradesh Land Revenue Act, 1954**- Section 123- Quashing an setting aside of the orders passed by Financial Commissioner against the petition challenging the mode of partition- **Held-** Petitioner failed to satisfy that the order suffers from grave illegality or perversity or jurisdictional errors- No merit- Petition dismissed. (Paras 17, 18)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

Petitioners have filed instant petition seeking following substantive relief: -

> "(i) *That the impugned orders Annexure P-1, P-3, P-4 and P-5 passed by Assistant Collector and order Annexure P-7 dated 9.6.2004, passed by Sub Divisional Officer, Annexure P-8, order date 20.3.2009, passed by Divisional Commissioner and order dated 30.8.2016, Annexure P-10, passed by Financial Commissioner, may kindly be quashed and set-aside, in the interest of justice and fair play."*

2. Brief facts necessary for adjudication of the petition are that the parties to the instant petition were co-owners of the land comprised in Khata/Khatauni No. 26/65 to 75, total measuring 0-71-55 hectares, situated in Tika and Mauza Bari, Tehsil Nurpur, District Kangra, H.P. as per jamabandi for the year 1991-92. In 1995, respondent No.5 herein, moved an application under Section 123 of the Himachal Pradesh Land Revenue Act for partition of above-mentioned joint land before the Assistant Collector 1st Grade, Nurpur. Vide order dated 2.6.1997 the mode of partition was proposed. Petitioners challenged the mode of partition dated 2.6.1997 by filing appeal before the learned Sub Divisional Collector, Nurpur, which was allowed vide order dated 25.10.2000 and the matter was remanded back to the Assistant Collector 1st Grade, Nurpur with following observations:

> *"I have heard the Ld. Counsels for both the parties and have also gone through the record of lower court very carefully. The perusal of the record shows that the mode of partition in the instant case was sanctioned by the A.C.1st Grade on 2.6.97. The Ld. A.C. 1st Grade has sanctioned the mode of partition without considering the objections of the appellants and the order already passed by his predecessor in this behalf.*
>
> *Keeping in view the facts mentioned above, the order of A.C. 1st Grade, Nurpur dated 2.6.97 cannot be sustained. I, therefore, remand the case back to the Ld. A.C. 1st Grade, for fresh decision, keeping in view the observations made above and after giving proper opportunity of hearing to all the interested parties."*

3. On 03.07.2022 , the Assistant Collector 1st Grade, Nurpur again proposed a mode of partition between the parties after hearing them. Petitioners again assailed the order dated 03.07.2002 passed by the Assistant Collector 1st Grade before the Sub Divisional Collector, Nurpur. The appeal of the petitioners was dismissed by learned Sub Divisional Collector, Nurpur vide order dated 09.06.2004. Petitioners assailed the order passed by the Sub Divisional Collector before the Divisional Commissioner, Kangra at

Dharamshala, who also dismissed the challenge of petitioners vide order dated 20.03.2009. Lastly, the petitioners approached the Financial Commissioner (Appeals), Himachal Pradesh by way of revision petition No. 152 of 2009, but again remained unsuccessful. Their revision was dismissed vide order dated 30.08.2016, hence the instant petition.

4. It is pertinent to notice that though the order dated 03.07.2002 passed by the Assistant Collector 1st Grade, had been assailed in appeal before the Sub Divisional Collector, Nurpur, but except for some time, there was no stay on the implementation of the order passed by the Assistant Collector 1st Grade. As a result, further proceedings continued before the Assistant Collector 1st Grade and finally, the mode of partition was accepted and instrument of partition was prepared. Another fact that cannot be ignored is the observation made by the learned Financial Commissioner in his order dated 30.08.2016, to the effect that the copy of "Roznamcha Wakiyati" dated 28.10.2009, placed on record of revision petition No. 152 of 2009 on behalf of the respondents clearly revealed that the partition had been effected between the parties and the possession also stood delivered to the parties on 28.10.2009 by the Field Kanungo.

5. The petitioners have approached this Court primarily with the grievance that none of the authorities right from the Assistant Collector 1st Grade to Financial Commissioner (Appeals) had taken cognizance of their objections. The Assistant Collector 1st Grade, passed the order dated 03.07.2002 without deciding the objections of petitioners and thereafter the Appellate and Revisional Courts either ignored the illegality committed by the Assistant Collector 1st Grade or condoned the same by observing that the parties were afforded opportunity by the Assistant Collector 1st Grade and after hearing them reasoned order had been passed. Petitioners alleged that they had specifically raised question of title before the Assistant Collector 1st Grade, which was neither considered nor decided by him while passing the

order dated 03.07.2002. On the basis of aforesaid contention, petitioners have further alleged violation of principles of natural justice and fair play.

6. I have heard learned counsel for the parties and have also gone through the records of the case carefully.

7. At the first instance, it is relevant to notice that prior to the filing of partition application by respondent No.5, another proceeding initiated on behalf of some of the petitioners for partition of same land stood decided by the Assistant Collector 1st Grade on 23.02.1994. It comes out from the record that the petitioners had withdrawn their application for partition at the fag end of the proceedings. It was thereafter that respondent No.5 had initiated the partition proceedings.

8. The order dated 03.07.2002 passed by the Assistant Collector 1st Grade, Nurpur reveals that the petitioners had not filed any written objections to the partition application. Petitioners had initially been proceeded against exparte on 16.01.1996. An application for setting aside exparte order was moved before the Assistant Collector 1st Grade on 29.06.1996, which was allowed. Thereafter, the parties were heard and the mode of partition was suggested vide order dated 02.06.1997. However, the said order was set-aside in appeal and the matter was remanded back, as already noticed above. The Assistant Collector 1st Grade further observed that though the petitioners did not file any written objections to the partition application, however, some objections were raised in their application seeking setting aside of exparte order.

9. The Assistant Collector 1st Grade had passed the order dated 03.07.2002 after hearing the learned counsel appearing for the parties.

10. It becomes evident from the grounds of appeal filed by the petitioners against the order dated 03.07.2002 passed by the Assistant Collector 1st Grade, Nurpur that one of the grievance raised by the petitioners was about the absence of original counsel for the petitioners before the

Assistant Collector 1st Grade and the non-preparedness of his associate. It is not the case of the petitioners that the counsel originally representing them had some genuine reasons for non-appearance and a request for adjournment was made on that account.

11. The findings recorded by the Assistant Collector 1st Grade to the effect that the petitioners had not placed any written objections has remained unrebutted. Petitioners have not placed any material on record to suggest that they in fact had filed some written objections. It is also not their case that on the date of hearing, the objection with respect to the question of title was raised even orally by learned counsel representing them. The Assistant Collector 1st Grade, Nurpur vide order dated 03.07.2002 has specifically dealt with the objections raised on behalf of the petitioners regarding non-inclusion of whole original Khata No. 15 for the purposes of partition. In this view of the matter, it is clearly proved on record that the petitioners had not submitted any written objections and had also not raised such objections orally at the time of hearing.

12. Learned counsel for the petitioners has submitted that the order dated 02.06.1997 passed by the Assistant Collector 1st Grade, which was set-aside by the Sub Divisional Collector, reveals that the petitioners had raised some objections. He has also placed reliance on the above noted order passed by the Sub Divisional Collector, Nurpur in case No. 45/1997 on 25.10.2000 whereby it was clearly noticed that the Assistant Collector 1st Grade, had sanctioned the mode of partition without considering the objections of the petitioners (appellants therein). The contentions so raised on behalf of the petitioners does not in any manner improve their case. The order passed by the Assistant Collector 1st Grade on 02.06.1997 does not contradict the post remand order of the same authority passed on 03.07.2002. There is nothing in the order dated 02.06.1997 that the petitioners had filed any written objections. It appears from the contents of order dated 02.06.1997 that the

Assistant Collector 1st Grade had dealt with the oral submissions/objections raised on behalf of the petitioners.

13. It was for the petitioners to have placed on record the material to show that they had raised specific objections before the Assistant Collector 1st Grade after remand of the case, but they have miserably failed to do so. In absence of such material, the grievance of the petitioners regarding non-consideration of objections is baseless and orders impugned in the present petition cannot be faulted on such ground.

14. Admittedly, after passing of the order dated 03.07.2002 and before disposal of appeal by the Sub Divisional Collector, Nurpur on 09.06.2004 the mode of partition had attained finality and instrument of partition had already been framed on 15.02.2003. There is no challenge to the final instrument of partition. It is also revealed from the order passed by learned Financial Commissioner (Appeals) that on 28.10.2009, the partition had been effected and possession was handed over to the parties by the Field Agency. A copy of "Roznamcha Wakiyati" referred to in the order of learned Financial Commissioner (Appeals) has been placed on record of this petition as Annexure R-5/1 and from its perusal the observations made by learned Financial Commissioner (Appeals), are found to be substantiated.

15. The partition proceedings started in the year 1995 and as per Annexure R-5/1, the copy of "Roznamcha Wakiyati", the possession could be handed over to the parties in accordance with the partition order in the year 2009. It wil not be equitable now to unsettle the entire process especially when the petitioners have not been able to show any specific violation of their legal right or prejudice caused to them.

16. There is no dispute with the proposition that the question of title once raised in partition proceedings has to be decided. However, in the facts of the instant case, it has been found that no such question was specifically raised. In absence of any specific pleadings raised before the Assistant

Collector 1st Grade, he could not have assumed the existence of the question of title.

17. This Court while exercising jurisdiction under Article 226 of the Constitution will not sit as a Court on appeal over the orders passed by statutory authorities. Such orders can be interfered with only in case those suffer from grave illegality or perversity or jurisdictional errors. The case of petitioners herein fails to satisfy any of above parameter, therefore, no interference is called for in the present case.

18. In light of above discussion, I have found no merit in the petition and the same is dismissed.

19. Petition is accordingly disposed of, so also the pending miscellaneous application(s), if any.

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

Anil Dutt ...Petitioner.

Versus

State of H.P. ...Respondent

For the petitioner : Mr. Dilip Sharma, Sr. Advocate with Mr. Manish Sharma, Advocate.

For the respondents : Mr. Desh Raj Thakur, Addl. A.G. with Mr. Narender Thakur, DAG.

CWP No. 2883 of 2020.
Reserved on: 22.12.2022
Decided on: 30.12.2022

Constitution of India, 1950- Article 226- Writ petition **CCS (CCA), Rules 1965**- Rule 14- Quashing the compulsory retirement and reinstatement of the petitioner with all consequential benefits- Complaint of sexual harassment was filed against the petitioner- Internal Complaint Committee recommended disciplinary action- **Held-** In absence of the adoption of due procedure of law, the infliction of punishment is wholly unsustainable in law and thus deserves to be quashed and set aside- Petition allowed with directions of reinstatement. (Paras 17, 18)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge:

By way of instant petition, the petitioner has prayed for the following substantive relief:-

> *"(i) That the impugned inquiry report dated 23.12.2016, Annexure P-4, the impugned order of compulsory retirement dated order dated 24.8.2018, Annexure P-9, as also order dated 19.12.2019, Annexure P-12, dismissing his revision petition, may kindly be quashed and set aside and the respondent department may kindly be directed to reinstate*

the petitioner in service, will all consequential benefits including arrears of salary, consideration for further promotion etc."

2. Brief facts necessary for adjudication of the petition are that in the year 2016, petitioner was posted as Assistant Commandant, 1st IRBn, Bangarh, District Una. A complaint of sexual harassment was filed against him by a female official of Police Department. An inquiry was held by Internal Complaint Committee for Sexual Harassment of Women at work place (for short the "ICC"). The ICC vide report dated 23.12.2016, expressed its view that the allegations against the petitioner were proved beyond doubt. Accordingly, the ICC recommended disciplinary action against the petitioner.

3. Taking cognizance of the report, submitted by the ICC, the Disciplinary Authority vide order dated 3.7.2017 proposed major penalty against the petitioner and afforded him an opportunity to explain as to why he should not be compulsorily retired from service. Petitioner submitted his representation against the order dated 3.7.2017. The Disciplinary Authority after considering the representation of the petitioner, imposed a penalty of compulsory retirement from service upon the petitioner vide order dated 24.8.2018. Petitioner assailed the order of Disciplinary Authority by filing a revision petition and also sought a legal remedy by filing O.A. before the erstwhile H.P. State Administrative Tribunal. The Tribunal directed the Revisional Authority to take a decision in the matter and held that the O.A. of the petitioner was not maintainable without final decision in the revision petition. Finally, the revision petition of the petitioner was also rejected by the competent authority vide order dated 19.12.2019.

4. I have heard the learned counsel for the parties and have also gone through the record carefully.

5. Mr. Dilip Sharma, learned Senior Advocate, assisted by Mr. Manish Sharma, Advocate, contended that the impugned order Annexure P-9

is illegal and arbitrary, having been passed without adoption of due procedure prescribed under law. He contended that no inquiry was held against the petitioner in terms of Rule 14 of the CCS (CCA), Rules 1965 (for short the "Rules") and in absence thereof, the order of compulsorily retirement of the petitioner from service is vitiated.

6. On the other hand Mr. Desh Raj Thakur, learned Additional Advocate General has contended that after amendment of Rule 14 (2) of the Rules, the ICC was to act as the Inquiry Authority appointed by the Disciplinary Authority, as such, there was due compliance of requirement of Rule 14 of the Rules in the case of petitioner.

7. It is made out from the record that on receipt of complaint of sexual harassment against petitioner, a preliminary inquiry was conducted by Commandant 6th IRBn Gariwala, District Sirmour. Thereafter, the complaint was entrusted to ICC, which after holding inquiry, had found the allegations proved against the petitioner and had recommended disciplinary action against him.

8. Indisputably, on the basis of the inquiry report submitted by ICC, the Disciplinary Authority had issued order dated 3.7.2017, requiring petitioner to show cause as to why he should not be compulsorily retired. Without holding any further proceedings, petitioner was compulsorily retired from service vide Annexure P-9 dated 24.8.2018, passed by the Disciplinary Authority.

9. Rule 14 (2) of the Rules, as amended after inclusion of a proviso, reads as under:-

> *"(2) Whenever the Disciplinary Authority is of the opinion that there are grounds for inquiring into the truth of any imputation of misconduct o misbehaviour against a Government servant, it may itself inquire into, or appoint under this rule or under the provisions of the Public Servants (Inquiries) Act, 1850, as the case may be, an authority to inquire into the truth thereof:*

["Provided that where there is a complaint of sexual harassment within the meaning of Rule 3-C of the Central Civil Services (Conduct) Rules, 1964, the Complaints Committee established in each Ministry or Department or Office for inquiring into such complaints, shall be deemed to be the Inquiring Authority appointed by the Disciplinary Authority for the purpose of these rules and the Complaints Committee shall hold, if separate procedure has not been prescribed for the Complaints Committee for holding the inquiry into the complaints of sexual harassment, the inquiry as far as practicable in accordance with the procedure laid down in these rules."]

EXPLANATION 1.- Where the Disciplinary Authority itself holds the inquiry, any reference in sub-rule (7) to sub-rule (20) and in sub-rule (22) to the inquiring authority shall be construed as a reference to the Disciplinary Authority.

EXPLANATION 2.- Where the Disciplinary Authority appoints a retired Government servant as inquiring authority, any reference in sub-rule (7) to sub-rule (20) and in sub-rule (22) shall include such authority."

10. A plain reading of aforesaid provision clearly spells that the Disciplinary Authority, when is of the opinion that there are grounds for inquiring into the truth of any imputation of misconduct or misbehaviour against a government servant, will hold the inquiry itself or shall cause such inquiry to be held by any other authority to be appointed by the Disciplinary Authority under Rule 14 (2) or under the provisions of Public Servants (Inquiries) Act, 1850. The procedure so prescribed admits of no exception. The proviso to Rule 14 (2) only provides for any other authority as Inquiry Authority specifically to the cases of complaints of sexual harassment. Such an authority is ICC, established in each Ministerial Department or Office for inquiring into such complaints.

11. The authorization of ICC as Inquiring Authority does not in any manner vest such authority to deviate from prescribed procedure. It is only provided that if separate procedure has not been prescribed for the ICC for

holding the inquiry, the ICC shall inquire as far as practicable in accordance with the procedure laid down in the rules.

12. The case of respondents is not that the ICC constituted in State Police Department had been vested with any special procedure to hold disciplinary inquiry under Rule 14 of the Rules. In absence of any such vestment of powers, the ICC is bound to follow the principles for holding inquiry under Rule 14 of the Rules.

13. Sub-rule (3) of the Rules provides that in the cases where it is proposed to hold an inquiry against a government servant under Rule 14 of the Rules, the Disciplinary Authority shall frame a charge-sheet and under sub-rule (4) shall deliver or cause to be delivered to the government servant a copy of articles of charge, the statement of imputation of misconduct or misbehaviour and a list of documents and witnesses by which each articles of charge is proposed to be sustained. The government servant is then required to be afforded with an opportunity to submit his written statement of defence. The Disciplinary Authority is empowered to either hold inquiry itself or to appoint under sub-rule (2) an inquiring authority for the purpose.

14. Reverting to the facts of the case, the non-compliance of the provisions of sub-rules (2) to (5) of Rule 14 of the Rules is clearly visible. The Disciplinary Authority on receipt of inquiry report from ICC, without seeking the aid of provisions of Rule 14 of the Rules, directly proposed infliction of major penalty upon the petitioner and after receiving a representation against such proposal, proceeded to pass the impugned order Annexure P-9.

15. The petitioner was a gazetted State Police Service Officer, who for disciplinary purpose is governed by CCS (CCA) Rules. Dealing with the case of another gazetted State Police Service Officer, relating to a fact situation involving identical question, a Coordinate Bench of this Court vide its judgment dated 10.9.2021 in CWP No. 3318 of 2021 has held as under:-

8(iii) As per pleaded case of the respondents, the fact finding inquiry was conducted by the ICC on the complaint dated 11.05.2021. As per office memorandum dated 16.07.2015, issued by Government of India, which is also applicable to all the departments of the respondent-State as clarified by the respondent-State in the circular dated 26.06.2019, and also as per the provisions of Act of 2013, the committee, after completion of fact finding/ preliminary inquiry/investigation, if is of the opinion that the complaint has substance, then such investigation is to be sent to the disciplinary authority. In conducting the fact finding inquiry, the ICC recorded and examined statements of 8 police personnel. It, prima facie, found substance in the allegations levelled in the complaint. If that was so, then this would have been the end of first stage of the role of ICC. The ICC thereafter was required to send its fact finding report to the disciplinary authority. It was for the disciplinary authority to examine the fact finding report of the ICC and to decide whether to issue charge sheet to the petitioner under Rule 14 of the CCS(CA) Rules or not. In case the disciplinary authority decided to issue the charge sheet to the petitioner, then the same was to be issued as per Rule 14(3) of CCS (CCA) Rules. Reply was to be called from the petitioner. Upon consideration of petitioner's reply, disciplinary authority was to take the final decision whether to proceed with formal inquiry against the petitioner or not. In case the disciplinary authority decided to proceed with formal inquiry, then the matter was to be again sent to the ICC as the ICC is the Inquiring Authority in complaints of sexual harassment as per provisions of Act of 2013 and the O.M. dated 16.07.2015. It is at this stage that the ICC comes into picture once again. This is the second stage mentioned in O.M. dated 16.07.2015. The provisions regarding appointment of Presenting Officer and the Defence Assistant also become applicable. This is the only interpretation possible on combined reading of the O.M. dated 16.07.2015, Act of 2013 and the CCS (CCA) Rules. The Internal Committee does not have the power to proceed with formal/regular inquiry on its own. It will be appropriate to refer to (2020) 13 SCC 56, titled Nisha Priya Bhatia Vs. Union of India and another, wherein following was observed in respect of fact finding inquiry by the ICC followed by conduct of regular inquiry :-

> *"95. Be that as it may, in our opinion, the petitioner seems to have confused two separate inquiries conducted under two separate dispensations as one cohesive process. The legal machinery to deal with the complaints of sexual*

harassment at workplace is well delineated by the enactment of The Sexual Harassment of Women at Workplace Act, 2013 (hereinafter "2013 Act") and the Rules framed thereunder. There can be no departure whatsoever from the procedure prescribed under the 2013 Act and Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013 (for short, "the 2013 Rules"), either in matters of complaint or of inquiry thereunder. The sanctity of such procedure stands undisputed. The inquiry under the 2013 Act is a separate inquiry of a fact-finding nature. Post the conduct of a fact-finding inquiry under the 2013 Act, the matter goes before the department for a departmental inquiry under the relevant departmental rules [CCS (CCA) Rules in the present case] and accordingly, action follows. The said departmental inquiry is in the nature of an in-house mechanism wherein the participants are restricted and concerns of locus are strict and precise. The ambit of such inquiry is strictly confined between the delinquent employee and the concerned department having due regard to confidentiality of the procedure. The two inquiries cannot be mixed up with each other and similar procedural standards cannot be prescribed for both. In matters of departmental inquiries, prosecution, penalties, proceedings, action on inquiry report, appeals etc. in connection with the conduct of the government servants, the CCS (CCA) Rules operate as a self-contained code for any departmental action and unless an existing rule is challenged before this Court on permissible grounds, we think, it is unnecessary for this Court to dilate any further."

8(iv) The SOP cannot override either the CCS (CCA) Rules or the provisions of Act of 2013 or the Office Memorandum issued by Government of India on 16.05.2015, which is also applicable to the respondents in terms of Circular dated 26.06.2019. Under the Act, the inquiry by ICC is to be completed within a period of 90 days. Formal inquiry/regular inquiry can be conducted after the issuance of charge sheet by the disciplinary authority under Rule 14 of CCS (CCA) Rules. In case the procedure laid down in para 7(a) of the SOP is followed in terms of interpretation given by the respondents, then in case of State Gazetted Police Service Officer, the disciplinary authority will come into picture only after completion of formal inquiry by the ICC, which would be in absolute derogation to the provisions of not only the Act of 2013,

but also CCS(CCA) Rules and the detailed guidelines dated 16.07.2015 issued by Government of India. It is not the case of the respondents that they can conduct the inquiry against the petitioner into the complaint dehors the provisions of CCS(CCA) Rules, Act of 2013, the Office Memorandum dated 16.07.2015 and the Circular dated 26.06.2019. It is not and even otherwise also cannot be the case of the respondents that after conclusion of the present formal inquiry being conducted against the petitioner by the ICC, the matter will go to the disciplinary authority and that the disciplinary authority will then direct issuance of charge sheet to the petitioner followed by another regular departmental inquiry. This is because as per para 7 (a) (xix) and para 4 of SOP, after conclusion of inquiry by the ICC, the matter goes to disciplinary authority for awarding punishment. A conjoint and holistic reading of the Act of 2013, the CCS(CCA) Rules, 1965, the O.M. dated 16.07.2015 issued by Government of India, the Circular dated 26.06.2019 issued by respondent-State and the SOP leads to only one conclusion that the ICC has no authority to issue the impugned memorandum dated 28.05.2021 to the petitioner. In case the ICC has not completed the fact finding inquiry, then it is entitled to complete the same but in accordance with law. However, in case the ICC has already concluded the fact finding inquiry against the petitioner, then it is required to send the fact finding inquiry report to the disciplinary authority. It is for the disciplinary authority to examine the fact finding report to decide whether to issue charge sheet to the petitioner or not. It is the disciplinary authority which can issue the charge sheet to the petitioner under Rule 14 of CCS (CCA) Rules. After examining the reply of the petitioner to the charge sheet, it is for the disciplinary authority to decide whether to proceed with formal inquiry against the petitioner. The ICC will come into picture once again only if disciplinary authority decides to hold formal inquiry against the petitioner. If that course is adopted by the disciplinary authority, then the matter will be once again referred to the ICC which is the inquiring authority in terms of Act of 2013, CCS(CCA) Rules and the O.M. dated 16.07.2015. The ICC at this second stage of coming into picture will hold the inquiry as per provisions of CCS (CCA) Rules as the petitioner is a Gazetted State Police Service Officer governed by CCS (CCA) Rules, 1965 for disciplinary purposes."

16. This Court finds no reason to take a different view than the view taken by a Coordinate Bench in aforesaid judgment. The Disciplinary Authority on receipt of inquiry report submitted by the ICC was under legal obligation to form an opinion as to whether the grounds for inquiring into truth of any imputation of misconduct or misbehaviour existed against the petitioner and after holding in favour of such existence, he was to draw the charges and serve the same upon the petitioner in terms of sub-rule (4) of rule 14 of the Rules. The written statement of defence was to be sought from the petitioner and thereafter in case of contest being raised by petitioner, the ICC should have been asked to hold the inquiry keeping in view the mandate of Rule 14 (supra).

17. In absence of the adoption of due procedure of law, the infliction of punishment upon petitioner vide Annexure P-9 is wholly unsustainable in law and thus deserves to be quashed and set aside. Similarly, the order Annexure P-12, passed by the Revisional Authority without considering the above noted legal aspect of the matter also deserves to be quashed and set aside. In fact the proceedings drawn by the Disciplinary Authority vide Annexure P-7 dated 3.7.2017 itself was against the mandate of law.

18. In result, the petition is allowed. Orders Annexure P-7 dated 3.7.2017, Annexure P-9 dated 14.8.2018 and Annexure P-12 dated 19.12.2019 are quashed and set aside. The infliction of punishment of compulsory retirement from service upon petitioner is held to be bad in law. Accordingly, the respondents are directed to reinstate the petitioner in service with all consequential benefits. It is however clarified that this judgment will not preclude the respondents from initiating disciplinary action against the petitioner, if so advised, strictly in accordance with law. The petition is accordingly disposed of. Pending applications, if any, also stand disposed of.

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

Bhag Chand ...Petitioner

Versus

State of Himachal Pradesh and others ...Respondents

For the petitioner : Mr.Chandra Narayana Singh, Advocate.
For the respondents: Mr. Desh Raj Thakur, Additional Advocate General, with Mr. Narender Thakur, Deputy Advocate General.

CWP No. 2885 of 2020
Reserved on: 12.12.2022
Decided on: 19.12.2022

Constitution of India, 1950- Article 226- Regularisation of service with consequential benefits and arrears on account of retrospective regularization- **Held-** The lack of minimum educational qualification not an impediment in the case of consideration of induction of petitioner to the post of Pump Attendant- Petition allowed with directions. (Paras 12, 13)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

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

> "i) *Issue a writ of mandamus or other appropriate writ or direction, directing the respondents department to grant the whole time/daily wage status to the petitioner immediately after completion of eight years of service i.e. w.e.f. 01.06.2015 with all consequential benefits and arrear on account of retrospective grant of daily wage status may kindly be ordered to be released in favour of the petitioner alongwith 12% interest.*

ii) *Issue a writ of mandamus or other appropriate writ or direction, directing the respondents department to regularize the service of the petitioner after completion of 5 years of service i.e. 2.6.2020 (or 13 years of total length of service part time as well as daily wage basis) with all consequential benefits and arrear on account of retrospective regularization may kindly be ordered to be released in favour of petitioner alongwith 12% interest. Or in alternative, issue a writ of mandamus or other appropriate wit or direction for directing the respondents department to convert the service of the petitioner on contract basis w.e.f. the date Sh. Thakur Dass and other similar situated persons part time service were coveted into Contractual appointment with all consequential benefits.*

iii) *Issue a writ of mandamus or other appropriate writ or direction, directing the respondents department to pay the salary/remuneration to the petitioner at par with at least daily wage employee for work done by the petitioner w.e.f. the initial date of engagement till date alongwith 12% interest."*

2. The case of petitioner in nutshell is that he was appointed as part time water guard through proper selection process by the respondents w.e.f. 01.06.2007. His contention is that though his appointment was on part time basis, but respondents had been taking full time work from him and even on Sundays, he was made to work on certain occasions. The petitioner has claimed status of daily wage/part time basis with effect from 01.06.2015 and regularization from 01.06.2021 in terms of the policies of State Government framed, from time to time.

3. Respondents No. 1 to 4 have contested the claim of petitioner on the ground that the petitioner was appointed as Jal Rakshak (Water Guard) by respondent No.5 i.e. Gram Panchayat, Shorshan, Tehsil Karsog, District Mandi, H.P. The letter of appointment was issued by the concerned Gram Panchayat on recommendation of the selection committee comprised of the Assistant Engineer (IPH) as its Chairman, Pradhan of concerned Gram Panchayat and section Junior Engineer concerned as its Members. Further

stand of respondents No. 1 to 4 is that the respondents had taken a conscious decision to transfer water supply schemes to Panchayati Raj Institutions (PRIs) for operation and maintenance in a phased manner under an agreement entered between the Executive Engineer of the IPH (now Jal Shakti Vibhag) and the concerned Gram Panchayat. As per the MoU between the parties, respondents No. 1 to 4 had to give financial assistance to the Gram Panchayat for engaging keyman/Jal Rakshak (Water Guard) on a fixed honorarium for operation and maintenance of transferred scheme.

4. Respondents No. 1 to 4 have further submitted that the State Government had decided to induct the Water Guards from the Panchayati Raj Institutions by inserting a provision in the R & P Rules of Pump Attendant. As per the said R & P Rules, a Water Guard was entitled for induction as Pump Attendant on contract basis after completion of 12 years of service with 3 years' experience of working with Pump/Motors and Electric Accessories. The minimum prescribed educational qualification was Middle pass. As per respondents No. 1 to 4, petitioner had completed 12 years of service as Water Guard with respondent No.5 in 2019 and his name has been included in the list of workers supplied to respondent No.3 by respondent No.4 and the consideration in petitioner's case for induction as Pump Attendant on contract basis would be made by the Screening Committee on receipt of approval of the post of Pump Attendant and that will be subject to petitioner fulfilling all other eligibility criteria required for the post as per the R & P Rules.

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

6. Annexure RA-3, reveals that the petitioner was appointed as Fitter for operation and maintenance of water supply scheme by the Gram Panchayat, Shorshan, Tehsil Karsog, District Mandi, H.P. vide its resolution dated 29.05.2007. Petitioner has been working under the Gram Panchayat since then. In view of the employment of petitioner under the Gram

Panchayat, the reliefs as sought by the petitioner by way of instant petition will not be available to him. However, petitioner has become entitled for being considered to be appointed as Pump Attendant in Jal Shakti Vibhag, Himachal Pradesh.

7. Respondents No. 1 to 4 by way of their reply have clearly averred that the Recruitment and Promotion Rules of the post of Pump Attendant in Jal Shakti Vibhag have been amended and one of the mode of appointment to the said post is induction of Water Guards subject to certain essential qualifications viz., completion of 12 years of service with three years' experience of working with Pump/Motor and Electric Accessories. In addition, the incumbent should be Middle pass.

8. Petitioner is lacking in educational qualification as he is not Middle pass. Respondents have contended that the induction of petitioner will be considered subject to the qualifications as detailed above.

9. In CWP No. 3047 of 2020, titled Jagdish Kumar and others vs. State of Himachal Pradesh and others, decided by a co-ordinate Bench of this Court vide judgment dated 23.06.2021, a similar question had arisen. Learned Single Judge held that the criteria of minimum qualification as per the R & P Rules of Pump Attendant would apply only in the case of direct recruitment and as far as the mode of appointment through induction of Water Guards is concerned, the minimum educational qualification will not be applicable. Following extract from the aforesaid judgment can be gainfully referred for the purpose of instant petition:

> *"14. Denial of appointment/engagement of Water Guards not having passed Middle standard examination, refusal of one time relaxation sought by the Department for their recruitment as Pump Attendants and expression of inability of Departments of Personnel and Finance to concur the proposal of relaxation are based on misconceived notion that condition of minimum educational qualification is also applicable to the persons who are to be appointed/inducted as Pump Attendants under the*

Recruitment and Promotion Rules. The said minimum educational qualification is applicable only for direct recruits and omissions and commissions on the part of respondents denying appointment to the petitioners and other similarly situated Water Guards to the posts of Pump Attendants are definitely arbitrary, irrational, unreasonable and violative of Constitutional mandate."

10. The State assailed the aforesaid judgment passed by learned Single Judge of this Court by filing LPA No. 104 of 2021, which was dismissed by learned Division Bench of this Court vide judgment dated 23.02.2022. The State also preferred SLP before the Hon'ble Supreme Court, but the same was also dismissed vide judgment dated 17.05.2022.

11. Similarly, in a case having almost identical facts, another Division Bench of this Court (in which I was one of the members) vide judgment dated 21.03.2022, passed in LPA No. 202 of 2021, made the same reiteration.

12. Thus, the lack of minimum educational qualification will not be an impediment in the case of consideration of induction of petitioner to the post of Pump Attendant. Accordingly, the petition is disposed of with direction to respondents No. 1 to 4 to consider the case of petitioner for induction to the post of Pump Attendant from due date. It is clarified that lack of minimum educational qualification will not be an impediment in such consideration.

13. Respondents No. 3 and 4 are directed to pass the consideration order within four weeks from the date of production of a copy of this judgment. Needless to say that all consequential benefits will follow.

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

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

M/s Inox Air Products Pvt. Ltd. ....Petitioner.

Versus

State of H.P. and ors.

...Respondents.

For the petitioner : Mr. Manish Jain, Mr. Sunil Mohan Goel, Mr. Mayur Kanwar and Siddhant Jain, Advocates.

For the respondents: Mr. Narender Guleria, Addl. Advocate General with Ms. Savneel Jaswal, Deputy Advocate General.

CWP No. 3166 of 2016
Decided on: 01.12.2022

Constitution of India, 1950- Article 226- **H.P. Tenancy and Land Reforms Act, 1972**- Section 118- **Companies Act, 1956-** Sections 20 and 23- Petition against rejection of the request made to change the name of the company- Prayer to issue a writ in the nature of mandamus or any other appropriate writ, order or direction commanding the respondents to record the name of the petitioner M/s Inox Air Products Pvt. Ltd in place of M/s Inox Air Products Ltd. in the revenue record as also all other relevant record of the State Govt- **Held-** Where partnership Firm became a private limited liability partnership, the stamp duty /registration fee cannot be levied upon conversion of partnership firm to a limited liability partnership firm. If it is so, no permission, if any, under Section 118 of H.P. Tenancy and Land Reforms Act, 1972 is required for change of name in the revenue documents from "M/s Inox Air Products Ltd." to "M/s Inox Air Products Private Ltd- Order quashed- Petition allowed with directions. (Para 22)

The following judgment of the Court was delivered:

Sandeep Sharma, Judge *(Oral)*

Being aggrieved and dissatisfied with communication dated 13.01.2016 (Annexure P-2), whereby request made by petitioner vide communication dated 22.05.2015, (Annexure P-7) seeking change in the name of the Company from *"INOX AIR PRODUCTS LTD" to "INOX AIR PRODUCTS PRIVATE LIMITED"* came to be rejected, petitioner-Company has approached this Court in the instant proceedings filed under Article 226 of the Constitution of India, praying therein for following reliefs:-

> *"a) Issue a writ in the nature of Certiorari or any other appropriate writ, order or direction quashing the impugned order dated 13.01.2016, Annexure P-2.*
> *b) Issue a writ in the nature of mandamus or any other appropriate writ, order or direction commanding the respondents to record the name of the petitioner M/s Inox Air Products Pvt. Ltd in place of M/s Inox Air Products Ltd. in the revenue record as also all other relevant record of the State Govt."*

2. Precisely the facts, which are relevant for the adjudication of the present case are that M/s Superior Air Products Limited was granted permission for establishing industrial unit under S.118 of the Himachal Pradesh Tenancy and Land Reforms Act in 1994 to purchase land at Barotiwala, on which present the petitioner is operating, as is evident from letter dated 5.1.1995 (Annexure P-3). Management of M/s SAPL was taken over by M/s Inox Air Products Limited (IAPL) on 1.4.2000 and aforesaid Superior Air Products Limited was amalgamated with Inox Air Products Limited, pursuant to order dated 10.1.2002 passed by this Court in Company Petition No. 13 of 2001. Simultaneously, Superior Air Products Limited also filed an amalgamation petition before the Bombay High Court under Ss. 391/394 of the Companies Act, which was allowed on 21.3.2002.

3. On 5.7.2002, Superior Air Products Limited submitted a request to the Tehsildar concerned for effecting change in the name of company in the

revenue record, which was accordingly changed by the concerned revenue authority.

4. Record reveals that the petitioner company took steps for conversion from "Public Limited" to "Private Limited" and sought necessary permission from the Central Government, which was granted vide letter dated 11.4.2015 and a Certificate of Incorporation dated 11.4.2015 was issued by the Registrar of Companies Mumbai (Annexure P-6) and name of the petitioner was changed to "Inox Air Products Private Limited".

5. As per petitioner, after conversion of the petitioner from a "public limited" to "private limited' company, its management, corporate structure etc. remained the same, having no effect on its debts, liabilities or contractual obligations which would remain binding and in force.

6. Vide letter dated 22.5.2015 (Annexure P-7), the petitioner requested respondent No.3 to change the name of the company in its records and issue a fresh *fard*, consequent to change of petitioner from a "public limited" to "private limited" company. It may be noted here that the petitioner also applied to various other departments like Income Tax Department, Central Excise Division, Directorate of Industries, Excise & Taxation Department etc, for change of its name. A new PAN was also issued by the Income Tax Department (Annexure P-8), in the name of new entity.

7. Vide letter dated 22.5.2015, respondent No.2 effected change of name of the petitioner company in its records and advised vide letter dated 6.6.2015 (Annexure P-9) to obtain other administrative and statutory approvals. On 30.6.2015, petitioner received a letter from Additional District Magistrate Solan regrading submission of LR-XIV form of both the companies, affidavits, recommendation of Department of Industries, original revenue papers and memorandum and article of association of M/s Inox Air Products Private Limited (Annexure P-10). Petitioner accordingly submitted all the required documents, except LR-XIV form vide letter dated 2.7.2015 (Annexure P-11). It

was informed by the petitioner that since neither there was sale nor purchase of land of the company nor there was any change in the ownership and management as such, LR-XIV form was not required.

8. On 31.7.2015, petitioner was directed by the Additional District Magistrate to submit LR-XIV form and affidavits of both the companies (Annexure P-12). Again vide letter dated 3.8.2015 (Annexure P-13), petitioner while replying to letter dated 31.7.2015, clarified that there was no sale or purchase of land by the company and there was no change in ownership and management and only name of the company had been changed, that too, after approval from the Central Government, after issuance of a fresh Certificate of Incorporation.

9. Subsequently, petitioner vide letter dated 13.10.2015 (Annexure P-14) sought clarification from respondent No.1 on the issue, who clarified vide letter dated 13.1.2016 (Annexure P-2) that a proprietor/partnership firm and a company are two separate legal entities an in such a situation if a company applies for change in its name, then it is clear cut case of transfer of property, which will attract provisions of S.118 of the Act ibid as also the Stamp Act, 1899. In the aforesaid background, petitioner has approached this Court in the instant proceedings seeking reliefs reproduced hereinabove.

10. Pursuant to notice issued in the instant proceedings, respondents have filed reply, wherein facts as noted herein above, have not been disputed, rather stand admitted. However, respondents have opposed the prayer made on behalf of the petitioner on the ground that a company and a proprietorship firm are two separate legal entities, as such are liable to pay stamp duty before change of its name in the revenue records.

11. Mr. Narender Guleria, learned Additional Advocate General, while inviting attention of this Court to instructions dated 16.02.2012 (Annexure P-15), issued by Department of Revenue, Government of Himachal Pradesh

argued that when the name of a company is changed with the approval of Registrar of the Companies and no transaction/sale of property takes place, in that case, company is not liable to pay any stamp duty, but in case proprietorship is changed to a partnership Firm then party seeking change in the name of the company, is liable to pay the stamp duty. Since in the case at hand, name of the company has been changed from M/s Inox Air Products Limited to M/s Inox Air Products Private Limited, it is liable to pay stamp duty, as has been clarified, vide Annexure P-2.

12. Mr. Manish Jain, learned Advocate duly assisted by Mr. Sunil Mohan Goel, Advocate, appearing for the petitioner, while refuting the aforesaid submissions made on behalf of learned Additional Advocate General vehemently argued that a bare perusal of instructions pressed into service by learned Additional Advocate General itself suggests that when only name of a company is changed with the approval of Registrar of Companies, in terms of Ss.20 and 23 of the Companies Act, and no sale/transaction of property takes place, then the company seeking change in name is not required to pay any stamp duty. While inviting attention of this Court to judgment dated 20.04.2022, passed by Division Bench of this Court in ***CWP No. 4394 of 2021,*** titled ***JSTI Transformers Pvt. Ltd.*** *Vs.* ***State of Himachal Pradesh,*** learned counsel representing the petitioner argued that issue, sought to be adjudicated in the instant petition, is no more *res integra*, rather stands duly adjudicated by Division Bench in the judgment referred hereinabove.

13. Having heard learned counsel representing the parties and perused the material available on record, this Court finds that the question, which needs determination in the case at hand is, "whether the petitioner company, pursuant to order of amalgamation passed by Bombay High Court, permitting it to change its name from "M/s Inox Air Products Ltd." to "M/s Inox Air Products Private Ltd." is liable to pay stamp duty on account of

sale, purchase transfer, if any, of the premises owned/possessed by aforesaid company having amalgamated into another company, in view of specific law laid by Division Bench of this Court in **JSTI Transformers Pvt. Ltd.**(Supra)?"

14. This Court finds that aforesaid question has been elaborately dealt with by Division Bench, while passing the judgment, wherein undersigned was also one of the coauthor.

15. Before ascertaining the rival submissions made by the parties, it would be apt to take notice of instructions dated 16.02.2012, Annexure P-15, which reads as under:-

Clarification regarding name change by Companies/firms

No. Rev. B.F.(10)-154/2009
Government of Himachal Pradesh
Department of Revenue

From

Principal Secretary-cum-F.C. (Revenue) to the Government of Himachal Pradesh.

To

1. *The inspector General of Registration SDA Complex, shimla-09, Himachal Pradesh.*
2. *All the Deputy Commissioners in Himachal Pradesh.*
3. *All the Tehsildars/Naib Tehsildars, in Himachal Pradesh.*

Dated; Shimla-171002, the 16th February, 2012

Subject:- Instructions for disposal of cases regarding change in name of the company.

Sir,

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 the 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, then 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 H.P. Tenancy and Land Reforms Act, 1972.

5. In cases where the name change as per example given in para-4 above is approved by the Registrar of Companies and the change n the name has also been given effect to by this 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 herein the old name of Company and reference of order in compliance to which the name is changed.

Yours Faithfully
-Sd-
Principal Secretary (Revenue) to
the Government of Himachal Pradesh.

Endst.No. As above, Dated: Shimla-2 16th February, 2012
Copy forwarded for information and similar
necessary action to :-

1. *The Settlement Officer, Shimla/Kangra at Dharamshala, H.P.*
2. *All the Sub-Divisional Magistrates, in Himachal Pradesh.*
3. *The IRSA-cum-Tehsildar, Stamp Cell, H.P. Sectt. Shimla-02.*

-Sd-
Principal Secretary (Revenue) to
the Government of Himachal Pradesh

16. Bare perusal of aforesaid instructions, itself reveals that after passing of order of amalgamation by competent Court of law, company can seek change in its name in record of the Registrar of the Companies, who after verification of the record, would issue fresh Certificate of Incorporation in the name of new company. In the case at hand, company, which is seeking change of the name in revenue record was earlier being run as M/s Superior Air Products Limited at Barotiwala. In the year 1995, M/s Superior Air Products Limited was granted permission under Section 118 of the Act to construct premises at Barotiwla, but since aforesaid M/s Superior Air Products Ltd. was taken over by M/s Inox Air Products Ltd., change in revenue record was effected on the basis of change in the name thereby showing M/s Inox Air Products ltd. as the owner of the property. It is an admitted position that M/s Superior Air Products Ltd. came to be amalgamated into M/s Inox Air Products Ltd. pursuant to order passed by Bombay High Court as well as this High Court in two separate Company

Petitions. Though, after passing of order of amalgamation, application submitted by petitioner seeking change in the name of company in revenue record as "M/s Inox Air Products Limited" was allowed but its prayer to change its name from "M/s Inox Air Products Ltd." to "M/s Inox Air Products Private Ltd." has been denied on the ground that there is change of ownership and management, whereas precise case of the petitioner-company is that neither the management nor the ownership has been changed.

17. Careful perusal of instructions dated 16.02.2012 clearly reveals that in case the name of a company is changed with the approval of Registrar of the Companies and no transaction/sale of property takes place, no stamp duty is chargeable from the Company seeking change in its name.

18. In the instant case, it is not the case of the respondents that while effecting change in the name of the company, sale/purchase, if any, of the property took place inter se two entities as detailed hereinabove rather, Certificate of Incorporation issued by Registrar of Companies in the name of "M/s Inox Air Products Private Limited" clearly reveals that there is only change of the name in terms of Ss.21 and 23 of Companies Act. Since no new entity, if any, has come into existence on account of proposed change in the name of company coupled with the fact that there is no document available on record, if any, to show that sale-purchase of properties took place between two entities, as noticed above, action of the respondents, demanding stamp duty appears to be highly unjust and unreasonable.

19. At this stage, it would be apt to take note of the following para of judgment passed by Division Bench of this Court in JSTI Transformer Pvt. Ltd. Vs. State of Himachal Pradesh (supra).

> "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-avis 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 ::: Downloaded on - 01/12/2022 15:12:49 :::CIS High Court of H.P. 15 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 17 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."

20. While placing reliance on various judgments passed by this Court as well as other Constitutional Courts, the Division Bench has categorically held in the judgment supra that 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. However, while making aforesaid

observations, Division Bench has further held that transfer of assets of a 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. If it is so, no stamp duty can be charged merely on account of change of the name of the company.

21. The Co-ordinate Bench of this Court in ***Sozin Flora Pharma LLP*** *Vs.* ***State of Himachal Pradesh and another***, which otherwise has been taken note in ***JSTI Transformer Pvt. Ltd.*** (Supra), while dealing with similar facts and circumstances, where partnership Firm became a private limited liability partnership, categorically held that the stamp duty /registration fee cannot be levied upon conversion of partnership firm to a limited liability partnership firm. If it is so, no permission, if any, under Section 118 of H.P. Tenancy and Land Reforms Act, 1972 is required for change of name in the revenue documents from "M/s Inox Air Products Ltd." to "M/s Inox Air Products Private Ltd."

22. Consequently, in view of the detailed discussion made hereinabove, this Court finds merit in the petition and the same is allowed. Impugned order dated 13.1.2016, Annexure P-2 is quashed and set aside. Respondents are directed to consider the request of the petitioner-company to effect change of name of petitioner company as "M/s Inox Air Products Private Limited", without insisting upon payment of stamp duty. Since petitioner-company is embroiled in litigation since 2016, this court hopes and trusts that the needful in terms of this order shall be done expeditiously, preferably within four weeks.

23. In the aforesaid terms, present petition is disposed of alongwith pending applications, if any.

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

Mandeep Kumar and Ors.

.....Petitioners.

Versus

State of Himachal Pradesh and Ors.

.....Respondents

For the Petitioner: Mr. Aman Parth Sharma, Advocate.

For the respondents: Mr. Sudhir Bhatnagar and Mr. Narender Guleria, Additional Advocates General, with Mr. Sunny Dhatwalia, Assistant Advocate General.

Civil Writ Petition No. 3476 of 2019
Decided on:24.11.2022

Constitution of India, 1950- Article 226- Writ petition praying appointment of the petitioners against the Computer Assistant (having 21 post vacant) in respondent department- pursuant to walk-in interview for the post of Computer Assistant conducted by the Institute Management Committees (IMCs) of ITI petitioners herein came to be selected and appointed as Computer Assistant at government Vocational Training Institute Nehranpukhar, Palampur and Kasauli respectively and since then, they have been discharging their duties against the aforesaid posts to the utmost satisfaction of the employer- Cases of petitioners herein for taking over their services on contract for the post of Computer Assistant in terms of notification, were not considered on the ground that they do not possess requisite qualification as prescribed under Recruitment & Promotion Rules- **Held-** There is ample material available on record suggestive of the fact that posts of Computer Assistant exist in the Industrial Training Institute and the petitioners herein were appointed against the post of Computer Assistant in the year, 2008- They had been working against such posts continuously without there being any interruption- Deserve to be considered for taking over services by the government on contract basis in terms of policy decision- Petition allowed. (Paras 12, 13)

Cases referred:

Nihal Singh & Ors v. State of Punjab & Ors (2013) 14 SCC 65;

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Being aggrieved and dissatisfied with order dated 01.7.2019 (Annexure P-12), whereby prayer made by the petitioners to post them as Computer Assistant in different Polytechnic Colleges in the State, as was done in the case of other similarly situate person Ms. Shweta Dhiman, came to be rejected, petitioner has approached this Court in the instant proceedings filed under Article 226 of the Constitution of India, praying therein for following main relief:

> "i) The respondents may kindly be directed to appoint the petitioners against the Computer Assistant (having 21 post vacant) in respondent department.
> ii) That office order dated 01.07.2019 (Annexure P-12) in as much as appointment order dated 13.07.2017 (Annexure P-6) may kindly be set-aside and quashed in the interest of justice and fair play."

For having bird's eye view, facts shorn of the unnecessary details, but necessary for adjudication of the case at hand are that pursuant to walk-in interview for the post of Computer Assistant conducted by the Institute Management Committees (IMCs) of ITI Nehranpukhar, Palampur and Kasauli in the year, 2008, petitioners herein came to be selected and appointed as Computer Assistant at government Vocational Training Institute Nehranpukhar, Palampur and Kasauli respectively and since then, they have been discharging their duties against the aforesaid posts to the utmost satisfaction of the employer. In the interregnum, pursuant to directions issued by the Division Bench of this Court in LPA No. 107 of 2014, decided vide judgment dated 3.12.2014, services of all the teaching and non-teaching employees engaged on hourly or period basis through Student Welfare Fund,

IMCs and other schemes up to 31.7.2015 in the government Engineering colleges, polytechnic colleges, industrial training institutions and the department of Technical Education Vocational and Industrial Training Himachal Pradesh, on contract basis were taken over by the State Government vide notification dated 3.10.2015 as one time measure (Annexure P-3), after completion of seven years or 9600 hours, whichever is earlier. However fact remains that cases of the petitioners herein for taking over their services on contract for the post of Computer Assistant in terms of aforesaid notification dated 3.10.2015, were not considered on the ground that they do not possess requisite qualification as prescribed under Recruitment & Promotion Rules. One of the similarly situate person Ms. Shweta Dhiman, who was also appointed in the walk-in interview for the post of Computer Assistant under the Student Welfare Fund from semester to semester basis, approached the erstwhile HP State Administrative Tribunal by way of OA No. 6669 of 2017, seeking therein direction to the respondents to implement the policy decision dated 3.10.2015 and take over her services on contract basis from the date of completion of seven years. In the reply filed to the aforesaid petition, respondents themselves admitted that there is flaw in the Recruitment & Promotion Rules for the posts of Computer Assistant and steps are being taken to amend the Recruitment & Promotion Rules. Having taken note of the aforesaid reply filed by the respondents, erstwhile HP State Administrative Tribunal vide judgment dated 19.12.2018 (Annexure P-10) disposed of the petition filed by the person namely Ms. Shweta Dhiman with direction to the Principal, Secretary (Technical Education) to the Government of Himachal Pradesh, to take further action in the matter by carrying out requisite amendment in the Recruitment & Promotion Rules in terms of letter dated 14.3.2018. Pursuant to aforesaid direction, respondents amended the Recruitment & Promotion Rules to give complete effect to the notification dated 3.10.2015 (Annexure P-7), as a consequence of which, above named

Ms. Shweta Dhiman as well as petitioners herein became eligible for their appointment against the post of Computer Assistant on contract basis. After amendment in the aforesaid Recruitment & Promotion Rules, respondents considered the case of the person namely Ms. Shweta Dhiman and posted her as Computer Assistant on contract basis at Government Polytechnic College Kangra. Since services of the petitioners, who were similarly situate to Ms. Shweta Dhiman were not converted from hourly basis to contract on the ground that they do not possess requisite qualification as per Recruitment & Promotion Rules, they after passing of the judgment dated 19.12.2018 in Ms. Shweta Dhiman's case supra also approached the erstwhile HP State Administrative Tribunal by way of OA No. 3187/2017, which came to be disposed of vide judgment dated 18.3.2019, passed by the erstwhile HP State Administrative Tribunal with direction to the respondents to consider and decide the case of the petitioners in light of judgment rendered by the Tribunal in Ms. Shweta Dhiman's case. Pursuant to aforesaid directions, case of the petitioners came to be considered afresh by the respondent department but vide order dated 1.7.2019, respondents rejected the contention of the petitioners that they are similarly situate to Ms. Shweta Dhiman and fulfill eligibility condition in order to take their service on contract to the post of Computer Assistant. Vide aforesaid order, respondents while rejecting the case of the petitioners observed that though the nomenclature of the post, which petitioners and Ms. Shweta Dhiman are working is the same i.e. Computer Assistant, but their job profile is quite different and as such, they cannot claim any parity. Besides above, respondents also cited another reason in the aforesaid impugned order that there is no post of Computer Assistant in ITIs and as such, there is no question of taking over the services of the petitioners against the post of Computer Assistant on contract basis, especially when they had been rendering the work of clerk since their appointment on contract basis under IMC. In the aforesaid background,

petitioners have approached this Court in the instant proceedings, praying therein for relief as reproduced herein above.

Pursuant to notice issued in the instant proceedings, respondents have filed reply, perusal whereof reveals that facts as have been noted herein above, are not in dispute, rather stand duly admitted. Reason cited by the respondents for rejecting the claim of the petitioners is that they were never appointed as Computer Assistant and from day one, had been performing work of clerks and as such, their services cannot be taken on contract basis against the post of Computer Assistant, which post is otherwise available in polytechnic college not in ITIs. Apart from above, respondents have stated in their reply that posts of Computer Assistant is a teaching post, whereas petitioners neither have teaching experience nor were made to do any teaching work while working under IMC contracts. Respondents have further stated in their reply that petitioners were not appointed by the respondents, rather by Institute Management Committees and as such, they have no right to claim parity with the persons, who have been appointed strictly in terms of Recruitment & Promotion Rules framed by the respondent-State. Respondents while stating that the petitioners are not similarly situate to Ms. Shweta Dhiman have stated in their reply that though Ms. Ms. Shweta Dhiman was also appointed as Computer Assistant under Student Welfare Fund in the Government Polytechnic College Kangra, but since day one, she had been performing the teaching work and as such, after amendment of Recruitment & Promotion Rules, her services rightly came to be converted on contract basis against the post of Computer Assistant, at Government Polytechnic College Kangra.

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

Before ascertaining the correctness of the rival submissions of learned counsel for the parties, it would be apt to take note of order dated 4.12.2021,

passed by this Court in the instant proceedings, which is reproduced herein below:

> "Precise prayer in the instant petition is that once, the petitioners were engaged as Computer Assistants (IMC) on contract basis vide appointment letters dated 14.8.2008 (Annexure P-2), respondent-State ought to have taken their services on contract, on the same post, in terms of Annexure P-3, policy decision taken by Government of Himachal Pradesh, dated 3.10.2015, whereby Government took a conscious decision to take over services of all teaching and non-teaching staff working under Institute Management Committees (IMC's) and under other schemes upto 31.7.2015 in the Government Engineering Colleges/Polytechnics and Industrial Training Centre or Department of Technical Education, on contract basis after completion of 7 years or 9600 hours, whichever is earlier, as one time measure.
>
> 2. Though in terms of aforesaid policy, services of the petitioners herein were taken over by the Government of Himachal Pradesh, Department of Technical Education but not against the posts of Computer Assistants, rather against the clerical posts, petitioners did not accept the aforesaid decision of the Government and continued to work on contract under IMC. Since services of similar situate persons were taken over on contract basis on the posts of Computer Assistants, they approached the court of law, seeking therein direction to the Government of Himachal Pradesh, to give them similar treatment. However, despite there being directions issued by erstwhile Himachal Pradesh Administrative Tribunal, aforesaid prayer made on behalf of the petitioners repeatedly came to be rejected on the ground that they were never appointed against the posts of Computer Assistants, rather from day one they are rendering clerical services, as such, their services were rightly taken over on contract basis against clerical posts.
>
> 3. Having heard learned counsel for the parties and perused material available on record this court finds that there are common Recruitment and Promotion Rules for THE posts of Computer Assistant in the Department of Technical Education, and as such, persons from common cadre can be appointed in ITI's as well as in Polytechnic colleges. Services of one Shweta Dhiman, who was also appointed on contract basis under SW against the post of Computer Assistant, though in Polytechnic, were taken over by the State Government in terms of Policy referred to supra, on contract basis against the post of Computer

assistant, as a result she is rendering services on the said post, in one of Polytechnics in the State of Himachal Pradesh. However, in case of the petitioners, who were also given appointment as Computer Assistants like Shweta Dhiman, claim is being made by respondent-State that their services cannot be taken over on contract basis against the teaching post i.e. Computer Assistant, Though respondent State has attempted to carve out a case that Shweta Dhiman is/was performing teaching work, but the latest affidavit filed by Director of Technical Education, in terms of order dated 18.8.2021, and information received by petitioners under Right to Information Act, 2005, clearly reveal that said Shweta Dhiman is performing duties of a non-teaching post, as are being done by the petitioners herein. Similarly, this court finds that at present 21 posts of Computer Assistant are lying vacant in the State of Himachal Pradesh in the Department of Technical Education and services of some of the persons working in ITI's have been transferred to Polytechnics. Careful perusal of information received by the petitioner under Right to Information Act, 2005, dated 24.10.2017 reveals that one Ashok Kumar working as Craft Instructor, Electrician on contract basis was ordered to be adjusted at Polytechnic Hamirpur against the post of Workshop Instructor Electrical.

4. If it is so, it is not understood, why services of petitioners, who were initially appointed as Computer Assistants, cannot be availed in various Polytechnic in the State of Himachal Pradesh, especially when 21 posts of the Computer Assistants are lying vacant.

5. Argument advanced by Mr. Narinder Thakur, learned Deputy Advocate General, that the posts of Computer Assistant are teaching post, falls to the ground, in view of affidavit filed by Director of Technical Education, as taken note herein above, as well as Annexure PR-3, information received by petitioners under Right to Information Act, 2005 dated 4.12.2019, whereby it has been informed that work assigned to Shweta Dhiman, Computer Assistant is non-teaching i.e. practical work of labs.

6. In view of aforesaid, Director of Technical Education, is directed to file an affidavit, specifically stating therein that why the petitioners herein cannot be adjusted against the posts of Computer Assistant(s), lying vacant in the Department of Technical Education, especially, when there is a common cadre of Computer Assistants in the Department of Technical Education. Besides above, Director of Technical Education may also inform that whether there is a common cadre of Computer Assistants in

> the Department of Technical Education or not? If yes, then why the persons from Industrial Training Centre cannot be transferred/ appointed/ adjusted in the Polytechnics or Engineering Colleges, run by the Department.
> 7. Needful be done positively on or before next date of hearing. List on 18.12.2021."

Pursuant to aforesaid order, respondents have filed affidavit (page-389) under the signature of Director, Technical Education, Vocational & Industrial Training, H.P., Sundernagar, H.P., wherein further plea has been taken that question of common cadre for the post of Computer Assistant in the department of Technical Education arises only when cadre of Computer Assistant is available in all the three types of institutions running in the respondent department of the State i.e. Industrial Training Institute, Diploma and Degree level Institute. Since there is no post of Computer Assistant prescribed by the Regulatory Agency i.e. DGE&T for Industrial Training Institute, no posts of Computer Assistant have been created in the govt. Industrial Training institutes running under control of the State. However, in the aforesaid affidavit, respondents have categorically admitted that 27 posts of Computer Assistant in diploma and degree level institutions have been created, but there is no post of Computer Assistant created in the government Industrial Training institutes of the State. While admitting that petitioners were appointed by Institute Management Committees of the respective institutions during the period, 2009, as per actual requirement of the work on consolidated monthly remuneration of Rs.5800/- further enhanced to Rs. 14100/-, respondents have claimed that wrong nomenclature of the post was given while issuing appointment letter because at that time, no posts of nomenclature of the Computer Assistant were available or created in the Industrial Training Institute running under the respondent department of the State. Most importantly, in the aforesaid reply, it has been claimed by the respondents that till the year, 2011, no approval was required for engaging the incumbents under the Institute Management Committees from the Director,

Technical Education, Vocational & Industrial Training, as a result of which Institute Management Committee was engaging the training staff on the contract basis as per their requirement. In the aforesaid affidavit, respondents while specifically answering query with regard to appointment of Ms. Shweta Dhiman, who was also appointed as Computer Assistant under the Student Welfare Fund in the polytechnic College, Hamirpur, have stated that though Ms. Shweta Dhiman was also appointed as Computer Assistant, which is a non-teaching post, but having seen her job profile, she was given teaching work, as a result of which, her case rightly came to be considered for conversion of her services from hourly basis to contract against the post of Computer Assistant available in the Government Polytechnic College Kangra. However, while justifying the appointment of one Ashok Kumar, who like petitioners was also appointed as Craft Instructor in govt. ITI and was regularized as Workshop Instructor in the Government Polytechnic College, Hamirpur, respondents have attempted to justify its action by stating that keeping in view the job profile of the aforesaid person, his services have been regularized in the Government Polytechnic College despite the fact that there is no common cadre.

Having perused the entire record adduced along with the pleadings, this court finds that petitioners herein were initially appointed as Computer Assistant by various Institute Management Committees on contract basis, which was though initially for one year, but came to be renewed on year to year basis with the approval of the Director, Technical Education, Vocational & Industrial Training, as a result of which, petitioners had been working in the department for more than 12 years, without there being any interruption. Similarly, it is not in dispute that pursuant to directions issued by this Court in LPA No. 107 of 2014, decided vide judgment dated 3.12.2014, service of all the teaching and non-teaching employees engaged on hourly or period basis through Student Welfare Fund, IMCs and other schemes up to 31.7.2015 in

the government Engineering Colleges, Polytechnic Colleges and Industrial Training Institutions were taken over on contract basis after their having completed seven years or 9600 hours by the state government vide notification dated 3.10.2015. Though pursuant to aforesaid policy decision, case of the petitioners alongwith other similarly situate persons was also considered for taking over their services on contract basis, but since they were not possessing requisite qualification as per Recruitment & Promotion Rules framed by the department for appointment against the post of Computer Assistant, one of similarly situate person Ms. Shweta Dhiman approached the erstwhile HP State Administrative Tribunal, which having taken note of the plea setup by the respondent-State that steps are being taken to amend the rules, disposed of the petition with direction to the respondents to take decision with regard to amendment of Recruitment & Promotion Rules expeditiously. After amendment of Recruitment & Promotion Rules though all the petitioners as well as Ms. Shweta Dhiman became eligible to be appointed against the post of Computer Assistant, however respondents though decided to take the service of Ms. Shweta Dhiman on contract basis against the post of Computer Assistant at Government Polytechnic College, Kangra, but it rejected the case of the petitioners on the ground that their initial appointment by Institute Management Committees was not against the post of Computer Assistant, rather from the day one, they had been performing work of the clerk. Though respondents offered to take service of the petitioners on contract basis against the post of clerk, but such offer was refused by the petitioners and till date, they had been working on contract basis against the post of Computer Assistant under IMCs in respective institutions.

Having carefully perused the appointment letter(s) of the petitioner placed on record (Annexure P-2), this court finds that they were appointed/engaged as Computer Assistant on contract basis on fixed remuneration of Rs. 5800/- which was further enhanced to Rs. 14100/-.

Though aforesaid appointment letter clearly reveals that contract issued in favour of the petitioners against the post of Computer Assistant was for one year but came to be renewed on year to year basis on the approval given by the Director, Technical Education, Vocational & Industrial Training as is evident from the communication dated respondent No.3.5.2016 (page-51). After having perused aforesaid appointment letter, this Court finds no force insubmission made by the learned Additional Advocate General that petitioners herein were appointed as clerk not Computer Assistant. Similarly, this court finds no force in the submission of learned Additional Advocate General that petitioners were wrongly offered appointment against the post of Computer Assistant in govt. ITIs because as per reply filed by the respondents, prior to year, 2011, training institutes were at liberty to appoint/engage persons against different posts as per their requirement. Perusal of Minutes of 1st meeting of State steering Committee held under the Chairmanship of the Principal Secretary (Technical Education) to the Government of Himachal Pradesh on 26.4.2007 (page 174 Annexure R/2) reveal that power to give appointment was delegated to the IMCs. Though respondents have not placed on record complete copy of the minutes, but perusal of complete copy of Minutes made available to this Court by the learned counsel for the petitioner clearly reveals that IMCs were directed to engage Instructors on contract basis. Para 4 of the aforesaid minutes is reproduced herein below:

> "4. Approval of appointments/engagements of Instructors on contract basis by IMC (Institution Management Committee) under CoE(Centre of Excellence):-
> The committee was apprised that as per guidelines of IMC's issued from DGE&T, Ministry of Labour and employment, Govt. of India, IMC's have been authorized to appoint/engage instructors on contract basis. This provision also finds mention in MOU signed between State and Central Govt. Since the posts were not created and COEs were to be made functional from august 2006, IMC's were asked to engage Instructors from COE Development Fund for those basic modules for which the

> Instructors in ITI's were not available and posts were not created. The services of the Instructors in trades which were merged in Centre of Excellence (COE) are being utilized in COE's so that there is bare minimum need of the instructors to be engaged afresh. The instructors so engaged are the contract employees of the IMC and not of the Govt. and have no claim for regularization.
> The details of instructors engaged by IMC from COE development Fund (As per Agenda Annexure IV attached herewith) were placed before the committee for approval. The action taken by the department and the IMC's in this behalf was approved.
> The Member Secretary – cum- Director, Technical Education, Vocational & Industrial Training, also brought to notice of State Steering Committee that the instructors are required to be engaged for advanced modules of the first batch and basic modules of the ITI's to be upgraded as centre of excellence from academic session starting from August, 2007 and the IMC's could be authorized to fill up posts on contract basis as were done in the previous year."

Since respondents pursuant to direction issued by the Division Bench of this Court in LPA themselves decided to convert/take over the services of all the persons employed on hourly/period basis to government Contract basis, there is no justification to deny such relief to the petitioners on the ground that they were not appointed against the post of Computer Assistant and since day one, they had been rendering service in the capacity of the clerk. If the policy decision taken by the respondents (P-3), is read in its entirety, it clearly reveals that decision was taken to convert services of all the teaching and non-teaching employees engaged on contract basis through Student Welfare Fund, Institute Management Committees and other scheme up to 31.7.015 in Government Engineering College Polytechnic and Industrial Training Institutes on contract basis after completion of seven years or 9600 hours, whichever is earlier. Since the policy specifically provided for taking over services of teaching and non-teaching employees engaged on contract basis through Student Welfare Fund and Institute Management Committees (IMCs),

case of the petitioners, who were appointed as Computer Assistant by IMCs could not be rejected on the ground that they were wrongly appointed against the post of Computer Assistant and they were working as clerk. It is not in dispute that IMCs were authorized by the State steering Committee in its meeting held on 26.4.2007, to make the appointments as per their requirements on contract basis. Pursuant to aforesaid guidelines, IMCs and Student Welfare Fund made certain appointments against the teaching and non-teaching posts and as such, at this stage, respondents cannot be permitted to claim that appointment made by the IMC against the post of Computer Assistant was not in accordance with rules. Moreover, this Court finds that at the first instance, when cases of the petitioners were considered for taking over by the government on contract basis, no such objection was raised with regard to non availability of the posts in ITI, rather at that time, specific case of the respondents was that petitioners do not possess requisite qualification to be appointed against the post of Computer Assistant lying vacant in the various Government Polytechnic Colleges. Since to give complete effect to the policy decision taken by the government, respondents amended the rules thereby relaxing educational qualification enabling the petitioners and other similarly situate person to become eligible to be considered against the post of Computer Assistant, now it is not open for the respondents-State to claim that neither there were posts of Computer Assistant in the ITIs nor petitioners were duly qualified to be appointed against the post of Computer Assistant.

Though learned Additional Advocate General while inviting attention of this court to the reply filed by the respondent-State vehemently argued that since there is no post of Computer Assistant available in the department, claim of the petitioners as made in the petition is not justified, but having taken note of the fact that petitioners had been rendering services as Computer Assistant in different ITI's is for more than a decade, respondents

State cannot be permitted to claim that on account of non-availability of posts, case of the petitioners cannot be considered. Once respondent-State by way of policy decision, took over the services of the persons appointed by IMCs to Government contract, it is under obligation to otherwise create posts to adjust the petitioners, but definitely cannot take up the plea of non-availability of posts to adjust the petitioners. In this regard, reliance is placed on judgment passed by the Hon'ble Apex Court in **Nihal Singh and Ors v. State of Punjab and Ors** (alongwith connected matter) **(2013) 14 SCC 65**, wherein it has been held as under:

> "20. But we do not see any justification for the State to take a defence that after permitting the utilisation of the services of large number of people like the appellants for decades to say that there are no sanctioned posts to absorb the appellants. Sanctioned posts do not fall from heaven. State has to create them by a conscious choice on the basis of some rational assessment of the need."

During the proceedings of the case, learned counsel for the petitioner while making this Court peruse information received by the petitions under RTI, argued that all three institutions i.e. Industrial Training Institute, Polytechnic College and Engineering Colleges are under the administrative control of one department i.e. Directorate of Technical Education, Vocational & Industrial Training, Government of Himachal Pradesh and there is a common cadre of Computer Assistant as a result of which, person working as Computer Assistant in ITI can be transferred to Government Polytechnic College or Government Engineering College. Having perused material available on record this court finds that in some of the branches/trades, department of Technical Education, which is administrative department of these three institutions have framed Recruitment & Promotion Rules separately for different posts, but till date, cadre of Computer Assistant is common and persons working in one institute against the post of Computer

Assistant is being appointed/transferred in other institute i.e. Government Polytechnic College or Engineering College or Directorate of Technical Education. As of today, more than ten posts of Computer Assistant are lying vacant in the department of Technical Education, Vocational & Industrial Training, meaning thereby, petitioners, who are three in number, can be easily accommodated against the posts of Computer Assistant lying vacant in polytechnic and degree colleges. Person namely Ms. Shweta Dhiman, who was similarly situate to the petitioners, was also not having requisite qualification to be appointed against the post of Computer Assistant as per old Recruitment & Promotion Rules, but after promulgation of policy of taking over the service by the government on contract basis, she approached the erstwhile HP State Administrative Tribunal and Tribunal having taken note of the plea set up by the respondent-State that on account of certain flaws in the Recruitment & Promotion Rules department is contemplating to amend the Recruitment & Promotion Rules, disposed of the petition with direction to expedite the matter. After amendment in Recruitment & Promotion Rules for the post of Computer Assistant, which is common cadre in the three wings of the department, Ms. Shweta Dhiman, was appointed as Computer Assistant in Government Polytechnic College, Kangra. Though aforesaid posts of Computer Assistant is being claimed to be a teaching post by the respondents/State, but perusal of communication dated 4.12.2019 (Annexure PR-3), issued by the Principal, Government Polytechnic College Kangra, under RTI reveals that posts of Computer Assistant is non-teaching i.e. practical work of labs. Similarly, Training Manual of Directorate of Technical Education Vocational and Industrial Training Himachal Pradesh (Annexure PR-7) placed on record by the petitioners clearly suggests that post of Computer Assistant is a non-teaching post and its number in all the institutions under department of Technical Education is 179. Respondents are claiming posts of Computer Assistant to be teaching post to justify the posting of Ms. Shweta Dhiman

against the post of Computer Assistant at Government Polytechnic College, Kangra. Stand taken by the respondents that since Ms. Shweta Dhiman was performing teaching work, she has been rightly considered against the post of Computer Assistant, which is a teaching post is totally contrary to the record, especially the manual which itself suggests that post of Computer Assistant in the department of Technical Education is non-teaching post.

