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Code of Civil Procedure, 1908- Order 22 Rules 4, 9 and 11 read with Section 151- **Limitation Act**,**1963**- Section 5- Taking judicial notice**- Held-** That liberal approach should be adopted for condoning the delay- The judicial notice of the fact can be taken that the restrictions in the wake of COVID-19 pandemic were imposed throughout the country in the third week of March, 2020, hence, the explanation, which has been given by the applicant in the application, is not liable to be doubted. It cannot be expected from a poor litigant to enquire about the fate of his case regularly from his counsel when his Regular Second Appeal has been admitted for hearing by the Court. Admittedly, the said Regular Second Appeal was not on Board for hearing. (Para 13) Title: Ghanthu Ram vs. Chuni Lal & others Page-595

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murmured even a single word about the mental state of testatrix at the time of execution of Will. The witnesses generally stated that the testatrix was neither dumb nor deaf and she was capable of understanding, but, all of them have remained conspicuously silent as to her mental state at most relevant time. None of them stated that at the time of execution of Will, testatrix was able to understand the consequences of her act or in other words she knew what she was doing. This gains importance in the factual background, when in the plaint as well as in her examination-in-chief plaintiff had specifically mentioned about lack of mental incapacity of testatrix to execute the Will. The weak physical condition by itself may not be a circumstance to raise questions about the mental capacity of a person to dispose his/her property by testamentary succession. The fact that the testatrix was not keeping good health and was bed ridden on the date of alleged execution of Will and she died within fifteen days thereafter is sufficient to prick the conscience of the Court to peep deep into the facts. (Paras 16, 17, 19, 23, 25 & 26) Title: Dini Devi vs. Kirana Devi Page-727

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B. The manner in which the deceased was raped and thereafter murdered

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Code of Criminal Procedure, 1973- Section 378- Special leave to appeal- **Indian Penal Code, 1860**- Sections 451, 354, 378- Applicant-State has sought the permission to assail the judgment of acquittal dated 01.04.2022 passed by Ld. Additional Sessions Judge, Sarkaghat, District Mandi (H.P.)- Held:-

A. It is no longer *res-integra* that the conviction in such type of cases can solely be based upon the sole statement of the prosecutrix, if inspires confidence- The term "if inspires confidence" puts the Courts on caution that before accepting the sole statement of the prosecutrix, the judicial conscience of the Court must be satisfied that the statement of the prosecutrix inspires confidence- The prosecutrix is not an illiterate lady and she has changed her version at different stages of the case.

B. Where, in an appeal against acquittal, two views are possible, the view taken by the Trial Court, is liable to be upheld- Leave to appeal is declined. (Paras 14, 15, 16) Title: State of H.P. vs. Vinod Kumar **(D.B.)** Page-164

Code of Criminal Procedure, 1973- Section 438- Anticipatory Bail- **Indian Penal Code, 1860**- Sections 354-A, 452- allegedly intruded privacy of female victim- **Held-** Allegations serious yet subject to proof- No requirement of custodial interrogation- Pre-trial incarceration not a rule- Procuring CDRs and recording statements are functions of investigating officer- Petitioner permanent resident with no flight risk- Ordered to be released in event of arrest subject to general conditions- Petition allowed. (Paras 8,9) Title: Shiv Kumar vs. State of H.P. Page-314

Code of Criminal Procedure, 1973- Section 438- Grant of pre-arrest bail- **Indian Penal Code, 1860**- Sections 408, 34- Alleged misappropriation of funds by the petitioner and three other employees, totalling Rs. 28,57,022/- **Held**- Allegations subject to proof- Substantial time given for investigation- Petitioner cooperated in investigation since grant of interim bail no case for custodial interrogation as investigating agency has means to extract facts- Ordered to be released on bail in case of arrest subject to general conditions-

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Code of Criminal Procedure, 1973- Section 439- Bail- **Indian Penal Code, 1860**- Sections 302, 341- Petitioner gave beatings to deceased with sticks which caused his death- **Held**- allegations subject to proof- material witnesses examined but not supported prosecution case- Pre trial incarceration not a matter of rule- No prejudice to remaining prosecution evidence- Violation of right to speedy trial- accused is from another State cannot be a ground to deny bail- Ordered to be released subject to general conditions- Petition allowed. (Para 11) Title: Charan Singh vs. State of H.P. Page-340

Code of Criminal Procedure, 1973- Section 439- Bail- **Indian Penal Code,**

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Code of Criminal Procedure, 1973- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances, Act, 1985**- Section 21- Successive bail applications- Petitioner in custody for one year and nine months- Only two out of sixteen witnesses have been examined- **Held**- right to speedy trial is a valuable constitutional right- Serious violation of this right taken as a changed circumstance- delay in trial is not attributable to petitioner- Cannot be detained in perpetuity- Petitioner is permanent resident, has minor daughter and there is no likelihood of absconding- Bail allowed- Petitioner ordered to be released subject to general conditions. (Paras 13, 14) Title: Kalpna vs. State of H.P. Page-73

Code of Criminal Procedure, 1973- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Section 20- 356 grams of charas recovered from petitioner- **Held-** Intermediate quantity of contraband does not invite rigors of Section 37- *Charas* bought for own use as petitioner is addicted- No suggestions as to criminal antecedents or involvement as a peddler/seller- Investigation completed- Considerable time to conclude trial- No purpose served by indeterminate incarceration- Ordered to be released- Bail petition allowed. (Para 7) Title: Het Ram vs. State of H.P. Page-310

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Code of Criminal Procedure, 1973- Section 439- Bail- **Indian Penal Code, 1860**- Sections 306, 506- Allegation of harassing and threatening leading deceased to commit suicide- **Held**- Suicide note and statements of witnesses prima facie show persistent harassment by petitioner- Previous attempt to influence witnesses and previous involvement in other two cases despite on bail considered- Nature and gravity of office along with circumstances of case do not allow enlargement on bail- Bail petition dismissed. (Para 18) Title: Swarit Malhotra vs. State of H.P. Page-220

Code of Criminal Procedure, 1973- Section 439- Bail- **Indian Penal Code, 1860**- Sections 302, 201- **Held**- Key prosecution witnesses examined did not support the prosecution case- Doubt created that accused made an accused on the basis of suspicion without any evidence- Credibility of investigation compromised- Granted bail subject to general conditions- Petition allowed. (Para 18) Title: Shyam Singh vs. State of H.P. Page-228

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Code of Criminal Procedure, 1973- Section 439- **Narcotic Drugs and Psychotropic Substances, Act 1985**- Sections 20, 37- Bail- Bail sought on the ground of prolonged incarceration of more than three years and violation of the constitutional right of expeditious disposal of trial- **Held-** Petitioner in custody since 20.11.2019, trial not likely to be concluded in near future and no delay attributed to the petitioner/accused- Petitioner ordered to be released subject to conditions- Bail petition allowed. (Para 16) Title: Kaul Ram vs. State of H.P. Page-28

Code of Criminal Procedure, 1973- Section 439- **Narcotic Drugs and Psychotropic Substances, Act 1985**- Sections 20, 37- Bail- bail sought on the ground of prolonged incarceration of more than three years and violation of the constitutional right of expeditious disposal of trial- **Held-** Petitioner in custody since 20.11.2019, trial not likely to be concluded in near future and no delay attributed to the petitioner/accused- Petitioner ordered to be released subject to conditions- Bail petition allowed. (Para 16) Title: Krishan Chand vs. State of H.P. Page-34

Code of Criminal Procedure, 1973- Section 439- Successive Bail- **Indian Penal Code, 1860**- Section 302- **Indian Arms Act, 1959-** Sections 25, 54, 59- Petitioner charged for murdering his wife by firing gunshot and in custody since 05.08.2020- **Held**- Witnesses including complainant examined and charge of murder not supported- For deciding application, court can look into the nature of allegations and materials on record- Petitioner has right to speedy justice and delay in trial not attributed to him- Ordered to be released subject to general conditions- Petition allowed. (Paras 8,9) Title: Ajeet Singh vs. State of H.P. Page-348

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Code of Criminal Procedure, 1973- Section 482- Quashing of FIR- **Indian Penal Code, 1860**- Sections 406, 420- Parties reached settlement executing compromise deed- **Held**- They admitted that dispute occurred in respect of performance of agreement to sell- FIR was offshoot from civil dispute- Nature of dispute more or less private- Parties settled the matter to live peacefully- FIR ordered to be quashed along with consequent proceedings- Petition allowed. (Para 7) Title: Vinod Kumar vs. State of H.P. & others Page-110

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Code of Criminal Procedure, 1973- Section 482- Quashing of FIR- **Scheduled Caste & Scheduled Tribe (Prevention of Atrocities) Act, 1989**- Section 3(1)(r)(s)(u)- Alleged use of term *harijan* in defamatory manner- Argued that word used was in reference to specific locality *harijan basti*- **Held**- Investigation concluded no offence and submitted closure report- evidence including copy of muster roll, estimate/assessment of work maintained by development block relied upon- FIR quashed with direction to special judge to accept closure report- Petition allowed. (Para 7) Title: Parmila Thakur & another vs. State of H.P. & another Page-170

Code of Criminal Procedure, 1973- Sections 482, 91, 309(2)- **Indian Evidence Act**- Section 114(g)- Quashing of FIR- Petitioner No. 2 filed application for issuance of direction to police officials to submit their mobile details so that petitioner could get CDR/Cellular records- **Held**- Supply of CDR of police will lead to a possibility of disclosure of information of other offences not connected to the present one- Police officials cannot be compelled to disclose source of information and also right to privacy will be violated- Trial not vitiated -Petition dismissed. Title: Manoj Kumar & others vs. State of H.P.

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Constitution of India, 1950- Article 226- Recruitment and Promotion Rules- Retrospective promotion and consequential seniority- Appellant has assailed the judgment passed by the Ld. Single Judge**- Held-** There were two channels of promotions available to the eligible holders of the post of Sub-Inspector i.e. either to the post of Inspector Grade-I or to the post of Head Analyst and appellant specifically opted for promotion to the post of Head analyst, as such, it was not open for her to take a 'U' turn a year later and to seek reversion to

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Constitution of India, 1950- Article 226- Writ of mandamus- Fundamental Rule 49- Claimed promotion and salary for additional duties discharged as junior engineer (civil) till superannuation- **Held**- Non payment of wages for additional duties of junior engineer (civil) is arbitrary and unsustainable- employee formally appointed to hold duties of higher post entitled to such pay- Court directed respondent to pay wages of junior engineer (civil) till date of superannuation- Merely performance of additional duties with respect to a post do not ipso facto confer right to seek promotion against such post- Duly compensated by way of payment of wages- Petition partly allowed. (Paras 9,10)

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Constitution of India, 1950- Section 226- Payment of arrears of ad hoc service, annual increment arrears with interest, counting of ad hoc service for pensionary benefits and promotion**- Held**- Services rendered already counted towards annual increment- Office order remained unchallenged within the statutory period with no explanation- Showed satisfaction of petitioner- Ad hoc services be treated as qualifying services for pension benefits- Limited relief granted- Petition disposed of. (Paras 5,6) Title: Chander Kanta vs. State of H.P. & ors. Page-96

Constitution of India, 1950- Section 226- Petitioner sought direction to grant him benefits for services rendered from March 12, 1981, to May 31, 1996, for the purpose of pension, increments, arrears, and interest- **Held**- Petitioner initially appointed as JBT teacher temporarily- Subsequently

appointed as Shastri teacher through separate recruitment process- Appointment as Shastri teacher unrelated to earlier appointment- Services as JBT teacher cannot be considered in continuity with that as of Shastri teacher- Petition dismissed. (Para 2) Title: Desh Raj vs. State of H.P & ors. Page-108

Constitution of India, 1950- Section 226- Quashing of rejection of representation before Director of Education and direction to rectify anomaly- Incumbents serving in the same category as that of the petitioner are being paid higher scale despite being his juniors- **Held-** No delayed claim as the petitioner raised grievance when he came to know about the anomalous situation, no gross negligence in pursuing remedy – Specific case of petitioner that no option for grant of PGT scale was given to him- Right of petitioner to have the same pay scale as juniors is unjustifiably and illegally denied- Senior cannot be paid lesser salary than his juniors is a settled law, anomaly ought to be rectified- Discrimination cannot be done without showing rational- Petition allowed. (Para 11) Title: Desh Raj Awasthi vs. State of H.P. & another Page-91

Constitution of India, 1950- Section 226- Writ of mandamus- direction to be promoted as Deputy Superintendent of Police on adhoc basis, to regularize promotion against vacancy for general category in order of merit cum seniority with consequential reliefs- **Held**- Ad hoc promotion was delayed without any basis- minimum educational qualification for post of DSP is graduation- Juniors promoted were matriculate- Petition allowed. (Para 17) Title: Maan Singh vs. State of H.P. & another Page-100

Constitution of India, 1950—Article 226- Articles 31, 14, 19 & 21- **Land Acquisition Act, 1894**- Sections 18 & 28A- Petition to quash Sections 18 and 28A of the Act and to declare these provisions unconstitutional and invalid to the extent these provide for limitation period**- Held-** Statute can provide for extinguishment of a right if it is not exercised within the prescribed limitation period- Providing the limitation period to the exercise of such rights in terms of Sections 18 and 28A is based upon good public policy as otherwise there will be no end to litigation and even settled land acquisition proceedings will get unsettled and reopened- Prescription of limitation period under Sections 18 and 28A of the Land Acquisition Act for the exercise of rights and for enforcement of such rights available in these provisions is not

unconstitutional- The provision of time period stipulated in these provisions is intra vires of the Constitution and is valid. (Paras 5, 6) Title: Mohammad Ali & others vs. Land Acquisition Collector and others **(D.B.)** Page-489

Constitution of India, 1950—Article 226- Petitioner was declared successful for appointment of Service Provider in a Corporation owned and Corporation Operated retail outlet and the petitioner completed all the formalities required at his end in terms of the Letter of Intent, but letter of appointment (LOA) was not issued**- Held-** The reasons offered by respondent Nos. 2 and 3 for not issuing the LOA in favour of the petitioner, cannot be sustained- Petition allowed. (Paras 5, 6, 7) Title: Tejinder Goyal vs. Union of India & Ors. **(D.B.)** Page-40

'F'

Family Courts Act, 1984- Sections 7 and 8- Establishment of Family Courts-Jurisdiction and powers conferred on a Family Court, Sections 7, 8, 12 and 26- **Code of Criminal Procedure, 1973-** Chapter IX- **Protection of Women from Domestic Violence Act, 2005 -** Chapters III, IV, Sections 18, 19, 20, 21, 22 and 26- Held that a petition under Section 12 of the Protection of Women from Domestic Violence Act, 2005, shall not be adjudicated upon by the Family Court- The Protection of Women from Domestic Violence Act, 2005, has been brought into force to provide for more effective protection of the rights of women, guaranteed under the Constitution, who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental therewith. This Court is of the considered view that Section 7 of the 1984 Act is very-very clear as to qua what all a Family Court has jurisdiction. In terms of the provision of Section 7(2)(a) thereof, a Family Court has been conferred jurisdiction exercisable by a Magistrate of the First Class under Chapter IX of the Code of Criminal Procedure. Protection of Women from Domestic Violence Act, 2005, is both a substantive as well as procedural Act. Neither in Section 7(1) nor in Section 7(2) of the Family Courts Act, 1984, there is any provision that a petition under Section 12 of the Protection of Women from Domestic Violence Act, 2005, shall be adjudicated upon by the Family Court. The Court is alive to the situation that in terms of Section 26 of the Protection of Women from Domestic Violence Act, 2005, any relief available under Section 18, 19, 20, 21 and 22 thereof can also be sought in any legal proceedings before a Civil Court, Family Court or Criminal Court

but then legislature in its wisdom did not include Section 12 in this section. Thus, it is apparent that a conscious decision was taken by the Legislature not to include Section 12 in Section 26 of the Act of the 2005 Act. The Court has no hesitation in holding that the order which has been passed by the Principal Judge, Family Court, is in fact without jurisdiction because in terms of the provisions of 1984 Act as also 2005 Act, a petition filed under Section 12 of the 2005 Act cannot be decided by a Principal Judge, Family Court. (Paras 7, 9, 17, 18, 19 and 20) Title: Preet Pratima vs. Samjeet Singh & others Page-631

'H'

H.P. Civil Services (Revised Pay) Rules, 2009- **CCS (Pension) Rules, 1972**- Fixation of pension**- Held-** Financial burden can be a valid ground to fix a cutoff date for the purpose of granting the actual benefit of revision of pension/ pay, as such, cutoff date fixed as 01.04.2013 in the Office Memorandum dated 21.05.2013 by the State cannot be said to be arbitrary and discriminatory- Appeal allowed. (Paras 24, 25) Title: State of H.P. & others vs. Tara Dutt Sharma & others **(D.B.)** Page-532

H.P. State Cooperative Societies Act, 1968- Sections 72, 73- Petition filed to implement judgment passed by single bench of High Court- **Held**- Decree passed by court at first instance merges in final stage of judgment/decree passed by higher courts in appeal or revision- Execution should be carried out according to HPSCS act and rules- Court of first instance is DRC and not writ court- Liberty to avail appropriate remedy- Petition dismissed as not maintainable. (Para 23) Title: Saraswati & others vs. H.P. State Cooperative Marketing & Consumer Federation Ltd. Page-151

H.P. Village Common Land Vesting and Utilisation Act, 1974- Section 8- **Mines and Minerals (Development and Regulation) Act, 1958**- Section 2- Petition for quashing notice and contract entered pursuant to notice between R 1 to 4 and R 5 and further restraining R 1 to 4 from allotting the land to respondent no. 5 for mining purposes contrary to the provisions of H.P. Village Common Land Vesting and Utilisation Act, 1974**- Held-** Once the land demarcated and set out for the common purposes then there is no power of the State to retransfer the said land from the common pool to the allottable pool- Action of the State to grant lease to respondent No. 5 from the allottable

pool is, prima facie contrary to the Act- Respondent No. 5 is restrained from operating quarry. (Paras 13, 14, 15 to 18) Title: Vikram Kumar & others vs. State of H.P. & others **(D.B.)** Page-243

Himachal Pradesh Ministerial Administrative Rules, 1973- The Executive Council is the highest decision making body of the University- Held that the respondent University cannot turn around and say that the petitioners were to get the benefits prospectively- The plea of time barred claim of the petitioners does not hold good in the given facts and circumstances of the case as the Memorandum was not issued by the competent authority, therefore, that cannot be an impediment in adjudication of the rights of the petitioners. Further, the petitioners had submitted their representation which had remained unanswered. It cannot be said that the petitioners had slept over their rights for unduly long period or were grossly negligent in pursuing their remedies. The claim of the petitioners, therefore, cannot be said to be barred by delay and laches. (Paras 13 & 14) Title: Dinesh Kumar & others vs. H.P. University Page-697

Himachal Pradesh Societies Registration Act, 2006 - Himachal Pradesh Town & Country Planning Act, 1977- Sections 28, 67, 71(b), 84(c)- Powers of the Director- **Himachal Pradesh Town & Country Planning Rules, 2014- Interim Development Plan for Shimla Planning Area-** Clause 10.4.1.2 (x) (viii)**- Special Area Development Authority-** Held that there is no authority with the State Government to grant relaxation in the prescribed norms- The relaxation was not granted by the Authority, rather the same was granted by the State Government. The State Government did not have any authority under the Act to grant the planning permission much less to grant relaxation in the prescribed norms. The Director/Chairman of the Authority i.e. respondent No.5 did not grant any relaxation, therefore, Clause 10.4.1.2 (x) (viii) of IDP cannot be pressed into service. The plain reading of section 28 reveals its application to the construction of buildings for the government offices and under sub-section (4) of Section 28 of the Act, the decision of the State Government taken under sub-Section (3) has been declared as final. The State Government was not vested with powers either to grant planning permission or to relax the norms prescribed for grant of such permission. Instead of decision being taken by the Authority; the State Government had taken the decision of granting relaxation to the Society which not only was without jurisdiction but was also arrived at in the most casual manner. The

Act provides for preparation of Regional Plans, Sectoral Plans and creation of Special Areas from the perspective of sustainable planning, development and land use. Keeping the object of the Act in mind, Shimla Planning Area was declared and an the IDP was framed keeping in view various relevant parameters viz. economic profile, environs, demographic characters, traffic and transportation, ecological conservation and environmental control etc. Needless to say, the norms have been prescribed keeping in mind all above parameters. Such norms cannot be allowed to be violated at whims and fancies of the State authorities. The State Government has not been vested with any authority to grant planning permissions or to relax the prescribed norms. In this view of the matter, the exercise of power by the State Government to grant relaxations in the case of the Society is clearly without jurisdiction hence illegal. Once the statutory provisions are in place none can violate or flout the same be it the Government agencies themselves. The executive by its illegal action cannot nullify the laws enacted by the legislature. The issue attracts more serious dimensions when protector of law itself becomes its violator. (Paras 17, 18, 19, 20, 28, 29, 30 & 31) Title: Baldev Singh Attri vs. State of H.P. & others Page-663

Himachal Pradesh, Micro and Small Enterprises Facilitation Council- The Micro, Small and Medium Enterprises Development Act, 2006, Sections 18(1), 18 (3), 24- **The Arbitration and Conciliation Act, 1996-** Section 7(1)- Held about the procedure to be adopted by the Council after unsuccessful effect for conciliation- After receiving the reference, Council has to resort to conducting conciliation in the matter either itself or to seek assistance from any institution or centre providing alternative dispute resolution service. On failure of conciliation, Council has to resolve the dispute by taking it up for arbitration either itself or refer it to any institution or centre providing alternative dispute resolution service. In such arbitration proceedings, provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the arbitration was in pursuance to arbitration agreement. Order directing the parties to resort to the arbitration clause already existing in the agreement to resolve the dispute, is quashed and set aside with direction to the Council to proceed further in accordance with the provisions of MSMED Act as applicable. (Paras 14 & 19) Title: Eco Power Solution vs. Punjab State Power Corporation Ltd. & another Page-690

'I'

Indian Penal Code, 1860- Sections 498-A, 325, 34- Trial court convicted the respondent for harassing and maltreating his wife for dowry, but acquitted his parents- Sessions Court set aside conviction in appeal- **Held**- Since findings against parents remained unchallenged, it attained finality. Conviction of one and acquittal of other accused on same set of facts cannot be justified for offence of cruelty. Prosecution failed to discharge burden to prove physical injury- Not proved that injury was the result of alleged incident. Delayed medical examination unexplained. False implication cannot be ruled out in view of strained relations. No independent source of corroboration, lack of sufficient evidence- Appeal dismissed. (Paras 9, 14) Title: State of H.P. vs. Pardeep Kumar Page-84

Industrial Disputes Act, 1947- Sections 25F and 25G- Wrongful termination- Relief entitled- Where termination is found to be in violation of Sections 25F and 25G of the Act, reinstatement is not the Rule, but an exception and ordinarily grant of compensation would meet ends of justice- Labour Court has rightly awarded compensation instead of reinstatement- Appeal dismissed. (Paras 21 to 25) Title: Bal Krishan Sharma vs. Punjab & Sindh Bank & another **(D.B.)** Page-403

'L'

Land Acquisition Act, 1894- Section 18- Appeals arose from common award passed by Ld. District Judge in land reference petition filed against award passed by Land Acquisition officer- **Held-** No deduction permissible considering the purpose of acquisition involved which is construction of a rural road for linking the rural areas to the State Highway- By constructing a link road, all the acquired land has been utilized for the same use and no part of land has been left for any other developmental activity- Settled law that compensation of market value at the uniform rate is justifiable when entire land is acquired for the same purpose- Appeals partially allowed. (Para 17) Title: State of H.P & others vs. Kanshi Ram & others Page-52

Limitation Act, 1963- Section 5- **ICDS Scheme/Guidelines**- Clause 12- Petition against rejection of appeal as time barred- Petitioner filed appeal one day after prescribed period- **Held**- Supreme Court order dated 23.03.2020 extended limitation period- Order dated 08.03.2021 excluded period from

15.03.2020 to 14.03.2021- Limitation period extended, whether condonable or not with respect to all kinds of proceedings before courts/tribunals/authorities- Such orders of the Supreme Court extended to all concerned authorities- Petitioner entitled to benefit of such orders- Petition allowed. (Para 8) Title: Roshni Devi vs. Deputy Commissioner Mandi & others Page-160

'N'

Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 2(xx), 2(xxiii), 2(xxiiia), 2(viia), 8(c), 21 & 22; Rules 65A, 66, 67 **-** The International Narcotic Control Board- **Constitution of India**,**1950**- Article 141- Held that the entire mass is to be considered as psychotropic substance. It is true that Lomotil or Diphenoxylate is not enlisted in the Psychotropic Substances in Schedule attached to the Act, however, Diphenoxylate is a psychotropic substance. The High Court, in view of Article 141 of the Constitution, is bound by the verdict of the Supreme Court and, therefore, orders/judgments passed either before verdict or in contravention thereof are to be ignored and pronouncement of the Supreme Court is to be relied. (Paras 22, 23 & 24) Title: Raj Kumar & others vs. State of H.P. Page-740

Negotiable Instruments Act, 1881- Section 138- Effect of compromise in cheque bounce case on condition of deposit of amount in Legal Services Authority- Held that condition of depositing cheque amount in State Legal Services Authority can be altered by the Court. Condition of depositing 15% of the cheque amount in State Legal Services Authority which is not part of the adjudication of subject matter of case, can be altered by the Court. There is another aspect that petitioner has paid entire agreed amount to complainant and order has been implemented completely, therefore, part of order that order shall take effect on deposit of Rs.75,000/- appears to be superfluous. (Para 10) Title: Padam Singh vs. Tota Ram & another Page-610

'P'

Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013- Section 5- **Constitution of India,1950**- Articles 14, 17, 21 & 32- Right to live with human dignity and to live the life which is free from exploitation- Held that it is the obligation of the State to protect its

citizens and that the mandate of Constitution is clear as far as the upliftment of the down trodden and unprivileged sections of the Society is concerned. The well-defined amplitude of Article 21 of the Constitution includes the right to live with human dignity and to live the life which is free from exploitation. It also includes right to reputation. Article 17 of the Constitution abolished untouchability and further forbids its practice in any form. Equally important is the right to equality before law enshrined in Article 14 of the Constitution. Petitioner belongs to the Scheduled Caste. Being an unprivileged member of society none heard his representation. The so called inquiries, be it the internal inquiry or the inquiry held by Tehsildar of the area, were nothing more than farce. The violation of the provisions of 2013 Act was writ large from the available bare facts; still no action was taken against the wrongdoers, forcing the petitioner to approach this Court. Petitioner has suffered humiliation, ridicule, disgrace, mortification and consequent embarrassment on account of acts and conduct attributable to the State and its instrumentalities. Respondents have been instrumental not only in violating the fundamental rights of the petitioner but also the legal rights available to him under 2013 Act. Even violation of legal rights has manifestation of violation of fundamental right, if remains un-redressed. Being custodian of the Constitution, this court cannot remain unmindful of its duties. The respondents have not only violated the rights of petitioner but have also undermined the mandate of law. The petitioner has invoked the writ jurisdiction of this Court for the reliefs as noticed above, on the ground of violation of his fundamental and human rights. Petitioner has sought monetary compensation in addition to the various directions as detailed above. Merely because the petitioner has alternative remedy to claim damages, he cannot be denied the audience in the instant proceedings, this Court being custodian and guardian of fundamental rights of the citizen of the country. (Paras 10, 12, 13, 14, 17, 18, 19, 21 & 22) Title: Charno Ram vs. Union of India & others Page-643

'R'

Recruitment & Promotion Rules- Conversion of services to the government contract from RKS- Held that the case of the petitioner being similarly situate to other persons also requires to be considered afresh for conversion to the government contract with the prior approval of the council of the ministers. The proposal of the RKS to continue services of the petitioner under

RKS was approved by the Government and as per its approval and for that purpose, two posts of Physiotherapists were created with the prior approval of the finance department. It is not in dispute that petitioner had been continuously working under RKS at RPGMC Tanda. Since other similar situate persons who were though initially appointed under RKS, but after their having completed eight years service, their services were converted into government contract, case of the petitioner is/was also required to be considered for conversion from RKS to government contract. Since Government conveyed its approval for converting services of the petitioner from SRC Project to RKS on the proposal made by the governing council and for that purpose, two posts were created with the prior approval of the Finance Department, it is not open at this stage for the State/respondent department to deny the admissible claim of petitioner for conversion of services from RKS to government contract on the ground that his initial appointment was not in accordance with the rules and same was not with the RKS. (Para 9) Title: Dr. Shekhar Sharma vs. State of H.P. & Ors. Page-704

'S'

Specific Relief Act, 1963- Specific performance of agreement- Pursuant to advertisement issued by the defendants, plaintiff applied for specific flat and paid Rs.1,10,000/- to defendant No. 1 who accepted the application, however, flat in question was not sold to plaintiff, he filed suit for specific performance of agreement- The suit was decreed and against this judgment and Decree, two original side appeals have been preferred**- Held-** Suit filed by the plaintiff was within limitation period and in the facts and circumstances of the case, the suit for specific performance, was liable to be decreed and decree passed by the Ld. Single Judge was in accordance with the agreement- Appeals dismissed. (Para 5) Title: M/s Highseas Holding Pvt. Ltd. and others vs. Mrs. Vijay Sharma and others **(D.B.)** Page-554

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Shivajirao Nilangekar Patil vs. Dr. Mahesh Madhav Gosavi 1987 (1) SCC 227;

Shyam Lal Vs. HPSEB 2012(3) ShimLC 1770;

Siddharth vs. State of Uttar Pradesh and another (2022) 1 SCC 676;

Simplex Infrastructures Ltd. Vs. Himachal Pradesh Micro and Small Facilitation Council and Another, Latest HLJ 2022 (HP) (1) (113),;

South Eastern Coalfields Ltd. & others Versus S. Kumar's Associates AKM (JV) (2021) 9 SCC 166;

State of Andhra Pradesh and Anr. vs. T. Gopalakrishnan Murthi and others (1976) 2 SCC 883;

State of Rajasthan and others vs. Ramesh Chandra Mundra and others (2020) 20 SCC 163;

State of Andhra Pradesh vs. Gangula Satya Murthy, 1997(1) SCC 272;

State of Goa Vs. Sanjay Thakran & Anr., (2007) 3 SCC 755;

State of H.P. Versus P.D. Attri and others, (1999) 3 SCC 217;

State of Haryana & another Vs. Chanan Mal & others (1977) 1 SCC 340;

State of Himachal Pradesh Vs. Sanjay Kumar alias Sunny, (2017) 2 SCC 51;

State of Karnataka Versus Laxuman (2005) 8 SCC 709;

State of Maharashtra vs. Association of Court Stenos, P.A. P.S. and another (2002) 2 SCC 141;

State of Maharashtra vs. Association of Stenographers AIR 2002 SC 555;

State of Punjab and others Versus Labhu Ram and others (1976) 4 SCC 339;

State of Rajasthan & another Vs Amrit Lal Gandhi & others, (1997) 2 SCC 342;

State of Rajasthan & others Versus Mahendra Nath Sharma, (2015) 9 SCC 540;

State of U.P. Vs. Chhotey Lal, (2011) 2 SCC 550;

State of Uttar Pradesh and others Vs Premlata 2022(1) SCC 30;

State of Uttarakhand Versus Sudhir Budakoti and others 2022 (4) JT 18;

State of West Bengal and others vs. The High Court Employees' Welfare Association and others (2016) 3 CLJ 448;

State of West Bengal vs. Indrajit Kundu & others (2019)10 SCC 188;

Steel Authority of India Ltd. Vs. Sutni Sangam & others (2009) 16 SCC 1;

Supreme Court Employees' Welfare Association vs. Union of India and Another 1993 Supp (3) SCC 727;

'T'

T.C. Basappa versus T. Nagappa and another, AIR 1954 S.C. 440 (Vol. 41, C.N. 106);

Tata Cellular versus Union of India, (1994) 6 Supreme Court Cases 651;

The Silppi Constructions Contractors vs. Union of India & anr., 2019 (11) Scale 592;

The State of Tripura & Ors. Vs. Smt. Anjana Bhattacharjee & Ors., 2022 LiveLaw (SC) 706;

TRF Ltd. Vs. Energo Engineering Projects Ltd. (2017) 8 SCC 377;

Tulshidas Kanolkar Vs. State of Goa, (2003) 8 Supreme Court Cases 590;

'U'

U.N. Krishnamurthy (since deceased) Thr. LRs Vs. A.M. Krishnamurthy 2022 SCC Online 840;

U.P. Raghavendra Acharya & others vs. State of Karnataka & others, (2006) 9 SCC 630;

Uflex Limited versus Government of Tamil Nadu and others, (2022) 1 SCC 165;

Union of India vs. S.B. Vohra & Ors. (2004) 2 SCC 150;

Union of India & another Vs. Pradeep Kumari & others (1995) 2 SCC 736;

Union of India & another vs. Sanjeev V. Deshpande, 2014 (13) SCC 1;

Union of India & Ors. Versus Manju Arora & Anr.2022 (1) Scale 1;

Union of India vs. K.A. Najeeb, (2021) 3 SCC 713;

'V'

Vidya Devi Vs. State of H.P. and others (2020) 2 SCC 569;

Vijay Raikwar Vs. State of Madhya Pradesh, (2019) 4 SCC 210;

Viran Gyanlal Rajput vs. State of Maharashtra, (2019) 2 SCC 311;

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

Smt. Neena Sharma .....Petitioner

Versus

State of HP & Anr. ... Respondents.

For the petitioners: Petitioner in person with Mr. H.K. Paul, Advocate.

For the respondents: Ms. Svaneel Jaswal, Deputy Advocate General.

CWPOA No. 998 of 2019
Decided on: 12.12.2022

Constitution of India, 1950- Article 226- Writ of certiorari and mandamus- Quashed decision rejecting regularization of services and directs respondents to appoint her as clerk- Initially appointed as *Beldar,* but performed clerical work- **Held**- State admitted petitioner performed duties of clerk from the start- quashed earlier decisions- Direction issued to regularize services- Despite being regularised continued to do clerical work- Subsequent appointment as clerk after passing recruitment test validated claim for regularization- Claim of petitioner rightful- Petition allowed. (Paras 10, 11)

The following judgment of the Court was delivered:

Sandeep Sharma, Judge (*Oral****)***

Being aggrieved and dis-satisfied with the order dated 23.01.2017, passed by respondent No.2, whereby request made by the petitioner to regularize her services as clerk w.e.f. 1.1.2001, came to be rejected, petitioner approached the erstwhile Himachal Pradesh Administrative Tribunal (in short 'erstwhile Tribunal') by way of filing Original Application bearing No. 3807 of 2017, which now on account of abolishment of erstwhile

Tribunal stands transferred to this Court and re-registered as CWPOA No. 998 of 2019, praying therein for the following reliefs:

> ***a) Appropriate writ, order and/or direction and a writ in the nature of certiorari may kindly be issued to quash and set aside the decision taken by the respondents as contained in Annexure A-1, A-4 ad A-12 in the interest of justice.***
>
> ***b) The respondents may kindly be commanded by a wit of mandamus to appoint/regularize the applicant as a Clerk on which post she has been working since April 1990, after completion of ten years of service with effect from 1.1.2001 in consonance with law laid down by the Hon'ble Supreme Court of India in the case of Mool Raj Upadhaya and other cases mentioned in para-24 above and she may be held entitled to all consequential benefits.".***

1. Facts shorn of unnecessary details, but relevant for adjudication of case are that petitioner was appointed on daily-wage basis as Beldar in the office of Assistant Engineer, HP PWD Sub Division, Matiana under HP PWD Division, Theog, District Shimla in the year 1990. However, on account of shortage of staff, petitioner came to be assigned the work of clerical job from day one of her appointment i.e. typing of official letters; making entries in the receipt and dispatch registers of the official dak; dispatch letters sent to the out-stations; to maintain the registers and account of service postage stamps etc. Since, petitioner from day one of her being appointed on daily wage basis was performing the job of clerk, she filed representation to respondent-department to pay her wages of clerk. However, such request of her was never paid any heed. On 1.1.2001, petitioner was regularized against the post of Beldar in terms of regularization policy of the State Government of Himachal Pradesh instead of clerk, as such she was compelled to file representation to the

authority concerned. Since, no positive action was taken on the representation of the petitioner, she was compelled to approach erstwhile Tribunal way way of Original Application bearing No. 1098 of 1997, which subsequently came to be transferred to this Court and was re-registered as CWP(T) No. 4386 of 2008. This Court while disposing of aforesaid petition, reserved liberty to the petitioner to file representation to the Competent Authority with further direction to the Authority concerned to decide the same in a time bound manner. Since, no compliance was made to the aforesaid directions, despite there being representation on behalf of the petitioner, petitioner was compelled to file contempt petition being COPC No. 181 of 2011, which was disposed of reserving liberty to the petitioner to make/file fresh representation for redressal of her grievance(s). Respondent No. 1 decided the representation filed by the petitioner, vide order dated 23.6.2011, Annexure A-1, whereby her claim though considered but rejected. In the meantime, petitioner participated in the Limited Direct Recruitment Test and was declared 'selected'. Though, pursuant to her being declared successful in the Limited Direct Recruitment Test, petitioner was given posting against the post of clerk in the department of education but subsequently on her request she was retained as clerk in the office of HPPWD. Since, no action was taken on the representation dated 12.9.2011 (Annexure P-2) filed by the petitioner, she was compelled to file CWP No. 11249 of 2011. In the instant petition, despite issuance of notice, respondent failed to file reply, as such this Court disposed of the aforesaid petition with a direction to the respondents to decide the representation dated 12.9.2011 (Annexure P-2), in accordance with law, after affording an opportunity of being heard to the petitioner. Vide order dated 2.1.2015, respondent No. 2 decided and rejected the representation of the petitioner.

3. Being aggrieved and dis-satisfied with the aforesaid order, passed by respondent No. 2 on the representation filed by the petitioner, she filed writ petition bearing No. 1586 of 2015 but the same was transferred to erstwhile

Tribunal after its re-establishment, re-registered as TA No. 2684of 2015. Vide order dated 21.7.2016, the aforesaid petition was allowed thereby quashing order dated 23.6.2011, passed by respondent rejecting representation of the petitioner and respondents were directed to consider the case of the petitioner for regularization as per regularization policy of daily wager, which was prevalent at the relevant time. In the meantime, on 17.10.2016 the H.P. Subordinate Services Selection Board, Hamirpur declared the result of Limited Direct Recruitment Test, wherein petitioner being eligible candidate was declared as successful. Though, initially petitioner was posted as clerk in the department but subsequent on her request she was given the job of clerk in the office of HP PWD itself.

4. Being aggrieved and dis-satisfied with the order dated 21.7.2016, passed by erstwhile Tribunal in TA No. 2684 of 2015, the respondent-department filed writ petition No. 3066 of 2016. However, no notice was ever issued to the petitioner in that case and the same was disposed of with a direction to the respondents to consider the case of the petitioner for regularization, as directed by erstwhile Tribunal, vide order dated 21.7.2016. However, respondents rejected the claim of the petitioner without considering the policy of regularization in view of the law laid down by Hon'ble Apex Court as well as by this Court.

5. Being aggrieved and dis-satisfied with order dated 23.1.2017, passed by respondent No. 2 in compliance to order passed by this court in CWP No. 3066 of 2016, petitioner again approached erstwhile Tribunal by way of instant petition.

6. Pursuant to the notices issued in the instant proceedings, respondent-State has filed the reply, perusal whereof clearly reveals that facts noticed herein above are not in dispute, rather stand admitted. Precisely, case of the respondents as has been set out in the reply and as has been further

canvassed by learned Additional Advocate General is that since petitioner never came to be appointed as clerk in the year 1990, hence there was no occasion for the respondents-State to regularize her services against the post of Clerk in terms of the Policy of the State Government and her services were rightly regularized on the post of Beldar. Learned Additional Advocate General while fairly admitting that petitioner had been performing clerical job in the office of HP PWD stated that no specific order of appointment was ever passed by authority concerned calling upon the petitioner to perform the clerical job, rather she of her own volition performed the job of clerk in HP PWD. He submitted that since at the time of regularization of her services, she was working as Beldar on daily wage basis, no illegality said to have been committed by the respondent-department by regularizing the petitioner against the post of Beldar.

7. To the contrary, case of the petitioner as canvassed by Mr. H.K. Paul, Advocate is that since the petitioner from day one of her appointment on daily wage basis as Beldar had been rendering the services of clerk, as such respondent-department ought to have been regularized her services against the post of clerk w.e.f. 1.1.2001 not against the post of Beldar. Mr. Paul while making this Court to peruse the material placed on record by the respondent-department, submitted that there is no dispute qua the fact that petitioner had been working against the clerical post from day one and her case should have been considered against the post of clerk not Beldar.

8. Having heard learned counsel for the parties and perused material available on record, this Court finds that though the petitioner was initially appointed as daily wage Beldar in the year 1990 but from day one, she was performing the duties of clerk. Respondent-State has specifically admitted in their reply that the petitioner was appointed as daily-wage Beldar in the year 1990 and she worked in various categories i.e. Beldar w.e.f. 1990 to 25.3.1994, Assistant Ledger w.e.f. 26.4.1994 to 25.11.1994, Assistant Store

Attendant w.e.f. 26.11.1994 to 25.9.1995, Store Munshi w.e.f. 26.10.1995 to 25.10.1996, Store Clerk w.e.f. 26.10.1996 to 25.4.1997 and again as daily wage Beldar w.e.f. 26.5.1997 onwards.

9. It is quite apparent from the reply filed by respondents-State that the petitioner was appointed as Beldar but from day one was asked to do the job of clerk in the office of HP PWD. Since, at the time of regularization petitioner was rendering the clerical job, respondent-State ought to have considered her case against the post of clerk not daily wage Beldar. True it is, reply filed by respondent-State reveals that after being regularized, petitioner had received a sum of Rs. 1,65,401/- but record clearly suggests that she was compelled to approach the Court of law for grant of relief, as has been claimed in the instant petition. Since, respondent-State from day one had been extracting the services of clerk from the petitioner, therefore, her services ought to have been regularized against the post of Clerk not Beldar. As has been taken note herein above, the petitioner throughout her service career has performed duties of clerical nature, as detailed herein-above, and as such she was rightly expecting herself to be regularized against the post of clerk. No doubt, there is no appointment letter on record to suggest that the petitioner was initially appointed as clerk but once the respondent-State has admitted in their reply that from day one she (petitioner) was rendering her services as clerk, at this stage, respondent-State cannot be permitted to take benefit of the fact that regularization against the post of daily-wager was accepted without there being any protest by the petitioner. This Court cannot loose sight of the fact that there was no choice left with the petitioner and as such she was compelled to accept the regularization against the post of Beldar in terms of the Policy framed by Government of Himachal Pradesh. Had she disputed the offer, her services would not have been regularized at that juncture. Petitioner has right to get the wages of the services performed/rendered by her and since

she has worked against the post of clerk, she is entitled to wages attached to the post of clerk and not of Beldar.

10. This Court in fact cannot loose sight of the fact that there is limited time for the recruit(s) and he/she cannot suffer on the basis of acceptance of their appointments because at that time they didn't have any option but to accept the offer made to them and the State being Modal Employer is under obligation to protect the dignity and interest of a poor workmen like the petitioner.

11. Recently, Co-ordinate Bench of this Court in CWPOA No. 3776 of 2019, having taken note of similar facts wherein, petitioner, from whom work of Junior Draughtsman was extracted, was given benefit of said post. Relevant paras of judgment (supra) are reproduced as under:

> **"9.** ***In the considered view of the Court, in the peculiar facts of the case, interest of justice would have been met, if the respondent-Corporation had upgraded the post of the Washer Boy, against which the petitioner was recruited, to that of Junior Draughtsman as a matter personal to him till the age of his superannuation. It is not in dispute that the petitioner possessed the minimum qualification for being appointed against the post of Junior Draughtsman.***
>
> ***10. In this view of the fact, coupled with the fact that the respondent-Corporation extracted the work of Junior Draughtsman from the petitioner right from the year 1987 onwards, it does not behove upon the respondent-Corporation to deny at least this much succor to the petitioner. Though, the petitioner was also entitled to the minimum of the wages drawn by a Junior Draughtsman, as from the date when he was called upon to perform the duties of a Junior Draughtsman, yet this writ petition is being disposed of by issuance of a mandamus to the respondent-Corporation, to upgrade the post of Washer Boy, held by the petitioner, to that of a Junior Draughtsman, as from the date of filing of the present petition and confer upon him the wages etc. of a***

Junior Draughtsman, from the said date till the date of his superannuation. Actual benefits as shall accrue to him on account of this order, shall be conferred upon the petitioner."

12. No doubt, the petitioner stands appointed as clerk after her having cleared the limited direct recruitment test but since she had been performing the duties of clerk from the date of appointment i.e. 1990, her prayer for regularization against the post of clerk w.e.f. 1.1.2001 deserves to be considered.

13. Consequently, in view of above, the instant petition is allowed and Annexures A-1, A-4 and A-12 are quashed and set aside. The respondent-State is directed to regularize the services of the petitioner as clerk w.e.f. 1.1.2001. Since, the petitioner had been fighting for her rightful claim from day one, there is no force in the submission of learned Additional Advocate General that petitioner is not entitled for consequential benefits and as such, petitioner after being regularized against the post of clerk be granted all the consequential benefits.

14. The petition stands disposed of in the aforesaid terms, along with all pending applications.

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

Ms. Himani Rana ....Petitioner.

Versus

State of Himachal Pradesh & ors. ... Respondents.

For the petitioner : Mr. Adarsh K. Vashista, Advocate.

For the respondents : Mr. Sanjeev Sood & Mr. Dinesh Thakur, Additional Advocates General for respondent No.1.

None for respondent No.2.

Mr. V.B. Verma, Advocate, for respondent No3.

Mr. Lovneesh Kanwar, Sr. Advocate with Mr. Tek Chand, Advocate, for respondent No.4.

CWPOA No. 277 of 2020
Decided on: 22.12.2022

Constitution of India, 1950- Article 226- Direction to consider candidacy of petitioner for Medical Officer (dental) and annulment of selection of respondents- **Held**- Selection process conducted based on merit- no priority to candidates with respect to date of acquiring qualifications- Reservation criteria for certain categories to ensure eligibility for specific post is not to restrict candidates from applying for other available positions- Prior participation in different recruitment process does not disqualify candidate from subsequent process- Petition dismissed as devoid of merits. (Paras 8,9,11)

The following judgment of the Court was delivered:

Ajay Mohan Goel, (*Oral*)

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

> ***" i) That the respondents may kindly be directed to consider the candidature of the applicant against the post of Medical Officer (Dental) from the year 2011 when the above mentioned post fell vacant and became available with the respondents for being filled up;***
>
> ***ii) That the respondents may kindly be directed to allow the benefit of selection, recruitment and appointment in favour of the applicant against the post of Medical Officer (Dental) in the current recruitment process and the selection and recruitment of respondent No.3 and 4 as Medical Officer (Dental) may kindly be quashed and set aside."***

2. The case of the petitioner is that respondent No.2 initiated recruitment process for filling up the post of Medical Officer (Dental) in the year 2009-2010, in which, posts were reserved for Physically Disabled Category. The petitioner being eligible, for the posts reserved for the said category, duly participated in the process, but was unsuccessful on merit. Thereafter, respondent No.2 initiated the recruitment process to fill up the posts of Medical Officer and in terms of Annexure A-4, advertisement dated 23.9.2011, two posts were also reserved for physically challenged person. However, the process was not taken to its logical conclusion. Later on respondent-Department again initiated the process for filling up the posts of Medical Officer (Dental) in terms of Annexure A-6 i.e. advertisement dated 10.1.2014. But this time, none of the posts were reserved for physically disabled person. This was followed by another advertisement issued by the respondent-department vide Annexure A-9 dated 12.2.2016, in terms whereof, two posts were advertised for Medical Officers (Dental) under the category of General Orthopedic Handicapped. The petitioner participated in the process,

but was unsuccessful. The grievance of the petitioner is that compared to the two selected candidates, i.e. private respondents No.3 and 4, the petitioner had done her BDS before the selected candidates and further one of the two selected candidates, namely, Dr. Abhishek Sharma was otherwise ineligible candidate to participate in the process against the posts reserved for physically disabled persons, as he had appeared in the year 2011 in the recruitment process undertaken by respondent No.2 as a General Category Candidate. Learned counsel for the petitioner has argued that non-selection of the petitioner in the year 2015, in the said recruitment process, is not sustainable in the eyes of law for the reasons that when a senior incumbent was available, who had acquired qualification much before the selected candidates then the act of selecting the private respondents by the official respondents is arbitrary and discriminatory. He further argued that once Dr. Abhishek Sharma has participated in the year 2011 recruitment process, under General Category, then this rendered him ineligible to participate against the category reserved for physically disabled person and in this background recommendation of the Public Service Commission qua Dr. Abhishek Sharma for being appointed against the posts reserved for physically disabled person is bad in law.

3. No other point was urged.

4. Learned Additional Advocate General submitted that the petition was nothing but an abuse of the process of law for the reason that the recruitment, which was done through the Public Service Commission was not batch-wise recruitment. He further submitted that the posts of Medical Officer being Class-I posts, the process was initiated through Public Service Commission and in terms of the advertisement, there was a screening test, which was followed by interview and the Public Service Commission recommended those candidates, whom it found meritorious for appointment against the post in issue. He further argued that in the process of direct

recruitment undertaken by the Public Service Commission, it was nowhere held out by the Public Service Commission that preference would be given to the candidates on the basis of their date of acquiring of the qualification. Similarly, he further argued that simply because Dr. Abhishek Sharma participated in the recruitment process under the General Category in an earlier process, same does not renders him ineligible to participate against the post reserved for differently abled category, more so, in light of the fact that indeed he was physically handicapped and that certificate so issued to him by the competent authority was not under challenge. Accordingly, he prayed that the petition being devoid of merit deserves dismissal.

5. Learned counsel for respondent No.4 besides adopting the arguments addressed by learned Additional Advocate General has also argued that the physical disability certificate, which has been issued by the Medical Board in favour of respondent No.3 is a genuine certificate and the petitioner has not challenged the veracity of the said certificate. Accordingly, he submitted that the selection of the private respondent is purely made on the basis of merit and, therefore, the petition deserves dismissal.

6. I have heard learned counsel for the parties and also gone through the records of the case.

7. The factual matrix involved in the case, as has already been narrated by me herein above, Two moot points which the Court needs to address in the present petition are; (a) whether the contention of the petitioner that she being senior to the private respondents as far as acquiring BDS qualification is concerned, would confer upon her any right of preference of appointment against the post of Medical Officer (Dental) in a process undertaken by Public Service Commission?; and (b) Whether the factum of respondent Dr. Abhishek Sharma having participated in the recruitment process undertaken by the respondent in the year 2011 as a General Category

Candidate would render him ineligible subsequently to participate against the post reserved for physically disabled person ?

8. The advertisement, in terms whereof, the private respondent was selected is on record as Annexure A-9. A perusal thereof demonstrates that in terms of this advertisement, various posts were advertised by Public Service Service for being filled up, which included the posts in the Medical Education as also posts under the Department of Health and Family Welfare. Two posts of Medical Officer (Dental) Class-I were advertised which were to be filled up on direct basis. These two posts were reserved for General Orthopedic (Backlog). The essential qualification prescribed in the advertisement was Bachelor Degree in General Surgery from a institute recommended by the Dental Council of India and registered with State Medical Council. It was further mentioned in the advertisement that the mode of recruitment shall be screening test/examination/viva voce test. The relevant Clause in issue is being reproduced herein below in its entirety.

> "**<u>Screening Test/Examination/Viva-Voce Test:-</u>**
> ***(i) In cases where the umber of eligible candidates for recruitment to the post(s) advertised by the Commission is inordinately large, the Commission may limit/shortlist the number of eligible candidates to be called for interviews by subjecting them to a screening test (objective-type/descriptive) of two hours duration. Final selection of a candidate will be made solely on the basis of his/her performance in the viva-voce test/interview, which will be of maximum 100 marks. The minimum pass marks in interview are 45 for the candidates of general category and 35 marks for the candidates of reserved categories.***
> ***(ii) Where selection is to be made on the basis of performance of the candidates having qualified the screening test, before the interview board, a candidate scoring more marks in the interview shall be placed above the candidates scoring lesser marks in the interview. If the candidate will score equal marks in an interview then***

a candidate securing more marks in the screening test will be placed above the candidate securing lesser marks in the screening test. In case the marks of screening test are equal, then the candidate who is senior in age is placed above the candidate junior in age. Where selection is to be made purely on the basis of performance of the candidate before te interview board, a candidate scoring more marks in the interview shall be placed above the candidate scoring lesser marks in the interview. If the candidate will score equal marks in an interview, then a candidate who is senior in age will be placed above the candidate junior in age.

(iii) The key of each screening test (objective type) will be uploaded on the website after freezing the answer sheets of the candidates for calling objections from the candidates. Seven days' time shall be given for inviting objections, if any, in the key. The Objections will be got verified from the concerned subject expert and if found correct, revised key of that screening test shall be uploaded on the website.

(iv) For more information of the candidates, Rules of Business of H.P. Public Service Commission pertaining to selection procedure etc. is available on the website of the Commission i.e. www.hp.gov. in/hpps.

(v) The eligibility of candidates(s) called for the interview will be determined on the basis of original documents produced on the day of interview and the Commission will not be responsible if the candidature of any candidate is rejected at that stage or at the time of verification by the appointing authority. As such, admission to the screening test/examination/interview shall be purely provisional.

(vi) Summoning of the candidate(s) for viva-voce test; conveys no assurance whatsoever that they will be selected or recommended. Appointment orders to the selected candidate(s) will be issued by the Government of H.P. (in the concerned Department).

(vii) If any visually impaired candidate requires scribes, he/she has to request for the same in writing to the Commission immediately after receipt of his/her roll number. Such applications will be entertained on merit and as per the rules.

(viii) Re-checking/re-evaluation, for the written examination/Screening Tests will not be allowed in any case.

(ix) Disputes, if any, shall be subject to Court jurisdiction at Shimla."

9. A careful perusal of the Clause demonstrates that there was no contemplation therein that in the matter of selection, any preference was go be given to a candidate on the basis of the date of his passing the essential qualification. In fact in terms of conditions contemplated in this Clause, even in case where the marks of candidates in the screening test were found to be equal, then a candidate who was senior in age was to be placed above the candidate junior to him and the date of passing essential qualification was not to have any right in said circumstances also. Therefore, in this view of the matter, when in terms of the advertisement in issue, the merit of the candidates was to be assessed by the Public Service Commission in terms of the selection criteria provided therein, the contention of learned counsel of the petitioner that the act of the respondent of not giving preference to the petitioner who had acquired the essential qualification before the private respondent was bad, is completed ill-founded.

10. The second argument raised by learned counsel for the petitioner that private respondent being participated in the recruitment process undertaken by the respondent department would render him ineligible subsequently to participate against the post reserved for Physically Disabled person is also without any merit.

11. It is not in dispute that respondent No.3 is a physically disabled person. It is not in dispute that the disability suffered by respondent No.3 is the one for which the post was reserved in terms of Annexure A-9 i.e. advertisement dated 12.2.2016. There is no challenge to the veracity of the Medical Certificate, which has been issued by the Medical Board qua respondent No.3 with regard to physical disability being suffered by him. It is settled law that whenever reservations are carved out for any class or category, be it vertical or horizontal, then as far as the reserved posts are concerned, only those candidates can participate, who fulfill the eligibility criteria prescribed thereto. However, candidates, who are eligible to participate for the reserved posts always have a right to participate for the posts, which are otherwise open. In this view of the matter, the arguments of learned counsel for the petitioner that respondent No.3 had rendered himself ineligible to participate in the process for recruitment against the post reserved for General Orthopedic handicapped has no merit because if the contention of learned counsel for the petitioner is taken to its conclusion, then its obvious fall out would be that a General Orthopedic handicapped person will have to wait till a post of this category is advertised and he would be rendered ineligible to apply for the posts, otherwise advertised in routine for open category.

12. Accordingly, in view of above observations, as this Court finds no merit in the present petition, the same is dismissed.

13. Pending miscellaneous applications, if any, also stand disposed of.

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

Promila and anr. ....Petitioners

Versus

State of Himachal Pradesh and anr. ...Respondents.

For the petitioners : Ms. Kiran Dhiman, Advocate.
For the respondents : Mr. Manoj Chauhan and Mr. Varun Chandel, Additional Advocate Generals.

Cr.MMO No. : 1294 of 2022
Decided on : 04.01.2023

Code of Criminal Procedure, 1973- Section 482- **Indian Penal Code, 1860**- Sections 324, 326- Quashing of FIR- Joint petition presented by the parties closely related being father-in-law and daughter-in-law- **Held-** Compromise effected, recorded statements and amicably settled the matter to live peacefully- Dispute private in nature and will not have serious effect on societal interest- Criminal proceedings quashed- Petition allowed.

The following judgment of the Court was delivered:

Satyen Vaidya, Judge *(Oral)*

A prayer has been made to quash FIR No. 130/2021, dated 07.10.2021, registered at Police Station B.S.L. Colony, Sundernagar, District Mandi H.P., under Sections 324 and 326 of Indian Penal Code and consequent criminal proceedings, on the ground of compromise.

2. The FIR was lodged on the complaint of petitioner No. 2, who is father-in-law of petitioner No.1. It is averred in the petition that the complaint made by petitioner No. 2 against petitioner No.1 was result of misunderstanding, which, now, stands sorted out. The entire family is now

living happily. The compromise has been effected with a purpose to have peaceful and harmonious future life.

3. Both the petitioners are present in the Court today. Their separate statements have been recorded. Petitioner No. 2 has reiterated the fact as averred in the petition. He has stated that the complaint was made by him against his daughter-in-law as a result of misunderstanding, which has, now, been sorted out. Petitioner No.2 has further stated that now, petitioner No.1 is living happily in the family and he has no subsisting grievance against her. He has also stated that he wants to maintain peaceful and harmonious relations in the family in future and for such purpose, he has entered into a compromise, Annexure P-2.

4. Petitioner No. 1 has also stated that FIR was lodged against her under some misconception of fact. Now, all the disputes stand amicably settled and she is residing happily in the family.

5. Parties have come forward by way of a joint petition to seek the order for quashing of FIR No. 130/2021, which was registered at the instance of petitioner No. 2 against petitioner No. 1. As revealed by the parties, they are closely related to each other. Petitioner No. 1 is wife of the son of petitioner No. 2. Both have stated on oath that FIR was lodged under some misconception of fact and misunderstandings. Now, all the past disputes have been settled by them amicably. They want to live in peace in future.

6. The dispute in question is more or less private in nature. The decision of the case either way will not have any serious effect on the interest of the society at large. Keeping in view the relationship *inter se* petitioners, no prejudice shall be caused to any third party, in case, the prayer made in the petition is granted.

7. The objective of every civilized society and legal system is to maintain and secure peace and harmony in the society. In the instant case also, parties have settled the matter to live in peace in future.

8. In light of above discussion, the instant petition is allowed. FIR No. 130/2021, dated 07.10.2021, registered at Police Station B.S.L. Colony, Sundernagar, District Mandi H.P., under Sections 324 and 326 of IPC and consequent criminal proceedings, are ordered to be quashed.

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

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

Christopher Noble @ Kelechi .....Petitioner

Versus

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

For the petitioner: Mr.Mandeep Chandel, Advocate.

For the respondent: Mr. Manoj Chauhan and Mr. Varun Chandel, Additional Advocate Generals.

Cr.MP(M) No. 2250 of 2022
Decided on: 04.01.2023

Code of Criminal Procedure, 1973- Section 439- **Foreigners Act, 1946**- Section 14- **Indian Penal Code, 1860** - Section 120B - Bail- **Held-** The antecedents of the accused petitioner do not convince the court to release him on bail as likely to be prejudicial to pending trial- Have to remain in confined precincts as deportation of the petitioner is underway- Bail petition dismissed.

The following judgment of the Court was delivered:

Satyen Vaidya, Judge (Oral)

By way of instant petition, petitioner has prayed for grant of bail in case FIR No.302 of 2021, dated 17.10.2021, registered under Section 14 of the Foreigners Act and Section 120-B of IPC at Police Station Sadar Kullu, District Kullu, H.P.

2. It is averred in the petition that the petitioner is innocent and has been roped in a false case. He has been kept behind the bars for last about one year without any fault on his part. The challan has been presented

in the Court and no fruitful purpose shall be achieved by keeping the petitioner behind the bars. Learned counsel for the petitioner further contended that the petitioner shall abide by all the terms and conditions as may be imposed at the time of granting bail to the petitioner and will regularly attend the hearings during the trial.

3. On the other hand, the bail petition has been opposed by learned Additional Advocate General on the grounds that the petitioner is a habitual offender and has no respect for the law. He is a foreign national and is residing in India for the last more than five years without valid documents. The instructions dated 24.11.2022 have also been placed on record, which contains the entire background of the petitioner and his past conduct.

4. I have heard learned counsel for the parties and have also gone through the records of the case carefully.

5. The instructions dated 24.11.2022 issued by the Senior Superintendent of Police, Kullu reveal that the petitioner was apprehended within jurisdiction of Police Station, Manali on 01.01.2016 without passport and visa. Case vide FIR No. 01/2016 was registered against him under Section 14 of the Foreigners Act, 1946 (for short, "the Act"). He remained in custody during the trial. Petitioner was convicted for offence under Section 14 of the Act vide judgment dated 28.7.2016 and was sentenced to imprisonment already undergone by him. Orders to deport the petitioner were also passed. The Senior Superintendent of Police, Kullu vide order dated 29.7.2016 issued under Section 3 (2) (E) of the Act directed the petitioner to be kept in restricted area of Police NGO Rest House, Kullu till the process for his deportation was not completed. On 5.8.2016, in violation of the restriction order, petitioner absconded from the premises of Police NGO Rest House, Kullu.

6. On 18.9.2016, petitioner was again arrested in a case under Section 21 of the Narcotic Drugs and Psychotropic Substances Act and

Section 14 of the Act, vide FIR No.181 of 2016, dated 18.9.2016 registered at Police Station, Manali. He remained under trial and was acquitted by learned Special Judge-II, Kullu vide judgment dated 01.10.2021. The directions were again issued to the Senior Superintendent of Police, Kullu to deport the petitioner to the country of his origin. Again a restriction order under Section 3 (2) (E) of the Act was issued on 7.10.2021, whereby the petitioner was directed to remain confined within the premises of Police, NGO Rest House, Kullu till the process of deportation was completed. Petitioner again violated the restriction order and absconded on 16.10.2021.

7. Another case under Section 14 of the Foreigners Act was registered against petitioner vide FIR No.302 of 2021, dated 17.10.2021 and presently the petitioner is in custody in the said case.

8. As per status report submitted by the respondent, challan has been presented against the petitioner and petitioner is an under-trial.

9. From the facts noticed above, there remains no doubt that petitioner is a person with doubtful antecedents. He has no respect for the law. The possibility of petitioner indulging in above noted activities intentionally to prolong his stay in India, cannot be ruled out. It cannot be assumed that petitioner, instead of preferring to be deported to the country of his origin, would opt to live in a foreign country, that too, in adverse circumstances. The fact that petitioner had been apprehended in a case under NDPS Act cannot be ignored, notwithstanding his acquittal in the case. Petitioner has not been adhering to the restriction orders issued against him time and again and each violation amounts to a fresh offence.

10. Keeping in view the past conduct and antecedents of petitioner releasing him on bail is likely to prove prejudicial to the trial pending against him. It may be difficult to procure his presence for the early disposal of trial. In any case the process for deportation of petitioner is underway and he will have to remain in confined precincts.

11. Keeping in view the facts of the case, the petitioner is not entitled to bail and hence, the instant petition is dismissed.

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 AJAY MOHAN GOEL, J.

Manoj 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
Decided on: 28.12.2022

Code of Criminal Procedure, 1973- Sections 482, 91, 309(2)- **Indian Evidence Act**- Section 114(g)- Quashing of FIR- Petitioner No. 2 filed application for issuance of direction to police officials to submit their mobile details so that petitioner could get CDR/Cellular records- **Held**- Supply of CDR of police will lead to a possibility of disclosure of information of other offences not connected to the present one- Police officials cannot be compelled to disclose source of information and also right to privacy will be violated- Trial not vitiated -Petition dismissed.

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.

Kaul Ram ....Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

For the petitioner :Mr. Yashveer Singh Rathore, Advocate.
For the respondent : Mr. Manoj Chauhan and Mr. Varun Chandel, Additional Advocate Generals.
SI Karam Chand, I/O P.S. Bhunter in person alongwith record.

Cr.MP(M) No. 2836 of 2022
Decided on: 04.01.2023

Code of Criminal Procedure, 1973- Section 439- **Narcotic Drugs and Psychotropic Substances, Act 1985**- Sections 20, 37- Bail- Bail sought on the ground of prolonged incarceration of more than three years and violation of the constitutional right of expeditious disposal of trial- **Held-** Petitioner in custody since 20.11.2019, trial not likely to be concluded in near future and no delay attributed to the petitioner/accused- Petitioner ordered to be released subject to conditions- Bail petition allowed. (Para 16)

Cases referred:

Mahmood Kurdeya Vs. Narcotic Control Bureau (2022) 3 RCR (Criminal) 906;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge (Oral)

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 on way leading to Village Bagi Shahri, he was found alongwith his co-accused Chet Ram and Krishan Chand with a bag in the right hand of accused Chet Ram 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 04.01.2023, 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. Co-accused of petitioner has already been ordered to be released on bail, vide order dated 23.12.2022 in Cr.MP. No. 2570 of 2022.

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. 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.

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.

Krishan Chand ....Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

For the petitioner :Mr. Yashveer Singh Rathore, Advocate.

For the respondent : Mr. Manoj Chauhan and Mr. Varun Chandel, Additional Advocate Generals.

SI Karam Chand, I/O P.S. Bhunter in person alongwith record.