During proceedings of the case, learned counsel for the petitioners invited attention of this court to the notification dated 18.5.2016, issued by the Government of Himachal Pradesh Technical Education, to demonstrate that vide aforesaid notification, 43 posts of teaching faculty and 65 posts of non-teaching faculty to start five disciplines i.e. Civil Engineering, Mechanical Engineering, Electrical Engineering, Computer Engineering and Automobiles Engineering with intake capacity of 60 students in each discipline from the session 2017-18 in new government Polytechnic at Basantpur, District Shimla, under Shimla Gramin Constituency, came to be created and post of Computer Assistant is non-teaching post as are of junior Assistant and Clerk. Though respondents have attempted to carve out a case that there is no post of Computer Assistant in ITIs, but careful perusal of communication dated 7.6.2022, issued under the signature of Director, Technical Education, Vocational & Industrial Training, H.P., which is reproduced herein below, clearly reveals that matter regarding the remuneration of Trainer/supporting staff engaged under the Institute Management Committees of Industrial Training Institutes on contract basis through outsource by Agencies except NIELIT, Shimla, was discussed vide agenda point No. 15.11 in the 15th meeting of the State Steering Committee held on 10.5.2022 at HP Secretariat, Shimla, wherein the said committee accorded its approval to hike the remuneration of Trainers/supporting staff, already engaged under Institute Management Committee.

"On the subject cited above, it is intimated that the matter regarding remuneration of Trainer/ supporting staff engaged under the Institution Management Committees (IMCs) of Industrial Training Institutes on contract basis/through outsource by Agencies except NIELIT, Shimla was discussed vide agenda point No. 15.11 in the 15th meeting of the State Steering Committee (SCC) held on 10.5.2022 at HP Secretariat, Shimla, under the Chairmanship of the worthy Secretary, Technical Education to the Govt. of Himachal Pradesh. The Committee has accorded its approval to hike the remuneration of Trainers/Supporting staff, already engaged under Institution Management Committee (IMCs). At the rate of 15% hike in the present salary of the Trainers/ supporting staff with effect from 1st June, 2022. The detail of is given below:

Sr. No.	Category	Existing remuneration being paid (Rs.) per month	@15% hike (Rs.)	Total remuneration per month (Rs.)
01	Trainer/Instructor	14,100/-	2115/-	14,100 +2115 =16215/-
02	Computer Assistant	14,100/-	2115/-	14,100 +2115 =16215/-
03	Clerk	7810/-	1172/-	7810+1172=8982/-
04	Class-IV	6200/-	930/-	6200+930= 7130/-

If the aforesaid communication, which is reproduced herein above, is perused in its entirety, it clearly reveals that posts of Computer Assistant exist in the Industrial Training institutes under IMCs and persons working against such post were being paid Rs. 14,100/- prior to further hike granted vide aforesaid communication and as of today, they are getting Rs. 16,215/-. Since there is ample material available on record suggestive of the fact that posts of Computer Assistant exist in the Industrial Training Institute and the petitioners herein were appointed against the post of Computer Assistant in the year, 2008 and since then, they had been working against such posts

continuously without there being any interruption, they also deserve to be considered for taking over services by the government on contract basis in terms of policy decision taken on 3.10.2015. Though respondents have claimed in their reply and supplementary affidavit that at present, there are no posts of Computer Assistant available in it is, but such plea appears to be totally contradictory on the face of communication dated 7.6.2022, issued by the Director, Technical Education, Vocational & Industrial Training, H.P., which itself speaks about the existence of posts of Computer Assistant in ITIs under Institution Management Committees. If it is so, persons appointed by IMC's on contract basis against the post of Computer Assistant are/were required to be considered for taking over of their services by the government on contract basis as per policy decision. Moreover, documents available on record clearly reveal that persons working in Govt. ITIs under various posts have been adjusted/absorbed in govt. Polytechnic colleges. One of the example is of Mr. Ashok Kumar, who was appointed as Craft Instructor in govt. ITI on contract basis but he was regularized as workshop Instructor (Electrical) in Government Polytechnic College, Hamirpur. Similar is the case of Ms. Shivangi, who was appointed as Computer Assistant Hydro Engineering College Bandla as is evident from Annexure P-6 (page 70). Since in all the three institutions i.e. Government Polytechnic College, Industrial Training Institutes and Engineering Colleges, which work under the administrative control of one department i.e. Directorate of Technical Education, Vocational & Industrial Training, there is common cadre of Computer Assistant, cases of the petitioners for conversion of their services from contract on IMCs to Government contract, deserve to be considered by the department against the 10 posts of Computer Assistant lying vacant in the department of Technical Education, be it in the Government Polytechnic College, Directorate or other Engineering Colleges. Since it is not in dispute that as per amended Recruitment & Promotion Rules, petitioners are eligible to be appointed

against the post of Computer Assistant, their claim to be considered for conversion of service from IMCs to government on contract basis in terms of the policy decision taken by the government cannot be allowed to be defeated on the ground of qualification or non-availability of posts of Computer Assistant in ITI's.

Consequently, in view of the detailed discussion made herein above as well as law taken into consideration, present petition is allowed and order dated 01.7.2019 (Annexure P-12) is quashed and set-aside and Director, Technical Education, Vocational & Industrial Training, Himachal Pradesh Sundernagar, HP, is directed to convert the services of the petitioners from IMC contract to Govt. contract from the due date with seniority on the post of Computer Assistant, but without financial benefits within two months from today. Present petition is disposed of alongwith pending applications, if any.

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

Between:
SH. JANKI DASS S/O SHRI RELU RAM, RESIDENT OF VILLAGE RICHHALI, P.O. DHWALI, TEHSIL SARKAGHAT, DISTT. MANDI, H.P. (RETIRED DRIVER, HP RURAL DEVELOPMENT DEPARTMENT).

....PETITIONER.

(MR. S.P. CHATTARJI, ADVOCATE)

AND

1. STATE OF H.P. (THROUGH ITS SECRETARY RURAL DEVELOPMENT AND PANCHAYATI RAJ, DEPARTMENT TO THE GOVERNMENT OF HIMACHAL PRADESH AT SHIMLA-2.

2. THE DIRECTOR, RURAL DEVELOPMENT DEPARTMENT, HIMACHAL PRADESH, SHIMLA-9.

....RESPONDENTS.

(M/S DINESH THAKUR AND SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL)

CIVIL WRIT PETITION
No.824 of 2020
Decided on: 21.10.2022

Constitution of India, 1950- Article 227- Grievance of the petitioner is that the act of the learned Labour Court of not granting actual pecuniary benefits to the petitioner as from the date when his services were ordered to be regularized is bad in law- **Held-** the award passed by the learned Labour Court suffers from infirmity and the same requires modification- Award modified- Petition allowed. (Paras 13, 14)

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/workman has assailed award dated 17.07.2019 (Annexure P-3), passed by the Court of learned Presiding Judge, Labour Court-cum- Industrial Tribunal, Kangra at Dharamshala, H.P., (Camp at Mandi), in Reference No.83 of 2015, titled Shri Janki Dass Versus the Director, Rural Development Department, Himachal Pradesh, Shimla-9.

2. Brief facts necessary for the adjudication of the present petition are as under:-

The petitioner was engaged on daily wage basis as a driver in the office of Deputy Commissioner, Kullu-cum-Chief Executive Officer, District Rural Development Agency, Kullu, H.P., w.e.f. 24.06.1998. His services were terminated w.e.f. 29.04.2004. Feeling aggrieved, the petitioner raised an industrial dispute, which resulted in the following reference being made by the appropriate Government to the learned Labour Court-cum-Industrial Tribunal:-

> "*Whether the termination of services of Shri Janki Dass s/o Shri Relu Ram Ex-Daily wages Driver by the Deputy Commissioner Kullu-cum-Chief Executive Officer, District Rural Development Agency Kullu, District Kullu, H.P. w.e.f. 30-04-2004 on the charges of misconduct without conducting any domestic enquiry and without comply the provisions of the Industrial Disputes Act, 1947 as alleged by the workman is proper and justified? If not, what relief of service benefits and amount of compensation the above aggrieved workman is entitled to*?"

3. This Reference was decided by the learned Labour Court in terms of award dated 24.07.2010, appended with the petition as Annexure P-1, in the following terms:-

> "*For all the foregoing reasons discussed the reference is allowed. The termination of the petitioner is set aside and quashed. The respondent is directed to reengage the petitioner forthwith along with seniority and continuity in service from the date of his illegal termination, though except back wages. The reference is answered in the following terms. A copy of this award be sent to the appropriate Government for publication in the official gazette and the file after completion be consigned to the record room.*"

4. The petitioner was re-engaged in terms of said award w.e.f. 01.04.2011, as has been stated at the Bar by learned counsel for the petitioner. Thereafter, feeling aggrieved by the fact that though persons junior to the petitioner stood regularized as drivers by the respondent-Department, yet his services were not being regularized, the petitioner again raised an industrial dispute through the Union and the following reference was made by the appropriate Government for the adjudication of the learned Labour Court:-

> "*Whether the demand of Janki Dass S/O Shri Relu Ram, R/O Village Richhali, P.O. Dhawali, Tehsil Sarkaghat, District Mandi, H.P. through Himachal Pradesh Lok Nirman Vibagh Majdoor Ekta Union affiliated with CITU Mandal Committee Dharampur, regarding regularization of his daily wages services from the date his similar situated workmen have been regularized, (as alleged by the workman) as per Government Policy to be fulfilled by the Director, Rural Development Department, Himachal Pradesh, Shimla-9, is legal and justified? If, yes, to what relief, service benefits above workman is entitled to from the above employer*?"

5. This Reference was decided by the learned Labour Court vide Annexure P-3, appended with the petition, dated 17.07.2019, as under:-

> "*For the foregoing reasons discussed hereinabove, the reference is allowed. Consequently, the petitioner shall be deemed to have been regularized on 4.8.2007, i.e. the date on which two of his juniors named S/Shri Bharat Kumar and Dharam Pal were regularized. Since, the petitioner was not on the rolls of the respondent/Department, the regularization shall be notional. The petitioner shall, however, not be entitled to any pecuniary benefits arising thereto. The reference is answered in the aforesaid terms.*

A copy of this Award be sent to the appropriate Government for publication in the official gazette and the file after due completion be consigned to the Record Room."

6. It is in this background, that the petitioner has preferred the present Writ Petition.

7. Learned counsel for the petitioner has argued that limited grievance of the petitioner is that the act of the learned Labour Court of not granting actual pecuniary benefits to the petitioner as from the date when his services were ordered to be regularized is bad in law and therefore, the award which has been passed by the learned Labour Court be modified to the extent that the petitioner be held entitled to pecuniary benefits as from the date his regularization has been ordered by the learned Labour Court.

8. The prayer is opposed by the learned Additional Advocate General, on the ground that a perusal of the award passed by the learned Labor Court in the first Reference which was raised by the petitioner feeling aggrieved by his termination demonstrates that though while setting aside the termination of the petitioner, learned Labour Court had directed re-engagement of the petitioner alongwith seniority and continuity in service from the date of his termination, but back wages were not granted to him and this award has attained finality, because the same was not challenged by the workman. On this count, learned Additional Advocate General submits that there is no infirmity with the impugned award and therefore, the petition is without merit and the same be dismissed.

9. I have heard learned counsel for the parties and have also gone through the pleadings as well as the documents appended therewith including the award referred to by the learned Courts below.

10. Having carefully gone through the relief prayed for by the petitioner and the awards passed by the learned Labour Court, dated 24.07.2010 and 17.07.2019, this Court is of the considered view that though,

partly, learned counsel for the petitioner as well as learned Additional Advocate General are correct, but the award which has been passed by learned Labour Court, which stands assailed by way of the present Writ Petition, does suffers from some infirmity and the same, therefore, requires some modification.

11. It is not in dispute as has been rightly pointed out by the learned Additional Advocate General that in terms of award dated 24.07.2010, when termination of the petitioner was held to be bad by learned Labour Court and when learned Labour Court ordered re-engagement of the petitioner alongwith seniority and continuity in service from the date of termination, back wages were not granted to him. This means that though the period in between 29.04.2010 upto 24.07.2010 or let us take it as 01.04.2011, i.e. the date when the petitioner subsequently joined the duties on the basis of the award passed by the learned Tribunal, dated 24.07.2010, the petitioner did not actually perform the duties with the respondent-Department, however, in terms of the award of the learned Labour Court, this period was required to be reckoned, both for the purposes of seniority and continuity in service.

12. Now, in this background, when the Court peruses the subsequent award passed by the learned Labour Court, dated 17.07.2019, the Court finds that the learned Labour Court while holding that the petitioner was deemed to have been regularized w.e.f. 04.08.2007, i.e. the date when persons junior to him were regularized as drivers, further held that the regularization shall be notional and the petitioner shall not be entitled to be any pecuniary benefits arising therein.

13. This Court is of the considered view that the learned Tribunal erred in not appreciating that this notional promotion ought to have been restricted as from the date of the deemed regularization till the services of the petitioner were re-engaged after passing of the first award and thereafter, at least the pecuniary benefits actual ought to have been ordered to be

paid/released in favour of the petitioner. To this effect, the award passed by the learned Labour Court suffers from infirmity and the same requires modification. The Court is making this observation, for the reason that once learned Tribunal and rightly so, came to the conclusion that the petitioner deserved to be regularized w.e.f. 04.08.2007, i.e. the date when the services of his juniors were regularized as such, then the actual monitory benefits at the most could have been denied to the petitioner for the period when he did not perform his duties as a result of his illegal termination by the Department till he re-joined his duties in implementation to Annexure P-1. But thereafter, as from the date the petitioner re-joined his duties, he ought to have been given the actual pecuniary benefits to which he was entitled to as a result of his regularization.

14. Accordingly, this petition succeeds to the said extent and the same is therefore, disposed of by modifying award dated 17.07.2019, ordering that the petitioner shall be deemed to have been regularized from 04.08.2007, i.e. the date on which two of his juniors, namely, Shri Bharat Kumar and Shri Dharam Pal were regularized, but as the petitioner was not on the rolls of the respondent-Department on account of his illegal termination in between 29.04.2004 to 01.04.2011, therefore, the petitioner will not be entitled to any pecuniary benefit as a result of said regularization from the date of his regularization till 01.04.2011, but as from 01.04.2011, he is held entitled to actual pecuniary benefits also. It is further ordered that if the pecuniary benefits to which the petitioner has been held entitled to by this Court by way of this judgment, are paid to him within a period of ninety days from today, then the same shall not entail any interest, but if the same are not paid within ninety days from today, then interest at the rate of 6% shall accrue upon the same as from the date of passing of the judgment. Pending miscellaneous applications, if any, disposed of. Interim order, if any, stands vacated.

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

Suresh Kapoor and others .....Petitioners.

Versus

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

For the Petitioners : Mr. Dilip Sharma, Senior Advocate with Mr. Manish Sharma, Advocate.

For the Respondents : Mr. Ashok Sharma, Advocate General with Mr. Rajinder Dogra, Senior Additional Advocate General, Mr. Vinod Thakur and Mr. Shiv Pal Manhans, Additional Advocate Generals, for respondents No.1 and 2.
Mr. K.D.Shreedhar, Senior Advocate with Ms. Sneh Bhimta, Advocate, for respondent No.3.

CWP No.1218 of 2021
Reserved on : 15.11.2022
Decided on: 01.12.2022

Constitution of India, 1950- Article 226- Prayer for direction to review DPC(s) for promotion to the post of Executive Engineer and Superintending Engineer on the basis of fresh seniority list in consonance with the judgments of this Hon'ble Court and the petitioners, may be held entitled to all consequential benefits as a result thereof- **Held-** The petitioners are guilty since they have acquiesced in accepting the appointment of the private respondent from the date and day they came to be appointed and did not challenge the same in time- because of acquiescence and waiver on the part of the petitioners, no relief can be granted to them as this would prejudicially affect rights of the private respondent- Preliminary objections upheld- Petition dismissed.(Paras 41, 42, 43)

Cases referred:

Ajay Kumar Shukla and others vs. Arvind Rai and others 2022 Labour and Industrial Cases 1475;

Malcom Lawrence Cecil D'Souza vs. Union of India and others, AIR 1975 SC 1269;

Prabhakar vs. Joint Director, Sericulture Department and another, 2015 (15) SCC 1;
Rabindra Nath vs. Union of India, AIR 1970 SC 470;
Shiba Shankar Mohapatra vs. State of Orissa (2010) 12 SCC 471;
State of Uttaranchal and another vs. Shiv Charan Singh Bhandari and others, (2013) 12 SCC 179;
U.P. Jal Nigam vs. Jaswant Singh, (2006) 11 SCC 464 para 12;
Union of India and others vs. N. Murugesan and others (2022) 2 SCC 25;
Union of India and others vs. Tarsem Singh, (2008) 8 SCC 648;
Union of India and others vs. C. Girija and others, 2019(3) SCALE 527;
Union of India and others vs. Chaman Rana, (2018) 5 SCC 798;
Vijay Kumar Kaul and others vs. Union of India and others, (2012) 7 SCC 610;

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

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

> "a) That the instructions issued vide letter dated 30.1.2018, Annexure P-12, and letter dated 25.2.2019, Annexure P-15, may kindly be read down/struck down to the extent these instructions run counter to the verdict of this Hon'ble Court in the judgments rendered in the cases of VK Behl (Annexure P-8), Vinod Kumar Bisht (Annexure P-9) and Baljeet Singh (Annexure P-10).
>
> b) That the seniority assigned to the respondent No.3 as Assistant Engineer vide letter dated 4.11.2008, Annexure P-6, by taking into account his army service on the basis of Rule 5(1) of the Ex-Servicemen (Reservation of vacancies in Himachal Pradesh Technical Services Rules, 1985, Annexure P-2, which has already been read down by this Hon'ble Court in the judgment rendered in the cases of Vinod Kumar Bisht (Annexure P-9) and Baljeet Singh (Annexure P-10) by placing reliance on judgment in the case of VK Behl(Annexure P-8), may kindly be quashed and set aside. Consequently, promotion granted to the petitioner as Executive Engineer vide notification dated 9.5.2011, Annexure P-7 and as

Superintending Engineer vide notification dated 29.8.2017, Annexure P-11, may also be quashed and set aside;

c) That the respondent department may be directed to hold review DPC(s) for promotion to the post of Executive Engineer and Superintending Engineer on the basis of fresh seniority list in consonance with the judgments of this Hon'ble Court at Annexures P-7 to P-9, and the petitioners, may be held entitled to all consequential benefits as a result thereof."

2. However, before arguments on merits of the case could be heard, learned Advocate General as also learned counsel for respondent No.3 raised preliminary objections regarding maintainability of this petition, more particularly it being barred on the grounds of delay and laches as also acquiescence and waiver.

3. We have heard the learned counsel for the parties and have gone through the pleadings and material placed on record.

4. This Court, at this stage, is required only to look into the undisputed facts which can be enumerated as under:-

(i) The petitioners were appointed as Assistant Engineers in the years 1996 and 1997, respectively, whereas, respondent No.3 was appointed as an Assistant Engineer against a vacancy reserved for Ex-Servicemen under the Technical Service Rules, 1985, subsequent to the petitioners vide notification dated 08.03.2000 and joined on 13.03.2000.

(ii) The final seniority list of the Assistant Engineers (Civil) as on 30.06.1997 was circulated vide letter dated 20.08.1997 and thereafter respondent No.3 was appointed as Assistant Engineer against a vacancy reserved for Ex-Servicemen vide notification dated 08.03.2000 and he joined on the said post on 13.03.2000.

(iii) The final seniority list of Assistant Engineers (Civil) as on 30.06.1997 was quashed by the H.P. Administrative erstwhile Tribunal vide its order dated 16.05.2002 passed in O.A. No. 1940 of 1997 titled Kuldeep Rao and others vs. State of H.P. and others and the seniority list issued on 01.09.1995 was restored.

(iv) Later, vide letter dated 07.08.2006, the respondents issued a provisional seniority list of Assistant Engineers(Degree

Holders) (Annexure P-4) as on 31.05.2006 wherein respondent No.3 was shown below the petitioners at Sr. No. 158. However, vide notification dated 23.04.2007 (Annexure P-5), respondent No.3 came to be promoted to the post of Executive Engineer (Civil) on ad hoc basis.

(v) Thereafter, vide letter dated 04.11.2008 final seniority list of Assistant Engineer(Civil) (Degree Holders) as on 31.05.2006 was circulated wherein respondent No.3 was now shown above the petitioners at Sr. No. 45.

(vi) In the meantime, the High Court decided the case of S.S. Kutlehria vs. State of H.P. and the said judgment was implemented vide notification dated 09.05.2011 where respondent No.3 as also petitioner Nos. 1 to 3 were assigned dates of regular promotion as Executive Engineers as follows:-

Petitioner/respondent	Date of regular promotion as Executive Engineer
1. Surinder Paul (R-3)	1.11.2009.
2. Suresh Kapoor(P-1)	1.3.2010
3.Narinder Paul Singh Chauhan(P-2)	1.4.2010
4. Vikas Sood (P-3)	1.8.2010

(vii) The other petitioners were thereafter promoted as Executive Engineers on regular basis as per the following details:-

Sr. No.	Date of regular promotion as Executive Engineer
1. Ajay Kapoor (P-4)	27.08.2011
2. Diwakar Singh Pathania (P-5)	27.08.2011
3. Raj Kumar Verma (P-6)	27.08.2011
4. Vijay Kumar (P-7)	27.08.2011
5. Deepak Raj (P-8)	21.11.2013
6. Pasang Negi (P-9)	21.11.2013

5. It is not in dispute that the petitioners did not challenge the seniority list issued vide letter dated 04.11.2008 which otherwise adversely affected their rights and had made them fully aware that the petitioners on the basis of having been appointed as Assistant Engineers (Civil) against vacancy reserved for Ex-servicemen had been assigned seniority in terms of the Ex-Servicemen (Reservation of vacancies in Himachal Pradesh Technical Services) Rules, 1985, by taking into consideration the period of approved military service of 4 years, 11 months and 27 days rendered by respondent No.3 in the Armed Forces.

6. It is also not in dispute that based upon the seniority of respondent No.3 in the cadre of the Assistant Engineers, he was promoted to the post of Executive Engineer vide notification dated 23.04.2007 on adhoc basis. Yet, again, the petitioners did not come forward to assail the same. It is yet again not in dispute that the final seniority list of the degree holders AMIE Assistant Engineers (Civil) was again re-drawn consequent upon further review DPC convened in pursuance to the orders passed by this Court on 03.03.2011 in COPC No. 214 of 2010 vide letter dated 02.05.2011 wherein respondent No.3 was again shown senior to the petitioners at Sr. No. 74 and a specific note appeared in the seniority list against the date of appointment as AE which reads as under:-

> "**13.03.2K (Seniority assigned w.e.f. 16.03.1995 by counting his army service)**."

7. The names of the petitioners, on the other hand, appeared from Sr. No. 79 onwards. It is thereafter that respondent No.3 was promoted to the post of Superintending Engineer in the year 2017 vide notification dated 29.08.2017 and despite this no representation was made by the petitioners and it is only on 26.06.2018 that the petitioners, for the first time, objected to the seniority list.

8. Thus, what stands established on record is the fact that the petitioners at no stage have questioned the assignment of seniority to respondent No.3 initially as Assistant Engineer on 13.09.2006 and thereafter as Executive Engineer vide notification dated 23.04.2007 and further not questioned the final seniority list of Assistant Engineers as circulated vide letter dated 02.05.2011 (Annexure R3/7) and have approached this Court only on 02.01.2021 by filing the instant petition, for the reliefs quoted above.

9. It is more than settled that there has to be an element of repose and a stale claim, more particularly to the one related to seniority and promotion, cannot be resuscitated.

10. It is also beyond any cavil or doubt that the remedy under article 226 of the Constitution of India is a discretionary one. For sufficient or cogent reasons, the court may, in a given case, refuse to exercise its jurisdiction; delay and laches being one of them. While considering the question of delay and laches on the part of the petitioners, the court must also consider the effect thereof.

11. As regards the service matters, more particularly, pertaining to seniority and promotion, the delay is to be strictly construed or else it would amount to unsettling the settled matters after a lapse of time. A person aggrieved by an order of promotion should approach the Court at least within six months or at the most a year of such promotion. It has been further held that 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 of the Constitution of India 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 matters.

12. Normally, delay itself may not defeat the party's claim or relief unless the position of the opposite party has been irretrievably altered or would be put to undue hardship. Delay is not absolute impediment to exercise judicial discretion and rendering of substantial justice and such matters lie in the exclusive discretion of the Court, which discretion obviously has to be exercised fairly and justly. The underlying principle behind dismissal of petition on the ground of delay and laches is to discourage agitation of stale claim and has to be construed from the perspective of the opposite party being prejudiced especially when the delay effects others' ripened rights, which may have attained finality. Each case will have to be decided on its own facts and merits. There may be cases where the demand of justice is so compelling that the Court would be inclined to interfere in spite of delay. Ultimately, as observed above, it would be a matter within the discretion of the Court.

13. Inordinate delay in making the motion for a writ will indeed be a good ground for refusing to exercise such discretionary jurisdiction. The underlying object of this principle is not to encourage agitation of stale claims and exhume matters which have already been disposed of or settled or where the rights of third parties have accrued in the meantime.

14. It is settled law that fence-sitters cannot be allowed to raise the dispute or challenge the validity of the order after its conclusion. No party can claim the relief as a matter of right as one of the grounds for refusing relief is that the person approaching the Court is guilty of delay and the laches. The Court exercising public law jurisdiction does not encourage agitation of stale claims where the right of third parties crystallises in the interregnum. ***(Refer:***

Shiba Shankar Mohapatra and others vs. State of Orissa and others, (2010) 12 SCC 471).

15. At this stage, it shall be profitable to refer to the following observations of the Hon'ble Supreme Court in ***Vijay Kumar Kaul and others vs. Union of India and others, (2012) 7 SCC 610*** as under:

> *"[23] It is necessary to keep in mind that claim for the seniority is to be put forth within a reasonable period of time. In this context, we may refer to the decision of this Court in P.S. Sadasivaswamy v. State of Tamil Nadu, 1974 AIR(SC) 2271, wherein a two-Judge Bench has held thus: -*
>
> > *"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 courts to put forward stale claims and try to unsettle matters."*
>
> *[24] In Karnataka Power Corporation Ltd. & Anr. v. K. Thangappan & Anr., 2006 AIR(SC) 1581 this Court had held thus that delay or laches is one of the factors which is to be borne in mind by the High Court when they exercise their discretionary powers under Article 226 of the Constitution. In an appropriate case the High Court may refuse to invoke its extraordinary powers if there is such negligence or omission on the part of the applicant to assert his right as taken in conjunction with the lapse of time and other circumstances, causes prejudice to the opposite party. Even where fundamental right is involved the matter is still within the discretion of the Court as pointed out in Durga Prasad v. Chief Controller of Imports and Exports, 1970 AIR(SC) 769. Of course, the discretion has to be exercised judicially and reasonably.*
>
> *[25] In City Industrial Development Corporation v. Dosu Aardeshir Bhiwandiwala & Ors., 2009 AIR(SC) 571 this Court has opined that one of the grounds for refusing relief is that the person approaching the High Court is guilty of unexplained delay and the laches. Inordinate delay in moving the court for a Writ is an adequate ground for refusing a Writ. The principle is that courts*

> *exercising public law jurisdiction do not encourage agitation of stale claims and exhuming matters where the rights of third parties may have accrued in the interregnum.*
> *[26] From the aforesaid pronouncement of law, it is manifest that a litigant who invokes the jurisdiction of a court for claiming seniority, it is obligatory on his part to come to the court at the earliest or at least within a reasonable span of time. The belated approach is impermissible as in the meantime interest of third parties gets ripened and further interference after enormous delay is likely to usher in a state of anarchy.*
> *[27] The acts done during the interregnum are to be kept in mind and should not be lightly brushed aside. It becomes an obligation to take into consideration the balance of justice or injustice in entertaining the petition or declining it on the ground of delay and laches. It is a matter of great significance that at one point of time equity that existed in favour of one melts into total insignificance and paves the path of extinction with the passage of time."*

16. A stale claim of getting promotional benefits normally should not be entertained and reference in this regard can conveniently be made to the judgment rendered by the Hon'ble Supreme Court in ***State of Uttaranchal and another vs. Shiv Charan Singh Bhandari and others, (2013) 12 SCC 179***, wherein after considering the entire law on the subject, it was held as under:

> *[27] We are absolutely conscious that in the case at hand the seniority has not been disturbed in the promotional cadre and no promotions may be unsettled. There may not be unsettlement of the settled position but, a pregnant one, the respondents chose to sleep like Rip Van Winkle and got up from their slumber at their own leisure, for some reason which is fathomable to them only. But such fathoming of reasons by oneself is not countenanced in law. Any one who sleeps over his right is bound to suffer. As we perceive neither the tribunal nor the High Court has appreciated these aspects in proper perspective and proceeded on the base that a junior was promoted and, therefore, the seniors cannot be denied the promotion.*
>
> *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."*

17. Seniority is a civil right, which has an important and vital role to play in one's service career. Future promotion of a Government servant depends either on strict seniority or on the basis of seniority-cum-merit or merit-cum-seniority etc. Seniority once settled is decisive in the upward march in one's chosen work or calling and gives certainty and assurance and boosts the morale to do quality work. It instills confidence, spreads harmony and commands respect among colleagues which is a paramount factor for good and sound administration. If the settled seniority is unsettled, it may generate bitterness, resentment, hostility among the Government servants and even the enthusiasm to do quality work may be lost.

18. Learned counsel for the petitioners would argue that determination of seniority dispute is continuing wrong and therefore, relief should be granted even if there is a long delay in seeking remedy, however we find no force in the said submission.

19. The legal position with respect to belated service related claim is well articulated by the Hon'ble Supreme Court in its decision in ***Union of India and others vs. Tarsem Singh, (2008) 8 SCC 648***, wherein it was held as under:

> *7. To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. But there is an exception to the*

> *exception. If the grievance is in respect of any order or administrative decision which related to or affected several others also, and if the re-opening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For example, if the issue relates to payment or re-fixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third parties. But if the claim involved issues relating to seniority or promotion etc., affecting others, delay would render the claim stale and doctrine of laches/limitation will be applied. In so far as the consequential relief of recovery of arrears for a past period, the principles relating to recurring/successive wrongs will apply. As a consequence, High Courts will restrict the consequential relief relating to arrears normally to a period of three years prior to the date of filing of the writ petition.*

20. In determining whether there has been such delay so as to amount to laches, the chief points to be considered are:

> (i) acquiescence on the claimant's part; and
> (ii)any change of position that has occurred on the defendant's part.

21. Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the claimant has become aware of it. It is unjust to give the claimant a remedy where, by his conduct, he has done that which might fairly be regarded as equivalent to a waiver of it; or where by his conduct and neglect, though not waiving the remedy, he has put the other party in a position in which it would not be reasonable to place him if the remedy afterwards to be asserted. In such cases, lapse of time and delay are most material. Upon these considerations rests the doctrine of laches. ***(Refer U.P. Jal Nigam vs. Jaswant Singh, (2006) 11 SCC 464 para 12)***.

22. It is by now settled principle of jurisprudence that a right not exercised for a long time is non-existent. Even when there is no limitation period prescribed by any statute relating to certain proceedings, in such cases Courts have coined the doctrine of laches and delays as well as doctrine of

acquiescence and non-suited the litigants who approached the Court belatedly without any justifiable explanation for bringing the action after unreasonable delay. Doctrine of laches is in fact an application of maxim of equity "delay defeats equities".

23. If a party having a right stands by and sees another acting in a manner inconsistent with that right and makes no objection while the act is in progress he cannot afterwards complain. This principle is based on the doctrine of acquiescence implying that in such a case party who did not make any objection acquiesced into the alleged wrongful act of the other party and, therefore, has no right to complain against that alleged wrong.

24. Thus, in those cases where period of limitation is prescribed within which the action is to be brought before the Court, if the action is not brought within that prescribed period the aggrieved party loses remedy and cannot enforce his legal right after the period of limitation is over. Likewise, in other cases even where no limitation is prescribed, but for a long period the aggrieved party does not approach the machinery provided under the law for redressal of his grievance, it can be presumed that relief can be denied on the ground of unexplained delay and laches and/or on the presumption that such person has waived his right or acquiesced into the act of other. These principles as part of equity are based on principles relatable to sound public policy that if a person does not exercise his right for a long time then such a right is non-existent. (***Refer: Prabhakar vs. Joint Director, Sericulture Department and another, 2015 (15) SCC 1)***.

25. The Constitution Bench of the Hon'ble Supreme Court in ***Malcom Lawrence Cecil D'Souza vs. Union of India and others, AIR 1975 SC 1269*** held that "although security of service cannot be used as a shield against administrative action for lapse of a public servant, by and large one of the essential requirements of contentment and efficiency in public services is a

feeling of security. It is difficult no doubt to guarantee such security in all its varied aspects, it should at least be possible, to ensure that matters like one's position in the seniority list after having been settled for once should not be liable to be reopened after lapse of many years at the instance of a party who has during the intervening period chosen to keep quiet. Raking up old matters like seniority after a long time is likely to result in administrative complications and difficulties. It would, therefore, appear to be in the interest of smoothness and efficiency of service that such matters should be given a quietus after lapse of some time."

26. Thus, what appears to be more settled is that once seniority has been fixed and it remains in existence for a reasonable time, any challenge to the same should not be entertained.

27. Earlier to that, a Constitution Bench of Hon'ble Supreme Court in ***Rabindra Nath vs. Union of India, AIR 1970 SC 470*** held as under:

> *"In so far as the attack was based on the 1952 rules, it must fail on the ground that this petition under Art. 32 of the Constitution had been brought about 15 years after the 1952 Rules were promulgated and effect given to them in the Seniority List prepared on August 1, 1953. Even though Art. 32 is a guaranteed right it does not follow that it was the intention of the Constitution makers that this Court should discard all principles and grant relief in petitions filed after inordinate delay. It would be unjust to deprive the respondents of the rights which had accrued to them. Every person ought to be entitled to sit back and consider that his appointment and promotion effected a long time ago would not be set aside after the lapse of a number of years."*

28. Similar reiteration of law is to be found in the recent judgments of the Hon'ble Supreme Court in ***Union of India and others vs. Chaman Rana, (2018) 5 SCC 798*** and ***2019(3) SCALE 527, Union of India and others vs. C. Girija and others***, wherein the Hon'ble Supreme Court reiterated the observations made in *P.S. Sadasivaswamy and Shiv Charan Singh Bhandari's cases* and observed that remaining oblivious to the factum

of delay and laches and granting relief is contrary to all settled principles and would bring a tsunami in the service resulting in administrative chaos.

29. Learned counsel for the petitioners would, however, argue that the Original Application No.191 of 1999 filed by the Assistant District Attorneys before the erstwhile Tribunal assailing constitutional validity of the Demobilized Armed Forces Personnel (Reservation of Vacancies in Himachal Pradesh Non-Technical Services) Rules, 1972, was dismissed by the learned Tribunal on 12.01.2001 and the same was assailed before this Court in CWP No. 488 of 2001 titled V.K. Behal and others vs. State of H.P. and others and the same was allowed by this Court vide judgment dated 29.12.2008 wherein in paras 26 and 27, it was held as under:-

> *"26. In view of the above discussion we are clearly of the view that in case Rule 5(i) of the Rules has to be upheld, the entire benefit of the same should be made available only to those ex-servicemen who joined the armed forces during the period of emergency. As far as other ex-servicemen are concerned they may avail the benefit of reservation and fixation of pay but cannot count the past service rendered in the armed forces for the purposes of counting their seniority in the civil service which they have joined under the reserved category of ex-servicemen. It is also made clear that in all cases the benefit of past service can only be available from the date when the ex-servicemen acquired the minimum educational qualification. No benefit can be given for the army service rendered prior to the date of attaining such education qualification.*
>
> *27. In view of the above discussion, the writ petition is allowed. The Provision of Rule 5(1) of the Rules are read down and they are held to be unconstitutional in so far as they give benefit of counting the past army service towards seniority in civil employment in case of ex-servicemen who have not joined the Armed forces during the period of emergency. It is also held that the benefit of such service can not be given from a date prior to the date when the ex-serviceman attains the minimum educational eligibility criteria prescribed in the rules."*

30. The Original Application No. 3686 of 2000 filed by one Vinod Kumar Bisht and others before the erstwhile Tribunal wherein the

constitutional validity of Rule 5(1) of the R&P Rules was challenged and the Original Application was transferred to the High Court and re-registered as CWP(T) No. 7035 of 2008 and disposed of vide judgment dated 20.10.2010 relying upon the judgment in V.K. Behl's case(supra).

31. Likewise another writ petition No. 132 of 2010 was also disposed of by this Court vide judgment dated 30.12.2010. Later, the Hon'ble Supreme Court vide its judgment dated 25.08.2017 rendered in case of R.K. Barwal vs. State of H.P., affirmed the judgment of this Court in V.K. Behl's case (supra). Thereafter, CWP No. 1735 of 2020 came to be decided by a Division Bench of this Court vide judgment dated 27.11.2020 and the same pertained to the seniority of Engineers in HPSEB. This Court held that since in the earlier litigation, the Ex-servicemen had duly contested the litigation and the law declared by this Court was a judgment *in rem* and not *in personam*, hence, in view of the fact that the provisions of Rule 5(1) of the Technical Service Rules, 1985, which were pari materia with the provisions of Rule 5(1) of the Non Technical Service Rules, 1972, the law declared by this Court in V.K. Behal's case (supra) was applicable to the Technical Service Rules, 1985 also.

32. In substance, the claim of the petitioners is that since the judgment rendered in V.K. Behl's case as affirmed by the Hon'ble Supreme Court in R.K.Barwal's case, even if, it is related to the interpretation of the identical rules being Rule 5(1) of the Technical Service Rules, 1985, would equally apply to the Non Technical Service Rules, as held by this Court in CWP No. 1735/2020. However, we need to reiterate that this Court, at this stage, is not going into the merits of this case and is not deciding the case on merits, but is confining itself to the question of delay and laches, as raised by the respondents.

33. It is not in dispute that the issue in V.K. Behl's case as affirmed by the Hon'ble Supreme Court in R.K. Barwal's case(supra)

pertained to the interpretation regarding Rule 5(1) of the Technical Service Rules and not to the interpretation of Rule 5(1) of the Non Technical Service Rules. This question was still at large and it was only in two orders that on 20.10.2010 and thereafter on 30.10.2010 that a Division Bench of this Court, for the first time, observed that the issue in question regarding reservation of technical service has to be considered in light of the judgment in V.K. Behl's case which was further pending consideration in the Hon'ble Supreme Court. However, these cases pertained to the Electricity Department and not to the department of the petitioners i.e. HPPWD.

34. That apart, it needs to be noticed that despite final seniority list of Assistant Engineers(Civil) having been issued on 04.11.2008, the petitioners did not choose to assail the same. Therefore, even these two orders subsequently passed by this Court on 20.10.2010 and 30.10.2010 are of no avail or advantage to the petitioners.

35. This Court sees no reason to interfere with stale or dead claim presented in this writ petition relating to seniority at this distance of time in view of the observations made in *P.S. Sadasivaswamy's case,* wherein the Hon'ble Supreme Court has guided that the matter of promotion and seniority should be agitated without delay and at least within six months or one year from the date of accrual of cause of action. The approach of the petitioners is found inordinately belated.

36. Thus, it would be prudent for this Court not to interfere and create multiple complications of seniority etc. and upset the settled rights of others in the cadre. The petitions as against the rights of the private respondent suffers from inordinate delay and un-explained laches.

37. The law on the point of delay in approaching the Court and, in particular, challenge to a seniority list is well settled in view of the judgment rendered by Hon'ble three Judges of the Hon'ble Supreme Court in ***Ajay Kumar Shukla and others*** *vs.* ***Arvind Rai and others 2022 Labour and***

Industrial Cases 1475, wherein after placing reliance on the earlier judgment of ***Shiba Shankar Mohapatra vs. State of Orissa (2010) 12 SCC 471***, it was held that seniority list which remains in existence for more than three to four years unchallenged should not be disturbed. It is apt to reproduce the relevant observations made in paras 21 to 24 which read as under:-

> *"21. We may now discuss the law on the point regarding delay in approaching the court and in particular challenge to a seniority list. The learned Single Judge had placed reliance on a judgment of this Court in the case of Shiba Shankar Mohapatra vs. State of Orissa (supra). Dr. B.S. Chauhan, J., after considering the question of entertaining the petition despite long standing seniority filed at a belated stage discussed more than a dozen cases on the point including Constitution Bench judgments and ultimately in paragraph 30 observed that a seniority list which remains in existence for more than three to four years unchallenged should not be disturbed. It is also recorded in paragraph 30 that in case someone agitates the issue of seniority beyond period of three to four years he has to explain the delay and laches in approaching the adjudicatory forum by furnishing satisfactory explanation. Paragraph 30 is reproduced below: -*
>
> > ***"30. Thus in view of the above, the settled legal proposition that emerges is that once the seniority had been fixed and it remains in existence for a reasonable period, any challenge to the same should not be entertained. In K.R. Mudgal, this Court has laid down, in crystal clear words that a seniority list which remains in existence for 3 to 4 years unchallenged, should not be disturbed. Thus, 3-4 years is a reasonable period for challenging the seniority and in case someone agitates the issue of seniority beyond this period, he has to explain the delay and laches in approaching the adjudicatory forum, by furnishing satisfactory explanation."***
>
> *22. On the other hand, the Division Bench while shutting out the appellants on the ground of delay relied upon following judgments of this Court.*
>
> • *Dayaram Asanand Gursahani vs. State of Maharashtra and others (1984) 3 SCC 36*

• B.S. Bajwa and another vs. State of Punjab and others(1998) 2 SCC 523

• Malcom Lawrence Cecil D'Souza vs. Union of India and others(1976) 1 SCC 599

• R.S. Makashi and others vs. I.M. Menon and others (1982) 1 SCC 379.

23. In the case of Dayaram Asanand Gursahani (supra), there was a delay of 9 years. In the case of B.S. Bajwa (supra), there was a delay of more than a decade. In Malcom Lawrence Cecil D'Souza(supra), the delay was of 15 years and in R.S. Makashi(supra) there was a delay of 8 years. In all these cases, this court has recorded that the delay has not been explained. Shiba Shankar Mohapatra (Supra) is a judgment of 2010, which has laid down that, three to four years would be a reasonable period to challenge a seniority list and also that any challenge beyond the aforesaid period would require satisfactory explanation.

24. In view of the above legal proposition, we now examine the facts of the present case, firstly, as to whether there was delay of more than three to four years and secondly, if there was delay of more than three to four years, whether the same has been satisfactorily explained."

38. It would be noticed from the narration of the facts as stated above that the petitioners are guilty of delay, laches and acquiescence. All these three concepts have been meticulously dealt with by the Hon'ble Supreme Court in a recent decision in ***Union of India and others*** *vs.* ***N. Murugesan and others (2022) 2 SCC 25*** and it shall be apt to reproduce paras 21 to 25 which read thus:-

"***Laches***

21.The word laches is derived from the French language meaning "remissness and slackness". It thus involves unreasonable delay or negligence in pursuing a claim involving an equitable relief while causing prejudice to the other party. It is neglect on the part of a party to do an act which law requires while asserting a right, and therefore, must stand in the way of the party getting relief or remedy.

22.Two essential factors to be seen are the length of the delay and the nature of acts done during the interval. As stated, it would also involve acquiescence on the part of the party

approaching the Court apart from the change in position in the interregnum. Therefore, it would be unjustifiable for a Court of Equity to confer a remedy to a party who knocks its doors when his acts would indicate a waiver of such a right. By his conduct, he has put the other party in a particular position, and therefore, it would be unreasonable to facilitate a challenge before the Court. Thus, a man responsible for his conduct on equity is not expected to be allowed to avail a remedy.

23.A defence of laches can only be allowed when there is no statutory bar. The question as to whether there exists a clear case of laches on the part of a person seeking a remedy is one of fact and so also that of prejudice. The said principle may not have any application when the existence of fraud is pleaded and proved by the other side. To determine the difference between the concept of laches and acquiescence is that, in a case involving mere laches, the principle of estoppel would apply to all the defences that are available to a party. Therefore, a defendant can succeed on the various grounds raised by the plaintiff, while an issue concerned alone would be amenable to acquiescence.

***Acquiescence** :*

24.We have already discussed the relationship between acquiescence on the one hand and delay and laches on the other.

25. Acquiescence would mean a tacit or passive acceptance. It is implied and reluctant consent to an act. In other words, such an action would qualify a passive assent. Thus, when acquiescence takes place, it presupposes knowledge against a particular act. From the knowledge comes passive acceptance, therefore instead of taking any action against any alleged refusal to perform the original contract, despite adequate knowledge of its terms, and instead being allowed to continue by consciously ignoring it and thereafter proceeding further, acquiescence does take place. As a consequence, it reintroduces a new implied agreement between the parties. Once such a situation arises, it is not open to the party that acquiesced itself to insist upon the compliance of the original terms. Hence, what is essential, is the conduct of the parties. We only dealt with the distinction involving a mere acquiescence. When acquiescence is followed by delay, it may become laches. Here again, we are inclined to hold that the concept of acquiescence is to be seen on a case-to-case basis."

39. Elaborating further on the question of delay, laches and acquiescence, the Hon'ble Supreme Court observed as under:-

"***Article 226 of the Constitution of India***

***28**. We would not dwell deep into the extraordinary and discretionary nature of relief under Article 226 of the Constitution of India. This principle is to be extended much more when an element of undue delay, laches and acquiescence is involved. The following decisions of this Court would suffice:*

***28.1** UP Jal Nigam v. Jaswant Singh, (2006) 11 SCC 464: (SCC pp. 469-70, paras 8-11)*

> ***"8. Our attention was also invited to a decision of this Court in State of Karnataka v. S.M. Kotrayya [(1996) 6 SCC 267 : 1996 SCC (L&S) 1488] . In that case the respondents woke up to claim the relief which was granted to their colleagues by the Tribunal with an application to condone the delay. The Tribunal condoned the delay. Therefore, the state approached this Court and this Court after considering the matter observed as under: (SCC p. 268)***
>
> > ***"Although it is not necessary to give an explanation for the delay which occurred within the period mentioned in sub- sections (1) or (2) of Section 21, explanation should be given for the delay which occasioned after the expiry of the aforesaid respective period applicable to the appropriate case and the Tribunal should satisfy itself whether the explanation offered was proper. In the instant case, the explanation offered was that they came to know of the relief granted by the Tribunal in August 1989 and that they filed the petition immediately thereafter. That is not a proper explanation at all. What was required of them to explain under sub-sections (1) and (2) was as to why they could not avail of the remedy of redressal of their grievances before the expiry of the period prescribed under sub-section (1) or (2). That was not the explanation given. Therefore, the Tribunal was wholly unjustified in condoning the delay."***
>
> ***9. Similarly in Jagdish Lal v. State of Haryana [(1997) 6 SCC 538 : 1997 SCC (L&S) 1550] this Court reaffirmed the rule that if a person chose to sit over the matter and then woke up after the decision of the Court, then such person cannot stand to benefit. In that case it was observed as follows: (SCC p. 542)***

"The delay disentitles a party to discretionary relief under Article 226 or Article 32 of the Constitution. The appellants kept sleeping over their rights for long and woke up when they had the impetus from Virpal Singh Chauhan case [Union of India v. Virpal Singh Chauhan, (1995) 6 SCC 684 : 1996 SCC (L&S) 1 : (1995) 31 ATC 813] . The appellants desperate attempt to redo the seniority is not amenable to judicial review at this belated stage."

10. In Union of India v. C.K. Dharagupta [(1997) 3 SCC 395 : 1997 SCC (L&S) 821] it was observed as follows: (SCC p. 398, para 9)

> *"9. We, however, clarify that in view of our finding that the judgment of the Tribunal in R.P. Joshi [R.P. Joshi v. Union of India, OA No. 497 of 1986 decided on 17-3-1987] gives relief only to Joshi, the benefit of the said judgment of the Tribunal cannot be extended to any other person. The respondent C.K. Dharagupta (since retired) is seeking benefit of Joshi case [R.P. Joshi v. Union of India, OA No. 497 of 1986 decided on 17-3-1987] . In view of our finding that the benefit of the judgment of the Tribunal dated 17-3- 1987 could only be given to Joshi and nobody else, even Dharagupta is not entitled to any relief."*

11. In State of WB v. Tarun K. Roy [(2004) 1 SCC 347 : 2004 SCC (L&S) 225] their Lordships considered delay as serious factor and have not granted relief. Therein it was observed as follows: (SCC pp. 359-60, para 34)

> *"34. The respondents furthermore are not even entitled to any relief on the ground of gross delay and laches on their part in filing the writ petition. The first two writ petitions were filed in the year 1976 wherein the respondents herein approached the High Court in 1992. In between 1976 and 1992 not only two writ petitions had been decided, but one way or the other, even the matter had been considered by this Court in Debdas Kumar [State of WB v. Debdas Kumar, 1991 Supp (1) SCC 138 : 1991 SCC (L&S) 841 : (1991) 17 ATC 261]. The plea of delay, which Mr Krishnamani states, should be a ground for denying the relief to the other persons similarly situated would operate against the respondents. Furthermore, the other employees not*

being before this Court although they are ventilating their grievances before appropriate courts of law, no order should be passed which would prejudice their cause. In such a situation, we are not prepared to make any observation only for the purpose of grant of some relief to the respondents to which they are not legally entitled to so as to deprive others therefrom who may be found to be entitled thereto by a court of law."

28.2. *Eastern Coalfields Ltd. v. Dugal Kumar, (2008) 14 SCC 295: (SCC pp. 302-04, paras 24-28)*

"24. As to delay and laches on the part of the writ petitioner, there is substance in the argument of learned counsel for the appellant Company. It is well settled that under Article 226 of the Constitution, the power of a High Court to issue an appropriate writ, order or direction is discretionary. One of the grounds to refuse relief by a writ court is that the petitioner is guilty of delay and laches. It is imperative, where the petitioner invokes extraordinary remedy under Article 226 of the Constitution, that he should come to the court at the earliest reasonably possible opportunity. Inordinate delay in making the motion for a writ is indeed an adequate ground for refusing to exercise discretion in favour of the applicant.

25. Under the English law, an application for leave for judicial review should be made "promptly". If it is made tardily, it may be rejected. The fact that there is breach of public law duty does not necessarily make it irrelevant to consider delay or laches on the part of the applicant. Even if leave is granted, the question can be considered at the time of final hearing whether relief should be granted in favour of such applicant or not. (Vide R. v. Essex County Council [1993 COD 344] .)

26. In R. v. Dairy Produce Quota Tribunal, ex p Caswell [(1990) 2 AC 738 : (1990) 2 WLR 1320 : (1990) 2 All ER 434 (HL)] , AC at p. 749, the House of Lords stated [Ed.: Quoting from O'Reilly

v. Mackman, (1982) 3 All ER 1124 at p. 1131a-b.] : (All ER p. 441a-b)

> ***"The public interest in good administration requires that public authorities and third parties should not be kept in suspense as to the legal validity of a decision the authority has reached in purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision."***

27. The underlying object of refusing to issue a writ has been succinctly explained by Sir Barnes Peacock in Lindsay Petroleum Co. v. Prosper Armstrong Hurd [1874 LR 5 PC 221 : 22 WR 492] , thus: (LR pp. 239-40)

> *"Now the doctrine of laches in courts of equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation, in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as it relates to the remedy."*

28. This Court has accepted the above principles of English law. In Tilokchand Motichand v. H.B. Munshi [(1969) 1 SCC 110 : (1969) 2 SCR 824] and Rabindranath Bose v. Union of India [(1970) 1 SCC 84 : (1970) 2 SCR 697] this Court ruled that even in cases

of violation or infringement of fundamental rights, a writ court may take into account delay and laches on the part of the petitioner in approaching the court. And if there is gross or unexplained delay, the court may refuse to grant relief in favour of such petitioner."

(emphasis supplied)

***28.3**. State of J&K v. R.K. Zalpuri, (2015) 15 SCC 602: (SCC pp. 608-11, paras 20-24)*

"20. Having stated thus, it is useful to refer to a passage from City and Industrial Development Corpn. v. Dosu Aardeshir Bhiwandiwala [City and Industrial Development Corpn. v. Dosu Aardeshir Bhiwandiwala, (2009) 1 SCC 168] , wherein this Court while dwelling upon jurisdiction under Article 226 of the Constitution, has expressed thus: (SCC p. 175, para 30)

"30. The Court while exercising its jurisdiction under Article 226 is duty-bound to consider whether:

(a) adjudication of writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;

(b) the petition reveals all material facts;

(c) the petitioner has any alternative or effective remedy for the resolution of the dispute;

(d) person invoking the jurisdiction is guilty of unexplained delay and laches;

(e) ex facie barred by any laws of limitation;

(f) grant of relief is against public policy or barred by any valid law; and host of other factors."

21. In this regard reference to a passage from Karnataka Power Corpn. Ltd. v. K. Thangappan [Karnataka Power Corpn. Ltd. v. K. Thangappan, (2006) 4 SCC 322 : 2006 SCC (L&S) 791] would be apposite: (SCC p. 325, para 6)

"6. Delay or laches is one of the factors which is to be borne in mind by the High Court when they exercise their discretionary powers under Article

> *226 of the Constitution. In an appropriate case the High Court may refuse to invoke its extraordinary powers if there is such negligence or omission on the part of the applicant to assert his right as taken in conjunction with the lapse of time and other circumstances, causes prejudice to the opposite party."*

After so stating the Court after referring to the authority in State of M.P. v. Nandlal Jaiswal [State of M.P. v. Nandlal Jaiswal, (1986) 4 SCC 566] restated the principle articulated in earlier pronouncements, which is to the following effect: (SCC p. 326, para 9)

> *"9. … the High Court in exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. If there is inordinate delay on the part of the petitioner and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in exercise of its writ jurisdiction. It was stated that this rule is premised on a number of factors. The High Court does not ordinarily permit a belated resort to the extraordinary remedy because it is likely to cause confusion and public inconvenience and bring, in its train new injustices, and if writ jurisdiction is exercised after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties. It was pointed out that when writ jurisdiction is invoked, unexplained delay coupled with the creation of third-party rights in the meantime is an important factor which also weighs with the High Court in deciding whether or not to exercise such jurisdiction."*

22. In State of Maharashtra v. Digambar [State of Maharashtra v. Digambar, (1995) 4 SCC 683] a three-Judge Bench laid down that: (SCC p. 692, para 19)

> *"19. Power of the High Court to be exercised under Article 226 of the Constitution, if is discretionary, its exercise must be judicious and reasonable, admits of no controversy. It is for that reason, a person's entitlement for relief from a High Court under Article 226 of the Constitution,*

be it against the State or anybody else, even if is founded on the allegation of infringement of his legal right, has to necessarily depend upon unblameworthy conduct of the person seeking relief, and the court refuses to grant the discretionary relief to such person in exercise of such power, when he approaches it with unclean hands or blameworthy conduct."

23. Recently in Chennai Metropolitan Water Supply and Sewerage Board v. T.T. Murali Babu [Chennai Metropolitan Water Supply and Sewerage Board v. T.T. Murali Babu, (2014) 4 SCC 108 : (2014) 1 SCC (L&S) 38] , it has been ruled thus: (SCC p. 117, para 16)

"16. Thus, the doctrine of delay and laches should not be lightly brushed aside. A writ court is required to weigh the explanation offered and the acceptability of the same. The court should bear in mind that it is exercising an extraordinary and equitable jurisdiction. As a constitutional court it has a duty to protect the rights of the citizens but simultaneously it is to keep itself alive to the primary principle that when an aggrieved person, without adequate reason, approaches the court at his own leisure or pleasure, the court would be under legal obligation to scrutinise whether the lis at a belated stage should be entertained or not. Be it noted, delay comes in the way of equity. In certain circumstances delay and laches may not be fatal but in most circumstances inordinate delay would only invite disaster for the litigant who knocks at the doors of the court. Delay reflects inactivity and inaction on the part of a litigant—a litigant who has forgotten the basic norms, namely, 'procrastination is the greatest thief of time' and second, law does not permit one to sleep and rise like a phoenix. Delay does bring in hazard and causes injury to the lis."

24. At this juncture, we are obliged to state that the question of delay and laches in all kinds of cases would not curb or curtail the power of the writ court to exercise the discretion. In Tukaram Kana Joshi v.

Maharashtra Industrial Development Corpn. [Tukaram Kana Joshi v. Maharashtra Industrial Development Corpn., (2013) 1 SCC 353 : (2013) 1 SCC (Civ) 491] it has been ruled that: (SCC pp. 359-60, para 12)

> *"12. … Delay and laches is adopted as a mode of discretion to decline exercise of jurisdiction to grant relief. There is another facet. The Court is required to exercise judicial discretion. The said discretion is dependent on facts and circumstances of the cases. Delay and laches is one of the facets to deny exercise of discretion. It is not an absolute impediment. There can be mitigating factors, continuity of cause of action, etc. That apart, if the whole thing shocks the judicial conscience, then the Court should exercise the discretion more so, when no third-party interest is involved. Thus analysed, the petition is not hit by the doctrine of delay and laches as the same is not a constitutional limitation, the cause of action is continuous and further the situation certainly shocks judicial conscience."*

And again: (Tukaram Kana Joshi v. MIDC (2013) 1 SCC 353 (SCC p. 360, para 14)

> *"14. No hard-and-fast rule can be laid down as to when the High Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches. Discretion must be exercised judiciously and reasonably. In the event that the claim made by the applicant is legally sustainable, delay should be condoned. In other words, where circumstances justifying the conduct exist, the illegality which is manifest, cannot be sustained on the sole ground of laches. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred, for the other side cannot claim to have a vested right in the injustice being done, because of a non- deliberate delay. The court should not harm innocent parties if their rights have in fact emerged by delay on the part of the petitioners.*

(Vide Durga Prashad v. Controller of Imports and Exports [Durga Prashad v. Controller of Imports and Exports, (1969) 1 SCC 185] , Collector (LA) v. Katiji [Collector (LA) v. Katiji, (1987) 2 SCC 107 : 1989 SCC (Tax) 172] , Dehri Rohtas Light Railway Co. Ltd. v. District Board, Bhojpur [Dehri Rohtas Light Railway Co. Ltd. v. District Board, Bhojpur, (1992) 2 SCC 598] , Dayal Singh v. Union of India (2003) 2 SCC 593] and Shankara Coop. Housing Society Ltd. v. M. Prabhakar [Shankara Coop. Housing Society Ltd. v. M. Prabhakar, (2011) 5 SCC 607 : (2011) 3 SCC (Civ) 56] .)" (emphasis supplied)

40. From the sequence of events, as narrated above, it is clearly established on record that at the time when the petitioners sought to agitate the matter, it was only a stale or dead issue and it was more than settled that the issue of limitation or delay and laches has been 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.

41. The petitioners are guilty since they have acquiesced in accepting the appointment of the private respondent from the date and day they came to be appointed and did not challenge the same in time. Had the petitioners been vigilant enough, they could have filed writ petitions well in time. The petitioners lost time or whiled it away and did not rise to the occasion in time for filing the writ petitions. Secondly, because of acquiescence and waiver on the part of the petitioners, no relief can be granted to them as this would prejudicially affect rights of the private respondent.

42. In such circumstances, there is no question why the Court should come to the rescue of such persons, when they themselves are guilty of acquiescence and waiver.

43. In view of the aforesaid discussion, the preliminary objection raised by the respondent-State is sustained and upheld. Consequently, the instant petition is dismissed not only on the grounds of delay and laches, but also on the grounds of acquiescence and waiver etc., leaving the parties to bear their own costs.

44. Pending application(s), if any, also stands disposed of.

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

Ramesh Kumar .....Petitioner

Versus

Union of India and others .....Respondents

For the Petitioner: Mr. Vijay Chaudhary, Advocate.

For the Respondents: Mr. Lokendar Paul Thakur,
Senior Panel Counsel.

CWP No.1545 of 2013
Decided on: 19.12. 2022

Constitution of India, 1950- Article 226- Writ petition for quashing of the order passed by the Appellate authority whereby the petitioner was penalized by removal from service- Two charges were levelled against the petitioner- First charge was that while discharging the duties as Constable/Driver, the petitioner was involved in undesirable activities in bringing a civil lady in his tent on 21.02.2007 without taking prior permission of the competent authority- Second charge was that the petitioner had unauthorizedly kept a civil lady in his tent without informing his senior officer- Did not maintain the discipline of the force and thus endangered/breached the campus security- **Held-** Petitioner was responsible for maintaining law and order. The inquiry report had proved that the petitioner had engaged himself in undesirable activity with a civilian lady**-** These acts of the petitioner tentamounted to gross indiscipline & misconduct and had endangered/breached the security of the campus- No interference- Petition dismissed. (Para 4)

Cases referred:

B.C. Chaturvedi Vs. Union of India, (1995) 6 SCC 749;
Lucknow Kshetriya Gramin Bank Vs. Rajendra Singh (2013) 12 SCC 372;
Om Kumar Vs. Union of India, (2001) 2 SCC 386;
State of Karnataka and another Versus N. Gangaraj (2020) 3 SCC 423;

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge

Penalty of removal from service was imposed upon the petitioner, a Constable (Driver), for the reason that he being a member of the disciplined force, had brought a civil lady in the official tent at the campus premises

during night hours on 21.02.2007 without seeking permission of the competent authority, engaged in undesirable activities with her, indulged in indiscipline and also endangered security of the camps. The penalty imposed upon the petitioner was not interfered by the Appellate Authority. The Revisional Authority also affirmed the penalty order. Pursuant to the directions passed by this Court in a writ petition filed by the petitioner, the appellate and the revisional authority revisited their orders and by passing detailed and speaking orders once again affirmed the penalty imposed upon the petitioner. Aggrieved against imposition of penalty, the petitioner has preferred this writ petition.

2. Bare minimum facts, which need to be noticedare that:-

2(i). The petitioner was appointed as Driver with Sashastra Seema Bal (SSB) in the year 1990. In the year 2007, he was discharging his duties with the Central Reserve Police Force as Driver. A complaint was lodged against the petitioner that he brought a civil lady in his tent on 21.02.2007 at about 10:30 pm, indulged in undesirable activities with her and endangered the security of the campus. The petitioner was put under suspension on 23.02.2007.

2(ii). The respondents got a preliminary inquiry conducted into the matter. The statements of the petitioner and four other witnesses were recorded. The petitioner admitted his guilt during the preliminary inquiry. The statements of the petitioner and four other witnesses recorded during the preliminary inquiry have been made part of the reply to the present petition at AnnexuresR-1 and R-2 (Colly.).

2(iii). A memorandum of charges was issued to the petitioner on 17.04.2007 under Rule 27 of the Central Reserve Police Force Rules, 1955. Two charges were levelled against the petitioner. The first charge was that while discharging the duties as Constable/Driver, the petitioner was involved in undesirable activities in bringing a civil lady in his tent on 21.02.2007

without taking prior permission of the competent authority. The second charge was that the petitioner had unauthorizedly kept a civil lady in his tent without informing his senior officer, did not maintain the discipline of the force and thus endangered/breached the campus security.

2(iv). The Inquiry Officer was appointed. Statements of the witnesses and of the delinquent official (petitioner) were recorded. On conclusion of the inquiry, the report was submitted by the Inquiry Officer to the Disciplinary Authority on 31.05.2007. Both the charges levelled against the petitioner were held proved. Show cause notice was issued by the disciplinary authority to the petitioner on 06.07.2007 (Annexure P-7) alongwith a copy of the inquiry report.

2(v). Petitioner's representationagainst the show cause notice and the inquiry report was considered by the disciplinary authority. On consideration of the inquiry report, the record of the case and the nature of misconduct, the petitioner was awarded penalty of removal from service with immediate effect vide order dated 06.08.2007.

2(vi). Petitioner's appeal against the imposition of penalty of removal from service was dismissed by the appellate authority on 18.10.2007 (Annexure P-12). His revision was also dismissed by the revisional authority on 23.07.2008 (Annexure P-15).

2(vii). Civil Writ Petition No.1164 of 2009 instituted by the petitioner against the penalty of removal from service imposed upon him, was allowed on 13.08.2012 on the ground that the appellate as well as revisional authority had not passed speaking orders in the matter. The appellate authority was directed to decide the matter afresh by passing a speaking order. Pursuant to the remand of the matter, the appellate authority considered the matter afresh and passed speaking order on 18.12.2012 (Annexure P-17), rejecting petitioner's appeal. The revisional authority also dismissed petitioner's revision vide reasoned order dated 18.02.2013 (Annexure P-19). In this background,

the petitioner has instituted the present writ petition for the grant of following substantive relief:-

> *"(i) That the charge-sheet dated 17.4.2007 (Annexure P-2), inquiry report (Annexure P-9), the order passed by the disciplinary authority dated 6.8.2007 (Annexure P-10), the order passed by the appellate authority dated 18.10.2007 (Annexure P-12) and the order passed by the revisional authority (Annexure P-15) being illegal, arbitrary and unjust be quashed."*

3. Heard respective counsel for the parties and gone through the record.

3(i). Learned counsel for the petitioner contended that the orders passed by the appellate authority and revisional authority are not in accordance with law as the medical examination of the petitioner was not conducted to substantiate and prove the act of misconduct alleged against him. In absence of such medical examination, the petitioner cannot be held guilty of misconduct attributed to him. It was also contended that the bed-sheets statedly used by the petitioner were not sent for chemical analysis by the respondents. Hence, it cannot be said that the alleged charge of misconduct was proved against the petitioner.

The argument of not conducting the medical examination of the petitioner and not sending the bed-sheets for chemical analysis is way off themark**.** The charges levelled against the petitioner were that while on duty, he had engaged in undesirable activity with a civilian lady in the official tentage accommodation and further that he had brought the lady in his tent without prior permission of the competent authority, thereby exhibiting disobedience of the superior officers, breach of security and non-maintenance of discipline of the force. There was no requirement of conducting petitioner's medical examination or sending the bed sheets for chemical analysis. This

point raised by the petitioner before the Revisional Authority was rightly rejected by the authority.

3(ii). The second point raised by the learned counsel for the petitioner is that the inquiry report was neither clear nor definitive. The inquiry report was perverse and based upon no evidence.

The above ground also lacks substance. The statements of witnesses and that of the petitioner recorded during preliminary inquiry have been made part of the case file at Annexures R-1 and R-2 (Colly.). The petitioner had admitted the allegations levelled against him in the preliminary inquiry. Statements of witnesses recorded during preliminary inquiry also corroborated the allegations. During regular inquiry, apart from the petitioner, five other witnesses were also examined by way of a questionnaire put to them. On conclusion of the inquiry, the Inquiry Officer submitted his report dated 31.05.2007, holding therein that both the charges levelled against the petitioner were proved. The inquiry report was independently considered by the Appellate Authority as well as the Revisional Authority not once but twice. Detailed and reasoned orders have been passed by these authorities pursuant to the directions of this Court. The argument raised by learned counsel for the petitioner is that during the regular inquiry, only one witness had supported the prosecution version. It is seen from the records that the points raised by the petitioner were elaborately dealt with by the appellate authority in para (c), (d) and (g) of its order passed on 18.12.2012 (Annexure P-17) as well as by the revisional authority in its order passed on 18.02.2013 (Annexure P-19). It has been observed by the appellate authority in its order as under:-

> *"Reply of Point (c) The point raised by the petitioner under this point is false and baseless hence denied however, it is submitted that prosecution witness No.2 No.0281258 CT/Dvr. Nirmal Sarkar while deposing before Inquiry Officer and petitioner that "on 21/02/2007, after performing duty, we all (companion drivers) were resting at our beds. No.9068410 CT/Driver Ramesh Kumar switched off the light and brought*

one lady in his tent and then switched on the light. Further, he deposed that, the petitioner took the lady to the bed of Constable (Driver) Kaushal Kumar and done indecent/objectionable act with the lady. Moreover, the petitioner himself also cross examined the said prosecution witness Constable (Driver) Nirmal Sarkar. However, the petitioner himself confessed in his statement during preliminary enquiry of the case that, a lady had come with him in the tent and he has done something wrong with her in the bed of his companion driver."

The revisional authority while independently considering the matter observed, inter alia, as under:-

"…… Another matter clubbed by the appellant is that "the point of appeal was rejected on the reason that the applicant had admitted during the course of Preliminary Inquiry, it is also not true, as during the course of Departmental Inquiry No.0281258 CT/Driver Nirmal Sarkar has deposed that "on 21/2/2007, after performing duty, we all (companion drivers) were resting in our beds. No.9068410 CT/Driver Ramesh Kumar switched off the light and brought one lady in his tent and then switched on the light. Further he deposed that the petitioner took the lady to the bed of constable (driver) Kaushal Kumar and did objectionable act with the lady. Both the delinquent and the witness have signed the statement which is available on record. Here it seems that the appellant is confused about preliminary inquiry and preliminary hearing. Hence, the contention of the para is rejected being baseless, untenable and does not stand against the evidences of available records."

The points raised by the petitioner have been effectively considered by the appellate and revisional authority.

3(iii). Learned counsel for the petitioner next contended that charge of breach of security was not proved against the petitioner. The tents were located in an area which could have been easily accessed by other people.

The above contention has also been rejected by the appellate authority with following reasoning:-

> *"Reply of Point-(b) The point raised by the petitioner under Point-(b) is denied being factually incorrect however, it is submitted that there is no relation between allegation of charges levelled against the petitioner and pitching of the tents on the road side or deputing of guard. Pitching of tents for accommodation of force personnel is the administrative arrangement of the Force. Moreover, it is pertinent to mention here that the petitioner himself was the member of disciplined force and it was his moral duty to stop the entry of unauthorized persons into the campus or tents, if noticed by him."*

The revisional authority held as under:-

> *"Vide para above the appellant is trying to mislead the inquiry report as there is no relation between security system of the tent area and the charges levelled against him. Hence, the point does not stand against the evidences."*

It is well settled that scope of judicial review in such like matters is very limited. Hon'ble Apex Court in ***(2020) 3 SCC 423, titled State of Karnataka and another Versus N. Gangaraj***, after noticing the facts of the case wherein Disciplinary Authority agreed with inquiry officer's findings about delinquent police official being guilty of misconduct and imposed penalty of dismissal, which was affirmed in appeal, observed that the Tribunal and the High Court could not have interfered with the findings of facts recorded by re-appreciating the evidence as if they were the Appellate Authority. It was also observed that power of judicial review is confined to the decision making process and is not akin to the power of Appellate Authority. Power of judicial review is meant to ensure that the individual receives fair treatment and not to ensure that the conclusion which the authority reaches is necessarily correct in eyes of law.