Cr.MP(M) No. 2837 of 2022
Decided on : 04.01.2023

Code of Criminal Procedure, 1973- Section 439- **Narcotic Drugs and Psychotropic Substances, Act 1985**- Sections 20, 37- Bail- bail sought on the ground of prolonged incarceration of more than three years and violation of the constitutional right of expeditious disposal of trial- **Held-** Petitioner in custody since 20.11.2019, trial not likely to be concluded in near future and no delay attributed to the petitioner/accused- Petitioner ordered to be released subject to conditions- Bail petition allowed. (Para 16)

Cases referred:

Mahmood Kurdeya Vs. Narcotic Control Bureau (2022) 3 RCR (Criminal) 906;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge (Oral)

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 on way leading to Village Bagi Shahri, he was found alongwith his co-accused Chet Ram and Kaul Ram with a bag in the right hand of accused Chet Ram 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 04.01.2023, 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.*
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> *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*
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> *The application seeking relief of bail having been rejected, the instant appeal has been filed.*
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> *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. Co-accused of petitioner has already been ordered to be released on bail, vide order dated 23.12.2022 in Cr.MP. No. 2570 of 2022.

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. 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.

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 A.A. SAYED, C.J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Tejinder Goyal .....Petitioner

Versus

Union of India & Ors. ...Respondents

For the petitioner: Mr. R.K.Gautam, Senior Advocate with Mr. Sahil Dixit, Advocate.

For the respondents: Mr. Balram Sharma, Deputy Solicitor General of India, for respondent No.1.

Mr. Bipin C. Negi, Senior Advocate with Mr. Nitin Thakur, Advocate for respondent Nos.2 and 3.

CWP No.7816 of 2021
Reserved on : 27.12.2022
Decided on: 05.01.2023

Constitution of India, 1950—Article 226- Petitioner was declared successful for appointment of Service Provider in a Corporation owned and Corporation Operated retail outlet and the petitioner completed all the formalities required at his end in terms of the Letter of Intent, but letter of appointment (LOA) was not issued**- Held-** The reasons offered by respondent Nos. 2 and 3 for not issuing the LOA in favour of the petitioner, cannot be sustained- Petition allowed. (Paras 5, 6, 7)

Cases referred:

Rishi Kiran Logistics Pvt. Ltd. Vs. Board of Trustees of Kandla Port Trust & Others (2015)13 SCC 233;

South Eastern Coalfields Ltd. & others Versus S. Kumar's Associates AKM (JV) (2021) 9 SCC 166;

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge

Petitioner was declared successful in the selection process undertaken by respondent Nos.2 and 3 the Oil Marketing company for appointment of Service Provider in a Corporation Owned and Corporation Operated retail outlet. The Letter of Intent was issued to the petitioner. He completed all the formalities required at his end in terms of the Letter of Intent. Despite this, the Letter of Appointment was not issued to him, hence, the petition.

2. Facts: -

2(i) Respondent Nos.2 and 3-The Hindustan Petroleum Corporation Limited (HPCL) issued an advertisement on 12.08.2020 for engagement of Service Provider for its Corporation Owned and Corporation Operated (COCO) Retail Outlet at Nalagargh, District Solan, H.P. The selection and appointment was to be made in terms of guidelines/brochure dated 31.03.2020 (Annexure P-2) being followed by all Oil Marketing Companies (OMCs). The petitioner applied for COCO Retail Outlet on 10.09.2020. He qualified for the interview. The interview letter was issued to him on 16.02.2021 (Annexure P-3). Interview was held on 05.03.2021. The result was declared the same day vide Annexure P-4, wherein the petitioner scored highest marks. On 08.03.2021 (Annexure P-5), respondents declared the petitioner selected as Service Provider for the location in question. The Letter of Intent (LOI) (proposed award of contract) as Service Provider for COCO Retail Outlet at Nalagarh, District Solan, was issued to the petitioner on 05.07.2021 (Annexure P-6). Petitioner completed the formalities at his end required in terms of the LOI. He furnished bank guarantee of Rs.70,00,000/- on 03.08.2021 (Annexure P-10). He also applied and got himself a GST registration number on 05.08.2021 (Annexure P-11). The petitioner also informed the respondents on 18.08.2021 (Annexure P-13) that apart from furnishing the bank guarantee and obtaining

the GST registration certificate, he had also arranged requisite manpower for running the Retail Outlet.

2(ii) The petitioner sent communications to the respondents on 18.08.2021 and 06.10.2021, requesting them to complete the formalities at their end to enable him to commence the retail outlet operations as he had statedly started incurring revenue losses. Respondent OMC through its response dated 22.02.2021 (Annexure P-18), informed that *"in the cases where LOI is issued but LOA and Agreement is not yet signed with COCO Service Provider, in such cases OMCs have decided to put on hold the selection process of COCO Service Provider……."* The decision of the respondents to put on hold petitioner's selection as COCO Service Provider prompted him to institute the present petition on 09.12.2021, seeking directions to the respondents to hand him over the COCO Retail Outlet mentioned in the LOI.

Contentions & Analysis

3. Heard learned counsel for the respective parties and gone through the case record.

4. The facts mentioned in para-2 above are not in dispute. In response to the advertisement issued by the respondent-HPCL on 12.08.2020, the petitioner participated in the selection process. He was interviewed on 05.03.2021. The result was declared on 08.03.2021. The petitioner was declared selected as Service Provider for COCO Retail Outlet Nalagarh, District Solan, H.P. **The first contention** of respondent Nos.2 and 3 is that mere declaration of petitioner's selection as Service Provider for the COCO Retail Outlet at Nalagarh, would not bestow any right upon him to be appointed as a Service Provider. Following clause from the selection letter issued in favour of petitioner on 08.03.2021 (Annexure P-5) was pressed into service.

> *"This is only preliminary intimation towards your selection for award for contract for Service Provider. However, the award of contract is subject to compliance of terms and conditions of the Corporation in this regard."*

We find from the record that things did not remain static at the stage of declaration of result. The petitioner's selection on 08.03.2021 as Service Provider for COCO Retail Outlet was followed by issuance of LOI to him for the location in question. The LOI was issued on 05.07.2021.

5. The respondent Nos.2 and 3 **next contended** that even the issuance of LOI in favour of the petitioner on 05.07.2021, did not confer any right in him to have the letter of appointment (LOA). (***2015)13 SCC 233 (Rishi Kiran Logistics Private Limited Vs. Board of Trustees of Kandla Port Trust & Others)*** was pressed into service to highlight the submissions that Letter of Intent merely indicates intention to enter into contract into future. It has no binding force. The respondents' submission is that the petitioner cannot seek specific enforcement of the LOI dated 05.07.2021 as: -

(a) LOI was only a proposed award. No binding contract came into existence by the issuance of LOI;

(b) Due to change in policy guidelines for selection of retail Service Provider for COCO Outlets, the OMCs had decided to issue fresh advertisements in cases where LOI was issued but LOA and agreement, had not been yet signed. Therefore, respondent Nos.2 and 3 be permitted to cancel the LOI issued in favour of petitioner and to re-advertise the location.

5(a) LOI: - A Proposed Award.

5(a)(i) For determining the nature of LOI, it would be appropriate to extract the relevant portion of LOI dated 05.07.2021 (Annexure P-6) issued in favour of the petitioner: -

> *"Sub:- Proposed award of contract for Service Provider for COCO Retail Outlet at Location: Nalagarh, District Solan, State: Himachal Pradesh.*
>
> *We refer to our advertisement dated 12.08.2020 for the award of contract of Service Provider for our COCO RO at the above location and the subsequent interview held at HPCL Retail Regional Office Shimla on 05.03.2021.*

Please be informed that by this Letter of Intent, we propose to award contract of Service Provider for operating our COCO Retail Outlet at the above location on the following terms & conditions: -

(i) You will arrange for requisite manpower as per the requirement of Corporation for operation of the subject COCO Retail Outlet and ensure compliance of applicable statutory guidelines/law with regard to engagement of manpower like ESI, PF etc.

(ii) You will provide Bank Guarantee of Rs.70.0 Lacs (Rs. Seventy Lacs Only) from a schedule bank within 30 days of this letter.

(iii) You will arrange for necessary Registration and obtain the requisite Licenses from the Statutory Authorities which are required for operation of the COCO Retail Outlet.

(iv) This letter of intent will stand automatically withdrawn and cancelled on the happening of any of the following events: -

a) It is found that you have suppressed and/or misrepresented any material facts in your application.

b) In case you are found to be convicted for any criminal/economic offence involving moral turpitude,

(v) This is merely a letter of intent and it not to be construed as Contract for Service Provider. You will be awarded the contract upon complying with the terms and conditions spelt out herein above by the issuance of appointment letter along with signing of our standard agreement between you and us.

Should you require any further detail/guidance, please get in touch with our office at the address mentioned below: -

Hindustan Petroleum Corporation Limited
3rd Floor, Hameer House, Lower Chakkar,
Shimla, PIN-171005

Please acknowledge receipt of this letter."

Emphasizing upon Clause 5 of above LOI and avowed stated subject of the LOI, learned senior Counsel for respondent Nos. 2 and 3 OMC contended that the letter dated 05.07.2021, (Annexure P-6) was only a Letter of Intent and not Letter of Appointment. Issuance of Letter of Intent in petitioner's favour cannot be construed to mean that a valid contract had come into existence between the parties. Hence, respondent Nos. 2 and 3 were not bound to issue LOA in favour of the petitioner.

5(a)(ii) In ***(2021) 9 Supreme Court Cases 166 (South Eastern Coalfields Limited and others Versus S. Kumar's Associates AKM (JV)***, Hon'ble Apex Court was seized of a situation in a tender matter where the bidder had neither submitted the performance security deposit nor signed the integrity pact. Consequently, work order was not issued to him. It was inter-alia held that the issue whether a concluded contract had been arrived at *inter se* the parties is dependent on the terms and conditions of the NIT, the LoI and the conduct of the parties. An LoI merely indicates a party's intention to enter into a contract with the other party in future. No binding relationship between the parties at this stage emerges and the totality of the circumstances have to be considered in each case. It is no doubt possible to construe a letter of intent as a binding contract if such an intention is evident from its terms, which must be clear and unambiguous.

In the given facts, we are not inclined to accept the submissions of respondent Nos.2 and 3. Admittedly the LOI was to be followed by the LOA. The LOA was not issued to the petitioner, that is why he has moved this petition. The LOA was to be issued to the petitioner subject to fulfilment of the conditions mentioned in the LOI. It is nobody's case that the petitioner did not fulfill the conditions stated in the LOI. Clause 1 of the LOI pertains to arranging the requisite manpower. The petitioner, on 18.08.2021, informed the respondents that he had arranged the requisite manpower for running the Retail Outlet. Clause 2 of LOI entailed providing of bank guarantee of

Rs.70,00,000/- from a scheduled bank by the petitioner. It is an admitted factual position that the petitioner had furnished the requisite bank guarantee to the respondents within the stipulated period. Under the 3rd Clause of the LOI, the petitioner was to obtain necessary registration and licence for running the COCO Retail Outlet. It is not in dispute that the petitioner had obtained the necessary registration and licence. Thus, all formalities required to be completed by the petitioner, had actually been completed by him. Respondent Nos. 2 and 3 even rejected a complaint made against selection of the petitioner as COCO Service Provider vide a detailed order passed on 25.06.2021. It is the respondents, who did not perform their part. The petitioner repeatedly requested respondent Nos. 2 and 3 to issue him the LOA. **Rishi Kiran Logistics** case supra relied upon by the respondent-OMC pertained to a tender process for allotment of plots. It was inter-alia observed by the Hon'ble Apex Court in the said case that when the LOI is hedged with condition that final allotment would be made after obtaining requisite clearances, it may then depict an intention to enter into contract at a later stage. However, if completion of formalities takes undue long time and prices of land shot up in the interregnum, then the respondent had a right to cancel the process, which had not resulted in a concluded contract. This situation does not exist in the case in hand. Present case does not pertain to tender process *stricto-senso*. All requisite formalities as per the LOI were completed by the petitioner. Respondent Nos. 2 and 3- OMC have not even made any grievance about want of completion of requisite formalities at the end of petitioner. Thus the submission that LOI will not lead to the LOA cannot be countenanced in the given facts.

5(b) Factual Reasons assigned by the respondents for not issuing LOA to the petitioner.

We may now examine the factual reasons given by the respondents for not issuing the LOA in favour of the petitioner.

5(b)(i) According to the respondents, on 05.08.2021, the Ministry of Petroleum and Natural Gas (MoP&NG) issued following letter to all OMCs: -

"M-12043(11)/171/2021-OMC-PNG
Government of India
Ministry of Petroleum & Natural Gas
***
Shatri Bhawan, New Delhi
Dated the 5th August, 2021

To

The Director (Marketing),
IOCL/BPCL/HPCL

Subject: Appointment of Service Providers for COCO Retail Outlets-reg.

Sir,

This Registry is receiving complaints from various affected parties and stakeholders on concerns regarding fair selection and transparency in the process of appointment of Service Providers for COCO Retail Outlets by the PSU OMCs.

2. It is in this context that all the PSU OMCs are hereby directed to ensure implementation of fair, uniform and transparent selection criteria while deciding on selection of service providership for COCO ROs and that weightage of interview for the selection criteria is kept not more than 20% as provided in the extant policy guidelines.

3. It may be noted that any deviation from the acceptable framework of norms and intent of unified and comprehensive policy guidelines in place in this regard will be viewed very seriously in this Ministry.

4. In light of the above PSU OMCs are advised in their won interest to strictly adhere to the said policy and to ensure that the selection process of service providers for COCO Retail Outlets is done in a fair and transparent manner.

This issues with the approval of competent authority.

Yours faithfully,
Sd/-
(A.K. Sinha)
Under Secretary (OMC Section)"

5(b)(ii) Bharat Petroleum Corporation Limited (BPCL- one of the OMCs) informed the MoP&NG vide letter dated 16.09.2021 that the issue of fair selection and transparency in the process of appointment of Service Provider highlighted by the Ministry had been deliberated by the OMCs. That need was felt for revising the existing COCO Service Provider appointment guidelines. It was further informed that *"all the selection process of COCO Service Providers for the COCO locations, which were advertised and interview were scheduled, have been cancelled and the ongoing selection process of COCO Service Provider, for which the interviews were already conducted, have been put on hold with immediate effect."* The petitioner was accordingly informed by respondent Nos. 2 and 3 (HPCL) on 22.10.2021 (Annexure P-18) that in the cases where LOI is issued but LOA and agreement is not yet signed with COCO Service Provider, "*in such cases OMCs have decided to put on hold the selection process of COCO Service Provider".*

5(b)(iii) We may also note that the petitioner in his rejoinder, had made specific averment that COCO Retail Outlets have been awarded by OMCs to different people even after issuance of the LOI to the petitioner on 05.07.2021. Referring to information received by him under the Right to Information Act (Annexure R-4), petitioner pointed out such like instances including the one where LOI was issued on 19.07.2021 and Retail Outlet was handed over on 24.09.2021 despite the decision taken by all OMCs on 16.09.2021 not to handover Retail Outlets where only LOIs had been issued. There is no rebuttal to this submission.

5(b)(iv) Fresh guidelines for selection of Service Providers of COCO Retail Outlets were framed on 07.04.2022 by the OMCs [Annexure A-1(Colly)]. These guidelines were approved by MoP&NG on 20.04.2022. Hence, the respondents decided to call for fresh advertisements for all their COCO locations where LOA had not been issued.

In the given facts, the reasons offered by the respondent Nos. 2 and 3 for not issuing the LOA in favour of the petitioner, cannot be sustained. The advertisement for appointment of Service Provider for COCO Retail Outlet at Nalagarh, District Solan, was issued on 12.08.2020 under the applicable guidelines then in force, i.e. issued on 31.03.2020. The MoP&NG in its letter dated 05.08.2021 did not direct the OMCs either to frame new guidelines or to apply any newly framed guidelines to the selection process initiated under the old guidelines in force at the relevant time. The Ministry had only directed the OMCs to ensure implementation of fair, uniform and transparent selection criteria while deciding on selection of service providership for COCO ROs and that weightage of interview during the selection process, should be kept not more than 20% as provided in the extant policy guidelines. The Ministry had merely directed the OMCs that their existing policy guidelines providing for giving weightage of the interview only up to the extent of 20% should be strictly adhered to in the process for selection of Service Provider for COCO Retail Outlets. Out of total 100 marks allocated in the 2020 guidelines, 80 marks were for scrutiny of the applications and 20 marks were kept for the interview. The OMCs were directed by the Ministry to insure the implementation of fair, uniform and transparent selection criteria. There was no direction to frame new guidelines. The OMCs on their own had decided to frame new guidelines for selection of Service Provider for COCOs. The new guidelines framed by the OMCs on 06.05.2022 do not even stipulate that the same are to be applied retrospectively i.e. to the selection process undertaken in terms of guidelines framed on 31.03.2020. In this context, it would be worthwhile to quote the following para from the judgment passed by the Hon'ble Apex Court on 22,09.2022 in ***Civil Appeal No(s) 1699-1723 of 2015, (Bharat Sanchar Nigam Ltd. and others Etc. Versus M/s Tata Communications Ltd. etc***.) wherein it was held that administrative/executive orders or circulars in absence of any legislative competence cannot be made

applicable with retrospective effect. Only law could be made retrospectively that too if it was expressly provided in the statute: -

> *"30. The power to make retrospective legislations enables the Legislature to obliterate an amending Act completely and restore the law as it existed before the amending Act, but at the same time, administrative/executive orders or circulars, as the case may be, in the absence of any legislative competence cannot be made applicable with retrospective effect. Only law could be made retrospectively if it was expressly provided by the Legislature in the Statute. Keeping in mind the afore-stated principles of law on the subject, we are of the view that applicability of the circular dated 12th June, 2012 to be effective retrospectively from 1st April 2009, in revising the infrastructure charges, is not legally sustainable and to this extent, we are in agreement with the view expressed by the Tribunal under the impugned judgment."*

Learned Deputy Solicitor General of India appearing on behalf of respondent No.1 has neither disputed the factual position of the case nor it is his submission that in the given facts of the case, new guidelines framed by the OMCs on 06.05.2022 could have been applied retrospectively to the selection process undertaken by respondent Nos. 2 and 3 under the then applicable policy guidelines framed on 31.03.2020. Leaned Deputy Solicitor General of India has also stated the obvious that the MoP&NG had not even directed the OMCs to frame fresh guidelines rather the OMCs were directed to ensure fair selection and transparency in the process of appointment of Service Providers for COCO Retail Outlets. Further that the Ministry had directed the OMCs that while deciding on selection of Service Providership for COCO ROs, weightage of interview should not be more than 20% as provided in the extant policy guidelines.

6. In view of the above discussion, it becomes apparent that respondent Nos. 2 and 3 had arbitrarily and illegally did not take the selection

process for selection of Service Provider in COCO Retail Outlet, Nalagarh, District Solan initiated on 12.08.2020 in terms of 2020 guidelines to its logical conclusion.

7. For all the foregoing reasons, we find merit in this petition. The same is accordingly allowed. Respondent Nos. 2 and 3 are directed to take further steps in terms of Letter of Intent issued to the petitioner on 05.07.2021 (Annexure P-6). Depending upon petitioner's completing the requisite formalities to the satisfaction of respondent Nos.2 and 3, the Letter of Appointment for COCO Retail Outlet at Nalagarh, District Solan, be issued in his favour. The entire exercise be completed within a period of eight weeks from today. The pending miscellaneous application(s), if any, also stands disposed of.

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

1. **RFA No. 305 of 2016**

   State of H.P. & others ...Appellants.

   Versus

   Kanshi Ram through LRs & others ...Respondents

2. **RFA No. 306 of 2016**

   State of H.P. & others ...Appellants

   Versus

   Kanshi Ram through LRs & others ...Respondents

3. **RFA No. 307 of 2016**

   State of H.P. & others ...Appellants

   Versus

   Kamlesh. ...Respondent

4. **RFA No. 308 of 2016**

   State of H.P. & others ...Appellants

   Versus

   Lekh Ram through LRs & others ...Respondents

5. **RFA No. 40 of 2016**

   Kanshi Ram through LRs & others ...Appellants

   Versus

   Kanshi Ram & others ...Respondents

6. **RFA No. 41 of 2016**

   Kanshi Ram through LRs & others ...Appellants

   Versus

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

7. **RFA No. 42 of 2016**

   Lekh Ram through LRs & others ...Appellants

Versus

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

For the petitioner : Mr. Desh Raj Thakur, Addl. A.G. for the appellants in RFA Nos. 305, 306, 307 and 308 of 2016 and for respondent-State in RFA No. 40, 41 and 42 of 2016.

For the respondents : Mr. J. L. Bhardwaj, Sr. Advocate with Mr. Sanjay Bhardwaj, Advocate, for the appellants in RFA Nos. 40, 41 and 42 of 2016 and for respondents in RFA Nos. 305, 306 and 308 of 2016.

Mr. Malay Kaushal, Advocate, for the respondent in RFA No. 307 of 2016.

RFA No. 305 of 2016
a/w RFAs No. 306, 307, 308, 40, 41 and 42 of 2016
Reserved on:26.12.2022
Decided on :4.1.2023

Land Acquisition Act, 1894- Section 18- Appeals arose from common award passed by Ld. District Judge in land reference petition filed against award passed by Land Acquisition officer- **Held-** No deduction permissible considering the purpose of acquisition involved which is construction of a rural road for linking the rural areas to the State Highway- By constructing a link road, all the acquired land has been utilized for the same use and no part of land has been left for any other developmental activity- Settled law that compensation of market value at the uniform rate is justifiable when entire land is acquired for the same purpose- Appeals partially allowed. (Para 17)

Cases referred:

Balwan Singh and others vs. Land Acquisition Collector and another (2016) 13 SCC 412;

Bhagwathula Samanna & others vs. Special Tehsildar and Land Acquisition Officer, Visakhapatnam Municipality, Visakhapatnam 1991 (4) SCC 506;

G.M. Northern Railway vs. Gulzar Singh & others 2014 (3) SLC 1356;

General Manager, NHPC & another vs. Rattan Dass & others 2018 (2) SLC 739;

Haridwar Development Authority, Haridwar vs. Raghubir Singh etc. AIR SC 2016 SC 1754;
Jaswant Singh &others vs. State of H.P. & others 2017 (Suppl.) SLC 263;
Kasturi & others vs. State of Haryana, 2003 (1) SCC 354;
Madishetti Bala Ramul (dead) by LRs vs. Land Acquisition Officer (2007) 9 SCC 650;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge:

All these appeals are being decided by common judgment as these arise from the same common award dated 16.10.2015, passed by learned District Judge, Bilaspur in Land Reference Petition Nos. 28/4 of 2013, 29/4 of 2013, 30/4 of 2013 and 31/4 of 2013.

2. The total land measuring 11-07-00 bighas was proposed to be acquired by the State Government for construction of link road "Namhol-Bahadurpur" in village Tipra, District Bilaspur.Notification dated 25.11.2009 under Section 4 of the Land Acquisition Act was published in *Rajpatra* dated 3.12.2009. Land Acquisition Collector *vide* award No. 14 of 2011 dated 9.12.2011 awarded the marked price ranging from Rs. 1,54,284/- to Rs. 7, 97,134/- per bigha, depending upon the classification of the land.

3. Aggrieved against the award passed by the Land Acquisition Collector, the claimants preferred Reference Petitions under Section 18 of the Land Acquisition Act, which came to be registered as Reference Petition Nos. 28/4 of 2013, 29/4 of 2013, 30/4 of 2013 and 31/4 of 2013 before learned District Judge, Bilaspur. The reference Court re-determined the market value at the rate of Rs. 10,28,571/- per bigha, irrespective of the classification.

4. Aggrieved against the common judgment/award, passed by learned District Judge, Bilaspur dated 16.10.2015, the State has preferred RFA Nos. 305, 306, 307 and 308 of 2016. The claimants in Land Reference Nos. 29/4 of 2013, 30/4 of 2013and 28/4 of 2013 have also assailed the

award/judgment dated 16.10.2015, passed by learned District Judge, Bilaspur by way of RFA Nos. 40, 41 and 42 of 2016.

5. The State has assailed the judgment/award, passed by learned District Judge, Bilaspur on the grounds that the standard deduction, in accordance with law,was not allowed from the market value. It is contended on behalf of the State that in terms of the judgment, passed by Hon'ble Supreme Court in ***Kasturi & others vs. State of Haryana***, **2003 (1) SCC 354** and ***Haridwar Development Authority, Haridwar vs. Raghubir Singh etc.*** **AIR SC 2016 SC 1754**, the deduction was bound to be made from the market value. On the other hand, it has been contended on behalf of the claimants that since the purpose of the acquisition of land was construction of a rural road, no deduction was permissible.

6. By way of RFA Nos. 40, 41 and 42 of 2016, the claimants have contended that their land was utilized for construction of road in the year 2005 and the notification under Section 4 of the Land Acquisition Act was issued in the year 2009, therefore, they were entitled to be compensated for a period between 2005 to 2009, as they had been divested from their valuable land.

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

8. Before dealing with the rival objections,it can be noticed that the purpose of the acquisition in the present case was construction of a rural road for linking the rural areas to the State Highway andthe exampler sale deed relied upon was of 7 biswas of land, whereas the total acquired land was 11 Bighas 7 Biswas.The purpose of acquisition was the same. These factsare not disputed by either side. Learned Reference Court awarded compensation at uniform rate irrespective of the classification of the land.

9. It is settled that when entire land is acquired for the same purpose, the compensation of market value at the uniform rate is justifiable.

Reference can be made to ***2018 (2) SLC 739*** titled as ***General Manager, NHPC & another*** vs. ***Rattan Dass & others*** as under:-

> *"8. At the outset, it may be observed that it is settled principle of law that if the entire land is put for a public use and no area is left out for carrying out any developmental activity, then the claimants are entitled for compensation for the entire acquired land, at uniform rates, regardless of its categorization. This aspect of the case has been considered by a coordinate Bench of this Court in RFA No. 282 of 2010 titled Suresh Kumar and others vs. Collector Land Acquisition, NHPC, decided on 22.10.2016 alongwith connected matters, wherein it was observed as under:*
>
> > *"26. It is a settled principle of law that if the entire land is put for a public use and no area is left out for carrying out any developmental activity, then the claimants are entitled for compensation for the entire acquired land, at uniform rates, regardless of its categorization. 27. The apex Court in Haridwar Development Authority vs. Raghubir Singh & others, (2010) 11 SCC 581 has upheld the award of compensation on uniform rates.*
> >
> > *28. In Union of India vs. Harinder Pal Singh and others 2005(12) SCC 564, while determining the compensation for acquisition of land pertaining to five different villages, the apex Court uniformly awarded a sum of Rs.40,000/- per acre, irrespective of the classification and the category of land.*
> >
> > *29. Further, in Nelson Fernades vs. Special Land Acquisition Officer 2007(9) SCC 447 while dealing with the case where the land was acquired for laying a Railway line, the Court held that no deduction by way of development charges was permissible as there was no question of any development thereof.*
> >
> > *30. Similar view stands taken by this Court in Gulabi and etc. Vs. State of H.P., AIR 1998 HP 9 and later on in H.P. Housing oard vs. Ram Lal & Ors.2003 (3) Shim. L.C. 64, which judgment has attained finality as SLP (Civil) No. 15674-15675 of 2004 titled as Himachal Pradesh Housing Board vs. Ram Lal (D) by LRs & Others, filed by the H.P. Housing Board came to be dismissed by the Apex Court on 16.8.2004. 31. This judgment was subsequently referred to and relied upon by this Court in Executive Engineer & Anr. Vs Dilla Ram {Latest HLJ 2008 HP 1007} and relying upon the decision of the Apex Court in Harinder*

Pal Singh (supra), wherein the market value of the land under acquisition situated in five different villages was assessed uniformly, irrespective of its nature and quality, also awarded compensation on uniform rates."

10. The learned Additional Advocate General insupport of his contention has placed reliance on the following extract of ***Kasturi & others*** vs. ***State of Haryana, 2003 (1) SCC 354***:

> *10. "This Court in* Administrator General of West Bengal vs. Collector, Varansi *[(1988) 2 SCC 150] referring to earlier decisions has held that prices fetched for small plots cannot form basis for valuation of large tracts of land as the two are not comparable properties. Para 12 of the said judgment reads:*
>
> > *"It is trite proposition that prices fetched for small plots cannot form safe bases for valuation of large tracts of land as the two are not comparable properties. (See Collector of Lakhimpur v. B.C. Dutta [(1972) 4 SCC 236]; Mirza Naushervan Khan v. Collector (Land Acquisition), Hyderabad [(1975) 2 SCR 184]; Padma Uppal v. State of Punjab [(1977) 1 SCR 329]; Smt. Kaushlya Devi Bogra v. Land Acquisition Officer, Aurangabad [(1984) 2 SCR 900]). The principle that evidence of market value of sales of small, developed plots is not a safe guide in valuing large extents of land has to be understood in its proper perspective. The principle requires that prices fetched for small developed plots cannot directly be adopted in valuing large extents. However, if it is shown that the large extent to be valued does not admit of and is ripe for use for building purposes; that building lots that could be laid out on the land would be good selling propositions and that valuation on the basis of the method of hypothetical lay out could with justification be adopted, then in valuing such small laid out sites the valuation indicated by sale of comparable small sites in the area at or about the time of the notification would be relevant. In such a case, necessary deductions for the extent of land required for the formation of roads and other civil amenities; expenses of development of the sites by laying out roads, drains, sewers, water and electricity lines, and the interest on the outlays for the period of deferment of the realization of the price; the profits on the venture etc. are to be made. In*

> *Sahib Singh Kalha v. Amritsar Improvement Trust [(1982) 1 SCC 419], this Court indicated that deductions for land required for roads and other developmental expenses can, together, come up to as much as 53 per cent. But the prices fetched for small plots cannot directly be applied in the case of large areas, for the reason that the former reflects the 'retail' price of the land the latter the 'wholesale' price."*

11. Similarly, reliance has also been placed on the judgment, reported in ***Haridwar Development Authority, Haridwar vs. Raghubir Singh etc. AIR SC 1754***, as under:-

> *"9. The claimants do not dispute the appropriateness of the said sale transaction taken as the basis for determination of compensation. Their grievance is that no deduction or cut should have been effected in the price disclosed by the sale deed, for arriving at the market value, in view of the following factors: (i) that the acquired lands were near to the main Bye-pass Road and had road access on two sides; (ii) that many residential houses hadalready come up in the surrounding areas, and the entire area was already fast developing; and (iii) that the acquired land had the potential to be used an urban residential area. When the value of a large extent of agricultural land has to be determined with reference to the price fetched by sale of a small residential plot, it is necessary to make an appropriate deduction towards the development cost, to arrive at the value of the large tract of land. The deduction towards development cost may vary from 20% to 75% depending upon various factors (see : Lal Chand vs. Union of India - 2009 (15) SCC 769). Even if the acquired lands have situational advantages, the minimum deduction from the market value of a small presidential plot, to arrive at the market value of a larger agricultural land, is in the usual course, will be in the range of 20% to 25%. In this case, the Collector has himself adopted a 25% deduction which has been affirmed by the Reference Court and High Court. We therefore do not propose to alter it."*

12. From the facts of aforesaid cases, it is clear that the purpose of acquisition of land was the construction of residential and commercial buildings, which involved the development activities for allied facilities like road, path, parks, and sewer etc. The aforesaid judgment will not help the cause of the State as the purpose of acquisition and the actual use to which

acquired land has been put becomes relevant. By constructing a link road, every inch of the acquired land has been utilized for the road. No part of land has been left for any other developmental activity.

13. This Court in number of judgments has consistently taken a view that the deduction will not be permissible where the purpose of acquisition of land is the construction of road, rail track or any other purpose relatable to the public at large, without any component of profit or loss.

14. Reference can be made to ***2014 (3) SLC 1356*** titled as ***G.M. Northern Railway vs. Gulzar Singh & others*** as under:-

> *"10. Even previously in judgments reported, in 1997 (2) SLC 229 and 1998(2) All India Land Acquisition Act LACC (1) SC, it has been mandated that when the purpose of acquisition is common, the award of compensation at a uniform rate for different classification/categories of land, is, tenable. Hence, it can be forthrightly concluded, that, the award of a uniform rate of compensation by the learned Additional District Judge Una for different lands bearing different classifications/categories, is, not legally infirm, especially when on acquisition they acquire a uniform potentiality.*
>
> *11. The learned counsel appearing for the appellant has concerted, to also espouse before this Court, that even though, reliance upon Ex. PW1/C by the learned Court below, is not misplaced, in as much, as it fulfilled the relevant enshrined legal parameter for its invocation/applicability, in as much, as (i) it being proximate to the land subjected to acquisition, as also (ii) its execution being contemporaneous to the issuance of the notification under Section 4 of the Land Acquisition Act. Nonetheless, he has canvassed that (i) given the largeness or expanse and immensity/immenseness of size of the land subjected to acquisition vis-à-vis the area of the land sold/ comprised in Ex.PW 1/C, the market value of the land comprised in Ex.PW1/C could not have been, as a whole applied to the entire land subjected to the acquisition, unless, deductions for developmental costs as warranted and mandated by the decisions relied upon by him had been made/accorded. Since, the learned Additional District Judge, Una omitted to give/make deductions from the total compensation arrived at/worked out on the basis of the value of the land sold/comprised in Ex.PW1/C, whereas, he*

was enjoined to do so, he has committed a grave legal error necessitating interference by this Court.

12. While proceeding to gauge the sinew of the above contention canvassed before this Court, it is necessary to bear in mind that the judgments cited in support of the above view espoused by the learned counsel for the appellant, are distinguishable, vis-à-vis, the facts at hand, hence, in the humble view of this Court, not reliable as (a) all the judgments relied upon by the learned counsel for the appellant, concert to marshal the view, of, deductions from the lump sum compensation assessed qua a large tract of land on the score of market value of a small/minimal piece of land being made. In other words, the emphasis in the aforesaid citations, is that, for the market value of small a tract of land to be comprising an admissible parameter, for, on its strength working out the compensation for a large tract of land, it is, imperative that deductions towards development costs is made. ***However, distinguishably in the citations aforesaid, the acquisition was made for the development of sites for allotment for housing purpose or for construction of a housing colony or the purpose of acquisition had an inherent profiteering motive****. Therefore, given the purpose for which the land was acquired, in, the cases relied upon by the learned counsel for the appellant, deductions were enjoined to be imperative or necessary, as, the entity for whom the land was brought under acquisition, would be entailed/obliged, to, make the land fit for the purpose for which it was acquired, in as much, as, such an entity concomitantly being driven to incur exorbitant expenses, towards its development for rendering it fit for use. As such, given the magnified increase in the scale of economies or given the ultimate manifold increase, in, the scale of economies or such incurring of exorbitant expenses on development, hence, acquiring the capacity to proportionately reduce their profit, as such, rendering the project for which the land was acquired financially viable, or, to obviate the losses accruing from the steep rates of compensation as may be awarded that deductions were permitted. In other words, deduction from compensation mandated to not render the venture and the purpose for which the land was acquired, in the aforesaid citations relied upon by the learned counsel for the appellant, to be financially un-whole some, as well as, unviable. More so, when the land is acquired for State holdings, building/housing agency(ies) or the agencies carrying out and engaged in profiteering work. However, in contra distinction, to the facts of the judgments, as relied upon by the*

learned counsel for the appellant, in the instant case, the land has been subjected to acquisition, for the purpose of construction of a railway track. In the appellant engaging itself in the construction of a railway track, it has assumed the role of doing so, as, a welfare measure and not as a profiteering measure. The railway track would continue to be owned by the appellant, in distinction to the facts of the judgments relied upon by the learned counsel for the appellant, where the agency for whom the land was subjected to acquisition, would on developing the land, sell it further or gain profit. (b) The appellant has omitted to adduce cogent evidence on record displaying the fact that each of the land holder, whose land was subjected to acquisition was holding a vast expanse of land. Omission to adduce into evidence such proof demonstrative of each of the land holders, whose land was subjected to acquisition, owing a wide expanse or a large sized holding, vis-à-vis, the sale transaction comprised in Ex. PW1/C, a firm conclusion can be formed, that, the size of the holding or the size of the land of the each of the land holders, whose land was subjected to acquisition was more or less equal to or not disproportionately larger in size to the area of the land comprised in Ex.PW1/C. Hence, there was no jurisdictional error, on the part of the learned Additional District Judge, Una, in not affording deduction, given the smallness in size of the land comprised, in, Ex.PW1/C, vis-à-vis, the lands of each of the individual land owners, whose land was subjected to acquisition. Besides, it has also not been cogently proved by the appellant that any part of the land owned by each of the land owners and subjected to acquisition did not bear potentiality nor would have commanded a market value, lesser than the value earned by the expanse of land comprised in Ex.PW1/C. It appears, that, given the proximity of the acquired land, as deposed by PW-4 Gulzar Singh and PW-3 Gurbachan Singh, to educational institution, temple and abadi of the villagers it enjoyed or commanded immense market value. Therefore, when each parcel of the land subjected to acquisition bore a market value, equivalent to the land subjected to acquisition, hence, there was, no, legal error committed by the learned Additional District Judge in relying upon for the market value depicted, in, Ex.PW1/C and applying it to the entire tracts of the land subjected to acquisition even, when it was smaller in size vis-à-vis the land subjected to the acquisition.

15. Similar, reiteration can be found in ***2017 (Suppl.) SLC 263***titled ***Jaswant Singh &others*** vs. ***State of H.P. & others:***

> *"21. Plea of the appellants on this issue is misconceived. In present case, acquisition is not for the purpose of developing a Housing Colony, setting up a commercial unit or any other purpose of like nature which may have resulted development of area on the cost of the State. In the judgments relied upon by the appellants, the deductions were allowed for two purposes i.e. (a) deduction for providing development infrastructure and (b) deduction for development expenditure/expenses and these deduction have been explained by the Apex Court in case titled Chandrashekar (dead) by LRs and others Vs. Land Acquisition Officer, reported in (2012)1 SCC 390, which is as under:-*
>
> > *"19. Based on the precedents on the issue referred to above it is seen, that as the legal proposition on the point crystallized, this Court divided the quantum of deductions (to be made from the market value determined on the basis of the developed exemplar transaction) on account of development into two components. 19.1 Firstly,*
> > *space/area which would have to be left out, for providing indispensable amenities like formation of roads and adjoining pavements, laying of sewers and rain/flood water drains, overhead water tanks and water lines, water and effluent treatment plants, electricity sub stations, electricity lines and street lights, telecommunication towers etc. Besides the aforesaid, land has also to be kept apart for parks, gardens and playgrounds. Additionally, development includes provision of civic amenities like educational institutions, dispensaries and hospitals, police stations, petrol pumps etc. This "first component", may conveniently be referred to as deductions for keeping aside area/space for providing developmental infrastructure.*
> > *19.2 Secondly, deduction has to be made for the expenditure/expense which is likely to be incurred in providing and raising the infrastructure and civic amenities referred to above, including costs for levelling hillocks and filling up low lying lands and ditches, plotting out smaller plots and the like. This "second component" may conveniently be referred to as deductions for developmental expenditure /expense.*
> > *20. It is essential to earmark appropriate deductions, out of the market value of an exemplar land, for each of the two*

components referred to above. This would be the first step towards balancing the differential factors. This would pave the way for determining the market value of the undeveloped acquired land on the basis of market value of the developed exemplar land.

22. Further, in Nelson Fernades Vs. Special Land Acquisition Officer 2007 (9) SCC 447 while dealing with the case where the land was acquired for laying a Railway line, the Court held that no deduction by way of development charges was permissible as there was no question of any development thereof. 23. In the present case, acquisition is for the purpose of establishing substation and construction of road and therefore, deduction price of development on the basis of either of the aforesaid two components is not applicable.

24. Deduction can be made for various reasons and in present case deduction of 1/3 value has been made as discussed above to the value of land available on record in agreements Ex. PW-4/A, Ex. PW-4/B and Ex. PW-4/C pertaining to the same village for the same period but with additional right of access to land from remaining land.

25. Learned District Judge has awarded Rs.39,000/- per biswa, which is nearer to Rs.40,000/-. Further, land owners have not preferred any appeal or cross-objection for enhancement of the amount of compensation. Therefore, as discussed above, no interference in the rate determined by learned District Judge, i.e.Rs.39,000/- per biswa is warranted."

16. In ***1991 (4) SCC 506***, titled as ***Bhagwathula Samanna & others vs. Special Tehsildar and Land Acquisition Officer, Visakhapatnam Municipality, Visakhapatnam,*** the Hon'ble Supreme Court has held as under:-

13. The proposition that large area of land cannot possibly fetch a price at the same rate at which small plots are sold is not absolute proposition and in given circumstances it would be permissible to take into account the price fetched by the small plots of land. If the larger tract of land because of advantageous position is capable of being used for the purpose for which the smaller plots are used and is also situated in a developed area with little or no requirement of further development, the principle of deduction of the value for purpose of comparison is not warranted. With regard to the nature of the plots involved in these two cases,

> *it has been satisfactorily shown on the evidence on record that the land has facilities of road and other amenities and is adjacent to a developed colony and in such circumstances it is possible to utilise the entire area in question as house sites. In respect of the land acquired for the road, the same advantages are available and it did not require any further development. We are, therefore, of the view that the High Court has erred in applying the principle of deduction; and reducing the fair market value of land from Rs. 10 per sq. yard to Rs. 6.50 paise per sq. yard. In our opinion, no such deduction is justified in the facts and circumstances of these cases. The appellants, therefore, succeed."*

17. Thus, the contention of learned Additional Advocate General cannot be upheld for the reasons *firstly,* that no deduction will be permissible keeping in view the purpose of acquisition involved in the instant appeals, *secondly*, every inch of acquired land was put to the same use for which it was acquired and *lastly,* the area of land in exampler sale deed and the acquired holdings of each claimant did not have contrasting dimensions.

18. Now I proceed to deal with the contention raised on behalf of claimants that they were also entitled to be compensated for the period between actual utilization of land and issuance of notification under section 4 of the Land Acquisition Act. Learned District Judge, on fact, has held that though the road was constructed in the year 2005 but the claimants were not entitled to any compensation as they had voluntarily asked the State to construct the road. The view so taken by learned Reference court cannot be countenanced for the reason thatafter construction of road, the claimants had approached this Court by way of writ petitions and thereafter their land was acquired vide notification, issued in the year 2009.Once the acquisition was there, the question of voluntariness of the claimants to surrender the land becomes redundant.

19. In ***Madishetti Bala Ramul (dead) by LRs vs. Land Acquisition Officer (2007) 9 SCC 650*** Hon'ble Supreme Court allowed the interest @ 15% per annum on the market value assessed by the Reference Court on the

ground that the land was utilized for public purpose without acquisition and payment of compensation for considerable long period. The relevant extract from aforesaid judgment is quoted for reference as under:

> *"9. The short question which, therefore, arises for consideration is as to whether Section 25 of the Act will have any application in the fact of the present case. Two notifications were issued separately. The second notification was issued as the first notification did not survive. Valuation of the market rate for the acquired land, thus, was required to be determined on the basis of the notification dated 23.12.1991. The earlier notification lost its force. If the notification issued on 16.03.1979 is taken into consideration for all purposes, the subsequent award awarding market value of the land @ Rs. 65/- per square yard cannot be sustained. As the said market value has been determined having regard to the notification issued on 23.12.1991, possession taken over by Respondent in respect of 3 acres 5 guntas of land, pursuant to the said notification dated 16.03.1979 was in the eye of law, therefore, illegal. The High Court evidently directed grant of additional market value @ 12% per annum on the enhanced market value from the date of the publication of the notification dated 23.12.1991 as also interest thereupon from the said date instead and place of 18.05.1979. We generally agree therewith.*
>
> > *15. The Land Acquisition Officer took possession of the land on the basis of a notification which did not survive. Respondent could not have continued to hold possession of land despite abatement of the proceeding under the 1984 Act. It was directed to be decided by the High Court upon a reference made by the Collector in terms of Section 30 of the Act. The State, therefore, itself realized that its stand in regard to the ownership of 3 acres and 5 guntas of land was not correct. It, therefore, had to issue another notification having regard to the provisions contained in the Land Acquisition (Amendment) Act, 1984. Whereas the High Court may be correct in interpreting the question of law in view of the decision of this Court, but the same would not mean that Appellants would not get anything for being remaining out of possession from 1979 to 1991.*
> >
> > *20. In the peculiar facts and circumstances of the case, although the proper course for us would have to remand the matter back to the Collector to determine the amount of*

> *compensation to which the Appellants would be entitled for being remained out of possession since 1979, we are of the opinion that the interest of justice would be met if this appeal is disposed of with a direction that additional interest @ 15% per annum on the amount awarded in terms of award dated 02.01.1999 for the period 16.03.1979 till 22.12.1991, should be granted, which, in our opinion, would meet the ends of justice."*

20. In ***Balwan Singh and others vs. Land Acquisition Collector and another (2016) 13 SCC 412,*** the same view was reiterated by the Hon'ble Supreme Court by directing the acquiring authority to award additional interest by way of damages @ 15% per annum from the date when the respondents-claimants were dispossessed till the date of notification under Section 4 of the Act. It shall be apposite to refer to the relevant observations which read thus:

> *"1. The short issue arising for consideration in this appeal is whether the appellants are entitled to interest for the period from the date of dispossession to the date of Notification under Section 4(1) of the Land Acquisition Act, 1894 (For short 'the Act'). That issue is no more res integra. In R.L. Jain Vs. DDA (2004) 4 SCC 79 at para 18, this Court has taken the view that the land owner is not entitled to interest under the Act. However, it has been clarified that the land owner will be entitled to get rent or damages for use and occupation for the period the Government retained possession of the property.*
>
> *2. Noticing the above position, this Court in Madishetti Bala Ramul Vs. Land Acquisition Officer (2007) 9 SCC 650, took the view that it may not be proper to remand the matter to the Collector to determine the amount of compensation to which the appellants therein would be entitled for the period during which they remained out of possession and hence, in the interest of justice, this Court directed that additional interest at the rate of 15% per annum on the amount awarded by the Land Acquisition Collector, shall be paid for the period between the date of dispossession and the date of Notification under Section 4(1) of the Act.*

> *3. The said view was followed by this Court in Tahera Khatoon Vs. Land Acquisition Officer (2014) 13 SCC 613.*
>
> *4. Following the above view taken by this Court, these appeals are disposed of directing the respondents to award additional interest by way of damages, at the rate of 15% per annum for the period between 1.7.1984, the date when the appellants were dispossessed till 2.9.1993, the date of Notification under Section 4(1) of the Act. Needless to say, that this compensation will be on the basis of land value fixed by the Reference Court. The amount as above, shall be calculated and deposited before the Reference Court within a period of three months from today."*

21. In the facts of given cases also learned reference court had arrived at a specific finding of fact in respect of utilization of land for construction of road by the State in the year 2005, which has not been assailed before this Court. Even otherwise, such finding of fact is ascertainable from material on record. Admittedly, the notification under Section 4 of the Land Acquisition Act was issued on 3.12.2009. The claimants are, therefore, held entitled to additional interest by way of damages, at the rate of 15% per annum for the period between 2005, the date when the appellants were dispossessed till 3.12.2009, the date of Notification under Section 4(1) of the Act. Needless to say, that this compensation will be on the basis of land value fixed by the Reference Court. The amount as above, shall be calculated and deposited before the Reference Court within a period of three months from today.

22. In result, RFAs 305 of 2016, 306 of 2016, 307 of 2016 and 308 of 2016 are dismissed. RFAs 40 of 3016, 41 of 2016 and 42 of 2016 are allowed to above extent. All the appeals are accordingly disposed of so also the miscellaneous application(s), if any.

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

Pawan Kumar .....Appellant.

Versus

Smt. Sunita Rani and others .....Respondents.

For the appellant: Mr. Navlesh Verma, Advocate.

For the respondents: Mr. Ashwani K. Sharma, Senior Advocate, with Mr. Ishan Sharma, Advocate.

RSA No. 236 of 2021
Reserved on: 30.12.2022
Decided on: 04.01.2023

Code of Civil Procedure, 1908- Section 100- Second appeal- Suit for possession, use and occupation charges- Plaintiffs claimed possession of partly constructed building based on their purchase from the previous owner- Defendant claimed lawful possession under an agreement with previous owner to secure loan- Trial and appellate court decreed the suit- **Held**- Defendant failed to show willingness to perform his part- Agreement relied upon by defendant unenforceable due to lack of registration- No substantial question of law occurred- No interference in findings of courts below- Appeal dismissed. (Para 10)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

Heard.

2. By way of instant Regular Second Appeal, the appellant has sought to assail judgment and decree dated 11.11.2021, passed by learned District Judge, Kangra at Dharamshala, (H.P.) in Civil Appeal (RBT) No. 63-D/XIII/2020/2019 affirming judgment and decree dated 28.11.2018 passed by learned Civil Judge Court No.1, Dharamshala, in Civil Suit No. 268 of

2013, whereby the suit of the respondents/plaintiffs for possession and use and occupation charges, has been decreed.

3. The parties hereinafter shall be referred to by the same status as they held before the learned trial Court. The respondents herein were the plaintiffs and the appellant herein was the defendant.

4. Plaintiffs filed a suit against the defendant claiming possession of partly constructed building (ground floor) comprised in Khata No. 392, Khatauni No. 543, Khasra Nos. 2073/1759/1490, 2065/1485, measuring 308-18 square meters, situated at Mohal Shyam Nagar, Tehsil Dharamshala, District Kangra, H.P. (for short, 'suit property'). Plaintiffs claimed title of the suit property by way of its purchase from its previous owner Smt. Kiran Kumari vide sale deed dated 22.07.201. The defendant was alleged to be unauthorised occupant of suit property. Accordingly, the reliefs of possession of the suit property and use and occupation charges at the rate of Rs.10,000/- per month from 27.07.2011 till the date of filing of the suit were claimed.

5. The defendant by way of written statement, contested the suit on the ground that his occupation on the suit property was not unauthorised. He claimed to have been put in lawful possession of the suit property by previous owner Smt. Kiran Kumari vide agreement dated 27.12.2008. The defendant specifically pleaded that Smt. Kiran Kumari had taken a loan of Rs.4,00,000/- from him to discharge her outstanding liabilities and in order to secure such loan had executed the agreement dated 27.12.2008. Smt. Kiran Kumari had agreed to repay the loan amount within twelve months from the date of execution of agreement, failing which, she had further agreed to transfer the suit property in favour of the defendant in lieu of payment of Rs.4,00,000/-. The defendant came up with a further plea that he could recover a sum of Rs.2,00,000/- only from Smt. Kiran Kumari and for balance of Rs.2,00,000/- he had instituted a suit of recovery against her.

6. On the pleadings of the parties, learned trial Court had framed the following issues:

1. *Whether the plaintiffs are entitled for the decree of possession, as prayed for? OPP*
2. *Whether the plaintiff is entitled for the use and occupation charges amounting to Rs.2,40,000/- for the period of two years from 25th July, 2011 to 25th July, 2013 @ 10,000/- per month, as prayed for? OPP*
3. *Whether the plaintiffs have no cause of action and locus standi to file the present suit, as alleged? OPD*
4. *Whether the plaintiffs are estopped by their acts, conduct and acquiescence from filing the present suit, as alleged? OPD*
5. *Whether the suit is misconceived, as alleged? OPD*
6. *Relief.*

Issues No. 1 and 2 were decided in affirmative and the suit of the plaintiffs was party decreed. The plaintiffs were held entitled for decree of possession of the suit property and also for use and occupation charges @ Rs.3000/- per month from 25.7.2011 till 25.7.2013.

7. The defendant preferred an appeal before the learned District Judge, Kangra at Dharamshala against the judgment and decree dated 28.11.2018 passed by learned trial Court. The appeal of the defendant has been dismissed, vide judgment and decree dated 11.11.2021, hence, the instant appeal.

8. The plaintiffs had sought the possession of suit property on the basis of their title. The defendant had not disputed the title of plaintiffs. He had also not set up any title in himself in respect of the suit property. Once, the defendant had not disputed the title of plaintiffs over the suit property, he could avoid the decree for possession only by proving a better title in him, which he failed.

9. The defendant had tried to protect his possession on the basis of terms of agreement dated 27.12.2008. The defendant himself had set up the

plea that by way of agreement dated 27.12.2008, he had lent a sum of Rs.4,00,000/- to Smt. Kiran Kumari and out of the such amount, he had received Rs.2,00,000/- and for balance of Rs.2,00,000/-, he had already instituted the suit for recovery against said Kiran Kumari. Though, the defendant had raised the plea that Smt. Kiran Kumari had agreed to transfer the suit property in his favour, in case of her default in payment of the amount of Rs.4,00,000/- within twelve months, yet there were no pleadings to the effect that defendant had been ready and willing to perform his part under the agreement dated 27.12.2008 executed with Smt. Kiran Kumari. The fact of matter is that defendant had sought to recover the amount due to him under the agreement and had filed a suit for such purpose.

10. Defendant had not shown any willingness to get the suit property transferred in his favour in terms of the agreement dated 27.12.2008. It was also not the case of the defendant that the agreement dated 27.12.2008 primarily was an agreement to sell, rather his own case was that only by way of default clause, he could be entitled to get the suit property transferred in his favour. It was also not the case of defendant that he was put in possession of the suit property by Smt. Kiran Kumari in part performance of the agreement to sell. That being so, the defendant was not entitled to protect his possession even under Section 53-A of the Transfer of Property Act. Even otherwise also, the said agreement was rightly held to be unenforceable by learned lower appellate court, for the purposes of part performance, in view of its non-registration.

11. Both the learned Courts below have concurrently returned the findings of facts that the plaintiffs were the title holders of the suit property and the defendant had failed to establish any better right to hold the possession thereof. The findings so returned by both the learned Courts cannot be termed to be illegal or perverse as the findings so returned are borne from overall assessment of the material on record. In absence of any

proof of entitlement of defendant to retain the possession of the suit property, the only legal consequence was the grant of decree of possession in favour of the plaintiffs.

12. Once there was concurrent findings of facts recorded by both the learned Courts below, this Court in exercise of jurisdiction under Section 100 of the CPC will be loath to interfere unless substantial question of law arises from the controversy. The impugned decree is based simply on the basis of findings of facts.

13. It is more than settled that substantial question of law should have foundation in pleadings, should emerge from substantial findings of facts and should not merely be a proposition of law, but should be a debatable question having bearing on the merits of the case.

14. No question of law much less a substantial question of law has arisen in the instant case. Thus, there is no merit in the appeal and the same is dismissed. Judgment and decree dated 11.11.2021, passed by learned District Judge, Kangra at Dharamshala, (H.P.) in Civil Appeal (RBT) No. 63-D/XIII/2020/2019 affirming judgment and decree dated 28.11.2018 passed by learned Civil Judge Court No.1, Dharamshala, in Civil Suit No. 268 of 2013, needs no interference by this Court.

15. The appeal stands disposed of, so also the pending application(s) if any. Records be sent back forthwith.

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

Kalpna ....Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

For the petitioner :Mr. Divya Raj Singh, Advocate.

For the respondent : Mr. Varun Chandel, Additional Advocate General.

HC Inder Jeet No. 16, Police Station, Indora, District Kangra in person with record.

Cr.MP(M) No. 356 of 2023
Reserved on : 27.02.2023
Decided on : 28.02.2023

Code of Criminal Procedure, 1973- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances, Act, 1985**- Section 21- Successive bail applications- Petitioner in custody for one year and nine months- only two out of sixteen witnesses have been examined- **Held**- right to speedy trial is a valuable constitutional right- Serious violation of this right taken as a changed circumstance- Delay in trial is not attributable to petitioner- Cannot be detained in perpetuity- Petitioner is permanent resident, has minor daughter and there is no likelihood of absconding- Bail allowed- Petitioner ordered to be released subject to general conditions. (Paras 13, 14)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

Petitioner has approached this Court by way of instant petition under Section 439 of Cr.P.C. in case FIR No. 76/2021, dated 06.05.2021, registered under Section 21 of the Narcotic Drugs and Psychotropic Substances, Act (for short 'ND&PS' Act), at Police Station Indora, District Kangra, H.P.

2. Petitioner is in custody since 06.05.2021.

3. As per prosecution case, on 06.05.2021, at about 4:30 pm, during routine patrol, police party was accompanied by independent witnesses and they noticed petitioner approaching the National Highway. At the sight of police party, petitioner got perplexed. She started walking back and simultaneously took out a polythene packet from her clothes and throwing the same on the road. She was apprehended by police. On search, polythene packet thrown by the petitioner was found containing *'Heroin/Chitta'* weighing 6.7 grams. The case was registered and petitioner was formally arrested. The challan was presented and the petitioner is undergoing trial.

4. This Court has been informed during the course of hearing that only two witnesses were examined till 27.02.2023 and three witnesses, out of remaining fourteen witnesses were summoned for 27.02.2023.

5. It has been contended by learned counsel for the petitioner that the petitioner has been in custody since 06.05.2021. The trial against her has been delayed inordinate and she cannot be made to suffer incarceration for indeterminate period. It is further submitted that the petitioner is permanent resident of Village Channi, Tehsil Indora, District Kangra, H.P. and she will not delay the trial in any manner and will remain available on each and every date.

6. On the other hand, learned Additional Advocate General has opposed the prayer for bail, on the ground that the petitioner had earlier approached this Court for grant of bail in the same case three times. For the

first time, her bail petition was dismissed as withdrawn, second time, the petition was rejected on merits and third time, the bail petition was dismissed as no changed circumstance was found to have taken place. It is contended that no circumstance has changed even after the passing of previous order by this Court and as such, the petitioner is not entitled to any bail.

7. I have heard learned counsel for the petitioner as well as learned Additional Advocate General and have also gone through relevant record.

8. Record reveals that on more than one occasions, petitioner has approached this Court for grant of bail in the same FIR. On 01.07.2021, petitioner had withdrawn her bail petition bearing Cr.MP(M) No. 1068/2021. On 27.10.2021, the second bail petition of the petitioner bearing Cr.MP(M) No. 1791 of 2021 was rejected by the Co-ordinate Bench of this Court, on the following grounds:-

> *"5. It is not in dispute that two FIRs are already registered against the petitioner under the provisions of the ND&PS Act. The factors, which have to be taken into consideration by a Court while adjudicating a bail petition under Section 439 of the Code of Criminal Procedure inter alia are (a) gravity of the offence alleged; (b) whether, if released on bail, the petitioner is likely to jump the bail, and thus ,evade trial or influence the outcome of the same by trying to win over the witnesses; and (c) whether there is possibility that, if released on bail, the petitioner may again indulge in similar activities. Incidentally, all these conditions are independent of each other.*
>
> *6. In this case, there is previous history of the petitioner of indulging in activities prohibited under the provisions of the ND&PS Act. The petitioner, while on bail in previous cases registered against her under the provisions of ND&PS Act, has again been found to have allegedly indulged in the commission of the offences punishable under the NDPS Act. In this view of the matter, though the contraband allegedly recovered from the petitioner is of intermediate quantity, yet, this Court is of the view that the petitioner does not deserves to be released on bail. Accordingly, this petition, being devoid of merit, is dismissed.*
>
> *7. The affidavit, which has been filed in compliance to previous order dated 24.09.2021,is taken on record and it is*

> *impressed upon the authority concerned to ensure that appropriate applications are filed before the appropriate Court(s) for recalling of the bail orders, in the cases, where the petitioners, after their release on bail, are again found to have indulged in the commission of similar activities."*

9. Thereafter, the petitioner had approached this Court by way of Cr.MP(M) No. 187 of 2022, which was dismissed on 28.01.2022, on the ground that there was no changed circumstance.

10. Petitioner is in custody now for one year and nine months approximately. Only two out of total sixteen witnesses were examined till 27.02.2023. There is no allegation against petitioner that the delay in trial is attributable to her. The curtailment on the right of liberty can be ensured through reasonable restrictions only. The facts of the case clearly reveal that the right of speedy trial available to the petitioner has been seriously violated. There is substance in the contention of learned counsel for the petitioner that petitioner cannot be detained in perpetuity without completing the trial as per mandate of law. This definitely can be taken to be a changed circumstance for considering the bail petition of the petitioner.

11. As noticed above, the right to speedy trial is a valuable constitutional right available to the petitioner. Petitioner has already suffered prolonged incarceration. She cannot be allowed to be detained in custody for indeterminate period.

12. As regards the involvement of petitioner in other two cases, it can be noticed that the case registered against petitioner vide FIR No. 271/2017 pertains to intermediate quantity of Poppy Husk and other case was registered for small quantity i.e. 2.01 grams of '*Heroin/Chitta'*. None of these cases have yet been decided. Thus, the petitioner is facing only the allegations since 2017.

13. The allegations against petitioner are subject to proof. A long list of witnesses still remain to be examined. In the given circumstances, the trial against petitioner is not likely to be concluded till lapse of considerable time.

14. Petitioner is permanent resident of Village Channi, Tehsil Indora, District Kangra, H.P. She has a minor daughter to be looked after. There is no likelihood of her absconding from the course of justice. Only concern of this Court, at this stage, is to secure fair trial, for which, appropriate terms can be imposed.

15. Keeping in view the facts and circumstances of the case, the bail petition is allowed and petitioner is ordered to be released on bail in case FIR No. 76/2021, dated 06.05.2021, registered under Section 21 of ND&PS, Act, at Police Station Indora, District Kangra, H.P., on her furnishing personal bond in the sum of Rs. 50,000/- with one surety in the like amount to the satisfaction of learned trial court. This order shall, however, be subject to the following conditions:-

i) *Petitioner shall regularly attend the trial of the case before learned Trial Court and shall not cause any delay in its conclusion.*

ii) Petitioner shall not tamper with the prosecution evidence, in any manner, whatsoever and shall not dissuade any person from speaking the truth in relation to the facts of the case in hand.

iii) Petitioner shall be liable for immediate arrest in the instant case in the event of petitioner violating the conditions of this bail.

(iv) Petitioner shall not leave India without permission of learned trial Court till completion of trial.

16. Any expression of opinion herein-above shall have no bearing on the merits of the case and shall be deemed only for the purpose of disposal of this petition.

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

Meena Ram ....Non-applicant/appellant

Versus

Vinay Nanda and another ...Applicants/respondents

For the non-applicant/appellant : Mr. V.S. Chauhan, Sr. Advocate, with Mr. Ajay Singh Kashyap, Advocate.

For applicant/respondent No.1 : Mr. P.D. Nanda, Advocate

For respondent No.2/non-applicant : Mr. B.M. Chauhan, Sr. Advocate, with Mr. Amit Himalvi, Advocate.

CMP(M) No. 1376 and CMP No. 14634 of 2022 in FAO(WCA) No. : 279 of 2012
Reserved on: 27.12.2022
Decided on: 02.01.2023

Code of Civil Procedure, 1908- Order 41 Rule 21- Re-hearing on application of respondent against whom ex-parte decree made- **Employees Compensation Act, 1923**- Section 30 - **Limitation Act, 1963-** Article 123- Appeal against award passed by Commissioner. To avoid technicalities, the Court treated application under Order 9 Rule 13 as that under Order 41 Rule 21, as former was not a proper remedy. Applicant placed reliance on the ground that he was never served - **Held**- Notice was issued and duly served at the address mentioned in the memorandum of parties and address remained undisputed. Applicant continually failed to appear despite date of service. Applicant could not satisfy the Court that the notice was not duly served upon him as required- Application dismissed. (Paras 13,14)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

FAO(WCA) No. 279 of 2012 was filed before this Court under Section 30 of Employees Compensation Act by the claimant against award dated 08.06.2012, passed by Commissioner under the Act *ibid* in Case No. 9-2/2011 of 2008.

2. The employer Sh. Vinay Nanda was impleaded as respondent No. 1 and insurer was impleaded as respondent No.2.

3. This Court decided FAO(WCA) No. 279 of 2012, vide judgment dated 08.10.2021.

4. The employer Sh. Vinay Nanda (applicant herein) approached this Court by filing an application CMP No. 10231 of 2022 on 07.07.2022 with a prayer to recall the judgment passed by this Court in FAO(WCA) No. 279 of 2012, on the ground that he had no notice of the pendency of appeal before this Court as he was never served with any notice and hence was not able to put in appearance. Applicant, however withdrew CMP No. 10231 of 2022 on 23.09.2022.

5. On 23.09.2012, applicant filed another application CMP No. 14634 of 2022 under Order 9 Rule 13 of the Code of Civil Procedure (for short 'The Code') with a prayer to set aside *ex parte* judgment dated 08.10.2021, passed by this Court in FAO(WCA) No. 279 of 2012. Another application CMP(M) No. 1376 of 2022 was also filed by the applicant on the same day i.e. 23.09.2022 under Section 5 of the Limitation Act, with a prayer to condone the delay in filing the application under Order 9 Rule 13 of the CPC. Both these applications are being decided by this order.

6. Rule 21 of Order 41 of the Code, provides for a remedy to a respondent, when the appeal has been heard *ex parte*, to apply to the Appellate Court to rehear the appeal on satisfying the Court that either the notice was not duly served upon him or he was prevented by sufficient cause

from appearing when the appeal was called on for hearing. On being satisfied on any of the above grounds, the Court is then mandated to rehear the appeal. The applicant instead of seeking aforesaid remedy, has approached this Court under Order 9 Rule 13 of the Code, which is not the proper remedy for him. In order to avoid technicalities, the application filed by the applicant is being treated hereafter as being filed under Order 41 Rule 21 of the Code.

7. Applicant has prayed for condonation of delay on the ground that he was not aware about the passing of judgment dated 08.10.2021 in FAO(WCA) No. 279 of 2012 till 03.03.2022, when he received a notice from this Court in Review Petition No. 127/2021, whereby the review of aforesaid judgment has been sought by the insurer.

8. The limitation, under Article 123 of the Limitation Act, to file an application under Order 41 Rule 21 of the Code is 30 days from the date of decree and when the summons or notice was not duly served, from the date of knowledge of passing of such decree. Assuming that applicant had no notice or knowledge of the pendency of appeal or its decision, he was obliged to apply to this Court for rehearing the appeal within 30 days from the date of knowledge dated 03.03.2022. The application has been filed on 23.09.2022.

9. The only explanation for delay in filing the application as rendered by the applicant is that after attaining the knowledge about the passing of judgment dated 08.10.2021, he had applied for the copies of records of the case from the Registry of this Court on 28.03.2022, which were supplied to him on 25.06.2022. The reason, so assigned, cannot be held to be a sufficient cause for not preferring the application within time. Firstly, the applicant having acquired knowledge on 03.03.2022 had applied for the copies of records at leisure on 28.03.2022 and secondly, had waited till the supply of the copies to him for knowing the details contained therein. There is no explanation as to why sufficient urgency was not shown by the applicant

as he had an easy option to inspect the records in accordance with the applicable rules.

10. Though, the applicant has not pleaded so , but this Court takes notice of the fact that the first application i.e. CMP No. 10231 of 2022 was filed by applicant on 07.07.2022 seeking recalling of the judgment dated 08.10.2021. Based on the reasons, as noticed above, even the application filed on 07.07.2022 cannot be said to be within limitation.

11. The reason of applying for copies of the records and then waiting for its supply, cannot be held to be cause much less sufficient cause for delay in filing the application. Such cause was generated by the applicant by his own mistake. He cannot be allowed to take benefit thereof.

12. It is also trite that the merits of the plea for rehearing the appeal, in appropriate cases may persuade the Court to grant the prayer for condonation of delay. Notwithstanding the fact that this Court has not found sufficient cause in the plea of applicant for condonation of delay, the merits of the plea for rehearing the appeal are being examined hereafter, only for aforesaid purpose.

13. Out of the two grounds mentioned in Order 41 Rule 21 of the Code, applicant has placed reliance on the ground that he was never served in FAO(WCA) No. 279 of 2012. It is averred in the application i.e. CMP No. 14634 of 2022 that the notice in the appeal was served upon one Smt. Reena Nanda, who was not related to the applicant. The plea, so raised by the applicant, has been found to be contrary to the records. A notice was issued to the applicant in FAO(WCA) No. 279 of 2012 in pursuance to order dated 17.07.2012, passed by the Court. Record reveals that the notice was issued to the applicant on the address as mentioned in the memorandum of parties available with the grounds of appeal. The date of appearance mentioned in the notice was 24.09.2012. There is an endorsement on the right top margin of the copy of notice that the same was issued through registered post with

acknowledgement due. The acknowledgment was received by the Registry of this Court duly signed by the applicant. After waiting for representation on behalf of the applicant, it was recorded by the Registry that the applicant stood served.

14. It is not the case of the applicant that the acknowledgement remitted by the Department of Posts to the Court did not bear his signature. It is also not his case that the address on the notice was not his correct address.

15. The plea regarding receipt of notice by one Ms. Reena Nanda cannot improve the case of applicant for the reason that the notice bearing report of Process Serving Agency to the effect that the notice was received by Ms. Reena Nanda, Sister-in-law of applicant, was issued during the pendency of the appeal to notify the fact that the matter was proposed to be listed before Lok Adalat on 29.03.2014. As noticed above, the applicant had been duly served with a notice of hearing of appeal for 24.09.2012 and despite service he had failed to put in appearance. His absence from the proceedings of appeal continued thereafter, and finally ,the judgment dated 01.10.2021 was passed in absence of applicant.

16. Applicant has also raised a plea that the presence of learned counsel for the parties were intermingled or wrongly recorded on few dates during the proceedings of appeal. This discrepancy had kept in only after 06.11.2018. Applicant cannot take any benefit of such discrepancy as he has not shown any prejudice having been caused to him as a result thereof. The fact remains that despite having been served with a notice for appearance on 24.09.2012, applicant had chosen not to appear.

17. Thus, applicant has failed to satisfy the Court on his plea that the notice was not duly served upon him. Accordingly, the applicant cannot succeed in his plea under Order 41 Rule 21 of the Code for rehearing of the

appeal. Both the applications deserve dismissal and are accordingly, dismissed.

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

State of Himachal Pradesh .....Appellant.

Versus

Pardeep Kumar .....Respondent

For the appellant : Mr. Desh Raj Thakur, Additional Advocate General with Mr. Narender Thakur, Deputy Advocate General.

For the respondent: Mr. N.K. Thakur, Sr. Advocate with Mr. Karanveer Singh, Advocate.

Cr. Appeal No. 299 of 2009
Reserved on: 15.12.2022
Decided on:02.01.2023

Indian Penal Code, 1860- Sections 498-A, 325, 34- Trial court convicted the respondent for harassing and maltreating his wife for dowry, but acquitted his parents- Sessions Court set aside conviction in appeal- **Held**- Since findings against parents remained unchallenged, it attained finality. Conviction of one and acquittal of other accused on same set of facts cannot be justified for offence of cruelty. Prosecution failed to discharge burden to prove physical injury- Not proved that injury was the result of alleged incident. Delayed medical examination unexplained. False implication cannot be ruled out in view of strained relations. No independent source of corroboration, lack of sufficient evidence- Appeal dismissed. (Paras 9, 14)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

State of Himachal Pradesh has assailed judgment dated 17.11.2008, passed by learned Additional Sessions Judge, Una in Criminal

Appeal No. 10/2007, whereby the judgment dated 20.07.2007, passed by learned Judicial Magistrate First Class, Court No. 2, Amb, District Una, H.P. in Criminal Case No. 138-1-2002/65-II-2003 convicting the respondent, has been set aside.

2. Respondent alongwith two others namely Ramesh Chand and Sudershana Devi were tried for offences under Section 498-A and 325 read with Section 34 of IPC before learned Judicial Magistrate First Class, Court No. 2, Amb, District Una, H.P.in Criminal Case No. 138-1-2002/65-II-2003,respondent was convicted for offences under Sections 498-A and 325 of IPC, however, the other two accused persons were acquitted.

3. The case was registered against the respondent and other co-accused, on the basis of complaint made by Smt. Mamta Sharma, wife of respondent alleging *inter alia* that she had been harassed and maltreated for demand of dowry by the accused persons after her marriage. The allegations were levelled against respondent and his parents. As per complainant, she had procured money from her parents many times on the asking of the accused persons. Respondent used to give her beatings. He had a Car Repair Work Shop at Delhi. When she accompanied her husband to Delhi, there also, she was being ill-treated. After her return from Delhi, complainant had narrated the entire incident to her parents. At the instance of parents of complainant and with the intervention of certain other persons husband and father-in-law of complainant agreed to take the complainant with them. She stayed in her matrimonial home for about five months, but throughout this period, she was ill-treated. In June, the complainant again accompanied her husband to Delhi, but there also, respondent kept on ill treating her by giving beatings. He was always coercing the complainant to bring money from her parents. On the night of 28.07.2002, respondent after bolting the door from inside stuffed the mouth of complainant with a cloth and gave her beatings with fists. Complainant had received an injury in her ear. She made

a complaint to her uncle Sh. Tara Chand. Finally, she came back to her parents and reported the matter to police.

4. On completion of investigation, challan was filed against respondent and his parents. Prosecution examined total eight witnesses. PW-1 Dr. Sandeep Narula proved his opinion Ext. PW1/A. PW-2 Smt. Shobha Rani and PW-3 Rajinder Kumar were examined to prove the allegations against accused persons, being parents of the complainant. PW-4 Sh. Joginder Pal Kalia was the uncle of the complainant and was also examined to prove the prosecution case. PW-6 Dr. Sunil Sharma was examined as a Medical Expert and he proved his opinion Ext. PW-6/A. Complainant was examined as PW-7. PW-5 and PW-8 were the police witnesses. Respondent and other co-accused were examined under Section 313 of Cr.P.C. Three witnesses were examined in defence.

5. Learned Trial Court convicted the respondent and acquitted his parents. Respondent was sentenced to undergo rigors imprisonment for two years and to pay a fine of Rs. 1500/- for offence under Section 498-A of IPC. In default of payment of fine, he was sentenced to further undergo simple imprisonment for one month. For commission of offence under Section 325 of IPC, respondent was sentenced to undergo rigors imprisonment for two years and to pay a fine of Rs. 2,000/-. In case of default of payment of fine, he was sentenced to further undergo simple imprisonment for one month. Both the substantive sentences were ordered to run concurrently.

6. Respondent assailed the judgment of conviction and sentence order passed against him by learned Trial Court by filing an appeal before learned Sessions Judge, Una. The appeal of the respondent was assigned to learned Additional Sessions Judge, Una, which was accepted and respondent was acquitted of all charges.

7. I have heard learned counsel for the parties and have also gone through the records of the case carefully.

8. At the outset a notice is being taken of the fact that the parents of respondent herein were acquitted by learned trial court by holding that there were only general allegations against them. The findings so recorded by learned trial court remained un-assailed and hence attained finality. Neither the State nor the complainant challenged the acquittal of the other co-accused.

9. Noticeably, the allegations with respect to demand of dowry, payments made to creditors after arranging the same from father of complainant etc. were commonly levelled against all the co-accused. That being so, acquittal of two of the co-accused and conviction of one on the same set of facts cannot be justified as far as offence under 498-A IPC was concerned.

10. Now comes the allegation of physical assault on the complaint. Such incident had allegedly taken place at Delhi on 28.7.2002 and was attributed to the respondent only. Learned Appellate Court acquitted the respondent, on the grounds, *firstly*, that learned Trial Court had no jurisdiction to try the offence as the allegations made by complainant related to the occurrence that had taken place at Delhi, *secondly*, that the prosecution had failed to connect the injury suffered by the complainant with the alleged incident, *thirdly*, that the delay in lodging the FIR had remained unexplained and *lastly*, the evidence led by prosecution was held to be deficient in proving the charge against respondent beyond all reasonable doubts.

11. Perusal of contents of FIR Ext.PW5/A reveal that the allegations levelled by the complainant were not confined to the incident that had taken place at Delhi on 28.07.2002. The allegations were of ill treatment of the complainant at the hands of accused persons in her matrimonial home also, which was situated within the jurisdiction of learned Trial Court. In her statement before the Court also, the complainant had made allegations

against the accused persons regarding her ill treatment in her matrimonial home. Keeping in view the aforesaid material, the finding returned by learned Appellate Court in respect of the lack of jurisdiction with learned trial Court, cannot be sustained.

12. The findings of learned Appellate Court regarding delay in lodging the FIR, being reason for acquitting the respondent, also cannot be sustained. The complainant was being allegedly tortured for dowry and was being maltreated by the accused persons after the marriage, which according to PW-1 had taken place in November, 2000. The allegations were of continuance ill treatment of the complainant. As per complaint lodged with the police, lastly, the complainant was tortured and gave beatings by respondent on 28.07.2002 at Delhi. She was brought back from Delhi by her parents on 30.07.2002. The complaint was lodged on 04.08.2002. Since, the allegations were against the husband of the complainant and his parents, it is, but natural that some time, must have been taken for deliberating on all the aspects of the matter, before lodging the FIR. The delay in making a complaint to the police cannot be said to be so inordinate that could be fatal for prosecution case.

13. In order to prove the charges against the accused persons, a heavy burden was upon prosecution. The charges were to be proved beyond all reasonable doubts. However, on scanning the evidence of prosecution, it cannot be said that the prosecution has been successful in discharging its burden. One of the allegations against accused persons was that they had been coercing the complainant to fetch the money from his parents on the pretext that they had to discharge the debts incurred for her marriage. It was also alleged that many shopkeepers of the area used to come to the matrimonial house of complainant demanding their dues. Noticeably, none of such persons were either associated during investigation or cited as witnesses. The version of complainant has not found support from any

independent source. Except for the parents and uncle of the complainant none else has been examined for the purposes of corroboration to the version of the complainant. Learned Trial Court had acquitted the parents of respondent by finding charges against them not proved. Learned Trial Court had not found any incriminating material against the parents of the respondent. The acquittal of the parents of respondent was not challenged. Respondent was also prosecuted with similar allegations and facts, therefore, the acquittal of other co-accused on same set of facts could not have entailed conviction of respondent atleast for offence under section 498-A IPC.

14. Learned Trial Court had convicted the respondent only by holding that the incident of 28.07.2002 was proved against him. However, such finding also needs reappraisal as there was no corroboration to the version of the complainant. Learned Appellate Court has rightly held that from the medical evidence produced by examining PW-1 and PW-6, it was not proved that the injury found on the person of complainant was result of the alleged incident that had taken place on 28.07.2002. None of the medical experts had stated the duration of injury. It has also remained unexplained that why the medical examination of complainant was deferred and delayed for a long period when she had come back to her parents on 30.07.2002. As per PW-1 Dr. Sandeep Narula, complainant was thereafter examined by PW-6 on 05.08.2002. It is evident from Ext. PW-1/A that the complainant had not mentioned the date or the approximate period when she had received the injury. Similarly remained the position when she was examined by PW-6 as the notes recorded by said witness vide Ext. PW-6/A do not suggest so.

15. The independent corroboration to the version of complainant in cases involving crimes arising from matrimonial disputes becomes necessary as the false implication cannot be ruled out keeping in view the strained relations of the spouses. No investigation appears to have been made to collect corroborative evidence. Thus, I have no reason to differ with the

findings of learned Appellate Court regarding lack of sufficient evidence to convict the respondent.

16. Record further reveals that by way of Cr.MP No. 27 of 2022 filed on behalf of the respondent, certain documents were placed on record. One of such documents was the judgment passed by learned District Judge, Una on 23.12.2008 in HMA Case No. 15/2008, whereby the marriage between the respondent and complainant was ordered to be dissolved under Section 13 (b) of Hindu Marriage Act. A copy of statement of parties recorded by learned District Judge, Una in aforesaid proceedings was also placed on record. It become evident from the aforesaid documents that the respondent and complainant had not been able to maintain cordial relations and their matrimonial relations were strained.

17. On 13.09.2021, certain instructions were placed on record by learned Additional Advocate General, which were received by him from Superintendent of Police, Una. The instructions, so placed on record reveal that the complainant had solemnized another marriage after her divorce with the respondent and respondent had also solemnized the second marriage.

18. Keeping in view the entirety of facts and circumstances of the case, I concur with the findings returned by learned Appellate Court to the extent that prosecution evidence was not sufficient to convict the respondent.

19 In result, the appeal filed by the State is dismissed.

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

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

Desh Raj Awasthi ...Petitioner.

Versus

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

For the petitioner : Mr. Subhash Sharma, Advocate.

For the respondents : Mr. Desh Raj Thakur, Addl. A.G. with Mr. Narender Thakur, Dy. A.G.

CWPOA No. 157 of 2019
Reserved on 22.12.2022
Decided on : 2.1.2023

Constitution of India, 1950- Section 226- Quashing of rejection of representation before Director of Education and direction to rectify anomaly- Incumbents serving in the same category as that of the petitioner are being paid higher scale despite being his juniors- **Held-** No delayed claim as the petitioner raised grievance when he came to know about the anomalous situation, no gross negligence in pursuing remedy – Specific case of petitioner that no option for grant of PGT scale was given to him- Right of petitioner to have the same pay scale as juniors is unjustifiably and illegally denied- Senior cannot be paid lesser salary than his juniors is a settled law, anomaly ought to be rectified- Discrimination cannot be done without showing rational- Petition allowed. (Para 11)

Cases referred:

Gurcharan & another vs. Punjab State Electricity Board & others 2009 (3) SCC, 94;

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). Annexure A-8 may kindly be quashed and set aside.

ii) That the respondent department may kindly be directed to rectify the above said anomalous position with respect to the grant of PGT Scale in favour of the applicant.

iii) That the respondent department may kindly be further directed to grant the same pay scale to the applicant retrospectively from the date when the above said juniors, i.e. Roshan Lal and Gian Chand have been granted with all consequential benefits."

2. Petitioner was appointed as Trained Graduate Teacher (TGT) along with other incumbents vide office order dated 6.10.1975. The petitioner approached the H.P. State Administrative Tribunal by filing O.A. No. 957 of 2003, with a grievance that he was being paid less pay than his juniors in the same cadre. His representation to the competent authority had been rejected on untenable grounds.

3. Petitioner averred that his name figured at Sr. No. 36 of office Order dated 6.10.1975, whereas, the names of S/Sh. Roshan Lal and Gian Chand figured at Sr. No. 42 and 54 respectively of the same office order. In all the subsequent seniority lists of TGTs, petitioner was placed higher than the said S/Sh. Roshan Lal and Gian Chand. Despite the fact that the said S/Sh. Roshan Lal and Gian Chand were juniors to petitioner, they were drawing higher pay than the petitioner. Petitioner represented his grievance to the Director of Education vide representation dated 18.8.1999 and 21.12.2000, through proper channel. His representation was forwarded by District Education Officer to the Director of Education vide communication dated 29.1.2001. However, the Director of Education vide letter dated 22.3.2001 rejected the claim of petitioner in following terms:-

"On perusal of the detail furnished/given in the letter referred to above it is found that the anomaly has arisen due to the option exercised by the junior w.e.f. 1.11.1979 on the grant of PGT scale, therefore, the pay of Sh. Desh Raj, Lecturer cannot be stepped up against Sh. Roshan Lal, Lecturer. The service book of Sh. Roshan Lal Lecturer is returned herewith."

4. The petitioner again made a request on 29.8.2001 for reconsideration of his grievance but the same remained unanswered. The Original Application of the petitioner came to be transferred to this Court and was registered as CWPOA No. 157 of 2019 on abolition of the Tribunal.

5. Respondents have contested the claim of petitioner on the grounds firstly that it was a highly belated attempt. The representation of the petitioner was rejected on 12.3.2001, whereas petitioner approached the erstwhile Tribunal on 4.5.2003 and secondly, it has been submitted that the juniors of petitioner, as referred to in the petition had opted for grant of PGT scale and as such, they were placed in higher pay scale than the petitioner. As per respondents, petitioner did not exercise the option for grant of pay scale of PGT, hence he was not entitled to any relief.

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

7. As regards the objection in respect of belated claim, it can be noticed that the petitioner raised the grievance when he came to know about the anomaly. Thereafter, he represented and his representation was rejected on 12.3.2001. Petitioner again made a representation for reconsideration of his case on 29.8.2001, which remained pending and undecided and in this view of the matter, the O.A. preferred by the petitioner on 4.5.2003 cannot be said to be inordinately delayed. It is not the case of the respondents that the petitioner was aware about the grant of higher pay scale to his juniors from the very beginning. Keeping in view the conduct of petitioner, it cannot be said that the petitioner had slept over the matter or was grossly negligent in pursuing his remedy. Accordingly, the objection with respect to the belated claim of petitioner cannot be sustained.

8. The respondents have accused the petitioner of not having exercised the option for grant of PGT Scale. There is nothing in the reply of the respondents that the petitioner was ever afforded with such an option. On

the other hand, it is categoric case of the petitioner that no such option was given to him. Petitioner has rightly contended that had such option been given to him, there was no reason why he should not have opted for higher scale.

9. The facts of the case clearly suggest existence of an anomalous situation having been created for which, the petitioner cannot be blamed. The incumbents serving in the same category of TGT, are being paid higher scale than the petitioner despite being juniors to him.

10. The denial of the right of petitioner to have the same pay scale as his juniors is unsustainable, especially in absence of any legal and justifiable reason. As the petitioner was never afforded any option to opt the PGT Scale, the reason for rejection of the representation of the petitioner vide Annexure A-8 also cannot be sustained.

11. The Hon'ble Supreme Court of India, in ***Gurcharan & another vs. Punjab State Electricity Board & others*** reported in ***2009 (3) SCC, 94*** has observed that as a settled principles of law, senior cannot be paid lesser salary than his juniors and, in such circumstances, even if, there was difference in incremental benefits in the scale given to the government servant, such anomaly should not be allowed to continue and ought to be rectified by fixing the pay in parity with the juniors.

12. The respondents have not been able to justify their action. The State Government cannot ignore the principle of equality and also cannot discriminate without showing rational of its administrative decision.

13. In result, the petition is allowed. Respondents are directed to grant the same pay scale to the petitioner, as his juniors S/Sh. Roshan Lal and Gian Chand mentioned at Sr. No. 42 and 54 of office order dated 6.10.1975 (Annexure A-1) were paid and from the same date when the said S/Sh. Roshan Lal and Gian Chand were made entitled thereto. The needful be done within six weeks from the date of production of a copy of this judgment.

The arrears will be payable to the petitioner from three years prior to filing O.A..

14. The petition is disposed of. Pending applications, if any, also stand disposed of.

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- Section 226- Payment of arrears of ad hoc service annual increment arrears with interest, counting of ad hoc service for pensionary benefits and promotion**- Held**- Services rendered already counted towards annual increment- Office order remained unchallenged within statutory period with no explanation- Showed satisfaction of petitioner- Ad hoc services be treated as qualifying services for pension benefits- Limited relief granted- Petition disposed of. (Paras 5,6)

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.

Maan Singh ...Petitioner.

Versus

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

For the petitioner : Mr. Sanjeev Bhushan, Sr. Advocate with Mr. Rakesh Chauhan, Advocate.

For the respondents : Mr. Desh Raj Thakur, Addl. A.G. with Mr. Narender Thakur, Dy. A.G.

CWPOA No. 3382 of 2019
Reserved on 22.12.2022
Decided on : 2.1.2023

Constitution of India, 1950- Section 226- Writ of mandamus- direction to be promoted as Deputy Superintendent of Police on adhoc basis, to regularize promotion against vacancy for general category in order of merit cum seniority with consequential reliefs- **Held**- Ad hoc promotion was delayed without any basis- minimum educational qualification for post of DSP is graduation- Juniors promoted were matriculate- Petition allowed. (Para 17)

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 a writ in the nature of mandamus may be issued directing the respondents to promote the petitioner as Deputy Superintendent of Police on adhoc basis w.e.f. 9.7.1999 and thereafter to regularize the promotion as Deputy Superintendent of Police w.e.f. 29.4.2006 against the vacancy available for general category in the year 1999 in order of merit cum seniority and such promotion may very kindly be ordered to be granted with all consequential benefits of pay, arrears, seniority, etc. etc."*

2. The case of the petitioner in nut-shell is that he was appointed as Constable in Himachal Pradesh Police on 30.10.1974. He was promoted as Head Constable in the year 1981. He qualified the Intermediate Course and was promoted as Assistant Sub Inspector in the year 1986. Petitioner was further promoted as Sub Inspector in the year 1990 and as Inspector on 22.8.1995. He was confirmed as Inspector w.e.f. 30.3.1998.

3. The grievance of the petitioner is that his juniors Inspectors with similar qualifications and with relaxation in educational qualifications were promoted as DSPs on *ad-hoc* basis w.e.f. 9.7.1999, whereas petitioner was denied the benefit of *ad-hoc* promotion as DSP till 2.11.2000 without any basis.

4. Further objection of the petitioner is that in DPC held on 18.4.2006 for promotion to the post of Deputy Superintendent of Police on regular basis, again the juniors of the petitioner were promoted by ignoring him. Petitioner made various representations but justice was not imparted to him

5. It is further submitted on behalf of the petitioner that representations of petitioner remained undecided with the observation to await the decision in CWP No. 3174 of 2012 as the respondents had clearly identified the case of petitioner to be similar to the case of petitioner in CWP 3174 of 2012.

6. In rejoinder, the petitioner clarified that during the pendency of instant petition, CWP No. 3174 of 2012 was decided by this Court on 8.4.2013 and the issue was decided in favour of the petitioner in that case. Petitioner further placed on record a copy of order dated 1.7.2014, issued by the Chief Secretary to the Government of Himachal Pradesh, whereby all consequential benefits were granted to the petitioner in CWP No. 3174 of 2012.

7. Respondents filed their reply. It is evident from the reply of respondents that the factual position with respect to the date of initial appointment of petitioner, his further promotions and seniority position in the rank of Inspector was not denied. It has also not been denied that the juniors to the petitioner were promoted firstly on ad-hoc basis and then on regular basis before petitioner. The only visible defence of the respondents is that the petitioner had already received the benefit of scheduled caste category in the matter of promotion and as such, he could not again get the benefit to be promoted on the basis of jumped up seniority, till the time the representation of scheduled caste (reserved) category fell short by the prescribed percentage of reservation.

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

9. Respondents have not disputed the factual aspect that the representations of the petitioner were not finally decided and were kept pending awaiting the decision in CWP No. 3174 of 2012. It will be relevant to reproduce the contents of note sheets of the department from N-352 and N-353, as under:-

> *"N-352 So far his regular promotion by considering him among General Category candidates is concerned, as per information received from the DGP, H.P., he had already derived the benefit of reservation. The instructions dated 27.05.1996 in this regard are reproduced as under (pl see flag 'A')-*
>
> > *"If a candidate has taken a benefit of promotion on account of reservation at any stage and has gained seniority above the senior general candidate in the promoted post, such reserved candidate will not be entitled to the consideration for the next promotion on the basis of such jumped up seniority till such time the representation of the said reserved category falls short of the prescribed percentage of reservation."*
>
> *N-353 Hence he has rightly been considered for promotion among ST category candidates by the DPC held during 2006 and subsequent DPCs and was promoted as such on 7.10.2008. It is*

also pertinent to mention here that a case CWP No. 3174/2012 on similar grounds is pending in Hon'ble High Court, H.P."

10. Thus, it is clear that the respondents had no doubt regarding similarity of issues involved in the case of petitioner as also in CWP No. 3174 of 2012.

11. From perusal of judgment passed by a Coordinate Bench of this Court in CWP No. 3174 of 2012, it is clear that the issue involved in said case related to application of "catch up" principle. The official respondents in said case had raised the contention that since the petitioner in that case had availed the benefit of Scheduled Tribe category at the time of passing of Intermediate Course, it was a case of accelerated promotion and the said petitioner could not be considered for further promotion in view of "catch up" principle.

12. In the instant case also the stand of respondents is that petitioner had derived the benefit of reservation under Scheduled Tribe category, while he was deputed to undergo the Intermediate School Course in October, 1985, therefore, he was not entitled to the consideration for the next promotion on the basis of such jumped up seniority till such time the representation of the said reserved category fell short of the prescribed percentage of reservation.

13. Undisputedly, petitioner was promoted as Assistant Sub Inspector in the year 1986 after qualifying the aforesaid Intermediate School Course. Similar was the fact situation in the case of petitioner in CWP No. 3174 of 2012. In that case also, the petitioner was promoted as Assistant Sub Inspector after he had qualified Intermediate Course by taking the benefit of Scheduled Tribe category.

14. While considering the above noted fact situation in CWP 3174 of 2012 the Coordinate Bench of this Court held the principle of "catch up" not applicable, by observing as under:-

"6. Petitioner was promoted as Assistant Sub Inspector in the year 1988 after he had qualified the intermediate course by taking benefit of Scheduled Tribe category. However, fact of the matter is that when the petitioner was promoted to the post of Sub Inspector, he has not been promoted against the roster point reserved for Scheduled Tribe category, but as per rule 13.21 of the Punjab Police Rules. Rule 13.21 of the Punjab Police Rules reads as under:

> *"13.21. Power of relaxation. Where the Inspector-General of Police is of the opinion that it is necessary or expedient so to do, he may, by order for reasons to be recorded in writing relax any of the provisions of this Chapter with respect of any class or category of persons."*

7. Petitioner has further been promoted to the post of Inspector on the basis of Seniority of Sub-Inspectors not against the roster point of Schedule Tribe, Respondent-State was directed to file supplementary affidavit whether the petitioner was considered for the post of Inspector against the roster point reserved for Scheduled Tribe Category candidate as per order dated 5.3.2013. The supplementary affidavit was filed by the Director General of Police on 26.3.2013. It is specifically stated therein that the petitioner was not given the benefit of reservation while promoting him to the rank of Inspector. In the seniority list of Inspectors of Police circulated on 22.1.2003, as it stood on 1.10.2002, petitioner was at Sr. No. 113 and private respondents No. 4 to 8 were at Sr. No. 115, 117, 122, 123 and 131, respectively. In the tentative seniority list of Inspectors of Police issued on 28.1.2005, as it stood on 1.1.2005, High petitioner is at Sr. No. 103 and private respondents No. 4 to 8 were at Sr. No. 105, 107, 112, 113 and 118, respectively. The Departmental Promotion Committee met on 27.11.2006. Case of the petitioner was required to be considered against the general category and not against the eligible Scheduled Caste/Scheduled Tribe candidates. Case of the petitioner has been considered by treating him as Scheduled Tribe candidate by treating his case as jump up seniority. This is contrary to law. Hypothetically, the promotion of the petitioner to the post of Assistant Sub-Inspection can be taken as 1 Thereafter, he was promoted as Sub-Inspector on 15.12.1994 with effect from 25.11.1993 but not again the roster point of Scheduled Tribe, but as per rule 13.21 of the Punjab Police Rules. This can be taken as L-2. Thereafter, petitioner was promoted as Inspector on the basis of merit-cum-seniority on the basis of seniority list of Sub-Inspectors. It can be treated hypothetically L-3. He has not taken

> *the benefit of belonging to Scheduled Tribe category at the time when he was promoted as Sub- Inspector on 15.12.1994 with effect from 25.11.1993 and Inspector on 10.12.1998. He was senior to the private respondents, whose names were recommended by the Departmental Promotion Committee in its meeting held on 27.11.2006 by considering the case of the petitioner on the basis of Scheduled Tribe category. Petitioner again has been considered against the post of Scheduled Tribe category in the Departmental Promotion Committee held on 30.9.2008 instead of general category as per the seniority list of Inspectors of Police issued either on 22.1.2003 or 28.1.2005. Petitioner was fully eligible as per rules since he had two years experience as Inspector of Police. It is not the case of the respondent-State that the persons of the general category have caught up with the petitioner at L-2 or L-3. Thus, the principle of accelerated/jump up seniority would not be applicable and the petitioner was required to be considered as per the seniority list of Inspectors for induction into H.P.P. Services. Respondent-State has misconstrued the notification dated 27.5.1996. In order to complete the facts at this stage, it is noted that the petitioner has been inducted into H.P.P. Services on 18.6.2009."*

15. After considering the factual position, as noted above and also the applicable law, the Coordinate Bench proceeded to pass the following directions while disposing of the said writ petition:-

> *"11. Accordingly, in view of the observations and discussions made hereinabove, the writ petition is allowed. Respondents are directed to consider the case of the petitioner for induction into H.P.P. Services for the vacancies, which were available in the years 2004, 2005, 2006 onwards, on the basis of seniority list circulated on 22.1.2003 or 28.1.2005 by convening review Promotion Committee, within a period of eight weeks from today. If the petitioner is found suitable, he shall be promoted with all the consequential benefits. In normal circumstances, promotions of private respondents were liable to be quashed and set aside, but in order to balance the equities, their promotions are not quashed and the respondent-State is directed to create supernumerary post if the petitioner is found suitable for the post of Deputy Superintendent of Police. Pending application(s), if any, also stands disposed of. No costs."*

16. Since the respondents had withheld the decision on the representations of petitioner on account of pendency of CWP No. 3174 of 2012 and now since the said petition stands finally decided and the respondents have implemented the same in letter and spirit, the case of the petitioner is also required to be finally considered and decided by the respondents in terms of the judgment passed in CWP No. 3174 of 2012.

17. Another contention of the petitioner that his *ad-hoc* promotion as Deputy Superintendent of Police was delayed without any basis also deserves to be upheld. Admittedly, the *ad-hoc* promotions were made on the basis of seniority. Though, the minimum educational qualification for the post of Deputy Superintendent of Police was Graduation, relaxation was given in cases of many Inspectors, who were Matriculate. Petitioner was also in the same category. The juniors of petitioner were promoted as DSPs on *ad-hoc* basis w.e.f. 9.7.1999, whereas petitioner was denied the benefit of *ad-hoc* promotion as DSP till 2.11.2000. Admittedly, petitioner had passed the matriculation in 1998 and had all other qualifications to be promoted as DSP. In such view of the matter, merely because the relaxation in case of petitioner was given from a later date that too under misconception of fact about his educational qualification, cannot be held sufficient to discriminate the petitioner.

18. In view of above discussion, the petition is allowed. The respondents are directed to consider the case of petitioner for induction into Himachal Pradesh Police Service in the rank of Deputy Superintendent of Police in light of the judgment passed by a Coordinate Bench of this Court dated 8.4.2013 in CWP No. 3174 of 2012, by convening review DPC within a period of eight weeks from today and if the petitioner is found suitable, he be promoted with all consequential benefits from due date and in case of need, a supernumerary post be created.

19. The petition is disposed of. Pending applications, if any, also stand disposed of.

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- Section 226- Petitioner sought direction to grant him benefits for services rendered from March 12, 1981, to May 31, 1996, for the purpose of pension, increments, arrears, and interest- **Held**- Petitioner initially appointed as JBT teacher temporarily- Subsequently appointed as Shastri teacher through separate recruitment process- Appointment as Shastri teacher unrelated to earlier appointment- Services as JBT teacher cannot be considered in continuity with that as of Shastri teacher- Petition dismissed. (Para 2)

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 SATYEN VAIDYA, J.

Vinod Kumar .....Petitioner

Versus

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

For the petitioner: Mr.Anuj Gupta, Advocate.

For the respondents: Mr. Manoj Chauhan and Mr. Varun Chandel, Additional Advocate Generals, for respondent No.1.
Mr. Prikshit Sharma, Advocate, vice Mr. Vipin Pandit, Advocate, for respondents No. 2 and 3.

Cr.MMO No.931 of 2022
Reserved on: 05.01.2023
Decided on: 07.01.2023

Code of Criminal Procedure, 1973- Section 482- Quashing of FIR- **Indian Penal Code, 1860**- Sections 406, 420- Parties reached settlement executing compromise deed- **Held**- They admitted that dispute occurred in respect of performance of agreement to sell- FIR was offshoot from civil dispute- Nature of dispute more or less private- Parties settled the matter to live peacefully- FIR ordered to be quashed along with consequent proceedings- Petition allowed. (Para 7)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge.

By way of instant petition, a prayer has been made to quash FIR No.133 of 2015, dated 20.8.2015, registered at Police Station Sadar, Solan, District Solan, H.P.under Sections 406 and 420 of IPC and consequent criminal proceedings arising therefrom.

2. It is averred in the petition that late Sh. Jaskaran Bir Singh, predecessor-in-interest of respondents No. 2 and 3 had lodged an FIR No. 133 of 2015 against the petitioner at Police Station Sadar, Solan, H.P. After investigation, the challan was presented and the case is pending before learned Judicial Magistrate 1st Class, Court No.1, Solan as Criminal Case No. 105 of 2016.

3. The FIR in question was an offshoot of a civil dispute between late Sh. Jaskaran Bir Singh and petitioner with respect to performance of an agreement to sell executed between them. A civil suit No. 73 of 2018 had also been filed arising out of the subject matter of the aforesaid agreement. Sh. Jaskaran Bir Singh died during the pendency of civil suit. After his death, respondents No. 2 and 3 as also the son of late Sh. Jaskaran Bir Singh, named Jasnoor Sandhu have settled all the disputes with the petitioner and compromise deed has been executed, a copy of which has been placed on record as Annexure P-3. On the basis of aforesaid compromise, FIR No. 133 of 2015 and consequent criminal proceedings arising therefrom are sought to be quashed.

4. On 20.12.2022, respondent No.2 and petitioner were present in the Court and their separate statements were recorded on oath. Both of them verified the factum of having arrived at a mutual settlement. They further verified the terms of compromise deed, Annexure P-3.

5. On 05.01.2023, respondent No.3 Ms. Hargun Sandhu and Jasnoor Sandhu, son of late Sh. Jaskaran Bir Singh also presented themselves before the Court and made a statement on oath to the effect that their all disputes with petitioner have been settled and now they have no objection in case the FIR No. 133 of 2015 and consequent criminal proceedings arising therefrom are quashed.

6. I have gone through the terms of the compromise, Annexure P-3. There is nothing in the said compromise which can be said to be unlawful.

7. The parties have come-forward to put an end to long standing dispute inter se them. It is admitted by both the sides that the dispute had arisen in respect of the performance of an agreement to sell executed between the petitioner and late Sh. Jaskaran Bir Singh. The FIR in question was also an offshoot arising from the civil dispute between the parties. Thus, the nature of dispute between the parties was more or less private in nature and had no repercussions whatsoever on the interest of the society at large.

8. To maintain peace and harmony, is the objective of every civilized society. Every step in such direction should be welcomed. In the instant case also, the parties have settled the matter in order to live in peace and harmony in future. Keeping in view the facts of the case, no prejudice shall be caused to either of the parties or to society at large, in case the prayer made in the petition is granted.

9. Accordingly, the instant petition is allowed and FIR No.133 of 2015, dated 20.8.2015, registered at Police Station Sadar, Solan, District Solan, H.P. under Sections 406 and 420 of IPC and consequent criminal proceedings arising therefrom i.e. Criminal Case No. 105 of 2016 pending before learned Judicial Magistrate 1st Class, Court No.1, Solan, District Solan, H.P. are ordered to be quashed in the interest of justice.

10. 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.

Rohit Chauhan .....Petitioner

Versus

State of Himachal Pradesh .....Respondent

For the petitioner: Mr.C. N. Singh, Advocate.
For the respondent: Mr. Manoj Chauhan and Mr. Varun Chandel, Additional Advocate Generals.
Mr. Sanjeev Bhushan, Senior Advocate with Mr. Rajesh Kumar, Advocate, for the complainant.

Cr. M.P.(M) No. 2527 of 2022
Reserved on: 04.01.2023
Decided on: 07.01.2023

Code of Criminal Procedure, 1973- Section 438- Grant of pre-arrest bail- **Indian Penal Code, 1860**- Sections 408, 34- Alleged misappropriation of funds by the petitioner and three other employees, totalling Rs. 28,57,022/- **Held**- Allegations subject to proof- Substantial time given for investigation- Petitioner cooperated in investigation since grant of interim bail no case for custodial interrogation as investigating agency has means to extract facts- Ordered to be released on bail in case of arrest subject to general conditions- Petition allowed. (Para 12)

Cases referred:
Siddharth vs. State of Uttar Pradesh and another (2022) 1 SCC 676;
Nathu Singh vs. State of Uttar Pradesh and others (2021) 6 SCC 64;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge.

By way of instant petition, a prayer has been made for grant of pre-arrest bail to petitioner in case FIR No. 94 of 2022, dated 19.11.2022,

registered at Police Station, Kotkhai, District Shimla, H.P. under Sections 408 and 34 of IPC.

2. The case has been registered on the basis of a complaint received by the police from Proprietor “Stan H.P. Enterprises” Gumma, which is a retail sale outlet for petroleum products, alleging inter alia that his four employees including the petitioner have misappropriated an amount to the tune of Rs.28,57,022/-. He further alleged that all the accused had absconded.

3. During investigation, the police is stated to have taken into possession the records maintained at “Stan H.P. Enterprises”. The investigation also discovered that the petitioner is maintaining five different bank accounts in his name and between February, 2022 to November, 2022, a total sum of Rs.17,57,014/- was deposited in his account with the Punjab National Bank. Out of such amount, a sum of Rs.3,26,372/- is stated to have been transferred to the account of another co-accused and Rs.2,45,645/- in the account of the complainant. The balance of the amount of Rs.11,84,997/- is stated to be withdrawn by the petitioner, from time to time and some part of it is stated to be transferred through UPI to other persons.

4. The respondent-State has opposed the grant of pre-arrest bail to the petitioner on the ground that the petitioner is not disclosing the name of persons in whose account he has transferred the money in addition to the co-accused and complainant. It has also been submitted that petitioner has been avoiding the questions in this behalf and has also been providing evasive answers.

5. On the other hand, it has been submitted on behalf of the petitioner that the petitioner is innocent. The transactions in his bank account were being made at the instance and with the consent of the complainant as also the Manager of the establishment named Surender Singh Pathania, who was looking after the accounts. It has further been contended on behalf of the petitioner that during investigation, he has fully associated himself and has

provided entire detail of accounts to the police. The petitioner is stated to be permanent resident of Village Gumma, Post Office, Gumma, Tehsil Kotkhai, District Shimla, H.P. He has also undertaken to abide by all the terms and conditions as may be imposed while disposing of this application.

6. The case was registered on 19.11.2022. Petitioner was admitted to interim bail on 23.11.2022. More than a month has elapsed thereafter. Petitioner has joined the investigation as and when required. The Investigating Agency already had sufficient time at its disposal to complete the investigation atleast substantially especially keeping in view the facts of the case.

7. It is alleged that petitioner instead of crediting the amount received from retail sale in the account of Petrol Station, had been directly crediting to his account. The allegations against petitioner are subject to proof. Mere fact that huge transaction has been found in the bank account of petitioner does not necessarily lead to the conclusion of his guilt. As per the investigation report, a sum of Rs.2,45,645/- stands transferred from the account of the petitioner to the account of “Stan H.P. Enterprises”. From this fact, it can be inferred, atleast prima-facie, that the bank account of “Stan H.P. Enterprises” was receiving payments from the account of petitioner. How and why there was no re-conciliation of the account of the Petrol Station, has not been explained. Had the petitioner intended to misappropriate the amount by depositing the same to his account, he would not have remitted any amount to the account of the Petrol Station.

8. The observations as above, have been made only to prima-facie assess the seriousness and gravity of allegations against petitioner.

9. The respondent has not been able to justify the reasons for seeking custodial interrogation of petitioner. It is submitted that the petitioner is not disclosing the names and identity of persons in whose account the money has been transferred from his account. The grounds so raised on behalf of the respondents does not appear to be justified for the reason that

the bank transactions can be ascertained by the police from documentary evidence. As regards the allegation of money withdrawn by the petitioner from his account and the non-disclosure of identity of persons to whom it has been disbursed, those facts may not be so relevant for proving all the allegations levelled against petitioner. The investigation in a criminal case cannot be used as a recovery proceeding.

10. The importance of personal liberty as a constitutional mandate has been underlined by the Hon'ble Supreme Court in ***Siddharth vs. State of Uttar Pradesh and another (2022) 1 SCC 676***, as under:

> "10. *We may note that personal liberty is an important aspect of our constitutional mandate. The occasion to arrest an accused during investigation arises when custodial investigation becomes necessary or it is a heinous crime or where there is a possibility of influencing the witnesses or accused may abscond. Merely because an arrest can be made because it is lawful does not mandate that arrest must be made. A distinction must be made between the existence of the power to arrest and the justification for exercise of it. If arrest is made routine, it can cause incalculable harm to the reputation and self-esteem of a person. If the Investigating Officer has no reason to believe that the accused will abscond or disobey summons and has, in fact, throughout cooperated with the investigation we fail to appreciate why there should be a compulsion on the officer to arrest the accused."*

11. In ***Nathu Singh vs. State of Uttar Pradesh and others (2021) 6 SCC 64***, the Hon'ble Supreme Court has observed as under:

> *"**19**. At first blush, while this submission appears to be attractive, we are of the opinion that such an analysis of the provision is incomplete. It is no longer res integra that any interpretation of the provisions of Section 438, Cr.P.C. has to take into consideration the fact that the grant or rejection of an application under Section 438, Cr.P.C. has a direct bearing on the fundamental right to life and liberty of an individual. The genesis of this jurisdiction lies in Article 21 of the Constitution, as an effective medium to protect the life and liberty of an individual. The provision therefore needs*

to be read liberally, and considering its beneficial nature, the Courts must not read in limitations or restrictions that the legislature have not explicitly provided for. Any ambiguity in the language must be resolved in favour of the applicant seeking relief. In this context, this Court, in the Constitution Bench decision of this Court in Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565, which was recently upheld and followed by this Court in Sushila Aggarwal vs. State (NCT of Delhi) (2020) 5 SCC 1 at SCC p. 56, para 14, held as follows: (Gurbaksh Singh Sibbia case, SCC p. 586, para 26)

> *"26. We find a great deal of substance in Mr Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An overgenerous infusion of constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned."*
>
> *emphasis supplied)*

***24**. However, such discretionary power cannot be exercised in an untrammeled manner. The Court must take into account the statutory scheme under Section 438, Cr.P.C., particularly, the proviso to Section 438(1), Cr.P.C., and balance the concerns of the investigating agency, complainant and the society at large with the concerns/interest of the applicant. Therefore, such an order must necessarily be narrowly tailored to protect the interests of the applicant while taking into consideration the concerns of the investigating authority. Such an order must be a reasoned one."*

12. Keeping in view the facts of the case and also aforesaid exposition, I am of the considered view that no case for custodial interrogation of petitioner is made out. The tool of custodial interrogation cannot be used to extract confession. Such interrogation is permissible where the Investigating Agency is without any means to extract the facts. As noticed above, in the instant case the bank transactions can easily be ascertained through documentary evidence.

13. The petitioner is permanent resident of Village Gumma, Post Office, Gumma, Tehsil Kotkhai, District Shimla, H.P. and there is no apprehension of his fleeing from the course of justice. It is also not alleged against petitioner that he potentially can tamper with the prosecution evidence. The State has also not come up with a plea that the arrest of other co-accused is not possible without interrogating the petitioner in custody.

14. Keeping in view the facts of the case, the petition is allowed and the petitioner is ordered to be released on bail, in case of his arrest, in FIR No. No. 94 of 2022, dated 19.11.2022, registered at Police Station, Kotkhai, District Shimla, H.P. under Sections 408 and 34 of IPC, on his furnishing personal bond in the sum of Rs.50,000/- with one surety in the like amount to the satisfaction of Investigation Officer. This order is, however, subject to following conditions: -

(i) That the petitionershall make himself available for the purpose of investigation, an and when required.

(ii) That the petitioner shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever.

(iii) That the petitioner shall not 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 the Court or the Police Officer; and

(iv) That the petitioner shall not leave India without prior permission of this Court till completion of investigation and thereafter of the trial court.

15. Any observation made hereinabove 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 hereinabove.

Petition stands disposed of.

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

Chaman Sharma

.....Petitioner

Versus

Rahul Sharma

.....Respondent

For the Petitioner: Mr. Dheeraj K. Vashishat Advocate.

For the Respondent: Mr. Vinod Chauhan, Advocate.

Cr.MMO No. 1124 of 2022
Date of Decision: 5.1.2023

Code of Criminal Procedure, 1973- Section 311- Petition against order dismissing application to examine witnesses- Trial Court closed evidence- No challenge to such order- **Held**- Negligence of petitioner cannot be a ground to reject prayer- Only assess whether evidence of witness is essential for just and fair decision- Proposed witnesses were to depose about practice adopted by complainant of obtaining blank cheques- Court ought to have allowed- Order quashed and set aside- Court below directed to afford one opportunity- Petition allowed subject to payment of costs. (Para 5)

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Instant petition is directed against the order dated 2.11.2022, whereby an application filed by the petitioner-accused under Section 311 Cr.PC, seeking therein permission to record the statements of witnesses namely Ram Dutt, Babu Ram, Madan and Surender, came to be dismissed.

2. Pursuant to notices issued in the instant proceedings, Mr. Vinod Thakur, Advocate, has put in appearance on behalf of the respondent. While opposing the prayer made in the instant petition, he vehemently argued that

since witnesses sought to be produced by way of filing an application under Section 311 Cr.PC were very much available at the time of recording of the evidence by the petitioner/accused and no plausible explanation has been rendered on record qua their non-examination at the first opportunity, no illegality can be said to have been committed by the court below while rejecting the application under Section 311 of Cr.PC. He further submitted that all the witnesses proposed to be examined in defence are already facing trial/proceeidngs initiated under Section 138 of the Act by the respondent-complainant. He further submitted that bare perusal of orders impugned in the instant proceedings suggest that repeatedly, matter came to be adjourned on the request of petitioner-accused for recording the statement of relevant witnesses, but on one pretext or the other, matter was got adjourned by learned counsel for the petitioner. He submitted that since after passing of the order impugned in the instant proceedings, matter has been already fixed for final arguments, it would not be in the interest of justice to accept the prayer made by the petitioner.

3. Mr. Dheeraj K. Vashishat, learned counsel for the petitioner-accused while refuting the aforesaid submissions made by Mr. Vinod Thakur, vehemently argued that record clearly reveals that only two opportunities were granted by the court for examining the petitioner-accused witnesses and as such, court below ought to have allowed the application under Section 311 Cr.PC, thereby permitting the petitioner to examine remaining witnesses. While making this Court peruse zimini orders placed on record, above named counsel, vehemently argued that court below appears to be in extraordinary hury to decide the case because matter is being adjourned for short durations. He submitted that CW1 while answering the suggestion put to him in his cross-examination stated that the contents of the Ext.CW1/C were filled by the accused. This witness also stated that it is wrong that while giving loan, they did not take two cheques as security, whereas three blank cheques

were taken by the complaint's brother Sh. Amit Sharma while running committee business i.e. chit fund. He submitted that witnesses sought to be adduced on record are very essential to prove the defence setup by the petitioner accused and as such, court below ought to have allowed the prayer made in the instant application.

4. Having heard learned counsel for the parties and perused the material available on record vis-à-vis reasoning assigned in the order impugned in the instant proceedings, this Court finds that after closure of complainant witnesses, matter was listed for recording the statement of accused under Section 313 Cr.PC on 23.3.2022, on which date, accused was not present and adjournment was sought on his behalf. On 28.3.2022, petitioner-accused was present alongwith his counsel and prayed for time for recording the statement of accused under Section 313 Cr.PC. On 20.4.2022 accused was present, however matter was adjourned for recording the statement of accused under Section 313 Cr.PC. On 21.4.2022, statement of the accused under Section 313 CrPC was recorded, whereafter petitioner wanted to lead the evidence in defence. However, when matter was listed on 29.4.2022 for recording the statements of DWs, no defence witnesses were present on account of steps not being taken by the petitioner and matter was adjourned for 4.6.2022, again on which date, no defence witnesses came present and as such, court below had no option, but to close the evidence.

5. No doubt in the case at hand, no challenge, if any, ever came to be laid by the petitioner-accused against the order closing the defence, but since petitioner filed an application under Section 313 Cr.PC, seeking therein permission to summon the certain witnesses as named herein above for cross-examination, court below was only required to see whether witnesses sought to be examined are just and required for fair disposal of the case or not. No doubt in the case at hand, petitioner accused remained negligent in causing presence of the witnesses in defence, but that may not be a ground to reject

the prayer made by the applicant under Section 313 CrPC for recalling/reexamining the certain witnesses, which may be crucial for the determination of the case. Section 311 Cr.PC, vests the Court, with jurisdiction to examine any person as a witness, if his/her evidence appears to it to be essential for the just decision of the case. The stage of inquiry or trial being immaterial, the court is only to assess whether the examination of a witness or his evidence is essential to the just decision of the case. Since in the case at hand, proposed witnesses are/were to depose with regard to practice adopted by the complainant to obtain blank signed cheques from the members of committee, court below ought to have allowed the prayer made by the petitioner, however, in the case at hand court below instead of assessing the necessity of examination of proposed accused witnesses, proceeded to dismiss the application on the grounds, which are extraneous to the requirement of Section 311 Cr.PC and as such, order impugned in the instant proceedings deserves to be quashed and set-aside.

6. Consequently, in view of the above, present petition is allowed and order dated 2.11.2022, is quashed and set-aside and court below is directed to afford one opportunity to the petitioner to examine the witnesses on **12.1.2023** subject to payment of costs of Rs. 10,000/- payable to the respondent-complainant. Learned counsel for the petitioner-accused undertakes to cause presence of the witnesses on the aforesaid date before the court below, enabling it to examine them on the aforesaid date. Learned counsel for the respondent-complainant also undertakes to cause presence of the learned counsel for the respondent complainant on the aforesaid date for cross-examination of the witnesses, if any, adduced on record by the petitioner-accused. It is made clear that in case petitioner accused fails to cause presence of the witnesses on the date fixed by this Court, order impugned in the instant proceedings shall automatically revive and no more opportunity would be given to lead the evidence. It is further made clear that

instant order is subject to payment of costs as quantified by this court and till the time, same is not paid, petitioner accused shall not be permitted to lead the evidence in terms of instant order.

7. The petition stands disposed of in the aforesaid terms, so also pending application(s), if any.

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 7,8- Alleged offer and acceptance of bribery and misconduct on part of public servant- **Held**- Initial stage of investigation and nature and gravity of offence did not make ground for anticipatory bail- Balance to be maintained between right to personal liberty and right to investigate and arrest- Petition dismissed. (Para 24)

Cases referred:

Mangal Singh Negi v. Central Bureau of Investigation, 2021(2) Shim. LC 860 : 2021(2) Him L.R. (HC) 917;

Manoranjana Sinh alias Gupta v. Central Bureau of Investigation, (2017) 5 SCC 218 (219);

P. Chidambaram v. Directorate of Enforcement, (2019) 9 SCC 24;

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***
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> **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.
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> **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)

> "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:
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> '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 MS. JUSTICE JYOTSNA REWAL DUA, J.

Rakesh Kumar ....Petitioner

Versus

State of Himachal Pradesh & Ors. …Respondents

For the petitioner: Mr. Bhuvnesh Sharma, Senior Advocate with Mr. Ramakant Sharma, Advocate.

For the respondents: Mr. Pranay Pratap Singh, Additional Advocate General for respondent Nos.1 and 2.

Mr. Vinod Chauhan, Advocate, for respondent No.3.

CWPOA No.4423 of 2020
Decided on: 09.01.2023

Constitution of India, 1950- Article 226- Petition for direction to correct birth date from 01.03.1962 to 25.03.1963 in official records based on birth certificate- Matriculation certificate showed 01.03.1962- **Held**- Petitioner presented matriculation certificate on joining of services- Date of birth to be corrected entered in service book and signed by petitioner- Matriculation certificate not changed/amended- Date cannot be changed merely on basis of birth certificate- Delay in application- Petition dismissed as meritless. (Para 5)

Cases referred:

Bharat Coking Coal Limited and others Versus Shyam Kishore Singh (2020) 3 SCC 411;

Karnataka Rural Infrastructure Development Limited versus T.P. Nataraja and others (2021) 11 SCALE 110;

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge

The petitioner, at the age of 56 years, filed this writ petition seeking direction to the respondents to correct his date of birth from

01.03.1962 to 25.03.1963. The relief has been prayed mainly on the basis of petitioner's birth certificate (Annexure A-1). In this date of birth certificate issued on 22.05.2019 and registered on 08.04.1963, petitioner's date of birth has been reflected as 25.03.1963.

2. It is not in dispute that in the matriculation certificate issued to the petitioner, his date of birth is reflected as 01.03.1962. It is also not in dispute that petitioner joined the service with the respondent on 26.03.1983 and at the time of joining the service, petitioner himself produced his matriculation certificate, reflecting his date of birth as 01.03.1962. It is not the case of the petitioner that he ever made any written representation/objection regarding alleged wrong entry of his date of birth in his service record. The present original application moved by the petitioner on 28.06.2019, at the age of 56 years, is the petitioner's first ever written prayer for correction in his date of birth, in the service record.

3. Note 6 of Fundamental Rules 56 provides that date of retirement of a Government servant, be it 58 years or 60 years, as the case may be, has to be determined with reference to date of birth declared by the Government servant at the time of appointment and accepted by the appropriate authority on production, as far as possible, of confirmatory documentary evidence such as High School Certificate or extracts from the Birth Register. The Note further provides that the date of birth so declared by the Government servant and accepted by the appropriate authority, shall not be the subject to any alteration except as specified in this note, as under: -

> *"Note 6-*
> *(a) a request in this regard is made within five years of his entry into Government service;*
> *(b) It is clearly established that a genuine bona fide mistake has occurred; and*
> *(c) the date of birth so altered would not make him ineligible to appear in any School or University or Union Public Service Commission examination in which he had*

appeared, or for entry into Government service on the date of which he first appeared at such examination or on the date on which he entered Government service."

Clause 7.1 of Chapter VII of Himachal Pradesh Financial Rules, 1971, provides that declaration of age made by the employee at the time of or for the purpose of entry into government service be deemed to be conclusive unless the employee applies for correction of his recorded age within two years from the date of his entry into the government service. Clause 7.1(d) of Chapter VII reads thus: -

"(d) (1) in regard to the date of birth a declaration of age made at the time of or for the purpose of entry into Government service, shall as against the Government servant in question, be deemed to be conclusive unless he applies for correction of his age as recorded within 2 years from the date of his entry into Government service. Government, however, reserves the right to make a correction in the recorded age of the Government servant at any time against the interest of that Government servant when it is satisfied that the age recorded in his service book or in the history of services of a gazette Government servant is incorrect and has been incorrectly recorded with the object that the Government servant may derive some unfair advantage therefrom.

(2) When a Government servant, within the period allowed, makes an application for the correction of his date of birth as recorded, an inquiry shall be made to ascertain his correct age and reference shall be made in all available sources of information such as certified copies of entries in the Municipal birth register, University or School age certificates, JANAMPATRI (horoscope) as the case may be. It should, however, be remembered that it is entirely discretionary on the part of the sanctioning authority to refuse or grant such application on being satisfied and no alteration should be allowed unless it has been satisfactorily proved that the date of birth as originally given by the applicant was a bona fide mistake and that

he has derived no unfair advantages therefrom. In case the matriculation certificate is available, the date of birth recorded in the certificate will be deemed to be the correct age.

(3) The result of every such inquiry should in the case of Gazetted/Non Gazetted Government servants be briefly stated in their service cards/service books and if correction is sanctioned, the fact should be reported to the Accountant General."

4. In ***(2020) 3 Supreme Court Cases 411 (Bharat Coking Coal Limited and others Versus Shyam Kishore Singh),*** the Hon'ble Apex Court held that request for change of date of birth in the service records at the fag end of service after accepting the same to be correct during service, cannot be entertained. Even if there is good evidence to establish that the recorded date of birth is erroneous, the correction cannot be claimed as a matter of right. Relevant paragraphs of the judgment read as under: -

"9. This Court has consistently held that the request for change of the date of birth in the service records at the fag end of service is not sustainable. The learned Additional Solicitor General has in that regard relied on the decision in the case of State of Maharashtra and Anr. vs. Gorakhnath Sitaram Kamble, wherein a series of the earlier decisions of this Court were taken note and was held as hereunder:

"16. The learned counsel for the appellant has placed reliance on the judgment of this Court in U.P. Madhyamik Shiksha Parishad v. Raj Kumar Agnihotri. In this case, this Court has considered a number of judgments of this Court and observed that the grievance as to the date of birth in the service record should not be permitted at the fag end of the service career.

17. In another judgment in State of Uttaranchal v. Pitamber Dutt Semwal relief was denied to the government employee on the ground that he sought correction in the service record after nearly 30 years of service. While setting aside the judgment of the High Court, this Court observed that the High Court ought not to have interfered with the decision after almost three decades.

* * *

19. *These decisions lead to a different dimension of the case that correction at the fag end would be at the cost of a large number of employees, therefore, any correction at the fag end must be discouraged by the court. The relevant portion of the judgment in Home Deptt.v. R. Kirubakaran reads as under:*

> *"7. An application for correction of the date of birth [by a public servant cannot be entertained at the fag end of his service]. It need not be pointed out that any such direction for correction of the date of birth of the public servant concerned has a chain reaction, inasmuch as others waiting for years, below him for their respective promotions are affected in this process. Some are likely to suffer irreparable injury, inasmuch as, because of the correction of the date of birth, the officer concerned, continues in office, in some cases for years, within which time many officers who are below him in seniority waiting for their promotion, may lose their promotion forever. … According to us, this is an important aspect, which cannot be lost sight of by the court or the tribunal while examining the grievance of a public servant in respect of correction of his date of birth. As such, unless a clear case on the basis of materials which can be held to be conclusive in nature, is made out by the respondent, the court or the tribunal should not issue a direction, on the basis of materials which make such claim only plausible. Before any such direction is issued, the court or the tribunal must be fully satisfied that there has been real injustice to the person concerned and his claim for correction of date of birth has been made in accordance with the procedure prescribed, and within the time fixed by any rule or order. … the onus is on the applicant to prove the wrong recording of his date of birth, in his service book."*

10. *This Court in fact has also held that even if there is good evidence to establish that the recorded date of birth is erroneous, the correction cannot be claimed as a matter of right. In that*

regard, in State of M.P. vs. Premlal Shrivas, it is held as hereunder;

"8. It needs to be emphasised that in matters involving correction of date of birth of a government servant, particularly on the eve of his superannuation or at the fag end of his career, the court or the tribunal has to be circumspect, cautious and careful while issuing direction for correction of date of birth, recorded in the service book at the time of entry into any government service. Unless the court or the tribunal is fully satisfied on the basis of the irrefutable proof relating to his date of birth and that such a claim is made in accordance with the procedure prescribed or as per the consistent procedure adopted by the department concerned, as the case may be, and a real injustice has been caused to the person concerned, the court or the tribunal should be loath to issue a direction for correction of the service book. Time and again this Court has expressed the view that if a government servant makes a request for correction of the recorded date of birth after lapse of a long time of his induction into the service, particularly beyond the time fixed by his employer, he cannot claim, as a matter of right, the correction of his date of birth, even if he has good evidence to establish that the recorded date of birth is clearly erroneous. No court or the tribunal can come to the aid of those who sleep over their rights (see Union of India v. Harnam Singh)

* * *

12. Be that as it may, in our opinion, the delay of over two decades in applying for the correction of date of birth is ex facie fatal to the case of the respondent, notwithstanding the fact that there was no specific rule or order, framed or made, prescribing the period within which such application could be filed. It is trite that even in such a situation such an application should be filed which can be held to be reasonable. The application filed by the respondent 25 years after his induction into service, by no standards, can be held to be reasonable, more so when not a feeble attempt was made to explain the said delay. There is also no substance in the plea of the respondent that since Rule 84 of the M.P. Financial Code does not prescribe the time-limit within which an application is to be filed, the

appellants were duty-bound to correct the clerical error in recording of his date of birth in the service book."

The above principles were reiterated by the Hon'ble Apex Court in (2021) 11 SCALE 110 (***Karnataka Rural Infrastructure Development Limited versus T.P. Nataraja and others),*** wherein after considering its previous pronouncements on the subject, the law on change of date of birth was summarized as under: -

"10. Considering the aforesaid decisions of this Court in law on change of date of birth can be summarized as under: -

(i) application for change of date of birth can only be as per the relevant provisions/ regulations applicable;

(ii) application can be rejected on the ground of delay and latches also more particularly when it is made at the fag end of service and/or when the employee is about to retire on attaining the age of superannuation.

11. Therefore, applying the law laid down by this Court in the aforesaid decisions, the application of the respondent for change of date of birth was liable to be rejected on the ground of delay and laches also and therefore as such respondent employee was not entitled to the decree of declaration and therefore the impugned judgment and order passed by the High Court is unsustainable and not tenable at law."

5. The above exposition of law is squarely applicable to the facts of the instant case. Petitioner had joined the service on 26.02.1983. At the time of joining the service, he had himself produced his matriculation certificate, on the basis of which, 01.03.1962 was entered as petitioner's date of birth in his service-book. That was also signed by the petitioner. The date of birth of the petitioner reflected in his matriculation certificate till date remains the same. Merely on the basis that in petitioner's birth certificate, his date of birth is recorded differently, his prayer for correcting date of birth in his service record

cannot be entertained at the fag end of his service. Such a course is even otherwise impermissible under the Fundamental Rules as well as the under H. P. Financial Rules.

Consequently, there is no merit in the present writ petition. The same is accordingly dismissed alongwith pending miscellaneous application(s), if any.

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

Saraswati & others ...Petitioner.

Versus

H.P. State Cooperative Marketing
& Consumer Federation Ltd. ...Respondent.

For the Petitioner : Mr.Jiya Lal Bhardwaj, Sr. Advocate with Mr.Raj Kumar Negi, Advocate.

For the Respondent: Ms. Rashmi Parmar, Advocate.

Execution Petition No. 42 of 2012
Decided on:07.01.2023

H.P. State Cooperative Societies Act, 1968- Sections 72, 73- Petition filed to implement judgment passed by single bench of High Court- **Held**- Decree passed by court at first instance merges in final stage of judgment/decree passed by higher courts in appeal or revision- Execution should be carried out according to HPSCS act and rules- Court of first instance is DRC and not writ court- Liberty to avail appropriate remedy- Petition dismissed as not maintainable. (Para 23)

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

This execution petition has been filed for implementation of judgment passed by Single Bench of this High Court on 3.4.2012 in CWP No. 5030 of 2010 and connected Writ Petitions, seeking certain directions to respondent to pay the emoluments strictly as per bills furnished by Liquidator vide letter dated 31.7.2012, by depositing the same in Registry of this Court.

2. Petitioners or their predecessor-in-interest (hereinafter referred as petitioners) were serving in Central Cooperative Consumers Store, Shimla, who were deployed as Salesmen/ Saleswomen at Public Distribution System of Super Bazar being run by HIMFED on management basis at Shimla.

3. Central Cooperative Consumer Store Ltd. Shimla went under liquidation and it had requested HIMFED to take services of petitioners for procurement and distribution of control articles vide letter dated 10.6.1994. HIMFED vide letter dated 18.6.1994 agreed to utilize 12 shops only for management purpose along with 18 workers (10 salesmen and 8 helpers) and relevant condition No.4 of letter dated 18.6.1994 reads as under:-

> "4. The workers employed in the running of these 12 shops will remain on your roll and Himfed will make payment of their salaries through you at the present pay scale being drawn by each worker."

4. Petitioners preferred petition under Section 72 of Himachal Pradesh Cooperative Societies Act, 1968 before the Registrar, H.P. State Cooperative Societies, who assigned the matter for adjudication to Deputy Registrar (Administration), Cooperative Societies (in short DRC). Claim of petitioners was that they were entitled for revised pay scale with all financial benefits. DRC vide order dated 26.7.2003 had held that petitioners were entitled to revised pay scale without arrears thereof.

5. HIMFED preferred an appeal before the Additional Secretary Cooperation (ASC) against the aforesaid order who decided the matter vide order dated 3.12.2005, which was assailed by HIMFED by filing CWP No. 272 of 2006 and vide order dated 21.6.2007 passed in the said Writ Petition, matter was remanded to ASC for fresh adjudication. ASC assigned the matter to Joint Secretary (Cooperation) who decided the appeal vide order dated 3.12.2007.

6. Order passed by Joint Secretary (Cooperation) was assailed by both, i.e. petitioners as well as HIMFED, by filing CWP Nos. 342 of 2008 and CWP No. 1001 of 2008 respectively. Both these petitions were dismissed vide order dated 3.4.2012 passed by Single Bench of this High Court.

7. In another set of litigation, dispute between petitioners and HIMFED was raised by petitioners before Conciliation Officer to the State Government under Industrial Disputes Act, which was referred to Industrial Tribunal-cum-Labour Court as Reference No. 32 of 2001, which was answered by Labour Court on 15.6.2010, whereby petitioners were held entitled for grant of pay scale, annual increments, additional dearness allowance, interim relief and other regular allowances admissible to them on the basis of revision of pay scales w.e.f. 1.1.1996.