In the instant matter, the petitioner had preferred appeal and revision against the penalty imposed upon him by the disciplinary authority. He remained unsuccessful in his endeavours. Pursuant to the decision of the

writ petition filed by him, the appellate authority as well as revisional authority again considered the matter and with elaborate reasoning, rejected petitioner's appeal and revisionthe second time. No infraction of procedure in conduct of inquiry proceedings has been pointed out.

3(iv). Learned counsel for the petitioner next contended that the punishment of removal from service imposed upon the petitioner was disproportionate to the charges levelled against him.

In this regard, it will be appropriate to refer to a decision of the Hon'ble Apex Court dated 20.04.2022, rendered in ***Civil Appeal No.2707 of 2022***, titled ***Anil Kumar Upadhyay Versus The Director General, SSB and others***. In the said case, learned Single Judge had interfered with the order of punishment imposed by the disciplinary authority inter-alia on the ground that the same was disproportionate to the charges and set it aside. The Division Bench of the High Court restored the punishment imposed by the disciplinary authority. The question before the Hon'ble Apex Court inter-alia was whether the learned Single Judge was justified in interfering with the order of punishment imposed by the disciplinary authority on the ground of same being disproportionate in the facts of the case where delinquent official was charged with indiscipline and misconduct leading to compromising security of occupants of 'Mahila Barrack'. It was observed that when disciplinary authority considered it appropriate to punish him with penalty of 'removal from service', which is confirmed by the appellate authority, thereafter it was not open for the learned Single Judge to interfere with the order of punishment passed by the disciplinary authority. Relying upon ***(2001) 2 SCC 386 Om Kumar Vs. Union of India, (1995) 6 SCC 749 B.C. Chaturvedi Vs. Union of India, (2013) 12 SCC 372 Lucknow Kshetriya Gramin Bank Vs. Rajendra Singh***, it was *held that question of quantum of punishment in disciplinary matters is primarily for disciplinary authority and jurisdiction of High Courts under Article 226 of Constitution or of Administrative*

Tribunals is limited and is confined to applicability of 'Wednesbury principles.' When a statute gave discretion to an administrator to take a decision, scope of judicial review would remain limited. Interference with punishment order on ground of disproportionate to the charges was not permissible unless punishment imposed was shocking to the conscience of the Court.

It will also be appropriate to refer to judgment dated 19.04.2022 passed by the Hon'ble Apex Court in ***Civil Appeal No.2665 of 2022***, titled ***Union of India and others V/s M Duraisamy***. The allegations against the respondent therein were that while serving as Postal Assistant during the period from 2004 to 2007, he had defrauded a substantial amount. On conclusion of the departmental inquiry, the disciplinary authority imposed penalty of removal from service upon the respondent. Learned Tribunal partly allowed the original application preferred by the respondent and modified the order of punishment from removal from service to that of compulsory retirement on sympathetic ground by observing that the delinquent officer had himself deposited the entire amount involved and, therefore, no loss was caused to the department. The Tribunal also noticed that the delinquent officer had completed nearly 39 years of service and had not suffered any other punishment, but for the present one. The High Court affirmed the order passed by the Tribunal. Aggrieved, the Department preferred appeal before the Hon'ble Apex Court. The question before the Hon'ble Apex Court was that whether in the facts of the case, the Tribunal and the High Court were justified in interfering with the punishment imposed by the disciplinary authority and modifying the same from removal from service to that of compulsory retirement. The Apex Court held that such substitution in the facts of the case was unsustainable. In reaching this conclusion, a plethora of judicial precedents was also noticed. The limited scope of judicial review and the limited jurisdiction of the High Court on the proportionality of the order of departmental authority was also gone into. It was observed that merely

because the employee had worked for 39 years and in those years, there was no punishment imposed and/or that he voluntarily deposited the defrauded amount alongwith penal interest cannot be a ground to interfere with the order of punishment imposed by the disciplinary authority. It would be appropriate to extract some relevant paragraphs from the judgment:-

> *"6. Therefore, the short question which is posed for the consideration of this Court is, whether, in the facts and circumstances of the case, the Tribunal and the High Court were justified in interfering with the punishment imposed by the Disciplinary Authority and modifying/substituting the same from removal to that of compulsory retirement.*
>
> *7. While answering the aforesaid question/issue, the decision of this Court in the case of Goparaju Sri Prabhakara Hari Babu (supra), on the judicial review and the limited jurisdiction of the High Court on the proportionality of the order of departmental authority is required to be referred to.*
>
> *In the said decision, after referring to a catena of judgments of this Court, it is observed and held by this Court that the jurisdiction of the High Court on the proportionality of the order of departmental authority is limited. It is observed that it cannot set aside a well-reasoned order only on grounds of sympathy and sentiments. It is further observed and held that once it is found that all the procedural requirements had been complied with, courts would not ordinarily interfere with the quantum of punishment imposed upon a delinquent employee. It is further observed that the superior courts, only in some cases may invoke the doctrine of proportionality, however if the decision of an employer is found to be within the legal parameters, the doctrine would ordinarily not be invoked when the misconduct stands proved.*
>
> *7.1 In the case of B.C. Chaturvedi (supra), the High Court interfered with the order of punishment imposed by the Disciplinary Authority and substituted the punishment of dismissal from service to one of compulsory retirement on the reasoning that the employee had put in 30 years of service and that he had a brilliant academic record and that he had earned promotion after the disciplinary proceedings were initiated. Setting aside the judgment and order passed by the High Court, this Court*

observed that the reasoning is wholly unsupportable. Such reasons are not relevant or germane to modify the punishment. What is required to be considered is the gravity of the misconduct. In the said case, the employee was found to be in possession of assets disproportionate to the known sources of his income. Therefore, this Court observed and held that the interference with the imposition of punishment was wholly unwarranted.

8. *Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand, the order passed by the Tribunal, confirmed by the Division Bench of the High Court, substituting the punishment of removal to that of compulsory retirement is unsustainable. Neither the Tribunal nor the High Court have found any irregularity in conducting the departmental enquiry. No procedural lapses have been found. In fact, the respondent employee admitted the charge of having defrauded Rs.16,59,065/- and on detecting the fraud, he deposited the defrauded amount of Rs.16,59,065/- along with penal interest. But for the detection of the fraud, probably, the respondent employee would not have deposited the defrauded amount. Once, a conscious decision was taken by the Disciplinary Authority to remove an employee on the proved misconduct of a very serious nature of defrauding public money, neither the Tribunal nor the High Court should have interfered with the order of punishment imposed by the Disciplinary Authority, which was after considering the gravity and seriousness of the misconduct.*

9. *Merely because the respondent-employee had worked for 39 years and in those years, there was no punishment imposed and/or that he voluntarily deposited the defrauded amount along with penal interest and therefore there was no loss to the Government/Department cannot be a ground to interfere with the order of punishment imposed by the Disciplinary Authority and substitute the same from removal to that of compulsory retirement. Neither the Tribunal nor the High Court have, in fact, considered the nature and gravity of the misconduct committed by the delinquent officer. Therefore, both, the Tribunal as well as the High Court had exceeded in their jurisdiction in interfering with the quantum of punishment imposed by the Disciplinary Authority.*

10. *None of the grounds/reasoning on which the order of punishment of removal has been interfered with by the Tribunal and affirmed by the High Court are germane and can be*

sustained. Once it was found thatthe delinquent officer who was serving in the post office had defrauded to the extent of Rs.16,59,065/- and that too, by way of fraudulent withdrawal in as many as 85 RD accounts and by way of non-credit of deposits in 71 RD accounts, no sympathy on such an employee was warranted. Being a public servant in the post office, the delinquent officer was holding the post of trust. Merely because subsequently the employee had deposited the defrauded amount and therefore there was no loss caused to the department cannot be a ground to take a lenient view and/or to show undue sympathy in favour of such an employee. What about the loss caused to the department by way of goodwill, name and fame of the department and its reliability amongst the public? By such a misconduct/act on the part of the delinquent officer, the reputation of the department had been tarnished. Therefore, in the facts and circumstances of the case, both, the Tribunal as well as the High Court have exceeded in their jurisdiction in interfering with the quantum of punishment imposed by the Disciplinary Authority and to substitute the same to that of compulsory retirement.

11. In view of the above and for the reasons stated above, the impugned judgment and order passed by the High Court as well as the order passed by the Tribunal substituting the order of punishment from removal to that of compulsory retirement cannot be sustained and the same deserve to be quashed and set aside."

In the instant case, it is an admitted position that the petitioner was a member of the disciplined force. He was responsible for maintaining law and order. The inquiry report had proved that the petitioner had engaged himself in undesirable activity with a civilian lady on the night of 21.02.2007 in the official tented accommodation. He had brought the lady on 21.02.2007 in his tent on his own will without prior permission of the competent authority. These acts of the petitioner tentamounted to gross indiscipline & misconduct and had endangered/breached the security of the campus. Hence, in light of settled legal principles, no case for interference is made out.

Before parting, it may also be observed that in the writ petition, there is no challenge to the order passed by the appellate authority on 18.12.2012 (Annexure P-17) and the order passed by the revisional authority on 18.02.2013 (Annexure P-19), whereby petitioner's appeal and revision against the imposition of penalty of removal from service upon him by the disciplinary authority were rejected vide speaking and reasoned orders.

4. For all the aforesaid reasons, I find no merit in the present writ petition and the same is accordingly dismissed alongwith pending miscellaneous application(s), if any.

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

Between:
SMT. KUSUM LATA, W/O SH. BALRAM SHARMA, R/O VILLAGE & POST OFFICE KUTHERA KHERLA, UNA ROAD, AMB, TEHSIL AMB, DISTRICT UNA, HIMACHAL PRADESH.

....PETITIONER.

(M/S ONKAR JAIRATH AND SHUBHAM SOOD, ADVOCATES)

AND

1. THE STATE OF HIMACHAL PRADESH THROUGH PRINCIPAL SECRETARY (EDUCATION) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.

2. THE DIRECTOR OF HIGHER EDUCATION, HIMACHAL PRADESH, LAL PANI, SHIMLA-171001.

3. THE DEPUTY DIRECTOR HIGHER EDUCATION MANDI, DISTRICT MANDI.

4. THE ADM-CUM-CHAIRMAN, PTA ENQUIRY COMMITTEE UNA, TEHSIL AND DISTRICT UNA.

5. THE PRINCIPAL GOVERNMENT SENIOR SECONDARY SCHOOL MUBARAKPUR, TEHSIL AMB, DISTRICT UNA, HIMACHAL PRADESH.

6. THE PARENT TEACHER ASSOCIATION (NOW RENAMED AS SCHOOL MANAGEMENT COMMITTEE) OF GOVERNMENT SENIOR SECONDARY SCHOOL MUBARAKPUR, TEHSIL AMB, DISTRICT UNA, HIMACHAL PRADESH THROUGH ITS PRESIDENT.

....RESPONDENTS.

(M/S DINESH THAKUR AND SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, FOR RESPONDENTS NO.1 TO 5-STATE)
(NONE FOR RESPONDENT NO.6)

CIVIL WRIT PETITION
No.1988 of 2015

Decided on: 20.10.2022

Constitution of India, 1950- Article 227- Petition for quashing of order passed by the learned Appellate Authority dismissing an application filed for reappointment under the PTA Guidelines, 2014- **Held-** the cutoff date after which an incumbent ought to have been terminated as envisaged in the Policy of 2014 was 01.01.2008 and the services of the petitioner stood terminated before that date- The relief being sought for by the petitioner cannot be granted- Order upheld- No merit- Petition dismissed. (Paras 5, 6)

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 petition, the petitioner has prayed for quashing of Annexure P-6, which is an order passed by the learned Appellate Authority, dated 15.12.2014, in terms whereof an application filed by the petitioner for her reappointment under the PTA Guidelines, 2014 stood dismissed.

2. Facts necessary for the adjudication of this writ petition are that the petitioner was appointed on PTA basis as a teacher in Government Senior Secondary School, Mubarakpur, District Una, H.P., on 12.05.2006 and her services were terminated as such on 25.08.2006. The petitioner though did assail her termination firstly before the erstwhile learned Himachal Pradesh Administrative Tribunal, wherein the Original Application filed by the petitioner was dismissed for want of jurisdiction and thereafter, before this Court by way of CWP No.1185/07, which was decided by this Court vide Annexure P-3, dated 21.04.2008, the fact of the matter remains that the termination of the services of the petitioner as on 25.08.2006 was not held to be bad by either any Court of Law or the Authority, to whom the petitioner was relegated in terms of the judgment passed by this Court in Annexure P-3. It appears that thereafter, the Government came out with the PTA Guidelines, 2014, circulated by the Government of Himachal Pradesh, Department of Education, letter No. EDN-A-B(6)8/2005-XI-L, dated 24.05.2014 and

thereafter, on the basis of these Guidelines, the petitioner filed an application before the ADM-cum-Chairman, PTA Inquiry Committee for her re-appointment in terms of these PTA Guidelines, 2014. This application of the petitioner has been rejected by the authority concerned vide Annexure P-6 and feeling aggrieved, the petitioner has approached this Court by way of the present petition.

3. I have heard learned counsel for the petitioner as well as learned Additional Advocate General. I have also perused the pleadings as well as the documents appended therewith.

4. For the purpose of the adjudication of the present petition, this Court is of the considered view that reference to the impugned order suffices the purpose. As already mentioned above, the prayer of the petitioner before the Chairman of the PTA Inquiry Committee, which has resulted in the issuance of Annexure P-6, was to the effect that as the services of the petitioner were terminated on 25.08.2006, on the ground that a regular teacher was appointed in a place in the school concerned, therefore, she be ordered to be reinstated in service in terms of the Guidelines which were brought into force by the Government of Himachal Pradesh, i.e. PTA Guidelines, 2014. A perusal of the impugned order demonstrates that the prayer of the petitioner has been rejected by the competent authority, on the ground that the petitioner was not covered by the Guidelines, as the Guidelines provided for reinstatement of those teachers appointed on PTA basis, who had served before 31.12.2007 and whose services were terminated due to some reason after 01.01.2008. Now, in the case of the petitioner, it is not in dispute that though she was engaged as a PTA teacher on 12.05.2006, but her services were terminated on 25.08.2006.

5. Keeping in view the fact that the Policy envisaged re-engagement of those PTA. teachers, who though might have been appointed before 31.12.2007, but whose services were terminated after 01.01.2008, the

rejection of the case of the petitioner by the competent authority cannot be held to be bad in law. This is for the reason that when the cut off date after which an incumbent ought to have been terminated as envisaged in the Policy of 2014 was 01.01.2008 and the services of the petitioner stood terminated before that date, i.e. on 25.08.2006, the findings returned by the competent authority that the petitioner was not covered by the Policy Guidelines are correct findings and the same do not call for any interference. It is pertinent to mention that there is no challenge to the cut off date as was envisaged in the PTA Guidelines, 2014 by the Government of Himachal Pradesh and therefore also, this Court is of the considered view that the relief being sought for by the petitioner cannot be granted.

6. Accordingly, in view of the observations made hereinabove, as this Court does not finds any merit in the present petition, the same is dismissed, so also the pending miscellaneous applications, if any.

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

Powai Labs Technology Private Ltd.

.....Petitioner.

Versus

State of Himachal Pradesh and others

.....Respondents.

For the Petitioner : Ms. Shalini Thakur, Advocate.

For the Respondents : Mr. Rajinder Dogra, Senior Additional Advocate General with Mr. Vinod Thakur, Additional Advocate General and Mr. Bhupinder Thakur, Deputy Advocate General.

CWP No. 2081 of 2013
Reserved on : 08.12.2022
Date of decision: 16.12.2022

Constitution of India, 1950- Articles 226, 229- **The Indian Contract Act, 1872**- Section 70- Directions to pay damages on account of non-performance of contractual obligations- **Held-** The contract being in contravention of Article 299 cannot be enforced- petitioner can sue the respondents for damages- Petition dismissed. (Para 13)

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

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

> "1) For issuing a writ of Mandamus or any other appropriate writ, order or direction to the respondents for releasing 100% payment i.e. Rs. 99,93,984/- to the petitioner as agreed in terms of MoA annexure P-3 dated 16.3.2010 within a time bound schedule along with 15% interest w.e.f. April 2010 till the date of payment.

> 2) For directing the respondents to pay to the petitioner damages on account of non performance of contractual obligations by them under the Memorandum of Agreement annexure P-3 dated 16.3.2010. Respondents may also be directed to pay to the petitioner, the expenses incurred by it on account of boarding/lodging and travel. Respondents may also be directed to pay the petitioner the cost of the writ petition and other legal expenses to the petitioner.
>
> 3) For the sustainability of the project the respondent may kindly be directed to pay for the reinstallation, extended warranty from the date of expire of Bank Guarantee, pay for any component that is damaged in transit from old campus to new campus, any component that is stolen etc., to enable the project be restarted for the benefit of the students and faculty of the State."

2. Brief facts of the case are that a letter was received by respondent No.3 from Indian Institute of Technology, Mumbai, signed by one Professor Madhav P. Desai wherein it was informed that the Micro Processor and VLSI are the emerging areas of technology and benefits under the distance education programme of IIT Mumbai could be achieved by setting up of VLSI Lab for which the representatives of the petitioner-company would liaison with IIT Mumbai Professors, who shall, in turn conduct courses for the students of remote locations. The total cost was stated to be Rs.96,09,600/- and it was desired to contact the petitioner an IIT Mumbai incubated entity at their phone number and e-mail.

3. Further communication was received from the petitioner on the pads depicting IIT Mumbai and Powai Labs i.e. petitioner, wherein it was indicated that IIT Professors are conducting the Microelectronic Course and the petitioner lab shall support the education delivery. Another communication, a certificate from IIT Mumbai signed by M.Shajai Baghini, Assistant Professor of Electrical Engineering, IIT, Mumbai, was received, wherein it was indicated that the representative from petitioner lab would be visiting under his guidance and his support visit to remote location will

reduce the gap between the students and faculty. Yet, another certificate purportedly signed by Professor Madhav P. Desai was issued wherein the petitioner had been shown to be the coordinator of the IIT Mumbai distance education programme. Not only this, the petitioner wrote a letter dated 22.12.2009 on the pad depicting the IIT logo contending to deliver IIT Course to the Technical Education Institutes of the State. The petitioner made an oral presentation on 10.02.2010 wherein the scope and benefits of the lab were discussed and feedback forms from the faculty were taken.

4. Even though, the petitioner was a private limited company, but uptill signing of the MOU, it conducted itself and purported to act on behalf of the IIT Mumbai distance education programme. According to the respondents, on account of this misrepresentation, they were led to believe that Powai Lab is an entity of IIT Mumbai and an enterprise venture for distance education programme. The communication made by the petitioner showing IIT Mumbai logo and Powai Lab specifically indicated the address as R & D Centre Registered Office 4th Floor, IIT, Bombay and its email address powailabs@it,iitb.ac.in wherein IIT Mumbai connotes Indian Institute of Engineering and Technology Bombay which again according to the respondents demonstrates an attempt on the part of the petitioner to believe that it was an enterprise of IIT Mumbai and its integral part. A MOU was drawn wherein the petitioner had been stated to be IIT Bombay incubated entity in bold words as is evident from Annexure P-3. A supply order was placed with the respondents for setting up VLSI lab and not for the supply of hardware and software. A communication was received by the respondents from IIT Mumbai wherein it was clearly stated that IIT Mumbai is under no obligation and has no legal relationship with the petitioner. It was then that the matter was appropriately referred to the Government and examined at various stages including Law Department and the following opinion was given by the Advisory Department of State of Himachal Pradesh:-

> "Examined in the Law Department. The S/D (State Director) has sought the advice of this department as to whether the Government can give approval to the Memorandum of Agreement (MOA) signed between Principal of the College and Director-cum-CEO of VLSI Lab?"

5. Record reveals that the MOU was signed by the Principal of respondent No.3-College on behalf of the Government of Himachal Pradesh for establishment of VLSI Design Lab by the petitioner. However, this memorandum had been signed without obtaining any approval from the Government or an authorization from the government.

6. Now, in this background, the moot question is whether the petitioner can be held entitled to the reliefs as claimed.

7. Article 299 of the Constitution reads as under:-

> "(1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise.
> (2) Neither the President nor the Governor shall be personally liable in respect of any contract or assurance made or executed for the purposes of this Constitution, or for the purposes of any enactment relating to the Government of India heretofore in force, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof."

8. It is more than settled that a contract is void for non-compliance with Article 299(1) of the Constitution. Therefore, the petitioner cannot seek enforcement of the contract.

9. Now, as regards the plea of damages, it is now settled that even though a contract in contravention of Article 299 is void and unenforceable by

either party, it may give rise to relief under Section 70 of the Contract Act (for short 'Act'). Section 70 of the Act reads as under:-

> "Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously; and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered".

10. It means that even though a contract may be void, if one party has performed his part under it and the other party has received the benefit of such performance, the first party is entitled to be compensated for such performance. This section, in short, provides for payment of compensation or restoration of a thing by a person who has enjoyed the benefit, irrespective of the validity or otherwise of the contract between the parties, if the following conditions are established-

(i) that the plaintiff has made a payment or delivered a thing to the defendant;

(ii) that the plaintiff was acting lawfully when he made the payment or delivered the thing to the defendant;

(iii) that the plaintiff did not intend to do that gratuitously;

(iv) that the defendant did enjoy that benefit.

If the above conditions are satisfied either the private party or the Government is entitled to sue under this section.

11. Adverting to the facts of the case, it would be noticed that the instant petition and the reply filed thereto is loaded with allegations and counter-allegations. Therefore, in the given facts and circumstances, it would neither be prudent nor safe for this Court to grant damages which will have to be proved by the petitioner by leading clear, cogent and convincing evidence before the Civil Court.

12. It needs to be clarified that merely because the petitioner satisfies any of the aforesaid conditions or all the said conditions, it does not mean that the suit that may be filed by it, has to be decreed. This would, of course, be subject to the rights and contentions of the respondents.

13. In view of the aforesaid discussion, the contract being in contravention of Article 299 cannot be enforced by the petitioner against the respondents. However, the petitioner, if so advised, can sue the respondents for damages, but the same shall be subject to all the defences as are open to the respondents, both legal as also factual including and not restricted to limitation, estoppel etc. etc.

14. The writ petition is disposed of in the aforesaid terms. Pending application(s), if any, also stands disposed of.

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

Kanta Bala ....Petitioner.

Versus

State of Himachal Pradesh & others .... Respondents

For the petitioner : Mr.Neeraj Kumar Shashwat, Advocate.

For the Respondents : M/s Sumesh Raj, Dinesh Thakur, Sanjeev Sood, Additional Advocates General, with Mr. Amit Kumar Dhumal, Deputy Advocate General, for respondents No.1 to 3- State.
Mr. Vir Bahadur Verma, Advocate, for respondent No.4.

CWP No.3009 of 2022
Decided on: 21.11.2022

Constitution of India, 1950-Article 227- Grievance of the petitioner is that denial of promotion on the ground that the qualification of matriculation possessed by the petitioner was not from a recognized institute, is not sustainable in the eyes of law- **Held-** Not considering her matriculation certificate to be good enough for the purpose of promotion is bad in law- Petition allowed- Mandamus issued. (Paras 9, 10)

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(Oral)*

The controversy involved in the present petition is in a very narrow compass.

2. The petitioner before this Court was engaged as Water Carrier in the year 2001 on temporary/contract basis in the Education Department. After completion of fifteen years of service, she was regularized as a Peon In Government Senior Secondary School, Tal, Hamirpur, District Hamirpur, H.P. w.e.f. 21.11.2016. The next promotional post from the post of Peon is that of Lab Attendant and it is undisputed that a Class-IV Employee is eligible for promotion to the post of Lab Attendant after completion of five years of service as a Class-IV employee, provided the candidate is possessing the requisite qualification of being a matriculate.

3. The grievance of the petitioner is that though, she did her matriculation in terms of Annexure P-2 from Grameen Mukt Vidhyalayi Shiksha Sansthan in the academic session 2018-2019, yet when the contemporaries of the petitioner were promoted against the post of Laboratory Attendant vide Annexure P-7, dated 26.03.2022, the name of the petitioner did not figure therein and when she made inquiries she was informed that she was not considered for promotion to the said post by the Departmental Promotion Committee on the ground that the qualification of matriculation possessed by her was not from a recognized institution.

4. Learned counsel for the petitioner has submitted that denial of promotion to the petitioner on the ground that the qualification of matriculation possessed by the petitioner was not from a recognized institute, is not sustainable in the eyes of law. He submitted that it is apparent from Annexure P-2 that petitioner did her matriculation from Grameen Mukt Vidhyalayi Shiksha Sansthan in the academic session of 2018 and she appeared in the examination which was conducted in the month of December, 2018, whereas the equivalence granted in favour of this institution by H.P. Board of School Education was withdrawn vide Annexure P-3, dated 05.02.2019, i.e. after the petitioner had appeared in the examination. Accordingly, he submitted that present petition be allowed and respondent be

directed to promote the petitioner against the post of Laboratory Attendant as from the date when persons junior to her were promoted against said post.

5. The petition is resisted by the respondents and in the reply which has been filed by the respondents, it is submitted that though the petitioner was working as Class-IV employee/Peon in the respondent/Department, however, the petitioner had passed her matriculation examination in the year 2018 and the certificate was issued by Grameen Mukt Vidhyalayi Shiksha Sansthan on 11.03.2019, whereas H.P. Board of School Education had already withdrawn/cancelled the equivalence/ recognition granted to Grameen Mukt Vidhyalayi Shiksha Sansthan vide notification dated 11.04.2019.

6. Learned Additional Advocate General on the strength of said reply has argued that as there is nothing illegal in the act of the respondent/Department in not granting promotion to the petitioner, as admittedly she was not possessing her matriculation qualification from a institution which could be stated to be recognized, therefore, the present petition being without any merit was liable to be dismissed. He submitted that in the absence of the petitioner possessing matriculation certificate equivalent to H.P. Board of School Education, the petitioner was not having any indefeasible right of promotion and therefore, denial thereof calls for no interference.

7. Record demonstrates that during the pendency of this petition, H.P. Board of School Education was impleaded as respondent No.4. There are on record the instructions which were imparted by the said Board to the learned counsel and perusal thereof demonstrates that it stands mentioned in Para-5 of said instructions that H.P. Board of School Education had issued a notification on 18.10.2021, wherein it was notified that H.P. Board of School Education in its 117th Meeting, dated 14.09.2021, under item No.11 had taken a decision that admissions before 01.12.2017 and after 05.02.2019 in

Grameen Mukt Vidhyalayi Shiksha Sansthan will not be recognized and it was decided to grant equivalence/ recognition to those who had passed matriculation and 10+2 from the said institution in the above mentioned sessions of notification dated 18.10.2021. It was further stated in these instructions that particulars of the petitioner stood verified and the factum of the petitioner having done matriculation from the said institution was found to be correct. A copy of notification dated 18.10.2021 is also appended with these instructions and perusal thereof demonstrates that H.P. Board of School Education had directed to give recognition to only those candidates who had obtained their certificates in between 01.12.2017 to 05.02.2019.

8. Having heard learned counsel for the parties and after carefully gone through the pleadings as well as the documents on record, this Court is of the considered view that denial of promotion to the petitioner purportedly on the ground that the matriculation certificate of the petitioner was not from a recognized institution or to put it differently, the matriculation certificate issued in favour of the petitioner by the institution from which she did her matriculation was no more recognized by the H.P. Board of School Education is not sustainable in the eyes of law. It is not much in dispute that the petitioner did her matriculation in the Academic Session 2018. The Court is not going into the legality of issuance of notifications dated 05.02.2019 or 18.10.2021, in terms whereof, H.P. Board of School Education took the decision that Class-10 and 10+2 certificates issued by recognition before 01.12.2017 and after 05.02.2019 will not be recognized. The petitioner in hand, had appeared for her matriculation examination in the month of December, 2018 and in terms of notification dated 18.10.2021, it was decided by H.P. Board of School Education that certificates issued in between 01.12.2017 to 05.02.2019 will be recognized by the Board.

9. This Court is of the considered view that as the petitioner had appeared for her matriculation examination after completing her

matriculation for the Academic Session 2018 before 05.02.2019, therefore, not considering her matriculation certificate to be good enough for the purpose of promotion is bad in law. It is not the case of the respondents that as upto 05.02.2019, the petitioner had not appeared in the matriculation examination. This Court is not oblivious to the fact that Annexure P-2 was issued on 11.03.2019, but fact of the matter remains that as the examinations were conducted in the month of December, 2018, the issuance of a detailed mark sheet was just a ministerial act and the date of issuance thereof will not determine the validity of the qualification possessed by a candidate. Besides this, this Court is further of the considered view that notification dated 05.02.2019 will have prospective effect only and therefore also, until and unless a candidate happens to have acquired matriculation from the institution concerned before 01.12.2017 or after 05.02.2019, neither this notification nor subsequent notification dated 18.10.2021 can take away the vested right of a party.

10. Accordingly, in view of the above discussion, this writ petition is allowed and a mandamus is issued to the respondents to hold a review Departmental Promotion Committee and consider the candidature of the petitioner for the post of Lab Attendant and if found eligible, she be granted promotion as from the date the person junior to her was promoted against said post. The promotion will be with all consequential benefits as from the date when the petitioner is found eligible for the purpose of promotion. Needful be positively done within a period of thirty days from today. No order as to costs.

11. The petition stands disposed of, so also the pending miscellaneous applications, if any.

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

Kamal Kanta ....Petitioner.

Versus

State of Himachal Pradesh & others .... Respondents.

For the petitioner :Mr. Lovneesh Kanwar, Advocate.
For the Respondents :M/s Sumesh Raj, Dinesh Thakur, Sanjeev Sood, Additional Advocates General, with Mr. Amit Kumar Dhumal, Deputy Advocate General, for respondents No.1 to 4- State.
Respondent No.5 *ex parte*.
Mr. Bhuvnesh Sharma, Advocate, for respondent No.6.

CWPOA No.4360 of 2019
Decided on: 25.11.2022

Constitution of India, 1950- Article 227- Appointment of the petitioner to the post of language teacher- Grievance of the petitioner was that issuance of advertisement for filling up the posts of Language Teachers on batch-wise basis by way of interview/counseling was *per se* bad in law- **Held-** In the absence of qualification benefit of relaxation flowing therefrom is not and was not applicable to the petitioner or similarly situated persons- Petitioner not eligible for the post- Petition dismissed. (Paras 20, 21)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

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

> "*i) That a writ of certioreri may kindly be issued quashing the appointment of respondents No.5 & 6.*

ii) That a writ of Mandamus may kindly be issued to the respondents to appoint the petitioner to the post of Language Teacher in Distt. Mandi, H.P."

2. The grievance, with which the present petition was filed by the petitioner, was that respondent/Department in terms of advertisement dated 24.12.2013 (Annexure P-9), invited applications to fill up the posts of Language Teachers in various schools in District Mandi, H.P and in terms thereof, the recruitment was to be made on batch-wise basis and counseling for this purpose was fixed for 06.01.2014, at 10.00 a.m., in the office of Deputy Director, Education, Mandi, District Mandi, H.P. According to the petitioner, the advertisement was not in knowledge of the petitioner and she came to know about the same only on 10.02.2014 and thereafter, she made representations to respondent No.3 to consider her also for interview for the post of Language Teacher in view of the fact that the results for interview dated 06.01.2014 had not yet been declared. As no action was taken on the representation of the petitioner and appointment letters were issued to the candidates selected in terms of the interview conducted on 06.01.2014, hence, the petition.

3. The contention of the petitioner in the writ petition was that issuance of advertisement for filling up the posts of Language Teachers on batch-wise basis by way of interview/counseling was *per se* bad in law because it was incumbent upon the respondent/Department to have had sent the requisition to fill up the post on batch-wise basis to the Employment Exchange concerned and omission on the part of respondent/Department to do so has resulted in grave injustice to the petitioner as in the absence of any requisition being placed to the Employment Exchange concerned, obviously the name of the petitioner was not forwarded for batch-wise recruitment resulting in her not being appointed against the post in issue. In this

background, present petition has been filed seeking the relief already spelled by this Court hereinabove.

4. The petition is resisted by respondent/ Department, *inter alia*, on the ground that the same was not maintainable as the petitioner was not eligible in terms of the advertisement for appointment against the post in issue. It has been stated in the preliminary submissions that the petitioner though was possessing the requisite qualification for the purpose of Language Teacher as per the relevant Recruitment & Promotion Rules, but as she passed the Teacher Eligibility Test on 14.03.2014 and the interview in question was held on 06.01.2014, therefore, in the absence of the petitioner possessing said qualification on the date of interview she was not entitled for the relief claimed for. It is not denied in the response that after conduct of the interview, the petitioner did make a representation, but as per the respondents, this representation was not acceded to, as while advertising the post it was made clear that any candidate failing to attend the counseling on the fixed date shall not be entertained by the Department.

5. As far as the issue of requisition being sent to the Employment Exchange is concerned, all that was stated in the reply by the respondent/State was that wide publicity was given for conducting the counseling on 06.01.2014 by way of advertisement in leading newspapers and it was the petitioner who failed to apply for the same being ineligible on account of non-possessing the qualification of Teacher Eligibility Test.

6. This Court on previous dates after hearing the contentions of learned counsel for the petitioner as also learned Additional Advocate General had issued a direction that let learned Commissioner-cum-Director of Employment, Shimla, Himachal Pradesh appear in the Court to explain the applicability of the provisions of Employment Exchanges (Compulsory Notification of Vacancies) Act, 1959, vis-a-vis the post which is subject matter of the advertisement dated 24.12.2013 (Annexure P-9). On 23.11.2022,

Deputy Director Employment Exchange to the Government of Himachal Pradesh alongwith Law Officer, Labour & Employment were present in the Court and they stated that all the posts which the respondent/State intends to fill up, have to be necessarily requisitioned to the concerned Employment Exchanges also, except the posts which were protected in terms of provisions of Section 3 of the 1959 Act. In fact, the response which has been filed by respondent No.4 to the writ petition is also to the effect that as no requisition was received from the Education Department by the said Employment Exchange, therefore, the names of eligible candidates could not be forwarded.

7. Today, the matter was heard further on the issue as to whether the petitioner was eligible for the post in issue in terms of the advertisement or not.

8. Before this Court is addressed, it is necessary to observe that the act of the respondent/Department of not sending requisition to the Employment Exchange for fill up the posts in issue is in fact bad in the eyes of law as the same violates the provisions of 1959 Act. The Court is not at all suggesting that the Department concerned could not have had issued the advertisement, but, it was mandatory for the Department to have had also sent the requisition to the concerned Employment Exchanges in addition to issuance of the advertisement, because the law as it stands today is that every eligible person has a right to apply for a post, *dehors* the fact as to whether his or her name has been sponsored by the concerned Employment Exchange or not. This issue is being put to rest by this Court by making these observations only, but by ordering that respondent/Department in future should be careful in this regard, because omission on their part adversely affects the interest of many eligible persons who rely upon the forwarding of their names by the Employment Exchanges.

9. Now, this Court will address the second issue as to whether in terms of the advertisement the petitioner was eligible for the post or not.

10. In terms of Annexure P-9, twenty six posts of Language Teachers were advertised to be filled in way of interview/counseling. The date of counseling was stated to be 06.01.2014. In this view of the fact, that as the date of eligibility was not expressly mentioned in the said advertisement, therefore, but obvious, the date of eligibility has to be construed to be the date of counseling, i.e. 06.01.2014. The essential qualifications mentioned in the advertisement read as under:-

> *"Essential Qualification:-*
> *B.A. with Hindi. As an elective subject and 2-year Diploma in Elementary Education (By whatever name known) Or.*
> *BA with at least 50% marks with Hindi as an elective subject and 1 -year Bachelor in education (B.Ed.) Or.*
> *BA with at least 45% with Hindi as an elective subject and 1-year Bachelor in Education (B.Ed.) in accordance with the NCTE (Recognition Norms & Procedure). Regulations issued from time to time in this regard. Or.*
> *B.A. with at least 50% marks with Hindi as an elective subject and 1 year bachelor in Education (B.Ed.) Special Education. Or.*
> *Prabhakar (Honours in Hindi) with 50% marks followed by B.A. Examination (English and on additional subject) with 50% marks from a recognized university and one year Bachelor in Education (B.Ed). Or.*
> *M.A. (Hindi) with at least 50% marks from a recognized university and 1 year Bachelor in Education (B.Ed.) and*
> *Pass in Teacher Eligibility Test (TET language Teacher) duly conducted by the H.P. Board of School Education, Dharamshala. Provided that the incumbents who have already qualified te Teacher Eligibility Test (TET) conducted by the H.P. Subordinate Services Selection Board, Hamirpur shall also be eligible subject to the condition as laid down in Para-Ii of the guidelines issued by the National Council for Teacher Education vide N.76-4/2010/NCTE/Acad, dated 11.02.2011.*
> *Note (1): Relaxation upto 5% will be allowed in minimum educational and also in minimum qualifying marks for TET to the candidates belonging to SC/ST/OBC/PH categories of Himachal Pradesh.*
> *Note(2): Relaxation to those persons who are ot B.Ed. and possess the academic qualification prescribed as above shall also be eligible or appearing in the TET upto 31st march 2014 only.*

Note (3): The persons possessing graduation with 50% marks in the relevant subject shall also be eligible for appearing in ET for LT upto 31st March, 2014.
Note (4): Teachers who are appointed under the relaxed qualifications/ norms as Note-2 above shall have to acquire the minimum qualifications within a period of 2 years from the year of appointment."

11. The qualification possessed by the petitioner, on the strength of which she states that she is eligible for applying for the post, is Prabhakar (Honours in Hindi) with 50% marks followed B.A. Examination (English with on additional subject) with 50% marks from a recognized university and one year Becholer in Education (B. Ed).

12. It is not much in dispute that on 06.01.2014, the petitioner had not yet passed the Teacher Eligibility Test. Said test was passed by the petitioner on 14.03.2014. Hence, the moot issue is as to whether the relaxations which are contained in Note-1 to 3 of the advertisement, cover the case of the present petitioner or not. Notes-1 and 2 mentioned in the advertisement are not relevant for the purposes of the adjudication of the present petition.

13. Note-3 of the same provided that the persons possessing graduation with 50% marks in the relevant subject shall also be eligible to appear in Teacher Eligibility Test for Language Teachers upto 31.03.2014.

14. Learned Additional Advocate General has submitted that the relaxation which is provide in Note-3 is applicable to only those categories of candidates who claim eligibility for being considered for appointment against the post of Language Teachers on the strength of graduation being the main subject. He argued that as far as the petitioner is concerned, her main qualification is not graduation, but it is Prabhakar. Accordingly, he argued that Note-3 does not covers the petitioner as in order to fall under Note-3 it

was essential for the petitioner to have had staked her claim for the post in issue as graduation. being the main qualification.

15. Learned counsel for the petitioner on the other hand has argued that Note-3 is very clear that persons possessing graduation with 50% marks in relevant subject shall also be eligible for appearing in Teacher Eligibility Test for LT upto 30.03.2014 and as it was an admitted fact that the petitioner was a graduate with 50% marks, therefore, she was eligible for appearing in Teacher Eligibility Test upto 31.03.2014. He further submitted that the case of the petitioner is on a better footing, for the reason that the petitioner had already appeared in the Teacher Eligibility Test examination and only her result was awaited, which admittedly was declared much before 31.03.2014.

16. Having heard the respective contentions of learned counsel on this issue, this Court is of the considered view that there is merit in the submission of learned Additional Advocate General.

17. At the cost of repetition, this Court reiterates that five categories of candidates were eligible in terms of advertisement (Annexure P-9) to apply for the post in issue.
They were as under:-

(a) B.A. with Hindi as an elective subject and two years diploma in Elementary Education.

(b) B.A. with at least 50% marks with Hindi as an elective subject and one year Bachelor in Education.

(c). B.A. with at least 45% marks with Hindi as an elective subject and one year B.Ed. in accordance with NCTE or B.A. with least 50% marks with Hindi as an elective subject and one year Bachelor in Education, B.Ed. special education.

(d) Prabhakar (Honours) in Hindi with 50% marks following by B.A. examination English and one additional subject with 50% marks from a recognized university and one year Bachelor in Education.

(e) M.A. Hindi with at least 50% marks from a recognized university and one year Bachelor in Education.

18. Now, if one juxtaposes Note-3 vis-à-vis the above five mentioned categories, then one finds that as far as category No.1 is concerned, a candidate who possesses B.A. Degree with Hindi therein and two years diploma in Elementary Education is also not eligible to get the benefit of Note-3 until and unless such candidate possesses the Degree of graduation with at least 50% marks. This is despite the fact that for this particular category in order to be eligible there is no minimum marks prescribed. Similarly, for category number (c) also the Note-3 comes into operation only if a candidate possesses more than 50% marks in graduation, because otherwise a candidate falling in this category even with 45% marks in B.A. Hindi is eligible to apply for the post, provided he already possesses Teacher Eligibility Test as on the date when the interviews were to be conducted.

19. Therefore, as in the case of the petitioner the principal qualification on the strength of which she is staking her claim to be eligible for the post of Language Teachers is Prabhakar (Honours in Hindi) and not B.A. in Hindi with 50% marks, this Court is of the considered view that Note-3 is not applicable either to the petitioner or to similarly situated candidates. The framers of the advertisement being fully aware of the qualifications which render the candidate eligible for the post in issue consciously took a decision in Note-3 only to use the word “graduation with 50% marks in relevant subject”, otherwise nothing prevented the Department from including “Prabhakar with 50% marks” also in Note-3. Reason is obvious. Prabhakar is done by a candidate after matriculation. Therefore, the same cannot be put on same footing as B.A. in Hindi as an elective subject.

20. In the absence of qualification of Prabhakar being mentioned in Note-3, this Court is of the considered view that benefit of relaxation flowing therefrom is not and was not applicable to the petitioner or similarly situated

persons. Accordingly, this Court concurs with the submissions made by learned Additional Advocate General that in terms of advertisement dated 24.12.2013 (Annexure P-9), the petitioner was not eligible for the post as on 06.01.2014.

21. In view of the above observation, this petition is dismissed. No order as to costs. Pending miscellaneous applications, if also, stand disposed of.

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

Poonam Kumari .....Petitioner.

Versus

State of Himachal Pradesh and others

.....Respondents.

For the Petitioner : Mr. Sanjeev Bhushan, Senior Advocate with Mr. Rajesh Kumar, Advocate.

For the Respondents : Mr. Ajay Vaidya, Senior Additional Advocate General.

CWP No.5707 of 2022
Date of decision:19.12.2022

Constitution of India, 1950- Article 226- Direction to allow the petitioner to remain on leave without pay and to grant extension in joining the post- **Held-** permit the petitioner to remain on leave without pay with directions to respondent- Petition allowed with directions to Chief Secretary to the Government of Himachal Pradesh. (Paras 21, 22, 24)

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

The petitioner completed her four years' B.Sc. (Nursing) from Shimla Nursing College, in the year 2016. On 28.12.2019, an advertisement was issued by the Himachal Pradesh Staff Selection Commission, Hamirpur, (for short 'Commission') for filling up various posts including 307 posts of Staff Nurse (on contract basis). The petitioner being fully eligible applied for the same. She also gave the written test that was conducted by the Commission in September, 2020. Since, the result had not been declared, the petitioner, in the meanwhile, started pursuing her M.Sc. (Nursing) Course of two years duration.

2. It is eventually on 21st January, 2022 that the result of the written test was declared wherein the petitioner having qualified was offered appointment on contract basis on fixed salary of Rs.13,500/-. The petitioner was directed to join at Dr. YSPGMC, Nahan, on or before 04.02.2022. However, as observed above, since the petitioner had been pursuing M.Sc. (Nursing), she accordingly sought extension of time for joining. The respondents acceded to the request of the petitioner by extending the period of joining by six months vide communication dated 01.02.2022 by extending the date of joining as 02.07.2022 which infact ought to have been 02.08.2022.

3. Since, the course of M.Sc. (Nursing), had not been completed, therefore, the petitioner filed representation dated 08.06.2022 requesting the respondents to allow time uptill November, 2022 to complete her course. The respondents did not respond to the request made by the petitioner constraining her to join at Nahan, on 02.07.2022.

4. Thereafter, the petitioner again made a request to the respondents vide her letter dated 28.07.2022 to grant leave without pay with effect from 01.08.2022 to 30.09.2022 so as to enable her to complete M.Sc (Nursing) Course because she had completed her 80% of the Course. The respondents again did not choose to respond to the same constraining the petitioner to file the instant petition for grant of the following reliefs:-

> "i. That appropriate writ, order or direction may very kindly be issued directing the respondents to allow the petitioner to remain on leave without pay up till 15th November, 2022 by further directing that such period may not even be counted for the purposes of regularization of the petitioner enabling her to complete her M.Sc. (Nursing), in the interest of law and justice.
>
> ii) That in the alternative the respondents may very kindly be directed to grant the extension in joining the post as Staff Nurse up till 15th November, 2022 on the analogy of the past practice, in the interest of law and justice."

5. The respondents have opposed the petition by filing reply wherein preliminary objections with regard to locus-standi and cause of action etc. have been raised. It is averred that the petitioner had been appointed as Staff Nurse on contract basis vide Office Order dated 21.01.2022 on fixed terms and conditions including a specific condition with regard to entitlement of leave at Sr. No.5 (as admissible in respect of contractual employees) which reads as under:-

> "The contractual appointee will be entitled for 1 day Causal Leave after putting one month service, 10 Days Medical Leave and 5 Days Special Leave in a calendar year. However, the Contractual Appointee with less than two surviving children may be granted Maternity Leave for 180 days. The contractual appointee shall also be entitled for maternity leave not exceeding 45 Days (Irrespective the number of surviving children) during the entire service, in case of miscarriage including abortion, on production of Medical Certificate issued by the authorized Government Medical Officer. The Contractual Appointee will not be entitled for Medical Reimbursement and LTC, etc. No leave of any other kind except above is admissible to the Contract Appointee."

6. It is also averred that the request made by the petitioner initially was considered sympathetically by the respondents and it is thereafter that six months time was granted to the petitioner to complete her M.Sc. (Nursing). As regards further request for extension of time for joining, the same could not be acceded to in view of the instructions issued by the Government on 09.09.2016, the relevant portion whereof reads as under:-

> "(i) In the offers of appointment issued by different Ministries/Departments, it should be clearly indicated that the offer would lapse if the candidates did not join within a specified period (which shall not normally exceed one month).
> (ii) If, however, within the period stipulated, a request is received from the candidate(s) for extension of time, it may be considered by the Ministries/Departments and if they are satisfied, an extension for a limited period of three months may be granted but extension beyond three months should not

be granted liberally and it may be granted only as an exception where facts and circumstances so warrant and in any case only upto a maximum of six months from the date of issue of the original offer of appointment. An offer of appointment would lapse automatically after the expiry of six months from the date of issue of the original offer of appointment. The candidates who join within the above period of six months will have their seniority fixed under the seniority rules applicable to the service/post concerned to which they are appointed, without any depression of seniority.

(iii) If, even after the extension(s) if any granted by the Ministry/Departments, a candidate does not join within the stipulated time (which shall not exceed a period of six months), the order of appointment should lapse automatically.

(iv) An offer of appointment which has lapsed should not ordinarily be revived later, except in exceptional circumstances and on grounds of public interest. The Commission should in all cases be consulted before such offers are revived.

(v) In a case where after the lapsing of the offer, the offer is revived in consultation with the Public Service Commission as mentioned in sub-para(iv) above, the seniority of the candidates concerned would be fixed below those who have already joined the posts concerned within the prescribed period of six months; and if the candidate joints before the candidates of the next selection/examination join, he should be placed below all others of his batch. If however, the candidate joins after some or all the candidates of the next selection/examination have joined, he should be:

(a) In cases of selection through interview, placed at the bottom of all the candidates of the next batch.

(b) In the case of examination, allotted to the next years batch and placed at the bottom."

7. Even the Government, as a matter of fact, had directed the respondents to proceed in accordance with Clauses iii, iv and v of the letter dated 09.09.2016 at the time when the petitioner had sought extension of time.

8. The petitioner filed rejoinder to the reply wherein the action of the respondents in denying the leave has been questioned on the ground of its being violative of Articles 14 and 16 of the Constitution of India. It has

been averred that extension of time for pursuing higher studies is being denied to the petitioner on the ground that there is no provision for grant of leave to the contractual employees. Whereas, in similar cases pertaining to the PWD, Junior Engineers (Civil), the Government itself had granted permission to those of the incumbents, who were pursuing higher studies to complete the same so that they may work with the Organization with more proficiency, copy of the reply to one of the miscellaneous application being CMP No. 3780 of 2022 in CWP No. 6350 of 2020 in case titled Apil Kanoungo and others vs. State of H.P. and others has been appended as Annexure P-8 with the rejoinder.

9. We have heard the learned counsel for the parties and have gone through the records of the case.

10. At the outset, it needs to be noticed that this Court on 23.08.2022 passed the following order:-

> "Notice. Mr. Ajay Vaidya, learned Senior Additional Advocate General, appears and waives service of notice on behalf of the respondents.
> Reply/instructions be filed/obtained by the respondents in light of the averments made in para-8 of the petition.
> List on 25.08.2022."

11. As regards para-8 of the petition, a specific averment regarding grant of extension for joining in the case of a Staff Nurse has been pleaded in para-8 (d) which reads as under:-

> "d. That one another glaring aspect of the matter is that in similar circumstances at earlier point of time the respondent-State has granted the extension for joining to the persons as Staff Nurse even up till a period of 2 years. It is submitted that in the year 2015, more than 20 appointees were given extension beyond a period of 1 year for joining the post of Staff Nurse on contract basis. Likewise in the year 2017, 35 incumbents were given extension of a period of beyond more than 1 year in order to enable them to complete Post Basic M.Sc. Nursing. It is submitted that the petitioner is also

> similarly situated, rather was praying for grant of extension only up till 15th November for a period of around eight and a half months, but the same was not granted, therefore, the action of the respondents is violative of Articles 14 and 16 of the Constitution of India and the same cannot sustain in the eyes of law."

12. In compliance to the aforesaid directions, the learned Senior Additional Advocate General has placed on record a communication dated 24.08.2022 received from the Principal Secretary (Health) to the Government of Himachal Pradesh which *inter alia* reads as under:-

> "I am directed to refer to the subject cited above and to say that the petitioner has joined as Staff Nurse on 2.07.2022 on contractual basis as per contract Agreement (Affidavit). She was given joining time to join her duties but in view of her representation that she is pursuing her M.Sc (Nursing) from Sister Nivedita Government Nursing College, IGMC Shimla so she may be permitted to join the duties on 2.07.2022 which extension was granted by the Director of Health Services, HP, Shimla as per rules. Thereafter she represented for EOL (Extra Ordinary Leave) on 12.08.2022 after joining her duties. So far as EOL is concerned, the said leave is being granted to regular employees whereas contractual employee is not entitled to the said leave. Copy of representation for EOL alongwith contract agreement (Affidavit) are enclosed for kind perusal."

13. A perusal of the aforesaid instructions would go to indicate that the respondents had not chosen to obtain specific instructions with regard to grant of extension of leave to similarly situated incumbents constraining the Court to pass the following order on 25.08.2022:-

> "**CWP No. 5707 of 2022 & CMP No.11474 of 2022.**
>
> As prayed for, list on **29.08.2022**. In the meanwhile, respondent No.3 is directed to permit the petitioner to attend the classes provisionally."

14. No doubt, the respondents thereafter filed a formal reply to the main petition. But, as regards the averments made in para-8(d) (supra), the same is conspicuously silent, as would be evident from the reply, which reads as under:-

> "8. That is is respectfully and humbly submitted that in the meanwhile, after expiry of her period of extension in joining the services as initially granted by the respondent department vide office order dated 01.02.2022, Annexure P-4, the petitioner had also joined her services as Staff Nurse on contract basis at her place of posting i.e. Dr. YS Parmar Government Medical College Nahan on 02.07.2022 (AN) as intimated by the Principal Dr. YS Parmar Government Medical College Nahan vide letter dated 21.07.2022, copy placed on record as **Annexure R-3** for kind perusal of the Hon'ble Court."

15. The interim order passed by this Court is continuing till date and, therefore, it would serve no purpose in case the order is vacated, modified or varied at this stage. But, we do share our concern and anxiety of the learned Senior Additional Advocate General that ultimately in such kind of situation whereafter issuing interim protection, the final orders are required to be passed on the ground that under interim protection, the time for joining duty stands extended, should not be encouraged. We are absolutely mindful of the fact that a person, who has been selected and appointed to a public post has a duty to join such post within the time permitted or extended.

16. It may well be questionable whether such a person has a vested right to insist that the offer of appointment be kept in abeyance for an indefinite period of time of several months/years or till he/she completes his/her higher studies which are being pursued. The requirement of administration to fill up the posts would have to be taken into consideration and essentially would be for the administration to exercise the discretion to extend or not to extend the time for joining duty. But, then such extension

of time cannot be made on a pick and choose policy that too without there being any uniformity of practice by various departments of the Government.

17. Like in the instant case, the Public Works Department (for short 'PWD') is over-zealous to permit the selected candidates to grant them time to complete their higher education, so that they may work with the Organization with more proficiency and such request of the Department has also been acceded to by the Government. Why such request in the instant case is not being acceded to is not at all forthcoming?

18. Thus, it is a clear-cut case of discrimination. We are also not oblivious to the fact that when it comes to grant or refusal of study leave, this requirement is taken to a further higher level of the sanctioning authority being of the opinion that it is necessary in public interest for working of the department in which the person is employed. Such higher study would augment the skills of the employee on return is just one of the considerations before the administration while considering the request for study leave. The vacancy position in the cadre, the requirement of sufficient employees to look after the service to be provided are only some of the considerations. There could be hosts and range of other factors which will have to be weighed by the administration. The right to apply for study leave or for extension of joining time is vastly different from claiming vested right to be granted the leave. The rules invariably recognize the right to apply for leave. However, before such an application is accepted, the administration has a right, power and the duty to assess the relevant factors of interest of exigencies of the public service. If in the opinion of the Government, there is a severe shortage of nurses due to which after joining the service, the nurse cannot be granted extension to join the service as leave to contractual leave employee otherwise is not available, then such decision, in our considered opinion cannot be said to be unreasonable.

19. Thus, the long and short of the matter is that the respondents will have to take a conscious decision after taking into account all the relevant aspects of the matter. But, even thereafter, the same essentially would have required to be applied uniformly without there being any discrimination.

20. The dilemma before the petitioner is that she had only a few months to complete her M.Sc. (Nursing) and in the meanwhile had got the job of Staff Nurse when she had already completed one year of the Course out of two years. So, if she was to accept the post of Staff Nurse, she could have done it only after giving up the M.Sc. (Nursing) Course. On the other hand, if she still chooses to continue with her higher studies over taking up an immediate job, her future would still remains uncertain as to whether she would get a job after completion of M.Sc. (Nursing). Obviously, in this competitive job market, it would be expecting to much of the petitioner to give up a job.

21. In the given facts and circumstances, we are not inclined to disturb the status quo, more particularly, when the duration of the Course has already come to an end and, therefore, permit the petitioner to remain on leave without pay up till 15th November, 2022, by further directing the respondents that such period shall not be counted for regularization of the petitioner. Ordered accordingly.

22. The instant petition is allowed in the aforesaid terms.

23. Pending application, if any, also stands disposed of.

24. Having come across lack of uniformity and varied approach on the same subject-matter i.e. extension of time in joining on account of pursuing higher studies, we direct the Chief Secretary to the Government of Himachal Pradesh to examine the issue thoroughly as the instructions dated 09.09.2016 do not touch upon this issue. Such decision would help in bringing about uniformity of practice so as to avoid un-necessary heart-

burning on account of different and varied approaches being adopted by the departments of the Government. Such decision be taken within three months.

25. We also make it clear that this order essentially is being passed in the peculiar facts and circumstances of the case and shall, therefore, not be treated as a precedent in future.

26. For compliance, to come up on **21.03.2023.**

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

Bhuvnesh Kumar .....Petitioner.

Versus

NTPC Ltd. and another .....Respondents.

For the Petitioner : Mr. Jagan Nath, Advocate.
For the Respondents: Nemo.

CWP No.8628 of 2022
Date of decision: 15.12.2022

Constitution of India, 1950- Article 226- Aggrieved by the tender process, the petitioner has filed the instant petition on the ground that the oustees constitute a homogeneous class and their claims could not have been prioritized in a manner as has been done in the advertisement- Held- All the oustees cannot be treated as homogeneous class so as to be treated equally- No irregularity much less an illegality in the priority- No merit- Petition dismissed. (Paras 11, 13)

Cases referred:

Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited and another (2016) 16 SCC 818;
Association of Registration Plates vs. Union of India, (2005)1 SCC 679;
Jagdish Mandal vs. State of Orissa; (2007) 14 SCC 517;
Directorate of Education vs. Educomp Datamatics Ltd., (2004) 4 SCC 19;
Global Energy Ltd., vs. Adani Exports Ltd; (2005) 4 SCC 435;
JSW Infrastructure Ltd., vs. Kakinada Seaports Ltd., (2017) 4 SCC 170;

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral)

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

> "a) That the notice inviting tender dated 26.11.2022 (**Annexure-P-6)** issued by the respondents may kindly be quashed and set aside;
> b) The respondent may kindly be directed to allow all the oustees of Koldam project to be participated in the tender process of deployment of vehicle at NTPC Koldam project without any condition;
> c) That the respondents may kindly be directed to remove the condition No.5.1 to 5.6 of the notice inviting tender (Annexure P-6)."

2. On 26.02.2000, the respondents executed a MOU with the Government of Himachal Pradesh for implementation of the Kol Dam Hydro Electric Project and on the same date formed a scheme for the rehabilitation and resettlement of the oustees of the Kol Dam Project.

3. It is averred that in July, 2000, the transportation facilities were required by the respondents for its employees and it was then that it was agreed between the management and the oustees/affected people that the management shall hire the vehicles of the oustees/affected people by way of an open tender for three years on contract basis. On 30.03.2022, respondent No.2 issued a list of 30 oustees eligible for deployment of vehicles in the NTPC. However, the criteria adopted by the respondents for deployment of the vehicles was assailed before this Court by filing CWP No. 3006/2006. During the pendency of the writ petition, the respondents cancelled the tender process thereby rendering the aforesaid petition as infructuous. It is now that the respondents have issued an advertisement inviting tender from the interested eligible oustees for hiring 8 hours, 16 hours/24 hours Non-AC Diesel closed commercial vehicles for a period of three years extendable by two years.

4. The advertisement as contained in Annexure P-6 reads as under:-

> "NTPC Limited
> (A Govt. of India Enterprise)

NOTICE INVITING TENDER (NIT)
(Exclusively for NTPC Koldam Oustees)
NTPC is inviting tender from interested eligible **Oustees** of NTPC Koldam for Hiring of 8 hr/24 hr Non-AC Diesel closed commercial vehicles for period of 03 years extendable up to 02 years with details as under:

Description	Duty Hrs	Drivers to be deployed	No. of vehicles required	Fixed Hiring Charges per Month(Rs)	Mileage (Km/Ltr)
Hiring of Non AC Diesel Jeep 2x2 (Mahindra Bolero) of Model 2022 or above	8	1	16	38716.14	13
	16	2	2	60311.64	
	24	3	4	81907.14	
Hiring of Non AC Diesel Twin Cabin Utility Pickup vehicles (2x2) (Mahindra Bolero Pickup) of Model 2022 or above	24	3	2	81922.29	8.5.
	16	2	1	60257.38	
Total	25				

NOTE: The cost of fuel required for running the vehicle for NTPC use shall be borne by the agency, which shall be reimbursed monthly by NTPC:
a) 13.0 km/Ltr. For 2x2 Non-AC closed jeeps;
b) 8.5 Km/Ltr. For twin cabin utility pickup

1) Interested Oustees need to visit R&R dept. of NTPC Koldam along with relevant documents for Verification and clearance for issue of tender.

2) Collection of tender documents from C&M dept. NTPC Koldam:

FROM : 01.12.2022 TO : 08.12.2022
(Between 10.00 AM and 5.00 PM)

3) Submission of tender documents at C&M dept., NTPC Koldam:

FROM : 02.12.2022 TO : 14.12.2022
(Between 10.00 AM and 5.00 PM)

4) Bid Opening Date : 15.12.2022 (11.00 am).

5) Vehicles shall be allotted as per following Priority:

5.1 **1st priority :** (Land + Homestead)oustees (weightage based on acreage of land acquired)

5.2. **IInd priority** : Homestead oustees.

5.3. **IIIrd priority:** Land oustees (weightage based on acreage of land acquired).

5.4. **IVth priority:** The Oustees who has been awarded a contract earlier for hiring of vehicle or any direct/indirect employment earlier at NTPC Koldam.

5.5. Vehicle applicants who are not engaged through direct/indirect employment at NTPC Koldam will be preferred for the deployment of vehicle, subject to above priority.

5.6. However, if Oustees falls in same category, the preference shall be as per the date of birth of vehicle owner according to PAN/DL/Aadhar card/10th certificate, Older date of birth (oldest owner) shall be given first preference.

6. Final List of Shortlisted oustees (For deployment of above 25 vehicles) shall be communicated to all participated Oustees through e-mail mode.

Note: As tenders are invited from all oustees of NTPC Koldam and information being published through newspaper, any claim regarding non-receipt of information for subject tender shall not be entertained later on.

For any further information please contact:

Smt. Salika Sharma, Manager (C&M) Mob: 7807000279

Leading the Power Sector."

5. Aggrieved by the tender process, the petitioner has filed the instant petition on the ground that the oustees constitute a homogeneous class and, therefore, their claims could not have been prioritized in a manner as has been done in Clauses 5.1 to 5.6 of the advertisement.

6. We have heard the learned counsel for the petitioner and have gone through the material placed on record.

7. At the outset, it must be observed that scope of judicial interference with the commercial contract matters is very limited. The tender inviting authority, being the owner, is undoubtedly having right and every justification to impose terms and conditions in the tender notification suitable for them, in order to select a qualified person to execute the contract work. Neither the intending bidder nor third party can have any say, whatsoever, on the terms and conditions of the contract, as to how it should be, so long as those terms and conditions are not opposed to public policy. Merely because, a particular clause or condition in the tender notification is not either suitable for a person or it indirectly excludes his participation in the tender process, that itself cannot be a reason to say that imposition of such clause or condition is either arbitrary or tainted with mala fide. The owner, certainly, cannot be expected to impose only such of those conditions which would suit all the intending bidders. Scope and ambit of commercial contract do not justify such expectation as reasonable. It is well settled that the Court should desist from interfering with the terms and conditions of the contract either by substituting the one, as projected by the intending bidder, or diluting the existing condition, in a way that would suit the said proposed party. After all, the owner of the contract, namely, the tender inviting authority is to be left

with free hands to select a suitable and fully qualified person to execute the contract work, more particularly, when the public money is involved in such project. The Hon'ble Supreme Court, in many decisions, has considered the aspect of judicial review on commercial contract and laid the following principles:-

> (a) The terms and conditions of the invitation to tender being in the realm of contract, the owner must have a free hand in setting the terms in the tender which are not open to judicial scrutiny.
>
> (b) Merely because it appears that some other terms would have been fair, wiser or logical, cannot be a ground for the court to strike down the tender prescribed by the owner, as it was for the authority to set the terms of the condition, unless it is established that such administrative policy decision is arbitrary, discriminatory or malafide.
>
> (c) Merely because a particular term or condition of the tender may result in depriving a particular individual bidder to take part in the tender process, that itself cannot be cited as an event of discrimination, since those terms and conditions are issued in common to all intending bidders and not stipulated on the particular individual alone.
>
> (d) If the decision relating to award of contract is bonafide and is in public interest, Courts will not, in exercise of power to judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer is made out.
>
> (e) The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes.
>
> (f) A mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional court to interfere, as the owner or the employer of the project having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents.?

8. The relevant decisions of the Hon'ble Supreme Court, which settled the above principles, are as follows:-

(i) Directorate of Education vs. Educomp Datamatics Ltd., (2004) 4 SCC 19

(ii) Global Energy Ltd., vs. Adani Exports Ltd; (2005) 4 SCC 435

(iii) Association of Registration Plates vs. Union of India, (2005)1 SCC 679.

(iv) Jagdish Mandal vs. State of Orissa; (2007) 14 SCC 517.

(v) JSW Infrastructure Ltd., vs. Kakinada Seaports Ltd., (2017) 4 SCC 170.

9. Thus, what can be concluded on the basis of the aforesaid exposition of law is that the owner or the employer of a project having authored the tender documents is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It may be possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation so given. (Refer: ***Afcons Infrastructure Limited*** *vs.* ***Nagpur Metro Rail Corporation Limited and another (2016) 16 SCC 818).***

10. Reverting back to the facts, it would be noticed that as per the priority set out in the notice inviting tender, it has given first priority to those of the oustees whose land and homestead (weightage based on acreage of land acquired) have been acquired. Thereafter, the second priority has been given to those of the oustees whose homestead has been acquired. Third

priority to the land oustees (weightage based on acreage of land acquired) has been given and likewise other priorities have been fixed.

11. We really do not find any irregularity much less an illegality in the priority. After-all, top priority has to be given to a person whose land as also homestead is acquired. Thereafter to the person whose homestead is acquired and likewise third priority has to be given to those of the oustees whose lands based on acreage of land have been acquired. All the oustees cannot be treated as homogeneous class so as to be treated equally. Therefore, the claims essentially need to be prioritized or else the action of the respondents would be arbitrary.

12. Now, let us take an example; where a person owns only 10 biswas of land along with homestead and his entire holdings along with homestead is acquired, can he be treated at par with a person, who owns 50 bighas of land out of which his 1 biswa of land is acquired and even though homestead is not acquired, as suggested by the learned counsel for the petitioner. However, priority will have to be given to that oustee whose land and homestead both have been acquired as against a person whose land to a very minuscule extent has been acquired. In no event, can the oustees in the given facts and circumstances of the case, be treated as a homogeneous class as their claims are essentially required to be prioritized, as has otherwise been done by the respondents.

13. In view of the aforesaid discussion and for the reasons stated above, we find no merit in the instant petition and the same is accordingly dismissed, leaving the parties to bear their own costs.

14. Pending application(s), if any, also stands disposed of.

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

Umesh Jaswal ...Petitioner.

Versus

State of H.P. & others ....Respondents.

2. CWP No. 5122 of 2022.

Subhash Chand ...Petitioner.

Versus

State of H.P. & others ....Respondents.

3. CWP No. 5124 of 2022.

Kunj Bihari ...Petitioner.

Versus

State of H.P. & others ....Respondents.

4. CWP No. 5276 of 2022.

Jeet Ram ...Petitioner.

Versus

State of H.P. & others ....Respondents.

5. CWP No. 5278 of 2022.

Gafoor Mohammad ...Petitioner.

Versus

State of H.P. & others ....Respondents.

For the Petitioners: Mr. Ankush Dass Sood, Senior Advocate with Mr. Rakesh Kumar, Advocate.

For the Respondents: Mr. Desh Raj Thakur, Additional Advocate General & Mr. Narender Thakur, Dy. A.G.

CWP No. 5090 of 2022
along with CWP Nos. 5122, 5124, 5276 and 5278 of 2022.
Reserved on: 14.12. 2022
Decided on : 19.12.2022

Constitution of India, 1950- Article 226- Writ petitions seeking the relief of regularization from the date of their initial appointments- Petitioners were appointed on contract basis- Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995- **Held-** The petitioners are entitled to be considered as regular employees from the dates of their initial appointments- Petition allowed with directions. (Para 10)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge.

Since all these petitions involve identical questions of facts and law, therefore, these are being decided by a common judgment.

2. Petitioners in CWP Nos. 5090 of 2022, 5278 of 2022 and 5124 of 2022 were appointed as Trained Graduate Teachers in the Department of Elementary Education, in the year 2010, under the 3% quota for disabled persons. Petitioners in CWP Nos. 5122 of 2022 and 5276 of 2022, were appointed as Peons (Class-IV) in Health and Family Welfare Department, in the year 2008, under the 3% quota for disabled persons.

3. The petitioners were appointed on contract basis. By way of instant petitions, they are seeking the relief that they be considered on regular basis from the date of their initial appointments.

4. The aforesaid claim of petitioners has been denied to them by the respondents, primarily on the ground that the Recruitment and Promotion Rules in vogue for the respective posts of petitioners, at the time of their respective appointments, provide for two modes of appointments, one by appointment on contract basis and other on regular basis. Since, the initial appointments of petitioners was in accordance with the relevant Recruitment and Promotion Rules and as such they cannot be granted the status of regular employee from the date of their initial appointments. It is also the case of the respondents that no exception can be carved in favour of the petitioners only because they have been recruited under 3% quota for disabled persons.

5. I have heard Mr. Ankush Dass Sood, learned Senior Advocate, for the petitioner and Mr. Desh Raj Thakur, Additional Advocate General for the respondents nad have also gone through the record carefully.

6. The question that arise for determination in all these petitions is whether the appointments of persons with disability, on contract basis, can be said to be in consonance with the persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995?

7. The above noted question has already been decided in negative by this Court vide judgment dated ***22.08.2022 passed in CWPOA No. 1066 of 2019, titled as Nitin Kumar vs. State & Anr.*** After discussing the relevant aspect on the issue, this Court has held as under::-

"9. The 1995 Act has been enacted with most laudable object to provide equal opportunities to the persons with disabilities. Section 32 of the Act provides for identification of posts, which can be reserved for persons with disabilities whereas, Section 33 provide for reservation of such posts, which reads as under:-

> *"33. **Reservation of posts**.—Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons or class of persons with disability of which one per cent each shall be reserved for persons suffering from—*
> *(i) blindness or low vision;*
> *(ii) hearing impairment;*
> *(iii) locomotor disability or cerebral palsy, in the posts identified for each disability:*
>
> *Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section."*

10. Thus, there is a clear mandate of law to every appropriate government to appoint in every establishment such percentage of vacancies not less than 3% for persons or class of persons with disability of which 1% each is mandatorily required to be reserved for persons suffering from hearing impairment, blindness and locomotor disability or cerebral palsy.