8. The aforesaid award dated 15.6.2010 was assailed by HIMFED by filing CWP No. 5030 of 2010. The said petition was allowed by Single Bench of this High Court vide common order dated 3.4.2012 passed in CWP No. 5030 of 2010 along with CWP Nos. 342 of 2008 and 1001 of 2008 and Award dated 15.6.2010, under challenge in CWP No.5030 of 2010, was set aside, whereas order, under challenge in CWPs No.342 of 2008 and 1001 of 2008, passed by Joint Secretary (Cooperation) was upheld.

9. The aforesaid common judgment was assailed by HIMFED as well as employees union of petitioners by filing LPA No. 477 of 2012 titled H.P. State Cooperative Marketing and Consumers Federation Ltd. vs. Registrar Cooperative Societies and others; LPA No. 4053 of 2013 titled H.P. State Cooperative Marketing and Consumers Federation Ltd. vs. General Secretary, Pradhan Employees Union and others; and LPA No. 107 of 2015 titled General Secretary, Pradhan Employees Union vs. H.P. State Cooperative Marketing and Consumers Federation Ltd. and others.

10. Aforesaid LPAs were disposed of vide order dated 5.8.2015, on the basis of statement made by learned counsel for HIMFED at bar that

HIMFED was ready to do needful in terms of para 15 of impugned judgment, by directing the HIMFED to do needful and take follow up action accordingly within eight weeks from the date of passing of order.

11. Claiming non-implementation of order passed by Court, Union of petitioners preferred COPC No. 963 of 2015, which was dismissed by Division Bench vide order dated 6.3.2017 with following observations:-

> "16. From the aforesaid discussion, it is abundantly clear that the members of the petitioner-Union were never granted any benefit at par with the regular employees of the Federation and rather the writ petition (CWP No. 342 of 2008) filed by them was dismissed and the award passed by the learned Labour Court-cum-Industrial Tribunal in their favour was specifically set-aside in the writ petition filed by the Federation (CWP No. 5030 of 2010). Therefore, the members of the petitioner-Union cannot claim any benefit over and above to what they were held entitled to in para-15 of the judgment passed by learned Writ Court as affirmed by learned Division Bench in LPA No. 4053 of 2013 along with other connected cases.
>
> 17 Even otherwise, the petitioner has placed no material on record whereby it can be gathered that they are not being paid an amount as specifically undertaken by the respondents before the learned writ Court and before the learned Division Bench in LPA.
>
> 18. Having said so, we find no merit in this petition and accordingly, the notice issued to the respondent is ordered to be discharged. Petition stands disposed of."

12. Review Petition No. 27 of 2017, preferred by Union of petitioners against order dated 6.3.2017, passed in COPC No. 963 of 2015 was dismissed vide order dated 29th March, 2019 with observation that any execution preferred by Union of petitioners may be continued and shall be decided on merits in accordance with law uninfluenced of the fact of dismissal of contempt proceedings.

13. Present Execution Petition No. 42 of 2012 was preferred by petitioners, on 20.12.2012. Prior to this execution petition, petitioners had filed Execution Petition No. 33 of 2012 for executing the order passed in CWP

No. 342 of 2008, which was dismissed by the Court vide order dated 3.4.2012 and therefore, execution of order of dismissal passed against the petitioners was not maintainable.

14. Thereafter, petitioners have filed present Execution Petition No. 42 of 2012 with prayer to issue direction for implementation of order dated 3.4.2012, on the ground that passed in CWP No. 5030 of 2010 and connected Writ petitions.

15. CWP No. 5030 of 2010 was preferred by HIMFED and it was allowed and Award dated 15.6.2010 passed by Labour Court was set aside. Therefore, there is no Award in favour of petitioners in existence passed by Labour Court as said Award was set aside by Court in CWP No. 5030 of 2010. Therefore, Execution Petition preferred by petitioners to implement the order passed in CWP No.5030 of 2010 is meaningless and misconceived and, thus, is not maintainable.

16. So far as other petitions CWP Nos. 342 of 2008 and 1001 of 2008 are concerned, Execution Petition No. 33 of 2012 filed for execution of order passed in CWP No. 342 of 2008 was dismissed by this Court being not maintainable and CWP No. 1001 of 2008 was filed by HIMFED against order dated 3.12.2007 passed by Joint Secretary (Cooperation). The said petition was also dismissed vide order dated 3.4.2012, referred supra.

17. LPAs preferred by parties were disposed of on 5.8.2015 in terms of Para-15 of aforesaid judgment dated 3.4.2012, passed by Single Bench, which reads as under:-

> "15. The Joint Secretary (Cooperation) in his order dated 3.12.2007 has held the workmen, as noticed above, entitled to annual increments. However, he has denied the D.A. and A.D.A. etc. to the workmen at par with the regular employees of the federation. It is made clear by way of abundant precaution that the workmen will get the benefits, which were payable to the workmen on 18.6.1994. Rather, Mrs.Ranjana Parmar has undertaken at the Bar that the monetary benefits to which the

> workmen were entitled on 18.6.1994 will be paid to them. She has also stated that the workmen have also been paid Rs.1000/- due to rise in price index. There is merit in the contention of Mrs.Ranjana Parmar and Mr.K.D. Sood, Sr. Advocate that there was no master-servant relationship between the workmen and federation. The federation has merely agreed to help the workmen after the winding up proceedings were initiated. The Liquidator, legally speaking, could not order the federation to engage the workmen after the financial crises in the Central Cooperative Consumers Stores Limited (Supre Bazar), Shimla. The Workmen were being paid what was agreed as per letter dated 18.6.1994. There is neither any illegality or perversity or procedural impropriety in order dated 3.12.2007. The same is upheld."

18. In aforesaid para, learned Single Judge had upheld the order dated 3.12.2007 passed by Joint Secretary (Cooperation). The said order was passed by the said authority in appeal preferred against the order dated 26.7.2003 passed by DRC.

19. As per Section 38 of CPC the decree may be executed either by Court which passed it or by Court to which it is sent for execution.

20. Section 37 of CPC provides definition of 'Court which passed a decree'. The relevant portion of Section 37 CPC reads as under:-

> "37. Definition of Court which passed a decree-The expression "Court which passed a decree", or words to that effect, shall, in relation to the execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include,-
>
> (a) where the decree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first instance, and....."

21. Undoubtedly, the decree passed by "Court at first instance" merges in final stage of judgment/decree passed by Higher Courts in appeal or revision. In present case, appeal was decided by Joint Secretary (Cooperation) and Civil Writ Petition and LPA arising thereto were decided by Single Bench and Division Bench of this High Court. Therefore, order passed by DRC has merged in final order passed by this High Court.

22. In present case, Civil Writ Petition has not arisen from omission or commission or order passed by any other authority, on administrative side, but writ petition in present case was preferred against order which has been passed by Joint Secretary (Cooperation) exercising power of Appellate Authority under H.P. State Cooperative Act for adjudicating an appeal preferred against order passed by DRC under Section 72 of H.P. Cooperative Societies Act. Therefore, in present case, the Writ Court is not a "Court at first instance" but is a Court exercising writ jurisdiction under Articles 226 and 227 of Constitution of India, like other writ petitions preferred in the matters under Industrial Disputes Act against award passed by Labour Court-cum-Industrial Tribunal as well as in revenue matters wherein writ is preferred against the order passed by Financial Commissioner in the matters adjudicated by revenue authorities and in those cases "Court at first instance" is either Labour Court-cum-Industrial Tribunal or Assistant Collector or Collector under Revenue Act, as the case may, be and in such eventualities, execution in such matters shall lie either before Labour Court or Revenue Court being "Court at first instance".

23. In aforesaid facts, 'Court of first instance', in present case, is DRC, who had passed an order/Award under Section 73 after adjudicating the proceedings under Section 72 of the H.P. State Cooperative Societies Act, by exercising delegated powers of Registrar of Cooperative Societies. Therefore, execution of orders passed either in CWP No. 1001 of 2008 along with its connected petitions or in LPA No. 477 of 2012 or connected LPAs shall lie before Registrar, being 'Court of first instance', which has decided reference under Section 72 of H.P. State Cooperative Societies Act.

24. It is also apt to record that H.P. State Cooperative Societies Act is complete Code in itself, wherein, in Chapter-XI, provision for execution of Awards, Decrees, Orders and Decisions has been provided. Section 87 shall be relevant with reference to present matter, which reads as under:

"87-Execution of order:

(1) Every order made by the Registrar under section 69 or under section 86, every decision or award made under section 73 and every order made under section 93 or 94 shall, if not carried out, be executed according to the law and under the rules for the time being in force for recovery of arrears of land revenue:

Provided that an application for the recovery of any sum shall be made-

(i) to the collector and shall be accompanied by a certificate signed by the Registrar or by any person authorised by him in this behalf;

(ii) within twelve years from the date fixed in the order, decision or award and if no such date is fixed, from the date of order, decision or award.

(2) Any private transfer or delivery of or encumbrance or charge on, property, made or created after the issue of the certificate of the Registrar or any person authorised by him, as the case may be, under sub-section (1), shall be null and void as against the society on whose application the said certificate was issued."

25. Chapter-XI of the H.P. State Cooperative Societies Rules provides procedure for 'Execution of Decrees'.

26. In aforesaid facts and circumstances and provisions of law, I am of the considered opinion that execution in present case shall be in accordance with provisions of H.P. State Cooperative Societies Act and the Rules made thereunder, but certainly shall not be maintainable in present Court.

27. With aforesaid observations, present Execution Petition is dismissed with liberty to petitioners to avail appropriate remedy for redressal of their grievances, if still anything survives, and in such eventualities, delay

and latches or limitation shall not come in their way as they were pursing the present petition bonafide, under legal advice, in this Court.

28. Needless to say for prayer to condone the delay, petitioners have to file appropriate applications which shall be considered and decided by concerned authority in light of aforesaid observations entitling the petitioners to claim benefit of Section 5 of Limitation Act.

Petition stands disposed of, so also pending application(s), if any.

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

Roshni Devi ...Petitioner.

Versus

Deputy Commissioner Mandi & others ..Respondents.

For the Petitioner: Mr.Devender K. Sharma, Advocate, for the petitioner.

For the Respondents: Mr.Harinder Singh Rawat, Additional Advocate General, for respondents No.1 to 4.

Mr.R.L. Chaudhary, Advocate, for respondent No.5.

CMPMO No. 453 of 2020
Decided on: 06.01.2023

Limitation Act, 1963- Section 5- **ICDS Scheme/Guidelines**- Clause 12- Petition against rejection of appeal as time barred- Petitioner filed appeal one day after prescribed period- **Held**- Supreme Court order dated 23.03.2020 extended limitation period- Order dated 08.03.2021 excluded period from 15.03.2020 to 14.03.2021- Limitation period extended, whether condonable or not with respect to all kinds of proceedings before courts/tribunals/authorities- Such orders of the Supreme Court extended to all concerned authorities- Petitioner entitled to benefit of such orders- Petition allowed. (Para 8)

The following judgment of the Court was delivered:

Vivek Singh Thakur, J. (Oral)

Present petition has been preferred by the petitioner against return of appeal preferred by her under Clause 12 of ICDS Scheme/Guidelines issued for engagement of Anganwari Workers, on the ground that the said

appeal was filed after expiry of limitation period of 30 days provided for filing the appeal under the said Clause.

2. Petitioner and respondent No.5 had applied for the post of Anganwari Workers and after conducting interview respondent No.5 was declared to be selected on 15.09.2020. Petitioner had preferred an appeal on 16.10.2020, which according to the respondents, was barred by limitation, as there was delay of one day.

3. It has been claimed by the respondents that as held in CWP No.1949 of 2008, titled as *Hira Mani vs. Jaiwanti,* being a statutory authority, in terms of the Policy guidelines, the Appellate Authority does not have the power under Section 5 of the Limitation Act, to condone the delay, and as no such power is conferred in the guidelines for condonation of delay, Appellate Authority, cannot enlarge the time by condoning the delay in filing the appeal, and therefore, return of appeal by Appellate Authority has been justified.

4. It has further been argued on behalf of respondent No.5 that even otherwise, appeal was not accompanied by any application for condonation of delay, so as to entitle the petitioner to claim condonation of delay in filing present petition.

5. Learned counsel for the petitioner has submitted that interview was conducted during extra ordinary circumstances of COVID-19 pandemic and in those days there was either complete Lockdown or partial Lockdown imposing certain restrictions on regular activities of the citizens and for that reason only Supreme Court vide order dated 22.03.2020, passed in Suo Motu Writ Petition (Civil) No(s).3 of 2020, had extended limitation period w.e.f. 15.03.2020 till further orders to be passed by the Court and, further that, thereafter, vide order dated 08.03.2021, it was ordered by the Supreme Court that in computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 till 14.03.2021 shall stand excluded

and consequently, the balance period of limitation remaining as on 15.03.2020, if any, shall become available with effect from 15.03.2021.

6. Relevant portion of order dated 23.03.2020 reads as under:-

> "To obviate such difficulties and to ensure that lawyers/litigants do not have to come physically to file such proceedings in respective Courts/Tribunals across the country including this Court, it is hereby ordered that a period of limitation in all such proceedings, irrespective of the limitation prescribed under the general law or Special Laws whether condonable or not shall stand extended w.e.f. 15th March 2020 till further order/s to be passed by this Court in present proceedings.
>
> We are exercising this power under Article 142 read with Article 141 of the Constitution of India and declare that this order is a binding order within the meaning of Article 141 on all Courts/Tribunals and authorities."

7. Relevant portion of order dated 08.03.2021 reads as under:-

> "1. In computing the period of limitation for any suit, appeal, application or proceeding, the period from 15.03.2020 till 14.03.2021 shall stand excluded. Consequently, the balance period of limitation remaining as on 15.03.2020, if any, shall become available with effect from 15.03.2021.
>
> 2. In cases where the limitation would have expired during the period between 15.03.2020 till 14.03.2021, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 15.03.2021. In the event the actual balance period of limitation remaining, with effect from 15.03.2021, is greater than 90 days, that longer period shall apply.
>
> 3. The period from 15.03.2020 till 14.03.2021 shall also stand excluded in computing the periods prescribed under Sections 23(4) and 29A of the Arbitration and Conciliation Act, 1996, Section 12A of the Commercial Courts Act, 2015 and provisos (b) and (c) of Section 138 of Negotiable instruments Act, 1881 and any other laws, which prescribe period(s) of limitation for instituting proceedings, outer limits (within which the court or tribunal can condone delay) and termination of proceedings."

8. On perusal of above referred orders passed by the Supreme Court, it is unambiguously clear that the said orders were also extended to all concerned authorities, and limitation period prescribed in all such proceedings irrespective of limitation prescribed under the General Law or Special Laws, whether condonable or not, were extended by the Supreme Court with respect to all kinds of proceedings to be adjudicated either before the Courts or Tribunals or Authorities.

9. In view of above, petitioner is also entitled for benefit of aforesaid orders passed by the Supreme Court. Therefore, appeal preferred by her is to be considered within limitation and, therefore, petitioner is permitted to present the petition/appeal before concerned authority on or before 20.01.2023 and if petitioner presents he appeal before the concerned authority on or before 20.01.2023, the same shall be considered and to have been filed on 16.10.2020, as petitioner had filed the same before the Appellate Authority on that day.

10. Present petition was filed in this Court on 04.12.2020 i.e. before 14.03.2021 and, therefore, period from 20.04.2020 till 20.01.2023 spent for agitating her cause deserves to be extended.

11. Therefore, in terms of order dated 08.03.2021 passed by the Supreme Court, on presentation of appeal on or before 20.01.2023, the same shall be considered to have been filed within limitation period.

12. It is made clear that this Court has not made any observation on merits of the appeal preferred by the petitioner and on filing same, the same shall be considered and adjudicated by concerned authority on its own merit, in accordance with law.

13. Petition is allowed and disposed of in aforesaid terms, so also pending application(s), if any.

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

State of Himachal Pradesh .....Applicant/appellant

Versus

Vinod Kumar ...Respondent

For the applicant: Mr. Rajinder Dogra, Sr. Addl. A.G with Mr. Vinod Thakur and Mr. Shiv Pal Manhans, Addl. A.G and Mr. J.S. Guleria, Dy. A.G.

For the respondent: *Nemo.*

Cr.M.P(M) No. 1514 of 2022
Reserved on: 30.11.2022
Decided on: 10.01. 2023

Code of Criminal Procedure, 1973- Section 378- Special leave to appeal- **Indian Penal Code, 1860**- Sections 451, 354, 378- Applicant-State has sought the permission to assail the judgment of acquittal dated 01.04.2022 passed by Ld. Additional Sessions Judge, Sarkaghat, District Mandi (H.P.)- Held:-

A. It is no longer *res-integra* that the conviction in such type of cases can solely be based upon the sole statement of the prosecutrix, if inspires confidence- The term "if inspires confidence" puts the Courts on caution that before accepting the sole statement of the prosecutrix, the judicial conscience of the Court must be satisfied that the statement of the prosecutrix inspires confidence- The prosecutrix is not an illiterate lady and she has changed her version at different stages of the case.

B. Where, in an appeal against acquittal, two views are possible, the view taken by the Trial Court, is liable to be upheld- Leave to appeal is declined. (Paras 14, 15, 16)

Cases referred:

Allarakha K. Mansuri v. State of Gujarat, 2002(1) RCR (Criminal) 748;
Mrinal Das & others v. State of Tripura, (2011) 9 SCC 479;

The following judgment of the Court was delivered:

Virender Singh, Judge

By way of present application, the applicant-State has sought the permission to assail the judgment of acquittal dated 01.04.2022 passed by the learned Additional Sessions Judge, Sarkaghat, District Mandi, H.P. (hereinafter referred to as the 'learned trial Court') in Sessions Trial No. 29/21/14.

2. By way of judgment of acquittal, the learned trial Court has acquitted the respondent (hereinafter referred to as the 'accused') for the offence punishable under Sections 451, 354, 354A & 376 of the Indian Penal Code.

3. The requisite leave to appeal has been sought on the grounds that the applicant is having a good and arguable case and there is every possibility that the appeal filed by the State will be accepted by this Court. The judgment of acquittal is also stated to be against the law and facts on record and the same has been passed by the learned Additional Sessions Judge on surmises and conjectures.

4. On all these submissions, a prayer has been made to allow the application, by granting leave to appeal against the judgment of acquittal.

5. Record has been perused.

6. The prosecution story, as divulged from the record, is that on 28.01.2018 at about 7.00 p.m. in village Kango-ka-Galu, Tehsil Sarkaghat, the accused allegedly committed the house trespass and requested the prosecutrix to remove her clothes. He kissed her. When the prosecutrix refused to dance on the tunes of the accused, then he i.e. accused had left the spot. The prosecutrix, thereafter, reported the matter to the police. On 29.01.2018, the

prosecutrix, made another application alleging rape against accused. After the completion of the investigation, the police has filed the charge-sheet against the accused for the commission of offence punishable under Section 376, 451, 354 and 354A IPC. On the basis of report under Section 173(2) Cr.P.C., the learned trial Court charge-sheeted the accused, accordingly, on 23.06.2018.

7. Thereafter, the prosecution was directed to adduce evidence. Consequently, the prosecution has examined as many as 13 witnesses.

8. The learned trial Court has passed the judgment of acquittal, after concluding that the evidence of PW-1, PW-2 and PW-9 is not confidence inspiring.

9. The prosecutrix, when appeared in the witness box, has deposed that on 27.01.2017 when she was present in her house, then accused came there and offered her Pakoda and toffees. When she had refused to eat those articles and went inside her room, then accused pushed her, removed her salwar and ravished her. Whereas, in the complaint Ext. PW-2/A, she has disclosed that on 28.01.2018 at about 7.00 p.m. when accused came to her house, at that time, her mother-in-law was not in the house and the accused had teased her and kissed her. The accused allegedly requested/directed the prosecutrix to remove her clothes. On the refusal of the prosecutrix, he had left the place.

10. On the basis of above facts, the learned trial Court has held that the statement of the prosecutrix is entirely inconsistent with the report lodged with the police. Highlighting the fact that the prosecutrix, in her cross-examination, has admitted that the application Ext.PW-2/C was written in the police station by the police official, as such, the learned trial Court has held that there are material contradictions and the evidence of the prosecutrix has been stated to be unbelievable.

11. Perusal of the statement of prosecutrix recorded under Section 154 Cr.P.C Ext. PW-2/A shows that the prosecutrix had got recorded that on

28.01.2018 at about 7.00 p.m. when she was present in her house, then accused came there and started teasing her. According to her further deposition, accused kissed her and requested her to remove her clothes. At that time, her mother-in-law was not present. According to the prosecutrix, when she had refused to accept his request, then accused left the spot. Thereafter, she had disclosed this fact to her husband on phone.

12. Admittedly, no allegation with regard to alleged "ravishment" has been leveled in the statement recorded under Section 154 Cr.P.C. The prosecutrix is not an illiterate as in her opening line of examination-in-chief, she has stated that she had completed her 2nd year of graduation from Government College, Nalagarh. In such a situation, the omission with regard to material facts regarding the alleged ravishment in her statement, recorded under Section 154 Cr.P.C., has rightly been considered by the learned trial Court. The improved version given by the prosecutrix has rightly been discarded by the learned trial Court.

13. Another fact, which is borne out from the record, is that the alleged incident had taken place on 28.01.2018, whereas, in the deposition on oath, she has disclosed that the incident had happened on 27.01.2017. In such a situation, this Court is of the view that the prosecutrix herself had not approached to the police with true facts and she had changed her version at different stages.

14. It is no longer *res-integra* that the conviction in such type of cases can solely be based upon the sole statement of the prosecutrix, if inspires confidence. The term "if inspire confidence" put the Courts on caution that before accepting the sole statement of the prosecutrix, the judicial conscience of the Court must be satisfied that the statement of the prosecutrix inspires confidence.

15. As stated above, the prosecutrix is not an illiterate lady and she has changed her version at different stages of the case. In the statement

recorded under Section 154 Cr.P.C, she has not leveled allegations against the accused with regard to her alleged ravishment by the accused. Admittedly, the prosecutrix, at that time, was accompanied by her parents. The prosecutrix thereafter moved another application on 29.01.2018 Ext. PW-2/C, alleging the fact that the accused had ravished her on 28.01.2018. The reason for non-disclosure of this material fact has been mentioned in the complaint as under:-

> *"Last day, I could not mention this fact due to social embrassement."*

Whereas, no such fact has been got recorded by her in statement recorded, under Section 164 Cr.P.C., Ext. PW-2/B. The prosecutrix, when appeared in the witness box had changed the date of incident as 27.01.2018, instead of 28.01.2018 and also made a futile attempt to explain the factum of non-mentioning of material fact, regarding her alleged ravishment by the accused, in her statement recorded, under Section 154 Cr.P.C., by stating that her condition, at that time, was not good. From the above reasons, this Court is in full agreement with the findings recorded by the learned trial Court.

16. It is settled proposition of law that where, in an appeal against acquittal, two views are possible, the view taken by the trial Court, is liable to be upheld. It has been held so by the Hon'ble Supreme Court in ***Allarakha K. Mansuri v. State of Gujarat, 2002(1) RCR (Criminal) 748***.

17. The Hon'ble Supreme Court in ***Mrinal Das & others*** v. ***State of Tripura, (2011) 9 Supreme Court Cases 479***, has elaborately discussed the powers of the Court to interfere in the judgment of acquittal. The relevant paras of 13 and 14 of the judgment are reproduced as under:

> *"13) It is clear that in an appeal against acquittal in the absence of perversity in the judgment and order, interference by this Court exercising its extraordinary jurisdiction, is not warranted. However, if the appeal is heard by an appellate court, being the final court of fact, is fully competent to re-appreciate, reconsider and review the evidence and take its*

own decision. In other words, law does not prescribe any limitation, restriction or condition on exercise of such power and the appellate court is free to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused. The presumption of innocence is available to the person and in criminal jurisprudence every person is presumed to be innocent unless he is proved guilty by the competent court. If two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal.

14. There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is found and to come to its own conclusion. The appellate court can also review the conclusion arrived at by the trial Court with respect to both facts and law. While dealing with the appeal against acquittal preferred by the State, it is the duty of the appellate court to marshal the entire evidence on record and only by giving cogent and adequate reasons set aside the judgment of acquittal. An order of acquittal is to be interfered with only when there are "compelling and substantial reasons", for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference. When the trial Court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts etc., the appellate court is competent to reverse the decision of the trial Court depending on the materials placed."

18. Judging the facts and circumstances of the present case, in the light of the decision of the Hon'ble Supreme Court in *Mrinal Das's* case (supra), this Court is of the view that the learned trial Court has taken the view, which is possible one, according to the facts and circumstances of the case. Hence, requisite leave to appeal is liable to be declined.

19. Consequently, no ground for grant of leave to appeal is made out. As such, the application under consideration is dismissed.

Record of trial Court be sent back.

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

Parmila Thakur & another ...Petitioners.

Versus

State of Himachal Pradesh & another ..Respondents.

For the Petitioner: Mr.Naresh K. Sharma, Advocate.

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

Cr.MMO No.524 of 2019
Decided on: 23.12.2022

Code of Criminal Procedure, 1973- Section 482- Quashing of FIR- **Scheduled Caste & Scheduled Tribe (Prevention of Atrocities) Act, 1989**- Section 3(1)(r)(s)(u)- Alleged use of term *harijan* in defamatory manner- Argued that word used was in reference to specific locality *harijan basti*- **Held**- Investigation concluded no offence and submitted closure report- evidence including copy of muster roll, estimate/assessment of work maintained by development block relied upon- FIR quashed with direction to special judge to accept closure report- Petition allowed. (Para 7)

The following judgment of the Court was delivered:

Vivek Singh Thakur, J (oral)

Present petition has been filed by the petitioners under Section 482 of the Code of Criminal Procedure (hereinafter referred to as 'Cr.PC'), for quashing of FIR No.201 of 2019, dated 30.08.2019, registered in Police Station Sadar, District Bilaspur, H.P., under Section 3(1)(r)(s)(u) of the Scheduled Caste & Scheduled Tribe (Prevention of Atrocities) Act (hereinafter referred to as 'SC & ST Act').

2. Notices were issued to private respondents, including complainant-respondent No.2, who did not opt to come forward to contest the petition.

3. Reply was filed on behalf of respondent No.1-State. Record was also made available. Fresh status report with respect to trial has also been filed.

4. Perusal of FIR shows that complaint was lodged against petitioners on the ground that in a Press Conference petitioners had stated that residents of 'Harijan Basti' were filing false atrocity cases which was completely untrue and the petitioners used word 'Harijan' which was defamatory for entire Bahujan Samaj. It has been further stated that using of word 'Harijan' has been declared unconstitutional since 1982 and using it, is an offence.

5. Stand of the petitioners is that they did not utter any word much less 'Harijan' to cause intentional insult or intimidation with intent to humiliate any member of Scheduled Caste within public view or to abuse any member of Scheduled Caste by caste name within public view or promote or attempt to promote feelings of enmity, hatred or ill-will against members of Scheduled Caste. It is further case of the petitioners that they used word 'Harijan Basti' denoting name of sub-Village wherefrom road was crossing and the said name has also been recorded as such in the Government documents of Government Department. To substantiate their claim, communication sent from Deputy Commissioner to Block Development Officer, Ghumarwin, District Bilaspur, H.P., dated 09.07.2012, regarding release of Scheme's sanctioned amount under VKVNY for the year 2012-13 has been referred, wherein at Sl.No.4 amount of `25000/- has been allotted to Gram Panchayat Bhapral for public path at Village Bani from the house of Durga Dass towards 'Harijan Basti'. Copy of Muster Roll, Estimate/Assessment of work being maintained by Development Block Ghumarwin of Rural Department of

Himachal Pradesh has also been relied upon to substantiate plea of the petitioners, wherein word 'Harijan Basti' has been used to denote name of sub-Village to which public path was being constructed.

6. In the fresh status report filed by respondent No.1-State, it has been stated that investigation in present case has been completed with conclusion that no case is made out as alleged in the FIR.

7. It has been stated in the status report that on investigation, considering statements of the witnesses, going through the CD of interview or other available record, it has been found that petitioners did not use word 'Harijan' with intention to harm reputation of any person or any section of society, but they used the word 'Harijan Basti' according to the documents related to the construction of road from Bani to 'Harijan Basti' and, therefore, no offence as alleged has been made out and, thus, closure report has been submitted in the Sessions Court/Court of District and Sessions Judge-cum-Special Judge, Bilaspur, H.P. on 31.10.2019, which has been listed on 11.01.2023 for proper order.

8. In aforesaid facts and circumstances, I find that there is substance in the petition filed by the petitioners. Taking into consideration relevant provisions of the Law especially SC & ST Act, I concur with cancellation report filed by the police.

9. Accordingly, FIR No.201 of 2019, dated 30.08.2019, registered in Police Station Sadar, Bilaspur, H.P., is quashed and set aside with further direction to the Special Judge, Bilaspur, to accept closure report and dispose of the matter accordingly.

10. Petition stands disposed of in above terms, so also pending application(s) if any.

11. Parties are permitted to produce/use copy of this order, downloaded from the web-page of the High Court of Himachal Pradesh, before the trial Court/authorities concerned, and the said Court/authorities shall not

insist for production of a certified copy but if required, may verify it from Website of the High Court.

BEFORE HON'BLE 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- Writ of mandamus directing respondents to follow reservation roster while promoting individuals to the post of Block Elementary Education Officer-Separate zones of consideration for promotion of SC/ST candidates- Petitioner appointed as junior basic trained teacher, promoted as center head teacher- Assertion made as to entitled to promotion to post of block elementary education officer and vacancies be filled based on separate rosters for each category- **Held**- For regular promotions, the zone of consideration is determined based on the number of vacancies to be filled- Reservation quota in SC category does not get filled if SC candidate selected to general vacancies based on merit- Promotion of SC category candidates cannot be considered only against reserved category posts- Petition dismissed. (Para 5)

Cases referred:

R.K. Sabharwal & Ors Vs. State of Punjab (1995) 2 SCC 745;
Shyam Lal Vs. HPSEB 2012(3) ShimLC 1770;
P. Sheshadri Vs. Union of India (1995) 3 SCC 552;

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 t*o* 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 MS. JUSTICE JYOTSNA REWAL DUA, J.

Mahi Pal ...Petitioner.

Versus

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

For the petitioner : Mr. Nishant Khidtta, Advocate.

For the respondents : Mr. Pranay Pratap, Additional Advocate General.

CWPOA No. 7863/2019
Decided on: 05.01.2023

Constitution of India, 1950- Article 226- Appointment on compassionate grounds- Applied for clerk position on compassionate ground but appointed as *Beldar*- Order appointing petitioner as clerk withdrawn by authorities- **Held**- Directed relevant authority to reconsider the petitioner's case, taking into account the 9 years long tenure as a clerk and overall circumstances- Interim order staying previous decision remains in force until new decision is made- Petition disposed. (Para 4)

Cases referred:

State of Uttar Pradesh and others Vs Premlata 2022(1) SCC 30;

The following judgment of the Court was delivered:

***Jyotsna Rewal Dua* , J**

Petitioner was employed on compassionate basis as daily wage Beldar on 7.3.2006. He was regularized as such on 6.9.2013. On 7.8.2015, respondent No.2 in purported compliance to an order passed by the Administrative Tribunal ordered for retrospective compassionate appointment of petitioner as Clerk (daily wage) w.e.f. 7.3.2006 and on regular basis w.e.f. 7.9.2013. Petitioner started working as Clerk. The order dated 7.8.2015 was withdrawn by the respondents on 8.6.2016. The operation of order dated 8.6.2016 was stayed in this case on 1.7.2016. Petitioner who continues to

serve as clerk has assailed order dated 8.6.2016 and has further prayed to allow him to continue to serve as clerk.

2. **The facts** are not in dispute:-

2(i) Petitioner's father was appointed as Pipe Fitter Grade-I with the respondent-department on 20.12.1990. He died in harness on 16.07.2000. The petitioner became a matriculate in the year 2003. He obtained 10+2 qualification in the year 2005.

2(ii) After attaining the age of majority, the petitioner applied for compassionate appointment to the post of clerk on 21.07.2004 (Annexure A-1). His case was recommended by respondent No.2 to respondent No.1 vide office letter dated 7.11.2005 (Annexure A-2).

2(iii) On 6.3.2006 (Annexure R-I), petitioner requested respondent No.3 to appoint him on compassionate basis as Beldar on daily-wage basis. Petitioner's request was accepted and he was offered compassionate employment as daily-wage Beldar vide order dated 7.3.2006 (Annexure R-II). The petitioner accepted the post and joined as such. He was regularized as Beldar on 06.9.2012 (Annexure R-III).

2(iv) Petitioner made a representation to the respondent-department on 18.9.2012 requesting to appoint him to the post of clerk. The application was made on the ground that he had applied for employment on compassionate basis as per the Policy prevailing in the year 2004. The petitioner was eligible for the post of clerk as per Policy prevailing at the relevant time. But instead of appointing him to the post of clerk w.e.f. 7.3.2006, the respondent-department had offered him the post of Beldar. Respondent No.3 considered petitioner's application and on 20.09.2012 (Annexure P-5), recommended reviewing petitioner's case to respondent No.2 for the post of clerk retrospectively. Recommendation made by respondent No.3 did not find favour with the Chief Engineer (SZ) IPH Department, who vide office letter dated 1.8.2013 (Annexure A-6) rejected the case for the

reason that "post once accepted by the petitioner on compassionate ground cannot not be changed in view of covering instruction of the Department of Personnel Office Memorandum No.Per(AP-II)f(4)/89dated 18.01.1990 Para-11".

2(v) The respondent's decision dated 01.08.2013 (Annexure A-6) was assailed by the petitioner in CWP No. 2626/2014 (***Mahi Pal Vs. State of H.P. & Ors***). It was submitted by the petitioner in the said petition that his case was covered by a judgment dated 22.11.2012 rendered in CWP No. 9945/2012 (***Naresh Kumar Vs. State of H.P. & Ors***). It was also brought to the notice of the Court that Special Leave Petition assailing the decision in ***Naresh Kumar's case*** supra had been dismissed by the Hon'ble Supreme Court on 16.12.2013 (Annexure A-10). Accordingly, petitioner's CWP No.2626/2014 was decided on 11.09.2014 (Annexure A-8) with the following directions:-

> *"5. As such, leaving all other questions of law open, we dispose of the present petition with the following directions:-*
>
> *(i) The respondents shall consider and decide the petitioner's case in the light of judgment rendered in Naresh Kumar (supra);*
>
> *(ii) Liberty is reserved to the petitioner to place additional material before the appropriate authority;*
>
> *(iii) The question of petitioner's entitlement, in accordance with law, shall be considered by the authorities;*
>
> *(iv) The decision shall be taken by the competent authority within a period of three months, from the date of production of certified copy of this order, by affording due opportunity of hearing / representation to all concerned, including the petitioner and*
>
> *(v) Also the authorities shall pass a reasoned order, which shall be communicated to the petitioner."*

At this juncture, it would be appropriate to take note of the judgment passed on 22.11.2012 in CWP No.9945/2012 ***(Naresh Kumar Vs. State of H.P. & Anr***) (Annexure A-9), which reads as under:-

"The writ petition is filed with the following prayer:-

"i) Issue writ of mandamus with directing the respondent-department to consider the case of the petitioner for appointment as daily waged clerk i.e. lowest grade of Class-III post."

2. According to the petitioner, on the date of his appointment on compassionate basis as Class-IV vacancies were available in Class-III.

3. In several judgments, this Court has made it clear that the appointment on compassionate basis necessarily need not be in Class-IV, if an incumbent is qualified and in case there is vacancy available, the appointment has to be made in the lowest grade of Class-III post. There will be a direction to the second respondent/competent authority to examine the case of the petitioner and in case, there was vacancy available in the lowest grade of Class-III post on the date of appointment of the petitioner as Class-IV, the petitioner shall be forthwith appointed in the lowest grade of Class-III.

4. With the aforesaid observations, the writ petitioners stands disposed of, so also the pending application(s), if any."

In light of directions dated 11.09.2014 issued in CWP No.2626/2014 ***(Mahi Pal Vs. State of H.P. & Ors)***, the respondent-department considered the case of the petitioner and observed that the petitioner was offered appointment as Beldar on 6.3.2006, which he accepted and joined as such on 07.03.2006. The petitioner had continued to serve as Beldar. Therefore under the Policy, his appointment cannot be changed from Class-IV to Class-III after a gap of 8 years. The claim of the petitioner for change in the category of the post on which he was given compassionate employment was hopelessly time barred. The order rejecting the case of the petitioner was passed by respondent No.3 on 06.02.2015 (Annexure A-11).

2(vi) Petitioner again represented to respondent No.3 on 19.3.2015 (Annexure P-13) seeking to review the order dated 06.02.2015, whereby his case was rejected by respondent No.3. In this third round, respondent No.3 recommended to respondent No.2 on 23.3.2015 (Annexure A-14) for

reviewing the compassionate employment case of the petitioner in accordance with the judgment rendered in CWP No.9945/2012 ***(Naresh Kumar Vs. State of H.P. & Anr)***. In the meanwhile, the petitioner preferred Original Application No. 1021/2015, before the erstwhile H.P. Administrative Tribunal. The said original application was decided on 21.05.2015 (Annexure A-19). The original application was taken up for disposal after dispensing the requirement of filing of replies. On behalf of the petitioner, it was stated that petitioner's case was covered by the judgment dated 22.11.2012 delivered in CWP No. 9945/2012 ***(Naresh Kumar Vs. State of H.P. & Ors).*** Taking note of the submissions, the learned Tribunal disposed of the original application with a direction to the respondent-competent authority that subject to the verification of records and on finding the petitioner to be similarly situate, the benefit of the said judgment shall also be extended to the petitioner with all consequential benefits.

2(vii) Respondent No.3 thereafter considered the entire matter afresh and vide order dated 7.8.2015 (Annexure A-21) ordered appointment of the petitioner as clerk on daily-wage basis w.e.f. 7.3.2006 and on regular basis w.e.f. 7.9.2013. The operative part of the order reads as under:-

> *"Hence, based upon the above admitted position and direction of the Hon'ble High Court and the Hon'ble Himachal Pradesh Administrative Tribunal at Shimla, it shall be in the fitness of things, being legal and proper that the petitioner may also be appointed as Clerk on daily wages basis @ Rs.89/- per day with effect from 7.3.2006. However, the petitioner shall not be entitled for arrears on account retrospective daily wages appointment as Clerk instead of Daily waged beldar and it shall be strictly on notional basis. Consequently, he shall be considered as regular clerk w.e.f. 7.9.2013 against vacancy in IPH Circle Nahan in the pay scale of Rs.5910-20200 + GP Rs.1900, initial start of Rs.7810/-."*

The above order passed by respondent No.3 was not accepted by the higher authority. On 23.06.2016 (Annexure A-23), respondent No.1 directed respondent No.2 that the order dated 7.8.2015 was passed without the approval of competent authority and wrongly gave Class-III post (clerk) to the petitioner, hence be rescinded. Consequently, respondent No.3 on 28.06.2016 (Annexure A-22) withdrew the office order dated 7.8.2015.

It is in the above background that the petitioner has preferred the instant writ petition seeking the following substantive reliefs:-

> *"(i) That the impugned orders 28.06.2016 (Annexure A-22) and order dated 23.06.2012 (Annexure A-23) may kindly be quashed and set aside being illegal and the office order dated 07.08.2015 passed by respondent No.3 may kindly be upheld.*
> *(ii) That the respondents may kindly be directed to allow the applicant to continue working as clerk in the office of the respondent No.3."*

Interim order dated 1.7.2016 passed in this petition stayed the operation of impugned order dated 28.06.2016 (Annexure A-22). Petitioner is presently serving as Clerk.

3. Contentions

Learned counsel for the petitioner contended that respondent No.3 had rightly passed the order dated 7.8.2015 (Annexure A-21) appointing the petitioner as Clerk retrospectively w.e.f. 7.3.2006 and regularizing him as such w.e.f. 7.9.2013. This was in view of the fact that the petitioner had possessed the qualifications required for appointment as clerk at the time of his initial appointment as Beldar. The petitioner was wrongly offered the appointment on compassionate basis as Beldar on 7.3.2006. In view of the Policy prevailing at that relevant time, the petitioner ought to have been appointed on Class-III post i.e. clerk. The error in his appointment had been rectified by respondent No.3 by issuing office order dated 7.8.2015. The said office order was also in consonance with the directions issued in CWP No.

2626/2014 ***(Mahi Pal Vs State of H.P. & Ors***) decided on 11.09.2014. In the said case, respondents were directed to decide petitioner's case in light of the judgment rendered in ***Naresh Kumar's case (supra)***. Petitioner's case was similar to that of Naresh Kumar. In compliance to judgment passed in Naresh Kumar's case supra, said Naresh Kumar in view of his qualification was eventually appointed against Class-III post. However, similar treatment was denied to the petitioner. The respondent-department had earlier wrongly rejected the case of the petitioner for appointment to the post of clerk vide office order dated 6.2.2015. This compelled the petitioner to institute OA No. 1021/2015. The directions issued in this original application on 21.05.2015 were implemented by respondent No.3 by passing order on 7.8.2015, whereby the petitioner was ordered to be appointed as Clerk on daily-wage basis w.e.f. 7.3.2006 and regularized w.e.f. 7.9.2013. In terms of this order, the petitioner was not to be paid any arrears on account of his retrospective appointment as clerk. The said appointment was to be only on notional basis w.e.f. 7.3.2006. He was to be considered as regular clerk w.e.f. 7.9.2013 against vacancy in I&PH Circle Nahan.

Opposing the writ petition, learned Additional Advocate General submitted that the order dated 7.8.2015 was not correct in law. It was passed by respondent No.3, who was not competent to pass such order. It was for that reason that the Special Secretary (IPH) had sent communication dated 23.6.2016 to respondent No.2 to rescind the order dated 7.8.2015 issued by respondent No.3, pursuant to which, by issuing office order dated 28.6.2016 (Annexure A-22), respondent No.3 had withdrawn its earlier passed order dated 7.8.2015. It was further submitted that the judgment in *Naresh Kumar's case* was based upon facts of that case and cannot be straightway applied to the facts of the instant case. Learned Additional Advocate General placed reliance upon certain decisions of the Hon'ble Supreme Court in

support of his contention that the petitioner was not entitled for compassionate employment to the post of clerk.

4 Observations

4(i) The case record shows that the petitioner had applied for compassionate appointment on 21.7.2004 against the post of clerk. It is an admitted case of the parties that at that stage petitioner was only a matriculate. It is pleaded case of the petitioner that he passed 10+2 examination during the year 2005. It is also borne out from the record that the petitioner had himself requested the respondents on 6.6.2006 for employing him on compassionate basis against the post of Beldar. The respondent-department had accordingly appointed the petitioner on compassionate basis as Beldar on daily-wage basis vide order dated 7.3.2006. The petitioner accepted the offer and joined as Beldar. The record also shows that the petitioner was even regularized as Beldar on 6.9.2012.

4(ii) Seven years after petitioner's compassionate appointment as Beldar on daily wage basis and after his regularization as Beldar, the petitioner moved a representation to the respondent-department seeking his appointment as clerk on compassionate ground w.e.f 7.3.2006. His case was rejected by the Chief Engineer (SZ) IPH Department on 1.8.2013. The decision dated 1.8.2013, though was not interfered with by this Court while deciding petitioner's Writ Petition No.2626/2014, however, respondent No.3 was directed to examine the case of the petitioner in light of the judgment dated 22.11.2012 rendered in ***Naresh Kumar's case (supra)***. In compliance thereto, respondent No.3 considered the case of the petitioner and vide office order dated 6.2.2015 turned down petitioner's prayer. The petitioner now filed an OA No. 1021/2015, before the erstwhile H.P. Administrative Tribunal. The Tribunal vide order dated 21.05.2015 again directed the respondent-department to decide the case of the petitioner in light of the judgment passed in ***Naresh Kumar's case (Supra).*** This time respondent No.3 decided the

case in favour of the petitioner and on 7.8.2015 ordered for his appointment as clerk retrospectively w.e.f. 7.3.2006. The petitioner was also to be considered as regular clerk in terms of this order w.e.f. 7.9.2013 against the vacancy in IPH Circle Nahan.

4(iii) According to the reply filed by respondents No.1 to 3, respondent No.3 was not competent to allow the claim of the petitioner for his appointment as clerk that too retrospectively w.e.f 7.3.2006 and to consider him as a regular clerk w.e.f. 7.9.2013. As per the reply, the order passed by respondent No.3 on 7.8.2015 was without jurisdiction. The competent authority to pass such order was the Finance Department. Be that as it may.

4(iv) In ***2022(1) SCC 30 (State of Uttar Pradesh and others Vs Premlata)***, 'Dying-In-Harness Rules 1974' on compassionate ground appointment in State of Uttar Pradesh were under consideration. Rule 5 of these rules provided for appointment on compassionate grounds on 'suitable post'. Hon'ble Apex Court considered various precedents in time line relating to appointment on compassionate ground. It was reiterated that appointment on compassionate ground offered to a dependent of a deceased employee is an exception to norms of providing equal opportunity to all aspirants in Government vacancies mandated under Articles 14 & 16 of the Constitution. The compassionate ground is a concession and not a right. The interpretation given by the High Court that 'suitable post' would mean any post suitable to the qualification of the candidate irrespective of the post held by the deceased employee, was held to be defeating the object and purpose of appointment on compassionate ground. Compassionate appointment to higher post than held by deceased employee cannot be granted as matter of right on ground that dependent is eligible for such higher post. Following was held by the Hon'ble Apex Court:-

> *"10.2 The Division Bench of the High Court in the present case has interpreted Rule 5 of Rules 1974 and has held that 'suitable*

post' under Rule 5 of the Rules 1974 would mean any post suitable to the qualification of the candidate irrespective of the post held by the deceased employee. The aforesaid interpretation by the Division Bench of the High Court is just opposite to the object and purpose of granting the appointment on compassionate ground. 'Suitable post' has to be considered, considering status/post held by the deceased employee and the educational qualification/eligibility criteria is required to be considered, considering the post held by the deceased employee and the suitability of the post is required to be considered vis a vis the post held by the deceased employee, otherwise there shall be no difference/distinction between the appointment on compassionate ground and the regular appointment. In a given case it may happen that the dependent of the deceased employee who has applied for appointment on compassionate ground is having the educational qualification of ClassII or ClassI post and the deceased employee was working on the post of Class/Grade IV and/or lower than the post applied, in that case the dependent/applicant cannot seek the appointment on compassionate ground on the higher post than what was held by the deceased employee as a matter of right, on the ground that he/she is eligible fulfilling the eligibility criteria of such higher post. The aforesaid shall be contrary to the object and purpose of grant of appointment on compassionate ground which as observed hereinabove is to enable the family to tide over the sudden crisis on the death of the bread earner. As observed above, appointment on compassionate ground is provided out of pure humanitarian consideration taking into consideration the fact that some source of livelihood is provided and family would be able to make both ends meet.

10.3 In the present case as observed hereinabove initially the respondent applied for appointment on compassionate ground on the post of Assistant Operator in Police Radio Department. The same was not accepted by the Department and rightly not accepted on the ground that she was not fulfilling requisite eligibility criteria for the post of Assistant Operator. Thereafter the respondent again applied for appointment on the compassionate ground on the post of Workshop Hand. The case of the respondent was considered, however, she failed in the physical test examination, which was required as per the relevant recruitment rules of 2005. Therefore, thereafter she was offered appointment on compassionate ground as Messenger which was equivalent to the post held by the deceased employee. Therefore appellants

were justified in offering the appointment to the respondent on the post of Messenger. However, the respondent refused the appointment on such post.

11. In view of the above and for the reasons stated above, the Division Bench of the High Court has misinterpreted and misconstrued Rule 5 of the Rules 1974 and in observing and holding that the 'suitable post' under Rule 5 of the DyingIn Harness Rules 1974 would mean any post suitable to the qualification of the candidate and the appointment on compassionate ground is to be offered considering the educational qualification of the dependent. As observed hereinabove such an interpretation would defeat the object and purpose of appointment on compassionate ground."

The above observations of the Hon'ble Apex Court were reiterated by the Hon'ble Apex Court in its decision dated 02.08.2022 passed in Civil Appeal No. 5038/2022 ***(Suneel Kumar Vs State of U.P. Ors)***. It was held therein that the words 'suitable employment' must be understood with reference to the post held by the deceased employee. Superior qualification held by a dependent cannot determine the scope of the words 'suitable employment'.

4(v) In the instant case, admittedly the petitioner had accepted the post of Beldar offered to him on compassionate basis. He had joined as Beldar on 7.3.2006. The petitioner was also regularized as Beldar on 6.9.2012. It was only on 20.09.2012 that the petitioner represented to the respondent-department for reviewing his case and to consider him for the post of clerk retrospectively on the ground that he had qualification of 10+2 required for the post of clerk at the time when he was offered the post of Beldar in the department. The case of the petitioner was turned down by the respondent-department on 1.8.2013. Pursuant to the directions issued on 11.09.2014 in CWP No. 2626/2014 instituted by the petitioner, respondent-department once again rejected the case of the petitioner on 6.2.2015. Though in compliance to order dated 21.05.2015, passed by the erstwhile Tribunal in O.A.

No.1021/2015, respondent No.3 allowed petitioner's prayer on 7.8.2015 by appointing him on compassionate basis as clerk (on daily wage basis) retrospectively w.e.f. 7.3.2006 & as a regular clerk w.e.f. 7.9.2013, however, the fact remains that this order was withdrawn on 8.6.2016.

Having observed the factual sequence of the case, one cannot lose sight of the fact that w.e.f. 7.9.2013/7.8.2015, the petitioner for all intents and purposes is working as a clerk. The impugned order dated 28.06.2016 (Annexure A-22) rescinded the office order dated 7.8.2015. The operation of impugned order dated 28.06.2016 had been stayed vide interim order dated 1.7.2016 passed in the instant case. The said order is still in force. The petitioner is still continuing as clerk. The petitioner has now spent almost 9 years as clerk. It is also seen from the record more particularly Annexure A-25 dated 9.12.2015 that the petitioner was due for appointment to the post of clerk against 20% Limited Direct Recruitment quota. His name was also sponsored for that purpose. However, he was not appointed as clerk for the reason that the petitioner was already serving as clerk w.e.f. 7.9.2013. Hence, taking holistic view of the facts and circumstances of the case and in the interest of justice, present writ petition is disposed of by directing respondent No.1-Secretary (I&PH) to the Government of Himachal Pradesh to consider the entire case of the petitioner afresh keeping in view the discussion made hereto before and also keeping in view the fact that the petitioner is continuing as clerk for past about 9 years. A fresh decision in accordance with law shall be taken by respondent No.1 within a period of 8 weeks from today after providing an opportunity of hearing to the petitioner. Interim order dated 1.7.2016 shall remain in force until the passing of order by respondent No.1. Copy of the order so passed, shall also be communicated to the petitioner. Pending miscellaneous application(s), if any, shall stand disposed of.

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

M/s Wipro Enterprises Pvt. Ltd. ...Petitioner/Non-applicant.

Versus

Wipro Karamchari Sangh Union/Group
...Respondent/Applicant

For the petitioner/Non-Applicant.	:	Mr. K. D. Shreedhar, Sr. Advocate with Ms. Sneh Bhimta, Advocate.
For the respondent/ Applicant	:	Mr. Nishant Khidtta, Advocate.

CMP No. 17615 of 2022
In CWP No. 3343 of 2022
Reserved on: 3.1.2023
Decided on: 9.1.2023

Constitution of India, 1950- Application for recalling or modification of order dated 27.05.2022 passed in CWP No. 3343 of 2022 and for listing the petition for final hearing at early date- Industrial dispute between the union of workers and the company regarding transfer of its employees from one unit to the other- Labour Court set aside the transfer order dated 1.8.2021 whereby 126 workmen were transferred- Company has assailed the order of Ld. Labour Court in Civil Writ Petition whereby order of Ld. Labour Court has been stayed**- Held-** The prayer of the union not to shift the machines from Unit-II as well as the members of the union appear to be not relatable to the matter in issue in reference No. 180 of 2021- It is trite that scope of interim relief cannot be beyond or outside the four walls of the relief in the main proceedings- Application dismissed being without merit. (Paras 6, 17, 18)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge:

By way of instant application, applicant/respondent has prayed for recalling or modification of order dated 27.5.2022, passed in CWP No. 3343 of 2022 and also for listing the above noted writ petition for final hearing at an early date.

2. Petitioner herein is a Company (for short 'The Company') incorporated and registered under the Companies Act, 1956. It has two manufacturing units situated at Plot No. 77 and plot No.87A in the vicinity of Industrial Area, EPIP Phase-I, Village Jharmajri, Tehsil Baddi, District Solan, H.P. Respondent/applicant is a Union of Workers of the Company (for short 'The Union').

3. An industrial dispute arose between the Union and the Company from the decision of the Company to transfer its employees from one unit to the other. The Union raised demand either to maintain status quo till the pendency of long term settlement dated 25.01.2018 or to enter into a fresh long term settlement. The settlement dated 25.01.2018 was valid till 31.12.2021.

4. The Union issued demand notice upon the Company on 27.04.2021. Taking cognizance of such notice, the Conciliation Officer issued notice dated 29.04.2021 calling upon the Company to submit its response for the purpose of conciliation under the Industrial Disputes Act, 1947 (for short 'The Act')

5. The conciliation proceedings were held on 18.6.2021, 13.7.2021 and 23.7.2021. The conciliation failed. On 03.08.2021, the Conciliation Officer submitted failure report under Section 12 (4) of the Act to the Labour Commissioner, Himachal Pradesh. On 29.07.2021, the Company issued transfer order of 126 members of the Union from the Unit in plot No. 87A to plot No. 77 which were to take effect on 01.08.2021. Feeling aggrieved against the action of the Company, the Union filed a complaint under Section 33A of the Act before the Labour Court, Shimla.

6. The learned Labour Court allowed the application of the Union under Section 33A of the Act vide order dated 9.12.2021, passed in Application No. 49 of 2021. The transfer order dated 1.8.2021, whereby 126 workmen were ordered to be transferred from Unit-II to Unit-I of the company was set aside and the company was directed to allow all 126 transferred workers to work at Unit-II. The Company has assailed the aforesaid order of learned Labour Court before this Court by way of CWP No. 322 of 2022. An order dated 11.1.2022 has been passed in CWP No. 322 of 2022, whereby the order dated 9.12.2021 passed by learned Labour Court has been stayed. The CWP No. 322 of 2022 has also been admitted for hearing vide order dated 27.4.2022.

7. In the meanwhile appropriate Government referred the dispute to learned Labour Court and such Reference No. 180 of 2021 is pending adjudication before learned Labour Court. The Union preferred another application before learned Labour Court being Interim Application No. 9 of 2022 inter-alia praying for restraining the company from shifting the machines from Unit-II to any other Unit and also from compelling 33 workmen to perform work of packing and lift of materials in PCP Section till final disposal of the reference. Company contested the Application No. 9 of 2022, however, learned Labour Court allowed the application vide order dated 11.5.2022 in following terms:-

> *"19. As a sequent effect to my findings on point No.1, the application under Section 10(4) and 2 (b) for restraining the respondent company from shifting the machine from Unit-II to some other place/unit and further compelling 33 operators of TSP/WS to perform the work of packing and lifting of the material in PCP Section till the final disposal of the main reference is allowed. Resultantly, the interim order dated 14.1.2022, in application No. 9 of 2022 is hereby ordered to be made absolute till the final disposal of the main reference petition. The application be registered separately and after its completion be tagged with the main case file.*

8. The company has assailed the aforesaid order dated 11.5.2022, passed by learned Labour Court in Application No. 9 of 2022 by way of CWP No. 3343 of 2022 before this Court. On 27.5.2022, this Court admitted the said writ petition and ordered the same to be listed along with CWP No. 322 of 2022. In interim, the operation of impugned order dated 11.5.2022, passed by learned Labour Court in Application No. 9 of 2022 was ordered to be stayed.

9. The Union assailed the aforesaid interim order before Hon'ble Supreme Court by way of SLP No. 10390 of 2022. The Hon'ble Supreme Court disposed of the aforesaid SLP in following terms:-

> *"Having heard the learned counsel for the parties at some length, we are of the view that since this matter emanates from an interim order, it would be appropriate for the High Court to re-visit the interim order which is the subject matter of challenge in this proceedings. To enable the High Court to do that, we permit the petitioner to file appropriate application for recall/modification of the interim order and such an application, after affording the opportunity to the either side, be disposed of by the appropriate bench of the High Court with a reasoned order. The petitioner is permitted to file the application within two days and the High Court is requested to dispose of the said application within three weeks, prior to the scheduled annual vacation of the High Court.*
>
> *Since this Court has passed an interim order on 02.06.2022, it is made clear that during the next four weeks the impugned interim order will remain in abeyance and paragraph 19 of the above-quoted order of the Industrial Tribunal-cum-Labour Court will govern the parties and this Court's status quo order would yield to above-quoted, paragraph 1, order of the Labour Court."*

10. The present application has been preferred by the Union in compliance to aforesaid order passed by the Hon'ble Supreme Court. The Union has sought recalling and modification of the order dated 27.5.2022, passed in CWP No. 3343 of 2022 on the grounds, firstly that by staying the operation of interim order passed by learned Labour Court in Application No. 9 of 2022, this Court has in fact granted the final relief to the Company, as

claimed by it in the main petition. Secondly, that the order passed by learned Labour Court is a reasoned order and should not be interfered by way of interim relief and thirdly, that the stay of operation of interim order passed by learned Labour Court will allow the company to succeed in its endeavour to cause prejudice to the rights of the members of the Union.

11. The Company has filed reply to the application and has denied the contents in totality. It is submitted that an order of stay is already operating on the execution of order dated 9.12.2021, passed by learned Labour Court in Application No. 49 of 2021, meaning thereby that the embargo on the transfer of the workmen from Unit-II to Unit-I of the Company has been removed, still the Company had not factually transferred the members of Union. It is further submitted that the company had shifted only one machine from Unit-II, which was not used for the production of the commodity in which the members of Union are employed. The Company has also taken stand that even otherwise the shifting of machine by the Company was a decision taken in the interest of the business of the Company and was not relatable to the dispute raised by the Union. Similarly, the order of restraint passed by learned Labour Court on placement of some workmen in another section of the same Unit has been stated to be alien to the matter under adjudication in Reference No. 180 of 2021, pending before learned Labour Court.

12. We have heard the learned counsel for the parties and have also gone through the record carefully.

13. The following reference has been sent by appropriate Government to learned Labour Court:-

> "*Whether the demands raised vide demand notice dated 27.4.2021 (copy enclosed) by the Pradhan/Secretary, Wipro Karamchari Sangh, Plot No. 87-A, Jharmajari, P.O. Barotiwala, Tehsil Baddi, District Solan, HP before the Management of M/s wipro Enterprises (P) Ltd., EPIP, Phase-I village Jharmajri, Tehsil*

Baddi, District Solan, HP is legal and justified? If yes, what monetary and other consequential service benefits, the above mentioned workmen of Wipro Karamchari Sangh are entitled to and if not, its effect?"

14. For prosecution of its case, the Union has preferred a claim petition before learned Labour Court with a prayer in following terms:-

"In view of the submissions made here in above, it is therefore most humbly prayed that the claim petition filed by the workers through their union may kindly be allowed and the reference sent by the appropriate government to this Ld. Court may kindly be allowed and further the demands of the workers regarding not to transfer them from Unit-II to Unit-I or some other place may kindly be allowed and the workers may kindly be allowed to work in the Unit-II till the date of their superannuation further the transfer orders of the 126 workers passed by the respondent company during the pendency of the dispute between the parties may kindly be held null and void in the eyes of law and the workers may be given all service benefits. The respondent company may further be directed to pay the damages on account of mental as well as financial loss caused to the workers of petitioner union to the tune of rupees two lacs each and the respondent may also be burdened with the cost of litigation amounting to rupees one lac."

15. The Union is agitating the cause of its members against the orders to transfer them from Unit-II to Unit-I of the company. Noticeably, in the application under Section 33A being Case No. 49 of 2021, the Unit had prayed for an identical relief. Learned Labour Court allowed the Application No. 49 of 2021 vide order dated 9.12.2021 and set aside the order issued by the company to transfer the members of Union from Unit-II to Unit-I of the company. CWP No. 322 of 2022, preferred against the aforesaid order dated 9.12.2021 of learned Labour Court has been admitted for hearing and vide an interim order, the operation of order impugned in the writ petition has been stayed.

16. It is not the case of Union that despite the stay of operation of order dated 9.12.2021 passed by learned Labour Court, the members of Union

have been transferred, rather their own case is that some of the members of the Union have been ordered to work in a different Section, though in the same Unit i.e. Unit-II.

17. During the pendency of Reference No. 180 of 2021, Unit approached the learned Labour Court by way of interim Application No. 9 of 2022, seeking restraint order against the Company not to shift the machines from Unit-II and also not to place the members of Union in any other Section of Unit-II than the Section in which they were working. The prayer so made by the Union in Application No. 9 of 2022 prima-facie appears to be not relatable to the matter in issue in Reference No. 180 of 2021. It is trite that the scope of interim relief cannot be beyond or outside the four walls of the relief in the main proceedings. In any case, the interim relief has to be necessarily relatable to the issue pending for adjudication. In Reference No. 180 of 2021, the issue pertains to legality of orders of transfer of the members of Union from Unit-II to Unit-I. Even if the Union succeeds in securing the relief in terms of prayer made by it in Reference No. 180 of 2021, the members of the Union will stay and continue to work in Unit-II. In such view of the matter, it is not comprehensible as to how the shifting of machines or placement of workmen in another Section of the same Unit will prejudice the rights of the Union or its members in pending Reference No. 180 of 2021. The impugned order on this count prima-facie appears to be an illegal order.

18. The order impugned in CWP No. 3343 of 2022, thus if allowed to operate will have comparatively harsher effects on the rights of the Company as compared to the rights, if any, of the Union. Order dated 11.5.2022, passed by learned Labour Court, which is subject matter of CWP No. 3343 of 2022, itself is an interim order and thus there cannot be any legal impediment for staying the operation of such order, also by way of an interim order, in exercise of writ jurisdiction of this Court, if the impugned order prima-facie appears to be wrong, harsh and inequitable.

19. In light of above discussion, we find no merit in the application and the same is accordingly dismissed.

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

Sh. Jai Prakash Chauhan ....Appellant.

Versus

Sh. Mehar Singh ...Respondent.

For the appellant : Mr. B.S. Chauhan, Senior Advocate with Mr. Munish Datwalia, Advocate.

For the respondent : Mr. V.S. Chauhan, Senior Advocate with Mr. Rajul Chauhan, Advocate for the respondent.

Cr. Appeal No.446 of 2010
Reserved on : 17.11.2022
Decided on : 22.11.2022

Code of Criminal Procedure, 1973- Section 378- **Negotiable Instruments Act, 1881**- Section 138- appeal against dismissal of complaint by trial court- Accused denied issuance of cheque but admitted order to stop payment and receipt of legal notice- Inconsistencies in settlement- Issuance of cheques after settlement creates doubts about completeness of settlement- Could not have relied upon testimony of DW3 as had apparent conflict of interest being enemy of complainant, credibility in doubt- Judgment of trial court set aside- Case remanded for fresh trial- Appeal allowed. (Para 9)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of this appeal, the appellant has challenged order dated 11.06.2010, passed by the Court of learned Sub Divisional Judicial Magistrate, Court No. 1, Rohru, District Shimla, H.P. in case No. 71-3 of 2003/2003, titled as Sh. Jai Prakash Chauhan vs. Sh. Mehar Singh, in terms

whereof, the complaint filed by the 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 filed by the complainant/appellant under Section 138 of the Negotiable Instruments Act against the accused *inter alia* on the ground that the accused had raised a loan of Rs. 70,000/- from the complainant in the month of September, 2000, for the purpose of making payments to his labour, with the promise that said amount would be paid back to the complainant in the month of April, 2001. This was also reduced in writing by the accused in favour of the complainant. In order to discharge said liability, a post dated cheque was issued by the accused in favour of the complainant for an amount of Rs. 70,000/-, however, when the cheque was presented for its encashment, the same was dishonoured due to the reason 'payment stopped'. Thereafter, the complainant issued a legal notice to the accused to make good the payment of the cheque amount. However, as the accused failed to do so even after issuance of the statutory legal notice, hence the complaint.

3. The complaint has been dismissed by the learned Court below *inter alia* by holding that the evidence on record demonstrated that the accused had issued the cheque Ext. P-3 for an amount of Rs.70,000/- in favour of the complainant, however, later on as the matter stood settled between the complainant and the accused in the presence of DW3 Jagdish Chand, on 27.03.2001, and accused had made payment of Rs. 55,000/- to the complainant through cheques Ext. DW1/C and DW1/D, through DW3, therefore, the accused had no legal and enforceable liability towards the complainant and the complainant had failed to prove the guilt of the accused on record beyond reasonable doubt.

4. Feeling aggrieved, the complainant has filed the present appeal.

5. Learned Senior Counsel appearing for the appellant has argued that the judgment passed by the learned Trial Court is not sustainable in the eyes of law as the learned Court erred in not appreciating the statement of DW3 in the right perspective. According to the learned Senior Counsel in view of the fact that cheque Ext. DW1/D and Ext. DW1/C were not issued in the name of the appellant, as was stated in the Court by DW3, therefore, the conclusion which was arrived at by the learned Trial Court on the basis of evidence of DW3 was totally uncalled for and the appeal in fact deserves to be allowed on this count. Learned Senior Counsel has further argued that learned Court erred in not appreciating that the appellant and DW3 were in litigation and statement which was made by DW3 in the Court was on account of enmity which he had against the appellant. Learned Senior Counsel further submitted that the conclusion arrived at by the learned Trial Court that the amount which was payable to the complainant by the accused stood duly paid, was completely against the evidence on record and that payment which was received by one Jagdish Singh could not construed to have been received on behalf of the appellant. Accordingly, he submitted that the present appeal be allowed and the judgment passed by the learned Trial Court be set aside.

6. Learned Senior Counsel appearing for the respondent, on the other hand, while supporting the judgment has argued that there was no infirmity in the findings returned by the learned Trial Court and as the same was clearly borne out from the record of the case, therefore, the present petition being devoid of merit, be dismissed.

7. I have heard learned Senior Counsel appearing for the parties and carefully gone through the judgment passed by learned Trial Court as well as record of the case.

8. The complaint filed under Section 138 of the Negotiable Instruments Act was to the effect that the complainant was an employee in

Irrigation and Public Health Department and that the accused was a permanent resident of village Jagothi and that they were close friends. During the apple season of 2000, accused borrowed Rs.70,000/- from the complainant at Rohru on the ground that he required this money to make payment to his labourers. The money was paid by the complainant to the accused, who assured the complainant that the same would be returned back in the month of April, 2001. Accused issued post dated cheque bearing No. 749540 dated 10.04.2001, pertaining to Uco Bank, Rohru, and a written Note to this effect was also given by the accused in favour of the complainant. Accused also acknowledged the receipt of the above amount by another receipt of the same date. As per the complainant, he presented the cheque for its encashment in the bank on 10.04.2001, but the same was dishonoured. When the complainant asked the accused as to why he ordered stop payment in his bank, the accused informed the complainant that he was not having sufficient funds in his account and he promised to make good the payment in his account so that the cheque could be honoured. The accused requested the complainant to present the cheque in the third week of September, 2001, which he did, but the cheque was against dishonoured. Thereafter, a legal notice was issued to the accused to make good the payment of the cheque amount. This notice was replied to by the accused, who flatly refused to make good the payment of the cheque amount as mentioned in the notice and accused wrongly averred therein that the payment stood made to the complainant in terms of the contents of the reply. Hence, the complaint.

9. Notice which was issued by the complainant to the accused is on record as Ext. P-6. Having carefully gone through the record as also the judgment passed by the learned Trial Court, this Court is of the considered view that the learned Trial Court has erred in dismissing the petition and the reasoning which has been so assigned by the learned Trial Court is not sustainable in law. The case as was put forth by the complainant before the

Court has been dwelled upon in detail by me hereinabove. A perusal of the statement of the accused under Section 313 of the Criminal Procedure Code demonstrates that he denied therein that on 10.04.2001, he issued a cheque for an amount of Rs. 70,000/- in favour of the complainant for valuable consideration and for discharge of his legal liability, yet he admitted the fact that the cheque Ext. P-3, when presented in the bank was dishonoured on account of stop payment so ordered by him. He also admitted the factum of issuance of legal notice to him. Be that as it may, as I have already mentioned hereinabove, the complaint was dismissed by the learned Trial Court primarily by holding that the evidence on record demonstrated that the accused in the presence of DW3, on 27.03.2001, had settled the matter with the complainant and accused had made payment of Rs.55,000/- to the complainant through cheques Ext. DW1/C and Ext. DW1/D through DW3. The cheque, dishonouring of which led to filing of the complaint, is for a sum of Rs. 70,000/- and the same is on record as Ext. P-3. The cheque is dated 10.04.2001. There are also on record Ext. CW1/A and Ext. CW1/B, the receipts, in terms whereof the accused had received the amount of Rs.70,000/- from the complainant. In this background, if one peruses the two cheques Ext. DW1/C and Ext. DW1/D, purportedly in terms whereof the liability of the complainant was discharged by the accused, the same demonstrates that the same are for amount of Rs. 30,000/- and Rs. 27,000/- respectively and are in the name of Jagdish Singh and are dated 01.05.2001 and 20.08.2001, respectively. The Court fails to understand as to how the liability in terms of cheque dated 10.04.2001, could have been settled in the month of April 2001 itself by way of issuance of two cheques which were post dated and relatable to months of May, 2001 and August, 2001, respectively. Not only this, there is also on record Ext. P-8, which is a communication issued by the accused to the Manager of his Bank, in terms whereof he has stated that in the event of cheque numbers mentioned therein being

presented to the Bank for encashment, the same be not honoured, as payment in terms thereof has been made by the accused in cash. The number of cheques mentioned in this communication includes the number of cheque which was issued by the accused to the complainant, i.e. 749540, and both the cheque Ext. P-3, as also communication Ext. P-8, are dated 10.04.2001. Now if the version of the accused is to be believed that he had already absolved the liability for which the cheque Ext. P-3 was issued and that too in cash, then it is not understandable as to why cheques Ext. DW1/C and Ext DW1/D were in fact issued by him. Now in continuation, if one goes through the statement of DW3, this witnesses deposed in the Court that the accused was doing contractorship in the IPH and PWD departments and in the year 2001, in the month of March, he had settled the accounts of the complainant and the accused, who were the partners. He further stated that as the complainant was a government employee, therefore, the amount of settlement was paid through him in terms of cheques which were issued in his name by the accused. Now the record demonstrates that there is enmity between DW3 and the complainant who otherwise are close relatives and besides the self serving statement of this person that the cheque amount was liquidated by the accused, by making the payments through him, there is no other cogent evidence on record to substantiate this fact. Therefore, in this view of the matter, the conclusion arrived at by the learned Trial Court that the accused had liquidated his liability through DW3, cannot be sustained in law because these findings returned by the learned Trial Court are based on conjectures so drawn by the learned Trial Court which are not substantiated from the record.

10. Accordingly, in view of above discussion, this appeal is allowed. The judgment passed by learned Trial Court is set aside and the matter is remanded back to the learned Trial Court for adjudication afresh on merit. Parties through Counsel are directed to appear before the learned Court below on 13.03.2023. Thereafter, learned Trial Court shall adjudicate the case in

light of observations made by this Court, on the basis of the pleadings and evidence on record. Pending miscellaneous application(s), if any, also stand disposed of accordingly.

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

Rajesh Kashyap … Petitioner

Versus

Himachal Pradesh State Industrial
Development Corporation … Respondent

For the petitioner: Mr. M.L. Sharma, Advocate

For the respondent: Mr. Mehar Chand Thakur, Advocate.

CWP No. 2865 of 2019
Decided on: 04.01.2023

Constitution of India, 1950- Article 226- Writ of mandamus- Fundamental Rule 49- Claimed promotion and salary for additional duties discharged as junior engineer (civil) till superannuation- **Held**- Non payment of wages for additional duties of junior engineer (civil) is arbitrary and unsustainable- employee formally appointed to hold duties of higher post entitled to such pay- Court directed respondent to pay wages of junior engineer (civil) till date of superannuation- Merely performance of additional duties with respect to a post do not ipso facto confer right to seek promotion against such post- Duly compensated by way of payment of wages- Petition partly allowed. (Paras 9,10)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

There is a short controversy involved in the present petition. The petitioner was serving in the respondent-Corporation, initially as a Supervisor/Draughtsman, on daily wage basis, till his services were regularized against the post of Supervisor w.e.f 06.05.2000. Thereafter, the petitioner was placed in the pay band of Technician Grade-I w.e.f. 01.10.2012,

after the cadre of the Supervisors was bifurcated in the ratio of 20:30:50 into Technician Grade-I, Technician Grade-II and Junior Technician. These facts are undisputed. The case of the petitioner is that vide order dated 19.02.2011, the petitioner was assigned the duties of Junior Engineer (Civil) and he was called upon to prepare the record of entry of bills etc. of Contractors in the Measurement Books, in addition to his own duties of the post of Supervisor. To cut the issue short, as per the petitioner, he continued to perform the duties of a Junior Engineer till his superannuation (though the writ petition was filed by the petitioner while he was in service), and accordingly, he is entitled for promotion to the post of Junior Engineer and also the salary of the Junior Engineer.

2. Learned counsel for the petitioner has argued that it is settled law that when a person is called upon to perform the duties of a higher post, then he is to be paid the wages of the superior post and further as the petitioner has put in more than eight years of service as a Junior Engineer after he was called upon by the respondent-Corporation to perform the duties of a Junior Engineer, he is also entitled for promotion to the said post. Accordingly, a prayer has been made that the present petition be allowed by directing the respondent-Corporation to promote the petitioner as a Junior Engineer after eight years of service as such from the year 2011 onwards and also to pay to him the wages of a Junior Engineer w.e.f. 19.02.2011.

3. The petition is resisted by the respondent-Corporation *inter alia* on the ground that the respondent-Corporation is executing various civil works on agency basis on behalf of the Department of Industries as well as other Government Departments. For the execution of deposit works, it had engaged various skilled and unskilled workers on musterroll/daily wage basis. The petitioner was engaged on musterroll basis against deposit work in February 1992 as Supervisor without sending a requisition to the

Employment Exchange and without there being a sanctioned post for his being appointed as such. His services were regularized as a Supervisor on work charge basis w.e.f. 09.07.2004 prospectively after creation of the post of Supervisor and he was designated as Technician Grade-I after the bifurcation of the cadre of the Supervisors in terms of Government Notification dated 29.05.2014. It is further the stand of the respondent-Corporation that the Corporation was facing acute shortage of Junior Engineers (Civil) during the year 2011 and it was decided that to manage its current affairs from amongst the existing manpower, authorization be given to someone to prepare and enter bills etc. of the Contractors in the management books and therefore, this was done in terms of order dated 19.02.2011, as a stop-gap-arrangement till further orders without grant of any additional financial benefits and without any change in the place of posting.

4. Learned counsel for the respondent-corporation has argued that it was in the year 2014 that in terms of order dated 27.12.2014, the petitioner was called upon to perform the duties of the post of Junior Engineer (Civil) against the vacant post of Junior Engineer (Civil), in addition to his own duties and this was also done with the clear understanding, as is evident from the Annexure R-4 appended with the reply, that the same shall not confer any right upon the petitioner to claim promotion to the post of Junior Engineer nor will he be entitled to any financial benefits. He submitted that the petitioner did not object to the issuance of office order dated 27.12.2014 and had he shown any reluctance not to perform the duties of the post of Junior Engineer (Civil) without financial benefits, then the Corporation would have had not called upon him to do the needful. Accordingly, he has argued that in this view of the matter, the petitioner is estopped from seeking either the relief of promotion against the post of Junior Engineer or the wages of the post of Junior Engineer and the petition being without merit deserves dismissal.

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

6. As already stated hereinabove, the petitioner is seeking two reliefs (a) promotion against the post of Junior Engineer after completion of eight years of service as such (b) wages of the post of Junior Engineer from the year 2011 onwards on the pretext that since then he actually performed the duties of the post of a Junior Engineer. Though, the petitioner has claimed that he was called upon to perform the duties of a Junior Engineer from the year 2011 onwards, however, the communications which have been placed on record by the petitioner alongwith the writ petition, do not demonstrate that when in the year 2011, the petitioner was called upon to perform some additional works, he was also formally called upon to hold the charge of post of Junior Engineer. However, Annexure R-4 appended with the reply, which is an office order dated 27.12.2014, issued by the Managing Director of the respondent-Corporation, clearly demonstrates that in terms of this communication, the petitioner alongwith other incumbents referred to therein, were ordered to hold the current duty charge of the post of Junior Engineer (Civil), in addition to their own duties. This means that as from 27.12.1014, there is no dispute that the petitioner in addition to the performance of his duties as a Supervisor was also called upon to hold the current duty charge of the post of Junior Engineer (Civil). Though, there was a rider contained in the officer order that the petitioner will not be entitled to any financial benefits but this Court is of the considered view that in light of the provisions of Fundamental Rule 49, no such condition could have been imposed by the employer.

7. Clause 1 of Fundamental Rules 49 reads as under:-

> *"F.R.49. The Central Government may appoint a Government servant already holding a post in a substantive or officiating capacity to officiate, as a temporary measure, in one or more of other*

independent posts at one time under the Government. In such case, his pay is regulated as follows.:-

(i) Where a Government servant is formally appointed to hold full charge of the duties of a higher post in the same office as his own and in the same cadre/line of promotion, in addition to his ordinary duties, he shall be allowed the pay admissible to him, if he is appointed to officiate in the higher post, unless the Competent Authority reduces his officiating pay under rule 35; but no additional pay shall, however, be allowed for performing the duties of a lower post;

8. A perusal of this clause clearly demonstrates that when a Government Servant is formally appointed to hold full charge of the duties of a higher post in the same office as his own, and in the same cadre/line of promotion in addition to his ordinary duties, he shall be allowed the pay admissible to him if he is appointed to officiate in the higher post unless the competent authority reduces his officiating pay under Rule 35, but no additional pay shall however be allowed for performing the duties of a lower post. Therefore, after the petitioner was called upon to hold the current duty charge of the post of Junior Engineer (Civil), in addition to his own duties, in terms of Clause 1 of FR-49, he was entitled for the wages of the higher post i.e. Junior Engineer (Civil), though, simultaneously, he could not have demanded the wages of the post of Supervisor also. Incidentally, it is also not much in dispute that the post which was being held by the petitioner when he was called upon to hold the current duty charge of the post of Junior Engineer indeed was a feeder post for appointment to the post of Junior Engineer (Civil) by way of promotion and the petitioner was otherwise possessing requisite qualifications for being promoted against the post of Junior Engineer (Civil).

9. Be that as it may, in view of the provisions of Clause (i) of FR 49, this Court has no hesitation in holding that the act of the respondent-Corporation of not paying to the petitioner, the wages of the post of Junior

Engineer (Civil), after he was called upon to hold the current duty charge of the post of Junior Engineer (Civil), in addition to his own duties, vide office order dated 27.12.2014, is arbitrary and not sustainable in the eyes of law. Accordingly, a mandamus is issued to the respondent-Corporation to pay to the petitioner the wages of Junior Engineer (Civil) w.e.f. 27.12.2014, till the date of his Superannuation. Let the needful be done within a period of two months from today, failing which, the financial benefits shall entail simple interest @ 6% per annum from the date of judgment.

10. As far as the relief of promotion being prayed for by the petitioner against the post of Junior Engineer (Civil) from February, 2011, is concerned, it is not the pleaded case of the petitioner that though there was a vacancy available, by way of promotion, of the feeder category, against which the petitioner was serving, yet promotion was denied to the petitioner against the post of Junior Engineer (Civil). That being the case, this Court is of the considered view that simply because the petitioner was called upon by the employer to perform the duties of Junior Engineer (Civil), in addition to his own duties, the same *ipso facto* does not confers upon the petitioner the right to seek promotion against the post of Junior Engineer (Civil) for the reason that the petitioner has been duly compensated by this Court in terms of the provisions of FR 49 (i) by safeguarding his interest by directing the employer to pay to him the wages of a Junior Engineer for the period he performed the duties of the post of Junior Engineer (Civil).

The petition stands disposed of in above terms, so also pending miscellaneous applications, if any.

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

Pushpa Devi ....Appellant.

Versus

Prem Lal and others ...Respondents.

For the appellant : Mr. Naresh K. Sharma, Advocate.

For the respondents : Mr. Malay Kaushal, Advocate, for respondents No. 1 to 5.

: Ms. Hem Kanta Kaushal, Advocate for respondents No. 8 and 9.

: Respondents No. 6 and 7 *ex parte*.

RSA No. 28 of 2020
Decided on: 06.12.2022

Code of Civil Procedure, 1908- Section 100- Appeal- **Specific Relief Act, 1963**- Sections 34, 38- Suit for declaration/ permanent prohibitory injunction- Plaintiff challenged will on ground of fraud after 22 years- **Held**- Barred by limitation- Plaintiff being a defendant made averments with respect to will in earlier suit in WS filed- Aware about execution of will and cannot come to court after 20 years from date of knowledge- Plaintiff admitted execution of will by her father in earlier suit- Estopped from challenging the same- No substantial question of law found- No infirmity in findings of courts below- Appeal dismissed as devoid of merits. (Para 11)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge *(Oral)*

By way of this appeal, the appellant has challenged the judgment and decree passed by the Court of learned Civil Judge (Jr. Divn.),

Court No. 2, Ghumarwin, District Bilaspur, H.P. in Civil Suit No. 110/1 of 20014, titled as Pushpa Devi vs. Prem Lal and others, dated 21.08.2018, in terms whereof, the suit for declaration/permanent prohibitory injunction filed by the appellant/plaintiff, was dismissed by the learned Trial Court as also the judgment and decree passed by the Court of learned Additional District Judge, Ghumarwin, District Bilaspur, camp at Bilaspur, H.P. in Civil Appeal No. 74-13 of 2018, titled as Pushpa Devi vs. Prem Lal and others, dated 23.10.2019, in terms whereof the appeal filed by the plaintiff against the judgment and decree passed by learned Trial Court, was dismissed.

2. Brief facts necessary for the adjudication of the present case are that the appellant/plaintiff (hereinafter to be referred as 'the plaintiff' for convenience) filed a suit for declaration to the effect that the plaintiff alongwith the defendants, including the proforma defendants, were the co-owners in joint possession of the land, measuring 19-15 bighas, comprised in Khasra No. Kitta 15, Khata/Khatoni No. 284/357, in all measuring 1-06 bighas comprised in Khasra No. 2624/1683/2, Khata/Khatoni No. 277/349, situated in village Lehri-Sarail, Parnana Ajmerpur, Sub-Tehsil Bharari, Tehsil Ghumarwin, District Bilaspur, H.P. (hereinafter to be referred to as 'the suit land/property' for short). According to the plaintiff, the parties were Hindu by religion and governed by Hindu law of Mitakshra school in the matter of succession, alienation and inheritance. The suit land was earlier owned by Sh. Jangi Ram, predecessor-in-interest of the parties, son of Fattu, son of Sh. Nurata, son of Jesar. The suit land was succeeded by Jangi Ram from his ancestors. Previously, the suit land was owned and possessed by Jangi Ram as *karta* of joint Hindu family, who died intestate on 02.09.1985. At the time of death, Jangi Ram was living with the plaintiff and after his death, plaintiff as well as defendants No. 1 and 2 and one Shri Mast Ram succeeded to his property alongwith proforma defendants in equal shares being class-1 heirs. According to the plaintiff, she was entitled to 1/8th share of the suit land, as

were the defendants and proforma defendants. It was further the case of the plaintiff that Jangi Ram had not executed any Will in favour of the defendants, and in fact, since January, 1980, he remained seriously ill till his death on 02.09.1985. It was further the case of the plaintiff that Jangi Ram was not in sound position of mind and at the relevant time, both Jangi Ram as well as his wife Sundri Devi, were residing with the plaintiff, who looked after both of them. With the intent to deprive the plaintiff and proforma defendants the right in the suit property, defendants No. 1 and 2 and one Mast Ram @ Bhagat Ram, prepared a false Will, dated 13.07.1982, in connivance with the scribe of the Will as well as witnesses and got the same registered. Further, as per the plaintiff, after the death of Jangi Ram, on the strength of said forged Will, the suit land was got mutated in their names on 31.12.1985 by defendants No. 1 and 2 and Mast Ram, which entries were illegal, wrong, null and void. It was further the stand of the plaintiff that she was owner in possession of 1/8th share in the suit land by way of adverse possession as after her marriage, she was residing in her parental home and was having the possession since 25.12.1985, on which, she had also constructed her house. As per the plaintiff, her possession of the suit land was open, undisturbed, hostile and to the knowledge of real defendants. It was further her case that being a rustic woman, she came to know about the revenue entries on 27.09.2014 when defendants No. 1 and 2 entered upon the suit land in her possession. It was in this background that the suit was filed, praying for the relief of declaration as also for permanent prohibitory injunction.

3. The suit was contested by the contesting defendants, *inter alia* on the ground that the suit was barred by limitation, it was hit by principle of res-judicata and the plaintiff was stopped from filing and maintaining the suit. On merits, it was contended by the contesting defendants that the plaintiff was having no right, title or interest over the suit land and that earlier, she had claimed gift deed from one Mast Ram, bother of the plaintiff as well as

defendants No. 1 and 2, which claim of her was not accepted by the Court. It was further the stand of the contesting defendants that Jangi Ram had bequeathed his property by way of Will in the name of his three sons and the property in issue was self acquired property of Jangi Ram.

4. On the basis of pleadings of the parties, learned Trial Court framed the following Issues:-

1. *Whether the plaintiff is entitled for decree of declaration to the effect that the plaintiff, real defendants and proforma defendants are co-owners in joint possession to the extent of 1/8th share of the suit land, as prayed for? OPP*
2. *Whether the suit land is ancestral, coparcenary and joint Hindu family property, as prayed for? OPP*
3. *Whether the Will dated 13.7.1982 executed by late Sh.Jangi Ram is illegal, wrong, null and void and is a result of fraud, misrepresentation and undue influence and coercion, as prayed for? OPP*
4. *Whether the plaintiff is owner of the suit land to the extent of 1/8th share by virtue of adverse possession, as prayed for? OPP*
5. *Whether the plaintiff is entitled for the decree of permanent prohibitory injunction, as prayed for? OPP*
6. *Whether in alternative the plaintiff is entitled for the decree of possession, if during the pendency of the suit, the real defendants will dispossess the plaintiff from the suit land or any part of it? OPP*
7. *Whether the suit is time barred, as alleged? OPD*
8. *Whether the suit is hit by the principle of resjudicata, as alleged? OPD*
9. *Whether the plaintiff is estopped to file the present suit by her own act, conducts, commissions and omissions, as alleged? OPD*
10. *Whether the Will dated 13.7.1982 is legal and valid, as alleged? OPD*
11. *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: *Partly yes*

Issue No. 3: *Yes*
Issue No. 4: *No*
Issue No. 5: *No*
Issue No. 6: *No*
Issue No. 7: *Yes*
Issue No. 8: *No.*
Issue No. 9: *Yes.*
Issue No. 10: No.
Relief : *Suit of the plaintiff is dismissed as per operative part of judgment.*

6. Learned Trial Court thus despite answering Issues No. 2 and 3 in favour of the plaintiff, dismissed the suit by holding that the suit was barred by limitation and further that the plaintiff was otherwise also estopped from challenging the Will in issue in view of her past conduct.

7. In appeal, these findings have been affirmed by learned Appellate Court and feeling aggrieved, the plaintiff has filed this regular second appeal.

8. I have heard learned Counsel for the parties for the purpose of admission and also gone through the judgments and decrees passed by learned Courts below as also the record of the case, which was summoned.

9. The issues which were framed by the learned Trial Court have already been quoted hereinabove. A perusal of the judgment passed by learned Trial Court demonstrates that while deciding Issue No. 7, i.e. '*whether the suit is time barred, as alleged*' learned Trial Court held that the contention of the defendants was that the suit was time barred as the plaintiff had challenged the Will in issue after a period of 22 years. Learned Trial Court after referring to the provisions of Articles 56 and 58 of the Limitation Act, held that in the earlier suit, which was filed as far back as in the year 1992, in which the plaintiff was the defendant, in her written statement, she had made averments with regard to the Will in issue, which demonstrated that she was aware about the execution of the Will and therefore, the filing of the suit, seeking declaration that the Will was bad being a result of fraud etc. was

definitely hit by limitation as the plaintiff had come to the Court after around 20 years as from the date of knowledge of the Will. Similarly, while deciding Issue No. 9, which pertained to estoppel, learned Trial Court held that in the earlier suit, as was evident from the judgments, which were duly exhibited before it, so passed in the earlier suit, the plaintiff had admitted about the execution of the said Will by her father and therefore, subsequently, now she was estopped from challenging the same as the plaintiff could not be permitted to change her stand as per her convenience.

10. Learned Appellate Court, while affirming these findings, was pleased to hold that the mutation, on the basis of the Will, was sanctioned on 31.12.1985 and the plaintiff in the written statement filed in the earlier litigation had asserted the Will to be a genuine document. Learned Court also held that the earlier suit came to be decided on 31.03.1999 and the said suit in fact was instituted as far back as in the year 1992 and written statement was filed in the year 1995. On these bases, it held that leaving aside the issue of estoppel, the fact of the matter was that the knowledge of existence of the Will was there to the plaintiff way back, yet she filed the suit on 18.06.2014, which was much beyond the period of limitation and therefore, the suit indeed was barred by law, being hit by limitation. On the issue of estoppel, learned Appellate Court concurred with the findings returned by learned Trial Court by observing that the plaintiff was indeed estopped from challenging the Will of late Sh. Jangi Ram when she herself had asserted the existence of said Will in the earlier proceedings.

11. Having carefully gone through the record of the case, as also the judgments and decrees passed by both the learned Courts below, this Court has no hesitation in holding that the findings which have been returned by both the learned Courts below on both these issues, are correct findings which are duly borne out from the record of the case. The judgment passed by the learned Court in the earlier proceedings, which were initiated by one

Meena Devi alongwith Arun Kumar and Puja, against the plaintiff and Smt. Sundri, by way of Civil Suit No. 19/1 of 1998/1992, is on record as Ext. D-1. A perusal of this judgment demonstrates that the suit was instituted on 10.09.1992 and the same was decided on 31.03.1999. A perusal of para-2 of the said judgment demonstrates that the stand which was taken by the present plaintiff, who was defendant No. 1 in the said Civil Suit, was that the suit land was self acquired property of Jangi Ram and that Jangi Ram had executed a Will in favour of his sons Mast Ram, Prem Lal and Devi. Incidentally, said suit was decreed by learned Trial Court in favour of the plaintiffs therein and the appeal which was preferred by the present plaintiff alongwith Sundri Devi was also dismissed by the Court of learned Additional District Judge, Ghumarwin, in terms of Ext. D-2 on record, dated 16.10.2004. A perusal of this judgment further demonstrates that learned Appellate Court also took note of the fact that the stand which was taken by the plaintiff herein in the said civil suit was that the suit land was self acquired property of Jangi Ram and that he had bequeathed the same by way of a valid Will in favour of his three sons. Now these three sons happened to be defendants No. 1 and 2 in the present suit and one Mast Ram. In view of the fact that it is clearly and categorically borne out from the record of the case that the plaintiff herein in the previous suit was party-defendant and therein she had taken a categorical stand that the property was self acquired property of Jangi Ram and that property stood bequeathed by way of Will in favour of his three sons, this Court is of the considered view that the findings which have been returned by both the learned Courts below to the effect that the plaintiff was (a) estopped from subsequently challenging the Will and thus change her stand and (b) that the suit was hit by law of limitation, are correct findings, which are duly substantiated from the evidence on record. The stand of the plaintiff, as has been taken in the plaint that cause of action accrued somewhere in the year 2014, cannot be believed because Exhibits D-1 and D-

2 make it amply clear that far far back the plaintiff was aware of the Will executed by Jangi Ram in favour of his three sons, execution whereof was admitted by the plaintiff in the previous suit, which was subsequently sought to be challenged by her in the suit, from which, the present regular second appeal arises.

12. Accordingly, in view of above discussion, as this court does not finds any substantial question of law involved in the present appeal and further as this Court finds no infirmity in the findings which have been returned by both the learned Courts below, this appeal being devoid of merit is dismissed. Pending miscellaneous application(s), if any, also stand disposed of accordingly. No order as to costs.

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

Swarit Malhotra …Petitioner.

Versus

State of Himachal Pradesh. …Respondent.

For the Petitioner. Mr. Virender Singh Chauhan, Sr. Advocate with Mr. Rajul Chauhan, Advocate.
For the Respondent: Mr. Hemant Vaid, Additional Advocate General.

Cr.M.P. (M) No. 2104 of 2022
Decided on: 12.01. 2023

Code of Criminal Procedure,1973- Section 439- Bail- **Indian Penal Code, 1860**- Sections 306, 506- Allegation of harassing and threatening leading deceased to commit suicide- **Held**- Suicide note and statements of witnesses prima facie show persistent harassment by petitioner- Previous attempt to influence witnesses and previous involvement in other two cases despite on bail considered- Nature and gravity of office along with circumstances of case do not allow enlargement on bail- Bail petition dismissed. (Para 18)

Cases referred:
K.V. Prakash Babu vs. State of Karnataka AIR 2016 SC 5430;
M.Arjunan vs. State represented by Its Inspector of Police (2019)3 SCC 315;
Praveen Pradhan vs. State of Uttaranchal & another (2012)9 SCC 734;
State of West Bengal vs. Indrajit Kundu & others (2019)10 SCC 188;

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Petitioner, invoking Section 439 of the Code of Criminal Procedure, has approached this Court for grant of bail in case FIR No.56/2022, dated

18.5.2021, registered under Section 306 & 506 of the Indian Penal Code (for short 'IPC'), in Police Station Kangra, District Kangra, Himachal Pradesh.

2. Status Report stands filed. Record has also been made available.

3. As per prosecution case, on 18.5.2022, one Ajay Chaudhary informed the police that a girl, a tenant in his commercial building located behind Kamal Dhaba in village Chhoti Haled, had committed suicide by hanging. Police Party rushed to the spot, where statement of Viveka Gill wife of Ankush Gill, sister of deceased, under Section 164 of the Code of Criminal Procedure (for short 'Cr.P.C.'), was recorded, stating therein that her deceased sister was married in the year 2009 with Karan Singh resident of Sham Nagar Dharamshala and she was having 13 years old daughter from the said wedlock. After marriage, deceased, for strained relations with her husband, left the house of her husband and started living in her matrimonial home and earning her livelihood as casual Beautician by providing home service as and when called and, in the year 2020, she started living in rented accommodation in the building of Ajay Chaudhary and continued her work of Beautician. In the year 2015, petitioner Swarit Malhotra took her (deceased) to his home and violated her person forcibly and thereafter continued to do so with assurance to marry her and he compelled her sister (deceased) to take separate rented accommodation, whereupon her sister, in the year 2020, hired a room in Kangra and asked petitioner Swarit Malhotra to marry her but the petitioner Swarit Malhotra flatly refused, whereupon her deceased sister lodged a complaint on 16.4.2022 against Swarit Malhotra in Women Police Station, under Section 376 IPC. In that case, petitioner Swarit Malhotra was arrested, but was enlarged on bail after about 20 days. After releasing from jail, on 16.5.2022 at about 5.30 p.m., petitioner Swarit Malhotra came to her (complainant) residence at Chilgadi and said that he was the first person who managed his bail in a rape case after spending Rs.30-35 lakhs and asked the complainant to advise her sister (deceased) to withdraw the complaint

otherwise he would manage murder of her brother and sister. On telling this to her sister (deceased), she told that she was already receiving such threats from Swarit Malhotra. On 16.5.2022, Swarit Malhotra solemnized marriage with someone else, which was known to her sister (deceased). Complainant alleged that her sister committed suicide due to harassment, threats and defamation for which petitioner Swarit Malhotra was liable.

4. During investigation, 12-page Suicide Note of deceased has been found by the Investigating Agency, wherein tale of sorrow of deceased on account of act, conduct and deeds coupled with threats of petitioner, causing unbearable harassment, humiliation and defamation to deceased, have been narrated in detail.

5. It is stated in the Suicide Note that when deceased contacted the Women Cell Dharamshala, for the first time, the SHO of Police Station did not register the complaint of the deceased by saying that deceased and petitioner were living in live-in relationship and, therefore, no case was made out. Thereafter, petitioner came to know about NGO 'Nai Roshni', an Organization helping women, and with the help of said NGO she again approached the Police but at that time also conduct of the police was hostile whereupon deceased had left the Police Station alongwith her complaint out of anger and disappointment, however lateron FIR could be lodged with great difficulty.

6. It has also been stated in the Suicide Note that the day when she (deceased) attended the Court for recording of her statement, petitioner Raman Malhotra @ Rinku had come alongwith Rs.10.00 lakh and contacted President of NGO Anuj Katoch, with whose interference FIR could be lodged, by saying that there was no possibility of marriage of deceased and petitioner Swarit Malhotra and, therefore, deceased should withdraw the case by accepting Rs.8-10 lakh and petitioner Raman Malhotra @ Rinku also visited husband of deceased for agreeing him to depose against the deceased by accepting Rs.1-2 lakh, to propagate that deceased was characterless.

7. It has been alleged by the deceased that after getting bail in previous case, petitioner Swarit Malhotra was harassing, threatening and humiliating the deceased because of which she was not having any other option but to end her life. After releasing on bail, petitioner made a call to one Lalta Aggarwal, a friend of deceased, to call deceased at Kangra, without informing the deceased that petitioner would be there and advised sister of deceased to ask the deceased to withdraw the criminal case with threat that in case of continuation of criminal case he would strip the deceased and would kill her and after release on bail petitioner had been continuously doing propaganda against the deceased and her family causing to decide the deceased to finish her life because petitioner Swarit Malhotra was threatening to kill the entire family and she could not bear damage and harm to her family.

8. It has been stated in the Status Report that on 17.4.2022, FIR No.9 of 2022 was registered against petitioner Swarit Malhotra, stating therein that petitioner Swarit Malhotra, under false promise of marriage, continued physical relation with her (deceased) since April 2015 to 8.2.2022, despite refusal of the complainant to do so but compelling her for that by giving false assurance to marry. In the said case, petitioner Swarit Malhotra was arrested on 17.4.2022 and was enlarged on bail on 7.5.2022 and after enlargement on bail, as stated in the Suicide Note, he continued to pressurize the deceased to withdraw the complaint. Therefore, a petition for cancellation of his bail in case FIR No.9 of 2022 has also been filed by Women Police Station Dharamshala, which is pending adjudication before the Additional Sessions Judge Kangra and next date wherein has been fixed as 4.6.2022. It has also been stated that in the year 2017, another case FIR No.1 of 2017 dated 12.3.2017, under Section 354A read with Section 34 IPC, was also registered against petitioner Swarit Malhotra.

9. As per Status Report, Charanjeet Singh, brother of deceased, has also made statement that petitioner Swarit Malhotra has extended threat by

communicating that deceased has died without any harm to the petitioner and now he (Swarit Malhotra) will compel him (Charanjeet Singh) to die and he is also threatening to ruin the whole family and further that Raman Malhotra has also threatened to teach a lesson to him (Charanjeet Singh).

10. After registration of FIR in present case, petitioner absconded and there was grave public unrest in the area, due to which dead body of deceased was not cremated for 3-4 days even after the postmortem and was cremated, after persuasive advice of the police, on 21.5.2022.

11. Petitioner Swarit Malhotra had also approached Additional Sessions Judge (1), Kangra at Dharamshala, seeking bail, which was dismissed on 23.5.2022. Thereafter, he approached this Court by filing Cr.MP(M) No. 1172 of 2022 which was dismissed on 3.6.2022. Cr.MP(M) No. 1166 of 2022 filed by co-accused Raman Malhotra, seeking anticipatory bail was also dismissed on 3.6.2022. Thereafter, petitioner and co-accused were arrested and since then petitioner is behind the bars, whereas co-accused Raman Malhotra has been enlarged on bail vide order dated 20.9.2022 passed in Cr.MP(M) No.1559 of 2022 by this Court.

12. Learned counsel for petitioner has submitted that there is no direct allegation of instigating or threatening the deceased leading her to take decision to commit suicide because of the petitioner, and the only allegation is threatening and abusing by petitioner through someone else, which cannot be construed sufficient reason for a person to commit a suicide. It has been further submitted that it appears that deceased intended to marry with Swarit Malhotra but for solemnization of his marriage on 16.5.2022 with someone else deceased committed the suicide on 18.5.2022 and it cannot be a sufficient ground to involve the petitioner under Section 306 IPC for committing suicide by deceased.

13. Learned counsel for petitioner has referred pronouncements of the Supreme Court in **Praveen Pradhan vs. State of Uttaranchal and another**

reported in **(2012)9 SCC 734**; **K.V. Prakash Babu vs. State of Karnataka** reported in **AIR 2016 SC 5430**; **M.Arjunan vs. State represented by Its Inspector of Police** reported in **(2019)3 SCC 315**; **State of West Bengal vs. Indrajit Kundu and others** reported in **(2019)10 SCC 188**; and judgment dated 12.10.2022 passed by the Supreme Court in **Cr. Appeal No. 1628 of 2022** titled **Mariano Anto Bruno vs. The Inspector of Police** wherein it has been observed that insulting the deceased by using abusive language and threatening will, by itself, not constitute the abetment of suicide and there should be evidence capable of suggesting that accused intended by such act to instigate the deceased to commit suicide and unless the ingredients of instigation/abetment to commit suicide are satisfied, accused cannot be convicted under Section 306 IPC and question of mens rea on the part of accused in such cases is to be examined with reference to the actual acts and deeds of accused and where acts and deeds are only of such nature where accused intended nothing more than harassment or snap show of anger, no offence for abetment of suicide would be constituted.

14. Learned Additional Advocate General has submitted that circumstances in present case are extraordinary and from the material on record involvement of the petitioner in harassing, humiliating and defaming the deceased leading her to decide to finish her life, are clearly evident, and keeping in view the impact of incident in reference on the society and public unrest prevailing in the area, the petition deserves to be rejected so as to enable the Investigating Agency to conclude the investigation at the earliest and it has been canvassed that enlargement of the petitioners on bail, at this stage, is not warranted.

15. Learned Additional Advocate General has submitted that keeping in view the fact that Petitioner Swarit Malhotra has been found involved in two other cases registered against him previously, and despite his enlargement on bail in FIR No.9 of 2022 with condition not to dissuade, threaten or allure the witnesses in that case, the petitioner indulged in humiliating, harassing and

threatening the complainant as well as other persons related to her and involved in heinous crime of abetting the deceased to commit suicide and threatening the complainant and other relatives of the deceased, he is not entitled for regular bail and the bail petition deserves to be rejected.

16. Learned Additional Advocate General submits that in ***Mariano Anto Bruno's case*** it has also been observed by Supreme Court that if accused kept on irritating or annoying the deceased by words or deeds until the deceased reacted or was provoked, a particular case may be that of abetment of suicide and such being the matter of delicate analysis of human behaviour, each case is required to be examined on its own facts, while taking note of all surrounding factos having bearing on the actions and psyche of accused and the deceased.

17. It has been further submitted by learned Additional Advocate General that detailed written dying declaration of deceased is a self speaking documents to establish prolonged and persistent harassment, threats and abuses to derive the deceased for commission of suicide for which petitioner is directly responsible. It has been further submitted that intention of petitioner for forcing the deceased to commit suicide is also evident from threats extended by him to brother of deceased whereby he had communicated that after commission of suicide by deceased, he will also ensure suicide by brother of deceased, and there is sufficient material that petitioner was harassing, abusing, threatening the deceased persistently in order to compel her to commit suicide.

18. Rival contentions of parties are not to be adjudicated on merits by this Court in this bail application as the same shall be evaluated and assessed by Trial Court during trial. However, taking into consideration entire material before me and nature and gravity of offence, surrounding circumstances and also impact of enlarging the petitioner on bail at this stage, with reference to factors and parameters required to be taken into consideration, as

propounded in pronouncements of the Supreme Court as well as this Court, I am of opinion that petitioner is not entitled for bail at this stage.

19. Any observations made hereinabove shall have no bearing on the merits of the case and are confined strictly to the disposal of the bail application.

Accordingly, petition is dismissed and disposed of.

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

Shyam Singh …Petitioner.

Versus

State of Himachal Pradesh. …Respondent.

For the Petitioner. Mr. Ajay Kochhar, Sr.Advocate with Ms.Avni Kochhar , Advocate.

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

Cr.M.P. (M) No. 450 of 2022

Decided on: 12.1.2023

Code of Criminal Procedure,1973- Section 439- Bail- **Indian Penal Code, 1860**- Sections 302, 201- **Held**- Key prosecution witnesses examined did not support the prosecution case- Doubt created that accused made an accused on the basis of suspicion without any evidence- Credibility of investigation compromised- Granted bail subject to general conditions- Petition allowed. (Para 18)

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

Petitioner, invoking provisions of Section 439 of the Code of Criminal Procedure, has approached this Court seeking regular bail in case FIR No. 94 of 2021, dated 16.6.2021, registered under Sections 302 and 201 of Indian Penal Code (in short 'IPC') in Police Station Theog, District Shimla, H.P.

2. Status report stands filed. Record was also made available.

3. As per prosecution case, on 14.6.2021, Dy.SP received a secret information that a person has been burnt in Gharaach forest. Information was passed to SHO/SI Madan Lal and both of them alongwith Police officials went to Gharaach forest and found burnt wood, ashes and bones in the forest

in a Nala. It came in the notice of police party that there was rumour that a Nepali who was residing with Shyam Singh @ Lath in village Bhalech, near Devi Moad was missing and probably it was he who was burnt. Whereupon Shyam Singh was summoned and enquired in Police Station who informed that Bheem Singh Nepali, residing with him, had expired one month ago because of ailment and two Nepalis serving with him had cremated him in the evening in Gharaach forest according to Hindu Rites and Rituals. After having this information, a Team from State FSL, on call of police, visited spot on 15.6.2021 and collected samples of remains of bones, teeth, ash and lower lying on spot and also sample of soil. From the room where Bheem was staying, bedding was also taken in possession.

4. As per prosecution case, on 14.6.2021, when police party, after visiting spot etc. reached at Bhang Jubbar, complainant Prem Singh made a statement to SI/SHO Madan Lal, which was reduced into writing under Section 154 Cr.PC wherein complainant had disclosed that about one month ago, when he, as his regular practice, was going for darshan in temple of of Devi in Devi Moad Mata Mandir, he noticed that at washing centre, Shyam Singh Lath was quarrelling with Nepali, who was residing with him and beating him, with stick/danda and when he came back from temple, both of them were not there and since then, he did not see that Nepali servant of Shyam Singh. Further that 3-4 days ago, he came to know that Shyam Singh Lath had cremated dead body of that Nepali in Gharaach forest and it was the same Nepali servant who was being beaten by Shyam Singh Lath.

5. On the basis of aforesaid statement, case under Sections 302 and 201 IPC was registered and investigation was carried on. Statements of witnesses were recorded under Section 161 Cr.PC. Shyam Singh Lath was interrogated. On finding sufficient material to arrest Shyam Singh Lath, he was arrested on 16.6.2021 at about 11.55 p.m. and information of his arrest was transmitted, according to his desire, to his daughter Nisha Chandani.

6. It is the case of prosecution that during interrogation Shyam Singh disclosed that he had employed Bheem Nepali, about 2 months ago, as a domestic helper, who had met him on road near his shop, but without retaining any document of Bheem Nepali, like Aadhar Card, Nepali National Certificate or any other document so as to identify his original citizenship and information with respect to Bheem Nepali was neither given to Local Panchayat nor to police.

7. It is further case of prosecution that during interrogation Shyam Singh disclosed that on 10.5.2021 he had arguments with Bheem Nepali, because Bheem Nepali had misbehaved whereupon out of anger, he had beaten Bheem Nepali with danda and during that, Nepali received injuries in neck, but he was not taken to hospital and no other person was informed about this. Another Nepali Raj Kumar serving with Shyam Singh had suggested to provide treatment to Bheem but Shyam Singh informed him that he was providing treatment to Bheem by giving medicines himself. On 12.5.2021, Bheem expired.

8. It has come in status report that as per statement of Raj Kumar that Bheem Nepali remained bed ridden for 6-7 days and he was not eating and drinking and was not able to talk and he had expired on account of grievous injury as well as for want of treatment at appropriate time.

9. Statements of Raj Kumar and Suresh Rana were recorded under Section 161 Cr.PC. On 18.6.2021, spot of cremation, room where Bheem Nepali was kept in captivity and room in which he died were identified.

10. As per status report, after recording disclosure statement under Section 27 of Indian Evidence Act, danda used to beat Bheem was also recovered and spot map of the place, i.e. cremation spot and room where deceased was kept were also identified.

11. In report of Chemical Analysis received from State FSL, it was reported that no significant evidence in soil was found and no opinion was

possible about exhibit. As per Specialist of Bio Department, blood was not detected on carpet/talai, cloth and bone pieces taken from spot and further that saliva was not detected in carpet/talai as well as cloth of Bheem. Bone fragments found and lying on spot were identified as human bones belonging to an adult.

12. As per observations of State FSL, charred teeth of deceased and charred bone pieces lifted from spot yielded highly degraded DNA which could not show amplification of Global Filer PCR Amplification Kit and therefore, DNA profile could not be generated from the exhibits.

13. Learned counsel for the petitioner has submitted that petitioner is behind the bars since June 2021 for no fault on his part as he did not kill Bheem. He has further stated that Bheem had expired due to ailment and in those days, Corona pandemic had spread all over the country and in those circumstances, petitioner was not able to dispose of dead body of Bheem in usual manner as there were restrictions in every sphere of life and therefore, dead body of Bheem was cremated with help of two other Nepali servants. It has been further submitted that had it been a case of murder of Bheem by petitioner Shyam Singh, then Shyam Singh would have never been favoured or helped by other Nepali servants. It has been further submitted that Nepali servants had accompanied and helped petitioner Shyam Singh in cremating the dead body of Bheem which indicates that Bheem did not die on account of beatings by petitioner but died on account of serious ailment.

14. Learned counsel for the petitioner has submitted that complainant Prem Singh and Nepali servant Raj Kumar have been examined in Court on oath where Prem Singh has completely denied his earlier statement recorded under Section 154 Cr.PC and for resiling from previous statements, recorded by police, he was permitted to be cross examined by Public Prosecutor. But in his cross-examination also, nothing material could be extracted in favour of prosecution. He has further submitted that Raj

Kumar was also declared hostile and he did not support the prosecution case rather he supported the version of petitioner that dead body of Bheem Bahadur was cremated in Gharaach forest for his death due to serious ailment.

15. It has been further contended on behalf of petitioner that recovery of danda has not been connected with commission of offence and further that death of Bheem Nepali with help of danda by beating him could not be proved and further that eye witnesses of spot have not supported the prosecution case.

16. Learned Additional Advocate General submits that petitioner is an accused under Section 302 IPC wherein capital punishment may be awarded to petitioner and, therefore, he has opposed the grant of bail to petitioner with further submissions that at this stage only two witnesses have not supported the prosecution case whereas other prosecution evidence is yet to be recorded and there is sufficient material to convict the petitioner under Section 302 IPC.

17. Learned counsel for the petitioner has submitted that witnesses examined by prosecution as PWs 1 and 2 were the key witnesses of prosecution case but they have not supported the prosecution case which casts doubt about credibility of conclusion of investigation in present case and petitioner has been made an accused only on the basis of suspicion without having any iota of evidence to show and establish the same.

18. Without commenting upon merits of the case, but taking into consideration material placed before me and taking note of 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 petitioner may be enlarged on bail.

19. Accordingly, present petition is allowed and petitioner is ordered to be enlarged on bail, subject to his furnishing personal bond in the sum of

Rs.1,00,000/- with two sureties each in the like amount, to the satisfaction of trial Court 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:-

2. That the petitioner shall make himself available to the Police or any other Investigating Agency or Court in the present case as and when required;

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

4. that the petitioner shall not obstruct the smooth progress of the investigation/trial;

5. that the petitioner shall not commit the offence similar to the offence to which he is accused or suspected;

6. that the petitioner shall not misuse his liberty in any manner;

7. that the petitioner shall not jump over the bail;

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

9. that the petitioner shall keep on informing about the change in address, landline number and/or mobile number, if any, for his availability to Police and/or during trial; and

10. the petitioner shall not leave India without permission of the Court.

20. It will be open to the prosecution to apply for imposing and/or to the trial Court to impose any other condition on the petitioner, 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.

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

22. 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.

23. 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.

24. 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 petition stands disposed of in the aforesaid terms.

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

Ashok Kumar ...Petitioner.

Versus

State of Himachal Pradesh ..Respondent.

For the Petitioner: Mr.Deepak Kaushal, Senior Advocate, alongwith Mr.Abhishek, Advocate.
For the Respondent: Mr.Hemant Vaid, Additional Advocate General.

Cr.M.P.(M) No.867 of 2022
Decided on: 12.01.2023

Code of Criminal Procedure,1973- Section 439- Successive bail- **Indian Penal Code, 1860**- Section 302- Deceased had burn injuries, died subsequently while being transferred to various hospitals- Alleged foul play by husband- **Held**- The court noted the case to be at an advanced stage- Any observation made on merit shall cause prejudice to case- Taking into account the factors and parameters propounded by Supreme Court and High Court- Petition dismissed. (Para 22)

The following judgment of the Court was delivered:

Vivek Singh Thakur, J (oral)

Petitioner has approached this Court, seeking bail under Section 439 Code of Criminal Procedure (in short 'Cr.P.C.'), in FIR No.282 of 2018, dated 04.11.2018, registered in Police Station Sarkaghat, District Mandi, H.P., under Section 302 of the Indian Penal Code (in short 'IPC').

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

3. As per status report, on 12.11.2018, at 10.55 a.m., on receiving information that Jyoti Devi had suffered burn injuries and she had been

taken to the Hospital, police party rushed to Civil Hospital Sarkaghat where victim Jyoti Devi and her husband (petitioner-accused) were present with burn injuries. After medical examination, Medico Legal Certificate was obtained by the police. Medical Officer declared Jyoti Devi to be fit for making statement whereafter, her statement was recorded in presence of Dr.Anjana who also put her signature thereon. Thereafter, Jyoti Devi was referred to Medical College and Hospital, Ner Chowk, for treatment, wherefrom she was further referred to Indira Gandhi Medical College and Hospital, Shimla (IGMC) and from IGMC to PGI, Chandigarh. On the way to PGI, Jyoti Devi died and her dead body was brought to Civil Hospital Sarkaghat. Thereafter, parents of deceased came to the Police Station and father of victim made statement under Section 154 Cr.P.C., stating therein that Jyoti Devi was one amongst their four children, i.e. two sons and two daughters, who was married with petitioner-Ashok Kumar about 6-7 years ago and couple was blessed with two children, i.e. one boy 4 years of age and one daughter about age of 1 ½ month.

4. It has further been stated by complainant that on 12.11.2018, at about 8.30 p.m., Jyoti Devi gave missed call on his mobile, and in response, he called his daughter and both of them inquired about wellbeing of each other. At about 10.30 p.m., Pawan Kumar (brother-in-law/Jeth) of Jyoti Devi made a call on mobile of complainant's wife and informed that Jyoti Devi was serious and she had been burnt totally and was not breathing. On inquiry about petitioner-Ashok Kumar, Pawan Kumar replied that he had fled after putting Jyoti Devi on fire and he further informed that Jyoti Devi was being taken in Ambulance to Sarkaghat Hospital. At about 11.00/11.30 p.m., petitioner-Ashok Kumar informed them that Doctors have referred Jyoti Devi to Medical College and Hospital, Ner Chowk and he was going there alongwith Jyoti Devi. Accordingly, complainant alongwith his wife (parents of victim) went to Ner Chowk Medical College/Hospital, wherefrom she was referred to

IGMC Shimla and from IGMC Shimla to PGI Chandigarh. On the way, complainant and his wife (parents of deceased/victim) were accompanying Jyoti Devi in the Ambulance.

5. Complainant-Krishan Chand has further stated that in the Ambulance Jyoti Devi disclosed to his wife by saying that she was revealing that fact for the first time that her husband threw some liquid on her body in the bedroom, which was smelling like petrol/ kerosene oil and victim also requested her mother to take her children with them in case of her death, because her husband was so cruel that he would kill children also and the habitants of vicinity would not disclose anything due to his fear. Further that, Jyoti Devi had stated that she had not disclosed those facts either to the police or someone else because she was worried about her children and, therefore, despite receiving grave burn injuries, she did not state anything against her husband to the police and she requested her parents to save future of her children.

6. It was further stated by the complainant that they did not question their daughter any more in this regard. He has also stated that his son-in-law Ashok Kumar used to harass their daughter since 6 months after the marriage and was having doubt on character of Jyoti Devi and because of Ashok Kumar (his son-in-law), either Jyoti Devi had ended her life or Ashok Kumar had burnt her by pouring some liquid upon her.

7. On the basis of aforesaid statement, FIR under Sections 302, 498-A and 306 IPC was registered and during investigation Ashok Kumar was arrested on 14.11.2018 at 2.00 a.m.

8. After completion of trial, challan under Section 302 IPC was presented in the Court, which is pending adjudication and is at the stage of recording evidence of prosecution. As on date, 35 witnesses out of total 37 witnesses have been examined and now case is fixed for recording of remaining 2 witnesses (one SHO and one I.O.) on 22.02.2023.

9. As per status report, in the past, four FIRs have been found registered against petitioner i.e. FIR No.233 of 2009, under Sections 451 and 504 IPC; FIR No.82 of 2009, under Sections 279 and 337 IPC; FIR No.153 of 2011, under Sections 451, 323 and 504 IPC; and FIR No.307 of 2016, under Sections 451, 435, 504 and 506 read with Section 34 IPC, in Police Station Sarkaghat.

10. As per postmortem report deceased died due to hypovolemic shock with multiple organ failure with cardiopulmonary arrest due to ante mortem burns.

11. After receipt report of physical and chemical analysis of the material sent to Regional Forensic Science Laboratory (RFSL), report with respect to cause of death remained the same and as per RFSL, kerosene was detected in a plastic bottle containing few drops of yellow coloured liquid as well as in partially burnt clothes collected from near the bed (bed box). Some semi burnt debris was also collected from different places of the bedroom, but kerosene oil could not be detected in that.

12. It has been submitted by learned counsel for the petitioner that story of burning Jyoti Devi by petitioner has been concocted in order to take revenge of death of their daughter by her parents as Jyoti Devi, in her statement made in the Hospital at Sarkaghat, did not disclose anything as narrated in the statement of her father recorded under Section 154 Cr.P.C., rather she had given statement in presence of Doctor that she caught fire due to leakage of gas while warming milk for her daughter. It has further been submitted that a small Gas Cylinder was kept in the bedroom, which suddenly, on the day of incident, started leaking causing burn injuries to Jyoti Devi and the said Cylinder was thrown by petitioner-Ashok Kumar in the courtyard to save life of his family members, including victim Jyoti Devi and despite disclosing this fact to the police, Investigating Agency did not take note of it. It has further been submitted that when Jyoti Devi was being taken

to PGI, she was not breathing properly and, therefore, Oxygen Mask was put on her mouth and in such situation, she was not able to disclose anything to anybody and, therefore, it is impossible to believe that she disclosed facts, as narrated in the FIR, to her mother particularly when she had already made statement in the Hospital in presence of the Doctor, contrary to the facts stated in the FIR.

13. It has further been submitted on behalf of the petitioner that in burnt debris collected from different places of the bedroom, no kerosene oil was found. There was no smell of kerosene in the body of the deceased which falsifies the story as told by complainant-Krishan Chand to the police. He has further submitted, as disclosed by victim-Jyoti Devi in the Hospital at the first instance that the moment Jyoti Devi caught fire, her husband Ashok Kumar-petitioner rushed to save her and he also suffered burn injuries and in case he was having intention to kill, he would have never tried to extinguish the fire to save Jyoti Devi.

14. It has been submitted by learned counsel for the petitioner that there are two dying declarations being relied upon by the prosecution, one was made before the police in presence of Doctor and another before mother and both dying declarations are contrary to each other and in such eventuality, petitioner is entitled for benefit for contradictory dying declarations and, in any case, the first dying declaration made by Jyoti Devi has to be given weightage as it was made immediately after the incident. Whereas, in second dying declaration, there is possibility of tampering and tutoring, more particularly when such statement has been claimed to have been made when victim was being taken from one Hospital to another Hospital with Oxygen Mask on her face and there were two more persons also present in the Ambulance and none of them have endorsed making of such statement by the victim.

15. Learned counsel for the petitioner has also placed reliance on order dated 26.11.2020 passed by the Supreme Court in Criminal Appeal No.814 of 2020, titled as *Ram Kumar @ Nanki vs. State of Madhya Pradesh now Chhattisgarh,* to substantiate the plea that testimony of parents of victim is not reliable for punishing the petitioner.

16. Learned counsel for the petitioner has also referred various depositions of the witnesses recorded in the Court during trial to impress upon the Court to enlarge the petitioner on bail after evaluating the veracity of these statements.

17. Learned Additional Advocate General has submitted that the judgment referred on behalf of the petitioner was passed by the Supreme Court during hearing of final appeal, but not in a bail application and final appeal is to be adjudicated based upon the evidence placed on record during trial, whereas, no such evaluation or assessment is to be undertaken by the Court at the time of deciding bail application. It has further been submitted that death has taken place within 7 years of marriage and material on record is sufficient to establish *prima facie* that petitioner has committed an offence under Section 302 IPC and, therefore, length of period of detention is not relevant for enlarging the petitioner on bail. It has further been submitted that report of the Forensic Lab and burnt material seized from the place of incident, i.e. bedroom, are indicating that petitioner has committed the offence as alleged in the challan as there was no occasion for boiling milk in the room when Kitchen of the family was adjacent to the room.

18. Learned counsel for the petitioner has also referred Scene Of Occurrence Report wherein it has been reported that match box and gas lighter were also lying aside to the wet blanket found on the floor, there was a wet towel, and rings of curtain were found broken, indicating that it was forcefully pulled from its position and there, in order to substantiate that there was a gas cylinder with burner being kept and used by family of

petitioner in the room. It has been contended that otherwise there was no question of keeping gas lighter in the bedroom.

19. Learned Additional Advocate General has submitted that in case the aforesaid report is to be considered, then entire report has to be taken into consideration as in this report it has also been mentioned that yellowish blue coloured liquid was found on the spot which lateron was found to be kerosene oil. It has also been recorded that search was made for other incriminating evidences like Gas Stove etc., but nothing could be found in the room and, further that, it was inferred in the report that 'a fire accident had occurred on the spot'.

20. Petitioner has also approached the Court by filing bail application Cr.M.P.(M) No.693 of 2019, titled as *Ashok Kumar vs. State of Himachal Pradesh,* which was dismissed by Coordinate Bench of this Court on 11.06.2019. Bail Application No.43 of 2021, preferred by the petitioner before Additional Sessions Judge, Sarkaghat, District Mandi, H.P., was also dismissed on 18.01.1022.

21. It has been submitted by learned Additional Advocate General that trial is at the advanced stage and only 2 witnesses are left to be examined and, therefore, it would not be appropriate for this Court to adjudicate evidence on merit for considering bail application of the petitioner. It has further been submitted that petitioner is an accused in a case under Section 302 IPC, for which petitioner may be sentenced for life imprisonment or capital punishment and, therefore, period of detention is not so much relevant in present case for adjudicating this bail application.

22. Case is at advanced stage now only 2 witnesses remain to be examined. Therefore, any observation by this Court on merit, shall cause prejudice to the merits of the case and, therefore, taking into consideration

entire facts, but without commenting on merits thereon and taking into account factors and parameters, as propounded by the Supreme Court and this Court, required 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. Therefore, petition is dismissed, however with direction to the Trial Court to conclude the trial as expeditiously as possible preferably by 13.04.2023, by ensuring presence and examination of remaining witnesses on 22.02.2023.

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

Vikram Kumar and others .....Petitioners.

Versus

State of Himachal Pradesh and others

.....Respondents**.**

For the Petitioners : Mr. Rajnish Maniktala, Senior Advocate with Mr. Naresh Verma, Advocate.

For the Respondents : Mr. Anup Rattan, Advocate General with Mr. Yashwardhan Chauhan, Senior Additional Advocate General with Mr. Y.P.S. Dhaulta, Additional Advocate General and Mr. J.S. Guleria, Deputy Advocate General, for respondent Nos. 1 to 4.

Mr. Deepak Kaushal, Senior Advocate with Mr. Abhishek Verma, Advocate, for respondent No.5.

Mr. Balram Sharma, Deputy Solicitor General of India, for respondent No.6.

CMP No.17021 of 2022
in CWP No.8445 of 2022
Order Reserved on: 09.01.2023
Decided on: 12.01.2023

H.P. Village Common Land Vesting and Utilisation Act, 1974- Section 8- **Mines and Minerals (Development and Regulation) Act, 1958**- Section 2- Petition for quashing notice and contract entered pursuant to notice between R 1 to 4 and R 5 and further restraining R 1 to 4 from allotting the land to

respondent no. 5 for mining purposes contrary to the provisions of H.P. Village Common Land Vesting and Utilisation Act, 1974**- Held-** Once the land demarcated and set out for the common purposes then there is no power of the State to retransfer the said land from the common pool to the allottable pool- Action of the State to grant lease to respondent No. 5 from the allottable pool is, prima facie contrary to the Act- Respondent No. 5 is restrained from operating quarry. (Paras 13, 14, 15 to 18)

Cases referred:

Him Privesh Environment Protection Society vs. State of H.P. Latest HLJ 2012 (HP) (DB) 533;

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

CMP No.17021 of 2022.

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

> "(A) That the notice inviting tender for putting the Village Common Land in reserve pool as incorporated in Khata No. 19 min, Khatauni No. 120min, Khasra No. 355, situated at Mohal-Har Dogri, Gram Panchayat- Kohlapur, Tehsil-Rakkar, District-Kangra, Himachal Pradesh as per jamabandi for the year 2018-19 and acceptance of highest bid pursuant to notice inviting tender, may be quashed and set aside.
>
> (B) That the contract entered pursuant the notice inviting tender Annexure P-4 (Colly) between respondents 1 to 4 and respondent No.5 allotting the land bearing Khata No. 19 min, Khatauni No. 120 min, Khasra No. 355, situated at Mohal-Har Dogri, Gram Panchayat-Kohlapur, Tehsil-Rakkar, District-Kangra, Himachal Pradesh to the respondent No.5 may also be quashed and set aside.
>
> (C) That the respondent Nos. 1 to 4 may be restrained from allotting the land in Khata No. 19, Khatauni No.120 min, Khasra No. 355, situated at Mohal-Har Dogri, Gram Panchayat-

Kohlapur, Tehsil-Rakkar, District-Kangra, Himachal Pradesh to the respondent No.5 for the purpose of mining.

(D) That the respondent No.5 may be restrained from using the land bearing Khata No. 19 min, Khatauni No. 120 min, Khasra No. 355, situated at Mohal-Har Dogri, Gram Panchayat-Kohlapur, Tehsil Rakkar, District-Kangra, Himachal Pradesh for mining purposes contrary to the provisions of Himachal Pradesh Village Common Land Vesting Utilization Act, 1974.

(E) That the respondent No.6 may be restrained from getting environmental clearance to respondent No.5 since in law the land cannot be used for mining purposes and if granted, may be quashed."

2. Along with the petition, the instant application has been filed for grant of the following reliefs:

"(i) that the further proceedings towards grant of permission for operating the quarry in Khata No.19, Khatauni No.120, Khasra No. 355, situated at Mohal-Hall Dogri, Gram Panchayat-Kohlapur, Tehsil-Rakkar, District-Kangra, Himachal Pradesh, my be stayed till adjudication in the matter.

(ii) that the respondent No.5 may be restrained from operating the quarry for purposes of mining in land recorded in Khata No. 19', Khatauni No.120', Khasra No. 355, situated at Mohal-Hall Dogri, Gram Panchayat-Kohlapur, Tehsil-Rakkar, District-Kangra, Himachal Pradesh during pendency of petition."

3. Petitioner Nos. 1 and 2 are residents of Mohal Har Dogri. Similarly, petitioner Nos. 3 and 4 are residents of Mohal Jatoli Chakran. Both these villages fall in Gram Panchayat, Kaulapur, Tehsil Rakkad, District Kangra, Himachal Pradesh. All the petitioners are residents of same estate. The land bearing Khata No.90 min, Khatauni No. 13 min, Khasra No. 355, measuring 15-23-10 hectares is recorded in ownership of State of HP and in possession of "Bartandaaraan" in "Reserve Pool", situated in

Village-Har Dogri, Panchayat-Kaulapur, Tehsil-Rakkad, District-Kangra, Himachal Pradesh.

4. According to the petitioners, respondent No.1 being the Principal Secretary (Revenue) to the Government of Himachal Pradesh is required to ensure that the provisions of Himachal Pradesh Village Common Land Vesting and Utilization Act, 1974 (for short the 'Act') are scrupulously followed and implemented in its letter and spirit as similar duties have also been imposed by law upon respondent Nos. 3 and 4 i.e. Director, Department of Industries, Government of Himachal Pradesh, Udyog Bhawan, Bemloe, Shimla, Himachal Pradesh and State Geologist, Office of the Director, Department of Industries, Government of Himachal Pradesh, Udyog Bhawan, Bemloe, Shimla, Himachal Pradesh. All these respondents have failed to follow and implement the provisions of law by illegally granting the land on lease to respondent No.5 for the purpose of mining which is contrary to the provisions of law.

5. It is averred that as per the provisions of law, the land which vests with the State is divided into two parts. The first part of the land, not less than 50% of the land, is reserved for grazing and common purposes of the villagers and is commonly known as reserve pool land. Rest of the land falls in allottable pool which can be allotted to the landless and houseless persons in accordance with the provisions of the Act. It is further averred that the land falling in the reserved pool or in the allottable pool is required to be used only in accordance with the provisions of the Act and cannot be let for any other use inconsistent with the objectives of the Act including the mining purposes. It is also averred that the land in the present petition forms a part of the reserve pool, which has specifically been allocated for grazing and other common purposes of the villagers. The said land is strictly to be used for grazing and common purposes of the villagers and cannot be put to any other use including that of the mining.

6. Respondent No.5 has contested the petition by filing the reply wherein in the preliminary objections, it has been averred that the petition is not maintainable being misconceived in view of the fact that the same has been filed with an oblique motive and by concealing the vital facts from the Court. It is submitted that the instant petition has been filed on behalf of the crusher owner namely M/s Sada Shiv Stone Crusher owned by Shri Davinder Bhutoo, situated at Village Kohlapur, Tehsil Rakkar and M/s Maa Jawala Stone Crusher owned by Sh. Gian Chand, situated at Village Adhwani. In addition to the aforesaid objections, certain other preliminary objections have also been raised.

7. On merits, it is contended that even though there is no clear description of the land which may go to show that the same is "Shamlat" land and is covered by the Act, but even if, it is to be assumed so, the same cannot be termed to be prohibited for the purpose of mining. It is submitted that the judgment rendered by this Court in ***CWP No.1077 of 2006*** case titled ***Khatri Ram and another*** *vs.* ***State of H.P. and others***, decided on 22.11.2007, is *per incuriam* as it does not deal with the provisions of Mines and Minerals (Development and Regulation) Act, 1957, (for short 'MMDR Act'). It is further submitted that Section 8(a) of the Act neither empowers the State for the grant of mining lease nor does it prohibit the same because the mines and minerals are the subject matter of the Central Government and there is specific declaration under Section 2 of the MMDR Act which stipulates that "*it is hereby declared that it is expedient in the public interest that the Union should take under its control the regulating of mines and the development of minerals to the extent hereinafter provided.*"

8. We have heard the heard the learned counsel for the parties and have gone through the records of the case.

9. It is not in dispute that the vires of Section 8-A that was inserted in the Principal Act vide amendment No.18 of 1981 was assailed before this Court and the same reads as under:

> "**8-A. Utilisation of land for development of the State**:- Notwithstanding anything contained in Section 8 of the Act, the State Government may utilize any area of the land vested in it under the Act by lease to any person or by transfer to any Department of the Government in the interests of the development of the State, if the State Government is satisfied that there are sufficient reasons to do so subject to the condition that land for the purposes mentioned in clause (a) of sub-section (1) of section 8 in no case shall be less than fifty per cent of the land vested in the Government under the Act.
>
> Provided that when land is not used by a person for the purpose for which it has been leased, the lease shall stand terminated free from all encumbrances and the Government shall re-enter on the demised premises and lease money, "if paid to the Government, shall be forfeited and no person shall be entitled to any compensation for any improvement made and for any building constructed thereon."