11. The Hon'ble Supreme Court of India in Union of India vs. National Federation of the Blinds & others, 2013 (10) SCC 772 interpreted the purpose of 1995 Act as under:-

> *"24) Although, the Disability Rights Movement in India commenced way back in 1977, of which Respondent No. 1 herein was an active participant, it acquired the requisite sanction only at the launch of the Asian and Pacific Decade of Disabled Persons in 1993-2002, which gave a definite boost to the movement. The main need that emerged from the meet was for a comprehensive legislation to protect the rights of persons with disabilities. In this light, the crucial legislation was enacted in 1995 viz., the Persons with*

Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 which empowers persons with disabilities and ensures protection of their rights. The Act, in addition to its other prospects, also seeks for better employment opportunities to persons with disabilities by way of reservation of posts and establishment of a Special Employment Exchange for them. For the same, Section 32 of the Act stipulates for identification of posts which can be reserved for persons with disabilities. Section 33 provides for reservation of posts and Section 36 thereof provides that in case a vacancy is not filled up due to non-availability of a suitable person with disability, in any recruitment year such vacancy is to be carried forward in the succeeding recruitment year. The difference of opinion between the appellants and the respondents arises on the point of interpretation of these sections.

25) It is the stand of the Union of India that the Act provides for only 3% reservation in the vacancies in the posts identified for the disabled persons and not on the total cadre strength of the establishment whereas Mr. S.K. Rungta, learned senior counsel (R-1) appearing in person submitted that accepting the interpretation proposed by the Union of India will flout the policy of reservation encompassed under Section 33 of the Act. He further submitted that the High Court has rightly held that the reservation of 3% for differently abled persons in conformity with the Act should have to be computed on the basis of the total strength of a cadre and not just on the basis of the vacancies available in the posts that are identified for differently abled persons, thereby declaring certain clauses of the OM dated 29.12.2005 as unacceptable and contrary to the mandate of Section 33 of the Act."

12. The Hon'ble Apex Court in para-52 of above noted judgment further mandated as under:-

> *"Thus, after thoughtful consideration, we are of the view that the computation of reservation for persons with disabilities has to be computed in case of Group A, B, C and D posts in an identical manner viz., "computing 3% reservation on total number of vacancies in the cadre strength" which is the intention of the legislature. Accordingly, certain clauses in the OM dated 29.12.2005, which are contrary to the above reasoning are struck down and we direct the appropriate Government to issue new Office Memorandum(s) in consistent with the decision rendered by this Court."*

13. Thus, keeping in view the object of 1995 Act there is no hesitation to hold that the purpose of reservation of posts under Section 33 of 1995 Act will not be fulfilled by making temporary, ad-hoc or contract appointments. Such an interpretation will make the very purpose of 1995 Act otiose. The reservation mandated under Section 33 of the Act will necessarily mean to provide employment, which has permanency attached to it and that can only be by way of regular appointment.

14. Reverting to the facts of the instant case, admittedly, petitioner is suffering from 90% hearing impairment and also was appointed against the backlog vacancies for persons with disability. Thus, petitioner is entitled for all protection as envisaged under 1995 Act. View from any perspective the petitioner was entitled to be appointed on regular basis from very inception."

8. The cases of the petitioners in the instant petitions are squarely covered by the aforesaid judgment passed by this Court in Nitin Kumar's case and as such no exception can be carved out in their cases. Therefore, the petitions are entitled to be considered as regular employees from the date of their initial appointments. The reasons assigned in the aforesaid judgment

titled as *Nitin Kumar vs. State of H.P. & Ors. (supra)* shall *mutatis mutandis* apply to the cases of the petitioners.

9. A coordinate bench of this Court while deciding ***CWP No. 4299 of 2019, titled as Pushpa Devi & Others vs. Himachal Pradesh University, decided on 16.08.2019,*** has also held the identical situated persons to be entitled for regular appointments from the date of their initial appointments.

10. In view of above discussion, the petitions are allowed and the respondents are directed to treat the appointments of petitioners on regular basis from the date of their initial appointments. The respondents are further directed to release all consequential benefits to the petitioners within eight weeks from the date of production of copy of this judgment by the petitioners. Petitions are accordingly disposed of, so also, the pending applications.

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

The Managing Director, M/s Luminous PowerTech .... Petitioner

Versus

Manoj Kumar & another .....Repondents

For the petitioner : Mr. Vishal Sharma & Mr. Daleep Chand Advocates.

For the respondent: Ms. Shikha Chauhan, Advocate for respondent No. 1

CWP No. 3488 of 2022
Reserved on: 22.9.2022
Decided on : 16.12.2022

Constitution of India, 1950- Articles 226, 227- Industrial Disputes Act- Petitioner has assailed the award passed by the Learned Labour Cuort cum Industrial Tribunal cancelling the transfer order passed by the petitioner- Contended that it was the prerogative of the petitioner management to transfer the employees- **Held-** Act of the petitioner to transfer the workmen was not bonafide- Attempt to thwart the process of registration of Union under the Trade union Act- Award upheld- Petition dismissed. (Para 67)

Cases referred:

Balram and another versus M.C.D (Delhi), SLR, Vol. 207, 2008(1);
Dr. K. Shringi versus Nuclear Power Corp. of India Ltd., & others, SCT Vol. 67 2008(1);
Hari Vishnu Kamath vs. Syed Ahmad Ishaque and others, SCC, 1955 (1) 1104;
Harjinder Singh vs. Punjab State Warehousing Corporation, 2010(3) SCC 192;
M/s Medley Minerals India Ltd. Vs. State of Orissa & others, AIR 2004 SC 485;
Management of Madurantakam Coop. Sugar Mills Ltd. vs. S. Viswanathan 2005 (3) SCC 193;
Pradip Lamp Works, Patna Vs.Workmen of Pradip Lamp Works, Patna & another, 1972 (I) LLJ 507;
State of Bihar versus Kripa Shankar Jaiswal,AIR 1961, SC (Vol. 1) 306;
T.C. Basappa versus T. Nagappa and another, AIR 1954 S.C. 440;

The following judgment of the Court was delivered:

Per Virender Singh, Judge

The petitioner, M/s Luminous Power Technologies, Unit-II Gagret, Tehsil Amb, District Una, through its Managing Director, has invoked the extraordinary writ jurisdiction of this Court under Article 226 and 227 of the Constitution of India.

2. By virtue of the present writ petition, the petitioner has sought indulgence of this Court for quashing the order dated 2.5.2022 (Annexure P-14), passed by respondent No. 2, i.e. Labour Court-cum-Industrial Tribunal, Kangra at Dharamshala.

3. The factual position, as emerges from the bare reading of the writ petition, is that the petitioner-Company is a manufacturing Company having its units, in various states, in the Country. Hence, the services of the workers are stated to be transferable.

4. In the year 2018, a unit in Hosur in Tamil Nadu was being expanded and trained manpower was required there, as such, 25 workers were ordered to be transferred for a limited period of 18 months, vide order dated 25.5.2018, (Annexure P-2) from Gagret, Tehsil Amb, District Una to Hosur in Tamil Nadu.

5. Out of 25 workers, 13 workers had joined their new place of posting, however, remaining 12 workers had refused to accept the transfer orders. Despite all the efforts to persuade them to join the new place of posting, they had not accepted the transfer orders. Hence their act is said to be an act of indiscipline.

Consequently, they were not permitted to enter in the factory premises at Gagret, Tehsil Amb, District Una.

6. Thereafter, respondent No. 1, who is claiming himself to be the President of Union namely, "Luminous Power Technologies Workers Union" (hereinafter referred to as, "the Union") filed the demand notice, which was not addressed to the Management, but was addressed to the Labour Conciliation Officer. Wide publicity was also given to the said demand notice. The contents of the said demand notice are said to be wrong and the demand notice is stated to have been issued with the motive to put pressure upon the petitioner and to evade transfer order dated 25.5.2018 (Annexure P-2).

7. On the basis of said demand notice, the notice was issued to the petitioner-Company by the Labour-cum- Conciliation Officer, vide notice dated 6.6.2018 (Annexure P-4). The said notice is stated to be unjustified and illegal, as it was the statutory duty of the Labour-cum-Conciliation Officer to hold the conciliation proceedings under Section 12 of the Industrial Disputes Act, 1947.

8. The act of the Labour- cum- Conciliation Officer in issuing the notice, dated 6.6.2018 has also been challenged, on the ground, that the Labour-cum- Conciliation Officer has issued notice without looking into the fact that respondent No. 1 was not having any legal authority to espouse the disputes or resolution of the Union authorizing him to raise the dispute or the written espousal, of at least a sizable number of workers. However, to the said notice, issued by the Labour-cum-Conciliation Officer, the petitioner-Management has

submitted its replies. The Labour-cum-Conciliation Officer issued failure report dated 8.4.2019 (Annexure P-8), in which, he has admitted that the offer of the petitioner-Management to cancel the transfer order and send the delinquent workmen to the plants in the surrounding areas was refused by respondent No. 1.

9. Even in the reply filed on 20.6.2018 (Annexure P-5), a categoric stand has been taken by the petitioner that respondent No. 1 is not authorized to raise the industrial dispute as the union is not registered.

10. Highlighting clause-2 of the appointment letter, in which, there is a stipulation that *"Management has right to transfer any workman in any part of India and will not change any service condition securing the Right to Livelihood of all workmen at par",* it has been pleaded that the above condition binds the workmen, in terms of contract, duly governed, as per Indian Contract Act, 1973.

11. Apart from this, the petitioner has also heavily

relied upon clause-16 of the Standing Orders, duly certified by the competent authority under the Industrial Employment (Standing Orders) Act, 1946(Annexure P-10). All these facts are stated to be apprised to the Labour-cum- Conciliation Officer. The well settled legal propositions have also been brought to his notice.

12. All these submissions were stated to be ignored by Labour-cum-Conciliation Officer and reference has been made on 6.9.2018 (Annexure P-11).

13. The petitioner, thereafter, received a Claim Statement filed before the Labour Court-cum-Industrial Tribunal, Kangra at Dharamshala (respondent No. 2). The Labour Court-cum-Industrial Tribunal had been requested to answer the reference, which reads as under:

"Whether the answering Management to transfer the 12 workers (named) elected as office bearers, which is under process for registration is legal and justified and if not what benefit the workmen entitle from the employer?".

14. Reiterating the stand that the alleged union was not registered and the prayer for registration of the Union has already been rejected by the authorities, it is the further case of the petitioner that the correspondences made by respondent No. 2 in the name of "Luminous Power Technologies Workers Union through its President" are wrong and illegal. In such circumstances, according to the petitioner, the Labour Court-cum-Industrial Tribunal has wrongly not entertained the objections. Despite the above rejection, the petitioner-Company had filed the reply to the claim statement, highlighting the fact that the alleged workers were neither terminated, retrenched nor discharged. As such, according to the petitioner, there was no dispute, which can be said to be "Industrial Dispute".

15. In the reply filed before the Labour Court-cum- Industrial Tribunal, the specific stand has been taken by the petitioner-Company that since the services of the workers were not retrenched nor they were dismissed, transfer order does not fall within the ambit of Section 2(A) or Section 2(K) of the Industrial Disputes Act, 1947.

16. As per the case, set up by the petitioner, the Labour Court-cum-Industrial Tribunal, Kangra, vide award dated 2.5.2022, has wrongly cancelled the transfer order, passed by the petitioner-Company. The said award has been assailed, inter-alia, on the ground, that it was prerogative of the petitioner-Management to transfer the employees to the plant at Hosur, where certain trained workers were required.

17. Supporting the transfer order, the award has been assailed on the ground that no intimation or any letter qua the proposal of the registration of the Union was ever communicated to the petitioner-Company.

18. The award has also been assailed on the ground that efforts of respondent No. 1 to get the Union registered, remained futile, as the said proposal was rejected on 12.9.2018, vide Annexure P-12 and there was no authority attached with the alleged claim, as per the provisions of Section 36 of the Industrial Disputes Act, 1947. Similarly, the claim statement, on behalf of Union, is also stated to be bad in law.

19 The reference, dated 6.9.2018, is also assailed on the ground that no reference can be made for unfair labour practice, as, the same is not included in the second schedule and the third schedule of the Industrial Disputes Act, 1947. In case of alleged unfair labour practice, which is stated to be prohibited under Section 25-T of the Industrial Disputes Act, it is the duty of the appropriate government to get the investigation done and to take the cognizance, if any offence is found to have been committed.

20. On all these submissions, a prayer has been made to allow the writ petition and to grant the relief, as prayed, in the writ

petition.

21. When put to notice, respondent No. 1 has filed the reply, in which, a stand has been taken that when their grievance was not redressed by the petitioner, they had no other option, but to approach the appropriate competent authority, as per law. Supporting the proceedings conducted by Labour-cum-Conciliation Officer, as well as the decision of Labour Court-cum-Industrial Tribunal, it is the further stand of respondent No. 1 that the petitioner- Company has acted with malafide intention to transfer the members of respondent No. 1-Union, from the present place of posting. Thus, a prayer has been made to dismiss the writ petition.

22. Management is before this Court to challenge the award passed by the Labour Court-cum-Industrual

Tribunal, Kangra at Dharamshala. By virtue of the award, the following relief has been given to the respondent No.1:

> "The transfer of the petitioners is cancelled being a malafide act of the respondent with a view to pressurize them not to pursue the matter regarding formation and registration of the trade union which they were in the process of registration. The petitioners shall be treated in continuity in service w.e.f. 26.5.2018 for next 18 months and they shall be entitled for all services benefits including salary for the above said period in the same manner as if they have worked at the same station and no dispute has arisen at all. The reference is confined to the period of 18 months and there can be any adjudication in this reference regarding the position that existed on the expiry of 18 months counted w.e.f. 26.5.2018, as the petitioner are regular employees of the respondent and they are governed by the R& P Rules of the respondent-Company. The petitioners namely S/Shri Dinesh Kumar and Neeraj Kumar i.e.

> petitioners No. 7 and 10 shall be entitled for the financial benefits for the period during which they remained out of the work before they were recalled after cancellation of their transfer orders".

23. The petitioner, in this case, heavily relied upon the terms and conditions of the appointment letter Annexure P-9, issued to the Workmen, including the President of Luminous Power Technology. In the appointment letter, there is a specific condition that the job of the workman is transferable. Clause-2 of the Appointment Letter (Annexure P-9) clearly stipulates that the services of the persons, so appointed, can be transferred from one factory to another factory. Even otherwise, the certified Standing Orders, issued under the provisions of Section 7 of the Industrial Disputes Act, 1947 contains the provisions that the Management shall have the right to transfer an employee from one department to another, from one establishment to another and from one station to another, underthe same employment/management of the factory.

24. However, a protection has been provided to the workman that his wages and other conditions of service shall not be un-necessarily effected. The Management can transfer the services of the workman with his consent or in the case, where there is specific provision, in the letter of appointment. Here, in this case, there is specific condition in the letter of appointment that the services of the workman can be transferred from one station to another. Vide letter dated 25.5.2018 (Annexure P-2), the services of25 workers were ordered to be transferred for limited period of 18 months from Gagret to Hosur in Tamilnadu.

25. Admittedly, the Luminous Powers Technology Workers Union, Tehsil Amb, District Una is not registered, as per the Trade Unions Act. This fact has clearly been depicted, in the letter head of Workers Union.

26. A perusal of the record clearly shows that vide Annexure P-12, Registrar of Trade Unions, Himachal Pradesh had written a letter to President/General Secretary, Luminous Power Technology Workers Union, Gagret Unit-II, Tehsil Amb, District Una, Himachal Pradesh. In this letter, it has specifically been mentioned that the application for registration of the Union, in the name of Luminous Power Technology Workers' Union, Gagret, under the Trade Unions Act, 1926 was moved on 16.4.2018. This date assumes significance, as, by moving application, on that date, the working committee of the petitioner-Company had initiated the process of registration.

27. In the letter, Annexure P-3, which, although, was addressed to the Press and Electronic Media, it has been mentioned that in order to raise the voice against the Management, it has been decided to constitute an organization, in the name of Luminous Power Technology Workers Union on 16.3.2018 and the requisite documents have been stated to be submitted with the office of Labour Commissioner, Shimla. Thereafter, vide letter dated 12.9.2018, the Registrar of Trade Union of Himachal Pradesh had written a letter, copy of which is on record as Annexure P-12, intimating the respondent No. 1 that the proposed Union does not fulfill the provisions, as contained in Section 4(1) of the Trade Unions Act, 1926, as such, the same cannot be registered under the Trade Union Act, 1926.

28. In the intervening period, on 6.6.2018, the Labour Officer, Una has intimated the Management of the petitioner-Company, qua the complaint moved by Shri Manoj Kumar, President of Luminous Power Technologies, Workers Union. The Management was directed to put in appearance through a person, duly authorized, on 13.6.2018. Admittedly, the Union was not registered, as, the proposal regarding its registration, under the Trade Union Act, was turned down only on 12.9.2018.

29. On the basis of above facts, it has vehemently been argued by learned counsel for the petitioner that the Labour Officer has wrongly taken the cognizance of the alleged complaint, made by Manoj Kumar, being President of Union and as such, the complaint was not maintainable.

30. On 4.7.2018, the Union has submitted the demand notice to Labour Commissioner-cum-Conciliation Officer, Una mentioning therein that they have formed the Union, in order to redress the grievances, with regard to their rights, working conditions, as well as, security. In the demand notice, it has also been mentioned that the requisite documents for registration of Union have already been submitted. However, when this fact came to the notice of the Management, then, they have adopted many tactics to thwart the process of registration. Mis-information has been spread by them that the Factory will be closed and the members of the Union have also been threatened that their working shifts will be changed. On 26.5.2018, all the 12 members of the Union were transferred to Hosur in Tamilnadu, which is stated to be about 2000 kms from Una.

31. On the basis of above facts, they have raised the following

demands:

(i) The transfer be cancelled and the workmen should be retained with full wages;
(ii) Continuity in service;

(iii) Intervention in Union formation should be stopped;

(iv) Neutrality be maintained in the registration process.

32. Alongwith the demand notice, photo copies of the application for registration of trade union as well as resolution have also been submitted.

33. To the said demand notice, reply was filed by the petitioner-Company, denying all the allegations. However, a stand has been taken by them that they have nothing to do with the registration of Union under the Trade Union Act. Justifying their stand to transfer the workmen, it has been stated that since January, 2018, the Management has been informing that some of the skilled workers are to be deputed in Hosur for smooth expansion of the said plant. The attitude of the Union is stated to be the effect of the discretion of petitioner-Company qua the transfer of workmen from Gagret to Hosur.

34. The information with regard to office bearers, was received by them only on 4.7.2018. As such, a request was made to reject the reference.

35. When the re-conciliation proceedings could not materialize, then the Labour Officer, Una has submitted its report, (Annexure P-8) to the Labour Commissioner, upon which, the appropriate government has made the reference under the provisions of Section 10(1) of the Industrial Disputes Act to the Labour Court-cum- Industrial Tribunal, Dharamshala.

36. By virtue of letter, Annexure P-11, the following reference has been made to the Labour Court-cum- Industrial Tribunal:

"Whether action of the management of M/s Luminous Power Technologies Ltd, Gagret, Tehsil Amb, District Una, Himachal Pradesh to victimize and transfer Shri Manoj Kumar (President) & other 11 Executive Members/Workers (As per list enclosed) in view of formation of Luminous Power Technologies Workers Union (which is under process for registration under the provisions of the Trade Union Act, 1926 in the office of the Registrar Trade Union, Himachal Pradesh) from the Luminous Power Technologies Ltd., Unit-II, Gagret, Tehsil Amb, District Una, Himachal Pradesh to the Luminous Power Technologies Ltd., Hosur, S.N. 150/1A & 1B, Gondigurki Road, Nalaganakothapalli, Shoolgiri, Kishangiri, Tamilnadu-645117 vide transfer order dated 25.5.2018 w.e.f. 30.5.2018 and 02.06.2018 for a span of 18 months and further closing the gate of above workers/Executive Members of the union w.e.f. 26.5.2018 amounts to "Unfair Labour Practices" as provided under section 2(a of the Industrial Disputes Act, 1947? If yes, what relief inluding the cancellation of the transfer orders and other service benefits, the above aggrieved workmen are entitled to from the above management under the provisions of the Industrial Disputes Act, 1947."

37. Consequently, statement of claim by Union as well as reply on behalf of petitioner-Company was filed.

38. On 19.2.2019, the following issues were framed by the Labour Court-cum-Industrial Tribunal, Dharamshala, respondent No. 2:

> "1.Whether the action of respondent to transfer the petitioners from the Luminous Power Technologies Ltd. Unit-II, Tehsil Amb, District Una, H.P., to the Luminous Power Technologies Ltd., Hosur, S.N. 150/1A & 1B Gondigurki Road, Nalaganakothapalli, Shooligiri, Kishangiri, Tamilnadu-635117 vide

transfer order dated 25.5.2018 w.e.f. 30.5.2018 and 2.6.2018 and further closing the gate of members of union w.e.f. 26.5.2018 amounts to "Unfair Labour Practices", as alleged? OPP

2. If issue No. 1 is proved in affirmative, to what service benefits the petitioners are entitled to?OPP
3. Whether the claim petition is not maintainable in the present form, as alleged?OPR
4. Whether the respondent has not issued any termination order, as alleged? OPR
5. Whether the petitioners have not come to this Tribunal with clean hands, as alleged? OPR
6. Whether the reference is not legal reference, as alleged? OPR
7. Relief.

39. Thereafter, the parties to the lis have adduced oral as well as documentary evidence. On 2.5.2022, the Labour Court-cum-Industrial Tribunal has passed the award, which has been challenged before this Court.

40. The moot question, which arises for determination before this Court, is about the maintainability of the demand notice by the unregistered trade union, i.e. respondent No. 1.

41. Admittedly, the union (respondent No. 1) has not yet been registered, as per Section 2(qq) of the Trade Union Act. Section 2(qq) of the Trade Union Act is reproduced as under:

"2(qq) "trade union" means a trade union registered under the Trade Unions Act, 1926"

42. The Legislature, in its wisdom, has defined trade union, which is registered under the Trade Union Act, 1926. At the cost of repetition, the Union, in the present case, has not been

registered as per the admitted case of the parties. The term "Industrial Dispute" has been defined in Section 2(k) of the Industrial Act. The power of the appropriate government to refer the industrial disputes to the Labour Court, is contained in Section 10(1) of the Industrial Disputes Act. The bare reading of Section 10(2) of the Industrial Disputes Act demonstrates that Industrial Disputes can be raised jointly or separately.

43. The question regarding maintainability of the reference, at the instance of unregistered Union, came up for consideration before the Hon'ble Supreme Court in **State of Bihar versus Kripa Shankar Jaiswal**, reported in
AIR 1961, Supreme Court (Vol. 1) 306 paragraph-6 whereof, is reproduced, as under:

> "It would be an erroneous view if it were said that for a dispute to constitute an industrial dispute it is a requisite condition that it should be sponsored by a recognized union or that all the workmen of an industrial establishment should be parties to it. A dispute becomes an industrial dispute even where it is sponsored by a Union which even where it is sponsored by a union which is not registered as in the instant case or where the dispute raises is by some only of the workmen because in either case the matter falls within Ss 18(3)(a) and 18(13) (d) of the Act." The binding nature of an award or a settlement as contemplated under Section 18 in clauses, inter alia all parties to the Industrial dispute that include all persons who were employed in the establishment or part of the establishment, as the case may be, to which the dispute relates on the date of the dispute and all persons who subsequently become employed in that establishment or part."

44. This view has again been reiterated by the Hon'ble Supreme Court in **Pradip Lamp Works, Patna Vs.Workmen of Pradip Lamp**

Works, Patna & another, reported in 1972 (I) LLJ 507, relevant paragraph of which isreproduced as under:

> "It cannot be said that merely because the dispute was not sponsored be the registered union it was not an industrial dispute. Even though the new union was not registered there was evidence to show that substantial number of workmen who are members of the new union espoused the dispute relating to the dismissal of ten workmen and that legal position is that espousal of a dispute before a reference is made even by a minority union having a membership of substantial number of workmen is sufficient to make such a dispute an industrial dispute. It was therefore held that the dispute espoused by the new unregistered union was an industrial dispute that the reference was competent. To the same effect was the decision of an earlier judgment of the Hon'ble Supreme Court in Newspapers Ltd. Allahabad Vs. State Industrial Tribunal reported in 1960

(II) LLJ 37.)

45. In view of the decision of Hon'ble Supreme Court, as referred to above, this Court is satisfied that the reference, on behalf of an unregistered Union, is not bad in the eyes of law and as such, learned Labour Court-cum- Conciliation Officer has rightly entertained the demand notice of the unregistered union and when the re- conciliation failed, then Labour-cum-Conciliation Officer has rightly submitted the report to the appropriate government. The appropriate government has rightly found that there was an industrial dispute, as such has made a reference to the Labour Court-cum-Industrial Tribunal, which has been replied by the Labour

Court-cum- Industrial Tribunal, in the present case.

46. The petitioner-Company, in this case, has also sought quashing of the order dated 2.5.2022, passed by the Labour Court-cum-Industrial Tribunal. The prayer qua issuance of writ of certiorari has been made justifying the transfer order dated 25.5.2018 (Annexure P-2).

47. The scope of issuance of writ of certiorari has elaborately been discussed by the Hon'ble Supreme Court way back in the year 1955, in **Hari Vishnu Kamath versus**

Syed Ahmad Ishaque and others, reported in Supreme Court Cases, 1955 (1) 1104, paragraph 4 whereof, is reproduced as under:

> "(4) The further question on which there has been some controversy is whether a writ can be issued, when the decision of the inferior Court or Tribunal is erroneous in law. This question came up for consideration in Rex v. Northumberland Compensation Appeal Tribunal; Ex parte Shaw(5), and it was held that when a Tribunal made a "speaking order" and the reasons given in that order in support of the decision were bad in law, certiorari could be granted. It was pointed out by Lord Goddard, C. J. that had always been understood to be the true scope of the power. Walsall Overseers v. London and North Western Ry. Co.
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> (1) and Rex v. Nat Bell Liquors Ld. (2) were quoted in support
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> of this view. In Walsall Overseers v. London and North Western Ry. Co.(1), Lord Cairns, L.C. observed as follows:

> "If there was upon the face of the order of the court of quarter sessions anything which showed that order was erroneous, the Court of Queen's Bench might be asked to have the order brought into it, and to look at the order, and view it upon the face of it, and if the court found error upon the face of it, to put an end to its existence by quashing it".

In Rex v. Nat Bell Liquors Ld. (2) Lord Sumner said: "That supervision goes to two points; one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise".

The decision in Rex v. Northumberland Compensation Appeal Tribunal; Ex parte Shaw(3) was taken in appeal, and was affirmed by the Court of Appeal in Rex v. Northumberland Compensation Appeal Tribunal; Ex parte Shaw(4). In laying down that an error of law was a ground for granting certiorari, the learned Judges emphasised that it must be apparent on the face of the record.

Denning, L.J. who stated the power in broad and general terms observed:

"It will have been seen that throughout all the cases there is one governing rule: certiorari is only available to quash a decision for error of law if the error appears on the face of the record".

The position was thus summed up by Morris, L.J.

> "It is plain that certiorari will not issue as the cloak of an appeal in disguise. It does not lie in order to bring an order or decision for rehearing of the issue raised in the proceedings. It exists to correct error of law where revealed on the face of an order or decision, or irregularity, or absence of, or excess of, jurisdiction where shown".

In Veerappa Pillai v. Raman & Raman Ltd. and Others(1), it was observed by this court that under article 226 the writ should be

issued "in grave cases where the subordinate tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction vested in them, or there is an error apparent on the face of the record". In T. C. Basappa v. T. Nagappa(2) the law was thus stated:

"An error in the decision or determination itself may also be amenable to a writ of 'certiorari' but it must be a manifest error apparent on the face of the proceedings, e.g., when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by 'certiorari' but not a mere wrong decision".

It may therefore be taken as settled that a writ of certiorari could be issued to correct an error of law. But it is essential that it should be something more than a mere error; it must be one which must be manifest on the face of the record. The real difficulty with reference to this matter, however, is not so much in the statement of the principle as in its application to the facts of a particular case. When does an error cease to be mere error, and become an error apparent on the face of the record? Learned Counsel on either side were unable to suggest any clear-cut rule by which, the boundary between the two classes of errors could be demarcated. Mr. Pathak for the first respondent contended on the strength of certain observations of Chagla, C. J. in Batuk K. Vyas v. Surat Municipality(3) that no error could be said to be apparent on the face of the record if it was not self-evident, and if it required an examination or argument to establish it. This test might afford a satisfactory basis for decision in the majority of cases. But there must be cases in which even this test might break down, because judicial opinions also differ, and an error that might be considered by one Judge as self-evident might not be so considered by another. The fact is that what is an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case."

48. In another decision, rendered by Hon'ble Supreme Court in **T.C. Basappa versus T. Nagappa and another**, reported in AIR 1954 S.C. 440 (Vol. 41, C.N. 106), the Hon'ble Supreme Court has again explained the essential features,

effects and conditions, in which, a writ of certiorari can be issued. Relevant paragraphs 7 to 11 of the judgment are reproduced as under:

> "7. One of the fundamental principles in regard to the issuing of a writ of certiorari is, that the writ can be availed of only to remove or adjudicate on the validity of judicial acts. The expression " judicial acts " includes the exercise of quasi-judicial functions by administrative bodies or other authorities or persons obliged to exercise such functions and is used in contrast with what are purely ministerial acts. Atkin L. J. thus summed up the law on this point in 'Rex v. Electricity Commissioners', 1924-1 KB 171 at p. 205 (C) : "Whenever any body or persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority they are subject to the controlling Jurisdiction of the King's Bench Division exercised in these writs."
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> The second essential feature of a writ of 'certiorari' is that the control which is exercised through it over judicial or quasi-judicial Tribunals or bodies is not in an appellate but supervisory capacity. In granting a writ of 'certiorari' the superior Court does not exercise the powers of an appellate Tribunal. It does not review or reweigh the evidence upon which the determination of the inferior Tribunal purports to be based. It demolishes the order which it considers to be without jurisdiction or palpably erroneous but does not substitute its own views for those of the inferior Tribunal. The offending order or proceeding so to say is put out of the way as one which should not be used to the detriment of any person, vide Per Lord Cairns in-'Walsal's Overseas v. L. & N W. Rly. Co.' (1879) 4 AC 30 at p. 39 (D).
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> 8. The supervision of the superior Court exercised through writs of 'certiorari' goes on two points, as has been expressed by Lord Sumner in 'King v. Nat. Bell Liquors Limited', 1922 (2) AC 128 at p 156 (E). One is the area of

inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of law in the course of its exercise. These two heads normally cover all the grounds on which a writ of 'certiorari' could be demanded. In fact there is little difficulty in the enunciation of the principles; the difficulty really arises in applying the principles to the facts of a particular case.

9. 'Certiorari' may lie and is generally granted when a Court has acted without or in excess of its jurisdiction. The want of jurisdiction may arise from the nature of the subject-matter of the proceeding or from the absence of some preliminary proceeding or the Court itself may not be legally constituted or suffer from certain disability by reason of extraneous circumstances, Vide Halsbury, 2nd Edition, Vol. IX, page 880. When the jurisdiction of the Court depends upon the existence of some collateral fact, it is well settled that the Court cannot by a wrong decision of the fact give it jurisdiction which it would not otherwise possess, Vide- 'Bunbury vs. Fuller' (1854) 9 Ex.111 (F);-R.vs. Income Tax Special Purposes Commissioners', (1889) 21 QBD 313. (G).

10. A Tribunal may be competent to enter upon an enquiry but in making the enquiry it may act in flagrant disregard of the rules of procedure or where no particular procedure is prescribed, it may violate the principles of natural justice. A writ of 'certiorari' may be available in such cases. An error in the decision or determination itself may also be amenable to a writ of 'certiorari'but it must be a manifest error apparent on the face of the proceedings, e.g., when it is based on clear ignorance or disregard of the provisions of law. In other words, it is a patent error which can be corrected by certiorari but not a mere wrong decision.

The essential features of the remedy by way of 'certiorari' have been stated with remarkable brevity and clearness by Morris L. J. in the recent case of 'Rex v. Northumberland Compensation Appellate Tribunal', 1952-1KB 338 at p. 357 (H). The Lord Justice says:

> "It is plain that 'certiorari' will not issue as the cloak of an appeal in disguise. It does not lie in order to bring up an order or decision for re-hearing of the issue raised in the proceedings. It exists to correct error of law when revealed on the, face of an order or decision or

> irregularity or absence of or excess of jurisdiction when shown."

11. In dealing with the powers of the High Court under article 226 of the Constitution this Court has expressed itself in almost similar terms, Vide-'Veerappa Pillai v. Raman and Raman Ltd.', AIR 1952 SC 192 at pp.195-196 (I) and said:

"Such writs as are referred to in article 226 are obviously intended to enable the High Court to issue them in grave cases where the subordinate Tribunals or bodies or officers act wholly without jurisdiction, or in excess of it, or in violation of the principles of natural justice, or refuse to exercise a jurisdiction ,vested in them, or there is an error apparent on the face of the, record, and such act, omission, error or excess has resulted in manifest injustice. However extensive the jurisdiction may be, it seems to us that it is not so wide or large as to enable the High Court to convert itself into a Court of appeal and examine for itself the correctness of the decision impugned and decide what is the proper view to be taken or the order to be made."

These passages indicate with sufficient fullness the general principles that govern the exercise of jurisdiction in the matter of granting writs of 'certiorari' under article 226 of the Constitution."

49. The Hon'ble Supreme Court in **Management of Madurantakam Coop. Sugar Mills Ltd. vs. S. Viswanathan** reported in 2005 (3) SCC 193, has again elaborately discussed the scope of High Court under Article 226 or 227 of the Constitution of India to interfere in the findings of facts, recorded by the Labour Court-cum-Industrial Tribunal, in paragraphs 12 and 13 of the judgment, which are reproduced as under:

> "12. Normally, the Labour Court or the Industrial Tribunal, as the case may be, is the final court of facts in these type of disputes, but if a finding of fact is perverse or if the same is not based on legal evidence the High Court exercising a power either under Article 226 or under Article 227 of the Constitution of India can go into the

> question of fact decided by the Labour Court or the Tribunal. But before going into such an exercise it is necessary that the writ court must record reasons why it intends reconsidering a finding of fact. In the absence of any such defect in the order of the Labour Court the writ court will not enter into the realm of factual disputes and finding given thereon. A consideration of the impugned order of the learned Single Judge shows that nowhere he has come to the conclusion that the finding of the Labour Court is either perverse or based on no evidence or based on evidence which is not legally acceptable. Learned Single Judge proceeded as if he was sitting in a court of appeal on facts and item after item of evidence recorded in the domestic enquiry as well as before the Labour Court was reconsidered and findings given by the Labour Court were reversed. We find no justification for such an approach by the learned Single Judge which only amounts to substitution of his subjective satisfaction in the place of such satisfaction of the Labour Court.
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> 13. The Division Bench too in appeal, in our opinion, has committed the same error. May be, there was some justification, since if it had to allow the appeal, then it had to consider the points on facts decided by the learned Single Judge. In that process it also took up for consideration every bit of evidence that was considered by the Labour Court as well as by the learned Single Judge and disagreed with the finding of the learned Single Judge." (Emphasis supplied)

50. In an another decision in **Harjinder Singh versus Punjab State Warehousing Corporation,** reported in 2010(3) SCC 192, the Hon'ble Supreme Court has directed to keep in mind the nature of the Industrial Disputes Act. Paragraphs 21 to 24 of the judgment are reproduced as under:

> "21. Before concluding, we consider it necessary to observe that while exercising jurisdiction under Articles 226 and/or 227 of the Constitution in matters like the present one, the High Courts are duty bound to keep in

mind that the Industrial Disputes Act and other similar legislative instruments are social welfare legislations and the same are required to be interpreted keeping in view the goals set out in the preamble of the Constitution and the provisions contained in Part IV thereof in general and Articles 38, 39(a) to (e), 43 and 43A in particular, which mandate that the State should secure a social order for the promotion of welfare of the people, ensure equality between men and women and equitable distribution of material resources of the community to sub-serve the common good and also ensure that the workers get their dues. More than 41 years ago, Gajendragadkar, J, opined that:

"10.....the concept of social and economic justice is a living concept of revolutionary import; it gives sustenance to the rule of law and meaning and significance to the ideal of welfare State."

(State of Mysore v. Workers of Gold Mines, AIR P 921, para 10.)

22. In Y.A. Mamarde v. Authority under the Minimum Wages Act (1972) 2 SCC 108, this Court, while interpreting the provisions of Minimum Wages Act, 1948, observed: (SSC pp.109-10)

"The anxiety on the part of the society for improving the general economic condition of some of its less favoured members appears to be in supersession of the old principle of absolute freedom of contract and the doctrine of laissez faire and in recognition of the new principles of social welfare and common good. Prior to our Constitution this principle was advocated by the movement for liberal employment in civilised countries and the Act which is a pre-constitution measure was the offspring of that movement. Under our present Constitution the State is now expressly directed to endeavour to secure to all workers (whether agricultural, industrial or otherwise) not only bare physical subsistence but a living wage and conditions of work ensuring a decent standard of life and full enjoyment of leisure. This Directive Principle of State Policy being conducive to the general interest of the nation as a whole, merely lays down

> the foundation for appropriate social structure in which the labour will find its place of dignity, legitimately due to it in lieu of its contribution to the progress of national economic prosperity."
>
> 23. The preamble and various Articles contained in Part IV of the Constitution promote social justice so that life of every individual becomes meaningful and he is able to live with human dignity. The concept of social justice engrafted in the Constitution consists of diverse principles essentially for the orderly growth and development of personality of every citizen. Social justice is thus an integral part of justice in the generic sense. Justice is the genus, of which social justice is one of its species. Social justice is a dynamic devise to mitigate the sufferings of the poor, weak, dalits, tribals and deprived sections of the society and to elevate them to the level of equality to live a life with dignity of person. In other words, the aim of social justice is to attain substantial degree of social, economic and political equality, which is the legitimate expectation of every section of the society.
>
> 24. In a developing society like ours which is full of unbridgeable and ever widening gaps of inequality in status and of opportunity, law is a catalyst to reach the ladder of justice. The philosophy of welfare State and social justice is amply reflected in large number of judgments of this Court, various High Courts, National and State Industrial Tribunals involving interpretation of the provisions of the Industrial Disputes Act,
>
> Factories Act, 1948; Payment of Wages Act, 1936; Minimum Wages Act, 1948; Payment of Bonus Act, 1965; Workmen's Compensation Act, 1923; the Employees' State Insurance Act, 1948; Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and Shops and Commercial Establishments Act enacted by different States."

51 Considering the factual position of the present case and in view of the decisions referred to above, this Court proceeds to find as to whether the petitioner is able to make out a case where the

award passed by learned Labour Court- cum-Industrial Tribunal, can be quashed by issuing the writof certiorari.

52. Learned counsel for the petitioner has relied upon the decisions of Hon'ble Supreme Court, in **M/s Medley Minerals India Ltd. Vs. State of Orissa and others**, reported in AIR 2004 Supreme Court 485, **Balram and another versus M.C.D (Delhi),** reported in Service Law Reporter, Vol. 207, 2008(1), **Dr. K. Shringi versus Nuclear Power Corp. of India Ltd., & others**, reported in SCT Vol. 67 2008(1) and the decision of Delhi High Court in W.P.(C) No 6187 of 1999, titled as

Rajni Manchanda versus P.O.Labour Court-I and another.

53. The term "Industrial Disputes" has been defined in Section 2(k) of the Industrial Disputes Act, which is reproduced as under:

2(k) of the Industrial Disputes Act:- "industrial dispute' mens any dispute or difference betweenemployers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non- employment or the terms of employment or with the conditions of labour, of any person;"

54. The petitioner-Company, in the present case, has transferred 25 employees, including office bearers of respondent-Union, only after the process for registration of the respondent-Union under the provisions of Trade Union Act was initiated on 16.4.2018. Learned Labour Court- cum-Industrial Tribunal has considered these material facts, in the right perspective, as the petitioner-Company could not prove on the file that before effecting transfer(s), the members of the respondent-Union were ever called to have the meeting nor any evidece has been adduced by the petitioner Company just to

probabilize the said stand.

55. The factual position, which has been mentioned by learned Labour Court-cum-Industrial Tribunal, has not been questioned, what to talk of controverting the same, by adducing cogent and convincing evidence in the present petition.

56. Para-27 of the award is reproduced as under:

"Thus as a result of the discussion made hereinabove on every aspect of the matter it is established that the transfer orders dated 25.5.2018 are the malafide act of the respondent to pressurize the petitioners to not to pursue the matter regarding the formation and registration of the worker Union. The transfer of all the office bearers of the proposed Union to a place more than 2000 kms away from the place they were working is nothing but an attempt to prevent them from forming the Union and bring forth the issues of the workmen for their redressal. Closing the gate of the factory on the next day of the transfer order is also an act to increase the pressure upon them to act in accordance to the wishes of the management and such acts amounts to Unfair Labour Practices. Issue No. 1 is thus held in favour of the petitioners."

57. Learned Labour Court, in this case, has specifically held that transfer of the employees by the petitioner-Company was an attempt to prevent the workmen from forming the Union. The said act of the petitioner- Company has also been stated to be the unfair labour practice.

58. In view of the decisions of Hon'ble Supreme Court referred to above in Hari Vishnu Kamath, T.C. Basappa and Management of Madurantakam Coop. Sugar Mills Ltd's cases (supra), the scope of this Court, to interfere, in the award passed by learned Labour Court, is limited where the award so passed falles within the definition of "preverse".

59. This Court, under Articles 226 and 227 of the Constitution of India, cannot review or reweigh the evidence. The only scope for interference under Articles 226 and 227 of Constitution of India, is in case there is a flagrant disregard of Rules of procedure or in case there is violation of principles of natural justice.

60. At the cost of repetition, the process of registration of Union by respondent No. 1 was initiated on 26.3.2018 and the requisite application was moved to the Registrar of Trade Union, Himachal Pradesh on 16.4.2018. No doubt, the process of registration of Union, under the Trade Union Act, has not been completed and the application, so made, has not been accepted by the Registrar of Trade Union, however, this information was given to the President of the respondent No. 1-Union on 12.9.2018.

61. The act of the petitioner-Company to transfer 25 workmen on 25.5.2018, if seen, in the light of the fact that the first step for the process of formation of Union was taken in the month of March, 2018 and out of those 25 persons, 12 members of the respondent-Union were transferred to Hosur, is the fact which has rightly been considered by the Labour Court, in this case.

62. The situation would have been differed, had this transfer order been passed, prior to the date, when the resolution to get the Union registered under the Trade Union Act, was passed. It has specifically been held by the Labour Court that the transfer order dated 25.5.2018 is malafide act of the petitioner-Company, to pressurize the members of the respondent No. 1-Union, not to get the same registered under the Trade Union Act.

63. These findings are clearly based upon the admitted factual position, in this case, and the petitioner- Company has miserably

failed to prove on record that any meeting was ever held prior to the date of taking extreme step of transferring the members of Union alongwith 13 other members to a place, which is more than 2000 km away, from the place, where they were working earlier.

64. Once, it has been held that the act of the petitioner-Company to transfer the workmen was not bonafide and the same was an attempt to thwart the process of registration of Union under the Trade Union Act, the caselaws relied upon by the petitioner are of no help to him, asthere is nothing on record to show that the above findings of fact, recorded by the Labour Court, suffers from any perversity.

65. Learned counsel for the petitioner could not point out as to how the said findings call for any interference bythis Court, that too, in the extra ordinary jurisdiction, under Articles 226 and 227 of the Constitution of India.

66. Considering all these factual aspects, there is no occasion for this Court to interfere with the findings recorded by learned Labour Court-cum Industrial Tribunal.

67. Accordingly, the award passed by Labour Court-cum-Industrial Tribunal, Kangra at Dharamshala, on 2.5.2022 (Annexure P-14) is upheld and the present petition is dismissed. The pending application(s), if any, are disposed of accordingly.

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

Between:

1. BALWANT, S/O SH. NARPAT RAM,
2. PINTU &
3. TEJ SINGH: BOTH SONS OF SHRI TEK CHAND,
4. REENA DEVI WD/O LATE SHRI TEK CHAND,
5. DINESH KUMAR,
6. LAL CHAND,

BOTH SONS OF SHRI TEK CHAND,

7. SMT. PAWNA D/O LATE SHRI NARPAT,

ALL RESIDENTS OF VILLAGE GUMMA, TEHSIL JOGINERNAGAR, DISTT. MANDI, H.P.

....APPELLANTS/PLAINTIFFS.

(BY MR. G.R. PALSRA, ADVOCATE)

AND

SMT. HIMA DEVI WIFE OF SHRI HEM SINGH, R/O VILLAGE GUMMAL, TEHSIL JOGINDERNAGAR, DISTT. MANDI, H.P.

.... RESPONDENT/DEFENDANT.

(NONE FOR THE RESPONDENT)

REGULAR SECOND APPEAL
No.228 of 2009
Decided on: 29.04.2022

Code of Civil Procedure, 1908- Section 100- Second Appeal against the judgment and decree dismissing the suit for declaration and appeal thereto- *W*hether the findings of the courts below are the result of complete mis-reading, misinterpretation of the evidence and material on record and against the settled position of law?- **Held-** Plaintiffs miserably failed to prove on record

that the Will in issue was not executed by deceased Narpat Ram, but was a forged document- No merit- Appeal dismissed. (Paras 15, 16)

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

J U D G M E N T

By way of this appeal, the appellants have challenged the judgment and decree passed by the Court of learned Civil Judge (Senior Division), Baijnath, District Kangra, Camp at Joginder Nagar, District Mandi, H.P., in Civil Suit No. 68/07/2001, titled as Shri Balwant & others Versus Smt. Hima Devi, decided on 07.01.2008, vide which a suit for declaration filed by the present appellants stood dismissed by the said Court, as also the judgment and decree passed by the Court of learned District Judge, Mandi, District Mandi, H.P., in Civil Appeal No.22 of 2008, titled as Balwant & others Versus Smt. Hima Devi, decided on 09.01.2009, vide which the appeal preferred by the present appellants against the judgment and decree passed by the learned Trial Court was also dismissed.

2. Brief facts necessary for the adjudication of the present appeal are that the appellants (hereinafter to be referred as the 'Plaintiffs') herein filed a suit for declaration to the effect that the Will dated 27.01.1995, executed by Shri Narpat Ram, son of Shri Khindu was a void document having no effect on the rights of the plaintiffs. As per them, Shri Narpat Ram, i.e. their father died on 14.08.1997. At the time of his death, he had considerable Jamindari as well as other movable and immovable assets in Tehsil Jogindernagar, District Mandi, H.P. On 19.07.2001, plaintiff No.1 visited the Patwari Halqua, Gumma for the purpose of preparing a Kisan Book when he was told by the Patwari concerned that his father (deceased Narpat

Ram) had executed a Will in favour of the defendant. According to the plaintiffs, before the said date they were not aware about the execution of any Will by their father in favour of the defendant. Thereafter, they applied for the copy of the Will and filed the suit for declaration. According to the plaintiffs, the alleged Will as set up by the defendant was never executed by Narpat Ram nor he ever visited the Tehsil campus for the purpose of either execution or registration of the same. The alleged Will was a forged documents, having no effect on the rights of the plaintiffs and at the time when the Will was stated to have been executed, Narpat Ram was seriously ill and was admitted in Civil Hospital at Mandi. Primarily, on these basis, the suit was filed for declaration that Will dated 27.01.1995 be declared null and void having no effect on the rights of the plaintiffs. It was further the claim of the plaintiffs that the defendant was a stranger as she was nowhere related to the plaintiffs or their deceased father and thus there was no reason that Narpat Ram would have had executed any Will in favour of the defendant.

3. By way of written statement, the defendant contested the suit, *inter alia*, on the ground that she was daughter-in-law of the deceased and a mention thereof was made in the Will itself. The Will being a forged document was denied by the defendant and it was contended that the Will under reference was a genuine document having been executed by the testator in the presence of the witnesses including his wife. It was the further stand of the defendant that the reason as to why the Will was executed were duly reflected in the said document itself and on these basis, dismissal of the suit was sought.

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

> *"1. Whether the Will dated 27.1.1995 executed by Narpat Ram is a forged document as alleged? OPP.*
> *2. Whether the plaintiffs have cause of action and locus standi to file the present suit? OPP.*

3. Whether the Will dated 27.1.1995 is a valid will of Narpat Ram as alleged? OPD.
4. Whether the suit is not maintainable in the present form? OPD.
5. Whether the plaintiffs are estopped by their act, conduct and acquisance to file the present suit? OPD.
6. Relief."

5. On the basis of evidence led by the parties in support of their respective contentions, the issues so framed were answered by learned Trial Court as under:-

"*Issue No.1*	:	*No.*
Issue No.2	:	*No.*
Issue No.3	:	*Yes.*
Issue No.4	:	*No.*
Issue No.5	:	*Yes.*
RELIEF	:	*Suit is dismissed as per operative part of the judgment.*"

6. Thus, the suit in issue was dismissed by the learned Trial Court by holding that the Will dated 27.01.1995 executed by Shri Narpat Ram was not a forged document and it was a valid will for all intents and purposes.

7. In appeal, the findings so returned by the learned Trial Court were affirmed by the learned Appellate Court by holding that the execution of the Will in favour of the defendant was duly proved in accordance with law and the Will in fact was executed by the deceased in favour of the defendant in lieu of the services which were rendered by her to the deceased.

8. Feeling aggrieved, the plaintiffs filed this Regular Second Appeal, which was admitted by this Court on 20.04.2010, on the following substantial question of law:-

> *"1. Whether the findings of the courts below are the result of complete mis-reading, misinterpretation of the evidence and material on record and against the settled position of law?*

9. I have heard learned counsel for the appellants at length and have gone through the record of the case.

10. The Will in issue is on record as Ext.DW3/A, perusal thereof demonstrates that the same was scribed by Jayoti Sharma and was attested by Smt. Geeta Devi, who happened to be the wife of the executor of the Will, as also by one Smt. Kala Devi.

11. As already mentioned hereinabove, the case put forth in the plaint by the plaintiffs was not that the Will in issue was got executed by the beneficiary by exercising some undue influence etc. upon the executant thereof. The stand of the plaintiffs is very-very explicit and categorical in the plaint that the Will in issue was a forged document. A careful perusal of the evidence on record demonstrates that there is not even an iota of evidence placed on record by the plaintiffs from which it could be inferred that the Will in issue was a forged document. As it was the case of the plaintiffs that the Will in issue was a forged document, therefore, this Court is of the considered view that the onus to prove said fact was on the shoulders of the plaintiffs which they miserably failed to perform.

12. Three witnesses examined by the plaintiffs including themselves failed to prove on record that the Will in issue was not executed by deceased Narpat Ram but was a forged document. The alleged factum of Narpat Ram being indisposed, being admitted in a hospital, being not in a physical and mental condition to execute a Will, have not been proved by the plaintiffs.

13. On the other hand, the execution of the Will was duly proved on record by the defendant, who herself stepped into the witness box as DW-2. She also examined Shri I.D. Tayagi as DW-1, who was one of the identifier

of the signatures of the executant of the Will and also Smt. Kala Devi as DW-3, one of the attesting witnesses.

14. A perusal of the judgments passed by both the learned Courts below demonstrate that this is exactly what weighed with them also while returning concurrent findings to the effect that the Will in issue was a valid Will of Narpat Ram and that the same was not a forged document.

15. Thus, when it stands proved on record that the Will in issue was duly executed by the executor in the presence of attesting witnesses, one of whom stated so in the witness box as DW-3, this Court is of the view that the findings as have been returned by both the learned Courts below qua the validity of the Will, call for no interference for the reason that during the course of hearing of this appeal, it could not be demonstrated that the judgments and decrees passed by both the learned Courts below were a result of either misreading or misinterpretation of the evidence and material on record. On the contrary, this Court returns the findings that the judgments and decrees passed by both the learned Courts below are based upon the pleadings as well as evidence which were on record and are a result of careful and correct appreciation thereof. Substantial question of law is answered accordingly.

16. Thus, as this Court does not finds any merit in the present appeal, the same is dismissed, so also the pending miscellaneous applications, if any. No order as to costs. Interim order, if any, stands vacated.

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

Surinder Singh ...Petitioner.

Versus

State of H.P. & others ...Respondents

For the petitioner : Mr. Rakesh Dhaulta, Advocate.

For the respondents : Mr. Desh Raj Thakur, Addl. A.G. with Mr. Narender Thakur, Dy. A.G.

CWPOA No. 440 of 2019
Reserved on 22.12.2022
Decided on : 30.12.2022

Constitution of India, 1950- Article 226- Writ petition against impugned action of the respondent whereby the applicants have reduced daily from Rs. 82.50 per day to Rs. 65/- per day and further direction to regularize the services of the applicant form the date he was appointed as Lab. Attendant on daily wages- **Held-** Impugned order is without any reason or justification and hence cannot be sustained- Impugned order set-aside- Petition allowed with directions. (Paras 10, 11)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge:

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

> *"i). That the impugned action of the respondent whereby the applicants have reduced daily from Rs. 82.50 per day to Rs. 65/- per day (A/3) may be termed illegal & arbitrary and violative of Article 14 and 16 of constitution of India and same*

may be quashed and set aside. Further the respondents be directed to pay the applicant daily of Rs. 82.50 per day as was being paid to the applicant till August 2005.

ii) That the respondents may be directed to regularize the services of the applicant form the date he was appointed as Lab. Attendant on daily wages."

2. Petitioner was initially appointed as Lab Attendant by respondents on daily wage basis w.e.f. 18.8.1998. He was being paid daily wage at the rate of Rs. 65/- per day. The daily wage of the petitioner was enhanced to Rs. 70.50/- per day w.e.f. 19.4.2001. As per revised daily wage rate, issued by the Government of Himachal Pradesh, the daily wage payable to petitioner was enhanced to Rs. 82.50/- per day w.e.f. 18.8.2003.

3. Petitioner is aggrieved against office order Annexure A-3 dated 10.3.2005 whereby the daily wage of Lab Attendants engaged in Schools/Colleges were reduced to Rs. 65/- per day retrospectively w.e.f. 15.8.2003.

4. Petitioner approached the H.P. State Administrative Tribunal immediately by filing O.A. No. 2629 of 2005, which on abolition of the Tribunal came to be transferred to this Court and was registered as CWPOA No. 440 of 2019 i.e. the instant petition.

5. Despite number of opportunities availed by the respondents, no reply has been filed. Finally, the opportunity of respondents to file reply was closed vide order dated 10.11.2020.

6. I have heard the learned counsel for the parties and have also gone through the record carefully.

7. The conduct of respondents in not filing the reply to the averments made in the petition for more than fifteen years clearly shows that they have nothing to controvert the plea of petitioner. In absence of any reply from respondents, the factual aspect of the case is deemed to be admitted. Otherwise also from documents annexed with the petition, the averments made in the petition are duly supported.

8. Impugned order Annexure A-3 is without any reason or justification and hence cannot be sustained. Though, a reference has been made to some Finance Department letter dated 18.8.2003, but no such letter has been placed on record. Once the category of Lab Attendants engaged on daily wage basis was paid at the rate of Rs. 70.50/- per day and then enhanced to Rs. 82.50/- per day, it could be reduced only for the reasons, which could have justification in rules. Nothing has been shown by respondents as to why such regressive step was taken.

9. Petitioner has specifically stated in the petition that he was being paid Rs. 82.50/- per day since August, 2004 and his daily wage could not be reduced. Evidently, an order having civil

and evil consequences against petitioner was issued at his back and for such reason also order Annexure P-3 is bad in law.

10. Petitioner has further contended that the respondents have sought recovery of amount already paid to the petitioner at the rate of Rs. 82.50/-. Such recovery, if any, is clearly against law, as declared by a Division Bench of this Court, in ***CWPOA No. 3145 of 2019***, dated 24th March, 2022, titled as ***S.S. Chaudhary*** vs. ***State of H.P. & Others*** decided alongwith connected matters, wherein it has been held by this Court that no recovery from employees belonging to Class-III & Class-IV can be effected. It has been further observed that recovery from the employees, when the excess payment has been made in excess of five years, before the order of recovery is issued, is impermissible.

Thus, the case of the petitioner is also covered by the decision rendered by the Division Bench of this Court in S.S. Chaudhary's case supra.

11. In result, the petition is allowed. Impugned order Annexure A-3 dated 10.3.2005 is quashed and set aside. The respondents are directed not to recover any amount from the petitioner in pursuance to Annexure P-3. Pending applications, if any, also stand disposed of.

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

Between:

1. SHRI PADAM DEV SON OF SHRI PARAS RAM (DECEASED THROUGH FOLLOWING LEGAL REPRESENTATIVES:-

1 (a) MANOHAR LAL
1 (b) SH. JAGDISH KUMAR
BOTH SONS OF LATE SHRI PADAM DEV.
1 (C) SMT. PREM DEVI WD/O LATE SH. PADAM DEV.
1(D) MR. SHAKUNTLA D/O LATE SH. PADAM DEV

ALL RESIDENTS OF VILLAGE BATHOE, P.O. DHARAMPUR, TEHSIL KASAULI, DISTT. SOLAN, H.P.

2.SHRI PREM SINGH SON OF SHRI PARAS RAM.
3. SHRI SUNDER SINGH SON OF SHRI PARAS RAM

ALL RESIDENTS OF VILLAGE TOP KI BER, P.O. DEOTHI, TEHSIL AND DISTRICT SOLAN, H.P.

4. SHRI AMAR SINGH SON OF SHRI NANDA, RESIDENT OF VILLAGE TOP KI BER, P.O. DEOTHI, TEHSIL AND DISTRICT

5. VED PRAKASH SON OF SHRI NANDA, RESIDENT OF VILLAGE TOP KI BER, P.O. DEOTHI, TEHSIL AND DISTRICT

6. MADAN SON OF SHRI NANDA, RESIDENT OF VILLAGE TOP KI BER, P.O. DEOTHI, TEHSIL AND DISTRICT

7. NIRMALA DEVI WIFE OF SHRI G. RAM, DAUGHTER OF NANDA, VILLAGE BAJNAL, P.O. DAMKARI, TEHSIL AND DISTRICT SOLAN, H.P.

8. BIMLA DEVI, WIFE OF SHRI CHAIN SINGH, RESIDENT OF NANDA, VILLAGE ANHECH, P.O. ANHECH, TEHSIL KASAULI, DISTRICT SOLAN.

9. SMT. SUBHADRA DEVI WIFE OF SHRI HIRA SINGH, DAUGHTER OF SHRI NANDA, R/O VILLAGE DAWALA, P.O. DHARAMPUR, TEHSIL KASAULI, DISTRICT SOLAN, H.P.

10. DEVKI DEVI DAUGHTER OF SHRI PARAS RAM, RESIDENT OF VILLAGE TOP KI BER, P.O. DEOTHI, TEHSIL AND DISTRICT SOLAN, H.P. (SINCE DECEASED THROUGH FOLLOWING LEGAL REPRESENTATIVES:-

10 (A) INDER DUTT, S/O
10(B) KHEM DUTT, S/O
10 (C) NEEMA DEVI, D/O LATE SMT. DEVKI DEVI

ALL R/O VILLAGE TOP KI BER, P.O. DEOTHI, TEHSIL AND DISTRICT SOLAN, H.P.

(APPELLANTS/PLAINTIFFS NO.1 TO 10 ARE LRS OF SHRI PARAS RAM (DEFENDANT NO.2)

....APPELLANTS/PLAINTIFFS.

(BY MR. BHUVNESH SHARMA, ADVOCATE, FOR APPELLANTS NO.1 TO 9 AND 10 (a) TO 10 (c))

AND

1. STATE OF HIMACHAL PRADESH THROUGH COLLECTOR, DISTRICT SOLAN, H.P.

.... RESPONDENT/DEFENDANT.

2. SHRI BRIJ MOHAN, SON OF LATE SHRI BRIJ BALLABH SINGH(DELETED VIDE ORDER OF HON'BLE COURT ORDER PASSED IN CMP NO.483/11),

3. SHRI PARAMJIT SINGH S/O LATE SHRI BRIJ BALLABH SINGH
4. SMT. KHUSHVINDER KAUR, D/O LATE SHRI BRIJ BALLABH SINGH

5. SMT. NIRANJAN KAUR, WIFE OF SHRI BRIJ BALLABH SINGH (DELETED VIDE HON'BLE COURT ORDER DATED 23-5-2013, PASSED IN CMP NO.483/11)

ALL RESIDENTS OF HOUSE NO. 249/2, SARDARA STREET LOBORI GATE, PATIALA PUNJAB.

6. SHRI RAVI AHULWALIA SON OF LATE SHRI RAJ BALLABH SINGH.

7. SHRI KARAN AHULWALIA SON OF LATE SHRI RAJ BALLABH.

8. SHRI VARUN AHULWALIA SON OF LATE SHRI RAJ BALLABH.

9. SHRI RANJAN AHULWALIA SON OF LATE SHRI RAJ BALLABH.

ALL RESIDENTS OF K-5-A, KALKAJI, NEW DELHI.

10. MRS. KIRAN WALIA WIFE OF SHRI RAJ KUMAR WALIA, DAUGHTER OF LATE SHRI RAJ BALLABH SINGH, RESIDENT OF MOHALLA KANUNGO, MURADABAD, DISTRICT MURADABAD, U.P.

11. SHRI RATTAN LAL SON OF SHRI RAGHU.
12. SHRI TILAK RAJ SON OF SHRI RAGHU.

13. SMT. MOHNI DEVI DAUGHTER OF SHRI RAGHU.

14. SMT. MEENA DEVI DAUGHTER OF SHRI RAGHU.
15. SMT. KAMLA DEVI DAUGHTER OF SHRI RAGHU.

16. SMT. SHEELA DEVI DAUGHTER OF SHRI RAGHU.

ALL RESIDENTS OF DHARAMPUR BATHOL, TEHSIL AND DISTRICT SOLAN.

17. GRAM PANCHAYAT DHARAMPUR THROUGH ITS PRESIDENT, THESIL & DISTRICT SOLAN, H.P.

.....PROFORMA RESPONDENTS.

(BY MR. DINESH THAKUR, MR. SUMESH RAJ, MR. SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, WITH MR. MANOJ BAGGA, ASSISTANT ADVOCATE GENERAL, FOR RESPONDENT NO.1-STATE)
(MR. BHUPENDER GUPTA, SENIOR ADVOCATE, WITH M/S JANESH GUPTA AND PRANJAL MUNJAL, ADVOCATES, FOR RESPONDENTS NO.6 TO 10)
(MR. JAGAN NATH, ADVOCATE, FOR RESPONDENT NO.11)
(NONE FOR REMAINING RESPONDENTS)

REGULAR SECOND APPEAL NO.177 OF 2009

1. SHRI RAVI AHLUWALIA, SON]
2. SHRI KARAN AHLUWALIA, SON]
3. SHRI VARUN AHLUWALIA, SON]

4. SHRI RAJAN AHLUWALIA, SON] OF LATE SHRI RAJ BALLABH SINGH

ALL RESIDENTS OF K-5/A, KALKAJI,
NEW DELHI-110019.

5. MRS. KRISHNA WALIA
(SINCE DECEASED) THROUGH HER
LEGAL REPRESENTATIVES:

(a) MS. SONIA WALIA, DAUGHTER]
(b) MR. GURMEET SINGH
WALIA, SON] OF LATE MRS. KRISHNA WALIA WIFE OF SHRI RAJ KUMAR WALIA

BOTH RESIDENTS OF HOUSE NO.676,
SECTOR 28, FARIDABAD (HARYANA).

.... PLAINTIFFS- APPELLANTS.

(BY MR. BHUPENDER GUPTA, SENIOR ADVOCATE, WITH M/S JANESH GUPTA AND PRANJAL MUNJAL, ADVOCATES)

VERSUS

1. STATE OF HIMACHAL PRADESH THROUGH COLLECTOR SOLAN, TEHSIL AND DISTRICT SOLAN (HP)-173212.

2. GRAM PANCHAYAT DHARAMPUR, VILLAGE AND P.O. DHARAMPUR, TEHSIL KASAULI, DISTRICT SOLAN (HP) THROUGH ITS PRESIDENT.

3. SHRI BRIJ MOHAN (SINCE DECEASED) NAME ORDERED TO BE DELETED VIDE ORDER DATED 08.09.2010 PASSED BY THE HON'BLE COURT.

4. SHRI PARAMJIT SINGH SON OF LATE SHRI BRIJ BALLABH SINGH, RESIDENT OF 249/2 SARDARA STREET, LAHORI GATE PATIALA, DISTRICT PATIALA (PUNJAB).

5. SMT. NIRANJAN KAUR (SINCE DECEASED), NAME ORDERED TO BE DELETED VIDE ORDER 19.07.2013 PASSED BY THE HON'BLE COURT.

6. SMT. KHUSHVINDER KAUR WIFE OF S. KULWANT SINGH, RESIDENT OF C-2/32 JANAKPURI, NEW DELHI.

7. SHRI PADAM DEV, SON]
8. SHRI PREM SINGH, SON]
9. SHRI SUNDER SINGH, SON] OF SHRI PARAS RAM

ALL RESIDENTS OF VILLAGE DHARAMPUR BATHOL, TEHSIL KASAULI, DISTRICT SOLAN (HP).

10. SMT. DEVKI DEVI (SINCE DECEASED) THROUGH HER LEGAL REPRESENTATIVES:-

(A) SHRI INDER DUTT, SON]
(B) SHRI KHEM DUTT, SON]
(C) SMT. NEEMA DEVI, DAUGHTER] OF LATE SHRI BIBHIA & SMT. DEVKI DEVI

ALL RESIDENTS OF TOP-KI-BER, POST OFFICE DEOTHI, TEHSIL AND DISTRICT SOLAN (H.P.)

11. SHRI AMAR SINGH, SON]
12. SHRI VED PRAKASH, SON]
13. SHRI MADAN, SON] OF SHRI NANDA

ALL RESIDENTS OF VILLAGE TOP-KI-BER, POST OFFICE DEOTHI, TEHSIL AND DISTRICT SOLAN (HP)

14. SMT. NIRMALA DEVI WIFE OF SHRI G. RAM (DAUGHTER SHRI NANDA), RESIDENT OF VILLAGE BAJNAL, P.O. DAMKARI, TEHSIL AND DISTRICT SOLAN (HP).

15. SMT. BIMLA DEVI WIFE OF SHRI CHAIN SINGH (DAUGHTER OF SHRI NANDA) RESIDENT OF VILLAGE AND P.O. ANEHCH, TEHSIL KASAULI, DISTRICT SOLAN (HP).

16. SMT. SUBHADRA DEVI WIFE OF SHRI HIRA SINGH (DAUGHTER OF SHRI NANDA), RESIDENT OF VILLAGE DAWALA P.O. DHARAMPUR, TEHSIL KASAULI, DISTRICT SOLAN (HP).

17. SHRI RATTAN LAL, SON]
18. SHRI TILAK RAJ, SON]
19. SMT. MOHINI DEVI, DAUGHTER]
20. SMT. KAMLA DEVI, DAUGHTER]
21. SMT. MEERA DEVI, DAUGHTER]
22. SMT. SHEELA DEVI, DAUGHTER] OF SHRI RAGHU RAJ

ALL RESIDENT OF VILLAGE DHARAMPUR BATHOL, TEHSIL KASAULI, DISTRICT SOLAN (HP).

…. DEFENDANTS-RESPONDENTS.

(BY MR. DINESH THAKUR, MR. SUMESH RAJ, MR. SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, WITH MR. MANOJ BAGGA, ASSISTANT ADVOCATE GENERAL, FOR RESPONDENTS-STATE)
(NAME OF RESPONDENT NO.3 STANDS DELETED VIDE ORDER DATED 08.09.2010)
(MR. RAJESH KUMAR, ADVOCATE, FOR RESPONDENT NO.4)
(MR. BHUVNESH SHARMA, ADVOCATE, FOR RESPONDENTS NO.7 TO 16)
(NONE FOR REMAINING RESPONDENTS**)**

REGULAR SECOND APPEAL
No.200 & 177 of 2009
Decided on: 26.05.2022

Code of Civil Procedure, 1908- Section 100- Second Appeal- **Himachal Pradesh Village Common Lands (Vesting and Utilization) Act, 1974**- Section 3(5)- Grievance of the plaintiff is with regard to the mutation which was entered in favour of Gram Panchayat, Dharampur, i.e. mutation No.80, attested on 12.08.1956 in terms of the provisions of Pepsu Village Common Lands Act- **Held-** Suit initiated before coming into force of the 1974 Act, then

by no stretch of imagination, the suit could have been held to be bad in law on the basis of the statutory provisions of the said Act- The reliefs prayed for in the original suit, stood incorporated in the amended suit also- Learned Lower Appellate Court misapplied the provisions of the Himachal Pradesh Village Common Land Vesting and Utilization Act, 1974- Appeals partly allowed. (Paras 17, 18, 19)

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

J U D G M E N T

Both these appeals are being disposed of by a common judgment as they arise out of the same judgment and decree dated 09.01.2009, passed by the Court of learned District Judge Solan, District Solan, H.P. in Civil Appeal No 35/S/13 of 1984/102-S/13 of 1986-84, titled as State of Himachal Pradesh through Collector Solan, District Solan, H.P. Versus Shri Brij Mohan & others.

2. Brief facts necessary for the adjudication of the present appeals are that a suit for declaration was filed by one Shri Brij Ballab Singh against Gram Panchayat, Dharampur and others, to the effect that he and defendants No.2 and 3 were owners in possession of the land measuring 337 bighas 14 biswas to the extent of 1/3rd share, situated in village Dharampur (Badholi) and relief of permanent injunction for restraining defendants No.4 to 6 from interfering with their possession upon the suit land was sought. According to the plaintiff, the grand-father of the plaintiff purchased about 37 bighas of land in Village Dharampur from one Mst. Jakhu alongwith her share in the Shamlat land in the month of June, 1911, vide registered sale deed for a consideration of Rs.700/-. A mutation to this effect was attested in favour of the grand-father of the plaintiff, namely, Shri Chuhar Singh. Smt. Jakku was in physical possession of the land to the extent of 1/6th share, which was

prior to the sale. Chuhar Singh remained in possession thereafter and after his death, the landed property including the share in the Shamlat Deh was inherited by plaintiff's father, namely, Shri Harsaran Dass, who remained in possession thereof as owner till the year 1942. After the death of Harsaran Dass, plaintiff and defendant No.3 succeeded to the property and were now the owners in possession. On 12.08.1956, vide mutation No.80, Shamlat land was mutated in the name of Gram Panchayat, Dharampur, under the provisions of Pepsu Village Common Land Act. According to the plaintiff, the mutation was attested at the back of the plaintiff as also his brother (defendant No.3) and besides the interest of the plaintiff, even the interest of defendant No.2 in the Shamlat Deh was extinguished by way of the said mutation attested on 12.05.1956. According to the plaintiff, he and defendants No.2 and 3 were in actual physical possession of the suit land and according to him the vesting of the ownership rights thereof in the Gram Panchayat and subsequently in the State of Himachal Pradesh was bad.

3. The suit was contested by the State on the grounds that the plaintiff and defendants were out of possession of the suit land and the same was Shamlat land which rightly vested in the Gram Panchayat and later in the State of Himachal Pradesh.