10. This Court vide its judgment dated 22.11.2007(supra) allowed the petition and held that the expression 'utilization of the land for developmental activities' mentioned in Section 8-A is read down and explained to mean those developmental activities which are akin to the agricultural pursuits read with the expression 'common purposes' defined in the Act and not the mining activities. We are not referring the judgment in detail because the matter thereafter subsequently came up before the Division Bench of this Court in ***Him Privesh Environment Protection Society*** *vs.* ***State of H.P. Latest HLJ 2012 (HP) (DB) 533*** wherein it was observed as under:

> "80. At this stage we are not required to go into this question in detail but vide the amendment Act of 2001 certain amendments were introduced in Section 3 and some of these lands were given

back to the villagers. Section 8 of the Act provides that out of the land so vested 50% shall be kept in the common pool for common purposes of grazing etc. of the inhabitants of the State and the remaining land can be allotted to landless or other eligible persons, handicapped or houseless persons for construction of the houses and to eligible persons under the schemes belonging to poor sections of the society. The land reserved for the common pool was required to be demarcated by the Revenue Officer.

81. Section 8-A was introduced by the Act of 2001 and this reads as follows:

> "8-A Utilization of land for development of the State- Not withstanding anything contained in section 8 of the Act, the State Government or any other officer authorized by the State Government in this behalf may utilize any area of the land vested in it under the Act by lease to any person or by transferred to any Department of the Government in the interests of the development of the State, if the State Government or the Officer authorized by it is satisfied that there area sufficient reasons to do so subject to the condition that land for the purposes mentioned in clause (a) of subsection (1) of section 8 in no case shall be less than fifty percent of the land vested in the Government under the Act. Provided that when land is not used by a person for the purpose for which it has been leased, the lease shall stand terminated free from all encumbrances and the Government shall re-enter on the demised premises and lease money, if pay to the Government, shall be forfeited and no person shall be entitled to any compensation for any improvement made and for any building constructed thereon."
>
> 82. This Section enables the Government to transfer the land by lease to any Department of the Government. This section has been the subject matter of a detailed decision rendered by this Court in **Khatri Ram v. State of H.P**, CWP No. 1077 of 2006 decided on 22.11.2007. The Division Bench of this Court held that though Section 8-A was unconstitutional being violative of **Articles 14 and 19 of the Constitution of India,** by invoking the principle of reading down the words in Section 8A were given a restricted meaning and therefore the Government could use the land vested in it under the Act only for those development activities which are akin to agricultural pursuits read with the expression 'common purposes' defined in the Act. The Division Bench held that

these common lands could not be leased out for mining purposes. Relying upon this judgment the petitioner contends that the State had no authority to lease out the common pool land for industrial use. On the other hand it is contended by the respondents that this judgment is under challenge before the Apex Court and the judgment has been stayed. The stay order passed by the Apex Court reads as follows:

> "Delay condoned. Issue notice. Stay in the meantime. Ms. Revathy Raghavan, learned counsel waives notice on behalf of respondent Nos. 1&2. Counter affidavit to be filed within four weeks. Rejoinder affidavit to be filed in four weeks thereafter. List thereafter."

83. This Court in Khatri Ram's case (supra) held as follows:

> "It is thus evident from the scheme of the Act that 50% of the land was reserved for the purpose of grazing and other common purposes of the inhabitants of the estate and the remaining 50% was to be allotted to a landless person or any other eligible person as well as for allotment of site to handicapped or houseless person for the construction of a house. The land which as per the Amendment Act No. 18 of 1981 is being allotted for developmental activities was the remaining 50% which was reserved for landless person or any other eligible person. The expression "landless person" and other "eligible person" had been defined. It is clear from the combined reading of both the expression as defined under **section 2(c)(dd)** that the land was to be allotted to agricultural labourer, who had no land or had land less than an acre. The utilization of 50% land, which was to be allotted to the landless and other eligible persons for mining activities will run counter to the spirit of the Principal Act. It is not that the land to be allotted to the landless or other eligible person has drastically been reduced but the same has also been put to other non-agricultural purposes i.e mining activities etc. This was never the intention of the legislature at the time of the enactment of the Principal Act. These observations also strengthen our findings that the land which has been vested in the State under section 3 of the Principal Act, could not be permitted to be used for mining purposes. It is in

this backdrop that we have to consider whether section 8-A inserted in the Principal Act by way of Act No. 18 of 1981 is unconstitutional being violative of **Articles 14 and 19 of the Constitution of India.** It is reiterated that the H.P Village Common Lands Vesting and **Utilization Act, 1974** is an agrarian piece of legislation and it was for this reason alone that it was put at Sr. No. 139 in Schedule-IX of the constitution of India. The **Amendment Act 18 of 1981 whereby section 8-A** has been inserted in the Principal Act has never received the assent of the President of India and its vires can be challenged being violative of the fundamental rights enshrined under Part-III of the Constitution of India. The land which had vested in the State in view of the Principal Act, 1974 was reserved for grazing pasture as well as for allotment to landless and other eligible persons. The landless and other eligible persons are the persons who are primarily dependent on agriculture labour and ancillary activities. Section 8-A though talks of utilization of the land for development but read as a whole it runs contrary to the spirit of the Principal Act. Section 8-A is unreasonable and arbitrary, thus violative of Article 14 as well as Article 19 of the Constitution of India. We are also fortified in taking this view for declaring Section 8-A ultra vires of the Constitution on the basis of definition given to the expression "common purposes" by way of amendment carried out in the year 2001. The mining activities could never be treated as part of agrarian reform as projected by the respondents at the time of hearing of the petition. The grant of mining lease in favour of respondent No. 3 is alien to the spirit of the Principal Act, 1974. The petitioners and other co-villagers are bound to get back their land which had earlier been vested in the State in the year 1974 after the insertion of **clause (d) in subsection (2) of Section 3** with effect from 1974. Though in clear terms we have declared **Section 8-A of the Amendment Act, 1981** unconstitutional, but we can avoid its striking down by reading down Section 8-A harmoniously with other sections of the Principal Act, 1974. The intent and the will of the Legislature is to

protect the rights of the tillers of the land as is evident from the main Objects and Reasons discussed here in above. Striking down of Section 8-A can be saved by this Court by giving a very very restrictive meaning to the expression utilization of land to the development by confining it to the agricultural pursuits/occupation and by not agreeing to the submissions made by the learned Advocates appearing on behalf of the respondents to give the expression 'development' extensive meaning. In view of the law laid down by the Hon'ble Supreme Court and after harmonizing **Section 8-A of the Amendment Act, 1981, and other sections of the Himachal Pradesh Village Common Lands Vesting and Utilization Rules, 1975, the Himachal Pradesh Lease Rules, 1993** and the Himachal Pradesh Village Common Lands Vesting and Utilization Scheme, 1975, we read down Section 8-A instead of striking it down by declaring that the mining activities/operations etc., cannot be termed as developmental activities as mentioned in section 8-A and the action of the State to grant lease to respondent No. 3 from the allotable pool is contrary to the Principal Act. Section 8-A will not get immunity under Article 31-A if the developmental activities carried out by the State are against the agrarian reforms. It is for this reason that the Court has to give very restrictive meaning towards developmental activities by restricting the word "development" to agriculture pursuits to achieve the purpose of this Statute as evidence by the context."

84. On behalf of the JAL it has been contended that the judgment in Khatri Ram's case is per in-curium because of the following reasons:

i) statements and object of the Act No. 18 of 1981 by which section 8A was introduced was not considered;

ii) Provisions of Rules 2-f and Rule 4 of the H.P Lease Rules 1993 alongwith Section 3-f (VII) of Land Acquisition Act, 1894 were not considered;

iii) The non-obstante **clause of Section 8A of H.P Village Common Land Vesting and Utilization Act, 1974** was not considered. Refer 1984 Supp. **SCC 196**, UOI v. Kokil, para 11 was not considered.

iv) The paragraph 19 of Sukhdev v. State of H.O, 1995 (2) Shimla LC 381 was not considered.

85. The judgment in Khatri Ram's case was delivered by a Division Bench. In this detailed and lengthy judgment, we find that objections raised have been dealt with. The statements and objects have been considered. The H.P Lease Rules have no effect whatsoever because they cover a large variety of land legislations and are not confined to the Village Common Lands Act. Furthermore, the dominant legislation i.e the Act cannot be interpreted on the basis of the subordinate legislation i.e the Rules.

86. The non-obstante clause of Section 8A has been considered by the Division Bench. The entire Section 8A has been considered by the Court and it is too much for the coordinate Bench to hold that the earlier Division Bench was not aware of the nonobstante clause. The decision in **Sukh Dev v. State of H.P**, **1995 (2) Shim.LC 381** has no relevance to the interpretation of Section 8A because in that case the Court was not considering the constitutional validity of Section 8A.

87. It was next urged that the judgment in Khatri Ram's case has been made inoperative by the stay order referred to above and we should not follow the said decision. Reference in this behalf has been made to the judgment of the Apex Court in Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association Madras, (1992) 3 SCC 1 and Kunhayammed v. State of Kerala, (2000) 6 SCC 359. In our view both these judgments are not at all applicable to the facts of this case. As far as the judgment in Chamundi Moped's case is concerned that has no relevance to the facts of the present case. Even the judgment in Kunhayammed's case does not help the case of JAL. The said judgment relates to the theory of merger but in the present case the Apex Court has not passed any final order on the SLP. In fact the Apex court held that when a SLP is dismissed by a non-speaking or un-reasoned order the order of the High Court did not merge in the order of the Supreme Court and therefore can be reviewed by the High Court.

88. In any event, we are of the view that once a coordinate Bench has taken a decision then this Bench should not take a different view especially when the judgment of the coordinate Bench is under challenge before the Apex Court.

Judicial propriety and discipline demands that we should respect the judgment of the coordinate Bench till it is set-aside by the Apex Court.

89. We are of the considered view that when the Apex Court in a given case stays the judgment the stay is only applicable to the parties covered by the said order. When the Apex Court wants to stay the declaration of law made in a judgment then specific orders in this regard are passed. The Apex Court while granting stay has not stayed the declaration of the law laid down by this Court in Khatri Ram's case (supra) and therefore we are bound by the said decision.

90. The Calcutta High Court considered the following identical question in Niranjan Chatterjee v. State of West Bengal, 2007 (3) CHN 683:

> "14. Therefore, the question that arises for determination is, simply because in an application for grant of special leave, the Supreme Court has stayed the operation of an order passed by the Division Bench of this Court declaring a statutory provision as ultra vires the Constitution of India as an interim measure by imposing further conditions upon the State in those cases, whether a citizen who is not a party to the previous litigation can be deprived of the benefit of doctrine of precedent in resisting the action of the State on the ground that it could not invoke the ultra vires provision of the statute against him."

The Calcutta High Court held as follows:

> "20. Therefore, the effect of the order of stay in a pending appeal before the Apex Court does not amount to "any declaration of law" but is only binding upon the parties to the said proceedings and at the same time, such interim order does not destroy the binding effect of the judgment of the High Court as a precedent because while granting the interim order, the Apex court had no occasion to lay down any proposition of law inconsistent with the one declared by the High Court which is impugned.
>
> 21. We, therefore, find substance in the contention of the writ petitioner that a Division Bench of this Court having declared the provision contained in the West Bengal Land Reforms Act regarding vesting without making any lawful provision for compensation for such

vesting in the Act as ultra vires the Constitution of India, the State cannot be permitted to proceed with the said provision of vesting against the petitioner so long adequate provision is not made in the statute for compensation."

We are in agreement with these views.

91. The order of stay passed by the Apex Court only stays the judgment but not the law laid down in the said judgment. As far as this Court is concerned, we are bound by the judgment rendered by the earlier Bench. We cannot set-aside the earlier judgment of the Division Bench as that would be against the judicial propriety. We cannot also stay the proceedings in this case to await the judgment of the Apex Court. Therefore, we are bound by the judgment delivered in Khatri Ram's case (supra) and if this judgment is applied it is apparent that the land which vested in the State Government could not have been allotted for industrial purposes of setting up a cement plant.

92. The Apex Court in a recent judgment in case **Jagpal Singh v. State of Punjab**, AIR 2011 SC 1123, dealt in detail with the Punjab Common Lands and the rights of the villagers. The Apex Court held as follows:

"4. The protection of commons rights of the villagers were so zealously protected that some legislation expressly mentioned that even the vesting of the property with the State did not mean that the common rights of villagers were lost by such vesting. Thus, in Chigurupati Venkata Subbayya v. Paladuge Anjayya, **1972 (1) SCC 521 (529**) this Court observed:

"It is true that the suit lands in view of **Section 3 of the Estates Abolition Act** did vest in the Government. That by itself does not mean that the rights of the community over it were taken away. Our attention has not been invited to any provision of law under which the rights of the community over those lands can be said to have been taken away. The rights of the community over the suit lands were not created by the landholder. Hence those rights cannot be said to have been abrogated by Section 3) of the Estates Abolition Act."

5. What we have witnessed since Independence, however, is that in large parts of the country this

common village land has been grabbed by unscrupulous persons using muscle power, money power or political clout, and in many States now there is not an inch of such land left for the common use of the people of the village, though it may exist on paper. People with power and pelf operating in villages all over India systematically encroached upon communal lands and put them to uses totally inconsistent with its original character, for personal aggrandizement at the cost of the village community. This was done with active connivance of the State authorities and local powerful vested interests and goondas. This appeal is a glaring example of this lamentable state of affairs.

6 to 12 xxxxxxxxxxxxxxx

13. We find no merit in this appeal. The appellants herein were trespassers who illegally encroached on to the Gram Panchayat land by using muscle power/money power and in collusion with the officials and even with the Gram Panchayat. We are of the opinion that such kind of blatant illegalities must not be condoned. Even if the appellants have built houses on the land in question they must be ordered to remove their constructions, and possession of the land in question must be handed back to the Gram Panchayat. Regularizing such illegalities must not be permitted because it is Gram Sabha land which must be kept for the common use of villagers of the village. The letter dated 26.9.2007 of the Government of Punjab permitting regularization of possession of these unauthorized occupants is not valid. We are of the opinion that such letters are wholly illegal and without jurisdiction. In our opinion such illegalities cannot be regularized. We cannot allow the common interest of the villagers to suffer merely because the unauthorized occupation has subsisted for many years.

14. xxxxxx

15. In many states Government orders have been issued by the State Government permitting allotment of Gram Sabha land to private persons and commercial enterprises on payment of some money. In our opinion all such Government orders are illegal, and should be ignored."

> If we were to apply this judgment, it would be apparent that Section 8A would be wholly unconstitutional. We are however not saying anything in the matter since that question is pending before the Apex Court.

93. Applying the aforesaid decision to the facts of the case, we are of the considered view that the Government had no authority to allot this land to the Departments and further allot it to JAL.

94. Assuming for the sake of arguments that land falling in the reserved pool could be transferred to the allotable pool and vice versa, we find that no material has been placed on record before us to show how a portion of the land was taken out of the reserved pool and placed in the allotable pool. The total land allotted to JAL is 325 bighas and 16 biswas out of which 119 bighas 10 biswas was in the common pool i.e reserved for grazing etc to be used for common purpose as defined under Section 3 of the Act. The balance 126.6 bighas was in the allotable pool. Assuming that this land could be leased out, we fail to understand how the Government could have taken out the land from the reserved pool/common pool and transferred it to the allotable pool and transferred some land from the allotable pool to the reserved pool.

95. Section 8 of the Act provides that the land reserved under clause (a) of sub-section (1) shall be demarcated by the Revenue Officer in the prescribed manner. Once the land is demarcated and set aside for common purposes we do not find any power in the State to re-transfer the land from the common pool to the allotable pool. The power to modify the scheme under Section 8(4) only relates to the schemes framed in terms of **Section 8(b)(i)** and once the land is put in the common pool we find that there is no power remaining in the State to take it out of the common pool and put this land in the allotable pool.

96. Even if, we presume that such power exists, we are clearly of the view that this power, if any, to transfer the land from the common pool to the allotable pool and vice-versa cannot be exercised without taking the local inhabitants into confidence. It is their rights which are going to be affected and no order transferring the land which will definitely affect their rights can be passed without giving them reasonable hearing. No such hearing

was given and in fact the record reveals that the land was transferred by the stroke of a pen four years later without giving any hearing to the villagers.

97. In this behalf, we may also add that after the amendments brought about in 2001 certain lands which had vested in the State Government again went back to the villagers. The Act was amended in the year 2001 with a view to define the expression 'common purposes'. It further provided that the land which reverted back to the co-sharers in terms of **Section 3(d)** could not be re-transferred by them. Therefore, the land which was recorded as "shamlat tika Hasab Rasad Malguzari" or any other such name and recorded to be in the cultivable possession of the co-sharers before 1950 was to go back to co-sharers. In this case no exercise was done to ascertain whether the land which was transferred to JAL fell within this category or not.

98. As far as the proposal of transfer of land is concerned, we find that nobody first of all applied their mind as to in what manner the land from the common pool could be transferred to the allotable pool. This was done by a stroke of the pen only on the ground that the government had allotted this land to JAL. The cart was placed before the horse. Instead of first deciding whether this land was required for common purposes and whether the land which was being transferred from the allotable pool to the common pool was fit for common purposes the land was transferred. In fact the Law Department had clearly opined that this could not be done and was contrary to the judgment of this Court in Khatri Ram's case (supra). Despite this fact, the proposal was approved only on the ground that there is stay of the judgment. We feel that it would have been much better if the Government had approached the Apex Court for clarification of the stay order rather than interpreting the same itself. Be that as it may, as held by us above, there is no conscious decision shown to us as to how it was decided that the land should be transferred from the common pool to the allotable pool. Again only the interest of JAL was watched and the interests of the common people were totally forgotten. It appears that the officials were more concerned about the interest of the project proponent and nobody bothered

about the interest of the villagers or the purposes of the Village Common Lands Act."

11. A bare perusal of the aforesaid judgment would go to show that this Court expressly refused to take a different view from the one expressed in ***Khatri Ram's case*** (supra) especially when the said view was under challenge before the Hon'ble Supreme Court.

12. But what is more important is that the Court held that when the Hon'ble Supreme in a given case stays the judgment, the stay is only applicable to the parties to the said order and when the Hon'ble Supreme Court wants to stay the declaration of law made in a judgment, then specific orders in this regard are passed. Whereas, in the instant case, the Hon'ble Supreme Court while granting stay in ***Khatri Ram's case*** (supra) has not stayed the declaration of the law laid down in the said case and, in such circumstances, the learned Division Bench of this Court held itself to be bound by the said decision in ***Khatri Ram's case*** (supra).

13. Thus, what stands stated for the time being is that once the land is demarcated and set out for the 'common purposes', then there is no power of the State to re-transfer the said land from the 'common pool' to the 'allottable pool'.

14. That apart, as per the scheme of the Act, 50% of the land has to be reserved for the purpose of grazing and other common purposes of the inhabitants of the State and the remaining 50% can be allotted to the landless persons and any other eligible persons for the construction of the house. The utilization of 50% of the land which is to be allotted to the landless and other eligible persons cannot be granted for mining activities which runs counter to the spirit of the Act as held by the learned Division Bench of this Court in ***Khatri Ram's case*** (supra). This was never the intention of the legislature at the time of promulgating the Act and run counter to the provisions of Section 3 of the Act. Thus, the action of the State to grant lease to respondent No.5 from the allottable pool is, prima

facie, contrary to the Act which has been mentioned in the Schedule IX of the Constitution and is thus saved under Article 31A of the Constitution of India.

15. It is not in dispute that Khasra No.355 has been kept in the reserved pool as is evident from an extract of the register (Annexure P-7) showing allottable/reserved pool land.

16. As regards the contention of respondent No.5 that the judgment rendered in ***Khatri Ram's case*** (supra) is *per incuriam* as it failed to take into consideration the provisions of MMDR Act and Rules framed by this Court, we would not, at this stage, like to go into the question, lest it prejudices the case of either of the parties, more particularly, respondent No.5 herein. Suffice it to say that once the declaration of law made by this Court has not been stayed by the Hon'ble Supreme Court, then as a matter of judicial precedent, propriety and comity, we are bound to follow the same.

17. The respondents would then contend that the entire exercise of putting the village common land use for mining purpose is after taking cue from the order passed in CWPIL No.108 of 2017 on 31.08.2018 by a Division Bench wherein one of us (Justice Tarlok Singh Chauhan) was a member. But, having gone through the said order, we find that there is no direction to the respondents therein to auction the lands that have been kept in the reserved pool and, therefore, no advantage can be taken on the basis of these directions.

18. Therefore, in the given facts and circumstances of the case, while leaving all questions of law open, we deem it appropriate to restrain respondent No.5 or any other person from operating quarry in Khata No. 19 min, Khatauni No. 120 min, Khasra No.355, situated at Mohal Har Dogri, Gram Panchayat-Kohlapur, Tehsil-Rakkar, District-Kangra, Himachal Pradesh, till further orders. The application stands disposed of.

CWP No. 8445 of 2022.

19. List on **6.3.2023** by which time respondent Nos. 1 to 4 and 6 shall positively file their responses to the writ petition.

BEFORE HON'BLE MS. JUSTICE SABINA, J. AND HON'BLE MR. JUSTICE SUSHIL KUKREJA, J.

Subhash Chand @ Bhashu

.....Appellant

Versus

State of H.P.

.....Respondent

For the Appellant: Mr. Rajiv Rai, Advocate.

For the Respondent: Ms. Divya Sood, Deputy Advocate General.

Criminal Appeal No.578 of 2019
Reserved on : 17.11.2022
Decided on:13.12.2022

Code of Criminal Procedure, 1973- Section 374 (2)- Appeal – **The Protection of Children from Sexual Offences Act, 2012**- Sections 6 & 10- Indian Penal Code, 1860- Section 506- Appeal against conviction**- Held-** Prosecutrix in a sexual offence is not an accomplice and there is no rule of law that her testimony cannot be acted upon and made basis of conviction unless corroborated in material particulars- Statement of child victim is consistent and order passed by Ld. Trial Court is modified to the extent that the accused is found guilty of having committed the offence of aggravated sexual assault and, as such, convicted under Section 10 of the Act and Section 506 of IPC. (Paras 18, 19, 23 31)

Cases referred:

Dilip and another vs. State of M.P., (2001) 9 SCC 452;
Jugendra Singh Vs. State of UP, (2012) 6 SCC 297;
Lillu @ Rajesh & another Vs. State of Haryana, (2013) 14 SCC 643;
Sham Singh Versus State of Haryana, (2018) 18 Supreme Court Cases 34;
State of Andhra Pradesh vs. Gangula Satya Murthy, 1997(1) SCC 272;
State of Himachal Pradesh Vs. Sanjay Kumar alias Sunny, (2017) 2 SCC 51;

The following judgment of the Court was delivered:

Sushil Kukreja, Judge

The instant appeal filed under Section 374 (2) of the Code of Criminal Procedure, lays challenge to judgment of conviction dated 31.08.2019 and order of sentence dated 23.09.2019, passed by the learned Special Judge, Kangra at Dharamshala, in R.B.T No.57-B/VII/19/2016, titled State of Himachal Pradesh Versus Subhash Chand alias Bhashu, whereby the appellant/accused was convicted for commission of the offence under Section 9(m) punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'the Act') and Section 506 of the Indian Penal Code (for short, 'IPC') and sentenced him to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.50,000/- (rupees fifty thousand only) and in default of payment of fine, he shall further undergo rigorous imprisonment for a period of one year for commission of the offence under Section 6 of the Act and he was further sentenced to undergo imprisonment for six months under Section 506 of IPC.

2. Briefly stated the facts of the case are that on 14.07.2016, on receipt of a telephonic information from the complainant (name withheld) at Police Station Baijnath, regarding committing of rape of her daughter by the accused, Inspector/SHO Kamal Kant, the Investigating Officer, alongwith other police officials went to village (name withheld) and at the spot, he recorded the statement of the complainant, wherein she had stated that on 14.07.2016 at about 8: 00 a.m., when she left for work in the nearby area, her youngest daughter i.e. child victim was alone in the house as her other two daughters had gone to Barot to the house of her parents and when she returned home in the evening at about 6:15 p.m., the child victim told her that in the morning after she (complainant) left the house, while she was sitting on the entrance (Deodi) of the house, the accused came there, dragged her inside to the room of the house and committed wrongful act with her and thereafter threatened to kill her if she disclosed the incident to anyone.

3. On the basis of the statement of the complainant, FIR No.96, dated 14.07.2016, was registered against the accused at Police Station Baijnath, District Kangra, H.P., under Section 4 of the Act and Sections 376 and 506 of IPC.

4. During investigation, the statement of the child victim was recorded and the Investigating Officer also moved an application before Ld. JMIC, Baijnath for recording the statement of the child victim under Section 164 Cr.P.C., consequently the statement was recorded. The Investigating Officer prepared the site plan of the spot, recorded statements of the witnesses and also got the child victim as well as the accused medically examined.

5. On the completion of the investigation and receipt of the RFSL report, the Investigating Officer submitted the charge-sheet to the then SHO Duni Chand, who presented the charge-sheet as well as the supplementary charge-sheet in the Court.

6. Vide order dated 29.08.2019, charge was framed by the learned trial Court against the accused under Section 9(m) punishable under Section 6 of the Act and Section 506 of IPC, to which, the accused did not plead guilty and claimed trial.

7. In order to prove its case, the prosecution examined as many as 20 witnesses. Statement of the accused was recorded under Section 313 Cr.P.C., wherein he denied all set of incriminating evidence led by the prosecution against him, besides pleaded that as he stood surety for father of the child victim in a criminal case and when her father jumped over the bail, he used to visit the house of the child victim in search of her father, the mother of the child victim used to threaten him not to search her husband, otherwise she would rope him in a false case. However, the accused did not examine any witness in his defence.

8. On the basis of evidence led on record by the prosecution, the learned trial Court convicted the accused, vide the impugned judgment and sentenced him as per the description given hereinabove.

9. Being aggrieved and dissatisfied with the judgment of conviction and order of sentence passed by the learned trial Court, the appellant/accused approached this Court by way of an appeal, praying therein for his acquittal after setting aside the aforesaid judgment of conviction and order of sentence.

10. The learned counsel for the appellant contended that the charge against the accused has not been proved beyond reasonable doubt. He further contended that the learned trial Court has not appreciated the statement of the child victim made under Section 164, Cr.P.C., wherein she had not averred a single word with regard to penetrative sexual assault and, as such, the appellant was wrongly convicted for the offence of aggravated penetrative sexual assault defined under Section 6 of the Act.

11. On the other hand, the learned Deputy Advocate General supported the judgment of the learned trial Court and contended that since the charge against the accused has been duly proved by the prosecution beyond all reasonable doubt, the learned trial Court has rightly convicted him on the basis of proper appreciation of evidence.

12. We have heard learned counsel for the appellant as well as the learned Deputy Advocate General and also gone through the record carefully.

13. The case of the prosecution mainly rests upon the statements of PW-2 Dr. Nandita Katoch, PW-3, the child victim, PW-4, mother of the child victim and PW-18 Rashmi (friend of the child victim).

14. The child victim, while appearing in the witness-box as PW-3, deposed that on 14.07.2016 she alongwith her mother was at home as her other two sisters had gone to the house of their maternal grandfather and at 8

a.m., her mother had gone for work and thereafter about 10-15 minutes of her mother having left the house, the accused had come there while she was sitting on the 'Deodi' (entrance) of her house, he dragged her inside the house from the 'Deodi' and in the room, he had opened his trousers/pyjamas and kept the same alongside the wall of the house and thereafter he had opened her 'Salwar' and put his penis in her vagina, but he was not in a position to penetrate. The accused touched her private part with his penis and in the meantime, some white material came out of his penis, which remained on her private part and then he told her not to disclose about this happening to anyone and threatened to kill her in case she would disclose it to anyone. The child victim also deposed that in the meantime her friend (PW-18) also came inside their house and after opening the door, she had seen her and the accused in a naked condition and then she had gone to bring her maternal grandmother. At about 6 p.m., her mother (PW-4) came there and then she had narrated the incident to her also and thereafter her mother had telephonically informed the police about the occurrence and the police had come to their house at about 8-8.30 p.m. Her mother had given statement to the police about the occurrence and the police had also made enquiries from her about this occurrence and had taken her to the hospital for her medical examination, but her medical could not be done on that night as no female medical officer was present in the hospital at Baijnath and she was taken to Palampur, where her medical examination had been conducted during night time and on the next day, she had shown the place of occurrence to the police and the police had taken the photographs Mark A-1 to Mark A-4 of that place and had also conducted videography of the proceedings. The police had also taken her to the Court of Judicial Magistrate, who had recorded her statement Ext. PW3/A and the police had also got her blood sample preserved from the spot.

15. PW-4, who is the mother of the child victim, deposed that on 14.07.2016 she had left the house at 8 a.m. to go to her place of work and the child victim remained at home, as her other two daughters namely Nisha and Laxmi had gone to Barot to the house of her parents and when she had come back at about 6 p.m., the child victim had met her on the road alongwith her friend Rashmi and her brother Rohit, who were grazing the animal, where the child victim had told her that the accused had come to their house when she had left the house and taken the child victim inside the room, undressed her Salwar and also undressed his pant and then he had tried to insert his private part in the private part of the child victim by making her stand against the wall, but he could not penetrate his private part in her private part. At that time her daughter was about 11 years of age and the accused was Ward Panch of the Panchayat. This witness further deposed that from the road she came to her house when the child victim had disclosed to her about the occurrence and then from her house, she had gone to the house of the accused and had brought him to her house, where she had asked him as to why he had tried to commit offence of rape with her daughter, on which, he had told that he had not done anything with her daughter and thereafter he had left the place by saying that she could not dare to do anything against him, on which, she had telephonically informed the police about the occurrence and thereafter the police had come to her house and recorded her statement Ex.PW4/A and during night, the police had taken her alongwith her daughter to Civil Hospital, Baijnath for medical examination of her daughter, but the lady doctor was not there, therefore, her medical examination could not be conducted and then the police had taken them to Civil Hospital, Palampur, where medical examination of her daughter was conducted.

16. PW-18 Rashmi, who is the friend of the child victim, fully corroborated the statement of the child victim on material particulars. This witness deposed that on 14th July, 2016 at around 8:10-8:15 a.m., she had

gone to the house of child victim and saw that the accused was inside the room who had put off his pant and the child victim was not wearing her salwar and thereafter she returned to the house of her Nani/maternal grandmother and told her about the incident. She alongwith her Nani came to the house of the child victim, where the accused was standing on the door of the house and the child victim was inside the room and after about 10-15 minutes, the accused came to her Nani's house and her Nani asked him whether he had done any wrong act with the child victim and the accused told that he had done nothing. Thereafter, the child victim came to her Nani's house and she asked her why she was not wearing the Salwar, on which, the child victim told that the accused had put off her Salwar and then done the wrong act with her.

17. Dr. Nandita Katoch appeared in the witness box as PW-2 and deposed that on 15.07.2016 the victim was produced before her with the alleged history of sexual assault by one Subhash Chand on 14.07.2016 at around 8 -10 a.m., when she was alone at her home. According to the victim, the accused had come to her house when she was alone, he opened her clothes and his pyjamas and touched his private part with her private part and masturbated in front of her, but no penetration was done and the accused had done similar activities earlier also (5-10 times) since last one year. This witness has further deposed that on examination of the victim, no scratches, bruises and lacerations were found on her body and she had issued MLC EX.PW-2/B. She had also referred the victim to dental examination for her age determination and on receipt of the RFSL report Ex.PX, she had opined that the possibility of sexual assault cannot be ruled out.

18. The law on Section 376 of the IPC has been categorized and reiterated by the Courts time and again. Testimony of a victim of such an

offence, if found cogent and credible by itself, is sufficient to nail the accused. No other supportive evidence is required. A prosecutrix of a sex related offence cannot be treated at par with an accomplice. She is in fact, a victim of the crime. She is undoubtedly, a competent witness and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence, as in the case of an injured. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice that her statement requires corroboration.

19**.** The Rule of appreciation of evidence of prosecutrix in cases relating to sexual assault has been considered in several cases by Hon'ble Supreme Court. In ***Dilip and another vs. State of M.P., (2001) 9 SCC 452,*** the Hon'ble Apex Court has held that prosecutrix in a sexual offence is not an accomplice and there is no rule of law that her testimony cannot be acted upon and made basis of conviction unless corroborated in material particulars. The relevant portion of the aforesaid judgment reads as under:-

> *"12. The law is well-settled that prosecutrix in a sexual offence is not an accomplice and there is no rule of law that her testimony cannot be acted upon and made basis of conviction unless corroborated in material particulars. However, the rule about the admissibility of corroboration should be present to the mind of the Judge. In State of H.P. Vs. Gian Chand-, on a review of decisions of this Court, it was held that conviction for an offence of rape can be based on the sole testimony of the prosecutrix corroborated by medical evidence and other circumstances such as the report of chemical examination etc., if the same is found to be natural, trustworthy and worth being relied on……."*

20. In ***Jugendra Singh*** Vs. ***State of UP, (2012) 6 SCC 297***, Hon'ble Apex Court has held that rape or an attempt to rape is a crime not against an

individual, but a crime which destroys the basic equilibrium of the social atmosphere. The relevant portion of the judgment reads as under:-

> ***"49. .....Rape or an attempt to rape is a crime not against an individual but a crime which destroys the basic equilibrium of the social atmosphere. The consequential death is more horrendous. It is to be kept in mind that an offence against the body of a woman lowers her dignity and mars her reputation. It is said that one's physical frame is his or her temple. So, the courts should deal with such cases sternly and severely. No one has any right of encroachment. ....."***

21. In ***Lillu @ Rajesh & another*** Vs. ***State of Haryana, (2013) 14 SCC 643***, the Hon'ble Apex Court has observed that rape is violative of victim's fundamental right under Article 21 of the Constitution, therefore, the courts should deal with such cases sternly and severely. The relevant portion of the judgment is reproduced as under:-

> ***"12. In State of Punjab v. Ramdev Singh: AIR 2004 SC 1290, this Court dealt with the issue and held that rape is violative of victim's fundamental right under Article 21 of the Constitution. So, the courts should deal with such cases sternly and severely. Sexual violence, apart from being a dehumanizing act, is an unlawful intrusion on the right of privacy and sanctity of a woman. It is a serious blow to her supreme honour and offends her self-esteem and dignity as well. It degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries, but leaves behind a scar on the most cherished position of a woman, i.e. her dignity, honour, reputation and chastity. Rape is not only an offence against the person of a woman, rather a crime against the entire society. It is a crime against basic human rights and also violates the most cherished fundamental right guaranteed under Article 21 of the Constitution."***

22. In ***State of Himachal Pradesh*** Versus ***Sanjay Kumar alias Sunny, (2017) 2 Supreme Court Cases 51,*** the Hon'ble Supreme Court held that the Courts should find no difficulty to act on the testimony of the victim of a sexual assault, if it inspires confidence and seeking corroboration to her statement before relying upon the same would literally amount to adding insult to injury. The relevant portion of the judgement is reproduced as under:-

> "*31.....By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance....."*

23. Therefore, the testimony of the child victim is required to be considered, keeping in mind these principles of appreciation of evidence of the rape victim. We have minutely gone through the statement of the child victim and found the same to be trustworthy and confidence inspiring. Her statement is consistent right from the time when she had made initial statement under Section 161, Cr.P.C. before the police and thereafter under Section 164 Cr.P.C. before the learned Judicial Magistrate 1st Class, Baijnath till the time of her deposition before the trial Court. Her statement is quite natural and is also consistent with the case of prosecution. She was cross-examined at length by the learned defence counsel, however, nothing favourable could be elicited from her lengthy cross-examination. She had successfully withstood the test of her cross-examination and there are no material discrepancies and contradictions in her statement, which go to the root of the case or which may affect the core of prosecution case in any manner. Even after being subjected to a lengthy cross-examination, the child victim's statement made in the examination-in-chief regarding sexual assault made by the accused remained totally un-impeached. She emphatically denied all the suggestions put forth by the defence counsel to probabilise non-complicity of the accused.

24. Learned counsel for the appellant has vehemently contended that there are material contradictions in the statement of the Child victim. However, after going through her statement minutely, we could not find any material contradiction therein, which may affect the core of the prosecution case. In ***Sham Singh Versus State of Haryana, (2018) 18 Supreme Court Cases 34,*** it has been held by the Hon'ble Supreme Court that while trying an accused on charges of rape, the Courts should not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. The relevant para of the judgement is reproduced as under:-

> *"6. We are conscious that the courts shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If the evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations or sexual assaults."*

25. We may refer to a decision of the Apex Court in ***State of Andhra Pradesh*** vs. ***Gangula Satya Murthy***, ***1997(1) SCC 272***, wherein it has been held that the Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or Insignificant discrepancies in the statement of the witnesses, which are not of a fatal nature to throw out allegations of rape. The relevant portion of the judgment reads as under:-

> *27".....Courts are expected to show great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or Insignificant discrepancies In the statement of the witnesses, which are not of a fatal nature to throw out allegations of rape. This is all the more Important because of late crime against women in general and rape in particular is on the Increase. It Is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection and we must emphasise that the courts must deal with rape cases in particular with utmost sensitivity and appreciate the evidence in the totality of the background of the entire case and not in isolation".*

26. The minor contradictions, which have been pointed out by the learned counsel for the appellant, are of no consequence as they do not go to the heart of the matter and shake the basic version of the prosecution case. We have also gone through the statement of the accused under Section 313, Cr.P.C., wherein he stated that he had been falsely implicated in the case as he stood surety for father of the child victim in a criminal case and when her father jumped over the bail, he used to visit the house of the child victim in search of her father, then the mother of the child victim used to threaten him not to search her husband, otherwise she would rope him in a false case. However, he did not lead any evidence in his defence, despite opportunity granted to him. We have also examined the statement of child victim as well the other prosecution witnesses to satisfy ourselves as to whether there was any likelihood of false implication or motive of false accusation. However, except for the bald statement of the accused under Section 313, Cr.P.C., no witness has been examined by him that may probabilise that the parents of the child victim had motive to falsely implicate the accused. The accused had placed on record various documents Ext.D-1 to D-10, pertaining to the proceedings before the SDM, Baijnath, initiated on 17.01.2016 under Section 107/151, Cr.P.C., in which the accused stood surety for the father of the child victim. It may not be out of place to mention here that the proceedings under Section 107/151, Cr.P.C. automatically come to an end within a period of six months from the date of initiation of the proceedings and when the incident had taken place on 14.07.2016, by that time, the period of six months had already elapsed. From the perusal of the proceedings, it appears that though the father of the child victim did not appear in the Court of SDM, Baijnath, but no notice had been issued to the accused to produce the father of the child victim, which could show that the accused was directed by the Court of SDM, Baijnath to produce the father of the child victim for which he had been visiting her house. There is no material on record to show that any punitive

action was taken against the accused by the Court of SDM, Baijnath. Even if the defence of the accused is accepted that he had been directed by the SDM, Baijnath to produce the father of the child victim, in which the accused stood surety by executing bond in the sum of Rs.5,000/-, the same cannot be a ground to falsely implicate him as for such a meagre amount of Rs.5,000/-, the complainant would not have implicated the accused in a case of this nature by putting the reputation of her daughter at stake.

27. The learned counsel for the appellant lastly contended that the learned trial Court has wrongly convicted the appellant for the offence of aggravated penetrative sexual assault defined under Section 6 of the Act as the entire statement of the child victim, coupled with the medical evidence shows that the accused had only touched the private part of the child victim with his private part and there was no penetration of his penis into her vagina. This contention of the learned counsel for the appellant deserves to be accepted as while appearing in the witness-box as PW-3, the child victim categorically stated that the accused while entering inside the room, had opened his trousers/pyjamas and thereafter opened her salwar and had put his penis in her vagina, but he was not in a position to penetrate and he had also touched her private part with his penis and in the meantime, some white material came out of the penis of the accused.

28. The medical evidence lends support to the aforesaid statement of the child victim as the Medical Officer, who appeared in the witness-box as PW-2, also deposed that when the child victim was brought for medical examination, the child victim disclosed to her that the accused had opened her clothes and touched his private part with her private part and masturbated in front of her and no penetration was done. She had also stated that on examination, no scratches, bruises and lacerations were found on the body of the child victim and the hymen was found intact and she had issued

MLC Ext.PW2/B. As per RFSL report Ext. PX, blood and semen were not detected in the vaginal smear slides and vaginal swabs of the child victim. At this stage, it would be relevant to refer to Section 7 of the Act, which reads as under:-

> "*7. **Sexual assault**.- Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other Act with sexual intent which involves physical contact without penetration is said to commit sexual assault."*

29. Since the evidence on record shows that the accused had touched the private part of the child victim with his private part with sexual intent and the same involved physical contact without penetration, hence, the accused had committed sexual assault on the child victim within the definition of sexual assault as per Section 7 of the Act .

30. Now the next question, which arises for consideration, is as to what was the age of the child victim at the time of the occurrence. PW-2 Dr. Nandita Katoch had referred the child victim for dental examination for her age determination. PW-16 Dr.Kalpana Mahajan, Radiologist, deposed that on 15.07.2016 the child victim was referred to her for ossification test and as per test and X-Ray reports, the age of the child victim was between 8½ to 12½ years and to this effect, she had issued report Ext.PW16/A. The mother of the child victim, while appearing on the witness-box as PW-4, disclosed that at the relevant time, the age of the child victim was 11 years. PW-5, the then Up-pradhan of the Gram Panchayat, stated that as per birth entry recorded in the register Ext. PW5/A, the date of birth of the child victim was recorded as 22.11.2005. PW-11, the then Secretary of the Gram Panchayat, deposed that

he had issued the date of birth certificate of the child victim Ext. PW11/B as per record and as per this certificate, the date of birth of the child victim was 22.11.2005. Thus, the perusal of date of birth certificate of the child victim Ext.PW11/B shows that her date of birth was 22.11.2005. The date of occurrence was 14.07.2016, meaning thereby that at the time of the occurrence, the age of the child victim was about 10 years and 8 months and, as such, she was below 12 years of age at the time of the incident. As per Section 9(m) of the Act, whoever commits sexual assault on a child below twelve years will come under the definition of aggravated sexual assault. Thus, the perusal of the entire evidence on record shows that the accused had committed aggravated sexual assault on the child victim within the definition of Section 9(m) of the Act punishable under Section 10 of the Act.

31. Consequently, in view of the detailed discussion made hereinabove, the judgment of conviction dated 31.08.2019 and order of sentence dated 23.09.2019 passed by the learned trial Court is modified to the extent that the accused is found guilty of having committed the offence of aggravated sexual assault and, as such, he is convicted under Section 10 of the Act and Section 506 of IPC and sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs.10,000/- (rupees ten thousand only) and in default of payment of fine, he shall further undergo rigorous imprisonment for a period of one year under Section 10 of the Protection of Children from Sexual Offences Act, 2012 and he is further sentenced to undergo imprisonment for six months under Section 506 of the Indian Penal Code. Both the sentences shall run concurrently.

32. Accordingly, the appeal is disposed of in the above terms. Pending miscellaneous application(s), if any, shall also disposed of.

BEFORE HON'BLE MS. JUSTICE SABINA, J. AND HON'BLE MR. JUSTICE SUSHIL KUKREJA, J.

Bal Krishan ....Appellant

Versus

State of H.P. ...Respondent

For the appellant : Mr. N.S. Chandel, Sr. Advocate with Mr. Vinod Kumar Gupta, Advocate.

For the respondent/State : Mr. Anil Jaswal, Additional Advocate General.

Cr. Appeal No. 149 of 2018
Reserved on: 15.11.2022
Decided on: 07.12.2022

Code of Criminal Procedure, 1973- Section 374(2)- Appeal- **Indian Penal Code, 1860**- Section 376- **Information Technology Act, 2000**- Section 67 – Appeal against conviction- Held:-

A. The consent of the prosecutrix to maintain physical relations was obtained by the accused by blackmailing her and by putting her in fear of hurting her reputation on the basis of transmitting obscene photographs, as such, her consent was not free from fear of hurting her reputation. (Para 32)

B. Delay in F.I.R.- Delay in lodging F.I.R. may not by itself be fatal to the prosecution case and it would not automatically render the prosecution case doubtful specially when delay has been satisfactorily explained- Evidence of the Prosecution is reliable- Appeal dismissed. (Paras 34, 36)

Cases referred:

Deelip Singh alias Dalip Kumar Vs. State of Bihar, (2005) 1 SCC 88;
Dildar Singh Vs. State of Punjab, (2006) 10 Supreme Court Cases 531;
Jugendra Singh Vs. State of UP, (2012) 6 SCC 297;

Kaini Rajan Vs. State of Kerala, (2013) 9 Supreme Court Cases 113;
Lillu @ Rajesh &Anr. Vs. State of Haryana, (2013) 14 SCC 643;
Satpal Singh Vs. State of Haryana, (2010) 8 Supreme Court Cases 714;
State of Andhra Pradesh vs. Gangula Satya Murthy, 1997(1) SCC 272;
State of U.P. Vs. Chhotey Lal, (2011) 2 SCC 550;
Tulshidas Kanolkar Vs. State of Goa, (2003) 8 Supreme Court Cases 590;

The following judgment of the Court was delivered:

Sushil Kukreja, Judge

The instant appeal filed under Section 374 (2) of Code of Criminal Procedure, lays challenge to the judgment/order of conviction/sentence dated 18.04.2018, passed by learned Additional Sessions Judge (I), Shimla, Camp at Rohru, H.P., in Sessions Trial No. 6-R/7 of 2013, whereby the appellant/accused/convict, (hereinafter referred to as "the accused"), was convicted and sentenced to undergo rigorous imprisonment for three years under Section 66-E of the Information and Technology Act (hereinafter referred to as "IT Act") and to pay a fine of Rs.1,00,000/- (rupees one lac) and in default of payment of fine to further undergo simple imprisonment for three months. The accused was further sentenced to undergo rigorous imprisonment for a period of two years under Section 67 of the IT Act and to pay a fine of Rs. 1,00,000/- (rupees one lac) and in default of payment of fine to further undergo simple imprisonment for two months. The accused was also sentenced to undergo rigorous imprisonment for a period of ten years under Section 376 of the Indian Penal Code (hereinafter referred to as "IPC") and to pay a fine of Rs. 50,000/- (rupees fifty thousand) and in default of payment of fine to further undergo simple imprisonment for six months. All the sentences were ordered to run concurrently.

2. The case of the prosecution in brief is that on 28.03.2013, the prosecutrix presented an application to the Suprintendent of Police, C.I.D. Shimla, wherein it was alleged that in the year 2006-07, she was studying in

Government Senior Secondary School, Sawra (Saraswati Nagar) and the accused used to run a shop in the name and style of 'Verma Trading Company' there. In the outer part of the shop, he used to sit himself, whereas, in the rear portion of the shop, his wife used to run a beauty parlour. As per the prosecutrix, firstly when she visited the beauty parlour of the wife of the accused for trimming her eyebrows, wife of the accused was present there. However, when second time she visited the beauty parlour, wife of the accused was not present there and taking advantage of her absence, the accused gave a toffee and chewing-gum to her. After consuming the same, she felt intoxicated and the accused clicked her obscene photographs. The accused also told the prosecutrix to come to her shop at regular intervals or else, he would upload her obscene photographs on Whatsapp and Facebook. Under the garb of obscene photographs, the accused had committed rape with the prosecutrix. In the month of April, 2012, the prosecutrix went to Baddi in connection with her job and in the month of November, 2012, she came to know that accused had forwarded her obscene photographs to taxi drivers of Sawra area. The prosecutrix also came to know that accused had also done similar type of act with another girl, who was the resident of Kuddu and had forwarded her obscene photographs also to taxi drivers. On the complaint of the prosecutrix, the police investigated the matter and on 29.03.2013, Inspector Kamal Chand, Investigating Officer, went to Verma Trading Company alongwith independent witnesses and prepared spot map. The office of the Verma Trading Company was searched and one i-pod along with one memory card of 2 GB, containing obscene photographs were recovered. The recovered articles were put in a cloth parcel, sealed with seal impression 'A' at five places and taken into possession. On the same day, Prem Lal, father of another girl presented three photographs of his daughter, six photographs of prosecutrix and one memory card of 2 GB, which were taken into possession. On 30.03.2013, Inspector Kamal Chand, went to Ghezta Studio at

Sawra and recovered one hard disk from co-accused, Jishan Lal in presence of the witnesses and the same was taken into possession. Thereafter, the accused persons were arrested and Investigating Officer also clicked photographs of accused Bal Krishan with his official camera for the purpose of comparison and sent the same to SFSL, Junga. The statements of the witnesses were recorded as per their versions. The Investigating Officer also got the medical examination of the prosecutrix conducted and obtained her birth certificate.

3. After completion of investigation, the accused Bal Krishan was charge-sheeted for the commission of offence punishable under Section 376 of IPC and Sections 66-E and 67 of Information and Technology Act, whereas, co-accused Jishan Lal was charge sheeted for the offence punishable under Sections 66-E and 67 of Information and Technology Act.

4. Charge was framed by the learned trial Court against the accused persons, vide order dated 16.06.2015, wherein, the accused persons did not plead guilty of the charges framed against them and claimed to be tried.

5. In order to prove its case, the prosecution examined as many as 20 witnesses. Statements of accused persons were recorded under Section 313 Cr.P.C., wherein they denied the prosecution case. However, they did not lead any evidence in their defence.

6. On the basis of evidence led on record by the prosecution, the learned trial Court acquitted co-accused Jishan Lal for the offence alleged against him, whereas, held accused Bal Krishan guilty of his having committed offence punishable under Sections 66-E and 67 of IT Act and Section 376 of IPC and sentenced him as per description given hereinabove.

7. Being aggrieved and dissatisfied with the judgment of conviction and order of sentence, passed by the learned trial Court, accused Bal Krishan

approached this Court, praying therein for his acquittal after setting aside the aforesaid judgment of conviction and order of sentence.

8. We have heard the learned Senior counsel appearing for the appellant, learned Additional Advocate General for the respondent-State and also gone through the records carefully.

9. Learned Senior counsel appearing on behalf of the appellant has contended that testimony of the prosecutrix does not inspire confidence, as the same is suffering from material contradictions. He has further contended that the prosecution has failed to prove the age of the prosecutrix as birth certificate and copy of parivar register are not admissible in evidence because the same are signed by the Secretary Gram Panchayat.He has further contended that there is delay in lodging the FIR, which has not been sufficiently explained. He has also submitted that prosecution has failed to prove on record that obscene photographs were clicked and transmitted by the accused Bal Krishan.

10. On the other hand, learned Additional Advocate General has contended that it has been duly established on record that accused Bal Krishan had committed sexual intercourse with the prosecutrix without her consent by putting her in fear of reputation and had also clicked and transmitted the obscene photographs of the prosecutrix for the purpose of blackmailing her.

11. The crime of rape can be regarded as the highest torture Inflicted upon a woman. It causes not only physical torture to the body of the woman but adversely affects her mental, psychological and emotional sensitivity. Therefore, rape is most hatred crime against the very basic human right and violative of the woman's most fundamental right, namely the right to life. It is less a sexual offence than an act of aggression aimed at degrading and humiliating women. Such cases are required to

be handled by the courts with utmost sensitivity and high responsibility.

12. The Rule of appreciation of evidenceof prosecutrix in casesrelating to rapehas been considered in several casesby Hon'ble Supreme Court. In ***Jugendra Singh*** Vs. ***State of UP,*** (2012) 6 SCC 297, Hon'ble Apex Court has held that rape or an attempt to rape is a crime not against an individual, but a crime which destroys the basic equilibrium of the social atmosphere. The relevant portion of the judgment reads as under:-

> *"49. .....Rape or an attempt to rape is a crime not against an individual but a crime which destroys the basic equilibrium of the social atmosphere. The consequential death is more horrendous. It is to be kept in mind that an offence against the body of a woman lowers her dignity and mars her reputation. It is said that one's physical frame is his or her temple. So, the courts should deal with such cases sternly and severely. No one has any right of encroachment. ....."*

13. In ***Lillu @ Rajesh &Anr.*** Vs. ***State of Haryana,*** (2013) 14 SCC 643, the Hon'ble Apex Court has observed that rape is violative of victim's fundamental right under Article 21of the Constitution, therefore, the courts should deal with such cases sternly and severely. The relevant portion of the judgment is reproduced as under:-

> *"12.In State of Punjab v. Ramdev Singh: AIR 2004 SC 1290, this Court dealt with the issue and held that rape is violative of victim's fundamental right under Article 21of the Constitution. So, the courts should deal with such cases sternly and severely. Sexual violence, apart from being a dehumanizing act, is an unlawful intrusion on the right of privacy and sanctity of a woman. It is a serious blow to her supreme honour and offends her self-esteem and dignity as well. It degrades and humiliates the victim and where the victim is a helpless innocent child or a minor, it leaves behind a traumatic experience. A rapist not only causes physical injuries, but leaves behind a scar on the most cherished position of a woman, i.e. her dignity, honour, reputation and chastity. Rape is not only an offence against the person of a woman, rather a crime against the entire society. It is a crime against basic*

human rights and also violates the most cherished fundamental right guaranteed under Article 21 of the Constitution."

14. In ***State of U.P.*** Vs. ***Chhotey Lal***, (2011) 2 SCC 550, the Hon'ble Supreme Courts has held that the courts must be sensitive and responsive to the plight of the female victim of sexual assault. Ours is a conservative society and, therefore, a woman and more so a young unmarried woman will not put her reputation in peril by alleging falsely about forcible sexual assault. The relevant portion of the judgment reads as under:-

"*26. The important thing that the court has to bear in mind is that what is lost by a rapevictim is face. The victim loses value as a person. Ours is a conservative society and, therefore, a woman and more so a young unmarried woman will not put her reputation in peril by alleging falsely about forcible sexual assault. In examining the evidenceof the prosecutrix the courts must be alive to the conditions prevalent in the Indian society and must not be swayed by beliefs in other countries. The courts must be sensitive and responsive to the plight of the female victim of sexual assault. Society's belief and value systems need to be kept uppermost in mind as rapeis the worst form of women's oppression. A forcible sexual assault brings in humiliation, feeling of disgust, tremendous embarrassment, sense of shame, trauma and lifelong emotional scar to a victim and it is, therefore, most unlikely of a woman, and more so by a young woman, roping in somebody falsely in the crime of rape. The stigma that attaches to the victim of rapein Indian society ordinarily rules out the levelling of false accusations. An Indian woman traditionally will not concoct an untruthful story and bring charges of rapefor the purpose of blackmail, hatred, spite or revenge."*

15. We may refer to a decision of the Apex Court in ***State of Andhra Pradesh*** vs. ***Gangula Satya Murthy***, 1997(1) SCC 272, wherein it has been held that the Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or Insignificant discrepancies in the statement of the witnesses, which are not of a fatal nature to throw out allegations of rape. The relevant portion of the judgment reads as under:-

> *27".....Courts are expected to show great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or Insignificant discrepancies In the statement of the witnesses, which are not of a fatal nature to throw out allegations of rape. This is all the more Important because of late crime against women in general and rape in particular is on the Increase. It Is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection and we must emphasise that the courts must deal with rape cases in particular with utmost sensitivity and appreciate the evidence in the totality of the background of the entire case and not in isolation".*

16. Keeping in mind these principles of appreciation of evidence of the victim of the rape case, let us examine version of the prosecutrix, who appeared in the witness box as PW-1 and had categorically deposed that in the year 2006-2007 she was studying in 10+1 standard in Government Senior Secondary School, at a place (name withheld) and at the same place, abeauty parlour was being run on the rear portion of the shop of accused Bal Krishan by his wife and on the front portion, watch shop was being run by the accused. She used to visit beauty parlour of the wife of accused Bal Krishan. She has further deposed that in the year, 2006, she visited the beauty parlor of accused Bal Krishan for trimming of her eyebrows and at that time, wife of accused Bal Krishan was there. However, next time when she visited the same beauty parlor, wife of the accused Bal Krishan was not there and he took the prosecutrix inside the beauty parlor. She further deposed that accused Bal Krishan offered her toffee and chewing-gum and after consuming the same, she lost her senses and accused had started kissing her. After becoming normal, she went back to her house. The said incident was not disclosed by her to anyone due to fear. She further deposed that thereafter accused Bal Krishan kept on calling her at his shop by saying that if she did not visit his shop again and again, he would show her objectionable

photographs to others and in this manner, accused Bal Krishan tortured her upto the year, 2011. Accused Bal Krishan also visited her house and threatened her that he would tell the entire incident to her father. She further deposed that in the year, 2012, she went to Baddi to work in a company and accused Bal Krishan used to give threatening calls to her on her mobile phone. In the month of November, 2012, when she was at Shimla, her parents told her that the accused Bal Krishan had transmitted her obscene photographs to others through his mobile phone and as such the accused humiliated her in the public. She further deposed that accused Bal Krishan also did the same illegal acts with another girl. She has further deposed that accused Bal Krishan had committed sexual intercourse with her in the beauty parlour in question for 5-6 times w.e.f. 2006 to 2011 against her wishes. She made written complaint Ext. PW-1/A to S.P., C.I.D., Shimla and thereafter she was got medically examined. The prosecutrix was cross-examined at length by the learned defence counsel, however, nothing favourable could be elicited from her lengthy cross-examination. She had successfully withstood the test of her cross-examination and there are no material discrepancies and contradictions in her statement, which go to the root of the case or which may affect the core of prosecution case in any manner orshake the veracity of the prosecution case.Even after being subjected to a lengthy cross-examination, the prosecutrix's statement made in the examination-in-chief regarding sexual assault made by the accused remained totally un-impeached. She emphatically denied all the suggestions put forth by the defence counsel to probablise non-complicity of the accused.

17. The statement of the prosecutrix is also supported by PW-4, who had stated that accused Bal Krishan used to offer sweets, chocolates etc. to her and inside the beauty parlor used to commit obscene activities with her and at that time, she was studying in 11th Standard. She further deposed that after taking sweets, chocolate etc. she lost her consciousness

and accused Bal Krishan used to kiss and touch her entire body and thereafter he had shown her the obscene photographs and started blackmailing her and on the basis of those obscene photographs accused used to call her time and again by threatening her that her photographs would be made public and under his threat, she used to visit her shop. She further deposed that in January, 2013, her father narrated the incident that accused Bal Krishan had made public, her as well as prosecutrix's photographs .

18. PW-5, Dr. Nishi Sood, Assistant Professor (Gynecologist), Kamla Nehru Hospital, Shimla, H.P., has deposed that the prosecutrix was medically examined by Dr. Ambika Chauhan on 2nd April, 2013, and thereafter, she was referred to Medical Board for obtaining the opinion and as per opinion of the Medical Board, possibility of sexual intercourse could not be ruled out. She further deposed that MLC, Ext. PW-5/A, was issued by the Board.

19. PW-9, Prem Lal, has deposed that in the year, 2012, his nephew handed over to him one memory card and shown him photographs of her daughter. In the said photographs, her daughter as well as the prosecutrix were visible alongwith accused Bal Krishan. He further deposed that on his asking, his daughter disclosed that accused Bal Krishan gave them sweets (toffee). Thereafter, they became subconscious and accused Bal Krishan took obscene photographs and had also done unwarranted activities with them. He further deposed that thereafter accused Bal Krishan started blackmailing her daughter, who at that time, was minor.

20. PW-10, Chander Lal, has deposed that Ajay Jamwal, who is a driver in Maxi Cab and also his friend, disclosed to him that there were photographs of her cousin sister, i.e. the prosecutrix and one another girl, in his mobile phone, which were obscene photographs and he had seen those photographs in the mobile of Ajay Jamwal. Thereafter, the aforesaid

photographs were transmitted through bluetooth in his mobile. He further deposed that he handed over memory card of his mobile phone, having such obscene photographs, to his uncle *(Mama)*.

21. PW-11, who is father of the prosecutrix, has deposed that in the month of November, 2012, PW-9 Prem Lal, had shown to him the obscene photographs of her daughter and one another girl alongwith accused Bal Krishan in his mobile and thereafter he contacted his daughter, who disclosed that said obscene photographs were clicked by accused Bal Krishan, who used to blackmail her and had committed sexual intercourse with her w.e.f. 2006 to 2010.

22. PW-12, Ajay Jamwal, has deposed that obscene photographs of the prosecutrix and another girl were given to him by Harish Chanjta through bluetooth in his mobile and he further transmitted the same through bluetooth in the mobile of one Chander Lal.

23. Thus, from the perusal of the statement of the prosecutrix, it has become clear that accused Bal Krishan used to blackmail her on the basis of obscene photographs by threatening her that he would disclose the entire incident to her father and also that he would make her obscene photographs viral if she did not fulfill his unlawful demand of sexual favour and had committed sexual intercourse with her for 5-6 times from the period w.e.f. the year 2006 to 2011 against her wishes.From the perusal of the statements of PW-3 Prem Singh, PW-9 Prem Lal, PW-10 Chander Lal, PW-11 Sangat Ram, PW-12 Ajay Jamwal, it has become clear that obscene photographs, Ext. PW-4/A to Ext. PW-4/C and Ext. PW-9/A-1 to Ext. PW-9/A-6 were transmitted in the electronic form and accused Bal Krishan is appearing in the aforesaid photographs alongwith the prosecutrix and one another girl, i.e. PW-4.

24. PW-20, Dr. Jagjit Singh, Scientific Officer, SFSL, has stated that obscene photographs Ext. PW-4/A to Ext. PW-4/C, Ext. PW-9/A-1 to Ext.

PW-9/A-6 were found in memory card Ext. P-8, which was recovered from accused Bal Krishan and memory card Ext. P-3, which was recovered from PW-9, Prem Lal. He has also annexed CD/DVD with certificate under Section 65-B of Indian Evidence Act alongwith his report Ext. PW-16/A. CD Ext. PW-20/F was prepared by him from memory card Ext. P-8, which was recovered from accused Bal Krishan. In this CD, obscene photographs were found along with other photographs. As observed earlier, accused Bal Krishan is appearing in the obscene photographs alongwith the prosecutrix (PW-1) as well as PW-4. In the said photographs, beauty parlour is also clearly visible. Therefore, from the above discussion and from the statements of material witnesses, it has been duly proved on record that accused Bal Krishan had clicked the obscene photographs for the purpose of blackmailing the prosecutrix and had transmitted the same through the electronic mode, when prosecutrix as well as PW-4 refused to fulfill his unlawful demand of sexual favour.

25. The basic question now is if the prosecutrix ever consented for sexual intercourse or the accused had committed sexual intercourse with her against her wishes by blackmailing herand by putting her in fear of hurting her reputation on the threat of transmitting her obscene photographs. At this stage a reproduction of the definition of the offence of rape would be necessary and relevant.

26. Section 375 defines rape. It reads as:

> *" 375. Rape.--A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions :--*
>
> ***First.-- Against her will***
>
> ***Secondly.-- Without her consent.***
>
> ***Thirdly.-- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.***
>
> ***Fourthly.-- With her consent, when the man knows that***

> ***he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.***
> ***Fifthly.-- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.***
> ***Sixthly.-- With or without her consent, when she is under sixteen years of age. Explanation.--Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.***
> ***Seventhly.-- When she is unable to communicate consent.***
> ***Exception 1.- A medical procedure or intervention shall not constitute rape. Exception 2.- Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."***

27. The concept of consent in the context of Section 375 IPC has come up for consideration before the Hon'ble Apex Court on many occasions. Before we refer to some of the decisions, reference to Section 90 IPC will be relevant. Section 90 of the IPC defines consent. It reads as under:-

> ***"90. Consent known to be given under fear or misconception.-*** *A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception....."*

28. The Hon'ble Supreme Court in a long line of cases has given wider meaning to the word consent in the context of sexual offences as explained in various judicial dictionaries. In Jowitt's Dictionary of English Law (2nd Edn.), Vol.1 (1977) at p. 422 the word consent has been explained as an act of reason accompanied with deliberation, the mind weighing, as in a balance, the good or evil on either side. It is further stated that consent supposes three things-a physical power, a mental power, and a free and

serious use of them and if consent be obtained by intimidation, force, meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind.

29. The Hon'ble Supreme Court in ***Deelip Singhalias Dalip Kumar*** Vs. ***State of Bihar***, (2005) 1 SCC 88, has held that submission of the body under the fear or terror cannot be construed as a consented sexual act.Para-25 of the judgment reads as under:-

> *"25. ……..The enunciation of law on the meaning and content of the expression 'consent' in the context of penal law as elucidated by Tekchand, J. in Harnarain's case (which in turn was based on the above extracts from law Dictionaries) has found its echo in the three Judge Bench decision of this Court in State of H.P. Vs. Mango Ram. K.G. Balakrishnan, J. speaking for the Court stated thus: (SCC pp. 230-31, para 13).*
> *"Submission of the body under the fear or terror cannot be construed as a consented sexual act. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise*
> *of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances."*

30. Similarly, the Hon'ble Supreme Court in ***Satpal Singh*** Vs. ***State of Haryana***, (2010) 8 Supreme Court Cases 714, has held thata woman has given consent only if she has freely agreed to submit herself, while in free and unconstrained possession of her physical and moral power to act in a manner she wanted.Para-30 of the judgment is reproduced as under:-

> *"30. It can be held that a woman has given consent only if she has freely agreed to submit herself, while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. Consent implies of her exercise of a free and untrammelled right to forbid or withhold what is being consented to, it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former. An act of helplessness in the face of inevitable compulsions is not consent in law. More so, it is not*

necessary that there should be actual use of force. A threat of use of force is sufficient.