4. At this stage, it is pertinent to mention that the Civil Suit was originally filed on 19.09.1973. Thereafter, Himachal Pradesh Village Common Land Vesting and Utilization Act, 1974 came into force. In terms thereof, the ownership of the suit land was vested in the State of Himachal Pradesh, which was subsequently impleaded as a party in the Civil Suit and the plaint was also amended.

5. On the basis of the pleadings of the parties, learned Trial Court framed the following issues:-

> *"Whether the plaintiff is owner in possession of the suit land ? OPP.*

Whether the land in dispute falls into the definition of 'Shamlat Deh' ? OPD.
Whether the plaintiff was owner in possession as alleged? OPP.
If issue No.3 is not proved whether the plaintiff is entitled to remain in possession as alleged in para No.6-A of the amended plaint? OPP.
Whether the suit is time-barred? OPD.
Whether this court has no jurisdiction to try the suit ? OPD.
Whether the suit is bad for want of notice under section 190 of the H.P. Panchayat Raj Act? OPD.
Whether the suit is bad for mis-joinder of parties? OPD.
Whether the plaint is not properly valued for purpose of court fee and jurisdiction? OPD
Relief."

6. On the strength of the evidence which was led by the parties in support of their respective contentions, the suit was decreed by the learned Sub Judge, 1st Class, Kandaghat, District Solan, H.P., vide judgment and decree dated 12.12.1983 in the following terms:-

"*On the basis of the discussion held, plaintiff and defendant No.3 are hereby declared as owners in possession of the land comprised in khewat khatauni No.14/46 to 57, bearing khasra No.203/1, 7/2, 7/4, 22/89, 96, 100, 174/2, Min, 177/2 Min, 8, 9, 13, 14, 15, 40, 86, 99, 201/105, 131, 166, 167, 168, 176/2 Min 177/2 Min, 85 Min, 17/2, 16, 2, 97, 177/2, 42, 47, 95, 7, 4/2, 176/2 Min, 23, 78, 98, 120, 122 measuring 337 bighas 14 biswas to the extent of 1/6th share therein situated in village Dharampur Batholi. The defendants 4, 5 and 6 are restrained permanently from interfering with the ownership and possession of the plaintiff in the land mentioned above.*"

7. Feeling aggrieved, the State preferred an appeal.

8. Vide judgment and decree dated 09.01.2009, the appeal of the State was allowed by the learned Appellate Court by holding that the Civil Suit was barred in terms of the provisions of Section 3(5) of the Himachal Pradesh Village Common Lands (Vesting and Utilization) Act read with Rule 9 of the Rules framed thereunder and the matter whether the land vested in the State, right was in the domain of the Collector and the Civil Court could not look

into this question. Learned Appellate Court further held that as the plaintiff was held to be in possession, therefore, said possession was liable to be protected till determination of the dispute by the Collector regarding vestment of the land in the Civil Suit. It further held that if inquiry as envisaged under Section 3(5) of the Himachal Pradesh Village Common Lands (Vesting and Utilization) Act read with Rule 9 of the Rules framed thereunder stood made, then the Collector shall be competent to proceed against the plaintiff in accordance with law for his dispossession.

9. Against the judgment and decree so given by the learned Appellate Court, the following two appeals were filed.

10. RSA No.177 of 2009 was filed by Shri Ravi Ahluwalia and others, successors in interest of plaintiff Raj Ballabh Singh, whereas RSA No.200 of 2009 has been preferred by successor in interest of defendant No.2 Paras Ram.

11. RSA No.177 of 2009 was admitted on 22.04.2009, on the following substantial questions of law:-

> *1. Whether the Lower Appellate Court has misunderstood and misapplied the provisions of Pepsu Village Common Land Act, Punjab Village Common Land Regulation Act, 1961 and H.P. Village Common Land (Vesting and Utilization) Act, 1974 to hold that Civil Court does not have the jurisdiction to entertain the dispute involved in the suit?*
>
> *2. Whether Lower Appellate Court has put undue reliance on the revenue entries which were not at all relevant by misreading the same and misconstruing the real import of such revenue entries, especially when the plaintiffs-appellants were claiming title to the suit property much before the enfocement of the aforesaid Act? Has not Lower Appellate Court acted in erroneous and perverse manner to hold that the land was a Shamlat land, when such characteristic of land was lost much before the enforcement of aforesaid statutes and regulations*?

RSA No.200 of 2009 was admitted on 08.09.2010, on the following substantial question of law:-

> "*Whether the suit land was exempt from vestment in the State, under the provisions of H.P. Village Common Lands (Vesting and*

Utilization) Act, as also in the Panchayat, under the Act of Pepsu, and the findings to the contrary, given by the first Appellate Court is illegal and erroneous?

12. Shri Bhupender Gupta, learned Senior Counsel appearing for the appellants in RSA No.177 of 2009, while taking the Court through the record of the case in terms of the substantial questions of law on which the appeal stood admitted, argued that the judgment and decree passed by the learned Appellate Court was not sustainable in the eyes of law for the reason that while allowing the appeal filed by the State, learned First Appellate Court erred in not appreciating that as the Civil Suit was filed much before coming into force of the Himachal Pradesh Village Common Land Vesting and Utilization Act, 1974, therefore, suit could not have been held to be not maintainable on the basis of the provisions of the said Act. Learned Senior Counsel submitted that at the time of filing of the suit, the plaintiff was aggrieved by the mutation which stood attested in favour of the Gram Panchayat of the suit land on the basis of the relevant provisions of the Pepsu Village Common Lands Act and this is clearly borne out from the record of the case. Therefore, in this background, holding that the suit filed by the plaintiff was not maintainable on the strength of the statutory provisions of a statute which was not even in force on the date when the Civil Suit was preferred was bad in law and learned Senior Counsel thus stated that the present appeal deserves to be allowed on this count alone. Mr. Ramakant Sharma, learned Counsel appearing for the appellants in RSA No.200 of 2009 advanced the arguments on similar lines.

13. On the other hand, learned Additional Advocate General submitted that as at the time when the suit and the appeals were decided, the 1974 Act had come into force and in the light of the statutory provisions thereof, the suit land stood vested from the Gram Panchayat to the State Government, therefore, learned Appellate Court rightly held that the suit was

not maintainable in view of the statutory provisions of the 1974 Act. He submitted that in this background, there was no infirmity with the judgment and decree passed by the learned Appellate Court and he, accordingly, prayed for the dismissal of the appeals.

14. I have heard learned counsel for the parties and have also gone through the judgments passed by both the learned Courts below as well as the record of the case.

15. In terms of the record, initially the suit was instituted by plaintiff Brij Ballabh Singh on the basis of a plaint dated 18.09.1973, against Gram Panchayat, Dharampur, praying that a decree be passed in favour of the plaintiff and defendants No.2 and 3, declaring that plaintiff and defendants No.2 and 3 were owners in possession 1/3rd i.e. 1/6th share belonging to the plaintiff and defendant No.3 and 1/6th belonging to defendant No.2 of the suit land and that mutation No.80 attested on 12.08.1956 in favour of defendant No.1 be declared void, ineffective and inoperative as regards the right of the plaintiff and defendants No.2 and 3 and entries in jamabandies subsequently made pursuant to the said mutation were also wrong and void and not binding upon the plaintiff. The suit was filed on 20.09.1973.

16. During the pendency of the suit, Himachal Pradesh Village Common Land Vesting and Utilization Act, 1974 came into force after it received the assent of the President of India on 09.08.1974 and was published in the extra ordinary 'Rajpatra' 29.08.1974. In terms of the record, after coming into force the 1974 Act, the land which was earlier mutated in the name of Gram Panchayat, Dharampur was transferred in the name of the Government of Himachal Pradesh, because of which the suit was amended. The amended plaint is on record and this amendment was carried out in the month of February/March, 1982. Yet, the fact of the matter remains that primarily the grievance of the plaintiff was with regard to the mutation which was entered in favour of Gram Panchayat, Dharampur, i.e. mutation No.80,

attested on 12.08.1956 in terms of the provisions of Pepsu Village Common Lands Act.

17. This Court is of the considered view that as the suit initiated before coming into force of the 1974 Act, then by no stretch of imagination, the suit could have been held to be bad in law on the basis of the statutory provisions of the said Act. This belies logic. Section 10 of the 1974 Act provides that save as otherwise expressly provided under the Act, no order made by the Collector or the State Government or any officer authorised by it, as the case may be, shall be called in question by any Court or before any officer or authority. It is reiterated that when the plaintiff filed the suit, he was not aggrieved by any order passed by any authority envisaged under the 1974 Act. The reliefs which were prayed for in the original suit, stood incorporated in the amended suit also, i.e. declaration to the effect that mutation No.80, dated 12.08.1956, attested in favour of Gram Panchayat, Dharampur was void, ineffective and inoperative as regards the rights of the plaintiff and defendants No.2 and 3. This extremely important aspect of the matter has been over looked by the learned Appellate Court while decreeing the suit and therefore, this Court holds that the learned Lower Appellate Court misapplied the provisions of the Himachal Pradesh Village Common Land Vesting and Utilization Act, 1974.

18. In view of the fact that this Court finds the judgment and decree passed by the learned Appellate Court are not sustainable on the reasoning assigned hereinabove and further it does not deems it appropriate to answer other substantial questions of law as this Court is of the view that it will be in the interest of justice to now remand the matter back to the learned Appellate Court with a direction to decide the appeal filed by the State afresh on merit.

19. Accordingly, these appeals are partly allowed by setting aside the judgment and decree dated 09.01.2009, passed by the Court of learned District Judge Solan, District Solan, H.P. in Civil Appeal No 35/S/13 of

1984/102-S/13 of 1986-84, titled as State of Himachal Pradesh through Collector Solan, District Solan, H.P. Versus Shri Brij Mohan & others and by remanding the matter back to the said Court for adjudication afresh on the appeal filed by the State. The represented parties through counsel are directed to appear before the learned Appellate Court on 20.06.2022 and taking into consideration the fact that the suit is quite an old one, the learned Appellate Court is requested to decide the same positively within a period of six months from today. No order as to costs. Pending miscellaneous applications, if any, stands disposed of. Interim order, if any, stands vacated.

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

Duni Chand ....Appellant/defendant.

Versus

Prem Sukh (deceased)
through LRs. Yash Pal & others .... Respondents/plaintiffs

For the appellant : Mr. Praveen Chandel, Advocate.
For the Respondents: Ms. Heena Chauhan, Advocate, vice Mr. B.S. Thakur, Advocate.

RSA No. 96 of 2022
Decided on: 18.11.2022

Code of Civil Procedure, 1908- Section 100- **Himachal Pradesh Urban Rent Control Act, 1987**- Section 14- Appeal challenging the suit for recovery filed by the respondents/plaintiffs decreed by the learned Trial Court for an amount of Rs.1,85,627/- **Held-** Plaintiff has been granted recovery of rent of only three months is a cogent and prudent judgment based upon the evidence on record and upholding the said judgment and decree by learned Appellate Court can also not be faulted with- No substantial question of law involved in the present appeal- Appeal dismissed. (Paras 17, 18)

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(Oral)*

By way of this appeal, the appellant has challenged the judgment and decree dated 20.04.2018, passed by the Court of learned Senior Civil Judge, Kinnaur at Reckong Peo, District Kinnaur, (Camp at Rampur Bushehar), H.P., passed in Civil Suit No.RBT 12-1 of 2015/14, titled Shri Prem Sukh, through L.Rs. Yash Pal Singh & others Versus Shri Duni Chand, as also the judgment and decree dated 05.10.2019, passed by the Court of learned District Judge Kinnaur Civil Division at Rampur Bushahr, in Civil

Appeal No. 14 of 2019, titled Duni Chand Versus Prem Sukh through L.Rs. Yash Pal Singh & others, in terms whereof suit for recovery filed by the respondents/plaintiffs was decreed by the learned Trial Court for an amount of Rs.1,85,627/- and the appeal preferred against the same was dismissed by learned Appellate Court.

2. Brief facts necessarily for the adjudication of the present appeal are that a suit was filed by the predecessor-in-interest of the present appellant, against the appellant/ defendant, *inter alia*, on the ground that the plaintiff was owner-in-possession of House No.67, situated in Ward No.-5, Middle Bazar, Rampur Bushehar, District Shimla, H.P., upon which there existed three shops. The plaintiff had let out one shop to the defendant in the month of January, 2007 on a monthly rent of Rs.4,500/-. A petition was filed under Section 14 of the Himachal Pradesh Urban Rent Control Act, 1987 against the defendant by the plaintiff on 04.10.2010. The same was preferred before learned Rent Controller, Rampur Bushehar, District Shimla, H.P. The Rent Petition was allowed by learned Rent Controller and the tenant was ordered to pay a rent of Rs.1,39,000/- (i.e. rent for thirty one months @ Rs.4,500/- per month) alongwith interest at the rate of interest at 6% per annum . The tenant was order to pay 10% of the enhanced rent after five years, i.e. an amount of Rs.4,950/- after 01.04.2012, which came to Rs.64,350/- upto the month of April, 2013 alongwith interest for thirty one months. In all, the liability of the tenant was calculated at Rs.2,17,262/- and he was also directed to pay cost of Rs.3,000/-. The tenant was further directed to vacate the shop and deposit the interest and cost within a period of thirty days of the order.

3. Feeling aggrieved by the order passed by learned Rent Controller, the tenant preferred an appeal. During the pendency of the appeal, the matter was compromised between the parties before the National Lok Adalat on 23.11.2013. In terms of this compromise the tenant was to hand over the

vacant possession of the shop to the plaintiff on or before 01.12.2013 and the matter of recovery of arrears of rent interest and cost was kept open.

4. For the recovery of said rent interest and cost, a suit was filed by the landlord/plaintiff, i.e. the suit for recovery of Rs.2,70,000/- with future interest @ 12% per annum on the decreetal amount from the date of institution of the suit till its realization. The suit was contested by the tenant/defendant, *inter alia*, on the ground that the suit was neither maintainable and more over it was hit by the provisions of Indian Contract Act and the same is also barred by limitation. It was further the case of the defendant that he had taken a single room on rent from the plaintiff and the same remained in his possession till August, 2008 and thereafter, the plaintiff did not allow the defendant to run business as he wanted to enhance the rent and also demanded advance money. Further, according to the defendant on his refusal to do so, the plaintiff put a lock on the suit premises. The rate of rent having been fixed @ Rs.4,500/- per month was also denied and it was also asserted that plaintiff had betrayed the defendant and on false assurances succeeded in taking possession of the suit premises. According to the defendant, he was not liable to pay any amount as was being demanded by way of the suit.

5. On the basis of the pleadings of the parties, learned Trial Court framed the following issues:-

> "*1) Whether the plaintiff is entitled to recover amount of Rs.2,70,000/- as arrear of rent, alongwith interest and cost, as prayed?.... O.P.P.*
> *2) Whether the plaintiff has cause of action to file the present suit? .... O.P.P.*
> *3) Whether the suit is not maintainable, as alleged? .... O.P.D.*
> *4) Whether suit is time barred, as alleged? .... O.P.D.*
> *5) Whether suit is not properly valued for the purpose of court fee and jurisdiction? .... O.P.D.*
> *6) Whether plaintiff has no locus standi to file the present suit, as alleged? .... O.P.D.*

7) Whether plaintiff is estopped by his own act and conduct to file the present suit? …. O.P.D.
8) Whether plaintiff has not approached the court with clean hands and suppressed material facts and suit also lacks basic and material facts, as alleged? …. O.P.D.
9. Relief".

6. On the basis of evidence led by the parties in support of their respective contentions, learned Trial Court returned the following findings on the issues so framed:-

"ISSUE NO.1 : Partly Yes.
ISSUE NO.2 : Yes.
ISSUE NO.3 : No.
ISSUE NO.4 : No.
ISSUE NO.5 : No.
ISSUE NO.6 : No.
ISSUE NO.7 : No.
ISSUE NO.8 : No.
Relief : Per operative portion of this judgment, the suit filed by the plaintiff is partly decreed with costs."

7. Learned Trial Court decreed the suit of the plaintiff for recovery of Rs.1,85,627/-.

8. Feeling aggrieved, the appellant preferred an appeal which was dismissed and the defendant has now preferred this Regular Second Appeal.

9. Learned counsel for the appellant has argued that the judgments and decrees passed by both the learned Courts below are not sustainable in the eyes of law and both the learned Courts below have erred in not appreciating that the plaintiff had failed to bring any evidence on record to substantiate his contention with regard to the alleged recovery of rent from the appellant. Learned counsel has further argued that reliance placed upon the adjudication made by learned Rent Controller by the learned Trial Court is not sustainable in the eyes of law as said Court erred in not appreciating that in

the Civil Suit, the plaintiff was liable to establish the plea afresh by leading cogent evidence. Accordingly, a prayer has been made that as there are serious substantial questions of law involved in the appeal, the same be admitted.

10. The prayer has been opposed by learned counsel for the respondents*, inter alia*, on the ground that there is no perversity in the findings which have been returned by the learned Courts below, as the decree for recovery has been passed by the learned Trial Court, as affirmed by learned Appellate Court on the basis of evidence which was led by the plaintiff. Learned counsel has also argued that in fact there was admission on the part of the defendant with regard to the rate of rent etc. and in this view of the matter, as the adjudication by learned Courts below is on facts only, therefore, as there is no substantial question of law involved in the present appeal the same be dismissed.

11. I have heard learned counsel for the parties and have gone through the judgments and decrees passed by both the learned Courts below.

12. The facts which led to the filing of the suit have also been narrated by me hereinabove. The stand which was taken by the defendant before the learned Trial Court has also been referred to in the above part of the judgment. The issues which were framed by the learned Trial Court have also been mentioned hereinabove.

13. While deciding issue No.1 in favour of the plaintiff, learned Trial Court held that the suit was an independent suit and not an execution petition of the order of learned Rent Controller and therefore, the plaintiff was required to prove his case independently. Learned Trial Court also held that in a suit for recovery only for an amount to the extent of three years from the date of filing of the suit could be recovered. It further held that in the suit it was an admitted fact between the parties that the defendant vacated the disputed shop on 30.11.2013, whereas the suit was filed on 15.01.2014. Learned Court further held that plaintiff could claim arrears of rent from the defendant for a

period of three years, i.e. w.e.f. 16.01.2011 to 30.11.2013, i.e. for a period of thirty four months and fifteen days. Learned Court thereafter held that as it was not much in dispute that the rent on which the premises was let out by the landlord to the tenant was Rs.4,500/- per month, therefore, the rent for the period of thirty four months and fifteen days came to Rs.1,65,250/-. Learned Trial Court also held that plaintiff shall also be entitled to interest for the period w.e.f. 16.01.2011 to 30.11.2013 @ 9% per annum which was statutory interest and it comes to Rs.20,376.56 paise. Learned Court thus held that the plaintiffs were entitled for recovery of Rs.1,85,626.56, that is to say Rs.1,85,626.56 paise.

14. Learned Appellate Court has affirmed the findings which have returned by learned Trial Court. While affirming the findings, learned Appellate Court held that DW-3 Sohan Lal had brought the record of Municipal Committee, in which the rent was fixed at Rs.4,500/- per month of other shopkeepers and he also stated that defendant had started the photography shop in the name of Raj Studio. Learned Appellate Court also observed that while discarding the oral evidence, learned Rent Controller had held in his judgment that the rent of the shop was Rs.4,500/- per month and defendant himself had admitted that he was paying Rs.4,500/- per month. Learned Appellate Court thus held that fact admitted need not be proved. It further held that the contentions raised by learned counsel for the defendant that recovery suit was not within the period of limitation was without merit and similarly, the plea of the learned counsel for the appellant that there was no cause was also incorrect. Learned Court held that as the appellant himself had failed to discharge his liability and to vacate the possession and he preferred the appeal which was compromised, in which it was clearly mentioned that the plaintiff was at liberty to recover the arrears of rent by way of separate proceedings, therefore, it could not be said that either the landlord was not

having the *locus standi* to file and maintain the suit or the same was time barred.

15. Having carefully gone through the judgments and decrees passed by both the learned Courts below, this Court is of the considered view that adjudication of issue No.1, in terms whereof, the suit for recovery has been decreed by the learned Trial Court is on pure facts. In fact, Para-26 of the judgment passed by learned Trial Court demonstrates that learned Court observed that when defendant appeared before the Court as DW-1, in his cross-examination, he admitted that rent of this shop was Rs.4,500/- per month and moreover, even learned Rent Controller in his decision dated 09.05.2013 (Ext.PW1/B), held that rent of the shop was Rs.4,500/- per month. During the course of arguments, learned counsel for the appellant could not demonstrate that these were the perverse findings or not borne out from the record of the case.

16. This Court does not agrees with the contention of learned counsel for the appellant that the order passed by learned Rent Controller could not have been relied upon by the learned Trial Court while returning its findings. It is a matter of record and not disputed that the matter with regard to vacation of the demised premises was compromised by the parties in the course of appeal which was filed by the appellant against the order passed by learned Rent Controller. It is also not much in dispute that at the time when the matter was settled as compromised, liberty was granted to the plaintiff to recover the arrears of rent.

17. In this view of the matter, the judgment and decree passed by learned Trial Court, in terms whereof, the plaintiff has been granted recovery of rent of only three months is a cogent and prudent judgment based upon the evidence on record and the upholding the said judgment and decreeing by learned Appellate Court can also not be faulted with.

18. Accordingly, in view of the above observations, as this Court is satisfied that there is no substantial question of law involved in the present appeal, the same is dismissed. No order as to cost.

19. Pending miscellaneous applications, if any, stand disposed of. Interim order, if any, stands vacated.

BEFORE HON'BLE MR. JUSTICE A.A. SAYED, C.J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

M/s Highseas Holding Pvt. Ltd. and others ..Appellants

versus

Mrs. Vijay Sharma and others ..Respondents

2. O.S.A. No. 1 of 2007

Raman Wasan ..Appellant

versus

Mrs. Jatender Nath Sharma and others ..Respondents

3. O.S.A. No. 15 of 2006

Mr. R.L. Sood, Senior Advocate, with Mr. Arjun Lall, Advocate, for appellant No. 1.

Ms. Shilpa Sood, Advocate, for appellant No. 2(a).
None for appellant No. 2 (b)
Ms. Sunita Sharma, Senior Advocate, with Mr. Dhananjay Sharma and Mr. Ranbir Singh, Advocates, for respondents No. 1(a) to 1(d) and respondent No. 2.

Mr. Digvijay Singh, Advocate, for respondent No. 3.

4. O.S.A. No. 1 of 2007
Mr. Digvijay Singh, Advocate, for the appellant.

Ms. Sunita Sharma, Senior Advocate, with Mr. Dhananjay Sharma and Mr. Ranbir Singh, Advocates, for respondents No. 1(a) to 1(d) and for respondents No. 2.

Mr. R.L. Sood, Senior Advocate, with Mr. Arjun Lall, Advocate, for respondent No. 3.
Ms. Shilpa Sood, Advocate, for respondent No. 4(a).
Respondent No. 4(b) already ex-parte.

O.S.A. No. 15 of 2006
alongwith O.S.A. No. 1 of 2007
Reserved on : 24.11.2022
Date of decision : 27.12.2022

Code of Civil Procedure, 1908- Section 96- **Specific Relief Act, 1963-** Appeal against the judgment passed by Single Judge decreeing the suit of the plaintiffs directing allotment of the flat in question in favour of the plaintiffs- To make an offer to the plaintiffs to execute buyer's agreement in its favour- Execute such an agreement in accordance with terms and conditions of allotment- **Held-** No infirmity in the impugned judgment- The suit for specific performance was liable to be decreed and the decree had to be passed in the manner contemplated by the agreement sought to be enforced- Relief/decree modified- Appeal dismissed.

Cases referred:

Azhar Sultana Vs. B. Rajamani and others (2009) 17 SCC 27;
Greater Mohali Area Development Authority Vs. Manju Jain (2010) 9 SCC 157;
Kamal Kumar Vs. Premlata Joshi and others (2019) 3 SCC 704;
Mayawant Vs. Kaushalya Devi (1990) 3 SCC 1;
Satish Kumar Vs. Karan Singh (2016) 4 SCC 352;
U.N. Krishnamurthy (since deceased) Thr. LRs Vs. A.M. rishnamurthy 2022 SCC Online 840;

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge

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Defendant No. 1 was the builder and defendant No. 2 was the owner of the property in question. Pursuant to advertisements issued by these defendants, the plaintiffs applied for a specific flat built by defendant No. 1 in the Group Housing Scheme. Defendant No. 1 accepted plaintiffs' application for allotment on 28.08.1995. Plaintiffs paid an amount of Rs. 1,10,000/- in all to defendant No. 1. The flat in question was, however, not sold to the plaintiffs. According to the defendants, the flat was sold to defendant No. 3 in October, 1998. On 01.03.1999, the plaintiffs instituted the civil suit for specific performance of agreement dated 28.08.1995. The suit was decreed on 03.11.2006. Against this judgment and decree, two original side appeals have been preferred i.e. OSA No. 15 of 2016 jointly preferred by defendants No. 1 and 2 and the other OSA No. 1 of 2017 has been preferred by defendant No. 3. Plaintiff No. 1 and defendant No. 2 have died during the pendency of these appeals and have been substituted by their legal representatives. Arising out of common judgment & decree dated 03.11.2006 and involving common issues of facts and law, these appeals have been taken up together for decision. Parties hereinafter are being referred to according to their status before the learned Single Judge.

2. Facts

2(i) Plaintiffs filed a civil suit seeking :- (i) specific performance of an agreement dated 28.08.1995 against the defendants, whereby defendant No. 1 had accepted plaintiffs' application for allotment of Flat No. C-12, 1st Floor, Dilshant Estate, Bharari, Shimla ; (ii) directions to the defendants to

hand over physical possession of the flat to the plaintiffs ; (iii) directions to defendants No. 1 and 2 to execute and register the sale deed in respect of the aforesaid flat in favour of the plaintiffs. **Plaintiffs' case** was that :-

2(i) (a) On 25.08.1995, defendant No. 1 wrote to plaintiffs regarding opening of booking of flats in Block 'C' in Dilshant Estate, Bharari, Shimla. Plaintiffs applied to defendant No. 1 for allotment of Flat No. C-12 on the first floor in Block-C with super area of 990 Sq. ft. Defendant No. 1 accepted plaintiffs' application on 28.08.1995. Plaintiffs paid a sum of Rs. 50,000/- in cash to defendant No. 1 against a duly issued receipt. Defendant No. 1 was also paid Rs. 10,000/- by the plaintiffs through a bank draft dated 30.08.1995. On 06.11.1995, defendant No. 1 demanded Rs. 50,000/- from plaintiffs to issue allotment letter to them. Plaintiffs paid this amount through bank draft dated 07.12.1995.

2(i) (b) On 12.09.1996, defendant No. 1 sought to return Rs. 60,000/- by a cheque to the plaintiffs towards purported cancellation of the booking. This cheque was sent alongwith a draft typed letter meant to be signed by the plaintiffs expressing their intention to cancel the booking. Plaintiffs did not accept this proposition of defendant No. 1. On 17.09.1996, they sent a letter through advocate requesting defendant No. 1 to honour its commitment and issue allotment letter in their favour for the flat in question. In response, plaintiffs received two letters dated 14.09.1996 and 26.09.1996 from defendant No. 1 stating that due to stay order passed by the High Court, construction of flats in Block C was not possible, hence plaintiffs should accept refund of amount towards cancellation of booking. The plaintiffs responded on 14.10.1996 and informed defendant No. 1 that they were not interested in cancellation of booking and also that they had not received Rs. 50,000/- alleged by defendant No. 1 to have been refunded to them in cash. The plaintiffs also conveyed having no intention to encash the cheque of Rs.60,000/-.

2(i) (c) On 02.12.1996, defendant No. 1 wrote a letter to the plaintiffs seeking return of Rs. 60,000/- in case they wanted to retain the booking. Plaintiffs were also directed to acknowledge refund of Rs. 50,000/- allegedly returned to them in cash by defendant No. 1. Plaintiffs responded on 06.12.1996 denying receiving Rs. 50,000/- in cash. The cheque dated 11.09.1996 for amount of Rs. 60,000/- was not returned to defendant No. 1 but plaintiffs reiterated that they had no intention to encash the cheque.

2(i) (d) There being no response of defendant No. 1 to the plaintiffs' communication dated 06.12.1996, the plaintiffs sent a letter to defendant No. 1 on 07.07.1998 calling upon it to issue allotment letter in their favour for the flat in question and to inform about further payments to be made by them towards purchase of the flat. This was followed by another letter of the plaintiffs dated 01.12.1998 reiterating their request. Defendant No.1 responded on 07.12.1998 enclosing with this letter a bank draft of Rs. 76,125/- towards refund of Rs. 60,000/- with interest @ 9% per annum. Defendant No. 1 also mentioned that Rs. 50,000/- had already been returned to plaintiffs in cash. Defendant No. 1 denied that there was any concluded contract between the parties with respect to the flat in question.

2(i) (e) Pleading that plaintiffs had always been ready and willing to perform their part of the contract as per the agreement dated 28.08.1995 in order to purchase and possess the flat and that cause of action accrued to them on 07.12.1998 when defendant No. 1 denied these rights to the plaintiffs, suit for specific performance was instituted by the plaintiffs on 01.03.1999.

2(ii) Written statement of defendant No.1.

Initially M/s Highseas Holding Pvt. Ltd.(defendant No. 1) was the only defendant impleaded in the suit. Defendant No. 1 in its written statement, inter-alia raised objections that suit was barred by limitation and

also bad for non-joinder of necessary party-Air Marshal G.B. Singh PVSM (Retd.) (owner of the property). It was pleaded that :-

2(ii) (a) Owner of the property i.e. Air Marshal G.B. Singh had not been impleaded as a party to the suit. Suit for specific performance was not maintainable in his absence. Condition No. 8 of the form accompanying application for allotment had clearly referred to the ownership of Air Marshal G.B. Singh over the property. The decree prayed for by plaintiffs was incapable of being executed as defendant No. 1 was not the owner of the property and could not execute sale deed. It was also disclosed that the suit property stood sold to one Sh. Raman Wasan.

2(ii) (b) No agreement to sell was ever executed in favour of plaintiffs. They had only applied to defendant No. 1 for allotment of a flat. Even the allotment letter had not been issued to the plaintiffs. Even if it is assumed that plaintiffs are seeking specific performance of agreement dated 28.08.1995, then also the suit filed on 01.03.1999 was barred by limitation.

2(ii) (c) On merits, it was admitted that the plaintiffs had applied to defendant No. 1 for allotment of the flat in question. Neither the acceptance of plaintiffs' application on 28.08.1995 for allotment of flat nor defendant No.1's letter dated 06.11.1995 written to the plaintiffs could be termed as an agreement to sell. The amount paid by the plaintiffs to defendant No. 1 towards the flat was refunded to them by defendant No. 1 on 12.09.1996. The plaintiffs though dishonestly retained the amount refunded to them but did not sign letter for cancellation of the booking. The construction of Block 'C' had been stayed due to Court order. This construction of Block-C was eventually completed and possession of the flat in question was handed over to one Sh. Raman Wasan in October, 1998.

2(ii) (d) Plaintiffs had only made an application for allotment of a flat. Plaintiffs were only 'intending allottees' and nothing more. No cause of action accrued in their favour for filing the suit for specific performance.

2(iii) Addition of parties to the suit and amendment of plaint

2(iii) (a) In view of averments and preliminary objections raised in defendant No.1's written statement about non-impleadment of necessary parties, the plaintiffs moved an application for impleading Air Marshal G.B. Singh PVSM (Retd.) (owner of the property) and Sh. Raman Wasan (alleged purchaser of the property) as parties to the suit. Application was also made for making certain amendments in the body of plaint. These applications were allowed. The above named persons were impleaded as defendants No. 2 and 3.

2(iii) (b) By way of amendment, plaintiffs pleaded that defendant No. 1 had never indicated any role to be played by defendant No. 2. The latter was never in picture. Defendant No. 1 had all along presented that all steps had to be taken only by defendant No. 1. Plaintiffs were not privy to whatsoever transpired between defendants No. 1 and 2. None of the terms and conditions accompanying the application for allotment gave any insight that plaintiffs had to deal with defendant No. 2. Plaintiffs had been interacting and corresponding only with defendant No. 1.

2(iv) Written statement of defendant No. 2.

Defendant No. 2 submitted that he was owner in possession of the property. Only he could have entered into any binding agreement to sell the flat and execute sale deed. No dealings whatsoever took place between plaintiffs and defendant No. 2. Plaintiffs had never negotiated with him. No money was paid to him. Condition No. 8 of the terms and conditions of allotment clearly stated that defendant No. 2 was owner of the property. There was no agreement between him and the plaintiffs. Therefore, suit for specific performance could not be maintained against him.

2(v) Written statement of defendant No. 3.

Apart from reiterating the pleadings of defendants No. 1 and 2, defendant No. 3's stand was that he was a bonafide purchaser of the

flat in question. He got the possession of the flat on 08.10.1998. He invested huge amount in the flat post its purchase. He opposed grant of relief to the plaintiffs.

2(vi) Parties led evidence in support of their respective pleadings. Plaintiff No. 1 entered in the witness box as PW-1. Defendant No. 1 examined Senior Planning Draughtsman as DW-1, Clerk Municipal Corporation, Shimla as DW-2, Captain Chimni-the Director of defendant No. 1 as DW-3, Rajesh Kumar Sirohi as DW-4. Defendant No. 3 appeared as DW-5. Defendant No. 2 did not step in the witness box. On his behalf an application OMP No. 220 of 2001 was moved on 10.05.2001 under Order 16 Rules 2 & 3 of the Code of Civil Procedure to examine two witnesses with a view to produce and prove a General Power of Attorney executed by him in favour of Cap. N.P Ahluwalia and Cap. P.S. Chimni (directors of defendant No.1) registered in the office of Sub Registrar New Delhi on 08.01.1992. The application was dismissed on 28.05.2001 for the reason that power of attorney allegedly executed by defendant No. 2 in favour of defendant No. 1 could easily be got produced by defendant No. 2 by serving notice on defendant No. 1. Defendant No. 2 thereafter served a notice under Order 12 Rule 8 C.P.C. upon defendant No. 1 for producing original power of attorney executed by defendant No. 2 in favour of directors of defendant No. 1. Learned counsel for defendant No. 1 undertook to produce this power of attorney as at that time defendants' witnesses were being examined. A General Power of Attorney allegedly executed by defendant No. 2 in favour of defendant No. 1 is on record of file as defendants' documents. (However, a perusal of statement of DW-3 recorded on 27.04.2001 shows that original power of attorney sought to be produced was not taken on record).

2(vii) After appreciating the pleadings, evidence and contentions of the parties, learned Single Judge decreed the suit on 03.11.2006. Defendant No. 1 was directed to allot the flat in question in favour of the

plaintiffs. He was directed to thereafter make an offer to the plaintiffs to execute buyer's agreement in its favour. Depending upon the plaintiffs executing buyer's agreement in accordance with terms and conditions of allotment within a month of such offer, defendant No. 1 was further directed to get the sale deed or 99 years lease deed as the case may be, executed in plaintiffs' favour from defendant No. 2. Defendant No. 1 was also directed to hand over possession of the flat to the plaintiffs. Aggrieved against this judgment and decree, defendants No. 1 and 2 jointly filed OSA No. 15 of 2006. Defendant No. 2 died during the pendency of the appeals, hence his legal representatives have been brought on record of the appeal as appellants No. 2(a) and 2(b). Plaintiff No. 1 also died during the pendency of the appeal. His legal heirs have also been arrayed in the appeals. Raman Wasan-defendant No. 3 has separately assailed the judgment and decree passed by the learned Single Judge by instituting OSA No. 1 of 2007.

3. Points for determination in these appeals

We have heard learned counsel for the parties and with their assistance gone through the record. The submissions of learned counsel for the parties have revolved around following five points :-

i) **Nature of document dated 28.08.1995 sought to be specifically enforced.**
Whether there was any valid & legal agreement executed between the parties specific performance of which could be enforced by the plaintiffs ?

ii) Form of impugned decree passed by the learned Single Judge.
Whether the civil suit could have been decreed in the manner it has been decreed by the learned Single Judge vide impugned judgment & decree dated 03.11.2006 ?

iii) Readiness and willingness of the plaintiffs to perform their part of the contract.
Whether the plaintiffs were ready & willing to perform their part of the agreement ?

iv) Limitation.

Whether suit filed by the plaintiffs was within the limitation period ?

v) Relief of Specific Performance.

Whether the plaintiffs are entitled to the relief of specific performance of the agreement ?

To avoid repetition of discussion on facts, evidence and submissions, we have hereinafter separately considered the above points raised for determination in these appeals.

4. Point No.1

4(i) Nature of document dated 28.08.1995 sought to be specifically enforced

The contention advanced by the appellants is that the document dated 28.08.1995 being sought to be specifically enforced by the plaintiffs is only a letter of intent issued by defendant No. 1 (builder) in favour of plaintiffs for booking of flat. This letter of intent issued by the builder does not confer any right on the plaintiffs to seek specific performance of same by terming it as an 'Agreement to sell'. Though the document dated 28.08.1995 is not the allotment letter, however, even the letter of allotment cannot be construed as a binding contract. Only a concluded contract is capable of being enforced. Court cannot make out a contract for the parties where none exists. In the facts of the case where a valid and enforceable contract has not been made out, specific performance cannot be ordered by the Court.

The counter arguments on behalf of respondents-plaintiffs are that there was an agreement to sell between plaintiffs and defendant No. 1 with regard to Flat No. C-12, Dilshant Estate, Shimla. The terms and conditions of said agreement are to be seen in Exhibits PW-1/A and PW-1/D. Plaintiffs were to pay for the flat at the rates indicated in PW-1/A. Plaintiffs had paid Rs. 1,10,000/- towards the price of the flat and were ready and willing to pay the balance sale consideration. They are entitled to the relief of specific performance.

We **observe** as under :-

4(i) (a) The evidence on record reveals that advertisements were issued for the property in question. Advertisement dated 20.05.1994 published in the Times of India (Original copy placed on record by defendants, but not exhibited though not disputed) invited applications for the flats/apartments in Dilshant Estate. The applicants have been advised therein either to contact defendant No. 2 at New Delhi on given telephone numbers or defendant No. 1 at the given addresses of Chandigarh, Amritsar, Ludhiana and Shimla. Another advertisement for the same property is Ex. DW-3/A published in the Hindustan Times on 13.05.2000. In terms of this advertisement, the interested persons have been advised to contact given telephone numbers in Delhi and Shimla. For Chandigarh, the contact number given is that of defendant No. 1. One more similar advertisement is Ex. DW-3/B published in the Hindustan Times on 07.05.1999 under the name of defendant No. 1. Yet another advertisement is Ex. DW-3/C published on 24.03.2001 in the Times of India with contact details of defendant No.1. The advertisements issued in the newspapers do give an impression that defendant No. 1 (builder) had owner's (defendant No.2) authority to deal with the property. These advertisements were issued by defendant No. 1 without giving any reference to the owner of the property. In terms of the advertisements, any one out of the given addresses/phone numbers could be contacted for buying flats. The addresses given were mostly of defendant No. 1. Defendant No.2 has not disputed the advertisements. The advertisements placed on record by the defendants lead to the presumption that defendant No. 1 was authorized by defendant No. 2 to allot/sell/lease out etc. the property/flat/areas in Dilshant Estate.

4(i) (b) Ex. PW-1/A is a letter dated 25.08.1995 written by Cap. P.S. Chimni (DW-3) the director of defendant No.1 intimating the plaintiffs that booking of flats will be open in a month's time. A plan of Block 'C' alongwith list of available flats/areas was part of the letter. The plan is proved

on record as Ex. PA. This document shows that Flat No. C-12 with area measuring 990 Sq. ft. was available for booking/sale with tentative price of Rs. 1250/- per Sq. ft. It appears that plaintiffs expressed interest to defendant No.1 for purchasing the flat in question. A printed format was handed over to plaintiffs by defendant No. 1. It contained an application for allotment of flat alongwith elaborate terms and conditions. The document though printed had some blank spaces which were filled in handwriting. The original of this document was produced by the defendants and exhibited as 'PB'. It is addressed to defendant No. 1. DW-3 has admitted these facts. Top portion of this document (Ex. PW/1-A) starts with printed request on behalf of the applicant for allotment of a residential flat/commercial shop. The para also includes applicant's undertaking to abide by the terms and conditions of 'sale' mentioned in the document. Ex.PW/1-A shows that the undated application for allotment moved by the plaintiffs was in respect of Flat No. C-12 on 1st Floor in Block-C with super area 990 Sq. feet (approximately) under payment mode 'B'. This application was accepted by defendant No. 1 on 28.08.1995. The document gives a definite impression that defendant No. 1 was authorized to settle the sale price, issue allotment letters and to bind the owner of the property (defendant No.2) with such allotment, sale price and the settled terms and conditions.

4(i) (c) Salient terms and conditions for allotment of residential flat/commercial shop in the Group Housing Scheme at Dilshant Estate, Bharari, Shimla are part of the printed application. The person applying for allotment of flat/shop, has been mentioned in these terms and conditions as 'intending allottee'. The person issuing the application form and specifying the terms and conditions was defendant No. 1.

Some of the terms and conditions around which submissions were made on both sides are as under :-

"2. The intending allottee agrees that he/she will pay the price of the flat/shop and other charges on the basis of the super area. The super area shall include the area of his/her flat/shop and also the area under partition walls and half the area under common walls as between two flats. It shall also include 50% of the Balcony, if any, and 50% of the staircases area. The latter will be apportioned on a prorate basis to each flat. Reserved parking spaces and membership of the club shall be charged for additionally on terms to be determined by the Builder.

5. The intending allottee(s) agrees to pay the increased cost, if any, during the progress of work, in the cost of development and construction of Flat/shop due to the increase in the cost of cement, steel or any other material and/or labour charges etc. The sale price shall be increased on prorate basis as assessed by the Builder and as certified by designated Architect. The same shall be payable on demand. However, escalation will be limited to a maximum of 5% of the total cost of flat/shop.

6. The time of payment of installments is the essence of this agreement. It shall be incumbent on the intending Allottee(s) to comply with the terms of payment and the other terms and conditions of allotment. In case the installments are delayed, the intending Allottee(s) shall have to pay the interest on the amount due as follows:-

i) Upto 30 days delay from the due date of outstanding amount @ 18% p.a.

ii) Upto 90 days delay from the due date of outstanding amount @ 24% p.a.

Even then if the intending Allottee(s) fails to pay the installment with interest within 90 days of the due date, the Builder shall forfeit the entire amount of earnest money deposited by him/her and the allotment shall stand cancelled and he/she will be left with no lien on the Flat. The amount if any, paid over and above the earnest money shall be refunded to the intending Allottee(s) without any interest and only after completion of the project.

7. All charges for the registration of the 99 years lease or sale deed and other legal and incidental expenses of the Flat/Shop shall be borne by the allottee(s).

8. The land on which the Flat/Shops are built, will remain the property of the owner, Air Marshal G.B. Singh, PVSM (Retd.) (hereinafter referred to as the "Owner"). The green areas i.e. all areas within Dilshant Estate on which flats/shops and other structures have not been built shall remain the property of the owner and the allottee shall only have a right/licence to use the green areas and shall have no right whatsoever to ownership of the said green areas and shall not have any right to occupy or make any construction whatsoever on the said green areas.

The allottee(s) will be entitled to have the residential Flat/commercial shop transferred in his/her own name through a regular sale deed if the Allottee(s) is entitled to purchase the same under section 118 of the Himachal Pradesh Tenancy and Land Reforms Act, 1972 or after obtaining necessary permission in other cases. Where no permission is obtained or the allottee is not entitled to have the sale deed executed in his/her favour the "Owner" shall execute a 99 years lease and with a right to sub-lease etc. and all other incidental rights enjoyed by a flat/shop owner in favour of the allottee(s). All expenses or cost in this behalf shall be borne by the allottee(s).

10. The intending allottee(s) has seen and approved the plans, designs, specifications which are tentative and agrees that the Builder may make such variations, additions, alterations, and modifications therein as it may, in its sole discretion, deem fit and proper or as may be done by any competent authority and the intending allottee(s) hereby gives his/her consent to such variations, additions, alterations and modifications. The intending allottee(s) has also seen the specifications and information as to the material to be used in the construction of the apartment as set out in the brochure which are also tentative and the Builder may make such variations and modifications therein as it may, in its sole discretion, deem fit and proper or as may be done by any competent authority and the intending allottee(s) hereby gives his consent to such variations and modifications.

14. The allotment of the flat/shop is entirely at the discretion of the Builder and the Builder has a right to reject any offer without assigning any reason thereof.

16. The intending Allottee(s) agrees to sign and execute, as and when desired by the Builder, the Flat Buyers Agreement on the Builders standard format."

The contents of above terms and conditions lead to a positive inference that defendant No. 1 was authorized by defendant No.2 to allot flats/shops, settle terms and conditions of allotment, settle sale price, the mode of payment, settle the installments schedule etc. From reading of all the terms and conditions, an irresistible conclusion that can be easily drawn is that defendant No. 1 (builder) had the authority to bind down defendant No. 2 (owner) with these terms and conditions.

As per Clause 2 of the terms and conditions price of the flat and other charges were to be paid by the allottee on the basis of super

area. Clauses 5 & 6 indicate that installment notice for the payment of balance installments was to be issued by the builder. The sale price was to be fixed by the builder. The price so fixed by the builder was virtually the sale price. As per clause 14 of the terms and conditions, the allotment of the flat was entirely at the discretion of the builder. Clause 5 of the terms and conditions states that increase in sale price, if any, was to be assessed by the builder and payable by the allottee on builder's demand. Clause 7 records that charges for registration of 99 years' lease or the sale deed as the case may be were to be borne by the allottee.

Clause 8 of the terms and conditions (extracted earlier), states that the sale/lease deed, as the case may be, was to be got executed by defendant No. 1 in favour of the allottee through defendant No 2. In case the allottee was entitled to purchase the flat under Section 118 of the H.P. Tenancy and Land Reforms Act or he had requisite permission to purchase, a regular sale deed was to be executed in his favour. Where requisite permissions either under Section 118 of the H.P. Tenancy and Land Reforms Act or under other applicable laws were not obtained, then the owner (defendant No.2) was to execute 99 years' lease deed in favour of the allottee with right to sub-lease. Clause 8 of the terms and conditions for allotment specifically binds the owner of the property with execution of sale/lease deed in favour of allottee. Once an application for allotment is accepted, then depending upon compliance of other specified terms and conditions including payment of sale consideration amount, the sale/lease deed becomes executable in favour of the allottee. This is to be got executed by defendant No. 1 through defendant No. 2. Name of owner of the property (defendant No.2) was though mentioned in the terms and conditions of the allotment, but his role was only to act as per the dictate of the builder (D-1). He was to execute the sale/lease deed on the asking of defendant No. 1 in terms of clause 8. The plaintiffs moved an application for allotment of Flat No. C-12 on the first floor

in Block-C. Their application was accepted by defendant No. 1 on 28.08.1995. On acceptance of the application and in view of the terms and conditions of allotment which are part of the printed format of application for allotment, this document has to be construed as an agreement of sale. This document has been intended to be an agreement of sale by defendants No. 1 and 2 by necessary implication.

4(i) (d) Defendant No. 2 (the owner) in his written statement has banked upon the very terms and conditions of document (Ex. PW/1-A) to contend that plaintiffs were only 'intending allottees' and that neither any allotment letter nor any agreement to sell was ever executed in plaintiffs' favour. That he did not receive any amount from the plaintiffs. No dealings took place between him and the plaintiffs, therefore, suit deserved to be dismissed. Not surprisingly, defendant No. 2 did not disown the terms and conditions of allotment set forth by defendant No.1. He rather relied on the same. It is thus obvious that the allotment of defendant No. 2's property by defendant No. 1 had to be honoured by defendant No. 2. On allottee's complying with the terms and conditions set forth including payments etc. the same was to be followed by execution of sale/lease deed, as the case may be. Under these terms and conditions, the sale/lease deed consideration amount was not to be paid by the allottee to the owner (defendant No. 2) but to the builder (defendant No.1). Hence, non-receipt of any amount by defendant No. 2 from the plaintiffs is irrelevant. Defendant No. 2's role was to come into play only at the time of execution of sale/lease deed in favour of the allottee chosen by defendant No.1.

4(i) (e) The person applying for allotment was termed as 'intending allottee' in the 'terms and conditions' of allotment. However, once his application for allotment was accepted by the builder, obviously his status became that of an allottee. Plaintiffs' application for allotment was accepted by defendant No. 1 on 28.08.1995. Defendant No. 1 on 06.11.1995 demanded Rs.

50,000/- from the plaintiffs for issuance of allotment letter. This amount was paid by the plaintiffs. Plaintiffs by now had virtually become 'allottes' on 28.08.1995. Issuance of letter of allotment was a mere formality. In case allotment letter was required to be issued to the plaintiffs, then defendant No. 1 was liable to issue it. On payment of the amount as per the settled terms and conditions, sale/lease deed was to be got executed in plaintiffs' favour by defendant No.1 through defendant No.2. Thus subject to satisfaction of terms and conditions imposed by the builder (defendant No.1), sale deed was to be got executed in plaintiffs' favour by defendant No. 1 through defendant No. 2.

4(i) (f) An argument forcefully raised by the appellants is that decree passed by the learned Single Judge is not in conformity with law. That after holding there being no offer of allotment, learned Single Judge in a suit for specific performance could not have ordered defendant No. 1 to first allot the flat, offer execution of buyer's agreement and then depending upon plaintiffs' execution of such buyer's agreement get the sale/99 years' lease deed executed in plaintiffs' favour from defendant No. 2. That defendant No. 1 cannot force defendant No. 2 to execute sale/99 years' lease deed in favour of plaintiffs.

We may first observe that learned Single Judge had given conclusive finding that there was an agreement to sell between the plaintiffs and defendants. Issue No. 1 framed in the suit was :-

> *"1. Whether there has been an agreement to sell between the parties, if so, what are the terms thereof ? OPP"*

After considering the pleadings, evidence and the submissions made by the parties, the learned Single Judge in para 47 of the impugned judgment has held that "there has been an agreement for allotment/sale or 99 years lease of Flat No. C-12 between the plaintiffs and defendant No. 1, who apparently acted on the authority given by defendant

No. 2. Issue is answered accordingly". Therefore, the appellants' contention that in view of operative part of the judgment, it has to be presumed that the learned Single Judge had held that there was no offer of allotment/non concluded contract between the parties, is not correct.

4(ii) **Point No. 2.**
Form of impugned decree passed by the learned Single Judge

Another contention raised for defendants No. 1 and 2 is that from the relief granted by the learned Single Judge it can be deduced that (i) there was no allotment letter in favour of plaintiffs ; (ii) that neither defendant No. 1 (builder) nor defendant No. 2 (owner) had offered to the plaintiffs to execute buyer's agreement. It was further submitted that the directions issued in the judgment to defendant No. 1 to first allot the flat to the plaintiffs, then to make an offer to them to execute buyer's agreement and in case plaintiffs execute such agreement then to get the sale/lease deed executed in their favour from defendant No. 2, are dehors the settled legal principles. Defendant No. 1 can neither force defendant No. 2 nor can it be compelled to get sale/lease deed executed in plaintiffs' favour by defendant No. 2. The decree is inexecutable.

We **observe** as under :-

4(ii) (a) It would be appropriate to extract the operative portion/relief granted in the impugned judgment :-

> *"59. In view of the above findings, suit of the plaintiffs is decreed with costs and a decree directing defendant No. 1 to allot flat No. C-12, block-C in Dilshant Estate Bharari, Shimla in favour of the plaintiffs and then to make an offer to the plaintiffs to execute buyer's agreement in its favour and if the plaintiffs execute such an agreement in accordance with the terms and conditions of allotment within a month of such offer, to get executed sale deed or ninety-nine years lease deed, as the case may be, in their favour from defendant No. 2. Defendant No. 1 is also directed to hand over possession of the aforesaid flat to the plaintiffs.*
>
> *Decree sheet be prepared accordingly."*

It would be worthwhile to note that while discussing issue No. 1, more particularly in paras 29 to 47 of the impugned judgment, learned

Single Judge has categorically held that there has been an agreement for allotment/sale or 99 years' lease of the flat in question between the plaintiffs and defendant No.1. We are in unison with the findings recorded by learned Single Judge on this issue. Defendant No. 1 cannot be permitted to take shelter behind the lame plea that it cannot be directed to get the sale/lease deed executed in plaintiffs' favour through defendant No. 2. Getting the sale/lease deed executed by defendant No. 1 in favour of allottee through defendant No. 2 is the only way of concluding the deal envisaged in the terms and conditions of allotment. We have already held that defendant No. 2 (owner) has not refuted the binding nature of the terms and conditions set forth by defendant No. 1 (builder). In the given facts, the document dated 28.08.1995 is nothing short of an agreement to sell. Defendant No.1's acceptance of plaintiffs' application for allotment of a particular flat and plaintiffs' paying the earnest money would have resulted into issuance of a formal allotment letter. In the peculiar factual scenario of the case, issuance of allotment letter was a mere formality.

4(ii) (b) We may also observe here that in the facts and circumstances of the case, it can be easily deduced that defendant No. 2 (owner) had separately entered into some agreement/arrangement etc. with defendant No. 1 (builder) regarding raising of construction by the latter over former's property and sale of that property (flats/shops/area etc.).

The document Ex. PW/1-A dated 28.08.1995 and chain of events that happened thereafter pre-suppose existence of some kind of agreement between the owner of the land (defendant No.2) and the builder (defendant No.1). No document evidencing authority of defendant No. 1 to build or allot etc. has been placed on record. Plaintiffs are not supposed to have either the access or the specific knowledge of any agreement inter-se between these two defendants. They obviously were not in a position to place on record any such agreement between defendants No. 1 and 2. We are of the

view that best evidence regarding exact nature of authorization issued by defendant No.2 in favour of defendant No. 1 has been withheld by defendants No. 1 and 2 from the Court. In the given facts, it is impossible to believe that defendant No. 2 did not execute any agreement clothing defendant No. 1 with authority to deal with the land in question. The authority of defendant No. 1 to build on defendant No.2's land, accept applications for allotment of the flats/shops thereupon, settle terms and conditions for sale of built up flats/shops etc. and to bind down defendant No. 2 to sell the land/flat/shop etc. in favour of allottee chosen by defendant No. 1, had to originate from some agreement other than the General Power of Attorney dated 08.01.1992 executed by defendant No. 2 in favour of defendant No. 1. The General Power of Attorney placed on record by defendant No. 1 alongwith documents filed by defendants and strongly relied upon by it during hearing of the case to project that it had very limited authority given to it by defendant No. 2, is irrelevant. Even a casual reading of this General Power of Attorney makes it crystal clear that this was not the document by which defendant No. 2 had authorized defendant No. 1 to build upon and sell his property. The said General Power of Attorney (even though not exhibited and accepted but is being referred to hereinafter only for testing the contention put forth by the defendants) only authorizes defendant No. 1 to do as under :-

1. *To act and appear before all land authorities, Municipal and Revenue or any other Govt. authorities of the State of Himachal Pradesh and thereby to make all sorts of correspondence, obtain various approvals and permissions under regulatory provisions, to carry out any developmental and construction activities on the said land, and for making due compliances with various regulations under their own signatures.*
2. *To submit and pursue detailed Building Layout(s), plans, models as per Govt. norms and specification(s) before the concerned authorities for seeking necessary approval(s) for enabling construction of the Housing Project to be known as Dilshant Estate or any other structure on the said land under their own signatures.*

3. *To appear and present before Himachal Pradesh State Electricity Board, Posts and Telegraphs Department, Telecommunication authorities, Water and Sewerage Authorities or any other Central or State Government Authorities, Body(ies), Organization(s) concerned in Himachal Pradesh and at any connected place within India and thereby to make all correspondences, submit application(s), make earnest and security deposit(s), obtain permission(s), approval(s), connection(s) or to execute any agreement(s), deed(s), affidavit(s) and to comply with statutory and regulatory provisions from time to time, under their own signature(s), for the purposes of making construction or development of the said land."*

The above extracted clauses do not give authority to defendant No. 1 (builder) to allot, fix terms & conditions for allotment and for sale of plots, fix the sale price, execute buyer's agreement and bind the owner of the property (defendant No. 2) to execute sale/lease deed in terms thereof. But this is exactly what defendant No. 1 has done and there is nothing on record to suggest that defendant No. 2 had ever objected to, repudiated or denied the actions of defendant No. 1. In fact all this shows that defendant No. 2 has impliedly admitted authorizing defendant No. 1 to act on his behalf. The specific authorization has not been placed on record. Defendants No. 1 and 2 have been inter-changeably represented by common counsels before the learned Single Judge. Present first appeal (OSA No. 15 of 2016) has been filed jointly by defendants No. 1 and 2. Their contentions are common. We, therefore, do not find any infirmity in the relief granted by the learned Single Judge. The relief granted is in terms of mechanism envisaged in the agreement dated 28.08.1995.

4(iii) Point No. 3
Readiness and willingness of plaintiffs to perform their part of the contract

The contention advanced by defendant No. 1 is that plaintiffs in all had paid an amount of Rs. 1,10,000/- to defendant No. 1. This entire amount had been refunded by defendant No. 1 to the plaintiffs. That Rs.

50,000/- were handed over in cash to plaintiff No. 1 by Rajesh Kumar (DW-4) on behalf of defendant No. 1 and an amount of Rs. 76,125/- was returned to plaintiffs by defendant No. 1 by way of demand draft. That the plaintiffs had not cross examined DW-4 regarding handing over Rs. 50,000/- in cash by him to plaintiff No. 1. Plaintiffs had also admitted receipt of demand draft of Rs. 76,125/-. The said demand draft was never returned by the plaintiffs to defendant No.1. Therefore, it stood proved on record that plaintiffs had never been ready and willing to perform their part of the contract. Hence, the suit for specific performance filed by them was liable to be dismissed.

Whereas plaintiffs' stand is that they had always been ready and willing to perform their part of the agreement by paying balance purchase price of the flat. As per terms and conditions, the amount and the installments were to be indicated by defendant No.1. Despite their repeated requests, defendant No. 1 did not ask for payment of balance purchase price. Instead, defendant No. 1 kept pressurizing the plaintiffs to repudiate the agreement. Plaintiffs had always expressed their readiness and willingness to take the agreement dated 28.08.1995 to its logical conclusion by paying the purchase price of the flat in question.

We **observe** as under :-

4(iii) (a) From perusal of the documents placed on record, it is clear that the plaintiffs had made an offer to purchase the flat in question, the tentative price of which was fixed at Rs. 1250/- per Sq. ft. The application of the plaintiffs for allotment of the flat was accepted by defendant No. 1 on 28.08.1995. The application for allotment (Ex. PW/1-A) alongwith the terms and conditions for allotment makes it clear that the plaintiffs had agreed to pay further installments of sale price as stipulated by the builder (defendant No.1) at his call.

4(iii) (b) The plaintiffs had paid an amount of Rs. 50,000/- in cash vide receipt Ex. PW-1/B to defendant No. 1 on 28.08.1995. Ex. PW-1/C is the

receipt dated 30.08.1995 issued to the plaintiffs by defendant No. 1 in lieu of Rs. 10,000/- paid by them. Defendant No. 1 vide letter dated 06.11.1995 (Ex. PW-1/D) demanded Rs. 50,000/- from plaintiff No. 1 to complete the earnest money against the booking and allotment of the flat. This amount was paid by the plaintiffs to defendant No. 1. The receipt of Rs. 50,000/- was acknowledged by defendant No. 1 on 11.12.1995 (Ex. PW-1/E). Plaintiffs thus in all paid an amount of Rs. 1,10,000/- (Rs. 50,000 + Rs. 10,000 + Rs. 50,000) to defendant No. 1 in lieu of the flat.

4(iii) (c) Instead of issuing allotment letter as assured in Ex. PW-1/D, defendant No. 1 on 12.09.1996, vide Ex. PW-1/F sought to return Rs. 60,000/- to the plaintiffs through a cheque towards purported refund of the booking amount. The plaintiffs were requested to sign a draft typed letter dated 02.09.1996 (purported request for cancellation on behalf of the plaintiffs). The plaintiffs did not sign the draft letter but responded by their letter (Ex. PW-1/H) dated 17.09.1996 expressing their intention that they wanted to retain booking of the flat and were not interested in cancellation of the booking. That they were ready and willing to pay the balance purchase price. The letter also contains the recital that the amount being sought to be refunded to them was otherwise short by Rs. 50,000/-. That one Rajesh (DW-4), who had brought the cheque of Rs. 60,000/- was requested by the plaintiffs to take back the cheque, however, he had left the cheque with the plaintiffs. The plaintiffs stated in the letter that the cheque sent by defendant No. 1 dated 11.09.1996 was not acceptable to them and they were not going to encash it since they were interested to complete the process for having the possession of the flat in question. The plaintiffs also stated that defendant No. 1 had also not assigned any reason for asking the plaintiffs to cancel the booking and to accept refund of the amount. Plaintiffs requested for issuance of the allotment letter for the flat in question. DW-3 Cap. P.S. Chimni admitted that draft letter alongwith letter dated 12.09.1996 was sent by him.

4(iii)(d) Defendant No. 1 on 14.09.1996 addressed a letter (Ex. PW-1/K) to plaintiff No. 1 that due to stay order passed by the Court, construction of blocks 'C' and 'D' had been stayed. That the Environment Commission appointed by the High Court to look into the matter had also recommended that no further construction of these two blocks should be permitted. Defendant No. 1 stated that due to above litigation, the construction was likely to be delayed indefinitely and might even be abandoned. Therefore, it was interested in cancellation of booking and accordingly had requested the plaintiffs to do so. DW-3 has admitted writing this letter to the plaintiffs.

4(iii) (e) On 26.09.1996, plaintiffs received another letter (Ex. PW-1/L) from defendant No. 1 that due to stay imposed by the High Court, the construction of Block-C might be cancelled. Defendant No. 1 further stated that presently it was not in a position to allot the flat, however, in case the plaintiffs wanted to wait indefinitely for allotment, then cheque dated 11.09.1996 for Rs. 60,000/- earlier sent to plaintiffs by defendant No.1 be returned. Plaintiffs were further requested by defendant No. 1 to acknowledge receipt of Rs. 50,000/- paid to them in cash on 12.09.1996 on behalf of defendant No.1.

4(iii) (f) On 14.10.1996, plaintiffs replied (Ex. PW-1/M) to defendant No. 1 that they had not received Rs. 50,000/- allegedly given to them in cash on behalf of defendant No. 1. They also reiterated therein that they wanted to retain the booking.

4(iii) (g) Vide letter dated 02.12.1996 (Ex. PW-1/P) defendant No. 1 asked the plaintiffs to return the cheque of Rs. 60,000/- and also to acknowledge receipt of Rs. 50,000/- alleged to have been paid to them in cash on 23.09.1996. Vide Ex. PW-1/Q, dated 06.12.1996, plaintiffs responded back by saying that amount of Rs. 50,000/- was not received by them, therefore, there was no question of it being returned or its receipt being acknowledged.

Insofar as returning of cheque of Rs. 60,000/- was concerned, plaintiffs stated that this cheque had not been encashed and that they will not encash it. Plaintiffs reiterated that they were not interested in cancellation of the booking. They further stated that defendant No.1's assumption that non-returning of cheque of Rs. 60,000/- and not acknowledging receipt of Rs. 50,000/- would amount to plaintiffs not interested in retaining the booking, was incorrect. Defendant No. 1 maintained silence for about next two years. On 07.07.1998 (Ex. PW-1/T), plaintiffs, through a legal notice, called upon defendant No. 1 to give them details of further payments required to be made by them on account of price of the flat in question. They stated that necessary and lawful dues towards consideration of the flat will be remitted by them upon hearing from defendant No. 1. This was followed by another notice of plaintiffs dated 01.12.1998 stating that plaintiffs will seek legal remedy in case defendant No. 1 did not take any positive action on their demand of issuance of allotment letter. On 22.12.1998, defendant No. 1 wrote a letter (Ex.PW-1/Z) to the plaintiffs stating that proposed construction of Blocks 'C' and 'D' was initially delayed and ultimately cancelled. That in such circumstances, an amount of Rs. 50,000/- in cash plus a sum of Rs. 60,000/- had been refunded to the plaintiffs, but the plaintiffs dishonestly did not acknowledge the receipt of Rs. 50,000/- received by them in cash. Defendant No. 1 stated that it was once again willing to refund to the plaintiffs a sum of Rs. 60,000/- alongwith interest @ 9% per annum (as per Clause 11 of the terms and conditions) which comes to Rs. 76,125/-. The amount was sought to be remitted to the plaintiffs by a demand draft dated 08.12.1998. Alongwith the letter dated 22.12.1998, demand draft dated 08.12.1998 in the sum of Rs. 76,125/- was also enclosed. Defendant No. 1 denied existence of any valid contract between it and the plaintiffs. On receipt of this reply, dated 07.12.1998, the plaintiffs filed the instant civil suit. The demand draft was made part of the plaint.

4(iii) (h) From the above series of facts and the supportive documents, it can safely be inferred that plaintiffs had been ready and willing to perform their part of the agreement. They had paid Rs. 10,000/- towards earnest money for booking the flat. On acceptance of their application for booking of Flat No. C-12, 1st Floor, Block-C, Dilshant Estate, Bharari, Shimla, they paid further amount of Rs. 50,000/-, as directed by defendant No.1. Additional amount of Rs. 50,000/- was demanded by defendant No. 1 and accordingly paid to it by plaintiffs. In all, Rs. 1,10,000/- was paid by the plaintiffs to defendant No. 1. Remaining amount of consideration settled at Rs. 1020/- per Sq. ft. (with right to seek escalation by defendant No.1 as per terms and conditions) was to be paid as and when demanded by defendant No.1. It is a fact that no further demand was raised by defendant No.1. Non raising of the demand by defendant No.1 would not lead to assumption that plaintiffs were not ready and willing to pay the balance consideration amount. The documents on record manifestly give an impression that defendant No. 1 wanted the plaintiffs to cancel the booking and for that reason had sought to return an amount of Rs. 60,000/- to the plaintiffs through cheque. Admittedly, cheque had not been encashed by the plaintiffs. Defendant No.1's stand is that it had also paid Rs. 50,000/- in cash to the plaintiffs through DW-4 Rajesh. That Ex. PW-1/F dated 12.09.1996 and the cheque for Rs. 60,000/- alongwith cash amount of Rs. 50,000/- were sent to plaintiffs through DW-4. However, DW-4 has only stated about handing over Rs. 50,000/- in cash to the plaintiffs. In Ex. PW-1/P, defendant No. 1 states that Rs. 50,000/- was returned to plaintiffs in cash on 23.09.1996. In pleadings, this date is 12.09.1996. While appearing as DW-3, Cap. P.S. Chimni stated that cash payment of Rs. 50,000/- was made to plaintiff No.1 a few days prior to sending the cheque of Rs. 60,000/-. Thus the payment of Rs. 50,000/- was not proved on record. The amount of Rs. 76,125/- sent by defendant No. 1 to the plaintiffs by way of demand draft was not on the asking of the plaintiffs. It

was sent by defendant No. 1 on its own. The said demand draft has been placed on record by the plaintiffs as Ex. PW/1-A. Plaintiffs had all along been very categoric in their stand to retain the booking and to proceed further in the matter of payment of balance amount.

4(iii) (i) Placing reliance upon **2022 SCC Online 840 (U.N. Krishnamurthy (since deceased) Thr. LRs** Vs. **A.M. Krishnamurthy)**, decided by Hon'ble Apex Court on 12.07.2022 and **(2009) 17 SCC 27 (Azhar Sultana** Vs. **B. Rajamani and others)**, it has been contended for defendant No. 1 that there is distinction between readiness and willingness to perform the contract. Both ingredients are necessary for the relief of Specific Performance. Readiness means capacity of the plaintiff to perform the contract which would include his financial position. Willingness relates to the conduct of the plaintiff. Plaintiff has to prove that all alongwith and till the final decision of the suit, he was ready and willing to perform his part of the contract. This facet has to be determined by considering all circumstances including availability of funds and mere statement or averment in plaint of readiness and willingness would not suffice.

In the instant case, plaintiffs have specifically pleaded in para 10 of the plaint that 'they had been ready and willing all along to pay the dues to defendant No.1 and had been asking it to indicate the amount so as to enable them to pay the amount and they are still willing and ready to pay the amount due as per the agreement between the parties in order to have and possess the flat in question.' Defendant No.1 in para 10 of its written statement has not specifically questioned readiness and willingness of plaintiffs. Plaintiff No. 1 while appearing as PW-1 clearly expressed that plaintiffs had always been ready and willing to pay for the flat as per terms and conditions. The documents proved on record demonstrate that plaintiffs had very clearly and that too repeatedly rejected defendant No.1's request to call off the deal and reiterated that they would like to proceed ahead with the

agreement, hence defendant No.1 (the builder) should indicate the balance price of flat as per terms and conditions. Hence, it has to be held that plaintiffs were all along ready and willing to perform their part of the agreement.

4(iv) **Point No. 4**

Limitation

An endeavour was made on behalf of defendants No. 1 and 2 to contend that the suit filed by the plaintiffs was barred by limitation. We do not find any substance in this submission for the following reasons :-

4(iv) (a) Defendant No. 1 had all along been pressurizing the plaintiffs to back off from the contract and to cancel the booking. Plaintiffs had withstood this pressure and declined to withdraw from the contract. Plaintiffs had repeatedly expressed their intentions to retain the booking. They had not encashed the cheque of Rs. 60,000/- sent to them by defendant No. 1 on its own on 02.09.1996 purportedly towards refund of booking amount. It was for defendant No. 1 to demand the balance sale consideration amount from the plaintiffs. The plaintiffs on 14.10.1996, 06.12.1996 and 07.07.1998 had requested defendant No. 1 to give details of further payments that were required to be paid by them on account of price of flat in question. They stated that they had not received the cash amount of Rs. 50,000/- as alleged by defendant No. 1 and further that they had not encashed the cheque of Rs. 60,000/- sent to them by defendant No. 1. It was on 22.12.1998 that defendant No. 1 addressed a communication to the plaintiffs to the effect that even if a firm allotment followed by an agreement had come into existence in favour of the plaintiffs, the contract is incapable of being performed due to reasons beyond its control. Alongwith the letter, a demand draft of Rs. 76,125/- was enclosed towards purported refund of the consideration amount paid by plaintiffs. As observed earlier, defendant No. 1 has not established payment of Rs. 50,000/- in cash to the plaintiffs. The demand draft of Rs.

76,125/- had been made part of the plaint by the plaintiffs. The cause of action thus accrued to the plaintiffs on 22.12.1998.

4(iv) (b) Limitation for filing a suit for specific performance in terms of Article 54 of the Schedule to the Limitation Act is three years "from the date fixed for the performance or if no such date is fixed, when the plaintiff has notice that the performance is refused."