31. The Hon'ble Supreme Court in ***Kaini Rajan*** Vs. ***State of Kerala***, (2013) 9 Supreme Court Cases 113, has held that consent for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of significance and moral quality of the act, but after having fully exercised the choice between resistance and assent. Para-12 of the judgment reads as under:-

> *"12. .....The expression "against her will" means that the act must have been done in spite of the opposition of the woman. An inference as to consent can be drawn if only based on evidence or probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in the mind of a person to permit the doing of an act complained of. Section 90 IPC refers to the expression "consent". Section 90, though, does not define "consent", but describes what is not consent. "Consent", for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of significance and moral quality of the act but after having fully exercised the choice between resistance and assent....."*

32. In the instant case, if evidence of prosecutrix is considered, then it can not be said to be a case of consent free from fear.From the statements of the prosecutrix i.e. PW-1, PW-4 father of the prosecutrix, PW-9 Prem Lal and PW-11 Sangat Ram, it has become clear that the accused Bal Krishan blackmailed the prosecutrix and even he had visited the house of the prosecutrix 3-4 times and threatened her that he would disclose the entire incident to her father and also make her obscene photographs public if she did not fulfill his unlawful demand of sexual favour. The accused by way of deceitful means clicked photographs of the prosecutrix and thus, the intention of the accused right from the beginning was to exploit the prosecutrix and she was entrapped by the accused and was subjected to

rape w.e.f. the year 2006 to 2011. The evidence on record clearly suggeststhat the consent of the prosecutrix to maintain physical relations with her was obtained by the accused by blackmailing her and by putting her in fear of hurting her reputation on the basis of transmitting obscene photographs, as such, her consent was not free from fear of hurting her reputation. We have also examined the evidence of prosecutrix and other prosecution witnesses to satisfy ourselves whether there was likelihood of false implication or motive for false accusation. However, except for the bald statement of accused under Section 313, Cr.P.C. that he has been falsely implicated as the prosecutrix had conspired with her relative to extract money from the accused,nothing has been brought on record that may probabilise that the prosecutrix had motive to falsely implicate the accused by extracting money from the accused. The circumstances even do not remotely suggest that the prosecutrix would put her reputation and chastity at stake by falsely implicating the accused.

33. So far as the age of the prosecutrix is concerned, her birth certificate has been placed on record as PW-8/B and as per the same, date of birth of the prosecutrix is mentioned as 05.03.1990. In parivar register Ext. PW-8/C also,the date of birth of the prosecutrix is mentioned as 05.03.1990. Similarly, date of birth of PW-4 is mentioned as 18.05.1993 in birth certificate Ext. PW-7/B. The evidence on record suggests that their photographs were clicked in the year, 2006. The prosecutrix as well as PW-4 have categorically deposed that their obscene photographs were clicked when they were studying in Government Senior Secondary School. Thus, it has become clear that at the time of clicking of the aforesaid photographs the prosecutrix as well as PW-4 were below 18 years of age and were minor school going girls. Learned Senior Counsel for the appellant has contended that the prosecution has failed to prove the age of the prosecutrix and PW-4 as birth certificate PW-8/B and parivar register Ext. PW-8/C and birth certificate of PW-4 i.e.

Ext. PW-7/B are not admissible in evidence, as the same are signed by the Secretary Gram Panchayat. However, this submission of learned Senior Counsel for the appellant is devoid of any force. Since as per our aforesaid discussion, the consent of the prosecutrix to maintain physical relations with her was obtained by the accused by blackmailing her and by putting her in fear of hurting her reputation on the basis of transmitting obscene photographs and he had committed sexual intercourse with her in the beauty parlour in question against her wishes.therefore, it is not material as to weather the prosecutrix was above or below the age of 18 years at the time of incident.

34. So far as the delay in lodging the FIR is concerned, it is settled law that delay in lodging the FIR may not by itself be fatal to the case of the prosecution. There is no hard and fast rule that any length of delay in lodging FIR would automatically render the prosecution case doubtful. The Hon'ble Supreme Court in ***Tulshidas Kanolkar*** Vs. ***State of Goa***, (2003) 8 Supreme Court Cases 590, has held that the delay in lodging first information report cannot be used as a ritualistic formula for discarding prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider, if any explanation has been offered for the delay. Relevant portion of the judgment reads as under:-

> "5. *We shall first deal with the question of delay. The unusual circumstances satisfactorily explained the delay in lodging of the first information report. In any event, delay per se is not a mitigating circumstance for the accused when accusations of rape are involved. Delay in lodging first information report cannot be used as a ritualistic formula for discarding prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once it is offered, the Court is to only see whether it is satisfactory or not. In a case if the prosecution fails to satisfactory explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of such delay, it is a relevant factor. On the*

other hand satisfactory explanation of the delay is weighty enough to reject the plea of false implication or vulnerability of prosecution case. As the factual scenario shows, the victim was totally unaware of the catastrophe which had befallen to her. That being so, the mere delay in lodging of first information report does not in any way render prosecution version brittle."

35. Similarly, in ***Dildar Singh*** Vs. ***State of Punjab***, (2006) 10 Supreme Court Cases 531, the Hon'ble Supreme Court has held that in normal course of human conduct an unmarried girl would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate such incident. Overpowered, as she may be, by a feeling of shame her natural inclination would be to avoid talking to anyone, lest the family name and honour is brought into controversy. Relevant portion of the judgment reads as under:-

"6…….. *This Court has observed in several decisions that the Courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. A girl in a tradition bound non-permissive society would be extremely reluctant even to admit that any incident, which is likely to reflect upon her chastity, had occurred, being conscious of the danger of being ostracized by the society or being looked down by the society. Her not informing any one about the incident in the circumstances cannot detract from her reliability. In normal course of human conduct an unmarried girl would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate such incident. Overpowered, as she may be, by a feeling of shame her natural inclination would be to avoid talking to anyone, lest the family name and honour is brought into controversy. Thus, delay in lodging the first information report cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same on the ground of delay in lodging the*

first information report. Delay has the effect of putting the Court on guard to search if any explanation has been offered for the delay and, if offered, whether it is satisfactory."

36. In the instant case, after carefully going through the evidence of the prosecution, it has become clear that the delay in lodging the FIR has been satisfactorily explained by the prosecutrix, as accused Bal Krishan had clicked obscene photographs of the prosecutrix in the year, 2006 and thereafter he started blackmailing the prosecutrix on the pretext that if she did not adhere to his unlawful demand of the sexual favour, he would transmit her obscene photographs and make the same public. It has also come in evidence that the accused Bal Krishan had also visited the house of the father of the prosecutrix 3 to 4 times by threatening the prosecutrix that he would disclose the entire incident to her father and in April 2012, when the prosecutrix went to Baddi to work in the company, thereafter also the accused had been threatening her continuously on her mobile phone and in the month of November, 2012, accused had transmitted the obscene photographs of the prosecutrix and had made the same public. Thus, it is clear that the prosecutrix being unmarried girl had first decided to maintain silence when accused Bal Krishan had clicked her obscene photographs and committed sexual intercourse with her being conscious of danger of her reputation and chastity being put at stake. However, when the accused had started blackmailing and sexually exploiting her time and again for more than five years and finally when in the month of November 2012, she came to know that he made her obscene photographs public, she immediately filed the complaint before the police. Thus, delay in lodging the FIR has satisfactorily been explained by the prosecutrix.

37. No other point was urged before us.

38. Thus in the given facts and circumstances, in our view, the evidence of the prosecution is reliable and has rightly been acted upon by the Ld. trial Court. The accused Bal Krishan entrapped the prosecutrix by deceitful means by clicking her obscene photographs as well as of PW-4 with a view to blackmail them and transmitted the same through the electronic means and later continued to satisfy his lust and committed sexual intercoursewith the prosecutrix by obtaining her consent under the fear of hurting her reputation. Therefore, the conviction and sentence awarded by the learned trial Court upon the accused Bal Krishan is based upon proper appreciation of evidence and law and the same do not warrant any interference and are liable to be upheld.

39. Ordered accordingly.

40. For the reasons recorded hereinabove, the appeal is dismissed.

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

Divisional Manager, H.P. State Forest Development Corporation Ltd.

...Petitioner

Versus

Prem Lal

...Respondent

2. CMPMO No.59 of 2023

Divisional Manager, H.P. State Forest Development Corporation Ltd.

...Petitioner

Versus

Rakesh Parkash

...Respondent

3. CMPMO No.60 of 2023

Divisional Manager, H.P. State Forest Development Corporation Ltd.

...Petitioner

Versus

Rakesh Parkash

...Respondent

For the petitioner(s): Mr. Rajesh Verma, Advocate.

CMPMO Nos.58, 59 & 60 of 2023
Decided on: 27.02.2023

Arbitration and Conciliation Act, 1996- Sections 36, 12(5)- Execution applications dismissed by the Ld. District Judge as unexecutable- **Held-** Arbitrator falls in the category specified in seventh schedule- Appointment/ nomination of an arbitrator by such person ineligible to become arbitrator is void ab initio- Proceedings conducted will be non est and awards void- Non obstante clause wipes out any prior agreement contrary to mandate of seventh schedule- No error on the part of Ld. District Judge in dismissing applications- Petitions dismissed as meritless. (Para 4)

Cases referred:

Bharat Broadband Network Ltd. Vs. United Telecoms Ltd. (2019) 5 SCC 755;
Jaipur Zila Dugdh Utpadak Sahkari Sangh Ltd. & Ors. vs. Ajay Sales & Suppliers 2021 (17) SCC 248;
TRF Ltd. Vs. Energo Engineering Projects Ltd. (2017) 8 SCC 377;

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge

These three petitions involve identical questions of law and are based on similar facts, hence have been taken up together for decision. In all these petitions, challenge has been laid to separate but similar orders passed by the learned District Judge on 25.07.2022, whereby, petitioners' applications in all the petitions moved under Section 36 of the Arbitration and Conciliation Act, 1996 (the Act, in short) for enforcement of arbitral awards (dated 11.12.2017 in CMPMO No.58 of 2023, 14.09.2017 in CMPMO No.59 of 2023 and 26.08.2017 in CMPMO No.60 of 2023), were dismissed. The arbitral awards were held un-executable. Aggrieved against the dismissal of the execution applications, the petitioners have preferred these three petitions.

2. For convenience, reference to CMPMO No.58 of 2023 has been made hereinafter for the purpose of factual matrix.

2(i) Respondent-Prem Lal was Forest Labour Supply Mate. The petitioner entered into an agreement with him on 20.03.2012 regarding extraction of resin and delivery thereof. According to the petitioner, the

respondent did not engage adequate labour for extracting resin, hence, he could not supply the required yield from the lot allotted to him. For the shortfall in the supply of resin, the petitioner assessed the due compensation payable to it by the respondent at Rs.1,76,972/-. The respondent did not deposit the compensation despite issuance of notice to him. Consequently, invoking Clause 36 of the agreement dated 20.03.2012, the Managing Director of the petitioner-corporation on 24.09.2015, appointed its Director (South) as an Arbitrator for adjudicating the dispute, which statedly arose from the said agreement. The Arbitrator-Director (South) of the petitioner-corporation passed the award on 11.12.2017 awarding a sum of Rs.1,76,972/- in favour of the petitioner-corporation alongwith interest @ 9% per annum from the date of filing of the claim petition i.e. 07.11.2015.

2(ii) Application under Section 36 of the Act was moved by the petitioner before the learned District Judge for enforcement of arbitral award dated 11.12.2017. This application was dismissed vide order dated 25.07.2022. While dismissing the application, it was held that appointment of the Arbitrator as well as the arbitral award passed by the concerned Arbitrator was in violation of Section 12(5) and Seventh Schedule of the Act. The arbitral award, being sought to be enforced by the petitioner was void and un-executable. The execution application was dismissed giving cause of action to the petitioner to institute the present petition.

3. Learned counsel for the petitioner has forcefully urged that the agreement was executed between the parties on 20.03.2012. Clause 36 of this agreement provided reference of dispute between the parties, arising out of the agreement, to the Managing Director, H.P. State Forest Development Corporation Ltd./Director concerned. The agreement came into force prior to the amendment of the Act whereby Sub-section 5 was inserted in Section 12 w.e.f. 23.10.2015. Learned counsel for the petitioner further submitted that Section 12(5) of the Act, therefore, could not be applied in the instant case. He

further submitted that the parties had consented for appointment of the Arbitrator by signing the agreement dated 20.03.2012. Hence, in view of the proviso to Section 12(5) of the Act, the arbitral award passed by the Director (South) of the petitioner-corporation was saved. The arbitral award dated 11.12.2017 was lawfully passed and was required to be executed. The impugned order dated 25.07.2022, dismissing the petitioner's application for enforcement of the arbitral award is illegal and is required to be set aside.

4. Having heard learned counsel for the petitioner and ongoing through the case file, I am of the considered view that these petitions lack merit. This is for the following reasons: -

4(i) Section 12(5) of the Act was inserted by the Act No.3 of 2016. It came into force w.e.f. 23.10.2015 and reads as under: -

> *"12(5) Notwithstanding any prior agreement to be contrary, any person whose relationship, with the parties or counsel or the subject matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an arbitrator*
>
> *Provided that parties may, subsequent to disputes having arisen between them, waive the applicability of this sub-section by an express agreement in writing."*

A plain reading of Section 12(5) of the Act makes it apparent that any person whose relationship with the parties or counsel or the subject-matter of the dispute, falls under any of the categories specified in the Seventh Schedule shall be ineligible to be appointed as an Arbitrator. It is not in dispute that the Director (South) i.e. the person appointed as an Arbitrator in the instant matter falls in the category specified in the Seventh Schedule of the Act.

4(ii) Any person who becomes ineligible to act as an Arbitrator in terms of Section 12(5) read with Seventh Schedule of the Act cannot appoint/nominate another Arbitrator for determining the dispute. Any appointment of other person nominated by such person as an Arbitrator for

determining the dispute arising under the arbitration agreement is void *ab initio.* The proceedings so conducted will be *non est.* The awards passed by such person, if any, are also void. [refer to *(**2017) 8 SCC 377, TRF Ltd. Vs. Energo Engineering Projects Ltd.; (2019) 5 SCC 755, Bharat Broadband Network Limited Vs. United Telecoms Limited**.]*

4(iii) In ***2021 (17) SCC 248 Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited & Ors. vs. Ajay Sales & Suppliers***, an argument was raised that Sub-section 5 of Section 12 read with Seventh Schedule to the Act shall not be applicable to the facts of the case, more particularly when the agreement between the parties therein was executed prior to the insertion of Sub-section 5 of Section 12 read with Seventh Schedule of the Act. This submission was not accepted by the Hon'ble Apex Court in view of the earlier decisions rendered in TRF Ltd. Vs. Energo Engineering Projects Ltd. (2017) 8 SCC 377, Bharat Broadband Network Limited Vs. United Telecoms Limited and (2019) 5 SCC 377 Voestalpine Schienen GMBH Vs. Delhi Metro Rail Corporation Limited (2017) 4 SCC 665. The Hon'ble Apex Court observed that in the above precedents, it has been observed that the main purpose for amending the provision was to provide for 'neutrality of arbitrators'. In order to achieve this, Sub-section 5 of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject-matter of the dispute falls sunder any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an Arbitrator. It was further observed that in such an eventuality i.e. when the arbitration clause finds foul with the amended provision i.e. Sub-section 5 of Section 12 read with Seventh Schedule of the Act, the appointment of an Arbitrator would be beyond pale of the arbitration agreement. Such would be the effect of non-obstante clause contained in Sub-section 5 of Section 12. The relevant paras from the judgment read as under: -

4.1 It is submitted that first of all Subsection (5) of Section 12 read with Seventh Schedule to the Act shall not be applicable to the facts of the case on hand more particularly when the agreement between the parties was prior to insertion of Sub section (5) of Section 12 read with Seventh Schedule to the Act. It is further submitted that even otherwise the 'Chairman' being an elected member shall not come within Seventh Schedule to the Act. It is submitted that 'Chairman' is not included within disqualified/ineligible person to be appointed in Seventh Schedule of the Act.

5 …….

6. It is not in dispute that distributorship agreement between the parties was dated 31.03.2015 i.e. prior to the insertion of Subsection (5) of Section 12 and Seventh Schedule to the Act w.e.f. 23.10.2015. It also cannot be disputed that Clause 13 of the Agreement dated 31.03.2015 contained the arbitration clause and as per Clause 13, any dispute and differences arising out of or in any way touching or concerning distributorship agreement shall be resolved through arbitration. As per Clause 13 such a dispute shall be referred to the sole Arbitrator – the Chairman, Sahkari Sangh.

6.1 …….

6.2 …….

6.3 So far as the submission on behalf of the petitioners that the agreement was prior to the insertion of Subsection (5) of Section 12 read with Seventh Schedule to the Act and therefore the disqualification under Subsection (5) of Section 12 read with Seventh Schedule to the Act shall not be applicable and that once an arbitrator – Chairman started the arbitration proceedings thereafter the High Court is not justified in appointing an arbitrator are concerned the aforesaid has no substance and can to be accepted in view of the decision of this Court in Trf Ltd vs Energo Engineering Projects Ltd, (2017) 8 SCC 377; Bharat Broadband Network Limited vs United Telecoms Limited, (2019) 5 SCC 755; Voestalpine Schienen GMBH vs. Delhi Metro Rail Corporation Limited, (2017) 4 SCC 665. In the aforesaid decisions this Court had an occasion to consider in detail the object and purpose of insertion of Sub section (5) of Section 12 read with Seventh Schedule to the Act. In the case of Voestalpine Schienen GMBH

> *(Supra) it is observed and held by this Court that the main purpose for amending the provision was to provide for 'neutrality of arbitrators'. It is further observed that in order to achieve this, Subsection (5) of Section 12 lays down that notwithstanding any prior agreement to the contrary, any person whose relationship with the parties or counsel or the subject-matter of the dispute falls under any of the categories specified in the Seventh Schedule, he shall be ineligible to be appointed as an arbitrator. It is further observed that in such an eventuality i.e. when the arbitration clause finds foul with the amended provisions (Subsection (5) of Section 12 read with Seventh Schedule) the appointment of an arbitrator would be beyond pale of the arbitration agreement, empowering the court to appoint such arbitrator as may be permissible. It is further observed that, that would be the effect of non obstante clause contained in subsection (5) of Section 12 and the other party cannot insist on appointment of the arbitrator in terms of the arbitration agreement."*

Thus, contention of the petitioner that Sub-section 5 of Section 12 read with Seventh Schedule of the Act cannot be applied to the instant case in view of agreement executed between the parties prior to insertion of Section 12(5) read with Seventh Schedule of the Act, cannot be accepted. Any prior agreement executed by the parties contrary to the mandate of sub-Section 5 of Section 12 and Seventh Schedule of the Act, gets wiped out by the non-obstante clause in Section 12(5).

4(iv) The contention of the petitioner that the respondent had signed the arbitration agreement and participated in the arbitration proceedings are also of no avail in view of the legal position settled in the aforesaid pronouncements by the Hon'ble Apex Court. Proviso to Section 12 (5) can only be invoked in case of 'existence of express agreement in writing' of the parties to satisfy the requirements of proviso to Section 12(5) of the Act and not otherwise. It will be appropriate to quote following paras from *Jaipur Zila Dugdh Utpadak Sahkari Sangh Limited* case *supra* in this regard: -

10. *Now so far as the submission on behalf of the petitioners that the respondents participated in the arbitration proceedings before the sole arbitrator – Chairman and therefore he ought not to have approached the High Court for appointment of arbitrator under Section 11 is concerned, the same has also no substance. As held by this Court in the case of Bharat Broadband Network Limited (Supra) there must be an 'express agreement' in writing to satisfy the requirements of Section 12(5) proviso. In paragraphs 15 & 20 it is observed and held as under:*

> *"15. Section 12(5), on the other hand, is a new provision which relates to the de jure inability of an arbitrator to act as such. Under this provision, any prior agreement to the contrary is wiped out by the non obstante clause in Section 12(5) the moment any person whose relationship with the parties or the counsel or the subject matter of the dispute falls under the Seventh Schedule. The subsection then declares that such person shall be "ineligible" to be appointed as arbitrator. The only way in which this ineligibility can be removed is by the proviso, which again is a special provision which states that parties may, subsequent to disputes having arisen between them, waive the applicability of Section 12(5) by an express agreement in writing. What is clear, therefore, is that where, under any agreement between the parties, a person falls within any of the categories set out in the Seventh Schedule, he is, as a matter of law, ineligible to be appointed as an arbitrator. The only way in which this ineligibility can be removed, again, in law, is that parties may after disputes have arisen between them, waive the applicability of this subsection by an "express agreement in writing". Obviously, the "express agreement in writing" has reference to a person who is interdicted by the Seventh Schedule, but who is stated by parties (after the disputes have arisen between them) to be a person in whom they have faith notwithstanding the fact that such person is interdicted by the Seventh Schedule.*
>
> *xxx xxx xxx*

20. This then brings us to the applicability of the proviso to Section 12(5) on the facts of this case. Unlike Section 4 of the Act which deals with deemed waiver of the right to object by conduct, the proviso to Section 12(5) will only apply if subsequent to disputes having arisen between the parties, the parties waive the applicability of sub-section (5) of Section 12 by an express agreement in writing. For this reason, the argument based on the analogy of Section 7 of the Act must also be rejected. Section 7 deals with arbitration agreements that must be in writing, and then explains that such agreements may be contained in documents which provide a record of such agreements. On the other hand, Section 12(5) refers to an "express agreement in writing". The expression "express agreement in writing" refers to an agreement made in words as opposed to an agreement which is to be inferred by conduct. Here, Section 9 of the Indian Contract Act, 1872 becomes important. It states:

"9. Promises, express and implied.—In so far as a proposal or acceptance of any promise is made in words, the promise is said to be express. In so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied." It is thus necessary that there be an "express" agreement in writing.

This agreement must be an agreement by which both parties, with full knowledge of the fact that Shri Khan is ineligible to be appointed as an arbitrator, still go ahead and say that they have full faith and confidence in him to continue as such. The facts of the present case disclose no such express agreement. The appointment letter which is relied upon by the High Court as indicating an express agreement on the facts of the case is dated 17.01.2017. On this date, the Managing Director of the appellant was certainly not aware that Shri Khan could not be appointed by him as Section 12(5) read with the Seventh Schedule only went to the invalidity of the appointment of the Managing Director himself as

> *an arbitrator. Shri Khan's invalid appointment only became clear after the declaration of the law by the Supreme Court in TRF Ltd. (supra) which, as we have seen hereinabove, was only on 03.07.2017. After this date, far from there being an express agreement between the parties as to the validity of Shri Khan's appointment, the appellant filed an application on 07.10.2017 before the sole arbitrator, bringing the arbitrator's attention to the judgment in TRF Ltd. (supra) and asking him to declare that he has become de jure incapable of acting as an arbitrator. Equally, the fact that a statement of claim may have been filed before the arbitrator, would not mean that there is an express agreement in words which would make it clear that both parties wish Shri Khan to continue as arbitrator despite being ineligible to act as such. This being the case, the impugned judgment is not correct when it applies Section 4, Section 7, Section 12(4), Section 13(2), and Section 16(2) of the Act to the facts of the present case, and goes on to state that the appellant cannot be allowed to raise the issue of eligibility of an arbitrator, having itself appointed the arbitrator. The judgment under appeal is also in correct in stating that there is an express waiver in writing from the fact that an appointment letter has been issued by the appellant, and a statement of claim has been filed by the respondent before the arbitrator. The moment the appellant came to know that Shri Khan's appointment itself would be invalid, it filed an application before the sole arbitrator for termination of his mandate."*

There is no pleading that any express agreement in writing satisfying the mandate of Sub-section 5 of Section 12 inclusive of its proviso and Seventh Schedule was ever executed by the respondent. The Director (South) continued to hold the arbitration proceedings even after enforcement of Sub-section 5 of Section 12 & Seventh Schedule of the Act and passed the award on 11.12.2017 in CMPMO No.58 of 2023, 14.09.2017 in CMPMO No.59 of 2023 and 26.08.2017 in CMPMO No.60 of 2023

In view of the above pronouncements, it is amply clear that the arbitration proceedings conducted by the Arbitrator-Director (South) are *non-est.* The awards passed by such Arbitrator were void. The awards were not enforceable. The learned District Judge did not commit any error in dismissing the execution applications filed by the petitioner, seeking enforcement of the void awards. Hence, I find no merit in the instant petitions and the same are dismissed so also the pending miscellaneous application(s), if any.

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

Het Ram .....Petitioner

Versus

State of Himachal Pradesh .....Respondent

For the petitioner: Ms. Ranjana Kumari, Advocate.

For the respondent: Mr. Rajan Kahol and Mr. Rakesh Dhaulta, Additional Advocate Generals.

Cr. M.P.(M) No. 333 of 2023
Reserved on: 20.02.2023
Decided on: 23.02.2023

Code of Criminal Procedure, 1973- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Section 20- 356 grams of charas recovered from petitioner- **Held-** Intermediate quantity of contraband does not invite rigors of section 37- *Charas* bought for own use as petitioner is addicted- No suggestions as to criminal antecedents or involvement as a peddler/seller- Investigation completed- Considerable time to conclude trial- No purpose served by indeterminate incarceration- Ordered to be released- Bail petition allowed. (Para 7)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge.

The petitioner is accused in case FIR No. 18 of 2023, dated 23.01.2023, under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, (for short 'ND&PS Act', at Police Station, Boileauganj, District Shimla, H.P. He is in custody since 23.01.2023.

2. Brief allegations against the petitioner are that on a prior information, police intercepted the vehicleNo. HP-24D-4194 (Innova) within the jurisdiction of Police Station (West), Shimla at about 10.10 p.m. Total 10 persons including females and children were found occupying the vehicle. One Mansa Ram was on the wheel and the petitioner was occupying the front passenger seat. Two minor girls sitting on the rear seat were appearing to be sick and accordingly, the vehicle was taken to PHC, Dhami. The girls were provided first aid. Thereafter, the vehicle was checked. Petitioner is stated to be holding a jacket in his lap. On checking the jacket, 356 grams 'Charas' was recovered. None of the other occupants of the vehicle are stated to have knowledge about the petitioner carrying the contraband with him. The case was registered and petitioner was arrested.

3. The status report filed on behalf of the respondent reveals that on interrogation, the petitioner had disclosed that he was addicted to consumption of Charas and had bought the contraband for such purpose on 22.01.2023 from Anni in District Kullu for Rs.20,000/-. He, however, could not provide the details of the person from whom the contraband was purchased. As per the report of SFSL, the mass of contraband sent for analysis has been found to be the extract of cannabis and sample of Charas. The investigation is stated to be in progress. It is submitted on behalf of the respondent/State that in case of grant of bail to the petitioner, he can win-over the prosecution witnesses and can tamper with the prosecution evidence.

4. On the other hand, learned counsel for the petitioner has submitted that the case has been falsely registered against the petitioner. It is submitted that petitioner has not committed any offence. No recovery was effected from him. Petitioner has been implicated in a false case for ulterior purposes. Petitioner is stated to be permanent resident of Village Deoli, Post Office Deoli, Tehsil Sadar, District Bilaspur, H.P. As per contention raised on behalf of the petitioner, he is not involved in any other criminal case and has

no criminal background. Petitioner has undertaken to abide by all the terms and conditions as may be imposed against him.

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

6. The contraband allegedly recovered from the petitioner is of intermediate quantity, therefore, the rigors of Section 37 of the ND&PS Act will not be applicable in the case.

7. As per status report, the petitioner is stated to be addict to consumption of Charas. As per police, petitioner had disclosed during interrogation that he had bought the Charas for his own use for Rs.20,000/-. It is not suggested by the status report that petitioner has any criminal antecedents or he has been involving himself as a peddler or seller of the contraband to the consumers. The fact that petitioner was travelling in the vehicle alongwith his family members and was also carrying contraband prima-facie lends credence to the above noted hypothesis. The investigation is almost complete. Petitioner is already in judicial custody. The allegations against petitioner are to be proved during trial, which is likely to take considerable time before conclusion. No fruitful purpose shall be served by allowing detention of petitioner in custody for indeterminate period. Pre-trial incarceration otherwise is not the rule.

8. Petitioner is permanent resident of Village Deoli, Post Office Deoli, Tehsil Sadar, District Bilaspur, HP. He has a family to support. There is no likelihood of his absconding or fleeing from the course of justice. The apprehension of respondent that the petitioner may tamper with prosecution evidence, though has remained unsubstantiated, yet can be taken care of by putting the petitioner to appropriate terms.

9. Keeping in view the peculiar facts and circumstances of the case, the petition is allowed and the petitioner is ordered to be released on bail in case registered vide FIR No. 18 of 2023, dated 23.01.2023, under Section 20 of

the ND&PS Act, at Police Station, Boileauganj, District Shimla, on his furnishing personal bond in the sum of Rs. 1,00,000/- with one surety in the like amount to the satisfaction of any Judicial Magistrate at Shimla. This order is, however, subject to the following conditions:

i) That the petitioner shall not indulge in any criminal activity and in the event of breach of this condition, the bail granted to the petitioner in this case, shall automatically be cancelled.

ii) That the petitioner shall not leave the territory of India without express leave of Trial Court during the Trial.

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 and shall not tamper with the prosecution evidence.

iv) That the petitioner shall regularly attend the trial of the case before learned Trial Court and shall not cause any delay in its conclusion.

10. 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 hereinabove.

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

Shiv Kumar .....Petitioner

Versus

State of Himachal Pradesh .....Respondent

For the petitioner: Ms. Meera Devi and Ms. Jyoti Dogra, Advocates.

For the respondent: Mr. Rajan Kahol and Mr. Rakesh Dhaulta, Additional Advocate Generals.

Cr. M.P.(M) No. 336 of 2023
Reserved on: 20.02.2023
Decided on: 23.02.2023

Code of Criminal Procedure, 1973- Section 438- Anticipatory Bail- **Indian Penal Code, 1860**- Sections 354-A, 452- allegedly intruded privacy of female victim- **Held-** Allegations serious yet subject to proof- No requirement of custodial interrogation- Pre-trial incarceration not a rule- Procuring CDRs and recording statements are functions of investigating officer- Petitioner permanent resident with no flight risk- Ordered to be released in event of arrest subject to general conditions- Petition allowed. (Paras 8,9)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

Petitioner has approached this Court for grant of pre-arrest bail in case FIR No. 06 of 2023, dated 07.02.2023, registered under Sections354-A and 452 of IPC at Police Station, Mcleodganj, District Kangra, H.P. Petitioner was admitted to interim bail on 13.02.2023. He has joined the investigation thereafter.

2. It is alleged against the petitioner that he is working as Accountant in the office of the Divisional Forest Officer, Saluni, District Chamba, H.P. On 03.02.2023, he visited Dharamshala in relation with audit of the Data Entry Operators and was accompanied by the victim as also another female Data Entry Operator. They all stayed at Dharamshala on 03.02.2023 in a hotel. In the night, the victim had preferred to stay in her room, whereas others were enjoying the party. The victim was also forced to join the party, but being uncomfortable, she came back and slept in her room. She had bolted the room from inside. At about 2.30 a.m., she found that the petitioner was sleeping besides her on the same bed. He was holding the hands of the victim and tried to force his will on her. She could save herself with difficulty and the petitioner left the room through balcony. In the morning, it was found that petitioner had crossed over to the balcony of the room of the victim from the balcony of the room he was occupying.

3. On notice, respondent has filed the status report. Petitioner has already associated himself in the investigation. It is submitted that the CDRs of the mobile phone of petitioner was still awaited and the statement of female Data Entry Operator, who was accompanying the petitioner and victim on 03.02.2023 to Dharamshala is yet to be recorded.

4. On the other hand, petitioner has prayed for grant of bail on the ground that he is innocent. All the preliminary investigation in the case are complete and nothing is required to be recovered from him. It is also contended on behalf of the petitioner that he is permanent resident of Village Basanda, Post Office Garola, Tehsil Bharmour, District Chamba and is a Government servant. There is no likelihood of his absconding from course of justice. Petitioner has undertaken to abide by all terms and conditions as may be imposed against him.

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

6. Undoubtedly, the allegations against the petitioner are serious in nature. He is alleged to have taken benefit of the loneliness of a female by unauthorisedly and illegally intruding into her privacy, however, the allegations are subject to proof.

7. The respondent has not shown any requirement of petitioner for custodial interrogation. In fact, petitioner has already joined the investigation and in the given facts of the case, no fruitful purpose shall be served by allowing the petitioner to be detained in custody. Petitioner will get his due, in case the offence alleged against him is proved. Pre-trial incarceration is not the rule. Therefore, no fruitful purpose shall be served by detaining the petitioner in custody for indeterminate period.

8. The CDR of the mobile phone of petitioner is awaited and the same is to be procured by the Investigating Agency from the service provider. Petitioner cannot be said to have any access to the record of service provider. Similarly, the statement of another female official accompanying the victim and petitioner is required to be recorded. This again is the function of the Investigating Officer. It is not the case of respondent that the said official is under the influence of petitioner. In any event, the facts do not suggest that the said official was an eye witness.

9. Petitioner is permanent resident of Village Basanda, Post Office Garola, Tehsil Bharmour, District Chamba, H.P. and is a Government official. There is no likelihood of petitioner absconding or fleeing from the course of justice. The only concern of the Court at this stage is to ensure the fair and expeditious investigation and trial, for which the petitioner can be put to appropriate terms.

10. Keeping in view the peculiar facts and circumstances of the case, petition is allowed. Interim order dated 13.02.2023 is confirmed. In the event of arrest of the petitioner in case FIR No.06 of 2023, dated 07.02.2023, registered under Sections 354-A and 452 of IPC at Police Station, Mcleodganj,

District Kangra, H.P., he shall be released on bail, subject to his furnishing personal bond in the sum of Rs. 25,000/- with one surety in the like amount to the satisfaction of Investigating Officer. This order is, however, subject to following conditions: -

(i) *That the petitionershall make himself available for the purpose of investigation, an and when required.*

(ii) *That the petitioner shall not tamper with the prosecution evidence nor hamper the investigation of the case in any manner whatsoever.*

(iii) *That the petitioner shall not 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 the Court or any Police Officer; and*

(iv) *That the petitioner shall not leave India without prior permission of this Court till completion of investigation and thereafter of the trial court.*

11. Any observation made hereinabove 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 hereinabove.

Petition stands disposed of.

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

Sangat Ram .....Petitioner

Versus

State of Himachal Pradesh .....Respondent

2. <u>Cr.MP(M) No. 398 of 2023</u>

Suraj Bahadur ....Petitioner

Versus

State of Himachal Pradesh ....Respondent.

For the petitioner(s): Mr. Yashveer Singh Rathore, Advocate, in Cr.MP(M) No. 370 of 2023 and Mr. Rakesh Kumar Chaudhary, Advocate, in Cr.MP(M) No. 398 of 2023.

For the respondent(s): Mr. B.C.Verma and Mr. Rakesh Dhaulta, Additional Advocate Generals.
HC Chander Shekhar, No. 54, P.S. Kullu, H.P. present in person.

Cr. M.P.(M) No. 370 of 2023
and Cr.MP(M) No. 398 of 2023
Reserved on: 20.02.2023
Decided on: 24.02.2023

Code of Criminal Procedure, 1973- Section 439- Bail- **Indian Penal Code, 1860**- Sections 302, 147,149- Deceased rolled down hill after being hit by stone pelted by accused petitioners- **Held-** Bail cannot be denied merely because of serious allegations- Maintaining balance between rights of accused and public interest is essential- Suppressed material fact- Body of deceased not recovered- Accusations subject to proof- Ordered to be released subject to general conditions- Bail petitions allowed. (Para 14)

Cases referred:

Dataram Singh vs. State of Uttar Pradesh and another (2018) 3 SCC 22;

Prasanta Kumar Sarkar vs. Ashis Chatterjee and another (2010) 14 SCC 496;
Ramesh Bhavan Rathod vs. Vishanbhai Hirabhai Makwana (Koli) and another (2021) 6 SCC 230;
Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge.

These two petitions have been heard together and are being decided by a common order as common questions of facts are involved. Both bail petitions have arisen out of the same FIR.

2. Petitioners have prayed for grant of bail in case FIR No.255 of 2022, dated 20.7.2022, under Sections 302, 147 and 149 of IPC, registered at Police Station, Sadar Kullu, District Kullu, H.P.

3. Brief facts necessary for adjudication of petitions are that on 19.7.2022 police recorded the statement of one Pratik Kundu under Section 154 Cr.P.C. regarding the incident in question. It was reported that on 14.7.2022, the complainant alongwith his four other friends namely Tushar, Sudhir, Nitin and Rohit reached Manikaran in District Kullu in their personal vehicle. They stayed at Manikaran on 15.7.2022. On 16.7.2022, all of them visited Barshaini in the vehicle and thereafter started tracking towards Khir Ganga. They reached Ice-Point at about 5.45 p.m. It was drizzling. They sat on the chairs in a café. While they were gossiping amongst themselves, some persons were having liquor in the adjoining shed. Two persons came to them and asked as to what were they talking about. They got enraged and started altercation with the complainant and his friends. They got scared and ran towards Khir Ganga. Some more persons joined together and chased the complainant and his friends and pelted stones on them. After running for about 1- 1½ kilometers, all five persons from complainant party ran downwards on a slope. Four of them took shelter under a stone, but Rohit did

not reach there. After some time four of them called Rohit, but Rohit did not respond. It had become dark by then. They came up, but did not find Rohit. Thereafter four of them started towards Khir Ganga, there also they came to know that local persons were searching for them. On 18.7.2022, they reached Barshaini via Bhun-Bhuni with the help of some persons. They could not contact anyone as there was no mobile signal on the hills. They informed their family members once they reached Barshaini. Thereafter, on 19.7.2022, the matter was reported to the police.

4. The case was registered. On completion of investigation, police has presented the challan in the Court on the hypothesis that Rohit had rolled down the hill after being hit by a stone and had drowned in the river. Six persons including the petitioners have been implicated as accused. It is alleged against them that on 16.7.2022 all the accused persons had chased the complainant party and had pelted stones on them. During investigation, the Investigating Officer recorded supplementary statements of the complainant and his friends, in which they disclosed that Rohit had rolled down the hill after being hit by a stone pelted by the accused persons. All the four friends had followed Rohit on the slope to save him, but he could not be saved and they all had seen him rolling towards the river.

5. Petitioners have prayed for grant of bail on the grounds that the complainant party has concocted a false story. The petitioners have not been involved in any offence. It is also submitted that there is no legal evidence to connect the petitioners with the alleged crime. The petitioners are stated to be permanent residents of Village Nakthan, Post Office Barsaini, Tehsil Bhunter, District Kullu, H.P. and they undertake to remain available for the purpose of trial.

6. On the other hand, the bail petitions have been opposed on behalf of the respondent/State. It has been submitted that the petitioners are accused of serious offence. The accusations against them are of serious

nature. In case of their release on bail, petitioners may abscond or flee from the course of justice and they may also try to influence the prosecution evidence.

7. I have heard learned counsel for the petitioner and learned Additional Advocate General for the respondent/State and have also gone through the records of the case carefully.

8. In **Prasanta Kumar Sarkar vs. Ashis Chatterjee and another (2010) 14 SCC 496**, the Hon'ble Supreme Court culled out the following guiding factors to be borne in mind while considering an application for bail :

> ***9***.*(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."*

9. In **Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40**, the Hon'ble Supreme Court observed and held as under:

> "***21***. *In bail applications, generally, it has been laid down from the earliest times that 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.*

> ***22***. *From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some un-convicted 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 this country, 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.*
>
> ***23***. *Apart from the question of prevention being the object of a 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 un-convicted person for the purpose of giving him a taste of imprisonment as a lesson."*

10. In **Dataram Singh vs. State of Uttar Pradesh and another (2018) 3 SCC 22**, the Hon'ble Supreme Court in paras 4 to 6 of the judgment, held as under:

> ***"4***. *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 Inhuman Conditions in 1382 Prisons, In re, (2017) 10 SCC 658.*
>
> ***5***. *The historical background of the provision for bail has been elaborately and lucidly explained in a recent decision delivered in Nikesh Tarachand Shah v. Union of India (2018) 11 SCC 1, going back to the days of the Magna Carta. In that decision, reference was made to Gurbaksh Singh Sibbia v. State of Punjab (1980) 2 SCC 565,in which it is observed that it was held way back in Nagendra Nath Chakravarti, In re, 1923 SCC Online Cal*

318, that bail is not to be withheld as a punishment. Reference was also made to Emperor v. H. L. Hutchinson, 1931 SCC online All 14,wherein it was observed that grant of bail is the rule and refusal is the exception. The provision for bail is therefore age-old and the liberal interpretation to the provision for bail is almost a century old, going back to colonial days.

***6**. However, we should not be understood to mean that bail should be granted in every case. The grant or refusal of bail is entirely within the discretion of the judge hearing the matter and though that discretion is unfettered, it must be exercised judiciously and in a humane manner and compassionately. Also, conditions for the grant of bail ought not to be so strict as to be incapable of compliance, thereby making the grant of bail illusory."*

11. In **Ramesh Bhavan Rathod vs. Vishanbhai Hirabhai Makwana (Koli) and another (2021) 6 SCC 230**, the Hon'ble Supreme Court in para 47 of the judgment, held as under:

*"**47**. The considerations which must weigh with the Court in granting bail have been formulated in the decisions of this Court in Ram Govind Upadhyay v. Sudarshan Singh (2002) 3 SCC 598 and Prasanta Kumar Sarkar v. Ashis Chatterjee(2010) 14 SCC 496. These decisions as well as the decision in Sanjay Chandra (supra) were adverted to in a recent decision of a two judge Bench of this Court dated 19 March 2021 in The State of Kerala v. Mahesh (2021) 14 SCC 86, where the Court observed: (SCC para 21)*

> *"21. …..All the relevant factors have to be weighed by the Court considering an application for bail, including the gravity of the offence, the evidence and material which prima facie show the involvement of applicant for bail in the offence alleged, the extent of involvement of the applicant for bail, in the offence alleged, possibility of the applicant accused absconding or otherwise defeating or delaying the course of justice, reasonable apprehension of witnesses being threatened or influenced or of evidence being tempered with, and danger to the safety of the victim (if alive), the complainant, their relatives, friends or other witnesses."*

Similarly, the Court held that the grant of bail by the High Court can be set aside, consistent with the precedents we have

discussed above, when such grant is based on non-application of mind or is innocent of the relevant factors for such grant."

12. In the instant case, the accusations against petitioners are serious in nature, however, in order to prima-facie assess the seriousness and gravity of accusations as also to prima-facie find out the existence of reasonable grounds for believing that the accused have committed the offence as alleged, a cursory scan of the material collected by the Investigating Agency becomes necessary. Merely because, the accusations are of serious nature and offence, if proved, will attract severe punishment, cannot be the only ground to deny the bail. It has to be weighed and balanced with other factors, such as the allegations against the bail-petitioners and also the available evidence to prove such allegations.

13. The onerous obligation on the Court while deciding a bail application, has its genesis in maintenance of balance between the rights of the accused on one hand and the public interest on the other. Needless to say that bail has been held to be the rule and jail as an exception.

14. Reverting to the facts of the case, the accusations and allegations against petitioners are subject to proof. The matter was reported to the police after two days of the alleged incident. The explanation rendered for delay is also subject to strict scrutiny. In the first version given by the complainant to the police, it was not disclosed that the complainant and his friends had seen Rohit rolling down from the hill towards river. It is unexplainable as to why such material fact was suppressed. The body of Rohit has not been recovered till date.

15. The observations made hereinabove, are only to prima-facie assess the seriousness and gravity of allegations against the petitioners and the material collected during the investigation to substantiate such accusations.

16. Analyzing the facts of the case at the touchstone of legal parameters, as enunciated from time to time and noticed above, this Court is of the view that petitioners are entitled to bail. The petitioners have a permanent abode. The apprehension expressed by learned Additional Advocate General regarding possibility of petitioners fleeing from the course of justice is only on supposition. No criminal history has been attributed to the petitioners. Even otherwise, petitioners can be put to strict terms for ensuring fair and speedy trial.

17. Learned Additional Advocate General has also not been able to convincingly reveal the material which may be sufficient to draw an inference regarding possibility of petitioners tampering with prosecution evidence.

18. Petitioners are already in custody since 21.7.2022. Their further detention in judicial custody are not going to serve any fruitful purpose. Pre-trial incarceration cannot be ordered as a matter of rule. In case the charges, if any against the petitioners are proved, they will suffer the legal consequences.

19. Accordingly, the petitions are allowed and the petitioners are ordered to be released on bail in case registered vide FIR No.255 of 2022, dated 20.7.2022, under Sections 302, 147 and 149 of IPC, at Police Station, Sadar Kullu, District Kullu, H.P., on their furnishing personal bonds in the sum of Rs.1,00,000/- each with one suretyeach in the like amount to the satisfaction of learned trial Court. This order shall, however, be subject to the following conditions:

i) That the petitioners shall not indulge in any criminal activity and in the event of breach of this condition, the bail granted to the petitioners in this case, shall automatically be cancelled.

ii) That the petitioners shall not leave the territory of India without express leave of Trial Court during the Trial.

iii). That the petitioners shall not directly or indirectly make any inducement, threat or promise to any person acquainted

with the facts of the case and shall not tamper with the prosecution evidence.

iv) That the petitioners shall regularly attend the trial of the case before learned Trial Court and shall not cause any delay in its conclusion.

20. 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 hereinabove.

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

Yuvraj Singh Jadeja .....Petitioner

Versus

State of Himachal Pradesh .....Respondent

For the petitioner: Mr. Karan Kapoor, Advocate.
For the respondent: Mr. Rajan Kahol and Mr. Rakesh Dhaulta, Additional Advocate Generals.
ASI Uttam Chand, P.S. Keylong, District Lahaul Spiti, H.P. present alongwith records.

Cr. M.P.(M) No. 340 of 2023
Reserved on: 20.02.2023
Decided on: 24.02.2023

Code of Criminal Procedure, 1973- Section 439- Bail- **Indian Penal Code, 1860-** Sections 302, 120-B, 201-Allegations of dowry related harassment by petitioner and his mother- **Held-** No eyewitness- No injury on the body of deceased except bruise on left leg- Deceased under influence of alcohol at time of drowning- No complaint regarding harassment for demand of dowry lodged by the deceased or her parents during her lifetime- Closely related witnesses cannot be presumed to be influenced by the petitioner- Ordered to be released subject to general conditions- Petition allowed. (Paras 17, 18)

Cases referred:

Dataram Singh vs. State of Uttar Pradesh and another (2018) 3 SCC 22;
Manoranjana Sinh alias Gupta vs. Central Bureau of Investigation (2017) 5 SCC 218;
Prasanta Kumar Sarkar vs. Ashis Chatterjee and another (2010) 14 SCC 496;
Ramesh Bhavan Rathod vs. Vishanbhai Hirabhai Makwana (Koli) and another (2021) 6 SCC 230;
Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge.

By way of instant petition, petitioner has prayed for grant of bail in case FIR No. 93 of 2022, dated 13.8.2022, under Sections 302, 120-B and 201 of IPC, registered at Police Station, Keylong, District Lahaul Spiti, H.P.

2. Petitioner was arrested on 03.09.2022. He remained in police custody till 14.9.2022 in the first instance and thereafter from 16.9.2022 to 19.9.2022. Petitioner is in judicial custody since 19.9.2022.

3. Brief facts necessary for adjudication of the petition are that the petitioner was married to Ms. Nidhiba (now deceased) on 05.02.2022 in Ahmedabad. Petitioner and his wife (deceased Ms. Nidhiba) undertook a pleasure trip to Leh-Ladakh in the month of July, 2022 through a Travel Agency named "Zoyo Trip Holidays" (a unit of Manali-Leh Adventure). On return journey, they halted at a place named "Jispa" in Lahaul-Spiti District, Himachal Pradesh. The travel agent had booked their stay in Himalayan Spirit Camp, Jispa, which had "tented" accommodation. Petitioner and deceased stayed in a tent, which was pitched near to the 'Bhaga River'. During mid-night, the body of Ms. Nidhiba was found, half floating in 'Bhaga River' with her left leg struck in the crate wire used at the spot to hold the river bank. Ms. Nidhiba when retrieved from the spot was found dead.

4. There are rival versions regarding the cause of death of Ms. Nidhiba. The first version is that the deceased and petitioner after having their dinner in Himalayan Spirit Camp enjoyed the "Bon-fire"till about 11.00 p.m. Thereafter the deceased expressed her wish to sit on the bank of river for some time with petitioner. Both of them sat on the river bank till about 12.45 a.m. and then came back to their tent. The deceased was still interested to sit on the river bank, however, petitioner was feeling sleepy and had in fact gone to sleep. After some time, petitioner noticed that the deceased was not on the bed. He called on the mobile number of his wife, but she did not attend the

phone. Petitioner came out of tent and found none. He went to the river bank and found that the foot of his wife was struck in the crate wire and rest of her body was floating in the river water. The mobile phone of the deceased was lying on the spot. Petitioner tried to retrieve the body of his wife from water, but could not succeed. Thereafter, he raised hue and cry, at which other occupants of the Camp came out and with their help, the body was taken out. Ambulance was called. The body was taken to hospital, but was declared brought dead.

5. The other version is that the petitioner had forced the face and head of Ms. Nidhiba in the river water for one-two minutes, which resulted in her death. The petitioner, subsequently, is alleged to have concocted a false story regarding accidental fall of his wife in river water.

6. The case was registered. After investigation, the Investigating Agency has concluded that the second version regarding cause of death of Ms. Nidhiba had found support from the evidence collected by it. As per Investigating Agency, the petitioner and his mother were involved in a criminal conspiracy and in pursuance thereto had caused death of Ms. Nidhiba, in a pre-planned manner. It is alleged that Ms. Nidhiba was being harassed by petitioner and his mother for dowry after the marriage. It is also alleged that in the month of June, 2022, petitioner had purchased two Life Insurance Policies for himself and his wife. The fact of purchase of Insurance Policies is also alleged to be an intentional act of petitioner to derive financial benefits after the death of his wife. On completion of investigation, challan has been presented in the Court with aforesaid allegations.

7. Petitioner has made a prayer for grant of bail on the ground that he has been implicated in a false case at the instance of the parents and other relatives of Ms. Nidhiba. The allegations regarding demand of dowry or harassment of Ms. Nidhiba for such purpose are stated to be baseless. It is contended on behalf of the petitioner that there is not even an iota of evidence

to suggest any foul play in the death of Ms. Nidhiba. The investigation has been completed and the Investigating Agency could not collect any legal evidence against petitioner. As per petitioner, the fall of Ms. Nidhiba into river water was purely accidental. It is submitted that petitioner had throughout associated during investigation. He has been in custody since 3.9.2022. The challan stands filed and no fruitful purpose shall be served by detaining the petitioner in custody for indefinite period. It is further submitted that the petitioner has permanent residence and also has roots in the society. He will make himself available for the trial.

8. On the other hand, the prayer for bail has been opposed on behalf of the respondent/State through the learned Additional Advocate General. It is submitted that the petitioner is accused of a very serious and heinous offence and he does not deserve any leniency. It is also submitted that in order to avoid punishment, petitioner may flee from the course of justice, which will adversely affect the trial. As per respondent, the petitioner if released on bail, may tamper with the prosecution evidence.

9. I have heard learned counsel for the petitioner and learned Additional Advocate General for the respondent/State and have also gone through the records of the case carefully.

10. In **Prasanta Kumar Sarkar vs. Ashis Chatterjee and another (2010) 14 SCC 496**, the Hon'ble Supreme Court culled out the following guiding factors to be borne in mind while considering an application for bail :

> ***9***.*(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."

11. In the instant case, the accusation against petitioner is that he has murdered his wife. No doubt, the accusation is serious in nature. However, in order to prima-facie assess the seriousness and gravity of accusation as also to prima-facie find out the existence of reasonable grounds for believing that the accused has committed the offence as alleged, a cursory scan of the material collected by the Investigating Agency becomes necessary. Merely because, the accusation is of serious nature and offence, if proved, will attract severe punishment, cannot be the only ground to deny the bail. It has to be weighed and balanced with other factors, such as the allegations against the bail-petitioner and also the available evidence to prove such allegations.

12. The onerous obligation on the Court while deciding a bail application, has its genesis in maintenance of balance between the rights of the accused on one hand and the public interest on the other. Needless to say that bail has been held to be the rule and jail as an exception.

13. In **Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40**, the Hon'ble Supreme Court observed and held as under:

"***21***. *In bail applications, generally, it has been laid down from the earliest times that 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.*

22. *From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great*

hardship. From time to time, necessity demands that some un-convicted 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 this country, 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.

***23**. Apart from the question of prevention being the object of a 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 un-convicted person for the purpose of giving him a taste of imprisonment as a lesson."*

14. An identical reiteration of above concept came to be recorded by the Hon'ble Supreme Court in **Manoranjana Sinh alias Gupta vs. Central Bureau of Investigation (2017) 5 SCC 218** in para 16 of the judgment as under:

*"**16**. This Court in Sanjay Chandra vs. 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."

15. In **Dataram Singh vs. State of Uttar Pradesh and another (2018) 3 SCC 22**, the Hon'ble Supreme Court in paras 4 to 6 of the judgment, held as under:

"4*. 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 Inhuman Conditions in 1382 Prisons, In re, (2017) 10 SCC 658.*

5*. The historical background of the provision for bail has been elaborately and lucidly explained in a recent decision delivered in Nikesh Tarachand Shah v. Union of India (2018) 11 SCC 1, going back to the days of the Magna Carta. In that decision, reference was made to Gurbaksh Singh Sibbia v. State of Punjab (1980) 2 SCC 565,in which it is observed that it was held way back in Nagendra Nath Chakravarti, In re, 1923 SCC Online Cal 318, that bail is not to be withheld as a punishment. Reference was also made to Emperor v. H. L. Hutchinson, 1931 SCC online All 14,wherein it was observed that grant of bail is the rule and refusal is the exception. The provision for bail is therefore age-old and the liberal interpretation to the provision for bail is almost a century old, going back to colonial days.*

6*. However, we should not be understood to mean that bail should be granted in every case. The grant or refusal of bail is entirely within the discretion of the judge hearing the matter and though that discretion is unfettered, it must be exercised*

judiciously and in a humane manner and compassionately. Also, conditions for the grant of bail ought not to be so strict as to be incapable of compliance, thereby making the grant of bail illusory."

16. In **Ramesh Bhavan Rathod vs. Vishanbhai Hirabhai Makwana (Koli) and another (2021) 6 SCC 230**, the Hon'ble Supreme Court in para 47 of the judgment, held as under:

> *"**47**. The considerations which must weigh with the Court in granting bail have been formulated in the decisions of this Court in Ram Govind Upadhyay v. Sudarshan Singh (2002) 3 SCC 598 and Prasanta Kumar Sarkar v. Ashis Chatterjee(2010) 14 SCC 496. These decisions as well as the decision in Sanjay Chandra (supra) were adverted to in a recent decision of a two judge Bench of this Court dated 19 March 2021 in The State of Kerala v. Mahesh (2021) 14 SCC 86, where the Court observed: (SCC para 21)*
>
> > *"21. .....All the relevant factors have to be weighed by the Court considering an application for bail, including the gravity of the offence, the evidence and material which prima facie show the involvement of applicant for bail in the offence alleged, the extent of involvement of the applicant for bail, in the offence alleged, possibility of the applicant accused absconding or otherwise defeating or delaying the course of justice, reasonable apprehension of witnesses being threatened or influenced or of evidence being tempered with, and danger to the safety of the victim (if alive), the complainant, their relatives, friends or other witnesses."*
>
> *Similarly, the Court held that the grant of bail by the High Court can be set aside, consistent with the precedents we have discussed above, when such grant is based on non-application of mind or is innocent of the relevant factors for such grant."*

17. Reverting to the facts of the case, noticeably, there is no eye witness. The prosecution has placed reliance mainly on the statements of the parents and other relatives of the deceased. Some documents in the form of transcript of WhatsApp chat between the deceased and her father have also been relied upon. In addition, reliance has been placed on the statements of

certain persons, who were present when the petitioner had made alleged inculpatory statements.

18. The allegations against petitioner are subject to proof. In absence of any eye witness to the incident, no such material exists which may lead to a strong inference negating the possibility of any other hypothesis than the commission of alleged offence by the petitioner. The allegation of demand of dowry and harassment of the deceased for such purpose at the hands of the petitioner and her mother, will be subject to strict scrutiny in absence of the fact that no complaint had been lodged either by the deceased during her life time or by her parents to any authority regarding the alleged harassment of deceased for demand of dowry.

19. Another circumstance, relied upon by prosecution is the purchase of two Life Insurance Policies by petitioner for himself and his wife jointly in the month of June, 2022. It is alleged that the purchase of such policies was part of the conspiracy and petitioner had purposely purchased such policies with the motive to derive monetary benefits after the death of his wife. The aforesaid fact has two facets. To infer any malafide against the petitioner in purchasing the insurance policies, as aforesaid, something more shall be required to be proved.

20. It can also be noticed that the cause of death of Ms. Nidhiba has been opined to be asphyxia, cardiac arrest, secondary to drowning. The deceased was also opined to be under influence of alcohol at the time of drowning. No other injury was found on the person of the deceased except abruise on her left leg which was found struck in crate wire.

21. The observations made hereinabove, are only to prima-facie assess the seriousness and gravity of allegations against the petitioner and the material collected during the investigation to substantiate such accusations.

22. Analyzing the facts of the case at the touchstone of legal parameters, as enunciated from time to time and noticed above, this Court is

of the view that petitioner is entitled to bail. The petitioner has a permanent abode. The apprehension expressed by learned Additional Advocate General regarding possibility of petitioner fleeing from the course of justice is only on supposition. No criminal history has been attributed to the petitioner. Even otherwise, petitioner can be put to strict terms for ensuring fair and speedy trial.

23. Learned Additional Advocate General has also not been able to convincingly reveal the material which may be sufficient to draw an inference regarding possibility of petitioner tampering with prosecution evidence. Most of the witnesses are closely related to the deceased and it is hard to presume that such witnesses can be influenced by the petitioner. As regards making of inculpatory statements by the petitioner, its admissibility will again be seen at the time of the trial at the touchstone of well settled principles of law.

24. Petitioner is already in custody since 03.09.2022. His further detention in judicial custody is not going to serve any fruitful purpose. Pre-trial incarceration cannot be ordered as a matter of rule. In case the charges, if any against the petitioner are proved, he will suffer the legal consequences. The mother of the petitioner already stands released on bail.

25. Accordingly, the petition is allowed and the petitioner is ordered to be released on bail in case registered vide FIR No. 93 of 2022, dated 13.8.2022, under Sections 302, 120-B and 201 of IPC, at Police Station, Keylong, District Lahaul Spiti, H.P., on his furnishing personal bond in the sum of Rs. 1,00,000/- with one suretyin 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 not indulge in any criminal activity and in the event of breach of this condition, the bail granted to the petitioner in this case, shall automatically be cancelled.

ii) That the petitioner shall not leave the territory of India without express leave of Trial Court during the Trial.

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 and shall not tamper with the prosecution evidence.

iv) That the petitioner shall regularly attend the trial of the case before learned Trial Court and shall not cause any delay in its conclusion.

26. 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 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- Quashing of FIR- **Indian Penal Code, 1860**- Sections 451, 323, 324, 504, 506, 34- Petitioners and private respondents settled past dispute and agreed to live peacefully- Parties live in same area, do not want to continue strained relations- Respondents accepted the contents of compromise deed- **Held**- Nothing found contrary to law- Compromise effected- FIR ordered to be quashed along with subsequent proceedings- 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.

Charan Singh ....Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

For the petitioner : Ms. Kanta Thakur, Advocate.
For the respondent : Mr. Rajan Kahol and Mr. Rakesh Dhaulta, Additional Advocate Generals.
S.I. Bikram Singh, P.S. Baddi, District Solan H.P. present alongwith record.

Cr.M.P(M) No.: 231 of 2023
Reserved on : 20.02.2023
Decided on: 23.02.2023

Code of Criminal Procedure, 1973- Section 439- Bail- **Indian Penal Code, 1860**- Sections 302, 341- Petitioner gave beatings to deceased with sticks which caused his death- **Held**- allegations subject to proof- material witnesses examined but not supported prosecution case- Pre trial incarceration not a matter of rule- No prejudice to remaining prosecution evidence- Violation of right to speedy trial- accused is from another State cannot be a ground to deny bail- Ordered to be released subject to general conditions- Petition allowed. (Para 11)

The following judgment of the Court was delivered:

Satyen Vaidya, Vacation Judge *(Oral)*

Petitioner is one of the accused in case FIR No. 235/2018, dated 21.09.2018, registered under Section 302 and 341 of the Indian Penal Code, at Police Station Baddi, Police District Baddi, District Solan, H.P.

2. Petitioner is in custody since 22.09.2018.

3. Petitioner alongwith his co-accused named Rambeer has been charged for offences under Sections 302 and 341 of the IPC. The allegation against them is that they on 21.09.2018, gave beatings to deceased Vijender Singh with sticks, which caused his death. The matter was reported to the police by Raghubardyal, who is son-in-law of the deceased. It is alleged that petitioner suspected relations of deceased with his wife and thus, beatings were given to the deceased. The petitioner and co-accused are under trials.

4. It has been contended on behalf of the petitioner that he has been falsely implicated. As per petitioner, material witnesses have been examined and none has supported the prosecution case. It is also submitted on behalf of the petitioner that he is also entitled to bail as his right to speedy trial has been violated.

5. Per-contra, learned Additional Advocate General has opposed the bail, on the ground that petitioner is accused of a serious offence and in case of his release on bail he may tamper with the prosecution evidence. It is further submitted that petitioner belongs to Uttar-Pradesh and if released on bail, he may not be available for trial.

6. I have heard learned counsel for the petitioner as well as learned Additional Advocate General and have also gone through the relevant record.

7. Petitioner was arrested on 22.09.2018. He remained in police custody till 26.09.2018 and thereafter his judicial custody is continuing. Only six prosecution witnesses have been examined till date and about eighteen of them remain to be examined.

8. No doubt petitioner is charged with commission of very heinous crime. However, the allegations against him are subject to proof. Material witnesses such as son-in-law of the deceased (complainant) and son of deceased have been examined. Copies of their statements have been placed on record, which *prima facie* reveal that none of them have supported the

prosecution case. Even the alleged eyewitness has been examined and again prosecution has found no support to its case from his statement.

9. Petitioner cannot be detained in custody for indeterminate period. Pre-trial incarceration cannot be inflicted, till conclusion of the trial, as a matter of rule. Each and every case has to be decided on its own merits. Material witnesses in the case have already been examined. No prejudice shall be caused to the prosecution evidence, in case of release of petitioner on bail, at this stage.

10. Even otherwise there is a serious violation of the right of speedy trial available to the petitioner. As noticed above, only six witnesses have been examined till date. The conclusion on trial is likely to take considerable time.

11. Merely because petitioner belongs to Uttar-Pradesh, he cannot be denied right of bail. He can be put to appropriate terms for securing his presence for the trial.

12. Keeping in view the entirety of facts and circumstances of the case, the instant petition is allowed and petitioner is ordered to be released on bail in case FIR No. 235/2018, dated 21.09.2018, registered under Section 302 and 341 of the Indian Penal Code, at Police Station Baddi, Police District Baddi, District Solan, 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) The surety shall necessarily be having immovable property in the State of Himachal Pradesh.

(v) Petitioner shall not leave India without permission of learned trial Court till completion of trial.

13. 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.

Jitender Kumar ....Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

For the petitioner : Mr. Manoj Pathak, Advocate.

For the respondent :Mr. Rajan Kahol and Mr. Rakesh Dhaulta, Additional Advocate Generals.

Cr.M.P(M) No.: 249 of 2023
Reserved on : 20.02.2023
Decided on : 23.02.2023

Code of Criminal Procedure, 1973- Section 439- Bail- **Indian Penal Code, 1860**- Section 306- Petitioner allegedly abetted suicide of his wife- **Held**- Marital life for fourteen years and no complaint against petitioner either by deceased or her family- Young son in 7th standard requires care and custody- No threat to fair investigation or trial- No purpose served by detaining indeterminately- Ordered to be released subject to general conditions- Petition allowed. (Para 9)

The following judgment of the Court was delivered:

Satyen Vaidya, Vacation Judge *(Oral)*

Petitioner is an accused in case FIR No. 07/2023, dated 10.01.2023, registered under Section 306 of the Indian Penal Code, at Police Station Rohru, District Shimla, H.P.

2. Petitioner is in custody since 10.01.2023.

3. The allegation against the petitioner is that he has abetted the suicide committed by his wife on 07.01.2023. The matter was reported to the

police on 10.01.2023 by the father of the deceased. It is alleged that petitioner was residing with his wife (deceased) and son at Rohru in a rented accommodation. He was habitual of drinking and used to harass the deceased in intoxicated condition. The complainant has alleged that deceased had made so many complaints to him but till the date of death of the deceased, no complaint had been made to any other authority whosoever.

4. Petitioner has prayed for grant of bail on the grounds that he is innocent and has not committed any offence. It is submitted that petitioner was married to the deceased for the last about fourteen years. He has a son studying in Class-VII at Rohru. There is no legal evidence to implicate him. It is further submitted that the preliminary investigation is almost complete. Petitioner is already in judicial custody and no fruitful purpose shall be served by keeping him in custody.

5. On the other hand, learned Additional Advocate General has opposed the bail, on the ground that there are serious allegations against petitioner. In case of his release on bail, petitioner may tamper with the prosecution evidence. The investigation is still continuing and the same is likely to be prejudiced by releasing the petitioner 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. It is evident from the status report that the married life of the petitioner and deceased had continued for about fourteen years. There was not even a single complaint either by the deceased or any of her family members to the police or any other authority regarding alleged misconduct of the petitioner. Nothing is revealed from the status report as regards any specific act of omission or commission committed by petitioner in proximate vicinity of time, when suicide was committed. These observations have been made merely to assess the seriousness and gravity of allegations against petitioner.

8. Petitioner is permanent resident of Village Damdaddi, P.O. Dharada, Tehsil Tikker District Shimla, H.P.. The young child requires his care and custody. It is not alleged against petitioner that he has not been treating his son well. Rather, it is inferable from records that petitioner has hired a rented accommodation at Rohru for educating his son.

9. There is nothing on record to suggest that petitioner will be a threat to fair investigation or trial. Any such apprehension can otherwise be duly taken care of by putting the petitioner to appropriate terms. Most of the prosecution witnesses are the relations of deceased from her paternal side. There is hardly any likelihood of such witnesses being influenced by the petitioner.

10. Petitioner is already in judicial custody. No fruitful purpose shall be served by detaining him in judicial custody for indeterminate period. The investigation can continue fairly even after release of petitioner on bail. Pre-trial incarceration is not the rule.