In the instant case, defendant No. 1 repeatedly urged the plaintiffs to cancel the agreement dated 28.08.1995 and to accept refund of the amount paid to them by defendant No.1. But plaintiffs remained firm in their stand to proceed ahead and did not accept the refund. They requested defendant No. 1 to proceed further in the matter as per terms and conditions. It was on 22.12.1998 that defendant No. 1 informed the plaintiffs that it was closing the chapter and sent Rs. 76,125/- by way of demand draft towards refund of the amount paid by plaintiffs invoking Clause 11 of the terms and conditions. Though it is another matter that entire amount paid by the plaintiffs has not been proved to have been refunded, yet the fact remains that cause of action accrued to the plaintiffs on 22.12.1998 when defendant No.1 clearly and unambiguously stated that "even if a firm allotment followed by an agreement had come into existence in favour of the plaintiffs, the contract is incapable of being performed due to reasons which are beyond the control of defendant No.1". The suit instituted on 01.03.1999 was, therefore, well within the limitation period.

4(v) **Point No. 5**

Relief of Specific Performance

(2016) 4 SCC 352 (Satish Kumar Vs. **Karan Singh)** and **(1990) 3 SCC 1 (Mayawant** Vs. **Kaushalya Devi)** have been pressed in service on behalf of defendant No. 1 to contend that jurisdiction to order specific performance of contract is based on the existence of a valid and enforceable contract. Where a valid and enforceable contract has not been

made, the Court will not make a contract for the parties. The acceptance of terms must be absolute and two minds ad-idem. On the basis of Hon'ble Apex Court judgment in **(2010) 9 SCC 157 (Greater Mohali Area Development Authority** Vs. **Manju Jain)** and **(2013) 12 SCC 776 (Hansa V Gandhi** Versus **Deep Shanker Roy)**, defendant No. 1 has submitted that mere draw of lots/allocation letter does not confer any right to allotment. It is only a mode to identify the allottee. It is not an allotment by itself. Mere identification for selection of the allottee does not clothe the selected person with a legal right to allotment.

In the given facts proved on record and in light of ocular & documentary evidence on record, we are inclined to hold that plaintiffs are entitled to the relief of specific performance of contract

4(v) (a) It is well settled that specific relief is a discretionary remedy, dependent upon several factors :- (i) existence of a valid & concluded contract ; (ii) readiness & willingness of plaintiff to perform his part of contract ; (iii) plaintiffs performing his part of contract ; (iv) whether it is equitable to grant relief of specific performance regarding suit property or it causes any hardship to the defendant, if yes, how and in what manner such relief can be granted and (v) entitlement of plaintiff to any other alternative remedy such as refund of earnest money with interest etc. [**Re (2019) 3 SCC 704 (Kamal Kumar** Vs. **Premlata Joshi and others)**].

4(v) (b) In the instant case, defendant No. 1 (builder) and defendant No. 2 (owner) had jointly and also independently issued advertisements in newspapers for sale of the suit property. The advertisements give the impression that defendant No. 1 had defendant No.2's authority regarding the subject matter. Upon plaintiffs' expression of interest, defendant No. 1 gave the details of flats available for booking and allotment. Plaintiffs applied for booking and allotment of the flat. Their application was accepted by defendant No. 1 and a specific flat with specified dimension at the

mentioned price was allotted. The terms and conditions for allotment were part of application. These terms and conditions give clear picture that by acceptance of plaintiffs' application, an agreement had virtually come into existence. As per the terms and conditions, on plaintiffs paying the amount demanded by defendant No. 1, sale/lease deed was to be got executed in plaintiffs' favour by defendant No. 1 (builder) through defendant No. 2 (owner). Defendant No. 2 (owner) has not repudiated these terms and conditions. He has not taken any action against defendant No. 1 for binding him down with the terms and conditions, rather he has relied upon these very terms to reiterate the stand of defendant No. 1. As observed earlier, defendants No. 1 & 2 have concealed from the Court the best evidence documenting the authority of defendant No. 1 (builder) to deal with defendant No.2's property viz. raising construction unit/its booking/allotment/fixing terms and conditions of booking/allotment/sale etc. and binding down defendant No. 2 with such terms. Plaintiffs had paid an amount of Rs. 1,10,000/- to defendant No. 1 towards booking/allotment/part price of the flat. Remaining amount was to be paid as and when demanded by defendant No. 1. Defendant No. 2 had no role in the entire deal. His role was to come only when he was to be asked by defendant No. 1 to execute sale/lease deed in favour of the plaintiffs. Choosing the allottees was purely in the domain of defendant No. 1. No money was to be paid to defendant No. 2 by the plaintiff. A wholistic reading of the terms and conditions lead to an inescapable conclusion that the document dated 28.08.1995, of which plaintiffs are seeking enforcement, is virtually akin to an 'agreement to sell'. Defendant No. 1's contention that it cannot be compelled to get the sale/lease deed executed in plaintiffs' favour from defendant No. 2, is not tenable in given facts where terms and conditions of the agreement dated 28.08.1995 provide for this very mode and mechanism of execution of the deed. Under the terms and conditions, person applying for booking of a flat is the 'intending allottee'. After acceptance of his application, the intending

allottee virtually becomes an allottee, though a formal allotment letter is to follow. Acceptance of application i.e. selection of allottee is at the sole discretion of the builder (defendant No. 1). Purchase price is to be settled by the builder. Purchase price is to be paid by the allottee only to the builder. Under the terms and conditions, the conveyance deed is to be got executed by the builder in favour of allottee through the owner. Once this mechanism of execution of sale/lease deed is envisaged in the very terms and conditions, then the decree had to be passed in that manner only. The relief granted by the learned Single Judge was in terms of the agreement dated 28.08.1995, sought to be enforced by the plaintiffs.

4(v) (c) Defendants No. 1 and 2 have taken a stand that defendant no. 3 had executed an agreement to purchase the suit property with defendant No. 2. This is also the plea taken by defendant No. 3. No such agreement has been placed on record. While appearing in the witness box, defendant No. 3 (DW-5) deposed that price of flat was paid by him to defendant No. 1 (builder) and papers were also submitted to defendant No. 1. Meaning thereby that all along, it was defendant No. 1 with whom the intending allottee had to negotiate and that it was defendant No. 1 to whom the money was to be paid and who was to execute all paper works pertaining to allotment & transfer. It may also be noticed that defendant No. 3 has also stated as DW-5 that the suit property has not been transferred in his name and is still in the name of defendant No. 2. No agreement for transfer of flat by defendants No. 1 and 2 in favour of defendant No. 3 has been placed on record, though the stance of defendants is that suit property was sold to defendant No. 3 on 08.10.1998. This also leads to an inference that defendant No.1's projected inability to construct the flat was a lame excuse as the flat had actually been constructed but not sold to the plaintiffs.

5. Conclusion

5(i) The evidence and pleadings are clear pointer that defendant No. 1 (builder) had been authorized by defendant No. 2 (owner) to raise construction over latter's land, to advertise for allotment/sale, to settle terms & conditions of allotment & sale, to bind down defendant No. 2 with such allotment & terms and conditions. Under the terms & conditions, defendant No. 1 has to get the sale/99 years lease deed, as the case may be, executed in favour of the allottee from defendant No. 2.

5(ii) Plaintiffs' application for allotment of a specific flat with specified dimensions in a specific block, i.e. the suit property was accepted by defendant No. 1. Plainttiffs paid the money demanded by defendant No. 1. The acceptance of plaintiffs' application, in view of the terms and conditions was akin to the execution of an agreement to sell. Issuance of an allotment letter was a mere formality in the given facts.

5(iii) The money demanded by defendant No. 1 was paid by the plaintiffs. The plaintiffs had always been ready & willing to perform their part of the agreement by paying the balance consideration amount to the builder.

5(iv) The pleadings and evidence on record do not show that defendant No. 2 had ever objected to the acts of defendant No. 1 or that defendant No. 2 took any action against defendant No. 1's dealing with former's property involved in the suit viz. advertising, settling terms & conditions of allotment & sale, allotting the property, fixing purchase price, accepting consideration money/installments from the allottees and binding down defendant No. 2 with its actions of allotment and for execution of conveyance deeds in favour of allottees at the asking of defendant No. 1.

5(v) The civil suit filed by the plaintiffs was within the limitation period. In the facts & circumstances of the case, the suit for specific performance was liable to be decreed and the decree had to be passed in the manner contemplated by the agreement sought to be enforced. The decree passed by the learned Single Judge was in accordance with the agreement.

In view of above discussion, we do not find any infirmity in the impugned judgment dated 03.11.2006 passed by learned Single Judge decreeing the suit of the plaintiffs directing defendant No. 1 to allot the flat in question in favour of the plaintiffs and then to make an offer to the plaintiffs to execute buyer's agreement in its favour and if the plaintiffs execute such an agreement in accordance with terms and conditions of allotment within one month of such offer to get the sale/99 years lease deed, as the case may be, executed in their favour from defendant No. 2 and to hand over the possession of aforesaid flat to the plaintiffs. However, taking note of long pendency of the litigation, we slightly mould the relief/decree dated 03.11.2006 by making it time bound. Step one i.e. action on part of defendant No. 1 to allot the flat in question to the plaintiffs and to make an offer in their favour to execute buyer's agreement be completed within one month from today. Step two i.e. execution of buyer's agreement in accordance with terms & conditions of allotment be carried out within one month of such offer as stipulated in the impugned judgment & decree dated 03.11.2006. If the plaintiffs execute such agreement, the third step i.e. execution of the sale/99 years lease deed, as the case may be, in plaintiffs' favour and handing over of possession of the suit property to them as mandated in the impugned judgment & decree dated 03.11.2006 be got completed within a period of one month from the date of completion of the second step.

For the foregoing reasons, both the original side appeals, therefore, fail hence are dismissed. All pending applications, if any, shall also stand disposed off.

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

New India Assurance Company Ltd. ...Appellant.

Versus

Smt. Kamla Devi (since deceased)
through LRs. Sh. Nek Ram & others ... Respondents.

For the appellant: Mr. B.M. Chauhan, Senior Advocate, with Mr. M.S. Katoch, Advocate.

For the respondents: Mr. Vipin Pandit, Advocate, for respondents No.1(a) to 1 (f).
Mr. Sanjeev Bhushan, Senior Advocate, with Mr. Rajesh Kumar, Advocate, for respondent No.2.

FAO No.4115 of 2013
Decided on: 17.11.2022

Employees Compensation Act, 1923- Sections 30, 22- Appeal challenging the award of compensation and whether the learned Commissioner exercising the powers of the Employee's Compensation Act, 1923 has wrongly saddled the Insurance Company with penalty in case of their failure to deposit the compensation amount- **Held-** the Insurance Company will be liable to pay only interest if it has failed to comply with the directions passed by learned Commissioner within the time period granted by learned Commissioner and not 'penalty'- Award modified- Appeal allowed. (Para 8)

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(Oral)*

By way of this appeal, the appellant has challenged the order dated 01.03.2013, passed by the Court of learned Commissioner, Employee's Compensation, Solan, District Solan, H.P., in WCA No.51/2 of 2011, titled Smt. Kamla Devi Versus Mrs. Kamlesh Thaur & another, in terms whereof, the claim petition filed by the claimant under Section 22 of the Workman's

Compensation Act was allowed by learned Commissioner by awarding an amount of Rs.4,23, 580/- with interest @ 12% per annum w.e.f. 12.07.2015, i.e. one month from the date of accident till the deposit of the amount. Learned Commissioner further ordered that the order be complied with by the Insurance Company with which the offending vehicle was insured within one month as from the date of the order, failing which it would liable to pay penalty and interest thereupon. This appeal was admitted on 16.09.2013 on the following substantial question of law:-

> *"1. Whether the learned Commissioner exercising the powers of the Employee's Compensation Act, 1923 has wrongly saddled the Insurance Company with penalty in case of their failure to deposit the compensation amount*?"

2. Leaned Senior Counsel appearing for the appellant has argued that the order passed by learned Commissioner, in terms whereof, it has been directed that in the event of failure of the Insurance Company complying the directions passed by learned Commissioner within one month as from the date of passing of the order, it will be liable to pay a penalty as also interest, is perverse order and not sustainable in the eyes of law, for the reason that the very factum of interest being levied for non-compliance of the order takes care of the interest of the other party and in these circumstances, the imposition of the penalty also is totally unsustainable and bad in law. Learned Senior Counsel has drawn the attention of the Court to the judgment of Hon'ble Supreme Court in *Ved Prakash Garg* Versus *Premi Devi, (1997) 8 Supreme Court Cases 1* and *L.R. Ferro Alloys Ltd.* Versus *Mahavir Mahto and Another, (2002) 9 Supreme Court Cases 450* and by relying upon these judgments, he submitted that imposition of penalty by learned Commissioner on default on the part of the Insurance Company in making good the order within one month is liable to be quashed and set aside as interest of the claimant is duly protected by imposing payment of interest in the event of non-compliance of the order. Accordingly, a prayer has been made that the appeal be allowed

and the order passed by leaned Commissioner, to the extent penalty stands imposed upon the Insurance Company in the event of default in compliance of the order within one month as from the date of passing of the order, be set aside.

3. I have heard learned counsel for the parties and have gone through the impugned order as well as the judgments being relied upon by learned Senior Counsel for the appellant.

4. This Court is of the considered view that as from the date when the order was announced by learned Commissioner, the grant of one month's time to the Insurance Company to comply with said order was a prudent direction given by learned Commissioner, as it gave reasonable time to the Insurance Company to comply with the order. The order passed by learned Commissioner to the extent, it has ordered that the Insurance Company would be liable to pay interest in the event of non-compliance of the order within one month from the date of passing of it can also not be faulted with, because once learned Commissioner had passed the order, the Insurance Company was duty bound to comply the same subject to its legal rights. However, once interest stood imposed for non-compliance of the direction, the imposition of the penalty also is not sustainable in the eyes of law. In fact, the scheme of the Act *per se* does not confers any such power upon learned Commissioner that after passing of the award, in the event of the same not being complied by the Insurance Company, besides levying interest, penalty can also be imposed.

5. Hon'ble Supreme Court in *Ved Prakash Garg* Versus *Premi Devi, (1997) 8 Supreme Court Cases 1*, has been pleased to hold that if ultimately the Commissioner after giving reasonable opportunity to the employer to show cause takes the view that there is no justification for delay on the part of insured employer and because of his unjustified delay and due to his own personal fault he is held responsible for the delay, then penalty would get

imposed on him, i.e. the employer. That would add further a sum upto 50% on the principal amount by way of penalty to be made good by the defaulting employer. Hon'ble Supreme Court further held that so far as this penalty amount is concerned, it cannot be said that it automatically flows from the main liability incurred by the insured employee under the Workmen's Compensation Act. To that extent such penalty amount as imposed upon the insured employer would get out of the sweep of the term 'liablility incurred' by the insured employer as contemplated by the proviso to Section 147 (1) (b) of the Motor Vehicles Act as well as by the terms of the Insurance Policy. Hon'ble Supreme Court further held that on the aforesaid interpretation of these two statutory schemes, the conclusion becomes inevitable that when an employee suffers from a motor accident injury while on duty on the motor vehicle belonging to the insured employer, the claim for compensation payable under the Compensation Act alongwith interest thereupon, if any, as imposed by learned Commissioner of the Compensation Act will have to be made good by the Insurance Company jointly with the insured employer. But so far as the amount of penalty imposed upon the insured employer is concerned, that is on account of personal fault of the insured not backed up by any justifiable cause, the Insurance Company therefore, cannot be made liable to reimburse that part of the penalty amount imposed on the employer.

6. Similarly, in *L.R. Ferro Alloys Ltd.* Versus *Mahavir Mahto and Another, (2002) 9 Supreme Court Cases 450*, Hon'ble Supreme Court has held as under:-

> " *5. The only contention put forth before us is that the entire liability including penalty and interest will have to be reimbursed by the Insurance Company and this aspect has not been examined by the learned single Judge in the High Court and needs examination at our hands. In Ved Prakash Garg v. Premi Devi and Ors., this Court after examining the entire scheme of the Act held that payment of interest and penalty are two distinct liabilities arising under the Act, while liability to pay interest is*

> *part and parcel of legal liability to pay compensation upon default of payment of that amount within one month. Therefore, claim for compensation along with interest will have to be made good jointly by the Insurance Company with the insured employer. But, so far as the penalty imposed on the insured employer is on account of his personal fault Insurance Company cannot be made liable to reimburse penalty imposed on the employer. Hence the compensation with interest is payable by the Insurance Company but not penalty. Following the said decision and for the reasons stated therein we modify the order made by the High Court to that extent. The appeal is allowed in part accordingly*."

7. Thus, if Hon'ble Supreme Court has laid down the law that even the statutory "penalty" cannot be shifted upon the Insurance Company, then but natural, default in compliance of the final order passed by learned Commissioner, cannot carry with it any "penalty" and the best course of safeguarding the interest of the claimant is of granting interest upon the said amount in case the amount is not deposited by the Insurance Company within some reasonable time.

8. Therefore, the present appeal succeeds to the extent that order 01.03.2013, passed by the Court of learned Commissioner, Employee's Compensation, Solan, District Solan, H.P., in WCA No.51/2 of 2011, titled Smt. Kamla Devi Versus Mrs. Kamlesh Thaur & another, is modified by directing that the Insurance Company will be liable to pay only interest if it has failed to comply with the directions passed by learned Commissioner within the time period granted by learned Commissioner and not 'penalty'. Substantial question of law is answered accordingly.

9. The appeal stands disposed of, so also the pending miscellaneous applications, if any. Interim order, if any, stands vacated.

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

Between:
NATIONAL INSURANCE COMPANY LIMITED, THE MALL SHIMLA, DISTRICT SHIMLA 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. SUBHADRA DEVI S/O LATE SH. MELA RAM,
2. PRIYANKA (MINOR) D/O LATE SH.MELA RAM,
3. INJAL (MINOR) D/O LATE SH. MELA RAM,

BOTH RESPONDENT NO.2 AND 3 ARE MINOR HENCE SUED THROUGH THEIR MOTHER AND NATURAL GUARDIAN SMT. SUBHADRA DEVI I.E. RESPONDENT NO.1
ALL R/O VILLAGE JITATA, TEHSIL CHIRGAON, DISTT. SHIMLA (H.P.)

….RESPONDENTS/PETITIONERS.

4. VIDASH S/O SH. BALDEV, R/O VILLAGE JITATA, POST OFFICE MASLI, TEHSIL CHIRGAON, DISTRICT SHIMLA, H.P.

…. RESPONDENT

(BY MR. VIRENDER SINGH RATHOUR, ADVOCATE, FOR RESPONDENTS NO.1 TO 3)
(MR. KULBHUSHAN KHAJURIA, ADVOCATE, FOR RESPONDENT NO.4)

FIRST APPEAL FROM ORDER (MVA)
No.249 of 2017

Decided on: 10.11.2022

Motor Vehicle Act, 1988- Section 173- Appellant assails the Award of compensation alongwith interest in favour of the claimants passed by the Court of learned Motor Accidents Claim Tribunal-II- **Held-** Learned Tribunal erred in not appreciating the nomenclature of respondent No.2/Insurance Company impleaded as a party respondent in the Claim Petition was the National Insurance Company Limited, The Mall Shimla, whereas the insurance policy was issued by one Future General Insurance Company which was not a party before learned Trial- Holding the Insurance Company liable to indemnify the claimants not sustainable in the eyes of law- The liability to indemnify the claim shall be that of the respondent/owner- Appeal partly allowed. (Para 11)

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

J U D G M E N T

By way of this appeal, the appellant assails the Award passed by the Court of learned Motor Accidents Claim Tribunal-II, Shimla, Camp at Rohru, in M.A.C. Petition No.2-R/2 of 2014, titled Subhadra Devi & others Versus Vidash & another, decided on 18.03.2017, in terms whereof, the Claim Petition preferred by the claimants therein was decided by learned Tribunal by awarding compensation to the tune of Rs.18,45,000/- alongwith interest in favour of the claimants.

2. Brief facts necessary for the adjudication of the present appeal are that the claimants approached learned Tribunal, praying for grant of compensation, on the ground that deceased Shri Mela Ram, who was predecessor-in-interest of the claimants, lost his life in an accident on 22.07.2013, while travelling in Mahendra Pick-up bearing registration No. HP 10B-0378, in which vehicle he was travelling in his capacity as the owner of the apple boxes. At the time of accident he was returning back after selling the apple boxes in Parwanoo Mandi. As per the claimants, the age of the

deceased was thirty eight years and his monthly income was Rs.40,000/- per month. Accordingly, a prayer was made for grant of compensation to the tune of Rs.20,00,000/- in favour of the claimants.

3. The Claim Petition was opposed by the respondents therein, i.e. the owner of the vehicle and the present appellant, which was impleaded as respondent No.2 in the Claim Petition. Respondent No.2/owner before the learned Tribunal*, inter alia*, while denying the claim, took the stand that the accident was not caused on account of rash and negligent driving of the driver and further that in fact the respondent was not owner of the vehicle at the time when the accident took place. The petition was opposed by the appellant/Insurance Company, *inter alia*, on the ground that the factum of the offending vehicle being insured with the Insurance Company was not admitted.

4. The Claim Petition was allowed by the learned Tribunal as already mentioned hereinabove by awarding an amount of Rs.18,45,000/- as compensation in favour of the claimants alongwith costs and interest. As the quantum of the Award is not the subject matter of the present appeal, therefore, the Court is not dwelling any further on this aspect of the matter. The appeal against the Award has been preferred by the Insurance Company as learned Tribunal also ordered that respondent No.2 being insurer had to indemnify the Award.

5. Feeling aggrieved, the Insurance Company has preferred this appeal.

6. Learned counsel appearing for the appellant has argued that the Award passed by the learned Tribunal to the extent that the appellant has been burdened with the liability of indemnifying the Award is on the face of it perverse, for the reason that there was not even an iota of evidence placed on record either by the claimants or respondent No.1 before the learned Tribunal that the offending vehicle was duly insured with the appellant/Insurance

Company. By referring to the record of the learned Tribunal, learned counsel has argued that the perversity in the Award is writ large on the face of it from the fact that the purported exhibit which has been construed to be the insurance of the vehicle in issue, i.e. Ext.RW2/A, in fact neither pertains to the appellant/Insurance Company, nor it is relatable to the date of the accident. On this short count, he argued that the present appeal is liable to be allowed and the Award passed by learned Tribunal to the extent the liability has been fastened upon the Insurance Company is liable to be set aside.

7. Learned counsel for the respondents on the basis of the documents on record though have not been able to controvert what learned counsel for the appellant has argued, but they have submitted that a close perusal of the reply filed by the appellant-Company before the learned Tribunal demonstrates that this plea was never taken.

8. I have heard learned counsel for the parties and have also gone through the Award under challenge as well as the record of the case.

9. Learned Tribunal for the purposes of deciding the Claim Petition, framed the following issues:-

> *"1. Whether on 22.07.2013, deceased Mela Ram died on account of rash and negligent driving of vehicle Pick Up bearing registration No.HP-10B-0378 being driven by late Sunil, as alleged? .. OPP.*
> *2. Whether the petitioners are entitled to compensation amount, if so, from whom and what extent? .. OPP*
> *3. Whether the petition is not maintainable in the present form, as alleged? .. OPR 1 and 2*
> *4. Whether the amount of compensation claim is highly exaggerated, as alleged? .. OPR-1*
> *5. Whether the vehicle was being driven without any valid driving licence, route permit and fitness certificate at the time of accident, as alleged? .. OPR-2*

6. Whether deceased Mela Ram was travelling as a gratuitous passenger in the vehicle, as alleged? .. OPR-2
7. Whether the petitioners have no cause of action to file the claim petition against respondent no.2, as alleged? .. OPR-2
8. Relief."

10. Now, while answering issue No.2, after concluding as to what amount the claimants were entitled to, learned Tribunal thereafter held that respondent No.2 being insurer of the offending vehicle shall indemnify this Award as the ill-fated vehicle at the time of accident was insured with respondent No.2 vide insurance Ext.RW2/A, w.e.f. 13.05.2014 to 12.05.2015. When these findings are compared with the record of the case, the conclusion is inevitable that these findings are completely perverse. It is not in dispute that the accident took place on 22.07.2013, in which the predecessor-in-interest of the claimants lost his life. That being the case, it is not understood as to how an Insurance Policy, currency of which was from 13.05.2014 to 12.05.2015 could have been construed to be an Insurance Policy insuring the vehicle as on the date when the accident took place. This demonstrates that there was a complete non-application of judicial mind by the learned Tribunal. The story does not ends here only. Learned Tribunal further erred in not appreciating that whereas the nomenclature of respondent No.2/Insurance Company impleaded as a party respondent in the Claim Petition was the National Insurance Company Limited, The Mall Shimla, Ext.RW2/A was issued by one Future General Insurance Company which was not a party before learned Trial. Therefore, reliance upon Ext.RW2/A by learned Tribunal for holding that it was the Insurance Company which was liable to indemnify the claimants is not sustainable in the eyes of law and the present appeal is therefore, liable to be allowed on this short count. Ordered accordingly.

11. This appeal is accordingly allowed. The Award passed by learned Tribunal is set aside to the extent, it held the appellant liable to indemnify the Award. The liability to indemnify the claim shall be that of the respondent/owner. Remaining part of the Award is not disturbed. The amount which has been deposited by the appellant be refunded back to the learned counsel for the appellant/Company in its account, details whereof be provided by the learned counsel with the Registry of this Court. The appeal stands disposed of, so also the pending miscellaneous applications, if any.

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

Between:

NEW INDIA ASSURANCE COMPANY LTD. THROUGH DIV. MANAGER, DIVISION OFFICE, 3rd FLOOR, BLOCK NO.7, SDA COMPLEX, SHIMLA-9.

....APPELLANT.

(BY. MR. BRIJ MOHAN CHAUHAN, SENIOR ADVOCATE, WITH MS. KAMAKSHI TARLOKTA, ADVOCATE)

AND

1. SMT. SAVITRI DEVI, WD/O SH. MOHINDER KUMAR,
2. MISS. BHAWNA MINOR, D/O SH. MOHINDER KUMAR,
3. MISS. NISHA, D/O SH. MOHINDER KUMAR (MINOR),
4. MASTER PANKAJ, MINOR, S/O SH. MOHINDER KUMAR,
5. SMT. NARAIN, W/O SH. BHAGAT RAM.

RESPONDENTS 2 AND 4 BEING MINORS THROUGH THEIR MOTHER AND NATURAL GUARDIAN SMT. SAVITRI DEVI, RESPONDENT NO.1,
ALL RESIDENT OF VILLAGE DOBH, PO: BHAJROO, TEHSIL CHURAH, DISTT. CHAMBA.

6. SH. RAMESH KUMAR, KUMAR TRANSPORT SERVICE B.C.261-262, PIRA GARI GARI, MANGOL PURI, PHASE II, DELHI INDUSTRIAL AREA, DEHLI.

....RESPONDENTS.

(NONE FOR THE RESPONDENTS)

FIRST APPEAL FROM ORDER
No.238 of 2010
Decided on: 13.10.2022

Workmen's Compensation Act, 1923- Appeal against the award allowing the claim petition preferred by the claimants and directing the appellant to pay penalty in its failure to pay compensation amount- **Held-** Learned Commissioner erred in holding that there was a connection between the death

of deceased and his employment- Matter remanded back with directions- Appeal allowed. (Para 17)

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

O J U D G M E N T

As despite repeated calls, none has put in appearance on behalf of the respondents, they are proceeded against *ex parte*.

2. By way of this appeal, the Insurance Company has challenged award dated 20.03.2010, passed by the learned Commissioner, Workmen's Compensation Act-Cum-S.D.O.(Civil), Churah, Distt. Chamba (H.P.)., in Case No.02 of 2006, titled Smt. Savitri Devi & others Versus Shri Ramesh Kumar & another, in terms whereof while allowing the claim petition preferred by the claimants under the provisions of Workmen's Compensation Act, learned Commissioner has awarded an amount of Rs.5,44,919/- in favour of the claimants. This appeal was admitted on 13.10.2011 on the following substantial questions of law:-

> "*1. Whether the learned Commissioner has gravely erred in holding that there was casual connection between the accident and the employment of the deceased?*
> *2. Whether the learned Commissioner has gravely erred in directing the appellant to pay penalty in its failure to deposit the compensation amount within one month from the passing of the award*?"

3. I have heard learned Senior Counsel appearing for the appellants and have gone through the record of the case as well as the award under challenge.

4. Record demonstrates that an application for compensation under the Workmen's Compensation Act was filed by the petitioner i.e. the private respondent herein, on the ground that husband of petitioner No.1

father of petitioners No.2 to 4 and son of petitioner No.5, namely, Mahinder Kumar was a workman, employed by respondent Ramesh Kumar. He was engaged as a driver and in the course of his employment, Mahinder Kumar died in between 10.07.2005 and 11.07.2005, while he was on duty of the respondent/employer at Lakhanpur Border, Jammu & Kashmir. According to the petitioners, on 10.07.2005, at around 9:00 p.m., deceased who was driving the vehicle bearing Registration No.HR-55-A-2346 from Srinagar to Pathankot, had reached at Lakhanpur Check Post/Barrier. There he stopped/ stayed to get his vehicle cleared. However, thereafter, the deceased went missing and his body was recovered in Kashmir Canal near Lakhanpur barrier on 16,07.2005. Deceased Mahinder Kumar died due to drowning in the Canal, which accident arose in the course of his employment. Thereafter, a rapat was duly lodged to this effect at Police Station, Lakhanpur. The petitioners being dependent upon deceased- Mahinder Kumar were entitled for compensation and accordingly, a prayer was made to compensate them to the tune of Rs.6,17,850/-. Record demonstrates that initially the Insurance Company was not impleaded as a party before the learned Commissioner, but subsequently it stood impleded as such.

5. The petition was resisted by respondent No.1, therein *inter alia*, on the ground that though Mahinder Kumar was engaged by him on contract basis to ply the vehicle in lieu of payment of Rs.125/- per day and that the deceased was driving the vehicle from Srinagar to Pathankot and had stopped for the purpose of clearance at Lakhanpur Barrier. But as per the said respondent, on the fateful night, Mahinder Kumar without the permission of the respondent and without giving any intimation to the staff of another vehicle left the vehicle unattended alongwith his father and on the next morning, driver of other vehicle informed the respondent about the abandoning of the vehicle by Mahinder. In lieu of said act and conduct of deceased-Mahinder, the stand of respondent/employer was that it could not

be said that Mahinder was performing the job under the direction of the employer.

6. The petition was resisted by the Insurance Company, *inter alia*, on the ground that as the dead body of the deceased allegedly found on 18.07.2005 in Kashmir Canal due to drowning, which could not be termed as an accident happening in the course of employment, therefore, the Insurance Company was not liable to indemnify the claimants on behalf of the employer. Further it was denied that the claimants were entitled for the claim as prayed for by them. The Insurance Company also took the stand that the deceased had not met with the accident while driving the truck and therefore, the unfortunate death was not an act arising in the course of employment of deceased.

7. On the basis of pleadings of the parties, learned Commissioner framed the following issues:-

> "*1. Whether the deceased Shri Mohinder Kumar died during the Course of his employment?*
> *2. If issue No.2 is proved in affirmative whether the applicants are entitled for amount of Compensation as payment for?*
> *3. Whether the petition is not maintainable in the present form?*
> *4. Whether the applicants have got no cause of action and locus Standi to file the present petition?*
> *5. Whether the applicants have not come to the Court with clean hands?*
> *6. Whether the Driver was not having valid and effective license at the time of accident*?"

8. On the basis of the evidence which was led by the parties to prove their respective contentions, the issues so framed were decided as under:-

> "*ISSUE NO.1 Yes.*
> *ISSUE NO.2 Yes.*
> *ISSUE NO.3 No.*
> *ISSUE NO.4 No.*
> *ISSUE NO.5 Yes.*

ISSUE NO.6	*No.*
RELIEF:	*Allowed.*"

9. Learned Commissioner, thus allowed the claim petition by awarding an amount of Rs.5,44,919/- in favour of the claimants. Learned Commissioner by holding that the vehicle in issue was found to be duly insured by the appellant/Insurance Company, further ordered that the compensation amount shall be paid by the appellant/ Insurance Company.

10. Feeling aggrieved, the appellant/Insurance Company has preferred this appeal.

11. The substantial questions of law, on which the appeal has been admitted, have already been quoted hereinabove.

12. Learned Senior counsel appearing for the appellant has argued that the impugned award is not sustainable in the eyes of law, for the reasons that perusal thereof demonstrates that it is a cryptic award which has been passed by the learned Commissioner without any due application of mind. Learned Senior counsel also submitted that the findings which have been arrived at by the learned Commissioner are without any foundation. There is no discussion of the respective stand of the parties in the impugned award and the conclusion is bereft of any reason as to how said conclusion has been arrived at by the learned Commissioner. Learned Senior counsel further submits that neither the evidence has been properly appreciated nor properly referred to in the award so as to justify the conclusions which have been arrived at by the learned Commissioner. Accordingly, a prayer has been made that the present appeal be allowed and the impugned award be set aside.

13. Having heard the learned Senior Counsel for the appellant, this Court concurs with the submissions so made by him.

14. As already mentioned hereinabove, on the basis of pleadings, six issues were framed by the learned Commissioner. While answering Issue

No.1, all that the learned Commissioner has held is that as respondent No.1 himself admitted in his reply that the deceased workman was engaged by him as a driver to ply his vehicle and further as respondent No.1, i.e. the employer had admitted that deceased had died in Kashmir Canal due to drowning, which is an incident arising out in the course of his employment, therefore, the death of Mahinder took place in the course of employment.

15. The findings which have been so recorded by the learned Commissioner in considered view of this Court cannot be upheld for the following reasons:-

. Section 3 of the Workmen's Compensation Act, i*nter alia*, provides that if personal injury is caused to a workman by an accident arising out or in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of Chapter-II of the Workmen's Compensation Act. There is not much dispute as far as this fact is concerned that the death of deceased did not take place on account of any accident of the vehicle concerned. In fact, it is the very case of the claimants that after deceased- Mahinder parked his vehicle at Lakhanpur Barrier on the fateful night at 9:00 p.m. to get same cleared, he went missing and thereafter his dead body was recovered on 16.07.2005 from the Kashmir Canal near Lakhanpur Barrier. The reply, which has been filed by the respondent before learned Commissioner, they have specifically taken the stand that in the given circumstances in which death of Mahinder took place, it could not be said that he died in the course of his employment. This point has neither been touched upon by the learned Commissioner nor adjudicated upon. By simply stating that as respondent No.1 before it had admitted that Mahinder was engaged as a Driver by him, this Court is of the considered view that, duty cast upon the learned Commissioner to have adjudicated this point, more so for the reason that Issue No.1 framed by it was to this effect only could not be said to have been duly discharged by it. Learned Commissioner was bound to

have had returned findings in this regard by referring to the circumstances in which the dead body of Mahinder was found, which has not been done.

16. Therefore, the appeal in fact is liable to be allowed on this count alone as the learned Commissioner indeed erred in holding that there was a connection between the death of deceased and his employment without actually assigning any reason as to how this finding was arrived at by the learned Commissioner.

17. Accordingly, present appeal is allowed by setting aside the impugned award but as this Court is of the considered view that this point still needs to be answered by the learned Commissioner in light of the issues which have been framed by the said Court it will be in the interest of justice, in case the the matter is remanded back to the learned Commissioner, with the direction that the same be decided afresh on the basis of the pleadings of the parties and the evidence which already stands led by the parties before it and with further direction that the learned Commissioner shall dispose of the claim petition by passing a reasoned and a speaking order. Ordered accordingly.

18. As the claim petition was filed before the learned Commissioner, Workmen's Compensation Act-Cum-S.D.O.(Civil), Churah, Distt. Chamba (H.P.). therefore, the case is ordered to be transferred to the learned Commissioner, Workmen's Compensation/ Civil Judge, who is having jurisdiction over the area upon which at the time when the claim petition was decided, the jurisdiction was being exercised by Sub-Divisional Officer (Civil). Award amount deposited by the appellant is ordered to be released in favour of the appellant with up-to-date interest.

19. Pending miscellaneous applications, if any, stands disposed of. Interim order, if any, stands vacated.

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

National Insurance Company Limited ....Appellant.

Versus

Sarita Kumari and another ....Respondents.

2. FAO(MVA) No. 96 of 2021.

National Insurance Company Limited ....Appellant.

Versus

Sarita Kumari and another ....Respondents.

3. FAO(MVA) No.164 of 2021.

Sarita Kumari ....Appellant.

Versus

Devi Saran Negi and another ....Respondents.

4. FAO(MVA) No.165 of 2021.

Sarita Kumari ....Appellant.

Versus

Devi Saran Negi and another ....Respondents.

For the Appellant(s) : Mr. Jagdish Thakur, Advocate for the appellant-Company in FAO(MVA) Nos.95 & 96 of 2021 and for the respondent-Company in FAO(MVA) Nos. 164 and 165 of 2021.

For the Respondent(s) : Mr. Raj Negi and Mr. Rajinder Singh Thakur, Advocates, for respondent No.1 in FAO (MVA) Nos. 95 and 96 of 2021 and for the appellant in FAO (MVA) Nos. 164 and 165 of 2021.

FAO(MVA) No. 95 of 2021 a/w FAO (MVA) Nos. 96, 164 and 165 of 2021.
Reserved on : 02.12.2022.
Date of decision: 16.12.2022.

Motor Vehicles Act, 1988- Section 173- Appeal for Enhancement of compensation amount- **Held**- Vishni Devi mother of the claimant was not travelling in the vehicle as owner of the goods, therefore, she is entitled to compensation to be paid by the owner Shri Devi Saran Negi of the vehicle- Whereas Punai Uraw father of the claimant, she is held entitled to compensation to be paid by the Insurance Company- Claimant is entitled to modified compensation- FAO Nos. 95 and 96 of 2021 are dismissed, whereas, FAO Nos. 164 and 165 of 2021 are allowed. (Para 25)

Cases referred:

Anita Sharma and others vs. New India Assurance Company Limited and another (2021) 1 SCC 171;

Bimla Devi and others vs. Himachal Road Transport Corporation and others, (2009) 13 SCC 530;

Kusum Lata and others vs. Satbir and others (2011) 3 SCC 646;

N.K.V. Bros. (P.) Ltd. vs. M.Karumai Ammal and others, AIR 1980 SC 1354;

National Insurance Co. Ltd. vs. Pranay Sethi and others (2017) 16 SCC 680;

Parmeshwari vs. Amir Chand, (2011) 11 SCC 635;

Sarla Verma and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121;

1. Tarlok Singh Chauhan, Judge

Since all these appeals arise out of the same accident, therefore, the same were taken up together for consideration and are being disposed of by a common judgment.

2. Aggrieved by the awards passed by the learned Motor Accident Claims Tribunal, Kinnaur at Rampur Bushahr, Camp at Reckong Peo, (for short 'Tribunal') on 16.03.2019, the Insurance Company, on the one hand, has filed FAO (MVA) Nos. 95 and 96 of 2021 and, the claimant, on the other hand, has filed FAO (MVA) Nos. 164 and 165 of 2021 for enhancement of the compensation amount.

3. As per the claimant, on 10.04.2014, her father Punai Uraw, had hired a vehicle bearing Registration No. HP-25B-0775 from Lippa to Jangi for transportation of his box, bags and beddings. The vehicle in question was en route and at about 7.00 A.M. when reached near Village Jangi, Tehsil Moorang, District Kinnaur, H.P., the driver lost his control over the vehicle in question and it fell down in a 'Dhank' about 1200 metres from Lippa-Jangi link road to NH-5 and caused the death of her father Punai Uraw, her mother Vishni Devi and their children due to multiple injuries. The driver also died on the spot. The deceased Punai Uraw and Vishni Devi, were serving as 'Beldars' in H.P.P.W.D., Division Kalpa, Distt. Kinnaur, H.P. and were drawing salaries amounting to Rs. 21,032/- and 16,061/-, respectively. An FIR bearing registration No. 7/2014 was registered with the police at Police Station, Pooh. The deceased were of the age of 42 and 38, respectively.

4. The claimant filed claim petitions under Section 166 of the Motor Vehicles Act, 1988 (for short 'Act') claiming compensation to the tune of Rs. 45,00,000/- and 40,00,000/-, respectively.

5. Since, respondent No.1 did not file any reply despite sufficient opportunities granted to him in this behalf, therefore, his right to file the same was struck off.

6. Respondent No.2-Insurance Company filed reply wherein preliminary objections qua maintainability, violation of terms and conditions of the insurance policy, the vehicle bearing registration No. HP-25B-0775 was being plied in breach of policy conditions, vehicle was being plied by its driver without effective driving licence and the deceased were travelling in the vehicle as gratuitous passengers, were taken. The deceased were of the age of 42 and 38 years at the time of the accident and were employed as 'Beldars' with HPPWD, Kalpa. The vehicle was insured in the name of Devi Saran. The insurance policy was valid with effect from 06.09.2013 to 05.09.2014 and respondent-Insurance Company was not liable to indemnify the insured and the claimant had claimed an exaggerated amount of compensation. It was denied that the vehicle in question was hired by the deceased, his wife and children for loading their box, bags and beddings from village Lippa to Jangi.

7. From the pleadings of the parties, the learned Tribunal on 02.12.2016 framed the following issues in the claim petitions filed by the claimant :-

> "1. Whether the accident in question resulting into the death of father of the petitioner was the result of rashness and negligency on the part of the driver (since deceased) in driving the ill-fated vehicle, as alleged? OPP.
> 2. If issue No.1 is proved in affirmative, whether the petitioner is entitled to claim compensation in the sum of Rs.45,00,000/- along with interest from the respondents, jointly and severally, as alleged? OPP.
> 3. Whether the offending vehicle had been plied by respondent No.1 contrary to the provisions of the Motor Vehicle Act and terms and conditions of the insurance policy, as alleged? OPR-3.
> 4. Whether the petition has been filed in collusion with respondent No.1, as alleged? OPR-3.

5. Whether the deceased was travelling in the offending vehicle as gratuitous passenger, as alleged? OPR-3.
6. Relief."

"1. Whether the accident in question resulting into the death of mother of the petitioner was the result of rashness and negligency on the part of the driver (since deceased) in driving the ill-fated vehicle, as alleged? OPP.
2. If issue No.1 is proved in affirmative, whether the petitioner is entitled to claim compensation in the sum of Rs.40,00,000/- along with interest from the respondents, jointly and severally, as alleged? OPP.
3. Whether the offending vehicle had been plied by respondent No.1 contrary to the provisions of the Motor Vehicle Act and terms and conditions of the insurance policy, as alleged? OPR-2.
4. Whether the petition has been filed in collusion with respondent No.1, as alleged? OPR-2.
5. Whether the deceased was travelling in the offending vehicle as gratuitous passenger, as alleged? OPR-2.
6. Relief."

8. After recording evidence and evaluating the same, the learned Tribunal below allowed the claim petitions and awarded compensation to the tune of Rs. 17,99,000/- and 14,75,000/-, respectively along with interest @ 7% per annum from the date of the petition till the deposit of the amount. Respondent No.2 was directed to deposit the amount of compensation within 45 days.

9. Learned counsel for the Insurance Company would argue that the instant case is case of no evidence of negligence and, therefore, in such circumstances, even if, the accident is said to have taken place, the liability to pay the compensation could not have been fastened upon the Insurance Company, especially, when it was so proved on record that the deceased were travelling as gratuitous passengers in the vehicle in question.

10. I have heard the learned counsel for the parties and have gone through the records of the case.

11. At the outset, it needs to be observed that it is well-known that in a case related to motor accident claim, the claimants are not required to prove the case as is required to be done in a criminal case.

12. Reference in this regard can conveniently be made to a judgment rendered by the Hon'ble Supreme Court in ***Kusum Lata and others*** *vs.* ***Satbir and others (2011) 3 SCC 646***. In matters like this, the Courts and Tribunals are required to take a holistic view of the matter and it is necessary to determine that strict proof of accident caused by a particular vehicle in a particular manner may not be possible to be done by the claimants. The claimants are merely to establish their case on the touchstone of preponderance of probabilities and the standard of proof beyond reasonable doubt cannot be applied. (Refer: ***Bimla Devi and others*** *vs.* ***Himachal Road Transport Corporation and others, (2009) 13 SCC 530)***.

13. The claimant is the daughter of the deceased, who belongs to the State of Jharkhand and it would be extremely harsh and otherwise unwarranted to place a very strict proof of the mode and manner of the accident upon the claimant. Rather, this is a fit case where doctrine of *res ipsa loquitur* needs to be applied.

14. In taking this view, I am supported by the judgment of the Hon'ble Supreme Court in ***N.K.V. Bros. (P.) Ltd.*** *vs.* ***M.Karumai Ammal and others, AIR 1980 SC 1354***, more particularly, the observations contained in para-3, which read thus:-

> "3. Road accidents are one of the top killers in our country, specially when truck and bus drivers operate nocturnally. This proverbial recklessness often persuades the courts, as has been observed by us earlier in other cases, to draw an initial presumption in several cases based on the doctrine of res ipsa loquitur. Accidents Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there. Save in plain cases, culpability must be inferred from the circumstances where it is fairly reasonable. The court

> should not succumb to niceties, technicalities and mystic maybes. We are emphasising this aspect because we are often distressed by transport operators getting away with it thanks to judicial laxity, despite the fact that they do not exercise sufficient disciplinary control over the drivers in the matter of careful driving. The heavy economic impact of culpable driving of public transport must bring owner and driver to their responsibility to their 'neighbour'. Indeed, the State must seriously consider no-fault liability by legislation. A second aspect which pains us is the inadequacy of the compensation or undue parsimony practised by tribunals. We must remember that judicial tribunals are State organs and Article 41 of the Constitution lays the jurisprudential foundation for state relief against accidental disablement of citizens. There is no justification for niggardliness in compensation. A third factor which is harrowing is the enormous delay in disposal of accident cases resulting in compensation, even if awarded, being postponed by several years. The States must appoint sufficient number of tribunals and the High Courts should insist upon quick disposals so that the trauma and tragedy already sustained may not be magnified by the injustice of delayed justice. Many States are unjustly indifferent in this regard."

15. The Hon'ble Supreme Court has otherwise repeatedly held that the approach of the Tribunals while dealing with such matters where it is extremely difficult to get evidence have to be sensitive enough to appreciate the turn of events at the spot or the appellant-claimants' hardship in tracing witnesses and collecting information for an accident when they themselves were not present at the accident spot. Further, the Courts/Tribunals must be mindful of the fact that strict principles of evidence and standards of proof like in a criminal trial are inapplicable to MACT case as the the standard of proof in such like matters is one of preponderance of probabilities, rather than to prove beyond reasonable doubt. The Courts/Tribunals have to be mindful that the approach and role of Courts/Tribunals while examining evidence in accident claim cases ought not to be to find fault with non-examination of some best eyewitnesses, as may happen in a criminal trial; but, instead

should be only to analyse the material placed on record by the parties to ascertain whether the claimant's version is more likely than not true. The Courts/Tribunals in matters of this nature are required to take holistic view and to bear in mind that strict proof of evidence caused by a particular bus in a specific manner may not be possible to be done by the claimants. The Courts/Tribunals must take into account first the legal effect of the failure to cross-examine the crucial witnesses on crucial issues.

16. Motor Vehicles Act is a benevolent piece of legislation. Certain guiding principles have evolved over the years which form the bedrock for evaluating the evidence and determining the compensation under the Motor Vehicles Act. Some of these principles may be stated thus:-

(i) Tribunals are free to evolve their procedure and they are not guided strictly by the principles of Civil Procedure Code.

(ii) The test in the claim petitions is preponderance of probabilities. Claimant is not required to prove the accident beyond doubt as required under the criminal proceedings.(Bimla Devi vs. Himachal RTC, (2009) 13 SCC 530.

(iii) Absence or non-production of FIR or the result of criminal trial does not have any bearing on the result of claim petition. (Minu Rout vs. Satya Pradyumna Mohapatra, (2013) 10 SCC 695.

(iv) Production of FIR and the report filed under Section 173 Cr.P.C. indicting the offending vehicle in the prima facie evidence to prove the accident.(N.K.V. Bros. (P) Ltd. vs. M. Karumai Ammal and Ors., (1980) 3 SCC 457.

(v) Examination of some best eye-witness is not the requirement in the motor-accident claims. Non-examination thereof is not fatal. (Anita Sharma vs. New India Assurance Co. Ltd., (2021) 1 SCC 171.

(vi) Site plan prepared by the Investigating Agency alone is not sufficient to prove the plea of contributory negligence. Onus to prove plea of negligence always lies on the respondent.(Sunita and others vs. Rajasthan State Road Transport Co. & Anr. (2020) 13 SCC 486.

vii) Some discrepancies are bound to appear in the ocular evidence as memory fades with the passage of time. (Ram Naresh vs. State of U.P. (2010) 15 SCC 252.

viii) Where best evidence has been withheld by the owner of the offending vehicle, adverse inference has to be drawn. (Smt. Laxmibai vs. Karnataka State Road Transport. (2001) 5 SCC 59.
(ix) Admission by owner of involvement of vehicle is not binding upon the driver of the vehicle (Saroj and others vs. Het Lal and others. (2011) 1 SCC 388.
(x) Failure to cross- examine the witness despite opportunity having been provided amounts to tacit admission of the testimony of the said witness. (Anita Sharma vs. New India Assurance Co. Ltd. (2021) 1 SCC 171.
(xi) Mere non-lodging of FIR or report by the injured is no ground to reject the claim petition when the other evidence is satisfactory to prove the claim. (Ravi vs. Badrinarayan, (2011) 4 SCC 693.
(xii) Whole evidence has to be considered for recording finding. Evidence should not be read in isolated parts. Similarly, hairsplitting of a statement made by the witness is not permissible. Whole testimony has to be seen not isolated sentences. (Sunil Kumar Sambhudayal Gupta and ors. vs. State of Maharashtra, (2010) 13 SCC 657.

17. In ***Anita Sharma and others*** *vs.* ***New India Assurance Company Limited and another (2021) 1 SCC 171,*** the Hon'ble Supreme Court reiterated the view earlier taken in ***Parmeshwari vs. Amir Chand, (2011) 11 SCC 635*** that it is very difficult to trace witnesses and collect information for an accident which took place many hundreds of kilometers away and in a situation of this nature, the Tribunal has rightly taken a holistic view of the matter.

18. This Court is not oblivious to the fact that the normal rule is that it is for the plaintiff to prove negligence but as in some accident cases hardship is caused to the plaintiff as the true cause of the accident is not known to him but is solely within the knowledge of the defendant, who caused it. The plaintiff can prove the accident but cannot prove how it happened to establish negligence on the part of the defendant. This hardship in many cases can be avoided by applying the principle of *res ipsa loquitur*. The general

purport of the words *"res ipsa loquitur"* is that the accident speaks for itself or tells its own story. There are cases in which the accident speaks for itself so that it is sufficient for the plaintiff to prove the accident and nothing more. It will then be for the defendant to establish that the accident happened due to some other cause than his own negligence. Where the maxim is applied, the burden is on the defendant to show either that in fact he was not negligent or that the accident might more probably have taken place in a manner which does not connote negligence on its part.

19. Applying the aforesaid judgments to the instant cases as also applying the ratio of *res ipsa loquitur* and from a perusal of the copy of the FIR, it is duly established on record that the accident took place because of the rash and negligent driving of the driver of the vehicle bearing registration No. HP-25B-0775. Therefore, it is established on record that the deceased had died on account of rash and negligent driving of the vehicle in question.

20. Now the moot question is whether the deceased were travelling in the vehicle in question as gratuitous passengers or were travelling as owners of goods after hiring the vehicle?

21. The evidence led by the parties establishes on record beyond doubt that as regards Punai Uraw, father of the claimant, there is sufficient evidence to show that he was travelling in the vehicle as owner of the goods and returning back to his native place with such goods. This is not only so established and duly proved by the claimant in her statement, but also tested in the cross examination conducted by the owner of the vehicle and such statement has not been shattered in the cross-examination conducted by the Insurance Company**.** However, as regards mother Vishni Devi, there is no evidence whatsoever to establish that she was travelling in the vehicle as owner of the goods, rather, it appears that she was simply accompanying her husband while going back to their native village after the father of the claimant had hired the vehicle.

22. As regards, the determination of compensation, the question is no longer *res integra* as the compensation has now to be determined in light of the judgment passed by the Hon'ble Supreme Court in ***Sarla Verma and others*** *vs.* ***Delhi Transport Corporation and another, (2009) 6 SCC 121*** and thereafter as per judgment of the Constitution Bench in ***National Insurance Co. Ltd.*** *vs.* ***Pranay Sethi and others (2017) 16 SCC 680.***

23. Applying the ratio of ***Pranay Sethi's case*** (supra) to the facts of the instant cases, the claimant would be entitled to the following compensation:-

FAO(MVA) No. 164 of 2021.

Sr.No.	**Award passed by the Tribunal**	**Modified Award by this Court**
	Details/Particulars	Details/Particulars
	Age of the deceased: 42 years	Age of the deceased: 42 years
(i)	Income of deceased: Rs.21,000/-	Income : Rs.21,000/-
(ii)	No addition on account of future prospects given	30% addition : Rs.21,000x30/100=Rs.6,300/-
(iii)	Total Income : Rs. 21,000/-	Total Income : Rs.21,000/-+ Rs.6,300/-= Rs.27,300/-
(iv)	No. of dependent 1 as loss of dependency taken : Rs10,500/- as per Sarla Verma vs. DTC.	Rs.27,300/2= Rs.13,650/-
(v)	Multiplier of 14	Multiplier of 14
(vi)	Annual Income: Rs.1,26,000/-	Annual Income : Rs. 1,63,800/-
(vii)	Loss of Income : Rs. 17,64,000/- (Rs.1,26,000x14)	Loss of Income : Rs. 22,93,200/- (Rs.1,63,800 X 14)
(viii)	Loss of love and affection: Rs.10,000/-	Not payable
(ix)	Loss of Estate : Not paid	Loss of Estate : Rs.15,000/- (NIC vs. Pranay Sethi)
(x)	Loss of Funeral Expenses:	Loss of Funeral Expenses :

	Rs.25,000/-	Rs.15,000/-(NIC vs. Pranay Sethi)
(xi)	Loss of Consortium : Not paid	Loss of Consortium: Rs.40,000/-(NIC vs. Pranay Sethi)
	Total : Rs.17,99,000/- plus interest @ 7% per annum.	Total : Rs. 23,63,000/- plus interest @ 7% per annum.

FAO(MVA) No. 165 of 2021.

Sr.No.	**Award passed by the Tribunal**	**Modified Award by this Court**
	Details/Particulars	Details/Particulars
	Age of the deceased: 38 years	Age of the deceased: 38 years
(i)	Income of deceased: Rs.16,000/-	Income : Rs.16,000/-
(ii)	Addition on account of future prospects: Not given	50% addition to be given as deceased was "Beldar" with PWD: Rs.8,000 as per NIC vs. Pranay Sethi.
(iii)	Total Income : Rs. 16,000/-	Total Income : Rs.16,000+ Rs.8,000/-= Rs.24,000/-
(iv)	Annual Income: Rs.16,000x12= Rs.1,92,000/-	Annual Income : Rs.24,000x12=Rs.2,88,000/-.
(v)	½ on account of Personal Expenses as number of dependent is 1 as per Sarla Verma vs. DTC: Rs.1,92,000/2= Rs.96,000/-	½ of Rs. 2,88,000/-= Rs.1,44,000/-
(vi)	Multiplier of 15	Multiplier of 15
(vii)	Loss of Income : Rs.96,000x15=Rs.14,40,000/-	Loss of Income : 1,44,000x15=Rs.21,60,000/-
(viii)	Loss of love and affection: Rs.10,000/-	Not payable
(ix)	Loss of Estate : Nil	Loss of Estate : Rs.15,000/-
(x)	Loss of Funeral Expenses: Rs.25,000/-	Loss of Funeral Expenses : Rs.15,000/-
(xi)	Loss of Consortium : Nil	Loss of Consortium: Rs.40,000/-

	Total : Rs.14,75,000/- plus interest @ 7% per annum.	Total : Rs. 22,30,000/- plus interest @ 7% per annum.

24. Since, this Court has already held that Vishni Devi mother of the claimant was not travelling in the vehicle as owner of the goods, therefore, she is entitled to compensation to be paid by the owner Shri Devi Saran Negi of the vehicle bearing registration No. HP-25B-0775. Whereas, in the case of Punai Uraw father of the claimant, she is held entitled to compensation to be paid by the Insurance Company.

25. In view of the aforesaid discussion and for the reasons stated above, FAO Nos. 95 and 96 of 2021 are dismissed, whereas, FAO Nos. 164 and 165 of 2021 are allowed in the aforesaid terms. The claimant is held entitled to the modified award amount of Rs.23,63,000/- and Rs.22,30,000/-, respectively, plus interest at the rate of 7% per annum, leaving the parties to bear their own costs. Pending application(s), if any, shall also stand disposed of.

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

Madan Lal and others Petitioners

Versus

State of H.P. and another Respondents

For the Petitioners : Mr. Bhuvnesh Sharma, Senior Advocate, with Mr. Parav Sharma, Advocate

For the Respondent : Ms. Ritta Goswami, Additional Advocate General, with Mr. Ram Lal Thakur, Assistant Advocate General

CWPOA No. 7531 of 2019
Reserved on : 23.12.2022
Date of decision:30.12.2022

Constitution of India, 1950- Article 226- **The Himachal Pradesh Civil Services (Revised Pay) Rules, 1998-** Rule 7- Writ petition for entitlement for benefit of ad-hoc service towards seniority, promotion, ACP, bunching and stagnation Scale w.e.f. due date with all consequential benefits and payment of arrears so accrued- **Held-** Having earned increments for the ad-hoc service, the petitioners are certainly entitled for bunching benefit of counting these increments for fixation of their pay in the revised pay scale- Assured Career Progression (ACP) Scheme has not been placed on record- Grant of ACP claimed declined- Petition partly allowed. (Para 5)

Cases referred:

Malook Singh and others Vs. State of Punjab and others (2021) 12 Scale 159;

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge

In **LHLJ 2009 (2) 887 (Paras Ram** Vs. **State of Himachal Pradesh and another)**, it was held that ad-hoc service followed without break by immediate regularization is to be counted towards annual increments. While arriving at this decision, the Court noted Office Letter dated 27.09.1977 which reads as under :-

"I am directed to refer to your letter No. EDN-H(2) B (2) 6/88-III dated the 12th September, 1977, on the above subject and to say that where there is a break in Ad-Hoc service and regular appointment, the period of Ad-Hoc service will not count towards increment, but where the ad-Hoc appointment in following by immediately regular appointment and there is no break in service, the AD-Hoc service will be counted towards increment in the normal course."

The above decision was followed by the Division Bench of this Court in its judgment dated 15.07.2010 rendered in LPA No. 36 of 2010 (Sita Ram Vs. State of H.P.) wherein benefit of ad-hoc service in addition to grant of increments was also allowed for the purpose of pension. Relevant extract from the judgment reads thus :-

"….However, this court in Paras Ram's case had laid down the law that if ad hoc service is followed by regular service in the same post, the said service could be counted for the purpose of increments. It is also settled principle of law that any service that is counted for the purpose of increment, will count for pension also. To that extent the appellant is justified in making submission that period may be treated as qualifying service for the purpose of pension also. However, so far as the seniority is concerned, the basic norms of seniority will be counted on the date of appointment in regular service, qua those who are already in regular service as on that date. If the claim of the petitioner-appellant is to be accepted, it will unsettle the settled seniority of those regular teachers. It may also not be out of context to note that none of the affected teachers is before us. Be that, as it may. Since the petitioner-appellant under law is entitled only for counting the ad hoc service, followed by regular service for the purpose of increments and pension, there is no merit in the appeal and the same is dismissed subject to the above modification that the period that is counted for the purpose of increment, will count for pension also."

2. Relying upon the above decisions, petitioners have raised further contention in the instant writ petition that (i) increments given for such ad-hoc service should also be counted towards bunching benefits and (ii) to count ad-hoc service for grant of Assured Career Progression (ACP). The substantive reliefs prayed for by the petitioners are as follows :-

"i) *That the impugned rejection dated 19.10.2015, Annexure A-3, may kindly be quashed and set aside and the applicants may kindly be held*

entitled for the benefit of their ad-hoc service towards seniority, promotion, ACP, bunching and stagnation Scale w.e.f. due date with all consequential benefits.

ii) That the arrears accrued to the applicants on account of bunching, ACP and stagnation scale after revision of pay, may kindly be ordered to be paid with interest."

Respondent No. 2 has rejected petitioners' representation seeking bunching of increments and grant of ACP for the ad-hoc service vide order dated 19.10.2015 (Annexure A-3)). This order has also been assailed in the petition.

3. On completion of 10 years of ad-hoc service, the petitioners' services were regularized by the respondents by awarding them special JBT certificates. In terms of the judgments passed in Paras Ram and Sita Ram's cases *(supra),* the benefit of ad-hoc service has been granted to the petitioners for the purpose of releasing them annual increments. It is also not in dispute that the ad-hoc service rendered by the petitioners is also to be counted towards due and admissible pension to the petitioners. In view of law laid down in aforesaid decisions, ad-hoc service cannot be counted towards seniority [***Re: (2021) 12 Scale 159 Malook Singh and others*** *Vs.* ***State of Punjab and others***] wherein it was held that initial stop gap arrangement being not in accordance with the rules and the ad-hoc service cannot be counted for the purpose of seniority.

4. The questions for consideration propounded in the instant petition are:-

(i) Whether the increments granted to the petitioners for the period of ad-hoc service rendered by them (in terms of decisions rendered in Paras Ram & Sita Ram's cases *supra)*, can also be considered for grant of bunching benefits or not ?

(ii) Whether the ad-hoc service can be considered for grant of Assured Career Progression ?

5. I have heard learned counsel on both sides on the questions involved in the instant petition. In my considered view the increments earned by the petitioners during the period of ad-hoc serevice in terms of decisions in Paras Ram & Sita Ram's cases *supra*, are liable to be considered for the grant of bunching benefits. However, ad-hoc service is not liable to be counted for grant of ACP. The reasons for holding so are as under :-

Question No. 1

5 (i) Bunching occurs in fixation of pay when pay at two or more consecutive stages in a pay scale/grade pay in the pre-revised scale gets fixed at the same stage in the corresponding pay scale/level in the revised pay structure. In other words, bunching occurs when two or more stages gets bunched and benefit of one increment is to be given for every two or more stages bunched.

5 (ii) The Himachal Pradesh Civil Services (Revised Pay) Rules, 1998 came into force from 01.01.1996. Rule 7 of these rules provided fixation of pay in the revised scale. The proviso to the rule provided for bunching of stages in the existing scale. The relevant part of this rule is extracted hereinafter :-

> *"**7. Fixation of Pay in the Revised Scale.**- The pay of a Government employee who opts or is deemed to have opted for the revised scale in terms of the provisions of these rules shall, unless in any case the Government by special order otherwise directs, be fixed in the following manner, namely:-*
> *(j) an amount representing forty percent of the basic pay in the existing scale shall be added to the "Existing Emoluments" of the employee; and*
> *(ii) after the existing emoluments have been so increased, the pay shall thereafter be fixed in the revised scale at the stage next above the amount of the existing emoluments so computed, if it falls between two stages and it the amount so computed is equal to a stage in the revised scale, then the pay shall be fixed at such equal stage;*
> *Provided that:-*

(a) if the minimum of the revised scale is more than the amount so arrived at, the pay shall be fixed at the minimum of the revised scale;
(b) If the amount so arrived at is higher than the maximum of the revised scale, the amount in excess of the maximum of the revised scale shall be treated as personal pay which shall be absorbed in future increments and shall be reckoned as pay for all purposes;

Provided further that where in the fixation of pay, the pay of Government employees drawing pay at more than three consecutive stages in an existing scale gets bunched, that is to say, gets fixed in the revised scale at the same stage, the pay in the revised scale of such of those government employees who are drawing pay beyond the first three consecutive stages in the existing scale shall be stepped up by grant of increment (s) in the revised scale in the following manner, namely :-

(a) for the Government employees drawing pay from the fourth upto the sixth stage in the existing scale- by one increment;

(b) for the Government employees drawing pay from the seventh upto the ninth stage in the existing scale, if there is bunching beyond the sixth stage- by two increments;

(c) For the Government employee drawing pay from the tenth upto the twelfth stage in the existing scale if there is bunching beyond the ninth stage- by three increments;

(d) For the Government employees drawing pay from the thirteenth upto the fifteenth stage in the existing scale, if there is bunching beyond the twelfth stage- by four increments;

If by stepping up the pay as above, the pay of a Government employee gets fixed up at a stage in the revised scale which is higher than the stage at which the pay of a government employee who was drawing more pay in the same existing scale is fixed, the pay of the latter shall also be stepped up to the level at par with the former;

Provided further that the fixation thus made shall ensure that every Government employee shall get at least one increment in the revised scale for every three increments (inclusive of ex-gratia increment (s), if any) in the existing scale; NOTE:- See Illustrations 1 to 7 appended to these rules for guidance…….".

On 07.11.1998, State Finance Department issued clarifications (Annexure MA-1) concerning Himachal Pradesh Civil Services (Revised Pay) Rules, 1998. Some of the relevant clarifications pertaining to bunching of increments read as under :-

" …..3. As per second proviso below rule 7 of the Revised Pay Rules, ibid, wherein the fixation of pay, the Benefit of bunching and stepping up of pay in such cases is to be allowed after identifying the

pay of Government employee, drawing pay at more than 3 consecutive stages in the existing scale gets bunched i.e. to say gets fixed I the revised scale at the same stage, the pay in the revised scale of such of the employees, who are drawing pay beyond the first three consecutive stages and so on in the existing scale, shall be stepped up by grant of increments according to number of stages.

It may be elucidated whether the benefit of bunching in such cases has to be allowed after identifying the particular officers or on presumptive basis, with reference to stages bunched.

particular officers/officials in the cadre.

4. An officer exercises option for fixation of pay in the revised scales w.e.f. 1.1.96 without getting annual increment due on 1.1.1996 in existing scale, as per note (1) under rule-7 of the H.P. Civil Services (Revised Pay) Rules, 1998. It needs to be clarified whether in such a case, the officer is to be first granted the normal increment due on 1.1.96 in the revised scale, before allowing him the benefit of bunching admissible, if any, or whether he is to be considered for the benefit of bunching before."

As is clear in Second Proviso under Rule 7 bunching is to be done by counting increments in the existing scale only. The pay actually drawn by an employee is to be taken into consideration. The pay of an employee, therefore, is to be fixed in the revised scale without taking annual due on 1.1.96 into consideration.

5 (iii) Vide office letter dated 24.12.2010 (Annexure R-1), the respondent-State circulated the advice given by the Finance Department that "the benefit of bunching increment shall not be admissible on the initial ad-hoc service". This letter was strongly pressed into service by the learned Additional Advocate General while opposing the writ petition.

5 (iv) It is beyond comprehension that when ad-hoc service (rendered in the manner prescribed in Paras Ram & Sita Ram's cases *supra)* is to be counted for grant of pension and increments, then why it is to be denied for the purpose of bunching of increments. The increments already earned by an employee are to be taken into consideration for grant of bunching benefit for fixation of his pay in the revised scale. Grant of increments and bunching of such increments is not dependent upon nature of service, be it ad-hoc or regular. It is the pleaded case of respondents in the reply that "in the bunching provisions of pay revision Rules, only the term "stages" or increment earned" on the post in previous scale is mentioned and it is nowhere mentioned that the service should be on regular or ad-hoc basis." Bunching of increments is purely dependent upon number of increments earned by the employee in the existing scale. It is an admitted fact that in accordance with decisions rendered in Paras Ram & Sita Ram's cases *supra,* the petitioners have earned and have been granted increments for the ad-hoc service rendered by them immediately before their regularization. Having earned increments for the ad-hoc service, the petitioners are certainly entitled for bunching benefit of counting these increments for fixation of their pay in the revised pay scale.

Question No. 2

5 (v) The next relief prayed for by the petitioners is for counting the ad-hoc service rendered by them for the purpose of allowing Assured Career Progression (ACP). No basis for claiming this relief has been

put forth. The only argument raised is that this benefit was granted by the respondents to a couple of employees, hence, on the same analogy, the benefit of ACP by counting the ad-hoc service should also be allowed to the petitioners. The respondents have pleaded that the benefit of ACP was wrongly passed on to a couple of employees, however, the mistake has since long been rectified and the benefit of ACP erroneously released in favour of some of the employees now stands adjusted. It is well settled that negative parity cannot be claimed. Ground of discrimination cannot be urged citing wrong orders passed in favour of others. No other reason has been put forth by the petitioners for releasing them the benefit of ACP. Assured Career Progression (ACP) Scheme has not been placed on record. Benefit of ACP is usually allowed to those regular government servants who do not have promotion avenues and stagnate for long time on the post held by them. The objective of an Assured Career Progression Scheme is to ensure financial upgradation, enhancements/promotions to a regular employee in his entire service career. Petitioners have neither placed on record the Assured Career Progression Scheme nor any of its clauses are under challenge. By nature of applicability and the object of ACP, it cannot be granted for the ad-hoc service rendered by the petitioners.

No other point was urged.

5. In view of the above discussion, it is held that the increments earned by the petitioners for the duration of their ad-hoc service in terms of decisions rendered in Paras Ram & Sita Ram's cases *(supra)* are liable to be bunched for the purpose of fixation of their pay in the revised pay scale. The respondents are directed to grant the benefit of bunching of increments earned by the petitioners during ad-hoc service and fix their pay accordingly within a period of six weeks from today. The relief of counting their ad-hoc service towards grant of ACP claimed by the petitioners is declined.

The writ petition stands disposed of in the aforesaid terms alongwith the pending applications, if any.

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

Chander Kanta ....Petitioner.

Versus

State of HP & ors. ... Respondents.

For the petitioner : Mr. Sanjay Jaswal, Advocate.

For the respondents : Mr. Sanjeev Sood, Additional Advocate General.

CWPOA No. 1859 of 2019
Decided on: 23.12.2022

Constitution of India, 1950- Article 226- Pay the arrears of annual increment of the ad hoc service period rendered and promotion after due calculation- **Held**- No explanation as to why the office order was not challenged by the petitioner within the statutory period prescribed in the HP Administrative Tribunal or within some reasonable period- Ad hoc service rendered by the candidate is to be treated as qualifying service for the purpose of pension- Petition partly allowed. (Paras 6, 7)

The following judgment of the Court was delivered:

Ajay Mohan Goel, (*Oral*)

By way of present writ petition, the petitioner has prayed for the following reliefs :-

> ***"i) That the respondents may kindly be directed to calculate and pay the arrears of annual increment of the ad hoc service period rendered w.e.f. 29.11.1985 to 31.3.1994 i.e. from the date of initial appointment on ad hoc basis as TGT (Arts) and till her regularization as TGT (Arts) and pay the same with interest to the petitioner. Respondents may be further directed to count the ad hoc service for the purpose of pensionary benefits also.***

ii) That the respondents may be directed to count the period of ad hoc service for the purpose of promotion;

iii) That the respondents may be directed to grant increment after completion of 18 years of service under the ACPS Scheme after 8/18 years, which has not been given to he petitioner, as per letter dated 15.2.1996."

2. Learned counsel for the petitioner at the very outset submitted that the petitioner is only pressing relief No.(i). He has also drawn attention of the Court to Annexure P-1 appended with the petition and submitted that the period of service rendered by the petitioner on ad-hoc basis has been counted towards annual increments by the respondent-department in terms of order dated 1996 but benefit has been granted to the petitioner notionally only uptill the issuance of Annexure P-1. He has also drawn the attention of the Court to the judgment rendered by Hon'ble Division Bench of this Court in LPA No. 36 of 2010, titled **Sita Ram vs. State of HP & ors** and submitted that in terms of the law laid down by Hon'ble Division Bench of this Court, the period of service rendered by the petitioner on ad hoc basis, is to be counted for the purpose of increments and further this period has also to be counted as qualifying service for the purpose of pension. Accordingly, he has prayed that the present petition be allowed by directing that the period spent by the petitioner in service of the respondent-department on ad hoc basis, as qualifying service for the purpose of pension and further respondent-department be directed to pay the actual benefits of annual increments post consideration of the services rendered by the petitioner on ad hoc basis and not notional basis, as has been done in terms of Annexure P-1.

3. The petition is opposed by the respondent-State, inter alia, on the ground that the relief of counting of ad hoc service for the purpose of increments has already been granted in favour of the petitioner in the year 1996 and her contention that the same be given on actual basis has no force

for the reasons that Annexure P-1 was issued in the year 1996 and if the petitioner really was aggrieved by the contents thereof, then she should have had assailed the same within the period of limitation as from the date of issuing of such office order as was prescribed under the HP Administrative Tribunals in view of the fact that HP Administrative Tribunal was functional at the relevant time.

4. Learned Additional Advocate General has also submitted that as the initial appointment of the petitioner was not in terms of the R&P Rules, therefore, the ad hoc service rendered by the petitioner cannot be counted for the purpose of pension.

5. Having heard learned counsel for the parties and having gone through the pleadings as well as documents appended therewith, this Court is of the considered view that in view of the office order dated 3.7.1996, in terms whereof the service rendered by the petitioner has already been counted towards annual increments, the prayer being made to the effect that respondent-department be directed to give her actual benefit and not notional benefits, has no force. Annexure P-1 i.e. office order in terms whereof the service rendered by the petitioner on ad hoc basis were ordered to be counted towards annual increments, as was issued by the competent authority on 3.7.1996. There is no explanation in the writ petition as to why the office order was not challenged by the petitioner within the statutory period prescribed in the HP Administrative Tribunal or within some reasonable period thereafter. This demonstrates that the petitioner was initially satisfied with the contents of office order dated 3.7.1996 and in this view of the matter, the petitioner cannot be permitted to rake up this controversy after so many years, as the present writ petition was only filed in the year 2012.

6. As far as the second relief sought by the petitioner that the service rendered by her be treated as qualifying service for the purpose of pension also i.e. ad hoc service rendered by her, as the Hon'ble Division

Bench of this Court in LPA No. 36 of 2010 supra, has already held that the ad hoc service rendered by the candidate is to be treated as qualifying service for the purpose of pension, the contention of the respondent-State to the contrary cannot be accepted and the petitioner is entitled for the said relief.

7. Accordingly, this writ petition is disposed of by granting limited relief to the petitioner that the service rendered by her on ad hoc basis be treated as qualifying service for the purpose of pension also. As the petitioner is stated to have superannuated in the year 2014, therefore, it is directed that the benefit of the reliefs granted to the petitioner by this Court shall stand conferred upon her from the date of her retirement as this petition was filed by her while in service.

8. In view of above the petition stands disposed of, so also pending miscellaneous applications, if any.

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

Brij Lal ...Petitioner

Versus

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

For the petitioner : Mr. Chandranarayan Singh, Advocate.

For the respondents: Mr. Desh Raj Thakur, Addl. Advocate General with Mr. Narender Thakur, Deputy Advocate General, for respondent No.1-State.
Mr. Tara Singh Chauhan, Advocate, for respondents No. 2 to 4.

CWPOA No. 2284 of 2020
Reserved on: 13.12.2022
Decided on: 26.12.2022

Constitution of India, 1950- Article 226- Retrospective benefit of amendment carried in the R & P Rules and promotion to post of Foreman along with consequential benefits- **Held-** Mere existence of post or vacancy does not confer any right on the incumbents in the feeder category to claim promotion- No merit- Petition dismissed. (Paras 10, 14)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

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

"i) *That the action of the respondents department is arbitrary, illegal, unreasonable, unconstitutional, discriminatory and violative of Articles 14, 16 and 21 of the Constitution of India.*

ii) That the announcement made by the Hon'ble Chief Minister in terms of the cabinet decision/policy decision taken by the Government and same is required to be implemented from the date of such announcement i.e. 2.5.2016. Contrary to the same the respondents have carried out the amendment in the

Recruitment and Promotion Rules for the post of Foreman, purposely after a lapse of more than one and half months denying the benefit of the announcement to the applicant and to favour their near and dear ones and made applicable with immediate effect, which is contrary to the above stated fact.

iii) That the right of consideration is a fundamental right of every employee. The action of the respondents w.r.t. not making applicable the amendment w.e.f. the announcement/policy decision taken by the Government would amount a violation of the abovementioned right."

2. Brief facts necessary for adjudication of the petition are that the petitioner was appointed as T-Mate in the Himachal Pradesh State Electricity Board (for short, "the Board") on work charge basis in the year 1977. He was regularized on the same post w.e.f. 7.10.1983. Petitioner was promoted as Lineman on 12.03.2007.

3. The next promotional post available from the feeder category of Lineman was that of Foreman. The petitioner attained the age of superannuation on 31.05.2016.

4. The Recruitment and Promotion Rules to the post of Foreman in the Board were notified in the year 1991. As per these Rules, the Lineman with ITI certificate having 7 years of regular service and non-ITI having 10 years regular service as Lineman was eligible to be considered for promotion to the post of Foreman. Till the date of retirement of petitioner, the aforesaid Rules remained in vogue. Since, petitioner had not completed requisite years of service as Lineman, he was not considered for promotion to the post of Foreman.

5. The 15th General Conference of Himachal Pradesh State Electricity Board Employees Union was convened at Sundernagar on 2.5.2016, in which Hon'ble the Chief Minister of the State made various announcements. One of such announcement was to reduce the promotion

criteria for Lineman from 10 years regular service to 7 years regular service for non-ITI Lineman. The Board notified the amendment in the Recruitment and Promotion Rules to the post of Foreman vide notification dated 23.6.2016, whereby the criteria of regular service of 10 years earlier prescribed for non-ITI Lineman was reduced to 7 years of regular service.

6. The petitioner, by way of instant petition, seeks the retrospective benefit of amendment carried in the R & P Rules on 23.6.2016 and is claiming his promotion to the post of Foreman and consequential benefits by making prayers as noticed above.

7. The respondents have contested the claim of the petitioner on the ground that the benefit of amendment in R & P Rules cannot be granted retrospectively. Petitioner was governed by the service conditions as were applicable till the date of his retirement. It has also been submitted that the announcement made by Hon'ble the Chief Minister was subject to its feasibility. Accordingly, the matter was placed before the Chairman of the Board on 13.5.2016. The procedural formalities and necessary approvals took reasonable time and finally the notification was issued on 23.6.2016.

8. I have heard learned counsel for the parties and have also gone through the records of the case carefully.

9. The first question that arises for consideration is whether the petitioner had acquired any right to be promoted to the next higher post of Foreman?

10. The answer is in negative for the reason that mere existence of post or vacancy does not confer any right on the incumbents in the feeder category to claim promotion. Only, right of consideration for promotion exists. In the facts of the case, even such right cannot be held to have existed in favour of the petitioner as he did not fulfill the requisite criteria applicable at the relevant time.

11. Indisputably, the petitioner was promoted as Lineman on 12.3.2007. He did not possess ITI certificate. He would have completed 10 years of regular service as Lineman on 12.3.2017. However, he retired on 31.5.2016 before completion of requisite period of 10 years regular service as Lineman, which could have made him eligible to be considered for promotion to the post of Foreman.

12. Merely because there was some assurance given by Hon'ble the Chief Minister of the State, the petitioner cannot be said to have acquired any right to be considered for promotion to the next higher post. The proposal was placed before the Chairman of the Board on 13.5.2016 and the notification amending the R & P Rules to the post of Foreman was issued on 23.6.2016. It cannot be said that the respondent-Board took unreasonably long time to issue the notification. The respondents have clearly explained the utilization of time taken for issuance of notification. Their stand is justified.

13. The petitioner has also not been able to place any material on record to show that the action of the respondents was malafide and was only to defeat the alleged right of petitioner. Even otherwise, the facts do not suggest such an inference for the reasons that the incumbents, even though might have been placed junior to petitioner in seniority list of Lineman, were promoted after 23.6.2016. Even if the petitioner had got chance to get promoted as Foreman during his service, his juniors would have become entitled immediately on his retirement.

14. In light of above discussion, I have not found any merit in the petition and the same is accordingly dismissed.

Petition is accordingly disposed of, so also the pending miscellaneous application(s) if any.

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

Between:

SH. NARESH KUMAR S/O SH. DILA RAM, R/O VILLAGE BATAIL, P.O. BHAMLA, TEHSIL SARKAGHAT, DISTRICT MANDI (HP).

....PETITIONER.

(BY MR. VIJAY SINGH BHATIA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH CHIEF SECRETARY TO THE GOVT. OF HIMACHAL PRADESH, SHIMLA-2 (HP).

2. ADDITIONAL SECRETARY (SA) TO THE GOVT. OF HIMACHAL PRADESH, DEPARTMENT OF PERSONAL SECRETARIAT ADMINISTRATION SERVICE-1, SHIMLA-2 (HP).

3. DEPUTY SECRETARY DEPARTMENT OF PERSONAL, SECRETARIAT ADMINISTRATION SERVICE-1, GOVT. OF HIMACHAL PRADESH, SHIMLA-2 (HP).

....RESPONDENTS.

(BY. MR. SUMESH RAJ, MR. SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, WITH MR. AMIT KUMAR DHUMAL, DEPUTY ADVOCATE GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.3061 of 2019
Decided on: 10.10.2022

Constitution of India, 1950- Article 226- **Central Civil Service (Classification, Control and Appeal) Rules, 1965**- Rule 14- Petition to quash the order of removal from service- **Held-** Arguments of petitioner are contrary to the record- No merit- Petition dismissed. (Paras 8, 9)

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

J U D G M E N T

CMPT No.906 of 2022

For the reasons stated therein, this application filed for early hearing of the petition is allowed and disposed of.

CWPOA No.3061 of 2019

With the consent of the parties, taken up for consideration today itself.

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

> A) *Writ of certiorari may kindly be issued against the respondents thereby quashing and setting aside order No. Per (SAS-1) B (14))-13/2010 of dated 17.9.2011 Annexure P-5 and Inquiry Report dated 5.7.2011 Annexure P-4 submitted by Sh. Hardev Singh Inquiry Officer cum Joint Secretary (Health) to the Govt. of Himachal Pradesh vide memo No. Per (SAS-1) B (14)-1310 of dated 19.7.2011 Annexure P-3 issued by the Additional Secretary (SA) to the Govt. of Himachal Pradesh.*
> *B) the cost of the petition may also be passed in favour of the petitioner and against the respondents.*"

2. Brief facts necessary for adjudication of the present petition are as under:-

The petitioner was appointed as a Clerk on 19.06.2003 in Secretariat Administration Service Pool of the Himachal Pradesh Secretariat. While serving as such, vide Annexure P-1, Memorandum dated 21.02.2011, was issued to the petitioner, intimating him that the Disciplinary Authority intended to hold an inquiry against the petitioner under Rule 14 of Central Civil Service (Classification, Control and Appeal) (hereinafter to be referred as 'CCS (CCA) Rules'), 1965. The substance of imputation of misconduct, in respect whereof the inquiry was proposed, were set out in the enclosed statement of Article of Charges and the petitioner was directed to submit his response thereto by way of

written statement in defence within ten days. It is not mentioned in the petition as to whether the petitioner submitted any response thereto. In terms of the averments made in the petition and annexures appended therewith, an Inquiry Officer was thereafter appointed by the Disciplinary Authority to hold an inquiry against the petitioner and a perusal of the Inquiry Report demonstrates that in the course of inquiry, when the charges were read over to the petitioner, he admitted the charges levelled against him vide Memorandum dated 21.02.2011 (Annexure P-1). It is also mentioned in the Inquiry Report that the charged official also gave in writing on 18.06.2011 that he was admitting the charges levelled against him. Thereafter, the penalty of removal from service was imposed upon the petitioner in terms of order dated 17.09.2011 (Annexure P-5), which has led to the filing of the present petition.

3. Learned counsel for the petitioner has argued that the impugned order is not sustainable in the eyes of law, as the petitioner was not guilty of the charges levelled against him and further, neither the inquiry was held in a proper manner nor he was associated or heard in the course of the inquiry.

4. On the other hand, learned Additional Advocate General has submitted that record speaks for itself that not only the inquiry held against the petitioner was strictly in terms of the provisions of CCS (CCA) Rules, but in the course of the inquiry, the petitioner admitted the charges levelled against him and therefore, in this background the penalty imposed upon the petitioner cannot be allowed to be challenged by him. Learned Additional Advocate General also argued that otherwise also, the petition has been filed without availing the right of appeal, which otherwise was available to the petitioner under the provisions of CCS (CCA) Rules.

5. Having heard learned counsel for the parties and after carefully gone through the pleadings as well as documents appended with the petition and the reply, this Court is of the considered view that present petition is without any merit.

6. Though, there are two Memorandums appended with the petition to the effect that the Disciplinary Authority intended to hold inquiry against the petitioner on account of misconduct, but this Court is referring only to Memorandum dated 21.02.2011 (Annexure P-1), because the Inquiry Report was submitted with regard to the said Memorandum and penalty of removal has also been passed with regard to the article of charges, which were appended with the said Memorandum.

7. As this Court has already mentioned hereinabove, the petition is conspicuously silent as to whether Memorandum dated 21.02.2011 (Annexure P-1) was responded to by the petitioner or not. Further, a perusal of the Inquiry Report (Annexure P-4) demonstrates that it is mentioned therein in the course of hearing of the charges, the charged official, i.e. the petitioner admitted the charges levelled against him and he also made this admission in writing on 18.06.2011. Alongwith the reply filed by respondent/ State as Annexure R-1, statement of the petitioner dated 18.06.2011 is appended, in which it is stated that the charges levelled against him were read over to him and all the charges were true and admitted. Now, incidently, there is no rejoinder filed to the reply, rebutting what has been mentioned in the reply and also the documents that stand appended with the reply. Thus, this leads us to a situation, wherein in the course of the inquiry proceedings which were held against the petitioner, upon his admitting the charges levelled against him, the order of dismissal of service was passed against him by the Disciplinary Authority.

8. In this background, this Court cannot accept the contention of the petitioner, as has been raised by learned counsel, that the inquiry was not held as per law or procedure or further the petitioner was neither associated nor heard in the course of inquiry. In fact, these arguments are completely contrary to the record.

9. Accordingly, in view of the findings returned hereinabove, as this Court does not finds any merit in the present petition, the same is dismissed, so also the pending miscellaneous applications, if any.

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

HPSIDC Officers Welfare Association and ors. ....Petitioners.

Versus

State of Himachal Pradesh and ors. ...Respondents

For the petitioners :Mr. Sunil Mohan Goel, Advocate.
For respondent No.1 :Mr. Desh Raj Thakur, Additional Advocate General with Mr. Narender Thakur, Deputy Advocate General.
For respondent No.2. : Mr. Balwant Kukreja, Advocate.

CWPOA No. 3215 of 2019
Reserved on: 19.12.2022
Decided on: 27.12.2022

Constitution of India, 1950- Article 226- Grievance is that decision of respondent No. 1 has caused serious prejudice to their legal vested rights- Petitioners are entitled to retirement gratuity in terms of the Service Bye Laws of SIDC and Group Gratuity Scheme of LIC subscribed by it- **Held-** No reason with the State to deny the benefit available to the petitioners, when there is no financial burden in this regard on the State Government- Decision quashed- Petition allowed. (Paras 19, 20)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

By way of instant petition, petitioners have prayed for following substantive reliefs:-

> *"a. That this Hon'ble Court may kindly be pleased to issue a writ of certiorari quashing Annexure P-13 communication dated 18.10.2011 and Annexures P-15 communication dated 22.02.2012 issued by respondent No.1."*

> *"b. That this Hon'ble Court may kindly be pleased to issue a writ of mandamus directing the respondent State to ratify the amendment carried out by the Board of Directors of respondent number 2-Company in clause 12 of the Service Bye Laws of respondent No. 2-Corporation, vide Resolution dated 23.09.1992 with further direction to respondent No.2-Corporation to pay to the members of petitioner No. 1-Association including petitioners 2 to 23 gratuity on their superannuation from the service of the respondent Corporation as per Clause 12 of the service Bye Laws as they stand after the amendment incorporated vide Resolution dated 2309.1992 by respondent No. 2-Corporation."*

2. Brief facts necessary for adjudication of the petition are that respondent No.-2-Corporation (for short 'SIDC') is a Government Company incorporated under Companies Act, 1956 having its own Memorandum and Articles of Association. Petitioner No. 1 is an Association of Officers of SIDC. Petitioners No. 2 to 23 are/were the officers of SIDC and also the members of petitioner No.1.

3. Petitioners have approached this Court with the grievance that respondent No. 1, vide its decision dated 24.10.2011, Annexure P-13 and decision dated 22.02.2012, Annexure P-15, has caused serious prejudice to their legal vested rights. Petitioners are entitled to retirement gratuity in terms of the Service Bye Laws of SIDC and Group Gratuity Scheme of LIC subscribed by it. According to the petitioners, as per Service Bye Laws of SIDC and Group Gratuity Scheme subscribed by it, there is no outer limit in terms of payable retirement gratuity to petitioners and other members of petitioner No. 1-Association, whereas respondent No. 1 is trying to impose the rules applicable to the State Government employees whereby the outer limit of gratuity is fixed at Rs. 10,00,000/-

4. The facts of the case are more or less admitted. SIDC, has not denied the factual position and has simply come out with a stand that it is bound by the orders of State Government in terms of Article 143 of the

Articles of Association of SIDC. Respondent No. 1 has not submitted any reply. There is only one affidavit sworn by Joint Secretary, Industries to the Government of H.P. in response to certain questions posed by this Court vide its order dated 18.04.2012. In such affidavit also, the factual position has not been denied. The only assertion made on behalf of State Government is that it has already directed SIDC to implement the directions issued by the State Government, vide Annexures P-13 and P-15.

5. The Service Bye Laws of SIDC from the inception provided that its officers shall be entitled to payment of gratuity on retirement at the rate of 15 days salary in a year multiplied by the number of years rendered in service by the incumbent, subject, however to maximum limit of salary equivalent to twenty months. On 10.03.1986, the Board of Directors (for short 'BOD') of SIDC approved the introduction of a Group Gratuity Scheme of LIC (for short, "the scheme"). The entitlement of the petitioners for gratuity remained the same as earlier provided in the Bye Laws. Thus, the rights of petitioners were not affected, rather, the LIC had promised to discharge the liability of SIDC towards payment of gratuity on receipt of periodical premium. The Service Bye Laws of SIDC were accordingly amended. The trust was formed and was again approved by the Board of Directors on 07.04.1986.

6. The rules framed under the scheme provided for payment of gratuity to the officers of SIDC. Rule 8 of Section IV of the Rules provided as under:-

> ***"8. <u>Benefits on Survival to Superannuation Date</u>:-***
>
> *Upon a member's retirement at superannuation date, there shall become payable to the Trustees, for the benefit of the member, an amount equal to 15 days salary as on the Annual Renewal Date last preceding the Superannuation Date multiplied by the total number of years of service completed by the Member, subject to a maximum of 20 months' salary.*
>
> *The Trustees shall pay the benefits to the Member in accordance with the provisions of Appendix (1).*

Members who have not rendered 5 years' service, shall not be entitled to any benefits hereunder. The Assurances effected in respect of such Members would be surrendered by the Trustees and the Surrender Value credited to surplus Account."

7. Subsequently, on 19.10.1990 the SIDC carried amendment in Clause-12 of Service Bye Laws and decided that gratuity shall be paid to the petitioners as was payable to State Government employees. State Government approved the amended Bye Laws in exercise of powers under Article 143 (i) of Articles of Association.

8. Petitioners and other affected employees of the SIDC raised objection. The Board of Directors reviewed its decision, vide its meeting held on 23.09.1992 and decided to grant gratuity to its employees, in accordance with the Scheme adopted by it.

9. The fact remained that the employees of SIDC were getting the gratuity in terms of its Service Bye Laws and the Scheme.

10. In 2011, the Auditors from the office of Accountant General raised objection with respect to the grant of gratuity to the employees of SIDC, on the ground that it exceeded the limit of Rs. 10,00,000/- prescribed for the State Government employees. SIDC defended its decision, but State Government, vide impugned Annexure P-13 on 24.10.2011 directed the SIDC to adhere to the amendment carried in Bye Laws on 19.10.1990. SIDC again requested the State Government to review its decision, but respondent No. 1 reiterated its earlier decision, vide impugned Annexure P-15, dated 22.02.2012.

11. I have heard learned counsel for the parties and have also gone through the record.

12. It has been contended on behalf of the petitioners that the decisions of State Government communicated, vide impugned Annexures P-13 and P-15, are harsh and arbitrary. As per petitioners, premium towards

Group Gratuity Scheme of LIC is paid from the contributions made by the petitioners and other members of the Scheme. State Government does not bear any financial burden in this regard. The amount of gratuity is paid by LIC to SIDC, which further is disbursed to the retiring officers. It is further submitted that the SIDC, otherwise, is a profit earning Government Company and for such reason two other Government undertakings namely Nahan Foundry Limited and Small Scale Corporation were merged with SIDC. On this count, SIDC had borne the burden of losses of these two entities to the extent of about Rs. 5 Crores. The employees of SIDC had objected for such merger, on the ground that they would be ultimate sufferers in terms of restrictions on their service conditions, but Government of India while approving the Scheme of Merger in February, 2011, has specifically agreed that the payment of allowances and other employees benefits to those employees of SIDC, who were in service on the date of merger would not be reduced or adversely affected. Further contention of petitioners is that though the SIDC is wholly owned and controlled by State, but still is an independent autonomous entity. The State Government decision to force the SIDC to amend its Bye Laws is clearly arbitrary being without any rationale and justified reasons.

13. It is not in dispute that earlier there was a Government Company known as 'Himachal Pradesh Minerals and Industries Development Corporation Ltd.' (for short, "MIDC") which was incorporated in the year 1966 under the Companies Act, 1956. The name of said Company was changed as 'Himachal Pradesh State Industries Development Corporation Ltd'. after approval of Government of India and thus, the SIDC was registered as a Company under the Companies Act on 21.10.1986. The objects of SIDC as detailed in Memorandum of Association clearly spelt the intent of State Government to relinquish some of its functions to compete in the open market by Industrial Development in the State. It is also inferable from the Articles of

Association that sufficient provisions were made for independent/autonomous working of SIDC. The Board of Directors was vested with administrative and decision making powers in respect of various functions of SIDC. It was by virtue of clause 143 of Articles of Association that certain decisions of Directors were held to be reserved for the decision of the Government of H.P. which included rules governing the conditions of service of the employees provident fund and other rules, creation of reserved and special fund.

14. Chapter-12 of the Bye Laws governing service condition of the employees of SIDC as incorporated originally provided for payment of gratuity. Bye Laws 12.4 specifically provided for entitlement to the rates of gratuity as under:-

> *"12.4. The rates of gratuity payable to an employee shall be as follows:-*
>
> *a) For every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days' pay based on the rate of pay last drawn by the employee concerned.*
>
> *b) The amount of gratuity payable to an employee shall not exceed twenty months' pay."*

15. In continuation of aforesaid Bye Laws and as a matter of financial prudence SIDC adopted Group Gratuity Scheme of LIC by entering into an agreement with the LIC. As per this Scheme, against payment of periodical premium, LIC had undertaken to discharge liability of SIDC towards payment of gratuity to its employees.

16. SIDC, as noticed above, had come into being on 21.10.1986 and it had stepped into the shoes of MIDC. The fact of the matter is that that Group Gratuity Scheme of LIC had been adopted by MIDC. On coming into being of SIDC, the said Scheme continued without any reservation shown by the State Government. It is clearly visible that the State Government had not raised any such objection. After amending its Bye Laws

on 19.10.1990, SIDC had again reviewed its decision on 23.09.1992 and inconformity there with the gratuity was being paid to the employees of SIDC. Again, the State Government never objected to such action of SIDC. It is only on the objection of Auditor of Accountant General in the year 2011 that the SIDC had to move the case to State Government for ratification of its decision and evidently thereafter State Government has refused such ratification.

17. Apparently, Clause-143 of Articles of Association, more particularly, Sub-Clause (ii), thereof has been incorporated for the purposes of government control on the affairs of SIDC touching the matters having serious bearing on its affairs. The vestment of such powers with State Government cannot be said to be absolute in the sense that it cannot be used arbitrarily. The arbitrariness corrodes the very purpose of vestment of power. More absolute the power, higher becomes the necessity for its use with fairness and due care/caution. The decision of the authority having power need to have some rationale and justifications, which should also have the backing of objectivity.

18. In the given facts of the case in hand, the State Government has failed to justify its stand, so much so that, it has not been able to file reply. Nothing has come forth, as to why, the SIDC has been directed to follow the principle of payment of gratuity as applicable to the State Government employees. There should not be any reason with the State to deny the benefit available to the petitioners, when there is no financial burden in this regard on the State Government. The gratuity is paid by LIC. The premium is paid to LIC from the contributions of the petitioners and other similarly situated employees of SIDC. During the course of hearing, it has been submitted that SIDC has, in fact, received the amount of gratuity in respect of those petitioners who have, now, retired in terms of scheme. SIDC has paid such petitioners a sum of Rs. 10,00,000/- only and remaining amount is lying

with it. This further makes the stand of respondent-State totally incomprehensible.

19. It is further not understandable, in case, the State Government had felt any financial constraints for granting the benefit of gratuity to the petitioners in terms of Bye Laws of SIDC, it would not have meddled with its entity by merging sick undertakings with the profit earning undertaking. Even if it was to be done, it should not have been done at the cost of the vested right of its employees.

20. This Court has not been able to find any reason for justification of stand taken by State Government, in result, petition is allowed. Annexure P-13, dated 24.10.2011, and Annexure P-15, dated 22.02.2012, are quashed. Respondent No. 1 is directed to ratify the amendment carried out by the Board of Directors of SIDC with a purpose to enable it to disburse the gratuity to the petitioners in terms of its Bye Laws as also the Group Gratuity Scheme of LIC adopted by it.

21. The petition is, accordingly, disposed of, so also the pending miscellaneous application, if any.

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

Rakesh Kumar ...Petitioner.

Versus

State of H.P. &others ...Respondents

For the petitioner : Mr. Onkar Jairath, Advocate.
For the respondents : Mr. Desh Raj Thakur, Addl. A.G. with Mr. Narender Thakur, Dy. A.G.

CWPOA No. 3883 of 2020
Reserved on 7.12.2022
Decided on : 19.12.2022

Constitution of India, 1950- Article 226- Petition to quash the order of refixation of salary and recovery thereto- Grievance of the petitioner is that his pay has been wrongly revised and re-fixed to his detriment- **Held-** Petitioner entitled to pay band of Rs. 10300-34800 + 3200 Grade Pay- Petitioner also became entitled to annual increments- Office order quashed and set-aside- Petition allowed with directions. (Para 21)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge:

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

"i). That the impugned office order dated 27.11.2017 contained in Annexure A-8 whereby the pay of the applicant has been refixed to his detriment and further ordered the recovery may be quashed and set aside.

ii) That the pay of the applicant be fixed at Rs. 15160 as on 15.9.2016 instead of Rs. 14,320.

iii) That the respondents may further be directed to grant pay band i.e. 10300+34500+3200 Grade Pay w.e.f. 15.9.2013.

iv) That the respondents may be further directed to grant the applicant actual consequential financial benefits on annual increments from date of promotion i.e. 15.9.2011 in place of notional benefits.

v) That the order of recovery issued by respondent No.3 be quashed and set aside"

2. Brief facts necessary for adjudication of the case arethat the petitioner was initially appointed as Part Time Water Carrier in the year 1996. He was converted into whole time contingent worker in June, 2000. The services of the petitioner were regularized w.e.f. 31.10.2000 as Class-IV. During his service as Class-IV, petitioner improved his qualification and passed10+2 examination, conducted by H.P. Board of School Education.

3. On the recommendations of DPC, petitioner was promoted to the post of Clerk vide office order dated 15.9.2011 in the pay scale of Rs. 5910-20200+1900 Grade Pay. The promotion order of the petitioner was subject to following condition:

> *"4.Officials so promoted as clerks will qualify the typing test with a minimum speed of 30 words per minute in English typewriting or 25 words per minute in hindi typewriting within probation period and during the period, if the candidates fail to qualify the typing test within the prescribed period, their probation will be extended. During this period the incumbents will get one more chance. If the candidates still failed to qualify the typing test in the extended period they will be reverted from clerk to class-IV posts".*

4. The pay of the petitioner was fixed in the Pay Band of Rs. 5910-20200+1900 Grade Pay *vide* office order dated 17.1.2012.

5. The State Government vide notification dated 27.9.2012 amended the H.P. Civil Services (Category/Post wise Revised Pay) Rules, 2012 by adding certain categories/posts in the schedule appended to the rules and the category of Clerks was also included therein for entitlement of Pay Band of Rs. 10300-34800+ Grade Pay of Rs. 3200. Such Pay Band and Grade Pay, however, was made available only to those incumbents, who had completed

two years of regular service. Petitioner completed two years of regular service as Clerk on 15.9.2013 and thus became entitled to Pay Band of Rs. 10300-34800+ Grade Pay of Rs. 3200 w.e.f. 15.9.2013. *Vide* communication dated 4.7.2014, the Deputy Director of Higher Education, Una verified such entitlement of petitioner and communicated the same to the Principal, Government College, Una, District Una, H.P., where the petitioner was posted.

6. Petitioner qualified the typing test on 30.4.2014 and became entitled to the annual increment w.e.f. 30.4.2015 as per terms and conditions of his promotion order, as noticed above. The petitioner was promoted as Junior Assistant by way of placement vide office order dated 18.8.2017 and his pay was fixed in the Pay Band of Rs. 11560-15160+ Rs. 3600 as Grade Pay.

7. Respondent No.2 vide office order dated 27.11.2017 re-fixed the pay of petitioner in the Pay Band of Rs. 5910-20200 + Grade pay of Rs. 1900 right from the date he was promoted as Clerk. In pursuance to said office order, the pay of petitioner as Junior Assistant as of 1.9.2017 was fixed at Rs. 14320 (10720 + Grade Pay of Rs. 3600). The over payment, if any, found to have been made to the petitioner was also ordered to be recovered.

8. Petitioner made a representation against the aforesaid re-fixation of his pay but without any response. Aggrieved against the aforesaid action of respondents, petitioner approached the erstwhile H.P. State Administrative Tribunal by way of O.A. No. 355 of 2018, which on abolition of the Tribunal came to be transferred to this Court and was registered as CWPOA No. 3883 of 2020 i.e. the instant petition.

9. The grievance of the petitioner is that his pay has been wrongly revised and re-fixed to his detriment. Consequently, the order to recover the overpaid amount from the petitioner has also been alleged to be wrong and illegal. As per contention of the petitioner, he was not afforded any opportunity of being heard before issuing an order to the detriment of his

vested rights. The impugned order dated 27.11.2017 has been assailed as illegal, arbitrary and discriminatory.

10. Respondents have filed the reply. As per stand of the respondents, petitioner was not entitled to annual increments as well as next higher scale or promotion without qualifying the typing test. Evidently, respondents have taken such stand by placing reliance on para-17.1.8 (i) and (ii) as contained in Volume-I of the Hand Book on Personnel Matters. The respondents have also made reference to the terms and conditions of the order, as noticed above, whereby the petitioner was promoted as Clerk.

11. I have heard learned counsel for the parties and have also gone through the record carefully.

12. Clause-4 of the terms and conditions of order of promotion of petitioner provided that the petitioner was to qualify the prescribed typing test within the probation period and in case he failed to qualify within the prescribed period of probation, the same would be extended and the petitioner would get one more chance to qualify the typing test. It was further provided that in case petitioner still failed to qualify the typing test in the extended period, he would be reverted from Clerk to Class-IV post.

13. The office order dated 15.9.2011, vide which petitioner was promoted as Clerk did not specifically provide that the petitioner was to remain on probation and also the duration of probation, if any. The reference to the probation could be found in Claue-4 of the terms and conditions of promotion order but there also the period of probation was not mentioned. The respondents have also not placed on record the Recruitment & Promotion Rules for the post of Clerks in Department of Education from which an inference as to the requirement of probation period or its tenure could be ascertained.

14. The reference made by respondents to Clause 17.1.8 of Hand Book on Personnel Matters in support of their stand appears to be clearly

misconceived. Chapter-17 of Volume-I of Hand Book on Personnel Matters relates to "employment assistance to dependents of Government servants, who die in harness or are permanently disabled or are missing". Clause 17.1.8 (i) and (ii) clearly have relation to appointment made on compassionate basis. Except the afore mentioned provisions of Hand Book on Personnel Matters, respondents have not been able to place on record any material to justify their stand.

15. During the course of arguments, learned counsel for the petitioner has submitted that the petitioner had qualified the typing test on 30.4.2014 and as such, he had no grievance with respect to grant of increments to the petitioner w.e.f. 30.4.2015. He however raised serious grievance with respect to the re-fixation of the pay of petitioner *vide* impugned order dated 27.11.2017 on the grounds that the petitioner had become entitled to Pay Band of 10300-34800+ Grade Pay of Rs. 3200 in terms of notification dated 27.9.2012, issued by the State Government, whereby the schedule to the Himachal Pradesh Civil Services (Category/Post wise revised pay) Rules 2012 was amended by including the post of Clerks. He further contended that petitioner had completed regular service of two years as Clerk on 15.9.2013 and thus had become entitled to the afore stated pay band. It has also been asserted that the vestment of petitioner to such pay band was also verified by Deputy Director of Higher Education, Una vide communication dated 4.7.2014. The entitlement of petitioner to such pay band was neither diluted nor taken away on account of failure of petitioner to pass typing test till 30.4.2014, as there was no such condition of service.

16. As noticed above, the stand of the respondents is that the petitioner was not entitled to annual increments, further promotion or senior pay scale till he qualified type test. However, respondents have failed to substantiate their above stand. Evidently, no such condition existed in the promotion order of petitioner. The respondents have also not been able to

justify their stand by showing any rule or condition of service to that effect. Since the petitioner himself has given up the challenge with respect to non-grant of increments to him, the same need not to adjudicate by this Court. As regards the rest of the claim, I am of the considered view that the impugned order dated 27.11.2017 is wrong, illegal and arbitrary, as it does not have the backing of any rule or applicable service condition behind it.

17. The entitlement of petitioner to Pay Band of 10300-34800+ Grade Pay of Rs. 3200 was in pursuance to the decision of the State Government to include the category of Clerks in the schedule appended to Himachal Pradesh Civil Services (Category/Post wise revised pay) Rules 2012. Such entitlement cannot be said to be relatable in any manner to failure of petitioner to qualify the typing test till 30.4.2014. Thus, the entitled of petitioner to such pay band and fixation of salary in accordance therewith could not have been taken away by respondents vide impugned order dated 27.11.2017. Except for the withholding of annual increments till lapse of one year after qualification of typing test by petitioner, the respondents had no right to reduce or re-fix his pay, as has been done by way of impugned order dated 27.11.2017.

18. Viewed from another angle, the stand of respondents as canvassed is clearly absurd. Firstly, there was no mention of probation period in the promotion order, hence reference to passing of typing test within the probation period was vague, secondly, the respondents have not come out clearly with the facts that when did initial probation period of petitioner came to an end and for how long it was extended. There is also no material to show that how many chances were availed by petitioner to qualify the test and thirdly, the respondent in order to take benefit of Clause-4 of the terms and conditions of promotion order could have come out clearly about the aforesaid facts as non-adherence to the terms of aforesaid Clause-4 of terms and conditions entailed reversion to Class-IV. Petitioner was promoted on

15.9.2011. He qualified the typing test on 30.4.2014. Instead of such delay on the part of petitioner in qualifying the typing test, he was further promoted to the post of Junior Assistant in 2017. Having granted all service benefits to petitioner, it is not understandable as to for what reason the impugned office order dated 27.11.2017 was issued. Said order clearly is without any basis. Moreover, an order having civil and evil consequences against petitioner was issued without affording petitioner an opportunity of being heard. Even the representation made by petitioner remained unanswered.

19. A Division Bench of this Court after considering the law on the subject including Chandi Prasad Unial, has passed the judgment on 24.03.2022 in ***CWPOA No.3145 of 2019, S.S. Chaudhary vs. State and others***, and culled out certain situations in which recoveries from government employee be held to be impermissible in the manner as under:-

> *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 overweigh 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 channelized 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."

20. It is not in dispute that the petitioner belonged to Class-III services. Thus, his case will be squarely covered under clause (i) of para 35 of the judgment referred above.

21. In view of above discussion, the petition is allowed. Impugned office order dated 27.11.2017 Annexure A-8 is quashed and set aside to the extent, it re-fixed and reduced the pay of petitioner to his detriment. It is held that petitioner was entitled to pay band of Rs. 5910-20200 + Grade Pay of Rs. 1900 from 15.9.2011 till 15.9.2013 and thereafter, he became entitled to pay band of Rs. 10300-34800 + 3200 Grade Pay and further his entitlement on his placement as Junior Assistant had arisen to the pay band of Rs. 10300-34800 + 3600 as Grade Pay. Additionally, the petitioner also became entitled to annual increments w.e.f. 30.4.2015. Consequently, the respondents are directed to re-fix the pay of petitioner in terms of this judgment within eight

weeks from the date of its pronouncement. It is further directed that no recoveries be effected from petitioner in terms of impugned office order dated 27.11.2017. Pending application(s), if any, also stand disposed of.

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

Viyas Dev ...Petitioner

Versus

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

For the petitioner : Mr. Devender Thakur, Advocate.
For the respondents: Mr. Desh Raj Thakur, Addl. Advocate General with Mr. Narender Thakur, Deputy Advocate General.

CWPOA No. 5323 of 2019
Reserved on: 07.12.2022
Decided on:14.12.2022

Constitution of India, 1950- Article 226- The grievance of the petitioner is he is entitled to the balance amount of arrears and he is also entitled for all consequential benefits including the allotment of GPF number as his services are liable for consideration for the purpose of pensionary benefits- Held- The respondents are directed to release the balance of arrears payable to the petitioner and also to consider the period of work-charge employment of the petitioner- Petition allowed. (Para 15)

Cases referred:
Prem Singh vs. State of U.P. & others 2019 (10) SCC 516;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

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

> "i) *That the respondents may kindly be directed to consider the case of the applicant to allot the G.P.F. number and also to cover the applicant under old Pension Scheme.*
>
> *ii) That the respondents may kindly be directed to pay the balance amount of arrears granted to the applicant on account*

of the grant of work charge status w.e.f. 01.01.2001 by deducting an amount of Rs.65,000/- with 9% interest."

2. Brief facts necessary for adjudication of the petition are that petitioner was engaged as daily wage Beldar w.e.f. 01.01.1991. His services were regularized as Peon w.e.f. 15.09.2006.

3. Petitioner had approached this Court by way of CWP No.2023 of 2011 seeking relief of conferment of work charge status on completion of 10 years of daily wage services. In pursuance to the order passed by this Court in CWP No. 2023 of 2011, the respondents conferred the work charge status on petitioner w.e.f. 01.01.2001. On this count, petitioner was also held entitled to arrears to the tune of Rs.3,26,370/-. The petitioner was paid only a sum of Rs.65,000/- out of the aforesaid calculated amount and the balance remained to be paid.

4. The grievance of the petitioner is that firstly, he is entitled to the balance amount of arrears out of the calculated amount of Rs.3,26,370/- and secondly, he is also entitled for all consequential benefits including the allotment of GPF number as his services w.e.f. 01.01.2001 on work charge establishment followed by the regular service w.e.f. 15.09.2006 is liable for consideration for the purpose of pensionary benefits.

5. The respondents have filed the reply. It is submitted that the petitioner was conferred the work charge status w.e.f. 01.01.2001 in pursuance to the order passed by this Court in CWP No. 2023 of 2011, though initially the arrears payable to petitioner were calculated at Rs.3,26,370/-, but only Rs.65,275/- was paid as first instalment. Subsequently, in compliance to instruction dated 15.12.2011 issued by the Principal Secretary (Finance) to the Government of Himachal Pradesh, the claim of arrears payable to the petitioner was restricted to a period of three years only and it was found that petitioner was entitled to Rs.53,000/- and a sum of Rs.12,174/- was recoverable from him.

6. As regards, the entitlement of petitioner for subscription of GPF, the respondents have taken a stand that they had submitted the case of the petitioner to Accountant General, Himachal Pradesh, but the said office rejected the case of the petitioner with following remarks:

> *"As per the Govt. Notification No.Fin.(c) A(3)-4/2001 dated 13.01.2016, all work charged employees, whose services have been regularized after 15.05.2003, against the regular posts and given work charge status in compliance to the orders of Hon'ble Court before 15.05.2003 are not eligible for the subscription of GPF and the period of work charge status is also not accountable towards the pensionary benefits under CCS (Pension) Rules, 1972."*

7. I have heard learned counsel for the parties and have also gone through the records of the case carefully.

8. In ***State of H.P. and others*** vs. ***Sukru Ram and another, CMPM No. 423 of 2017,*** decided by a Division Bench of this Court on 23.5.2017, it was held as under:

> *"The issue is no longer res integra, which stands settled by the Hon'ble Supreme Court of India in Punjab State Electricity Board and another v. Narata Singh and another, (2010) 4 SCC 317, as also earlier decision of this Court in CWP No. 2240 of 2008, titled as The State of H.P. and others v. Sh. Tulsi Ram, decided on 31.5.2012, in which learned Single Judge, while holding the service rendered by the writ petitioner on work-charged basis from 1.4.2001 to 2.4.2017 to be counted for the purpose of pension"*

9. Later in ***State of H.P. & others*** vs. ***Matwar Singh & another, CWP No. 2384 of 2018***, decided by a Division Bench of this Court on 18.12.2018, it was held as under:-

> *"It is by now well settled that the work charge status followed by regular appointment has to be counted as a component of qualifying service for the purpose of pension and other retiral benefits. Executive instructions, if any, issued by the Finance Department to the contrary, are liable to be ignored/struck down, in the light of view taken by this Court in CWP No.6167 of 2017, titled Sukru Ram vs. State of H.P. & others, decided on 6th March,*

> *2013. A Full Bench of Punjab and Haryana High Court in Keshar Chand vs. State of Punjab through the Secretary P.W.D. B & R Chandigarh and others, (1988) 94(2) PLR 223, also dealt with an identical issue where Rule 3.17 (ii) of the Punjab Civil Services Rules excluded the work charge service for the purpose of qualifying service. Setting aside the said Rule being violative of Articles 14 and 16 of the Constitution of India, it was held that the work charge service followed by regular appointment will count towards qualifying service for the purpose of pension and other retiral benefits. The aforesaid view was also confirmed by the Hon'ble Apex Court."*

10. Similarly, in ***CWP No. 2956 of 2019***, decided on 13.7.2021, another Division Bench of this Court observed as under:-

> *"It has also been contended by respondents that the petitioners were granted work charge status only vide order dated 13.10.2015 and the expression used therein was "work charge regularization". In any case, be it conferment of work charge status or regularization in favour of petitioner vide office order dated 13.10.2015, the same will not affect the outcome of this petition. In view of the law laid down by this Court in CWP No. 6167 of 2017, titled Sukru Ram vs. State of H.P. & Ors., CWP No. 2384 of 2018 titled State of Himachal Pradesh & Ors. Vs. Matwar Singh and also by Hon'ble Supreme Court in Prem Singh Vs. State of H.P. (2019) 10 SCC 516, the work charge status followed by regular appointment has to be counted as a component for qualifying service for the purpose of pension and other retiral benefits."*

Thus, it is more than settled now that work charge status followed by regular appointment has to be counted as a component for qualifying service for the purpose of pension and other retiral benefits.

11. Adverting to the facts of the present case, the petitioner was conferred work charge status on 01.01.2001 and was followed by his regularization on 15.09.2006. Thus, the service of petitioner as work charge employee, followed by regular appointment is liable to be counted for the purpose of pension and other retiral benefits, hence the distinction drawn by

the respondents on the ground that petitioner was regularized after the cutoff date i.e. 15.5.2003, cannot be sustained. The petitioner had earned the status of work charge employee as a matter of right under the policy of the State Government.

12. It is apt to reproduce the observations made by Hon'ble Supreme Court in para-31 of the judgment rendered in case of ***Prem Singh*** vs. ***State of U.P. & others 2019 (10) SCC 516***, which read as under:-

> *"In the aforesaid facts and circumstances, it was unfair on the part of the State Government and its officials to take work from the employees on the work-charged basis. They ought to have resorted to an appointment on regular basis. The taking of work on the work-charged basis for long amounts to adopting the exploitative device. Later on, though their services have been regularized. However, the period spent by them in the work-charged establishment has not been counted towards the qualifying service. Thus, they have not only been deprived of their due emoluments during the period they served on less salary in work-charged establishment but have also been deprived of counting of the period for pensionary benefits as if no services had been rendered by them. The State has been benefitted by the services rendered by them in the heydays of their life on less salary in work-charged establishment".*

13. Once the work charge employment of the petitioner is held liable to be counted for the grant of pensionary benefits to him, as a natural corollary, he will be governed under CCS Pension Rules, 1972 and the Contributory Pension Scheme will not be applicable to him.

14. The stand of the respondents with respect to withholding of payable arrears to the petitioner on the basis of the instructions dated 15.12.2011 issued by the Finance Department can also not be countenanced. Petitioner had earned the right to the arrears payable to him on account of service rendered by him on work charge basis, such right cannot be abridged by administrative instructions.

15. For the aforesaid reasons, the present petition is allowed. The respondents are directed to release the balance of arrears payable to the petitioner and also to consider the period of work-charge employment of the petitioner, followed by his regular service for the purpose of grant of pensionary benefits and for that purpose to grant him the GPF Number. The needful be done within a period of three months from today.

16. The petition stands disposed of in the aforesaid terms, so also the pending application(s), if any.

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

Desh Raj ....Petitioner.

Versus

State of HP & ors. ... Respondents.

For the petitioner : Mr. Adarsh K. Vashista, Advocate.
For the respondents : Mr. Sanjeev Sood, Additional Advocate General.

CWPOA No. 5675 of 2019
Decided on 23.12.2022

Constitution of India, 1950-Article 226- Benefit of services rendered by the applicant on ad hoc basis for the purpose of pension- **Held-** the present is not a case where the adhoc service of the petitioner as a JBT teacher was subsequently regularized by the State- petition is completely misconceived- Petition dismissed. (Para 3)

The following judgment of the Court was delivered:

Ajay Mohan Goel, (*Oral*)

By way of present writ petition, the petitioner has prayed for the following relief:

> "i) That the respondents may kindly be directed to grant and allow the benefit of services rendered by the applicant on ad hoc basis w.e.f. 12.3.1981 to 31.5.1996 for the purpose of pension and increments along with arrears and due and admissible interest."

2. Having heard learned counsel for the parties and having carefully gone through the pleadings as well as documents appended therewith, this Court is of the considered view that the present writ petition is completely misconceived. The petitioner was initially appointed in terms of

Annexure A-1 as a JBT teacher for 89 days' and as has been stated by the petitioner, probably he continued to serve as such till he was appointed against the post of Shashtri in the Education Department in the year 1996. However, as is evident and apparent from the stand taken by the respondent-State, the present is not a case where the adhoc service of the petitioner as a JBT teacher was subsequently regularized by the State. This is a case where on hand the petitioner was initially appointed as a JBT teacher for 89 days having continue to serve as such, on the other hand, he participated in a separate process undertaken by the concerned department for recruiting Shashtri teacher and being successful therein, he was offered appointment against the post of Shashtri teacher, which appointment had got nothing to do with his earlier appointment as JBT teacher. In other words, even if the petitioner was not serving as a JBT teacher on adhoc/contract basis but obvious he had a right to be selected as Shashtri teacher as he was successful in the process so undertaken by the concerned Department.

3. In view of above observations as the reliefs prayed for by the petitioner are in the context of treating the services rendered by him as a JBT teacher in continuity along with the services rendered by him as a Shastri teacher, the prayer of the petitioner cannot be accepted, hence the writ petition is dismissed.

4. Pending miscellaneous applications, if any, also stand disposed of.

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

Shri V.P. Rana ....Petitioner.

Versus

The State of Himachal Pradesh & others

. Respondents

For the petitioner :	Mr. Karan Singh Parmar, Advocate.
For the Respondents	:M/s Sumesh Raj, Dinesh Thakur, Sanjeev Sood, Additional Advocates General, with Mr. Amit Kumar Dhumal, Deputy Advocate General, for respondents No.1 to 3- State. Respondents No.4 & 5 *ex parte*. Name of respondent No.6 stands deleted.

CWPOA No.250 of 2019
Decided on: 21.11.2022

Constitution of India, 1950- Article 226- Promotion to the post of Employment Officer- Grievance of the petitioner is that the respondent/Department took option from the private respondents which is bad in law- **Held-** The doctrine of election, at the very first instance, puts an onus upon an employee to make a choice as to whether he wants to opt for promotion to stream 'A' or stream 'B'- Review Departmental Promotion Committee qua the petitioner and consider his candidature for promotion to the post of Employment Officer- Petition allowed with directions. (Para 10)

The following judgment of the Court was delivered:

Ajay Mohan Goel, J *(Oral)*

The controversy involved in the present petition is in a very narrow compass.

2. The case of the petitioner is that he was serving in the respondent Department as a Statistical Assistant. The next promotional post

from the post of Statistical Assistant is that of Employment Officer, Recruitment & Promotions Rules whereof are appended with the present petition as Annexure A-1. In terms of said Recruitment & Promotion Rules, the post of Employment Officer is to be filled in from amongst Statistical Assistant/Senior Assistant, who possess six years regular service or regular combined with continuous adhoc (rendered upto 31.03.1998) service, if any, in the grade. The petitioner has also appended with the petition as Annexure A-2 the Recruitment and Promotion Rules to the post of Superintendent Grade-II, in terms whereof, the feeder channel for said post is Senior Assistant and a Senior Assistant who possesses six years regular service is stated to be eligible for promotion to the post of Superintendent Grade-II.

3. The grievance of the petitioner as has been raised in the petition is that the respondent/Department took option from the private respondents, who were serving as Senior Assistants, on 29.09.2001 and all respondents opted for being promoted to the post of Superintendent Grade-II. Subsequently, again on 21.03.2002, option was taken from them and this time, they opted for promotion against the post of Employment Officer. According to the petitioner, the option once exercised, exhausts the right of the incumbent and the act of the respondent/Department of seeking option time and again from the private respondents has jeopardized the future career of the petitioner at the time when he was to be promoted as Employment Officer, he was not promoted on account of this repeated option being sought from the private parties. Accordingly, the petitioner has prayed that the promotion which has been granted to the private respondents against the post of Employment Officer be quashed and set aside and the respondents be directed to consider the case of the petitioner for promotion to the post of Employment Officer from the date of promotion orders appended with the petition as Annexure A5/A.

4. The response stands filed to the writ petition. Learned Additional Advocate General by placing reliance on the same in general and preliminary submissions thereof in particular has submitted that on 29.09.2001, the Department had sought option from twelve Senior Assistants for promotion against the post of Superintendent, Grade-II or Employment Officer. Accordingly, Senior Assistants from whom options were sought exercised their options. Mohinder Singh, Senior Assistant, Sub-Office, Employment Exchange, Tissa, exercised his option for promotion against the post of Superintendent, Grade-II. Jagdish Kumar, Senior Assistant did not opt for any channel of promotion and Amar Singh was not invited at all by the Department to give his option. One Smt. Shally Vaidya, Senior Assistant had opted for the post of Employment Officer and she was accordingly promoted as Employment Officer in terms of promotion order dated 03.04.2022. Mohinder Singh, Senior Assistant was not considered that time when he had opted for promotion to the post of Superintendent, Grade-II and Jagdish Kumar, Senior Assistant was also not considered for promotion to the post of Employment Officer as he had not opted for the said promotional channel. The Department as per its practice again invited applications from the Senior Assistants for filling up the post of Superintendnet/Employment Officer vide letter dated 21.03.2002. The options were also sought from the officials mentioned hereinabove. This time, Mohinder Singh changed his option and opted for promotion against the post of Employment Officer, whereas Jagdish Kumar, Senior Assistant and Amar Singh, Senior Assistant also opted for the post of Employment Officer. In this view of the matter and in view of the revised options of Mohinder Singh, said Mohinder Singh as well as Jagdish Kumar were promoted against the post of Employment Officer on 21.06.2002.

5. Learned Additional Advocate General has argued that in light of said option being available to the Senior Assistants, no illegality was committed by the Department by seeking the option from Mohinder Singh, as

when the subsequent option was sought from Mohinder Singh, he still was holding the feeder category post. Accordingly, he argued that as there is no merit in the present petition, the same be dismissed.

6. I have heard learned counsel for the parties and have gone through the pleadings as well as documents on record.

7. It is evident from the facts of the case that whereas for Statistical Assistants, there is only one channel of promotion, i.e. to the post of Employment Officer, however, on the other hand, for the post of Senior Assistant there are two channels of promotion, i.e. the Employment Officer and Superintendent, Grade-II. In the present case, it is evident from the record that respondent Mohinder Singh had earlier opted for promotion to the post of Superintendent, Grade-II in the year 2001, however, he could not be promoted to the said post for one reason or the other. Thereafter, again in the year 2002, option was sought from Moninder Singh once again and this time he changed his option from the stream of Superintendent, Grade-II to the stream of Employment Officer. This resulted in the promotion of Mohinder Singh against the post of Employment Officer, whereas but natural, the petitioner could not considered for promotion to the said post.

8. This court is of the considered view that taking into consideration the fact that whereas, for a Statistical Assistant there was only one channel of promotion and on the other hand, for the post of Senior Assistant there were two channels of promotion, the act of respondent-Department of giving more than one opportunity to the Senior Assistants to exercise their options is arbitrary and not sustainable in the eyes of law. The doctrine of election, at the very first instance, puts an onus upon an employee to make a choice as to whether he wants to opt for promotion to stream 'A' or stream 'B'. Once, he has exercised that particular option, then this Court is of the considered view that he cannot be subsequently permitted to resile from that option of his and allowed to opt for the other stream. This is for the

reason that herein as already mentioned hereinabove, the Senior Assistants were having two channels of promotion as compared to the Statistical Assistants. Now, in case the Senior Assistants at every stage are allowed an option to either opt for promotion to the post of Employment Officer or Superintendent, Grade-II, then this Court is of the considered view that the doctrine of election looses its significance because such an incumbent will at every stage opt for the post which is available and the person from the other stream, i.e. the stream of Statistical Assistant will be left high and dry**,** for the simple reason that Statistical Assistant has only one channel of promotion. Therefore, the act of respondent-Department of again seeking option from Mohinder Singh in the year 2002 is bad and not sustainable in the eyes of law. Once, he had opted for the channel of Superintendent, Grade-II in the year 2001, then his right for being considered for promotion to the post of Employment Officer stood exhausted and he was to wait for promotion against the post of Superintendent, Grade-II only as per his seniority and turn and subsequently, he could not have been allowed to resile from his earlier option and again go for a fresh option.

9. Accordingly, in view of the above observations, this petition succeeds and it is held that the act of the respondent-Department, seeking the subsequent option from Mohinder Singh, who had earlier opted for promotion to the post of Superintendent, Grade-II is bad in law. The obvious result thereof is that the promotion which were conferred upon Mohinder Singh vide Annexure A-5 is held to be bad.

10. At this stage, the Court stands informed that Mohinder Singh as well as the petitioner had superannuated during the pendency of the present petition. Taking into consideration this fact, though this Court has held the promotion of Mohinder Singh to be bad in law, but it is not quashing the said promotion and a direction is hereby issued to the respondents to hold a review Departmental Promotion Committee qua the petitioner and consider

his candidature for promotion to the post of Employment Officer as from the date when Mohinder Singh and other incumbents were promoted against the post of Employment Officer and if found otherwise eligible as per his seniority, then he be conferred promotion to the said post from the said date with all consequential benefits. The Court purposely is granting all consequential benefits including pension etc. to the petitioner for the reason that the present petition was filed by the petitioner as far back as in the year 2002. Needful be done within a period of thirty days from today.

11. With these observations, the petition is disposed of, so also the pending miscellaneous applications, if any.

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

Between:

1. NAMITA SAINI DAUGHTER OF SHRI JOGINDER SINGH SAINI, RESIDENT OF NEAR CO-OPERATIVE TRAINING CENTRE, A.T.M. MUNNI NIWAS, SANGTI-1ST, SHIMLA-171005 (H.P.), PRESENTLY WORKING AS GRAM PANCHAYAT VETERINARY ASSISTANT IN VETERINARY DISPENSARY ANADPUR, DISTRICT SHIMLA, H.P.

2. ABHISHEK CHAUHAN SON OF SHRI PARTAP CHAUHAN, RESIDENT OF VILLAGE BAREON, P.O. PANOG, TEHSIL KOTKHAI, DISTRICT SHIMLA, H.P., PRESENTLY WORKING AS GRAM PANCHAYAT VETERINARY ASSISTANT IN VETERINARY DISPENSARY CHANDNI CHOWK, TEHSIL KOTKHAI, DISTRICT SHIMLA, H.P.

3. DEV RAJ KAPIL SON OF SHRI HEM CHAND KAPIL, RESIDENT OF V.P.O. DHUNDAN, TEHSIL ARKI, DISTRICT SOLAN, H.P., PRESENTLY WORKING AS GRAM PANCHAYAT VETERINARY ASSISTANT IN VETERINARY DISPENSARY BHADECH, TEHSIL & DISTRICT SHIMLA, H.P.

4. CHANDER PARKASH SON OF SHRI OM PARKASH, RESIDENT OF VILLAGE NANTI, P.O. JABRI, TEHSIL & DISTRICT SHIMLA, H.P., PRESENTLY WORKING AS GRAM PANCHAYAT VETERINARY ASSISTANT IN VETERINARY DISPENSARY JUNNI, TEHSIL SUNNI, DISTRICT SHIMLA, H.P.

5. RAJ KUMAR SON OF SHRI SHER SINGH, RESIDENT OF VILLAGE NIHARKHAN, P.O. BRAHMPUKHAR, TEHSIL SADAR, DISTRICT BILASPUR, H.P., PRESENTLY WORKING AS GRAM PANCHAYAT VETERINARY ASSISTANT IN VETERINARY DISPENSARY ADHWANI, DISTRICT HAMIRPUR, H.P.

6. ANIL KUMAR SON OF SHRI DEI RAM, RESIDENT OF VILLAGE ORAN, P.O. DHARCHANDNA, TEHSIL KUPVI, DISTRICT SHIMLA, H.P., PRESENTLY WORKING AS GRAM PANCHAYAT VETERINARY ASSISTANT IN VETERINARY DISPENSARY THANAH, GRAM PANCHAYAT CHAROLI, TEHSIL CHOPAL, DISTRICT SHIMLA, H.P.

7. MONIKA PATHANIA DAUGHTER OF SHRI SANTOKH SINGH, RESIDENT OF VILLAGE SUKNARA, P.O. NAGROTA SURIAN, TEHSIL JAWALI, DISTRICT KANGRA, H.P., PRESENTLY WORKING AS GRAM PANCHAYAT VETERINARY ASSISTANT IN VETERINARY DISPENSARY SUKNARA, TEHSIL JAWALI, DISTRICT KANGRA, H.P.

8. PUSHAP LATA DAUGHTER OF LATE SHRI BHAGAT RAM, RESIDENT OF VILLAGE BHAJOL, P.O. THACHI, TEHSIL SUNNI, DISTRICT SHIMLA, H.P., PRESENTLY WORKING AS GRAM PANCHAYAT VETERINARY ASSISTANT IN VETERINARY DISPENSARY CHANDNI CHOWK, TEHSIL KOTKHAI, DISTRICT SHIMLA, H.P.

9. POOJA WIFE OF SHRI CHANDER PARKASH, RESIDENT OF VILLAGE NANTI, P.O. JABRI, TEHSIL & DISTRICT SHIMLA, H.P., PRESENTLY WORKING AS GRAM PANCHAYAT VETERINARY ASSISTANT IN VETERINARY DISPENSARY PIPLIDHAR, TEHSIL & DISTRICT SHIMLA, H.P.

10. RAMA DAUGHTER OF SHRI KARTAR SINGH, RESIDENT OF VILLAGE CHALHOG. P.O. SHAKRAH, TEHSIL & DISTRICT SHIMLA, H.P., PRESENTLY WORKING AS GRAM PANCHAYAT VETERINARY ASSISTANT IN VETERINARY DISPENSARY CHORUND, TEHSIL & DISTRICT SHIMLA, H.P.

11. BABLI SHARMA DAUGHTER OF SHRI ROSHAN LAL, RESIDENT OF VILLAGE KADHYARA, P.O. BADHOG. TEHSIL THEOG. DISTRICT SHIMLA, H.P.. PRESENTLY WORKING AS GRAM PANCHAYAT VETERINARY ASSISTANT IN VETERINARY DISPENSARY DEDHYOG. TEHSIL SUNNI, DISTRICT SHIMLA, H.P.

12. SHEETAL SHARMA WIFE OF SHRI GAGAN, RESIDENT OF VILLAGE DEOTHI, P.O. BADHERI, TEHSIL & DISTRICT SHIMLA, H.P., PRESENTLY WORKING AS GRAM PANCHAYAT VETERINARY ASSISTANT IN VETERINARY DISPENSARY BHARARA, TEHSIL THEOG, DISTRICT SHIMLA, H.P.

13. NARESHA DAUGHTER OF SHRI RAM PAL, RESIDENT OF VILLAGE BAJATALI, P.O. SORUD, TEHSIL RAMPUR, DISTRICT SHIMLA, H.P., PRESENTLY WORKING AS GRAM PANCHAYAT VETERINARY ASSISTANT IN

VETERINARY DISPENSARY BEOUNTHAL, TEHSIL RAMPUR, DISTRICT SHIMLA, H.P.

14. MANOHAR LAL SON OF SHRI RATTI RAM, RESIDENT OF VILLAGE CHANGAR, P.O. MATARNY, TEHSIL ARKI, DISTRICT SOLAN, H.P. PRESENTLY WORKING AS GRAM PANCHAYAT VETERINARY ASSISTANT IN VETERINARY DISPENSARY MANPUR, TEHSIL BADDI, DISTRICT SHIMLA, H.P.

15. VIKRANT CHANDEL SON OF SHRI HIMENDER SINGH, RESIDENT OF VILLAGE TAWAR, P.O. CHANDPUR, TEHSIL SADAR, DISTRICT BILASPUR, H.P., PRESENTLY WORKING AS GRAM PANCHAYAT VETERINARY ASSISTANT IN VETERINARY DISPENSARY TATRARA, DISTRICT BILASPUR, H.P.

16. PARDEEP KUMAR SON OF SHRI SUNDER LAL, RESIDENT OF VILLAGE BALYANA, P.O. TAKRER, TEHSIL GHUMARWIN, DISTRICT BILASPUR, H.P., PRESENTLY WORKING AS GRAM PANCHAYAT VETERINARY ASSISTANT IN VETERINARY DISPENSARY LADROUR, TEHSIL GHUMARWIN, DISTRICT BILASPUR, H.P.

17. ISHANI GAUTAM DAUGHTER OF SHRI PARKASH GAUTAM, RESIDENT OF V.P.O. AUHAR, TEHSIL GHUMARWIN, DISTRICT BILASPUR, H.P., PRESENTLY WORKING AS GRAM PANCHAYAT VETERINARY ASSISTANT IN VETERINARY DISPENSARY DANDWIN, DISTRICT HAMIRPUR, H.P.

18. SWAROOP KUMAR SON OF SHRI CHUNI LAL, RESIDENT OF VILLAGE BODDU SARNA, P.O. REHLU, TEHSIL SHAHPUR, DISTRICT KANGRA, H.P., PRESENTLY WORKING AS GRAM PANCHAYAT VETERINARY ASSISTANT IN VETERINARY DISPENSARY AMBARI, DISTRICT KANGRA, H.P.

19. RAHUL SON OF SHRI KARAM CHAND, RESIDENT OF VILLAGE GHAJRA, P.O. GHAJRA, TEHSIL NALAGARH, DISTRICT SOLAN, H.P., PRESENTLY WORKING AS GRAM PANCHAYAT VETERINARY ASSISTANT IN VETERINARY DISPENSARY ABHRANI, TEHSIL NALAGARH, DISTRICT SOLAN, H.P.

20. DHARMENDER KUMAR SON OF SHRI JOGINDER SINGH, RESIDENT OF VILLAGE DADOWOWALL, P.O. & TEHSIL NALAGARH, DISTRICT SOLAN, H.P., PRESENTLY WORKING AS GRAM PANCHAYAT VETERINARY ASSISTANT IN VETERINARY DISPENSARY DELLA, TEHSIL NALAGARH, DISTRICT SOLAN, H.P.

21. HEM LATA W/O SHRI SUNIL DUTT, RESIDENT OF VILLAGE KOTHI, P.O. RAMSHEHAR, TEHSIL NALAGARH, DISTRICT SOLAN, H.P., PRESENTLY WORKING AS GRAM PANCHAYAT VETERINARY ASSISTANT IN VETERINARY DISPENSARY SHITALPUR, DISTRICT SOLAN, H.P.

22. BHANU W/O SHRI BHUPENDER VERMA, RESIDENT OF VILLAGE BHOG, P.O. ANANDPUR, TEHSIL & DISTRICT SHIMLA, H.P., PRESENTLY WORKING AS GRAM PANCHAYAT VETERINARY ASSISTANT IN VETERINARY DISPENSARY MUNDAGHAT, TEHSIL & DISTRICT SHIMLA, H.P.

23. SEEMA THAKUR DAUGHTER OF SHRI JAGAT RAM, RESIDENT OF V.P.O. NAVGAON, TEHSIL ARKI, DISTRICT SOLAN, H.P., PRESENTLY WORKING AS GRAM PANCHAYAT VETERINARY ASSISTANT IN VETERINARY DISPENSARY KHILLIAN, DISTRICT SOLAN, H.P.

24. PAWAN KUMAR SON OF SHRI CHUNI LAL, RESIDENT OF V.P.O. SACH, TEHSIL & DISTRICT CHAMBA, H.P., PRESENTLY WORKING AS GRAM PANCHAYAT VETERINARY ASSISTANT IN VETERINARY DISPENSARY BRANGAL, DISTRICT CHAMBA, H.P.

25. KAPIL DEV SON OF SHRI KANTHI REM, RESIDENT OF VILLAGE GANGTOLI, P.O. TIMBI, TEHSIL SHILLAI, DISTRICT SIRMOUR, H.P., PRESENTLY WORKING AS GRAM PANCHAYAT VETERINARY ASSISTANT IN VETERINARY DISPENSARY MANAL, DISTRICT SIRMOUR, H.P.

26. HEM RAJ SON OF SHRI HARI SINGH, RESIDENT OF NEAR NIRMLA PRINTING PRESS, ITI ROAD JOGINDERNAGAR, TEHSIL JOGINDERNAGAR, DISTRICT MANDI, H.P., PRESENTLY WORKING AS GRAM PANCHAYAT VETERINARY ASSISTANT IN VETERINARY DISPENSARY NERI, TEHSIL JOGINDERNAGAR, DISTRICT MANDI, H.P.

27. ASHWANI KUMAR SON OF SHRI THAKUR SINGH, RESIDENT OF VILLAGE CHAB, P.O. NAHNAUHI, TEHSIL JOGINDERNAGAR, DISTRICT MANDI, H.P., PRESENTLY WORKING AS GRAM PANCHAYAT VETERINARY ASSISTANT IN VETERINARY DISPENSARY BADI, TEHSIL JOGINDERNAGAR, DISTRICT MANDI, H.P.

28. RAJU SON OF SHRI MOHAR SINGH, RESIDENT OF VILLAGE SHAJUHALI, P.O. CHANON, TEHSIL BANJAR, DISTRICT KULLU, H.P., PRESENTLY WORKING AS GRAM PANCHAYAT VETERINARY ASSISTANT IN VETERINARY DISPENSARY KOTLA, DISTRICT KULLU, H.P.

29. SANJU DEV SON OF SHRI RAM SINGH, RESIDENT OF VILLAGE LAUT, P.O. DUNI, TEHSIL NIRMAND, DISTRICT KULLU, H.P., PRESENTLY WORKING AS GRAM PANCHAYAT VETERINARY ASSISTANT IN VETERINARY DISPENSARY PUJARLI, TEHSIL NIRMAND, DISTRICT KULLU, H.P.

....PETITIONERS.

(BY. MR. R.L. CHAUDHARY, ADVOCATE)

AND

1. STATE OF H.P. THROUGH SECRETARY (ANIMAL HUSBANDRY) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-171002.

2. SECRETARY (PANCHAYATI RAJ) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-171002.

3. DIRECTOR OF ANIMAL HUSBANDRY, HIMACHAL PRADESH, SHIMLA-171 005

4. DIRECTOR OF PANCHAYATI RAJ, HIMACHAL PRADESH, SHIMLA-171 009.

5. DEPUTY DIRECTOR OF ANIMAL HUSBANDRY SHIMLA, DISTRICT SHIMLA, H.P.

6. DEPUTY DIRECTOR OF ANIMAL HUSBANDRY BILASPUR, DISTRICT BILASPUR, H.P.

7. DEPUTY DIRECTOR OF ANIMAL HUSBANDRY SOLAN, DISTRICT SOLAN, H.P.

8. DEPUTY DIRECTOR OF ANIMAL HUSBANDRY SIRMOUR AT NAHAN, DISTRICT SIRMOUR, H.P.

9. DEPUTY DIRECTOR OF ANIMAL HUSBANDRY HAMIRPUR, DISTRICT HAMIRPUR, H.P.

10. DEPUTY DIRECTOR OF ANIMAL HUSBANDRY MANDI, DISTRICT MANDI, H.P.

11. DEPUTY DIRECTOR OF ANIMAL HUSBANDRY KANGRA AT DHARAMSHALA, DISTRICT KANGRA, H.P.

12. DEPUTY DIRECTOR OF ANIMAL HUSBANDRY CHAMBA, DISTRICT CHAMBA, H.P.

13. DEPUTY DIRECTOR OF ANIMAL HUSBANDRY KULLU, DISTRICT KULLU, H.P.

14. HIMACHAL PRADESH STATE SELECTION COMMISSION HAMIRPUR, DISTRICT HAMIRPUR, H.P., THROUGH ITS SECRETARY.

15. SHRI NITIN KUMAR SON OF SHRI DEVENDER KUMAR, RESIDENT OF VILLAGE KOTHI, P.O. OCHHGHAT, TEHSIL & DISTRICT SOLAN, H.P.

16. MS. KIRAN DAUGHTER OF SHRI SHANKAR SINGH, RESIDENT OF VILLAGE BHANJWANI, P.O. AUHAR, TEHSIL GHUMARWIN, DISTRICT BILASPUR, H.P.

17. SHRI MANINDER SINGH SON OF SHRI BALVINDER SINGH, RESIDENT OF V.P.O. DHABOTA, TEHSIL NALAGARH, DISTRICT SOLAN, H.P.

18. SHRI PAWAN KUMAR SON OF SHRI MANISH RAM, RESIDENT OF VILLAGE THER, P.O. GURCHAN, TEHSIL NURPUR, DISTRICT KANGRA, H.P.

....RESPONDENTS.

(BY. MR. DINESH THAKUR, MR. SUMESH RAJ, MR. SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, FOR RESPONDENTS NO.1 TO 13-STATE)

(MR. RAJ KUMAR NEGI, ADVOCATE, FOR RESPONDENT NO.14)

(NO NOTICE HAS BEEN ISSUED TO RESPONDENTS NO.15 TO 18)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.2919 of 2020
Decided on: 23.05.2022

Constitution of India, 1950- Article 226- Himachal Pradesh Animal Husbandry Department Veterinary Pharmacist Class-III (Non-Gazetted) Recruitment & Promotion Rules, 2011- Clause 10- Quashing of Rule 10 (ii) of the amended Recruitment & Promotion Rules qua the post of Veterinary Pharmacists and directions for appointment as per old Recruitment & Promotion Rules- **Held-** State has given an opportunity to a Class which was earlier excluded from competing for the post of Panchayat Pharmacist, to now compete for the same- Not an arbitrary act- Petition dismissed. (Paras 12, 14)

Cases referred:

P.U. Joshi and others Vs. Accountant General Ahmedabad and others 2003 (2) SCC 632;

R.K. Sabharwal and others Vs. State of Punjab and others, (1995)2 SCC 745;

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

J U D G M E N T

By way of the present petition, the petitioners have prayed for the following reliefs:-

"*(i) That the notification dated 08.09.2017 (Annexure A-20), may kindly be quashed and set aside.*
(ii) That Rule 10 (ii) of the amended Recruitment & Promotion Rules qua the post of Veterinary Pharmacists (Annexure A-13) may kindly be quashed and set aside, since the said amendment has deprived the applicants from getting appointment against the post of Veterinary Pharmacist, whereas similarly situated candidates have already been given appointment to the post of Veterinary Pharmacist as per the old Recruitment & Promotion Rules Annexure A-5.
(iii) That the respondents may kindly be directed to give appointment to the applicants as per old Recruitment & Promotion Rules dated 22.12.2011 (Annexure A-5) in light of principle of parity, since number of the candidates belonging to their batch have already been given appointment to the post of Veterinary Pharmacist by the respondent department who were working as Gram Panchayat Veterinary Assistants on honorarium basis.
(iv) That the appointments of private respondents and other similar candidates who do not fulfill the requisite criteria for the appointment, may kindly be quashed and set aside, since they were not fulfilling the eligibility criteria.
(v) That the respondent department may kindly be directed to follow the roster points in the selection process of Veterinary Pharmacists for the year 2017-18 as per the ratio laid down by the Hon'ble Apex Court in R.K. Sabarwal v/s State of Punjab.
(vi) That the respondent authorities may kindly be directed to pay salary equal to Veterinary Pharmacists (contractual) to the applicants in light of the principle of 'equal pay for equal work', since the applicants are doing the work of Veterinary Pharmacists in all respect, but they are not being paid equal salary."

2. The case of the petitioners is that they are serving as Panchayat Veterinary Assistants with various Gram Panchayats as from the date of their engagement on contract basis. In terms of Annexure A-5, i.e. notification dated 22.12.2011, the Government of Himachal Pradesh, Department of Animal Husbandry, brought into force the Himachal Pradesh Animal Husbandry Department Veterinary Pharmacist Class-III (Non-Gazetted) Recruitment & Promotion Rules, 2011. Clause-10 of the said Rules, provided

for method of recruitment by direct recruitment and by promotion and in terms thereof, 88% of the posts were to be filled in by way of direct recruitment on regular basis from amongst Panchayat Veterinary Sahayak or by recruitment on contract basis from amongst the said category as the case may be. Further, 12% of the posts were to be filled in by way of promotion, falling which by way of direct recruitment on regular basis or by recruitment on contract basis from amongst Panchayat Veterinary Sahayak as the case may be.

3. The grievance of the petitioners is with regard to Annexure A-13, i.e. notification dated 10.05.2016, vide which an amendment has been made in the 2011 Rules (supra), to the effect that now 44% of the posts of Veterinary Pharmacist are to be filled in by way of direct recruitment on regular basis from amongst Panchayat Veterinary Sahayak or by recruitment on contract basis from amongst the said class as the case may be and 44% by way of direct recruitment through concerned Recruiting Agency, i.e. Himachal Pradesh Staff Selection Commission, Hamirpur, H.P., on regular basis or by recruitment on contract basis as the case may be.

4. Mr. R.L. Chaudhary, learned counsel for the petitioners has argued that the impugned amendment is not sustainable in the eyes of law for the reason that result thereof is that the chances of promotion to the post in issue of the present petitioners have been arbitrarily reduced without any cogent reason. He has argued that when the petitioners underwent the course in issue, it were the old Rules which were in force and there was a legitimate expectation amongst the petitioners of being promoted to the post of Veterinary Pharmacist, once recruited against the post of Panchayat Veterinary Assistant and this legitimate expectation of theirs has been defeated by way of the impugned amendment. Learned counsel has also argued that the impugned amendment is also contrary to the judgment of Hon'ble Supreme Court of India as has been laid down in ***R.K. Sabharwal***

and others Versus State of Punjab and others, (***1995)2 Supreme Court Cases 745***. Accordingly, learned counsel for the petitioners has prayed for quashing of Annexure A-13, i.e. the amending Rules as well as Annexure A-20, which is a notification issued subsequent to the issuance of the amendment in Rules. No other point was urged.

5. Mr. Dinesh Thakur, learned Additional Advocate General has defended the amendment which has been so incorporated, on the ground that the reason and the rational as to why the amendment was incorporated was to instill the element of competition. He submitted that the contention of the petitioners that their chances of recruitment to the post in issue have been diminished is totally without any basis because even now 88% of the posts are available for the category concerned, but the only distinction is that now there are two channels of recruitment which stand provided in the Rules and in case the petitioners fulfill the eligibility criteria then they can compete from either of two channels as stand incorporated by way of the amendment. He has further submitted that as far as the judgment of Hon'ble Supreme Court in *R.K. Sabharwal's* case (supra) is concerned, reliance upon the same is completely misplaced, because it is not understood as to how the amendment incorporating the Rules in any manner violates the law laid down by Hon'ble Supreme Court in the said judgment. On these basis, the State has prayed for the rejection of the petition.

6. Mr. Raj Kumar Negi, learned counsel for the Staff Selection Commission, Hamirpur, H.P. has submitted that in terms of the amendment which has incorporated in the Rules, as and when requisitions are received by the Commission from the employer, the process is initiated for filling up the posts in issue and due representation is given to all the classes in terms of reservation policy of the Government.

7. I have heard learned counsel for the parties and have gone through the pleadings as well as documents appended with the petition.

8. The grievance as has already been enumerated hereinabove of the petitioners is with regard to the amendment which has been carried out in the Recruitment & Promotion Rules to the post of Veterinary Pharmacist. In terms of the 2011 Rules, 88% of the said posts were to be filled in by way of direct recruitment on regular or contract basis from was amongst Panchayat Veterinary Sahayak, whereas in terms of the amended Rules, this quota has been reduced to 44% and the remaining 44% quota is now to be filled in by way of direct recruitment through the concerned Recruiting Agency.

9. As far as the recruitment to be made through the now carved out 44% second category is concerned, there is no alteration in the minimum educational qualifications required for being considered to be eligible to compete for the post in issue, meaning thereby that an incumbent who is eligible to participate in the process of recruitment under clause (a) of the amended Rules is also eligible for consideration for recruitment under the clause (b). The only distinction is that whereas earlier 88% of the posts were to be filled in either on regular basis or on contract basis from amongst Panchayat Veterinary Sahayak, now by reducing this category from 88% to 44%, the State has given an opportunity to those candidates also who though presently are not serving as Panchayat Veterinary Sahayak, but do possess the qualification for appointment against the post in issue to compete for the post. This step of the State by no stretch of imagination can be said to be arbitrary or discriminatory.

10. It is settled law that it is not for the Court to direct the State a particular method of recruitment or eligibility criteria or avenues of promotions or impose itself by substituting its view for that of the State. It is well open and within the competence of the State to change the Rules relating to a service and alter or amend by additions/subtractions the qualifications, eligibility criteria and other conditions of service including avenues of promotions from time to time as the administrative exigencies may need or

necessitate (see ***2003 (2) Supreme Court Cases 632***, titled as ***P.U. Joshi and others*** Versus ***Accountant General Ahmedabad and others***).

11. This Court though is alive to the situation that such power cannot be exercised by the State arbitrarily and in case exercise of such power is found to be arbitrary, then the Courts do interfere.

12. In the present case, what has been done by the State cannot be said to be an arbitrary act. As already mentioned hereinabove, the State in fact has given an opportunity to a Class which was earlier excluded from competing for the post of Panchayat Pharmacist to now compete for the same. However, the petitioners have not been excluded in any manner nor their quota can be said to have been curtailed, because (a) on the strength of the petitioners being Panchayat Veterinary Sahayak, they can compete for direct recruitment on regular basis against 44% of the posts and (b) they can otherwise compete for the remaining of 44% seat by way of direct recruitment on the strength of their education qualification. In fact, this is exactly the stand of the State also as is evident from the averments which are contained in Paras 1 to 4 of the preliminary submissions.

13. As far as the reliance placed upon by learned counsel for the petitioners upon the judgment of Hon'ble Supreme Court of India in *R.K. Sabharwal's* case (supra) is concerned, this Court is also of the considered view that the law laid down by the Hon'ble Supreme Court in the above mentioned judgment is not attracted in the present case, because it is not the case of the petitioners that the vacancies which have become available on account of the same being vacated by an incumbent recruited against a particular reserved roster point has been given to the open category.

14. In this view of the matter, as this Court does not finds any merit in the present petition, the same is dismissed, so also the pending miscellaneous applications, if any.

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

Between:

1. DINESH KUMAR S/O LATE SHRI GHANSHYAM DASS, R/O VILLAGE AND POST OFFICE SHAKRA TEHSIL KARSOG, DISTRICT MANDI, H.P. PRESENTLY SERVING AS RECEPTIONIST AT MAMLESHWAR CHINDI, TEHSIL KARSOG, DISTRICT MANDI, H.P.

2. RAJINDER SHARMA S/O SHRI JAGAT RAM SHARMA, R/O VILLAGE MALYAR POST OFFICE SHILLARO TEHSIL THEOG, DISTRICT SHIMLA, H.P. PRESENTLY SERVING AS RECEPTIONIST IN THE APPLE BLOSSOM, FAGU, DISTRICT SHIMLA, H.P.

....PETITIONERS.

(BY. MR. NEEL KAMAL SHARMA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH, THROUGH SECRETARY (FINANCE & PAY REVISION) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-2.

2. H.P. TOURISM DEVELOPMENT CORPORATION, RITIZ ANNEXEE, THE MALL, SHIMLA THROUGH ITS MANAGING DIRECTOR.

....RESPONDENTS.

(M/S SUMESH RAJ, DINESH THAKUR, SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, WITH MR. AMIT KUMAR DHUMAL, DEPUTY ADVOCATE GENERAL AND MR. MANOJ BAGGA, ASSISTANT ADVOCATE GENERAL, FOR RESPONDENT NO.1-STATE)

(MR. SURENDER KUMAR SHARMA, ADVOCATE, FOR RESPONDENT NO.2)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.3312 of 2019
Decided on: 25.08.2022

Constitution of India, 1950- Article 226-Quashing of rejection of representation and prayer to equate the post of Receptionist with the post of Clerk with further direction to add the post of Receptionist- Direction to pay revised pay along with all consequential benefits- **Held-** The revised pay scale of the existing pay scale of petitioners, could not have been denied to the petitioners simply because the nomenclature of the post being held by them did not find mention in notification- When respondent No.2 revised the pay scale of other categories of employees, same treatment was required to be given to the petitioners also- Petition allowed- Mandamus issued. (Paras 10, 11)

This petition coming on for orders this day, the Court passed the following: **J U D G M E N T**

The petitioners by way of the present petition have prayed for the following reliefs:-

> "*i) That letter dated 28th January, 2014 contained in Annexure P-4 whereby representation of the petitioners has been rejected may kindly be quashed and set aside.*
> *ii) That respondents may kindly be directed to equate the post of Receptionist with the post of Clerk with further direction to add the post of Receptionist in Annexure P-2 and with further directions to the respondents to revise the pay band of the category of Receptionist from Rs.5910-20200 to Rs.10300-34800 and also to enhance the Grade Pay from Rs.2000/- to Rs.3200/- from the date when other categories have been given the same benefits.*
> *iii) That the respondents may further be directed to provide revised pay band and revised grade pay of the petitioners with effect from 1.10.2012 with all consequential benefits alongwith interest at the rate of 9%.*
> *iv) That the respondents may kindly be burdened with costs*."

2. Brief facts necessary for the adjudication of the present petition are as under:-

The petitioners are serving in the respondent-Tourism Development Corporation against the posts of Receptionist. At the time when the petitioners were promoted against the said posts, the pre-revised scale which the post was carrying was Rs.3330-6200/-, which subsequently was revised w.e.f. 01.01.2006 to Rs.5910-20200+Rs.2000/- Grade Pay. The grievance of the petitioners is that pursuant to issuance of notification dated 27th September, 2012 (Annexure P-2), by the Government of Himachal Pradesh, Finance Department, vide Annexure P-3, vide Office Order dated 19.09.2013, the respondent-Corporation has revised the pay scales of the categories/posts mentioned in Office Order. However, the petitioners have been left out for the reason that as the posts which are being held by the petitioners do not find mention in notification, Annexure P-2, issued by the Government, therefore, they have been ignored as far as revision of pay scale is concerned, by their employer also, as is apparent from Office Order Annexure P-3.

3. Learned counsel for the petitioners has submitted that as the pay band of the petitioners was akin to that of the Clerks in the respondent-Corporation, therefore, even if the category of the post of Receptionist did not find mention in notification dated 27th September, 2012, the petitioners ought to have been granted the benefit of the revised Grade Pay by conferring upon them the pay band as conferred upon the Clerks and result of not including the category of Receptionist in Office Order Annexure P-3 is that the pay band of the petitioners stands stagnated.

4. Learned counsel for the respondent-Corporation has submitted that as the post of Receptionist was not mentioned in Annexure P-2, which is the notification issued by the respondent-State, therefore, the respondent-Corporation could not include the same in Office Order Annexure P-3 and it is for this reason that the post of Receptionist does not find mention in Annexure P-3.

5. When this case was listed on 07.07.2022, all the facts which have been mentioned hereinabove were taken note of by the Court in its order and learned Additional Advocate General was directed to have instructions as to why the category of Receptionist was not included in notification dated 27.09.2012 and what was being done by the State to ensure that the petitioners do not stagnate at the pay band presently being enjoyed by them especially when the same stood revised with regard to other categories of the employees in the respondent-Corporation.

6. Today, learned Additional Advocate General, in terms of the instructions which have been imparted to him, has submitted that the Writ Petition be disposed of on merit.

7. Having heard learned counsel for the parties, this Court is of the considered view that denial of the revised pay scale to the petitioners, simply because their category is not reflected in Annexure P-2, i.e. notification dated 27.09.2012, is not sustainable in the eyes of law. Respondent-Corporation for the purposes of grant of revised pay scale, is relying upon the notifications being issued by the respondent-State in this Regard. Qua this, there is no dispute between the parties. A perusal of the reply, which has been filed to the Writ Petition by respondent No.2, demonstrates that the stand which has been taken by the said respondent is that the replying respondents is a Company and cannot always act like Government Departments and just for the reason that till the issuance of notification dated 27.09.2012, by the State Government for its employees, the petitioners were getting the pay scale at par with the Clerks, the petitioners have no legal and fundamental right to claim the same. It is further the stand of respondent No.2 that in notification dated 27.09.2012 issued by respondent No.1, the category of Receptionist is not mentioned. On the analogy of aforesaid notification dated 27.09.2012, the Board of Directors took a decision and issued notification regarding grant of revised pay and after detailed deliberation, the Board of Directors issued

notification dated 19.09.2013, whereby pay scales of fifteen different categories on the analogy of Annexure P-2 were revised and the category of receptionist cannot always be equated with the category of Clerks.

8. No independent reply to the Writ Petition was filed by respondent No.1 and as is recorded in order dated 15.06.2022, the reply filed by respondent No.2, was adopted by respondent No.1.

9. In the background of the specific stand which has been taken by respondent No.2, this Court is of the considered view that the revised pay scale of the existing pay scale of petitioners, could not have been denied to the petitioners simply because the nomenclature of the post being held by them did not find mention in notification dated 27.09.2012 (Annexure P-2). Here is a case where respondent No.2 has granted revised pay scale to various categories of employees serving with it by following the revision of the pay scale as has been notified in terms of Annexure P-2. However, while doing so, respondent No.2 erred in not appreciating that as the category of Receptionist was not mentioned in Annexure P-2, therefore, the pay scale which was being paid to the Receptionist also called for revision and either this fact should have been brought by respondent No.2 to the notice of the State or it should have had independently taken a decision with regard to revision of the pay scale of the post of Receptionist by being guided by what the revised pay scale of the pay scale correctly being enjoyed by Receptionist.

10. The petitioners cannot be left in a lurch simply because the posts held by them is not mentioned in Annexure P-2. When respondent No.2 revised the pay scale of other categories of employees, same treatment was required to be given to the petitioners also. By not doing so, respondent No.2 has in fact discriminated the petitioners and said act of respondent No.2 is arbitrary and violative of Article 14 of the Constitution of India. In other words, even if, the category of the post of Receptionist was notmentioned in notification Annexure P-2, then also the revision in the pay scale of

Receptionist ought to have been done by respondent No.2 by granting them the revised pay scale of the pre-revised pay scale being enjoyed by the petitioners. It is not in dispute that in terms of Annexure P-1, the pay scale being enjoyed by the petitioners was Rs.5910-20200+Rs.2000/- Grade Pay. The guiding factor for respondent No.2 could have been the revision in the pay scale of the pay band of Rs.5910-20200+Rs.2000/- Grade Pay. However, by not doing so, indeed great injustice has been done to the petitioners.

11. Accordingly, this Writ Petition is disposed of by issuing a mandamus to the respondent-Corporation to revise the pay scale of the petitioners on the analogy of notification dated 27.09.2012 (Annexure P-2) as well as Office Order dated 19.09.2013 (Annexure P-3) by granting to the petitioners the revised pay scale of the pay band of Rs.5910-20200+Rs.2000/- Grade Pay or in the alternative, to grant them the revised pay sale as has been granted by respondent No.2-Corporation to the Clerks (Admn.) whichever is less. The revised pay scale shall be payable to the petitioners w.e.f. 01.10.2012. In case, the revised pay scale is released in favour of the petitioners on or before 31.12.2022, then the same shall not entail any interest. But, in case, the same is not paid by said time, then the same shall entail interest @ 6% per annum w.e.f. 01.01.2023.

12. Pending miscellaneous applications, if any, also stand disposed of.

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

Smt. Uma Sharma ....Petitioner.

Versus

State of Himachal Pradesh & another .... Respondents.

For the petitioner : Mr. Dilip Sharma, Senior Advocate, with M/s Manish Sharma and Deepak Sharma, Advocates.

For the Respondents :M/s Sumesh Raj, Sanjeev Sood, Additional Advocates General, with Mr. Amit Kumar Dhumal, Deputy Advocate General, for respondent No.1-State. Respondent No.2 *ex parte*.

CWPOA No.4929 of 2019
Decided on: 07.12.2022

Constitution of India, 1950- Article 226- Releasing the proficiency set up with all consequential benefits and amount of leave encashment as also arrears on account of enhancement of dearness allowance- **Held-** After the acceptance of the untraced report and pronouncement of the judgment in case against petitioner by Hon'ble Coordinate Bench, the respondent Council ought to have had released the proficiency step up in favour of the petitioner- Petition allowed with directions. (Para 8)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

As despite repeated calls, none has put in appearance on behalf of respondent No.2, said respondent is ordered to be proceeded against *ex parte*.

By way of the present Writ Petition, the petitioner has prayed for the following reliefs:-

> *"(i) That the respondents may be directed to consider the petitioner for releasing her proficiency set up w.e.f. 1992 and 2000 on completion of 8 and 16 years of service will all consequential benefits including arrears of salary.*
> *(ii) That the respondents may be directed to release the amount of leave encashment as also arrears on account of enhancement of dearness allowance in 2007, with arrears of salary.*
> *(iii) That the respondents may also be directed to pay interest on delayed payments on market rate."*

2. Brief facts necessary for the adjudication of the present petition are that the petitioner was appointed as Child Welfare Organizer under respondent No.2, which post was upgraded on 02.01.1984 to that of Executive Officer. As per the petitioner, she became eligible for grant of proficiency step up on completion of eight years of service as Executive Officer in the year 1992, but the benefit of proficiency step up was not given to her on account of registration of two FIRs, i.e. FIR No.5 of 990 and FIR No.38 of 1991, on 15.03.1991. As per the petitioner, these FIRs were in fact registered against the then General Secretary of the respondent Council, but subsequently the name of the petitioner was also implicated in these matters without any basis. Though, the petitioner was suspended for some time, but the suspension was revoked on 06.07.1995, but the benefit of proficiency step up was not given to her from the due date.

3. Learned Senior Counsel appearing for the petitioner has argued that withholding of the proficiency step up to which the petitioner was entitled to upon completion of eight and sixteen years of service, respectively, as an Executive Officer is totally arbitrary and illegal, for the reason that the FIR in issue, i.e. FIR No.38 of 1991 upon investigation resulted in an untraced report being presented in the Court of learned Judicial Magistrate, 1st Class, Court No.1, Shimla, H.P. and this untraced report which was submitted before the

Court on 15.12.2012 was accepted by the learned Court on 26.03.2013. By drawing the attention of the Court to Annexure MA-1 appended with M.A. No.1480 of 2018 (Page 73 of the Paper Book), learned Senior Counsel has submitted that one another accused in FIR No.38 of 1991, namely, Shri Lekh Ram had approached this Court for release of proficiency step up and in his case, in terms of judgment dated 26.02.2015, i.e. Annexure MA-1, this Court was pleased to allow the petition filed by Shri Lekh Ram and the respondents were directed to consider the case of the petitioner therein for grant of all the reliefs claimed in the petitioner within four weeks from the date of passing of judgment, failing which it was held that the petitioner shall be entitled for interest @ 9% on the amount so assessed. Learned Senior Counsel further submitted that despite the fact that this judgment was pronounced by Hon'ble Coordinate Bench of this Court as far back as on 26.02.2015, till date the proficiency step up has been denied to the petitioner on the pretext of lodging of said FIR only, i.e. FIR No.38 of 1991. To substantiate his contention, learned Senior counsel has drawn the attention of the Court to the reply which has been filed by respondent No.2 and by referring to para-2 of the same on merit, learned Senior counsel has submitted that perusal thereof clearly demonstrates that the proficiency step up at the relevant time was denied to the petitioner only on account of the pendency of FIR No.38 of 1991. Learned Senior Counsel further submitted that to be fair to respondent No.2, though this reply was filed on 29.08.2012, yet the adjudication of the writ petition of Shri Lekh Ram cannot be denied by respondent No.2 as it was a party respondent in the said petition and in all fairness, after the adjudication of the case of Lekh Ram, respondent No.2 ought to have had given proficiency step up to the petitioner also. Accordingly, learned Senior Counsel has submitted that the present petition be allowed by diercting the petitioners to grant the proficiency step up upon completion of eight and fifteen years of service and with regard to the remaining relief, learned Senior Counsel has

submitted that the petitioner be granted liberty to move an appropriate representation to the authority concerned.

4. Learned Additional Advocate General, who is representing respondent No.1, has submitted that a perusal of the reply filed by respondent No.2 demonstrates that at the relevant time the proficiency step up was correctly denied to the petitioner, as FIR No.38 of 1991 was pending against the petitioner. He further submitted that in the facts involved in the petition, appropriate orders be passed.

5. Having heard learned Senior Counsel appearing for the petitioner as also learned Additional Advocate General and having carefully gone through the pleadings, more so the response filed by respondent No.2, this Court is of the considered view that the present petition has to be allowed as far as the of grant of proficiency step up is concerned.

6. It is clearly borne out from the record of the case, that proficiency step up upon completion of eight and sixteen years of service as an Executive Officer was denied to the petitioner on account of pendency of registration of FIR No.38 of 1991, in which the petitioner was also an accused.

7. Be that as it may, as is evident from the judgment which was passed by Hon'ble Coordinate Bench of this Court in CWP No.278 of 2012, titled Lekh Ram Versus State of H.P. & another, decided on 26.02.2015 that post investigation of said FIR and untraced report was presented to the Court of learned Judicial Magistrate, 1st Class, Court No.1, Shimla, H.P. on 15.12.2012, which was accepted by learned Trial Court on 26.03.2013, this Court is of the considered view that now there is no cogent reason available with respondent No.2 to deny the proficiency step up to the petitioner. In fact, the Court concurs with the submissions made by learned Senior Counsel for the petitioner that after the pronouncement of the judgment in Lekh Ram's case (supra) by Hon'ble Coordinate Bench, the respondent Council ought to

have had released the proficiency step up in favour of the petitioner, as the foundation for denying the same stood eroded.

8. Accordingly, this Writ Petition is allowed to the extent that the respondents are directed to grant proficiency step up to the petitioner on completion of eight and sixteen years of service from the date due within a period of eight weeks from today, failing which the petitioner shall also be entitled to interest @ 9% on the amount so assessed. With regard to the remaining reliefs, the petitioner is permitted to agitate the same by way of representation before the appropriate Authority and it be construed that the present petition has been permitted to be withdrawn *vis-à-vis* those reliefs, with liberty to approach the Authority concerned.

9. With these observations, the petition is disposed of, so also the pending miscellaneous applications, if any.

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

Sohan Lal Verma .....Petitioner

Versus

State of H.P. and another .....Respondents

For the Petitioner: Mr. Ajay Kumar Dhiman, Advocate.

For the Respondents: Ms. Ritta Goswami, Additional Advocate General with Mr. Ram Lal Thakur, Assistant Advocate General.

CWPOA No.5506 of 2019
Decided on: 16.12.2022

Constitution of India, 1950- Article 226- **Recruitment & Promotion Rules** – Clause 11- Prayer of the petitioner is that the respondents be directed to consider his candidature for promotion to the post of Superintendent Grade-II- Held- The respondents are directed to open the recommendations of the Disciplinary Committee kept in the sealed cover in terms of its proceedings and to take appropriate decision on further promotion of the petitioner- Petition allowed.

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge

CMP(T) No.1107 of 2022

In view of the averments made in the application, the same is allowed and disposed of.

CWPOA No.5506 of 2019

With the consent of learned counsel for the parties, the matter is taken up for decision.

2. Petitioner's prayer is that the respondents be directed to consider his candidature for promotion to the post of Superintendent Grade-II.

3. The **case of the petitioner** is that:-

3(i). The petitioner was appointed as Clerk on 24.02.1987. He was promoted to the post of Junior Auditor/Senior Assistant on 02.03.2009. Further promotion from the post of Senior Assistant is to the post of Superintendent Grade-II.

3(ii). In terms of Clause 11 of the Recruitment & Promotion Rules (in short 'R&P Rules') for the post of Superintendent Grade-II, notified on 14.09.2011, the petitioner acquired eligibility for promotion to the post of Superintendent Grade-II on 02.03.2015. Despite the availability of vacancy of Superintendent Grade-II, the respondent-Department did not make promotions of eligible Senior Assistants to the post of Superintendent Grade-II. Petitioner's representations to the respondents seeking his promotion did not yield any positive response, hence, he preferred the instant petition, initially registered as O.A. No.2413 of 2015 before the erstwhile H.P. Administrative Tribunal, praying for the following substantive reliefs:-

> *"a). That the respondent may kindly be directed to consider the candidature of the applicant to be promoted to the post of Superintendent Grade-II.*
> *b). That the respondents may kindly be directed to complete the proceedings for the Departmental Promotion Committee for promotions to the post of Superintendent Grade-II."*

4. The **respondents in their reply** have not disputed the factual position. Their stand is that initially the meeting of Departmental Promotion Committee (DPC) could not be convened due to non-finalization of seniority list of Senior Assistants. The same was finalized on 15.07.2015, showing the position as on 31.12.2014. It was only thereafter that the meeting of DPC for promotion to the post of Superintendent Grade-II was convened on 10.08.2015 as per the applicable R&P Rules. In the said DPC meeting, name of the petitioner was considered, however, the recommendations of the DPC in that regard were kept in a sealed cover as a charge-sheet dated 09.06.2015 had been issued to the petitioner under Rule 14 of the Central Civil Services

(Classification, Control and Appeal) Rules, 1965 [in short 'CCS(CCA) Rules, 1965']. The departmental inquiry was pending against the petitioner, hence, sealed cover procedure was adopted by the DPC.

5. It is not in dispute that the departmental inquiry against the petitionerhas since long been concluded. The disciplinary authority imposed the penalty of stoppage of two increments without cumulative effect upon the petitioner on 13.08.2015. During hearing of the case, learned counsel for the petitioner placed on record a copy of the order passed by the Appellate Authority on 02.03.2016, whereby the penalty of withholding two increments without cumulative effect was reduced to withholding of future increment of pay without cumulative effect for a period of one year with further order that the penalty was to come into effect from the date of order of the Disciplinary Authority, i.e. 13.08.2015. Learnedcounsel for the petitioner also submitted that the order passed by the Appellate Authority has also been assailed by the petitioner by filing CWPOA No.7064 of 2019.

Be that as it may. The fact remains that the Memorandum of Charge-sheet issued against the petitioner has culminated in passing of office order dated 13.08.2015 by the Disciplinary Authority, as modified by the Appellate Authority on 02.03.2016, whereby penalty of withholding of future increment of pay without cumulative effect for a period of one year has been imposed upon the petitioner. Learned counsel for the petitioner has submitted that imposition of minor penalty does not constitute a bar to the eligibility and consideration of the employee for further promotion. In support of such submissions, reliance has been placed upon Chapter 16.13 of the Handbook on Personnel Matters, Vol-I (Second Edition), issued by the Government of Himachal Pradesh, Department of Personnel, which reads as under:-

> *"16.13 Minor penalties do not constitute a bar to eligibility and consideration for promotion.*
>
> *The imposition of minor penalty of censure does not by itself stand against the consideration of such person for*

promotion. So far as the eligibility of such a person to appear at a departmental/promotional examination is concerned, he cannot merely because of the penalty of censure, be debarred from appearing at such an examination. In case, however, the rules of such an examination lay down that only those eligible persons can be allowed to appear at the examination who are considered to be fit for the purpose, the fitness of an eligible candidate who has been awarded the penalty of Censure, to appear at the examination has to be considered on the basis of an over-all assessment, of his service record and not merely on the basis of penalty of censure.

In cases where the responsibility of an officer for any loss is indirect, or where increments of an officer have been stopped as a measure of penalty, while it is not possible to lay down any hard and fast rules in this regard, it is for the competent authority to take a decision in each case having regard to its facts and circumstances. Recovery from the pay of a Government servant, of the whole or part of any pecuniary loss caused to Government, by negligence or breach of orders, or withholding of increments of pay, are also minor penalties laid down in Rule 11 of the C.C.S. (C.C.A.) Rules. As in the case of promotion of a Government servant who has been awarded the penalty of censure, the penalty of recovery from his pay of the loss caused by him to Govt. or of withholding his increment(s) does not stand in the way of his consideration for promotion though in the latter case promotion is not given effect to during the currency of the penalty. While, therefore, the fact, of the imposition of such a penalty does not by itself debar the Govt. servant concerned from being considered for promotion, it is also taken into account by the Departmental Promotion Committee, or the competent authority, as the case may be, in the overall assessment of his service record for judging his suitability or otherwise for promotion or his fitness for admission to a departmental/promotional examination (where fitness of the candidat.es is a condition precedent to such admission).”

Rule 11 of the CCS(CCA) Rules, 1965 provides for major and minor penalties. Withholding of increments of pay is a minor penalty in terms of Rule 11(iv). The respondents have not controverted this position.

In this view of the matter, now there is no embargo upon the respondents from proceeding ahead to open the recommendations of the DPC dated 10.08.2015, which till date, have been kept in a sealed cover. Accordingly, the respondents are directed to open the recommendations of the DPC kept in the sealed cover in terms of its proceedings held on 10.08.2015 and to take appropriate decision on further promotion of the petitioner in accordance with law within a period of six weeks from today.

The writ petition stands disposed of in the above terms, so also the pending miscellaneous application(s), if any.

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

New India Assurance Co. Ltd. ....Appellant.

Versus

Asha Rani and others ...Respondents.

For the appellant : Mr. Raman Sethi, Advocate.
For respondents No.1 to 4 : Mr. Sunny Modgil, Advocate.
For respondents No.5 & 6 : Mr. Vinod Thakur, Advocate.

FAO(MVA) No.: 08 of 2016
Reserved on: 08.12.2022
Decided on: 19.12.2022

Motor Vehicle Act, 1988- Sections 173, 166, 168- The insurer, by way of instant appeal, has assailed the award of compensation in favour of the claimants passed by learned Motor Accident Claims Tribunal-II- **Held-** Claimants held entitled to interest at the rate of 9% per annum from the date of petition till its deposit or payment to the claimants whichever is earlier- Apportionment made by the learned Tribunal in the impugned award shall remain the same- Appeal dismissed. (Paras 28, 29)

Cases referred:

Magma General Insurance Company Ltd. Vs. Nanu Ram @ Chuhru Ram and Ors. (2018) 18 SCC 130;

National Insurance Company Ltd. Vs. Pranay Sethi and Ors.(2017) 16 SCC 680;

National Insurance Company Ltd. Vs. Rattani and Ors., (2009) ACJ 925;

National Insurance Co. Ltd. Vs. Swaran Singh and others (2004) 3 SCC 297;

National Insurance Company Ltd. Vs. Geeta Bhatt and Others, (2008) ACJ 1498;

Oriental Insurance Company Ltd. Vs. Prem Lata Shukla & Others, (2007) 13 SCC 476;

Pappu Deo Yadav vs. Naresh Kumar and others, AIR 2020 (SC) 4424;

Sarla Verma (Smt) and Ors. Vs. Delhi Transport Corporation and Anr., (2009) 6 SCC 121;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

The insurer, by way of instant appeal, has assailed the award dated 07.09.2015, passed by learned Motor Accident Claims Tribunal-II, Una in M.A.C.P. No. 37/2014.

2. The claimants (respondents No. 1 to 4 herein) filed a Claim Petition under Section 166 of the Motor Vehicles Act, 1988 (for short 'Act') for grant of compensation on account of death of Sh. Mohinder Chand in a motor vehicle accident involving Truck No. HP-22-7495 and Scooter No. HP-20A-4639 that had taken place on 31.01.2014 at Village Bhadsali, Tehsil Haroli, District Una, H.P.

3. As per claimants, Sh. Mohinder Chand was riding Scooter No. HP-20A-4639 on his way from office to residence. He was accompanied by Mr. Shyam Mohan, who was on the pillion of the scooter. When the scooter reached near Village Bhadsali, it collided with Truck No. HP-22-7495 from the back side of the Truck. It was alleged that the offending truck was parked by its driver negligently and had left the vehicle in a dangerous position on the road without using parking or indicator lights. Due to dense fog on the road, the parked truck could not be sighted and as a result thereof the accident occurred in the abovesaid manner. The deceased was stated to be working as Assistant Lineman in H.P. State Electricity Board and his last drawn pay was Rs. 22,630/-

4. The driver and owner of truck (respondents No. 5 and 6 herein) filed their joint reply in which they submitted that the deceased himself was negligent in riding the scooter and as a result thereof the accident had taken place. Reliance was placed on FIR No. 19 of 2014, dated 31.01.2014, registered at Police Station Haroli, according to which,

deceased himself was negligent. It was further averred that the driver of the truck was driving the vehicle at very slow speed as the truck was loaded with cement bags. It was on account of rash and negligent driving of the deceased himself that this scooter collided with the truck. The owner/ driver also alleged that at the time of accident the deceased and the person on his pillion were drunk.

5. The insurer (appellant herein) contested the petition separately on the ground firstly that the claimants were not entitled to any compensation for the cause of accident was rash and negligent driving of the deceased himself and secondly, that the insurer was not liable to indemnify the insured as there was serious breach of the terms of insurance policy. According to the insurer, the driver of the truck did not have valid and effective driving license at the time of accident. In addition, various other breaches of the terms of insurance polices were alleged.

6. On the pleadings of the parties, learned Tribunal framed the following issues:-

1. Whether on 31.01.2014 at about 6:45 PM at Bhadsali, respondent NO. 1 was driving truck No. HP-22-7495 rashly and negligently and caused death of Mohinder Chand?

2. If issue No. 1 is proved in affirmative, to what amount of compensation the petitioners are entitled to and from whom? OPP.

3. Whether the driver of the truck No. HP22-7495 was not holding valid and effective driving license to drive the truck at the time of accident? OPR.

4. Whether the truck in question was being driven without valid registration certificate, fitness certificate and route permit? OPR

5. Whether there is collusion between petitioners and respondents No. 1 and 2 ?OPR

6. Whether the truck in question was being driven and used in violation of terms of insurance policy and Motor Vehicle Act? OPR

.

7.Whether the petition is not maintainable as the deceased was himself tort-fesor? OPR.

8. Relief.

Issue No.1 was decided in affirmative. The claimants were held entitled to compensation of Rs. 22,86,528/- with interest @ 9% per annum from the date of filing of the appeal. Issues No. 3 to 7 were decided in negative.

7. I have heard learned counsel for the parties and have also gone through the records of the case carefully.

8. Mr. Raman Sethi, learned counsel for the insurer at the very outset contended that the award passed by learned Tribunal against insurer is not sustainable. He submitted that the factum of accident having been caused due to rash and negligent driving of the deceased himself was duly proved on record. He placed strong reliance on FIR Ext. PW2/A and statement of RW-1, Sh. Hem Raj. On the other hand, learned counsel for the claimants submitted that learned Tribunal has rightly concluded that the accident was caused due to negligent act of the driver of the truck. He supported his argument with the statement of PW-5, Sh. Shyam Mohan.

9. Learned Tribunal has held the driver of the truck to be negligent in parking the vehicle on the road. The cause of accident has also been attributed to such negligence. While holding so, learned Tribunal has also placed reliance upon statement of PW-5.

10. On one hand, FIR Ext. PW2/A and the version of RW-1 reveals that the truck was not stationary, it was moving and it was the deceased who was riding the scooter in rash and negligent manner, on the other, PW-5,

Shyam Mohan has a different version to tell. According to him, the truck was negligently parked without parking or indicator lights being on and due to dense fog the truck could not be sighted and as a result thereof the accident had taken place. This witness has further stated that the scooter was being ridden by the deceased in a slow speed as there was fog on the road.

11. Learned Tribunal ignored the evidence in the shape of FIR on the ground that it was not a substantive piece of evidence. To counter such findings, learned counsel for the insurer has placed reliance on the judgment passed by Hon'ble Supreme Court in ***Oriental Insurance Company Ltd.*** Vs. ***Prem Lata Shukla and Others,*** reported in ***(2007) 13 SCC 476*** *and* ***National Insurance Company Ltd.*** *Vs.* ***Rattani and Ors.,*** reported in ***(2009) ACJ 925.*** On the strength of aforesaid judgments, he has raised the contention that the FIR was proved on record by the claimants and as such they were now precluded from denying its contents.

12. To test the above contention of learned counsel for the insurer, it will be gainful to notice the following extracts from the aforesaid judgments. In Prem Lata Shukla (supra), where it was observed as under:-

> "12. *In Narbada Devi (supra) whereupon reliance has been placed, this Court held that contents of a document are not automatically proved only because the same is marked as an Exhibit. There is no dispute with regard to the said legal proposition.*
>
> *13. However, the factum of an accident could also be proved from the First Information Report. It is also to be noted that once a part of the contents of the document is admitted in evidence, the party bringing the same on record cannot be permitted to turn round and contend that the other contents contained in the rest part thereof had not been proved. Both the parties have relied thereupon. It was marked as an Exhibit as both the parties intended to rely upon them.*
>
> *14. Once a part of it is relied upon by both the parties, the learned Tribunal cannot be said to have committed any illegality in relying upon*

the other part, irrespective of the contents of the document been proved or not. If the contents have been proved, the question of reliance thereupon only upon a part thereof and not upon the rest, on the technical ground that the same had not been proved in accordance with law, would not arise.

15. A party objecting to the admissibility of a document must raise its objection at the appropriate time. If the objection is not raised and the document is allowed to be marked and that too at the instance of a party which had proved the same and wherefor consent of the other party has been obtained, the former in our opinion cannot be permitted to turn round and raise a contention that the contents of the documents had not been proved and, thus, should not be relied upon. In Hukam Singh (supra), the law was correctly been laid down by the Punjab and Haryana High Court stating;

> *"8. Mr. G.C. Mittal, learned counsel for the respondent contended that Ram Partap had produced only his former deposition and gave no evidence in Court which could be considered by the Additional District Judge. I am afraid there is no merit in this contention. The Trial Court had discussed the evidence of Partap in the light of the report Exhibit D.1 produced by him. The Additional District Judge, while hearing the appeal could have commented on that evidence and held it to be inadmissible if law so permitted. But he did not at all have this evidence before his mind. It was not a case of inadmissible evidence either. No doubt the procedure adopted by the trial Court in letting in a certified copy of the previous deposition of Ram Partap made in the criminal proceedings and allowing the same to be proved by Ram Partap himself was not correct and he should have been examined again in regard to all that he had stated earlier in the statement the parties in order to save time did not object to the previous deposition being proved by Ram Partap himself who was only cross-examined. It is not a case where irrelevant evidence had been let in with the consent of the parties but the only objection is that the procedure followed in the matter of giving evidence in Court was not correct. When the parties themselves have allowed certain statements to be placed on the record as a part of their evidence, it is not open to them to urge later either in the same Court or in a court of appeal that the evidence produced was inadmissible. To allow them to do so would indeed be permitting them both to appropriate and reprobate."*

13. In Rattani (supra), Hon'ble Supreme Court observed as under:-

"7. We are not oblivious of the fact that ordinarily an allegation made in the first information would not be admissible in evidence per se but as the allegation made in the first information report had been made a part of the claim petition, there is no doubt whatsoever that the Tribunal and consequently the appellate courts would be entitled to look into the same.

13. The question as to whether burden of proof has been discharged by a party to the lis or not would depend upon the facts and circumstances of the case. If the facts are admitted or, if otherwise, sufficient materials have been brought on record so as to enable a court to arrive at a definite conclusion, it is idle to contend that the party on whom the burden of proof lay would still be liable to produce direct evidence to establish that the deceased and the injured passengers were gratuitous passengers.

As indicated hereinbefore, the First Information Report as such may or may not be taken into consideration for the purpose of arriving at a finding in regard to the question raised by the appellant herein, but, when the First Information Report itself has been made a part of the claim petition, there cannot be any doubt whatsoever that the same can be looked into for the aforementioned purpose."

14. From aforesaid exposition, it is clear that the FIR can be looked into as a piece of evidence, especially, against the party who places reliance on it. This proposition, in my considered view, will not help the cause of insurer, keeping in view the facts and circumstances of the case. To consider the contents of FIR as piece of evidence is one thing and to take its contents as proof of fact is another. The proof of fact, in motor accident claims cases, depends on the preponderance of probabilities based on entire evidence on record. In the instant case, as noticed above, there was evidence in the shape of oral testimony of PW-5. Learned Tribunal gave precedence to the version of

PW-5 over the contents of FIR as also the statement of RW-1 and this Court does not find any reason to interfere with the findings of learned Tribunal to this effect. The FIR recorded the version, which was given to the police by none else than the driver of the truck. He has also been examined as RW-1. As against this, the eye witness to the incident has also deposed before learned Tribunal as PW-5. It was not the case of the driver and owner that there was none on the pillion of the scooter. Rather, it was their specific stand that the deceased and the person on the pillion of the scooter were drunk. In the cross-examination of PW-5, it has not been suggested to him that said witness was not the person on pillion of the scooter at the time of accident. In such view of the matter, the version mentioned in the FIR has to be taken with a pinch of salt for the reason that the driver of the truck would always try to provide such a version, which would save him from the legal consequence. The statement of PW-5, despite his lengthy cross-examination, has not been shattered. Reliance can easily be placed upon his version. Support to such hypothesis can be drawn from the fact that there is no evidence on the allegation that the deceased and pillion were drunk at the time of accident. Another fact is that the investigating officer of the case was not examined to prove the veracity of the contents of FIR either by owner/driver or the insurer. This neutralizes another argument of learned counsel for the insurer that the police had filed untraced report. Without examination of the record of investigation, no inference can be drawn about the authenticity of the report submitted by police.

15. Learned counsel for the appellant next contended that it was proved on record by way of document Ext. R-Y that the driver was not holding valid driving license. As per him, the Investigator appointed by insurer had sought the information with respect to the driving license held by the driver from the concerned Registering and Licensing Authority and the authority had disclosed that the driving license held by the driver was not issued by

such authority. Mr. Raman Sethi, learned counsel has placed reliance on judgment passed by Hon'ble Supreme Court in ***National Insurance Company Ltd.*** Vs. ***Geeta Bhatt and Others,*** reported in ***(2008) ACJ 1498*** to assert that in the identical fact situation Hon'ble Supreme Court had assumed the driving license of driver as a fake one. However, the contention so raised on behalf of the insurer also deserves to the rejected for the reason that in the facts of that case, the investigator himself had visited the office of Licensing Authority and had inspected the record register. In the instant case, the insurer has simply tendered the investigation report Ext. R-Y without even examining the investigator. The report does not suggest that the investigator had himself seen the records of concerned Registering and Licensing Authority. In such circumstances, the insurer cannot derive any benefit from the above referred judgment.

16. It is settled proposition of law that onus to prove exception is on the insurer. Reference can be made to the following extract from the judgment passed by Hon'ble Supreme Court in ***National Insurance Co. Ltd.*** *Vs.* ***Swaran Singh and others*** reported in ***(2004) 3 SCC 297***:-

> *'66. A bare perusal of the provisions of Section 149 of the Act leads to only one conclusion that usual rule is that once the assured proved that the accident is covered by the compulsory insurance clause, it is for the insurer to prove that it comes within an exception.*
>
> *67. In MacGillivray on Insurance Law it is stated:*
>
> *"25-82 Burden of Proof: Difficulties may arise in connection with the burden of proving that the facts of any particular case fall within this exception. The usual rule is that once the assured has proved that the case comes within the general risk, it is for the insurers to prove that it comes within an exception. It has therefore been suggested in some American decisions that, where the insurers prove only that the assured exposed himself to danger and there is no evidence to show why he did so, they*

cannot succeed, because they have not proved that his behaviour was voluntary or that the danger was unnecessary. Since an extremely heavy burden is imposed on the insurers if they have to prove the state of mind of the assured, it has been suggested in Canadian decisions that the court should presume that the assured acted voluntarily and that, where he does an apparently dangerous and foolish act, such danger was unnecessary, until the contrary is shown. In practical terms, therefore, the onus does in fact lie on the claimant to explain the conduct of the assured where there is not apparent reason for exposing himself to an obvious danger."

68. In Rukmani and Others vs. New India Assurance Co. Ltd. and Others [1999 ACJ 171], this Court while upholding the defences available to the insurer to the effect that vehicle in question was not being driven by a person holding a licence, held that the burden of the insurer would not be discharged when the evidence which was brought on record was that the Inspector of Police in his examination in chief merely stated,

"My enquiry revealed that the respondent No.1 did not produce the licence to drive the abovesaid scooter. The respondent No.1 even after my demand did not submit the licence since he was not having it."

69. The proposition of law is no longer res integra that the person who alleges breach must prove the same. The insurance company is, thus, required to establish the said breach by cogent evidence. In the event, the insurance company fails to prove that there has been breach of conditions of policy on the part of the insured, the insurance company cannot be absolved of its liability. (See Sohan Lal Passi (supra)."

17. Thus, it was solely upon the insurer to discharge the burden of proof regarding allegation of fake license. It was not a case that the driver of offending vehicle was not having any license at all. The insurer itself had taken into consideration a driving license belonging to the driver of the offending vehicle.

18. In the facts of the case, the insurer has miserably failed to discharge the burden of proving invalidity of driving license held by the petitioner.

19. The mode adopted by insurer to prove the factum of fake license was also not in accordance with law. A fact can be proved either by oral or documentary evidence. In the case in hand, the fact that license possessed by driver was not genuine could be proved by production of original record of concerned Licensing Authority, which purportedly had issued such license. It was not a case where primary evidence was not available. The investigation report allegedly submitted by the investigator is merely a hearsay and cannot substitute legal mode required to prove the fact.

20. In light of aforesaid findings, the insurer fails in both its contentions raised before this Court.

21. Learned counsel for the claimants submitted that the compensation granted in favour of the claimants was not just and fair and the same is liable to be enhanced. He contended that learned Tribunal had wrongly deducted 1/3rd from the income of the deceased on account of his personal expenses, whereas it should have been only 1/4th keeping in view the mandate of judgment passed by Hon'ble Supreme Court in ***Sarla Verma (Smt) and Ors.*** Vs. ***Delhi Transport Corporation and Anr.,*** reported in ***(2009) 6 SCC 121***. He further contended that the learned Tribunal also failed to add the component of income on account of future prospect, for such contention, reliance has been placed on judgment passed by Hon'ble Supreme Court in ***National Insurance Company Ltd.*** Vs. ***Pranay Sethi and Ors.(2017) 16 SCC 680***. He has further stated that the claimants have also not been awarded due amount in terms of judgment passed by Hon'ble Supreme Court in ***Magma General Insurance Company Ltd.*** Vs. ***Nanu Ram @ Chuhru Ram and Ors. (2018) 18 SCC 130.***

22. The aforesaid contentions have been contested by learned counsel for the insurer on the ground that the claimants have shown their satisfaction with the award and have not filed any appeal or cross-objection and thus, they were not entitled to raise the issue of inadequacy of compensation.

23. Sections 166 and 168 of the Motor Vehicles Act, empowers to Tribunals and Courts with jurisdiction to award just compensation. The appeal is continuation of proceedings undertaken before the Tribunal constituted under the Act. It is the bounden duty of the Tribunals or/and Courts to conclude on just compensation on the basis of material on record. In ***Pappu Deo Yadav vs. Naresh Kumar and others, AIR 2020 (SC) 4424***, the Hon'ble Supreme Court has held as under:

> *"8. This court has emphasized time and again that "just compensation" should include all elements that would go to place the victim in as near a position as she or he was in, before the occurrence of the accident. Whilst no amount of money or other material compensation can erase the trauma, pain and suffering that a victim undergoes after a serious accident, (or replace the loss of a loved one), monetary compensation is the manner known to law, whereby society assures some measure of restitution to those who survive, and the victims who have to face their lives…."*

24. In Sarla Verma (supra), it has been held that where the number of depend family members is 4 to 6, the deduction on account of personal expenses should be 1/4th. In this view of the matter, the award needs to be interfered. Instead of deduction of amount to the extent of 1/3rd from the income of deceased, the deduction has to be 1/4th only and the balance will count towards dependency. It is not in dispute that there are four dependent family members of deceased Sh. Mohinder Chand.

25. In Pranay Sethi (supra), it has been held as under:-

> *"61 (iii) While determining the income, an addition of 50% of actual salary to the income of the deceased towards future prospects, where the deceased had a permanent job and was below the age*

of 40 years, should be made. The addition should be 30%, if the age of the deceased was between 40 to 50 years. In case the deceased was between the age of 50 to 60 years, the addition should be 15%. Actual salary should be read as actual salary less tax."

26. In the facts of the case, the age of the deceased was 53 years and by application of the mandate of Pranay Sethi (supra) an addition of 15% to the actual salary is required to be added while assessing the compensation.

27. Further keeping in view the ratio of judgments passed by the Hon'ble Supreme Court in National Insurance Company Limited vs. Pranay Sethi and others (2017) 16 SCC 680 and Magma General Insurance Company Ltd. Vs. Nanu Ram alias Chuhru Ram and others (2018) 18 SCC 130, the claimants are entitled to a sum of Rs.15,000/- under the head 'loss of estate', Rs.15,000/- for funeral charges and Rs.40,000/- to each claimant i.e.Rs.1,60,000/-under the head 'loss of consortium'.

28. Thus, the impugned award needs to be modified to the extent that the claimants are held entitled to following amounts:

1.Loss of contribution=Rs.21675 X11X12=Rs.28,61,100/-

2. Loss of estate = Rs. 15,000/-

3. Funeral charges = Rs. 15,000/-

4. Loss of consortium = Rs. 1,60,000/- (Rs.40,000x4)

Total = Rs.30,51,100/-

Claimants are further held entitled to interest at the rate of 9% per annum from the date of petition till its deposit or payment to the claimants whichever is earlier. It is clarified that the apportionment made by the learned Tribunal in the impugned award shall remain the same.

29. The appeal is accordingly disposed of. The impugned award is modified only to the extent as detailed above. The pending application(s), if any, also stands disposed of.

BEFORE HON'BLE MR. JUSTICE VIRENDER SINGH, J.

N.T.P.C. Koldam Hydro Electric Power Project

...Appellant

Versus

Narvada & others

...Respondents

For the Appellant : Mr. Jagdish Thakur, Advocate.

For the respondents : Ms. Archana Dutt,Advocate, for respondentNo. 1

RSA No. 6 of 2022
Reserved on: 4.11.2022
Decided on : 23.12.2022

Code of Civil Procedure, 1908- Section 100- Appeal for dismissal of the judgment and decree passed by the learned trial Court, whereby it has partly decreed the suit for recovery of Rs. 7,03,074/- alongwith simple interest @ 6% per annum from the date of filing of the suit, till the realization of the whole amount, with costs of the suit, against defendant No. 1(Appellant)- **Held-** Oral evidence is totally contrary to the document, as in the said document no reference to the alleged damages has been given, nor it has been mentioned in the document that the house in question is not fit for human habitation- The impugned judgments are, thus, vitiated on account of mis-interpretation of oral, as well as, documentary evidence- Appeal Allowed. (Paras 39, 41)

The following judgment of the Court was delivered:

Virender Singh, Judge

The Appellant-NTPC has filed the present Regular Second Appeal under Section 100 of the Code of Civil Procedure(hereinafter referred to as "the CPC") against the impugned judgment and decree, dated 30.9.2021, passed by learned Additional District Judge, Sundernagar, District Mandi, HP (hereinafter referred to as "the first appellate Court") in Civil Appeal No. 1 of 2021, whereby, the judgment and decree, dated 13.11.2020, passed by learned Senior Civil Judge, Court No. 1, Sundernagar, District Mandi, H.P. (hereinafter referred to as "the trial Court") in Civil Suit No. 42-1/2015, has been affirmed.

2. By virtue of the present Regular Second Appeal, the appellant has prayed that both the judgments, passed by the learned trial Court and affirmed by the learned first Appellate Court, be set aside by allowing the appeal and the suit of the plaintiff may kindly be dismissed, with costs.

3. Initially, the appeal had been filed against all the three respondents, however, names of proforma respondents No. 2 and 3, were ordered to be deleted, from the array of parties, vide Court order dated 1.4.2022.

4. For the sake of convenience, parties to the lis, are referred to, in the same manner, in which they were referred to by the learned trial Court.

5. Plaintiff Narvada had filed suit for damages to the tune of Rs. 10,00,000/- against defendant No. 1-N.T.P.C. In the said suit, Roshan Lal and Katku were the co-sharers and were also impleaded as defendants No. 2 and 3. The said suit had been filed on the ground that land comprised in Khewat No. 178, khatauni No. 209, khasra No. 815, land measuring 01-06-04 bighas, situated in Muhal Chowk/7, Tehsil Sundernagar, Distt. Mandi (hereinafter referred to as "the suit land"), upon which she has constructed the house, is stated to be jointly owned and possessedby the plaintiff and other co-sharers.

According to the plaintiff, other co-sharers have not been impleaded, as parties, in this case, as no relief, adverseto the interest of other co-sharers, has been claimed.

It is the case of the plaintiff that defendant No. 1, in the month of February, 2010, started lifting the soil from the suit land, owned by Roshan Lal and Katku for the construction of Koldam Hydro Power Project. The house of the plaintiff is adjacent to the land owned by defendants No. 2 and 3, on the upper side, from the place, where defendant No. 1 started lifting the soil.

Plaintiff had earlier filed a suit in the month of May, 2012, for seeking relief of permanent prohibitory injunction. However, the said suit was withdrawn on 3.3.2014 by the plaintiff, as defendant No. 1 had stopped lifting the soil. Defendant No. 1, even after withdrawal of the suit by the plaintiff, had not adhered to its words and started the process of lifting soil, for a period of more than 10 days.

According to the plaintiff, defendant No. 1 had lifted the soil from adjacent land, in an unscientific manner, and it has caused damages to the house of the plaintiff beyond repair. The said house is situated over the suit land and according to the plaintiff, now, the said house is not fit for human habitation. When, the oral requests were not considered by defendant No. 1- NTPC, then the legal notice, dated 21.10.2014, was served upon defendant No. 1 and the same was also stated to be replied by defendant No.1.

Cause of action is stated to have accrued in favour of the plaintiff firstly, in the first week of March, 2014, when defendant No. 1 once again started lifting the soil, secondly in second week of March, 2014, when defendants left the land unleveled, on 21.10.2014, when legal notice was served upon the defendants and also on 11.10.2014, when defendants refused

to admit the claim of the plaintiff, by filing reply on false, fabricated and flimsy grounds.On all these submissions, the plaintiff has prayed that the suit may kindly be allowed, as prayed for.

6. When put on notice, defendants No. 2 and 3 have opted not to contest the said suit.

7. However, defendant No. 1 has filed written statement, by taking the preliminary objections with regard to estoppel, maintainability, cause of action and res- judicata. Further, the suithas been stated to be hit by provisions of Order 2 Rule 2 CPC and also that the suit is bad for non-joinder of necessary parties.

On merits, it is the stand of defendant No. 1 that lifting of soil was started in the month of February, 2010, after obtaining permission from the Himachal Pradesh Government. It is the specific stand of defendant No. 1 that no mining work was carried out within a distance of 50 meters from the private structure and the house of the plaintiff was not in existence, in or abutting to mining area in the month of February, 2010 nor any extraction work was done over the suit land. The said work was stated to have been completed in the month of December, 2012 and the land, taken on lease, was handed over to different owners, in the month of May, 2013.

It is the further stand of defendant No. 1 that it has no concern whatsoever, with the suit land. Defendant No. 1, throughits officials, had handed over the land, measuring 163.9-15 bighas, taken on lease agreement, in Muhal Kanaid and Chowk between 9.5.2013 to 18.5.2013, to the respective owners in the presence of revenue officers. Rest of the contents have been denied. Hence, a prayer has been made to dismiss the suit.

8. Plaintiff has filed replication, denying the preliminary objections, as well as the contents of the written statement by re- asserting that of the plaint.

9. From the pleadings of the parties, learned trial Court

has framed the following issues, in this case, on 28.12.2016:

1. Whether the defendants damaged the suit land by way of extraction work in March, 2014, as alleged? OPP
2. Whether the plaintiff is entitled to damages, as prayed for? OPP
3. Whether the plaintiff has got no cause of action? OPD
4. Whether the plaintiff is estopped to file the present suit? OPD
5. Whether the suit is hit under the principle of res-judicata?OPD
6. Whether the suit is bad for non joinder of necessary parties?OPD
7. Relief.

10. Thereafter, the parties to the lis were directed to adduce the evidence. The parties have led the oral, as well as, documentary evidence. After closure of evidence and after hearing learned counsel for the parties, the learned trial Court has partly decreed the suit for recovery of Rs. 7,03,074/- alongwith simple interest @ 6% per annum from the date of filing of the suit, till the realization of the whole amount, with costs of the suit, against defendant No. 1.

11. Feeling aggrieved from the said judgment and decree, defendant No. 1 preferred the appeal under Section 96 CPC, before the learned first appellate Court. By virtue of the said appeal, defendant No. 1 assailed the judgment and decree of learned trial Court, on the ground, that there is nodocumentary as well as oral evidence, in support of the case of the plaintiff and findings given by the learned trial Court, on issues No. 1 and 2, are wrong and liable to be reversed.

12. According to defendant No. 1, the document Ext.

PW-3/A is a fictitious document and no details and explanation of damages, have been mentioned in the said document.

13. The findings of the learned trial Court qua the

fact that the house of the plaintiff is situated adjacent to the worksite, are also stated to be wrong. Oral as well as documentary evidence are stated to be not properly appreciated by the learned trial Court.

14. On the basis of grounds of appeal, it had been prayed before the learned first appellate Court that the appeal be accepted and judgment and decree be set aside by dismissing the suit of the plaintiff, with costs.

15. The learned first appellate Court dismissed the appeal, vide judgment and decree dated 30.9.2021, holding that the learned trial Court has rightly considered the evidence of the parties.

16. Feeling aggrieved from the said judgment and decree, the present appeal has been preferred, before this Court, almost on the same grounds, on which, the judgment and decree of the learned trial Court, had been assailed before the learned first Appellate Court.

17. The appeal has been admitted by this Court, vide order dated 1.4.2022, on the following substantial questions of law:

> "1. Whether the learned Courts below are wrong in law by relying upon the unilateral report of the Architect Ext. PW3/A without there being corroborating evidence?
>
> 2. Whether the impugned judgments passed by the learned courts below are vitiated on account of misinterpreting and misconstruing the oral as well as documentary evidence led by the parties?
>
> 3. Whether the impugned judgments passed by learned Courts below is the result of non-consideration and misinterpreting and misconstruing the exhibit D-1?"

18. Records perused.

19. Since all the substantial questions of law, formulated by this Court, are interlinked and interconnected, as such, the same are taken up together for the purpose of discussing the oral, as well as,

documentary evidence, in order toavoid repetition.

20. From the pleadings of the parties, it transpires that it is the stand of the plaintiff that in the month of February, 2010, defendant No. 1 had started lifting work of soil fromkhasra No. 814, owned by proforma defendants, whereas, it isthe stand of defendant No. 1 that the land measuring 163.9-15 bigha was taken on lease in Muhal Kanaid and Chowk for the period commencing from 9.5.2013 to 18.5.2013, and the said work was completed in the month of December, 2012. It is the further case of defendant No. 1 that the land was handed over to the respective owners in the Month of May, 2013.

21. When the parties to the lis were directed to lead evidence, plaintiff Narvada Devi appeared as PW-1 and filed her affidavit in examination-in-chief and reiterated her stand astaken in the plaint.

In cross examination, this witness has admitted that she had earlier filed the suit, which was withdrawn and in the said suit, it is her case that defendant No. 1 caused damage to her house. The construction work of the house was started in the year2009. She has denied that on 9.5.2013, the land, from where the soil was lifted, was handed over to its owners. The house overthe suit land is stated to be at a distance of 30-35 meters from the land, where the extraction work was done.

22. PW-2 Beli Ram has also supported the case of theplaintiff. In his examination-in-chief, this witness has stated that he had visited the suit property in the month of August, 2014. The length of the house of the plaintiff is stated to be 25-30 feet and width of the same is stated to be 26 feet. He could not disclose about the date, month and year, when the said house was constructed. He has shown his ignorance to the fact that defendant No. 1 had stopped the extraction work in the month of December, 2012. The house of the plaintiff is stated to be situated at a distance, about 40-50 meters, from the

place where extraction work was done. He has further deposed that minor cracks have developed in the house.

23. PW-3 is the Architect, who has been examined by the plaintiff to prove her case. This witness has supported the case ofthe plaintiff, qua the fact, that damages to the house of the plaintiff were caused not only due to extraction work, but, due to soil erosion. The house is stated to be damaged beyond repairand the same is not fit for human habitation.

This witness had superannuated from the PWD department in the year 2012. He could not disclose about the age of the structure. He had visited the spot in the year 2013. He has further deposed that he had not mentioned the percentage of the damages in the report, but deposed that the entire building has been damaged.

24. To rebut this evidence, defendant No. 1 has examined Ram Narayan Malik as DW-1. He has deposed, as per the stand, taken in the written statement, that for construction of Koldam project in Muhal Kanaid, the land was taken, on lease, for lifting the soil. The soil extraction was completed in the month ofDecember, 2012 and the land was handed over to the owners, as per Rules of Mining Department. When the land was handed over to the respective owners, at that time, the then Tehsildar, Sundernagar, Local Commissioner and this witness were present there and the said process was documented by virtue of document Ext. D-1. He has deposed that the suit land was not taken on lease nor the soil was extracted from there. He further deposed that they used to extract the soil at a distance of about 50 meters away from the construction site. He has relied uponthe site plan Ext. D-2.

After completion of said process, "No Dues Certificate"was obtained. He could not disclose about the period when the extraction work was started in Muhal Kanaid. He has feigned hisignorance about the fact that the

land of the plaintiff is adjacentto the suit land. He has deposed that they used to extract the soil,as per approved mining plan. He has further denied that the extraction work again started in the year 2014. He hasvoluntarily stated that the same was finished in the month of December, 2012 and the land was handed over to its owners in the month of May, 2013. He has shown his ignorance about the fact whether the house of the plaintiff is now fit for humanhabitation.

25. So far as the documentary evidence is concerned, Ext.

PW-1/B is copy of Jamabandi, Ext. PW-1/C is the copy of order dated 3.3.2014, Ext. PW-1/D is the copy of legal notice and Ext. PW-1/E is the copy of reply and Ext. D-1 is the certificate given by NTPC Officer.

26. A perusal of the document Ext. D-1 shows that the land measuring 163.9.15 bigha, situated in village Kanaid and village Chowk was, obtained on lease w.e.f. 9.5.2013 to 18.5.2013. The perusal of the description of the land shows that khasra No. 814/2 was also taken on lease.

27. Learned trial Court, while deciding issues No. 1 and 2, has taken into consideration Ext. PW3/B and awarded damagesto the tune of Rs. 7,03,074/-, by holding that this document shows that this much amount has been spent by the plaintiff, for construction of her house, whereas, the person, who has preparedthis document, has nowhere mentioned that he had assessed the damages caused to the house of the plaintiff, due to alleged unscientific manner, in which the extraction of soil was carried by defendant No. 1.

28. Title of Ext. PW-3/B is 'Abstract of Cost'. In all the 15 columns of this document, the estimate with regard to construction has been mentioned. There is no whisper, in the document, that how much damage was caused to the house of the plaintiff.

29. Rajesh Kumar, PW-3, in the affidavit filed in his examination-in-chief, has mentioned the following lines:

> "The residential house is damaged beyond repair and is not fit for human habitation."

30. This above oral evidence is totally contrary to the document Ext. PW-3/B, as in the said document, no reference to the alleged damages has been given, nor it has been mentioned in the document that the house in question is not fit for human habitation. PW-3, who has been examined as an expert, to prove his report Ext. PW-3/A, is totally silent about the fact that any damage has been caused to the house.

31. In such situation, learned trial Court as well as learned first appellate Court have fallen in error by relying upon Ext. PW-3/B, the document mentioning the alleged damages, caused to the house of the plaintiff, whereas, by virtue of this document, PW-3 has simply estimated the cost of the house of the plaintiff.

32. In order to succeed in a suit for damages, it was incumbent upon the plaintiff to prove that due to alleged act of tortfeasor, defendant No. 1, she had suffered legal injuries, which resulted into the damages to his house. At the cost of repetition, evidence of PW-3 is too short to conclude that damages were caused to the house of theplaintiff by the alleged act of defendant No. 1. Ext. PW-3/A doesnot bear any date. PW-3 has also not bothered to mention the date, when he had visited the spot, to assess the damages, allegedly caused to the house of the plaintiff.

33. In the affidavit, no date has been mentioned, whereas in the cross-examination, he has deposed that he had visited the house of the plaintiff in the year 2013. This fact is sufficient to destroy the case of the plaintiff, as pleaded in para-7 of the plaint, which is reproduced as under:

> "That the plaintiff protested against the un-natural extractionwork of soil and the defendant in the second week of March, 2014 left the land unleveled and due to rainy season huge water accumulated in the unleveled land and caused soil erosion and the residential house of the plaintiff damaged beyond repair and not remained fit for human habitation."

34. In view of above discussion, both the Courts below have mis-interpreted the document Ext. PW-3/A.

35. The another fact, which has been highlighted by learned counsel for the appellant is that by virtue of the document Ext. D-1, possession of the land obtained by the defendant for extraction of soil has been handed over to the owners.

36. Although, no date has been mentioned in the documents, however, it has specifically been mentioned that the land was taken on lease for the period commencing from 9.5.2013 to 18.5.2013. This document was signed by Tehsildar, Sundernagar, retired Kanungo, who has signed the same asLocal Commissioner and official of defendant No. 1. Since this document has been signed by the Tehsildar and the govt. official, as such the provisions of Section 35 of the Evidence Act attaches the presumption of accuracy and fidelity with the official's act. The oral evidence of the plaintiff qua the fact that alleged extraction work was again started in the month of March,2014, is liable to be ignored in view of the document Ext. D-1.

37. The impugned judgments are, thus, vitiated on account of mis-interpretation of oral, as well as, documentary evidence .

38. Considering all these facts, the substantial questions of law are answered in favour of defendant No. 1.

39. In view of the aforesaid discussion and observations made hereinabove, the appeal is allowed by setting aside the impugned judgment and decree, passed by learned trial Court in Civil Suit No. 58 of 2015, on

13.11.2020 which was affirmed by learned first appellate Court, in Civil Appeal No. 1 of 2021, on 30.9.2021. Consequently, the suit of the plaintiff is ordered to be dismissed. However, the parties are left to bear their own costs. Decree Sheet be prepared accordingly. The pending application(s), if any, are also disposed of.