11. Petitioner is permanent resident of Village Damdaddi, PO Dharada, Tehsil Tikker District Shimla, H.P. and there is no likelihood of his absconding or fleeing from the course of justice.

12. Keeping in view the entirety of facts and circumstances of the case, the instant petition is allowed and petitioner is ordered to be released on bail in case FIR No. 07/2023, dated 10.01.2023, registered under Section 306 of the Indian Penal Code, at Police Station Rohru, District Shimla, H.P., on his furnishing personal bond in the sum of Rs. 50,000/- with one surety in the like amount to the satisfaction of learned Judicial Magistrate First Class, Rohru, Distt. Shimla, H.P. 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.

13. 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.

Ajeet Singh ....Petitioner.

Versus

State of Himachal Pradesh ...Respondent.

For the petitioner :Mr. Gaurav Sharma, Advocate.
For the respondent : Mr. Rakesh Dhaulta and Mr. B.C. Verma, Additional Advocate Generals.

Cr.MP(M) No.: 361 of 2023
Reserved on : 21.02.2023
Decided on : 24.02.2023

Code of Criminal Procedure, 1973- Section 439- Successive Bail- **Indian Penal Code, 1860**- Section 302- **Indian Arms Act, 1959-** Sections 25, 54, 59- Petitioner charged for murdering his wife by firing gunshot and in custody since 05.08.2020- **Held**- Witnesses including complainant examined and charge of murder not supported- For deciding application, court can look into the nature of allegations and materials on record- Petitioner has right to speedy justice and delay in trial not attributed to him- Ordered to be released subject to general conditions- Petition allowed. (Paras 8,9)

The following judgment of the Court was delivered:

Satyen Vaidya, Vacation Judge

Petitioner has approached this Court for grant of bail in case FIR No. 123/2020, dated 05.08.2020, registered under Section 302 of the Indian Penal Code and Section 25-54-59 of the Indian Arms Act, at Police Station Theog, District Shimla, H.P.

2. Petitioner is in custody since 05.08.2020.

3. Petitioner has prayed for grant of bail on the ground that, though, he has been charged for commission of offence under Section 302 of the Indian Penal Code, but there is no legal evidence to support such charge. It is submitted on behalf of the petitioner that despite lapse of more than two years and six months since his custody, the trial has not been concluded. Petitioner cannot be allowed to remain in custody for indeterminate period. He has a right to speedy trial. It is further submitted that all the material witnesses have already been examined and only the police officials remain to be examined. As per petitioner, the sole eye witness of the case has not supported the charge framed against petitioner. Petitioner is stated to be permanent resident of Village Kello Jubbar, P.O. Mahori, District Shimla, H.P. It is submitted that there is no likelihood of his absconding or fleeing from the course of justice.

4. On the other hand, the prayer for bail on behalf of the petitioner has been opposed by learned Additional Advocate General, on the ground that the allegations against petitioner are serious in nature. In the event of release of petitioner on bail, the trial may be prejudiced. He may tamper with the prosecution evidence.

5. I have heard learned counsel for the petitioner as well as learned Additional Advocate General and have also gone through the status report.

6. Petitioner has been charged for committing murder of his wife by firing a gun shot at her on 04.08.2020.

7. Noticeably, the case was registered against the petitioner initially under Sections 336 & 304 of IPC and Section 25 of the Indian Arms Act. The daughter of the petitioner is the complainant. In her initial version to the police, she had stated that her mother (deceased) had pointed the gun towards herself. She called her father and when both of them tried to snatch the gun, it fired and hit the deceased causing her death. In a subsequent version to the police, complainant stated that there was an altercation

between her mother and father. The father picked the gun and threatened to commit suicide. He pointed the barrel of gun towards him. The complainant and her mother tried to snatch the gun and during this scuffle, the gun fired and hit her mother. Section 302 of IPC came to be incorporated by the police after a communication was addressed to a Bench of this Court, during pendency of a bail petition of petitioner, purportedly addressed by the complainant alleging *inter alia* that the petitioner had committed the murder of his wife.

8. Petitioner had earlier approached this Court for grant of bail, but had remained unsuccessful. His bail application was rejected by this Court, lastly, on 08.03.2022. Thereafter, a number of witnesses including complainant has been examined. Petitioner has placed on record a copy of the statement of complainant recorded in the Court. Perusal of such statement *prima facie* reveals that the complainant has not supported the charge of murder as framed against petitioner.

9. The above observations have been made only to assess seriousness and gravity of allegations against petitioner. While deciding the bail application under Section 439 of Cr.P.C., the Court is not precluded from looking into the nature of accusations and the material collected on record in support thereof.

10. Keeping in view the facts of the case, this Court is of the considered view that the petitioner has made out a case for bail. Even otherwise, petitioner has remained in custody for about two years and six months. There is no material to suggest that the trial has been delayed for the reasons attributable to the petitioner. Petitioner has a right to speedy trial, which definitely has been infringed in the instant case.

11. The objection raised on behalf of learned Additional Advocate General regarding possibility of petitioner tampering with the prosecution

evidence is found to be without substance as the material witnesses including complainant has already been examined in the case.

12. Petitioner is permanent resident of Village Kello Jubbar, P.O. Mahori, District Shimla, H.P.. He has family to support. In such circumstances, there is no likelihood of his absconding or fleeing from the course of justice.

13. In order to ensure conclusion of fair trial, petitioner can be put to appropriate terms.

14. Keeping in view the peculiar facts of the case, the bail petition is allowed and petitioner is ordered to be released on bail in case FIR No. 123/2020, dated 05.08.2020, registered under Section 302 of the Indian Penal Code and Section 25-54-59 of the Indian Arms Act, at Police Station Theog, District 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.

15. 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.

Sandeep Thakur ....Petitioner.

Versus

State of Himachal Pradesh ..Respondent.

For the petitioner :Mr. Sanjeev Kumar and Mr. Vinod Kumar, Advocates.

For the respondent :Mr. Rakesh Dhaulta and Mr. B.C.Verma,Additional Advocate Generals.

Cr.MP(M) No.: 307 of 2023
Reserved on : 22.02.2023
Decided on : 24.02.2023

Code of Criminal Procedure, 1973- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 21, 29- Petitioner on passenger front seat when intermediate quantity of heroin recovered from vehicle beneath foot mat of driver- petitioner in custody since 24.11.2022 - **Held**- Nature of allegations being serious cannot be the sole ground for rejection of bail- Vehicle from which recovery was made in the name of wife of co-accused- Knowledge about contraband subject to proof- No certainty whether petitioner consumer of *heroin* or dealer- Conclusion of trial shall take considerable time, no purpose served in detaining for indeterminate period- Ordered to be released subject to general conditions- Petition allowed. (Para 7)

The following judgment of the Court was delivered:

Satyen Vaidya, Vacation Judge

Petitioner has approached this Court for grant of bail in case FIR No. 171/2022, dated 24.11.2022, registered under Sections 21 & 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'ND&PS' Act), at Police Station Dhalli, District Shimla, H.P.

2. Petitioner is in custody since 24.11.2022.

3. Brief facts necessary for adjudication of the petition are that on 24.11.2022, a police party had laid *'Nakka'* near Chhrabra, within the jurisdiction of police Dhalli. They received a secret information that one Car No. HP-95-2257 (Alto) was on way from Chandigarh to Rampur with two persons namely Anuj Sirkek and Sandeep travelling therein and in case, the vehicle was searched *Chitta/Heroin* could be recovered. Proceedings under Section 42(2) of ND&PS, Act, were drawn and information was sent to the Supervising Officer, Police Station Dhallli. At about 9:00 am, two independent witnesses were associated. Car No. HP-95-2257 (Alto) was noticed by the police party at 9:30 am with two persons occupying the same. The vehicle was stopped. Accused Anuj Sirkek was on the wheel and petitioner was occupying the front passenger seat. The vehicle was searched. 10.54 grams of *Chitta/Heroin* was recovered from beneath the foot mat of the driver seat. After preliminary interrogation, the case was registered. Petitioner alongwith other co-accused namely Anuj Sirkek were arrested. On completion of investigation, challan has been presented before the Court against both the accused persons including petitioner.

4. Petitioner has prayed for grant of bail, on the ground that, he is innocent as he was not aware about the contraband in the vehicle. According to the petitioner, the vehicle belonged to Anuj Sirkek and petitioner had taken lift from the co-accused. It is further submitted that petitioner has never remained involved in any similar offence. He has no criminal history.

5. On the other hand, the prayer for bail on behalf of the petitioner has been opposed by learned Additional Advocate General, on the ground that the substantial quantity of *'heroin'* has been recovered from the vehicle, which was occupied by both the accused persons. Petitioner was aware about the carriage of contraband in the vehicle. It is further submitted that in

case of grant of bail to the petitioner, he may abscond from the course of justice with a view to evade punishment.

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 status report submitted by respondent/State reveals that the petitioner has no criminal antecedents. No case of similar nature or for any other offence has been found against the petitioner. However, co-accused Anuj Sirkek has been involved in nine criminal cases in the past, out of which, three were under ND&PS Act. First case against co-accused Anuj Sirkek was registered under Section ND&PS, Act in the year 2015. The co-accused Anuj Sirkek had also filed a separate bail petition for grant of bail. This Court had shown its disinclination to grant bail to said Anuj Sirkek in view of his repeated indulgence in offences and the learned counsel representing the accused Anuj Sirkek had withdrawn the petition on 22.02.2023.

8. Since, the petitioner in the instant petition has no criminal background, his petition has been considered separately.

9. The quantity of '*heroin*' recovered in the case is intermediate and thus, the rigors of Section 37 of ND&PS, Act, will not be applicable. Admittedly, petitioner is not the owner of the vehicle. The vehicle, from which contraband has been recovered, is registered in the name of the wife of co-accused Anuj Sirkek. The allegation against petitioner of having knowledge about the contraband in the vehicle is subject to proof during trial.

10. Though, the allegations against petitioner are serious, but it cannot be taken to be sole criteria to reject the bail application. The right of liberty available to the petitioner is to be weighed and balanced against public interest. Keeping in view the fact that there is no criminal history attach to the petitioner, it cannot be said with certainty that petitioner is either consumer of '*heroin*' himself or a dealer.

11. Petitioner is permanent resident of Village and Post Office Jahu, Tehsil Nankhari, District Shimla, H.P. and there is no likelihood of his absconding or fleeing from the course of justice. The apprehension expressed by learned Additional Advocate General regarding possibility of petitioner influencing the prosecution witnesses is not supported by any tangible material. In any case, for ensuring free and fair trial, petitioner can be put to appropriate terms.

12. No fruitful purpose shall be served by detaining the petitioner in custody for indeterminate period. The conclusion of trial is likely to take considerable time.

13. Keeping in view the peculiar facts of the case, the bail petition is allowed and petitioner is ordered to be released on bail in case FIR No. 171/2022, dated 24.11.2022, registered under Sections 21 and 29 of ND&PS, Act, at Police Station Dhalli, District Shimla, H.P., on his furnishing personal bond in the sum of Rs. 50,000/- with one surety in the like amount to the satisfaction of learned trial Court. This order shall, however, be subject to the following conditions:-

i) *Petitioner shall regularly attend the trial of the case before learned Trial Court and shall not cause any delay in its conclusion.*

ii) That the petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the Police.

iii) That the petitioner shall not in any manner tamper with the prosecution evidence.

iv) That any indulgence of petitioner in criminal activities during the continuance of this order shall entail cancellation of the bail granted to the petitioner.

v) That the petitioner shall not leave India till conclusion of trial without permission of the learned trial Court.

14. Any expression of opinion herein-above shall have no bearing on the merits of the case and shall be deemed only for the purpose of disposal of this petition.

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

Himachal Pradesh High Court, Non-Gazetted Employees/Official Employees Association .....Petitioner.

Versus

State of Himachal Pradesh and others .....Respondents.

For the Petitioner : Mr. Sanjeev Bhushan, Senior Advocate with Mr. Piar Chand and Mr. Sohail Khan, Advocates.

For the Respondents : Mr. Anup Rattan, Advocate General with Mr. Vinod Thakur, Additional Advocate General and Mr. Rajat Chauhan, Law Officer, for respondent Nos.1 and 2.

Mr. J.L. Bhardwaj, Senior Advocate with Ms. Dhanvanti, Advocate, for respondent No.3.

CWP No.534 of 2018
Judgment Reserved on : 28.12.2022
Date of decision: 09.01.2023

Constitution of India, 1950- Articles 226 and 229- Prayer for issuance of appropriate writ, order or direction to Respondent Nos. 1 and 2 to issue necessary notification bringing parity in the pay scales of employees of this High Court registry with their counter parts in Punjab and Haryana High Court, further grant of 20% hike in the pay scales (grade pay) of the employees of the Registry of High Court of Himachal Pradesh w.e.f. 01.01.2006, with all consequential benefits of pay, arrears etc. – Representation of the Employees Association was recommended by the Hon'ble Chief Justice and the Registrar General sent a communication to the Government requesting to take up the matter with the Finance Department and issue necessary notification bringing parity in pay scales of employees of this Court Registry with their counterparts in Punjab and Haryana High Court- Representation was turned down by the

State Government- **Held-** The State has clearly misdirected themselves on a point of law, more particularly, being oblivious to the provisions contained in Article 229 of the Constitution of India- Rejection of proposal of the petitioners is devoid of merit and cannot be accepted- Petition allowed- Directions issued to place the judgment before Hon'ble the Chief Justice of this Court to constitute a Committee that shall go into the details with respect to grant of hike as prayed by the petitioners. (Paras 56, 86, 94)

Cases referred:

Adeline Rodrigues and others vs. State of Maharashtra and others (2013) 5 AIR Bombay 1207;

Chandrakant Sakharam Karkhanis and others vs. State of Maharashtra and others, AIR 1977 Bombay 193;

Employees Welfare Association vs. Union of India and Another (1989) 4 SCC 187;

High Court Employees Welfare Association, Calcutta and others vs. State of West Bengal and others (2004) 1 SCC 334;

High Court of Gujarat vs. K.K. Parmer 1992 (2) GLH (DB) 379;

High Court of Judicature for Rajasthan vs. Ramesh Chandra Paliwal and Another (1998) 3 SSC 72,;

M. Gurumoorthy vs. Accountant General, Assam and Nagaland and others, (1971) 2 SCC 137;

R.N. Arul Jothi and others vs. Principal Secretary to Government Home (Cts. V) Department Secretariat, Chennai and another 2020 Labour and Industrial Cases 3324;

State of Andhra Pradesh and Anr. vs. T. Gopalakrishnan Murthi and others (1976) 2 SCC 883;

State of Rajasthan and others vs. Ramesh Chandra Mundra and others (2020) 20 SCC 163;

State of Maharashtra vs. Association of Court Stenos, P.A. P.S. and another (2002) 2 SCC 141;

State of Maharashtra vs. Association of Stenographers AIR 2002 SC 555;

State of West Bengal and others vs. The High Court Employees' Welfare Association and others (2016) 3 CLJ 448;

Supreme Court Employees' Welfare Association vs. Union of India and Another 1993 Supp (3) SCC 727;

Union of India vs. S.B. Vohra & Ors. (2004) 2 SCC 150;

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:-

> "i) That an appropriate writ, order or direction may very kindly be issued to respondent No.1 and 2 to issue the necessary notification bringing parity in the pay scales of employees of this High Court registry with their counter parts in Punjab and Haryana High Court, by further directing the respondent No.1 and 2 to grant 20% hike in the pay scales (grade pay) of the employees of the registry of High Court of Himachal Pradesh w.e.f. 01.01.2006, with all consequential benefits of pay, arrears etc., in the interest of law and justice and communication dated 19.12.2017 (Annexure P-18) may very kindly be quashed and set aside.
>
> 1(a). That the decision as taken in the meeting held on 24th July, 2019 which is Annexure P-19 to the Writ Petition may also very kindly be quashed and set aside, in the interest of law and justice."

2. A single Bench of the Punjab and Haryana High Court in its decision rendered in ***CWP No. 15833 of 2009*** titled as ***Hari Mohan Dixit and others*** *vs.* ***Punjab and Haryana High Court***, ***Chandigarh and others,*** decided on 10.02.2011 directed the Union of India to consider the recommendations made by three Judges' Committee which had been accorded approval by Hon'ble the Chief Justice of the Punjab and Haryana High Court and take an appropriate decision in accordance with law and especially keeping in view the guiding principles reiterated in ***Union of India*** *vs.* ***S.B. Vohra & Ors. (2004) 2 SCC 150***. It was pursuant to these directions that the Government of India eventually granted 20% hike in the pay scales (Grade Pay). The Government of India vide memorandum dated 27.02.2012 granted hike of 20% in the existing pay including Grade Pay to the employees

specified in the memorandum and serving in Punjab and Haryana High Court with effect from 01.01.2006.

3. One of the Welfare Associations of the Himachal Pradesh High Court accordingly made a representation dated 11.04.2012 claiming therein the same and similar benefits on the basis of the ***Hari Mohan Dixit's case*** (supra).

4. On receipt of such representation, the matter was directed to be placed before a Committee consisting of three Hon'ble Judges, who after taking into consideration the entirety of facts and circumstances submitted a report that it was the prerogative of Hon'ble the Chief Justice to independently consider the matter and to make recommendations for grant of benefits to the employees of this High Court. The Hon'ble Chief Justice thereafter made the note "recommended" "Address the govt." on 28.04.2012.

5. Accordingly, the Registrar General of this Court sent a communication to the Government requesting the Government to take up the matter with the Finance Department and issue the necessary notification bringing parity in the pay scales of the employees of this Court Registry with their counter-parts with the Punjab and Haryana High Court.

6. After the receipt of such communication, the Office of the Principal Secretary (Home) called upon the High Court to supply legible copy of the letter dated 27.02.2012 vide which 20% hike had been granted to the employees of the Punjab and Haryana High Court with effect from 01.01.2006. The same was duly supplied by this High Court and in addition thereto, another communication was sent by the High Court to the Principal Secretary (Home) requesting him to expedite the matter vide reminder dated 29.08.2012.

7. It is only then that for the first time the Department of Home vide communication dated 05.11.2012 sought a comprehensive proposal along with details of financial implications. The query of the Department of Home

vide communication dated 05.11.2012 with regard to financial implications was duly attended to by the High Court by sending a communication dated 15/17th December, 2012. However, the Department of Home again sent a communication dated 21.08.2013 raising therein certain other queries. These queries were duly attended to vide communication dated 24/26th December, 2013.

8. The Department of Home then sent a communication dated 05.04.2014 to the Registrar General of this Court wherein a reference was made to Rule 6 of the Himachal Pradesh Officers and Members of the Staff (Recruitment, Condition of Service, Conduct and Appeal), Rules, 2003 and a question was raised as to how without carrying out an amendment in the Rules, the hike of 20% could be granted to the employees of this High Court. In response thereto, the Registrar General addressed a communication to the Chief Secretary of the State of Himachal Pradesh pointing out in detail the entire issue. This was followed by a letter from the Registrar General wherein a detailed background of the case was given and it had been pointed out that the State of Himachal Pradesh right from its inception on attaining the statehood in 1971 had been following the State of Punjab insofar as the pay scales, allowances and other amenities are concerned as the State Government had not constituted its own Pay Commission so far. The nomenclature of posts in High Court of Himachal Pradesh is also the same as in the High Court of Punjab and Haryana. Even the nature of duties and responsibilities of the employees of both the High Courts are undisputedly the same and identical and that the working of the High Court is altogether different from the Departments and Offices of the Government.

9. It is pointed out that the background of the hike given in the pay scales is that the pay scales of the Clerks working in the Subordinate Courts were enhanced in every State including the State of Punjab and Haryana by adopting the recommendations of the Shetty Pay Commission,

as a result whereof, an anomaly arose between the pay of the Clerks of the Subordinate Courts and the High Courts. In simple words, the Clerks working in the Subordinate Courts started to draw more pay than their counter parts in the High Court.

10. It was thereafter that the Clerks of the Punjab and Haryana High Court made a representation to Hon'ble the Chief Justice of the said High Court requesting to remove the anomaly by bringing parity in the pay scales of the Clerks of the High Court with those of the Subordinate Courts. It was then that Hon'ble the Chief Justice of the said High Court constituted a three Judges' Committee to examine the matter, who, in turn, recommended that the demand of the Clerks of the High Court was justified and that their pay deserved to be brought at par with the Clerks of the Subordinate Courts.

11. It was also recommended that the pay scales of other categories of the employees of the High Court is also deserved to be hiked by 20% of the existing pay with effect from 01.01.2006 so that no more anomalies arise in the pay structures of the employees. The recommendations of the Committee were duly accepted by Hon'ble the Chief Justice and the same were made to the Union of India for acceptance and for issuing necessary memorandum in this behalf.

12. It is only when the recommendations were not acted upon that the Association of the employees of the Punjab and Haryana High Court filed the aforesaid writ petition which was allowed and the Union of India finally issued a notification/memorandum whereby an additional pay at the rate of 20% of the pay drawn (i.e. pay in the Pay Band+ Grade Pay) was granted to the categories mentioned therein. In addition to that, an additional pay of 10% of pay drawn (i.e. pay in the Pay Band + Grade Pay) was also granted in terms of the letter issued by the Ministry of Law and Justice dated 15.10.2012 to the categories from the level of Secretary up to the level of

Registrar. Further, in terms of the letter dated 18.07.2012, 20% additional pay was also given to the following left out categories:

Sr.No.	Name of the Post	Corresponding Pay Band (in Rs.)	Grade Pay (in Rs.)
1.	Superintendent Gr.II	10300-34800	5000
2.	Reader	10300-34800	5000
3.	Private Secretaries	10300-34800	5000

13. It was further pointed out that the issue with regard to 20% hike in pay was taken up by this High Court with the Ministry of Law and Justice, Government of India, New Delhi, in the year 2014 and in response thereto, the said Ministry vide letter dated 06.03.2014 advised the Registry that in view of the provision of Article 229(2) of the Constitution of India, any proposal for revision of pay scales of the High Court needs to be processed by the State Government of Himachal Pradesh. Lastly, it was pointed that the duties, responsibilities and work of the Judiciary throughout the Country are more arduous and somewhat similar in nature. The quantum of work undertaken by the Officers/Officials concerned as well as the extent of work ethos like efficiency, promptitude and probity etc. required from them is of the highest order.

14. It was bearing in mind these aspects that the Shetty Pay Commission had recommended different pay scales to the Judicial Officers and staff of the Subordinate Courts than that of the State Government.

15. It is averred that the State Authorities despite the matter having been discussed at the highest level still kept on lingering the matter on one pretext or the other and ultimately vide communication dated 19.12.2017 (Annexure P-18) rejected the proposal submitted by the High Court mainly on the ground that the employees of the High Court had already been granted enhanced pay scales (Pay-Band and Grade Pay) with effect from 01.10.2012

at par with the pay scales of other State Government employees which is higher and equal to the pay scales granted to the six categories on the recommendations of Shetty Pay Commission.

16. It is also pointed out that the granting of special increment to certain categories of employees of Subordinate Courts with effect from 01.04.2003 could not be construed as an anomaly particularly in the pay scales. Special increment has been granted as a measure personal to an employee and his pay scale has not been changed. In addition to that, it was pointed out that special increment to the Subordinate Court employees has been granted on the recommendations of the Shetty Pay Commission which is applicable to the Subordinate Court employees in the State.

17. As regards parity, it was claimed that normally the State of Himachal Pradesh takes into account the recommendations of the Punjab Pay Commission pay scales in respect of its employees, but the same are implemented with suitable modifications as the Government of Himachal Pradesh has its own staffing pattern of service and R&P Rules, method of recruitment, prescribed educational qualification, geographical/traditional conditions, natural, administrative implications and financial resources. While allowing any financial benefit, creation of posts or revision of pay scales, the State Government gathers various informations on that particular issue from various State Governments/other Institutions and it is only thereafter that a decision is taken.

18. It has also been claimed that the Punjab and Haryana High Court is under the control of Government of India being part of UT administration and not in the State of Punjab and involvement of Rule 6, parity of granting any financial benefits to the H.P. High Court employees always remained at par with the employees of H.P. Government and not with the Punjab and Haryana High Court employees. Consequently, all the employees of the H.P. High Court are getting the same pay scales and other

allowances/ financial benefits as are admissible to the corresponding or comparable posts in H.P. Secretariat including Secretariat Pay/allowance and Special Pay. These extra financial benefits which also form the part of pensionary benefits are not being paid to the employees of similar categories of employees in Subordinate Offices of Government as well as Subordinate Judiciary where the service conditions/pay scales of Subordinate Judiciary employees are governed by the H.P. Subordinate Courts' Employees (Pay Allowance and other Conditions of Service) Amendment Act, 2005. These employees are not being paid any Secretariat Pay/Allowance or Special Pay etc. The High Court employees are already getting higher pay than the Subordinate Judiciary employees due to allowing of Secretariat Pay and Special Pay. The amount of Secretariat Pay/Special Pay along with Dearness Allowance is much higher than the amount of Special Increment allowed at the rate of 3% to the Subordinate Judiciary employees by the Shetty Pay Commission.

19. Lastly, it is claimed that the Hon'ble Supreme Court in **Appeal (Civil) No.2033 of 1996** titled ***State of Himachal Pradesh*** *vs.* ***P.D. Attri and others,*** decided on 11.02.1999, had clearly held that the claim of the employees therein was not based on any constitutional or any other legal provisions whereby they could claim parity with the posts similarly designated in Punjab for grant of pay scales from the same date. It was then concluded that since there is no anomaly in the pay scales of H.P. High Court employees vis-a-vis Subordinate Courts' employees of Himachal Pradesh, their representation was rejected. As regards the matter of party of pay scales of High Court employees, it is always with the State Government employees as laid down in Rule 6.

20. On 03.12.2018, a Coordinate Bench of this Court passed the following order:-

"One of us (Justice Chander Bhusan Barowalia, J.) has dealt with this matter in the capacity of Registrar General (In-charge), however, since only some correspondence has been made with the respondent-State in this regard, therefore, neither learned Addl. Advocate General nor the petitioner have any objection, in case this Bench continues with further proceedings in this writ petition.

On hearing this matter for some time, it transpired that with the implementation of Shetty Commission report, the staff in various cadre(s) working in Subordinate Courts in the State is getting more pay and allowances as compared to the employees in corresponding cadre(s) on the establishment of the Registry of the High Court. An anomalous situation has thus arisen on account of the staff in the subordinate Courts is drawing higher salary as compared to their counterparts on the establishment of the Registry of this Court. Such an anomalous situation has also occurred in other States on implementation of the Shetty Commission report with respect to staff working in the Subordinate Courts, including adjoining States of Punjab and Haryana. The High Court of Punjab and Haryana, vide judgment dated 10.2.2011 passed in CWP No. 15833 of 2009 titled Hari Mohan Dixit & ors. Vs. Punjab and Haryana High Court, Chandigarh & ors. had directed Union of India to consider the recommendation made by Three Judges' Committee qua enhancement of the salary of the Staff working in the Registry of the High Court at par with their counter parts in the District Judiciary. In Punjab and Haryana High Court, the employees in various categories have been given the hike in their salary as is apparent from the perusal of Annexure R-3/F (colly.) (pages 89 to 92 of the record). We have further been informed that similar relief has been granted to the employees in various categories working in other High Courts also in the country. In the High Court of Himachal Pradesh also, this matter has been considered by the Administrative Committee comprising Hon'ble Chief Justice and two senior most Judges which has recommended to pay the salary to the employees of the High Court at par their counterparts in the District Judiciary. The recommendation so made has also been approved by the Hon'ble Chief Justice and the matter taken up with the respondent-State.

Being so and also that the prayer made in the writ petition, prima-facie is genuine and bonafide, we hope and trust that the respondents instead of inviting judgment in this matter

> must consider the relief sought in this writ petition in the light of the material available on record. Learned Addl. Advocate General prays for and is granted four weeks' time to do the needful. List on 2.1.2019.
>
> An authenticated copy of this order be supplied to learned Addl. Advocate General for compliance."

21. Now, adverting to the reply filed on behalf of the High Court, it has been stated that the representation dated 11.04.2012 made by the H.P. Employees Welfare Association, High Court of H.P. was referred to the Committee consisting of three Hon'ble Judges as per the orders of Hon'ble the Chief Justice. The three Hon'ble Judges' Committee considered the representation along with judgment passed by the Punjab and Haryana High Court and thereafter it was concluded by the Hon'ble Committee that it is the prerogative of Hon'ble the Chief Justice to independently consider the matter and to make recommendations for grant of benefits to the employees of the High Court of H.P. The report of the Hon'ble Committee dated 23.04.2012 was placed before Hon'ble the Chief Justice, who, in turn, was pleased to direct the matter to be taken up with the State Government. The High Court has otherwise supported the claim of the petitioner by stating that the State of Himachal Pradesh has been following the State of Punjab in matters of pay scales and allowances to its employees from the very inception.

22. It is also claimed that the nature of duties and responsibilities of the employees of the Punjab and Haryana High Court and those of this High Court are same and identical. Even the nomenclature of posts existing in both the High Courts is also same and similar. It has also been stated that pursuant to the judgment dated 10.02.2011 delivered in ***Hari Mohan Dixit's case*** (supra), the Government of India vide memorandum dated 27.02.2012 has granted hike of 20% in the existing pay including grade pay to the employees specified and serving in Punjab and Haryana High Court with effect from 01.01.2006 and the matter in respect of left out categories

was under consideration with the Union of India and States of Punjab and Haryana.

23. It has been further averred that the State Government was also apprised of the mandate of the Hon'ble Supreme Court of India in ***S.B. Vohra's case*** (supra) wherein the Hon'ble Supreme Court *inter alia* has held that the independence of the High Court is an essential feature for the working of the democratic form of Government in the Country and, therefore, an absolute control has been vested in the High Court over its staff which should be free from interference from the Government subject, of course, to the limitations as imposed under Article 229 of the Constitution of India. Rest of the averments regarding sending of the comprehensive proposal along with details of the financial implications involved in the case has not been denied. In addition thereto, it has been submitted that the High Court had also sent a letter to the Registrar General of the Punjab and Haryana High Court requesting him to supply copy of the order regarding sanction of 20% and 10% hike along with latest copy of the pay scales and grade pay of the employees of the Punjab and Haryana High Court.

24. The matter was also taken up by the High Court with the Secretary to the Government of India vide letter dated 24/26th December, 2013 requesting for intervention by the Ministry of Law and Justice to bring parity in the pay scales and allowances vis-a-vis their counter-parts serving in the High Court of Punjab and Haryana. However, the Deputy Secretary to the Government of India addressed a letter dated 06.03.2014 and stated that any proposal for revision in the pay scales of the employees of the High Court of Himachal Pradesh needs to be processed by the State Government of Himachal Pradesh.

25. The Secretary (Home) vide letter dated 05.04.2014 informed the High Court that the matter had been taken up with the Finance Department which had observed that an additional increment granted to the employees of

the Subordinate Courts with effect from 01.01.2012 does not constitute an anomaly in the pay scales of employees of Himachal Pradesh High Court. However, thereafter a detailed information was sought by the Secretary (Home) on the following points:

> "(i) It may be informed if there is any anomaly in the pay scales of employees of H.P. High Court vis-a-vis the Subordinate Courts in Himachal Pradesh?
> (ii) Whether there is any anomaly in the pay scales of employees of H.P. High Court with the equivalent posts in the State Government?
> (iii) Details of categories in which anomaly exist vis-a-vis the similar category of employees in the State Government."

26. In response, the High Court invited the attention of the Chief Secretary to the Government of Himachal Pradesh vide D.O. Note dated 02.06.2014 regarding the long pending demand of grant of 20% and 10% hike and also informed that the information sought vide communication dated 05.04.2014 was uncalled for as the same had been supplied earlier. However, despite this, respondent No.1 issued a reminder in the matter for supply of the information, though the same was already available with it. However, the High Court again sent the required information vide letter dated 06/10.09.2014.

27. It is further averred that the matter regarding the grant of an additional pay was also discussed in the meeting of Hon'ble the Chief Minister and Hon'ble the Chief Justice held on 30.10.2014 and it was resolved that the matter would be examined by the State in consultation with the Registry of the High Court. Thereafter, the High Court sent a letter dated 18/20.12.2014 requesting the Chief Secretary to the Government of Himachal Pradesh to take steps to examine the matter in consultation with the Registry of this High Court. This was followed by another letter dated 15/17.10.2015 wherein it was mentioned that the Hon'ble Chief Justice had already made recommendations which in terms of the judgment of the

Hon'ble Supreme Court in ***P.D. Attri's case*** (supra) were not only required to be considered but due weightage also required to be given by the Government.

28. As per further averments, it has been stated that the High Court had been repeatedly taking up the matter with the State Government, but to no avail. It was ultimately during the meeting of the concerned Secretaries of the State Government and the Registrars of this High Court held on 12.05.2017, it was resolved that a meeting of the representatives of the High Court and State Government be held on 16.05.2017 to examine the issue regarding 20% hike in the pay scales of the employees of the High Court. Accordingly, the meeting was held on 16.05.2017, but the representation made by the High Court was turned down by the State Government.

29. Now as regards the State Government, it has been sued through its Secretary (Home) and Secretary (Finance) and a joint reply has been filed by them wherein a number of preliminary submissions have been made and the same and similar grounds, as were raised in the rejection order dated 19.12.2017 (Annexure P-18) have been raised.

30. On merits, it has been averred that 20% hike as allowed by the Punjab and Haryana High Court is not a part of any pay scale and, therefore, it needed a thorough examination at the State Government level which has been done and it is thereafter it was found that this extra financial benefit of 20% hike in the salaries has no basis for allowing it to the H.P. High Court employees. It is again reiterated that the Punjab and Haryana High Court is under the control of Government of India being part of UT Administration and not in the State of Punjab. In view of the existing rules, no case for parity for granting any financial benefit to the H.P. High Court employees with those of the employees of the Punjab and Haryana High Court does not arise as there has been always a parity amongst the employees of the H.P. High Court

with the employees of the H.P. Government/Secretariat and not with the employees of the Punjab and Haryana High Court.

31. According to these respondents, the higher post in the Subordinate Courts is the Superintendent Grade-I and Personal Assistant to whom higher pay scales and special increment have been granted on the recommendations of the Shetty Pay Commission and, therefore, there is no question of the so-called anomaly in the pay scales of incumbents of higher posts above Superintendent Grade-I/S.O./P.S. in the H.P. High Court. It is averred that the proposal as submitted by the High Court for grant of increase in salaries is not based on any anomaly arisen between the employees of the High Court and the Subordinate Courts and since the employees of the High Court draw salaries at par with the State Government, the question of parity also does not arise.

32. Lastly, it has been reiterated that the High Court employees having equivalence with the employees of the H.P. Secretariat are already getting higher pay scales than the Subordinate Judiciary employees due to allowing of Secretariat Pay/Special Pay. The amount of Secretariat Pay/Special Pay along with Dearness Allowance is also countable for pensionary benefits (due to which they are also getting higher amount of pension as compared to their counter-parts in Subordinate Judiciary) and is much higher than the amount of special increment allowed at the rate of 3% to the Subordinate Judiciary employees by the Shetty Pay Commission.

33. It is contended by Shri Sanjeev Bhushan, Senior Advocate, assisted by Shri Piar Chand and Shri Sohail Khan, Advocates, for the petitioner that the respondent-State has been completely oblivious to the provisions contained in Article 229 of the Constitution of India under which Hon'ble the Chief Justice of the High Court has the prerogative powers to fix scales of pay of the Officers and staff of the High Court and the Government has to only allocate financial sanction thereof.

34. On the other hand, the learned Advocate General would argue that no case is made out for interference as the employees of the High Court have been placed at par with the employees of the State Government and are getting the same pay as is given to the State Government employees. The learned Advocate General would further argue that in any case difference in the pay scales being recommended by Hon'ble the Chief Justice would create an anomaly.

35. On the other hand, Shri J.L. Bhardwaj, Senior Advocate, assisted by Ms. Dhanvanti, Advocate, for the High Court would argue that the State Government was un-necessarily raising frivolous objections by sending queries which were neither warranted under the law nor were required. These objections were clearly beyond their jurisdiction as is clear from a plain reading of Article 229 of the Constitution of India. He would further argue that the State Government was required to give due deference to the recommendations made by Hon'ble the Chief Justice and approved the recommendations unless such approval has been granted as a matter of course.

36. We have heard the learned counsel for the parties and have gone through the material placed on record.

37. At the outset, it would be necessary to refer to Article 229 of the Constitution of India which reads as under:

> "229. Officers and servants and the expenses of High Courts (1) Appointments of officers and servants of a High Court shall be made by the Chief Justice of the Court or such other Judge or officer of the Court as he may direct:
> Provided that the Governor of the State may by rule require that in such cases as may be specified in the rule no person not already attached to the Court shall be appointed to any office connected with the Court save after consultation with the State Public Service Commission
> (2) Subject to the provisions of any law made by the Legislature of the State, the conditions of service of officers and servants of a

High Court shall be such as may be prescribed by rules made by the Chief Justice of the Court or by some other Judge or officer of the Court authorised by the Chief Justice to make rules for the purpose:

Provided that the rules made under this clause shall, so far as they relate to salaries, allowances, leave or pensions, require the approval of the Governor of the State

(3) The administrative expenses of a High Court, including all salaries, allowances and pensions payable to or in respect of the officers and servants of the court, shall be charged upon the Consolidated Fund of the State, and any fees or other moneys taken by the Court shall form part of that Fund."

38. The provisions of Article 229(2) of the Constitution of India has been a subject-matter of interpretation by the Hon'ble Supreme Court in its various judgments.

39. In ***M. Gurumoorthy*** *vs.* ***Accountant General, Assam and Nagaland and others, (1971) 2 SCC 137***, the Hon'ble Supreme Court held that the Governors' approval must be sought because the finance has to be provided by the Government and to that extent the Government has to approve it. The Hon'ble Supreme Court further held that Hon'ble the Chief Justice has exclusive powers under Clause (1) read with Clause (2) of Article 229 of the Constitution not only in the matter of appointments but also with regard to prescribing the conditions of service of officers and servants of a High Court and further held as under:

> "The unequivocal purpose and obvious intention of the framers of the Constitution in enacting Article 229 is that in the matter of appointments of officers and servants of a High Court it is the Chief Justice or his nominee who is to be the supreme authority and there can be no interference by the executive except to the limited extent that is provided in the Article. This was essentially to secure and maintain the independence of the High Courts. The anxiety of the constitution makers to achieve that object is fully shown by putting the administrative expenses of a High Court including all salaries, allowances and pension payable to or in respect of officers and servants of the court at the same level as the salaries and allowances of the judges of the High Court nor can the amount of any expenditure so charged be varied even by the legislature. Clause (1) read with clause (2) of Article 229 confers exclusive power not only in the matter of appointments but also with regard to prescribing the conditions of service of officers and servants of a High Court by Rules on the Chief Justice of the Court. This is subject to any legislation by the State legislature but only in respect of conditions of service. In the matter of appointments even the legislature cannot abridge or modify the powers conferred on the Chief Justice under clause (1). The approval of the Governor, as noticed in the matter of Rules, is confined only to such rules as relate to salaries, allowances, leave or pension. All other rules in respect of conditions of service do not require his approval."

40. In ***State of Andhra Pradesh and Anr.*** *vs.* ***T. Gopalakrishnan Murthi and others (1976) 2 SCC 883***, the Hon'ble Supreme Court held that grant of approval by the Government under Article 229 of the Constitution is not a formality and further held as under:

> "One should expect in the fitness and in view of the spirit of Article 229 that ordinarily and generally the approval should be accorded. But surely it is wrong to say that the approval is a mere formality and in no case it is open to the Government to refuse to accord their approval."

41. The Hon'ble Supreme Court in ***Employees Welfare Association*** *vs.* ***Union of India and Another (1989) 4 SCC 187*** held that when a Rule is framed by the Chief Justice, it should ordinarily be approved since the rule has been framed by a very high dignitary and should be looked upon with respect unless there was a good reason for not approving the reasons and the Hon'ble Supreme Court further held as under:

> "So far as the Supreme Court and the High Courts are concerned, the Chief Justice of India and the Chief Justice of the concerned High Court, are empowered to frame rules subject to this that when the rules are framed by the Chief Justice of India or by the Chief Justice of the High Court relating to salaries, allowances, leave or pensions, the approval of the President of India or the Governor, as the case may, is required. It is apparent that the Chief Justice of India and the Chief Justice of the High Court have been placed at a higher level in regard to the framing of rules containing the conditions of service. It is true that the President of India cannot be compelled to grant approval to the rules framed by the Chief Justice of India relating to salaries, allowances, leave or pensions, but it is equally true that when such rules have been framed by a very high dignitary of the State, it should be looked upon with respect and unless there is very good reason not to grant approval, the approval should always be granted. If the President of India is of the view that the approval cannot be granted, he cannot straightway refuse to grant such approval, but before doing so, there must be exchange of thoughts between the President of India and the Chief Justice of India."

42. In the ***High Court of Judicature for Rajasthan*** *vs.* ***Ramesh Chandra Paliwal and Another (1998) 3 SSC 72***, the Hon'ble Supreme Court held as under:

> "Since, under the Constitution, Chief Justice has also the power to make rules regulating the conditions of service of the officers and servants of the High Court, it is obvious that he can also prescribe the scale of salary payable for a particular post. This would also include the power to revise the scale of pay. Since such a rule would involve finance, it has been provided in the Constitution that it will require the approval of the Governor which, in other words, means the State Government. This Court in State of Andhra Pradesh & Anr. vs. T. Gopalakrishnan Murthi & Ors. AIR 1976 SC 123 = 1976 (1) SCR 1008, had expressed the hope that "one should accept in the fitness of things and in view of the spirit of Article 229 that the approval, ordinarily and generally, would be accorded." This was reiterated by this Court in Supreme Court Employees Welfare Association vs. Union of India, AIR 1990 SC 334 = 1989 (3) SCR 488 = (1989) 4 SCC 187. We again reiterate the hope and feel that once the Chief Justice, in the interest of High Court administration, has taken a progressive step specially to ameliorate the service conditions of the officers and staff working under him, the State Government would hardly raise any objection to the sanction of creation of posts or fixation of salary payable for that post or the recommendation for revision of scale of pay if the scale of pay of the equivalent post in the Government has been revised."

43. The Hon'ble Supreme Court in ***State of Maharashtra*** *vs.* ***Association of Court Stenos, P.A. P.S. and another (2002) 2 SCC 141*** further held as under:

> "Under the Constitution of India, appointment of officers and servants of a High Court is required to be made by the Chief Justice of the High Court or such other Judge or officer of the Court as the Chief Justice directs. The Conditions of Service of such officers and servants of the High Court could be governed by a set of rules made by the Chief Justice of the High Court and even the salaries and allowances, leave or pension of such officers could be determined by a set of rules to be framed by the

> Chief Justice, but so far as it relates to salary and allowances etc., it requires approval of the Governor of the State. This is apparent from the Article 229 of the Constitution. On a plain reading of Article 229(2), it is apparent that the Chief Justice is the sole authority for fixing the salaries etc of the employees of the High Court, subject to the rules made under the said Article. Needless to mention, rules made by the Chief Justice will be subject to the provisions of any law made by the Legislature of the State. In view of proviso to sub-Article (2) of Article 229, any rule relating to the salaries, allowances, leave or pension of the employees of the High Court would require the approval of the Governor, before the same can be enforced. The approval of the Governor, therefore, is a condition precedent to the validity of the rules made by the Chief Justice and the so-called approval of the Governor is not on his discretion, but being advised by the Government. It would, therefore, be logical to hold that apart from any power conferred by the Rules framed under Article 229, the Government cannot fix the salary or authorise any particular pay scale of an employee of the High Court."

44. Similar view was expressed by the Hon'ble Supreme Court in the case of ***High Court Employees Welfare Association, Calcutta and others*** *vs.* ***State of W.B. and others (2004) 1 SCC 334***. Further, in ***S.B. Vohra's case*** (supra), the Hon'ble Supreme Court held as under:

> "Independence of the High Court is an essential feature for working of the democratic form of the Government in the country. An absolute control, therefore, have been vested in the High Court over its staff which would be free from interference from the Government subject of course to the limitations imposed by the said provision. There cannot be, however, any doubt whatsoever that while exercising such a power the Chief Justice of the High Court would only be bound by the limitation contained in Clause 2 of the Article 229 of the Constitution of India and the proviso appended thereto. Approval of the President/Governor of the State is, thus, required to be obtained in relation to the Rules containing provisions as regard, salary, allowances, leave or promotion. It is trite that such approval should ordinarily be granted as a matter of course."

45. In light of the aforesaid judgments of the Hon'ble Supreme Court, it is clear that the rules can be framed by Hon'ble the Chief Justice with regard to conditions of service of employees, officers of the High Court and the same are normally treated as final and conclusive except with regard to salary, allowances, leave or pension which require approval of his Excellency the Governor and the reasons for requiring such approval is the involvement of the financial liability of the State.

46. Article 229 (3) of the Constitution of India contemplates that the administrative expenses of a High Court including salaries, allowances and pensions payable to or in respect of the officers and servants of the Court, shall be charged upon a Consolidated Fund of the State and as per Article 203 of the Constitution, such administrative expenses shall not be submitted to the vote of the Legislative Assembly. Obviously, this provision was incorporated mainly to maintain the independence of the Judiciary. The Hon'ble Supreme Court while interpreting the proviso to Article 229(2) of the Constitution has held that the approval was required from his Excellency the Governor in matters relating to salaries, allowances, leave or pensions etc.

47. The Hon'ble Supreme Court further held that his Excellency the Governor cannot be compelled to grant approval, but, further held that whenever Hon'ble the Chief Justice, who is a very high dignitary of the State frames such rules, it should be looked upon with respect unless there are strong and cogent reasons for not approving. The Hon'ble Supreme Court further went on to say that if approval cannot be granted, his Excellency the Governor could not straightway refuse to grant such approval, but before doing so, there must be an exchange of thoughts between the State Government and Hon'ble the Chief Justice of the High Court.

48. As observed by the Hon'ble Supreme Court in ***S.B. Vohra's case*** (supra) that the independence of the High Court is an essential feature for the working of the democratic form of the Government in the Country and that

absolute control was vested in the High Court over its staff which is free from interference from the Government subject to the limitations imposed under the proviso.

49. The Hon'ble Supreme Court has categorically held that the State Government is only required to grant approval with regard to the salaries, allowances, leave or pension. The State Government, however, cannot refuse to accord approval solely on the ground that, if the pay scale is approved, it will cause financial implications. If this ground is allowed to be taken, it will give a handle to the State Government to deny approval on each and every occasion whenever the matter comes up before it with regard to the approval relating to the pay scales, salaries, allowances, leave, pension etc. and the High Court would be saddled with a begging bowl in its hands, which was never the intention of the framers of the Constitution.

50. It is apparent that in order to maintain the independence of the judiciary, the framers of the Constitution thought it wise and expedient to make a provision as contained in Clause (3) of Article 229 of the Constitution. It is not sufficient for the State Government to refuse to grant an approval on the strength of financial constraint. In ***S.B. Vohra's case*** (supra), the Hon'ble Supreme Court has held that financial implications cannot be made a ground to disapprove the rules. The Hon'ble Supreme Court held as under:

> "It has to be further borne in mind that it is not always helpful to raise the question of financial implications vis-a-vis the effect of grant of a particular scale of pay to the officers of the High Court on the ground that the same would have adverse effect on the other employees of the State. Scale of pay is fixed on certain norms; one of them being the quantum of work undertaken by the officers concerned as well as the extent of efficiency, integrity etc. required to be maintained by the holder of such office. This aspect of the matter has been highlighted by this Court in the case of the judicial officers in All India Judges' Association v. Union of India as well as the report of the Shetty Commission."

51. In ***High Court Employees Welfare Association, Calcutta and Ors.*** *vs.* ***State of W.B. and Ors., (2004) 1 SCC 334***,(supra), the Hon'ble Supreme Court held as under:

> "The Government will have to bear in mind the special nature of the work done in the High Court which the Chief Justice and his colleagues alone could really appreciate. If the Government does not desire to meet the needs of the High Court., the administration of the High Court will face severe crisis."

52. The Hon'ble Supreme Court, in the light of the aforesaid decisions also held that before refusing to grant approval, there should be an exchange of thoughts between the Chief Justice and the State Government. In the present case, the Court finds that a Committee was constituted comprising of officers of the High Court and that of the State Government. A perusal of the minutes of this High Power Committee indicates the narrow mindset of the State Government. The only hurdle before the State Government appears that the parity granted pursuant to the resolution of the Chief Justices and the Chief Ministers in the year 1962 would be disturbed, in the event a higher pay scale is granted and that, it would also create financial problems. It is also apparent that the State Government is insisting that the pay scale of the Class IV employees should be similar to the pay scale of the Class IV employees of the State Government.

53. The Hon'ble Supreme Court in ***Supreme Court Employees' Welfare Association*** *vs.* ***Union of India and Another 1993 Supp (3) SCC 727*** considered the question of grant of same pay scales and benefits to the employees working in the Supreme Court at par with the employees working in the Delhi High Court and held as under:

> "15. It appears before the Committee on behalf of Ministry of Finance an anomaly was pointed out which has been stated as follows:
> "(A) The Punjab High court pay scale of Rs. 400-600 extended to junior Clerks of the Delhi High court, w. e. f January 1, 1978 had

been fixed after absorbing the dearness allowance calculated at C. P. I. 320.

(B) Even so, the dearness allowance was given to the Junior clerks of Delhi High court at the central government rates which had been calculated over and above the basic pay fixed as on 1/01/1993 taking the then existing C. P. I. 200 as the basis,

(C) The Punjab High court pay scale of Rs. 300-430 accorded to class IV employees of the Delhi High court was again arrived at after absorbing the dearness allowance calculated at C. P. I. 320 as on 1/01/1978 and even so the dearness allowance was given to them at the central government rates which was calculated over and above the basic pay fixed on 1/01/1973 taking C. P. I. 200 as the basis.

(D) As a result their pay scales were higher than what was legitimately due to the corresponding posts in the government of India and that had resulted in double payment of dearness allowance for 120 points of C. P. I, and this had resulted in an anomaly, namely, the Class IV employees of the Delhi High court and of the Supreme court to whom similar benefits were extended pursuant to the interim order of this court were drawing a higher salary which works out to rs 159 more as on 1/01/1978 and Rs. 308. 00 more as on 1/01/1986, compared with the salary accorded to Class IV employees in the service of the central government and their salary is even more than the pay of l. D. Cs. in central government service.

(E) The Junior Clerks of the Delhi High court and of the Supreme court to whom the pay scales of the Delhi High court were extended pursuant to the interim order of this court have been drawing a higher salary which works out to Rs. 159. 00 more than the corresponding central government employees as on 1/01/1978 and by Rs. 356. 00 as on 1/01/1986.

(F) That the confirming of similar pay scales to Junior Clerks and class IV employees on the establishment of this court by the rules to be made by the chief justice of India under Article 146 results in great disparity between the pay scales of the corresponding posts under the central government and this will constitute a ground for the central government employees to demand parity in the pay scales, i. e. pay scales accorded to the corresponding employees of the Delhi High ourt and the Supreme court and this will result in enormous financial liability on the central government."

16. We first remove the anomaly in the recommendation made by the committee in respect of the post of Private Secretaries to the

Registrars of the Supreme court and which is the subject-matter of Interlocutory application No. 5 of 1992. The Committee in its recommendation has allowed the pay scale of Rs. 3000-4500 in respect of the posts of Section officer, Librarian, court Master and Sr. Assistant Librarian but has recommended the pay scale to Private secretary to the Registrar at Rs. 2300-3700. A perusal of the pay scales as recommended by the Fourth pay Commission itself at Item No.11 shows that the Section Officer, librarian, Private secretary to the chief justice, Private secretary to the Judges, Private secretary to Registrar, court Master, and Sr. Assistant librarian have been given the pay scale of Rs. 2300-3700. This clearly shows that the post of Private secretary to Registrar was kept equivalent to the other posts of Section Officer, court Master etc., as already mentioned above and fixed in the same pay scale of Rs. 2300-3700. The committee of Judges have recommended the increased pay scale of Rs 3000-4500 in case of Section Officer, Librarian, court Master and Sr. Assistant Librarian who were fixed in the pay scale of Rs. 2300-3700 by the Fourth Pay Commission. The post of Private secretary to the Registrar being also in the pay scale of Rs. 2300-3700 should be entitled to the pay scale of Rs. 3000-4500. It may also be noted that even on 1/01/1986 from which date the recommendations of the Fourth Pay Commission has been made to be effective. Private secretary to Registrar was in the same pay scale of Rs. 775-1200 as given to Section Officer, Librarian, Private secretary to the chief justice, Private secretary to the Judges, court master and Sr. Assistant Librarian. Thus in the circumstances mentioned above when all the other officers who were in the pay scale of Rs. 775- 1200 as on 1/01/1986 and fixed in the pay scale of Rs. 2300-3700 even by the Fourth Pay Commission have been recommended the pay scale of Rs. 3000-4500 by the Committee of Judges, the Private secretary to the Registrar has also become entitled to the same pay scale of Rs.3000-4500. The Interlocutory Application No. 5 of 1992 in Writ petition (Civil) No. 801 of 1986 stands disposed of in the manner indicated above.

17. Taking the recommendations of the Committee of Judges as a base, we would now dispose of the other interim applications mentioned above. In Interlocutory Application No. 4 of 1992 filed by the Junior 3 stenographers it has been contended that the Junior Clerks of Delhi High court have been fixed in the pay scale of Rs. 1350-2200 from January I, 1986. By an order of this court dated 18/04/1991 the Junior Clerks of this court have also

been granted a similar pay scale of Rs. 1350-2200, w. e. f. 1/01/1986. It has been submitted that the post of Junior stenographer is a promotional post from Junior Clerks. In the Third Pay commission the Junior Stenographers were fixed in the pay scale of Rs 330-560 which was also the pay scale of Senior Clerks. So far as the junior Clerks are concerned they were fixed in the pay scale of Rs. 260- 400 by the Third Pay Commission. The Committee of Judges have also recommended the pay scale of Rs. 1400-2300 to the Junior Stenographers treating them at par with Senior Clerks of this court who are equivalent to upper Division Clerks of the Delhi High court. It has been contended on behalf of the Junior Stenographers that they are also entitled to the pay scale of Rs. 1400-2300 as already recommended by the Committee. We find force in the above contention. The Senior Clerks of this court have been treated equivalent to U. D. Cs. of Delhi High court who have been allowed the pay scale of Rs.1400-2300 and the Junior Stenographers being treated at par with the Senior Clerks of this court have been rightly placed by the Committee in the pay scale of Rs. 1400-2300. It may also be noted that the Junior Clerks have already been allowed the pay scale of Rs 1350-2200 and as such the Junior Stenographers of this court, who are on a higher post than the Junior Clerks, are entitled to the pay scale of Rs. 1400-2300 as recommended by the Committee of Judges. The interlocutory Application No. 4 of 1992 in Writ Petition (Civil) No. 801 of 1986 filed by the Junior Stenographers stands disposed of in the manner indicated above.

18. As regards Interlocutory Application No. 3 of 1992 in Writ petition (Civil) No. 801 of 1986 filed by the Supreme court Employees welfare Association it has been prayed that in view of the order passed by the High court of Delhi directing payment of the pay scale of Rs. 3000- 4500, w. e. f. 1/01/1986 to the court Masters, Superintendents and other categories of employees of the said court, the staff holding corresponding posts in this court should also be allowed the aforesaid pay scales by way of interim measure till the rules are framed under Article 146 of the Constitution.

19. It may be worthwhile to note that the Committee of Judges have already recommended the pay scale of rs 3000-4500 in the case of section Officer, Librarian, court Master, Sr. Assistant Librarian to bring them at par with the incumbents holding corresponding posts of superintendent, Librarian and Court Master in the Delhi High court. The committee of Judges have also recommended new pay scale of Rs. 3300-4800 in case of the

posts of Assistant Registrar, Principal Private secretary to the chief justice of India, Assistant Editor, Supreme court reports, Chief Librarian, Assistant Registrar-cum-Private secretary to the chief Justice of India, Assistant Registrar-cum-Private secretary to the judges and Assistant Registrar-cum-Private secretary to the Registrar- general of this court. The said new pay scale has been recommended in view of the fact that the lower post of Section Officer, Librarian, court Master and Sr. Assistant Librarian have been fixed in the pay scale of Rs.3000-4500. It is needless to mention that in the aforesaid category of posts for which the pay scale of Rs. 3000-4500 has been recommended, one more category of Private secretary to Registrar shall be added which have already been dealt above while disposing of Interlocutory application No. 5 of 1992. Thus we direct that the recommendation made by the Committee of Judges for granting the pay scale of Rs. 3000-4500 and a new pay scale of Rs.3300-4800 for the posts mentioned therein may be given by way of interim measure from the month of March 1993 subject to the rules made by the chief justice of India under Article 146 of the Constitution.

20. It may be noted that the Delhi High court by order dated 14/11/1991 in Writ Petition No. 2756 of 1991 had allowed the pay scale of Rs. 3000-4500 from 1/01/1986 to the court Masters, and Superintendents of Delhi High court and the Special Leave Petitions no. 2594 of 1992 filed against the judgment of the High court having been dismissed on 25/03/1992 by this court and the same having become final, the employees in the Supreme court are justified in claiming the pay scale of Rs. 3000-4500 from 1/01/1986. Same is the position in the case of Junior Stenographer. The Chief Justice may consider and if deem appropriate direct that the payment of arrears can be made by deposit of the whole arrears or part in General Provident Fund or by way of suitable instalments as the case may be by taking note of the financial involvement in consultation with the government. We are making it clear that we are not giving any direction in this regard and the chief Justice while framing the rules under Article 146 ofthe Constitution shall be free to consider and pass appropriate orders as regards the arrears. Interlocutory Application Nos. 2 and 3 in Writ Petition (Civil) No. 801 of 1986 stand disposed of in the manner indicated above.

21. Interlocutory Application No. 2 of 1992 in Writ Petition (Civil) no. 1201 of 1986 has been filed by the Supreme court Class IV employees Welfare Association claiming the pay scale of Rs. 975-

1660 as allowed to such employees by the Delhi High court vide its judgment dated 4/11/1991 in Civil Writ No. 3464 of 1990. The Committee of Judges have recommended the aforesaid pay scale to Peon, Farash and safaiwala employed in the Supreme court fixing them at par with corresponding post of Peon, Farash and Sweeper in the Delhi High court. The Committee of Judges have also recommended the new and higher pay scale of Rs. 1000-1750 to Daftry and Jamadar employed in the Supreme a court in view of the fact that these posts are promotional posts and are entitled to higher pay scale as the lower pay scale of Rs. 975-1660 has been recommended to Peon, Farash and Safaiwala. We direct that the pay scales as recommended by the Committee of Judges may be given from the month of March 1993 by way of interim measure. It may be noted that the Union of India has already filed special leave petition under Article 136 of the Constitution before this court against the decision of the Delhi high court dated 4/11/1991 passed in Civil Writ Petition No. 3464 of 1990. The said special leave petition is still pending for consideration. We, therefore, direct that the grant of the above-mentioned pay scales of Rs. 975-1660 to the Peon, Frash and Safaiwala and the pay scale of Rs. 1000-1750 to Daftry and Jamadar from March 1993 shall be subject to the decision of the special leave petition filed by the Union of India against the judgment of Delhi High court dated 4/11/1991. This disposes of the Interlocutory Application No. 2 of 1992 in Writ petition (Civil) No. 1201 of 1986. As regards arrears from January I, 1986 the chief justice shall pass appropriate orders.

22. It has been mentioned in the report submitted by the Committee of judges that in view of the constraints of the interim orders passed by this court from time to time the Committee has recommended that the Chief justice of India can make rules under Article 146 of the Constitution of India if the limitations of the interim orders are lifted by the court on the judicial side. We consider the oppositeness of such recommendation made by the Committee. We therefore, make it clear that the Chief Justice of India is free to make rules in exercise of powers under Article 146 of the constitution of India without any constraint and irrespective of any interim orders passed on 25/07/1986, 14/08/1986, 14/11/1986 and 5/01/1987.

23. With the above observations we dispose of all the interlocutory applications as mentioned above."

54. It was by virtue of judicial pronouncement that the Hon'ble Supreme Court in the aforesaid judgment granted benefit to the employees working in the Supreme Court at par with the employees, who were working in the High Court at Delhi. In the matter of payment of salary, the Hon'ble Supreme Court further observed that there did not appear to be any justification that the holders of the corresponding posts in the High Court of Delhi were getting scales of pay pursuant to the orders aforesaid, however, those scales could not be denied to the corresponding posts of the Hon'ble Supreme Court till the rules came into force.

55. At this stage, it may be observed that it is not only the employees of Delhi, Punjab and Haryana High Courts alone, but even the employees working in Gujarat, Karnataka and Madras High Courts where the employees are getting a hike pursuant to the judicial pronouncements.

56. As regards the question of parity of pay of the staff of the High Court being at par with the District Judiciary pursuant to the recommendations of the Shetty Pay Commission, the question is no longer *res integra* and has been decided in favour of the staff of the High Court in view of the judgments delivered by the various High Courts. (Refer: ***Adeline Rodrigues and others*** *vs.* ***State of Maharashtra and others (2013) 5 AIR Bombay 1207 : (2013) 6 Maharashtra Law Journal 14, State of West Bengal and others*** *vs.* ***The High Court Employees' Welfare Association and others*** **(2016) 3 Calcutta Law Journal 448,** ***High Court Employees Association and others*** *vs.* ***State of Tripura and others*** in ***Writ Petition (Civil) Case No.71 of 201***5, decided on 11.08.2016, ***Kishan Pilley and others*** *vs.* ***State of Madhya Pradesh and others*** in ***Writ Petition No. 7058 of 2016***, decided on 28.04.2017, ***Kerala High Court Typist, Copyist Association- C. Krishna Kumar*** *vs.* ***High Court of Kerala, Writ Petition (Civil) 30000 of 2016,*** decided on 09.01.2018).

57. But, this is only a secondary issue as the main issue is with regard to recommendations made by Hon'ble the Chief Justice of this High Court calling upon the respondents to issue necessary notification bringing about parity in the pay scales of the employees of this High Court with their counter parts in the Punjab and Haryana High Court on the basis of the judgment rendered in ***Hari Mohan Dixit's case*** (supra).

58. Surprisingly, the State Government has rejected the ground of parity of the employees working in the Himachal Pradesh High Court with that of the Punjab and Haryana High Court by claiming that there is no such parity that too without assigning any reason whatsoever. The State has not given any reasons why the High Court employees of the State cannot be granted upgraded pay scales at par with the High Court of Punjab and Haryana. They have not even made any comparison between the nature of duties discharged by the employees of the High Court of Himachal Pradesh with other High Court employees to get scales of pay at par with the employees of the Punjab and Haryana High Court. The respondent-State was duty bound to reach at a decision by taking into account the relevant considerations and should not have taken into account the wholly irrelevant and extraneous considerations.

59. The State has clearly misdirected themselves on a point of law, more particularly, being completely oblivious to the provisions contained in Article 229 of the Constitution of India.

60. It is not the answer that the official respondents acted bonafide or that they bestowed painstaking consideration. The reasons as given by the official respondents are not good reasons as the relevant factors have been kept out of consideration and irrelevant considerations were made the basis of the decision (Annexure P-19).

61. As regards the applicability of the judgment of the Hon'ble Supreme Court in ***P.D. Attri's case*** (supra), admittedly, the claim of the

employees therein was not based on any constitutional or any other legal provisions whereby they could claim parity with the posts similarly designated in Punjab for grant of pay scales from the same date. It was in that background that the Hon'ble Supreme Court had observed as under:

> "5. The case of the respondents is not based on any Constitutional or any other legal provisions when they claim parity with the posts similarly designated in the Punjab & Haryana High Court and their pay-scales from the same date. They do not allege any violation of any Constitutional provision or any other provision of law. They say it is so because of "accepted policy and common practice" which according to them are undisputed. We do not think we can import such vague principles while interpreting the provisions of law. India is a union of States. Each State has its own individualistic way of governance under the Constitution. One State is not bound to follow the rules and regulations applicable to the employees of the other State or if it had adopted the same rules and regulations, it is not bound to follow every change brought in the rules and regulations in the other State. The question then arises before us is if the State of Himachal Pradesh has to follow every change brought in the States of Punjab & Haryana in regard to the rules and regulations applicable to the employees in the States of Punjab & Haryana. The answer has to be in negative. No argument is needed for that as anyone having basic knowledge of the Constitution would not argue otherwise. True, the State as per "policy and practice" had been adopting the same pay-scales for the employees of the High Court as sanctioned from time to time for the employees of the Punjab & Haryana High Court and it may even now follow to grant pay-scales but is certainly not bound to follow. No law commands it to do so.
>
> 6. The State of Punjab was reorganised into States of Punjab, Haryana and Himachal Pradesh, to begin with, was a Union Territory and was given the status of full statehood in 1970. Since employees of the composite States of Punjab were taken in various Departments of the State of Himachal Pradesh in order to safeguard the seniority, pay-scales etc., the State of Himachal Pradesh followed the Punjab pattern of pay-scales. After attaining the status of full statehood, High Court of Himachal Pradesh formulated its own rules and regulations for its employees. It adopted the pattern of Punjab & Haryana High Court rules of

> their employees. When Punjab & Haryana High Court gave effect to certain portion of its Rules from 25.9.1985 by notification dated 23.1.1986 as a result of which redesignation of the posts of Senior Translators and Junior Translators were equated to the posts in Punjab Civil Secretariat, the Himachal Pradesh High Court similar effect was given to in its rules for its employees. When the Punjab & Haryana High Court gave effect to those rules from 23.1.1975, the State Government did not agree to the recommendations of the Chief Justice of the Himachal Pradesh High Court to follow the same suit. It is true that till now, Himachal Pradesh High Court has been following the rules applicable to the employees of the Punjab & Haryana High Court and it may go on following those rules as may be amended by the Punjab & Haryana High Court from time to time, but certainly it is not bound to so follow. No law commands the State Government to follow the rules applicable to the employees of the Punjab & Haryana High Court to the employees of the Himachal Pradesh High Court. That being the position, it is not necessary for us to examine different qualifications for appointment to the posts of Senior Translators and Junior Translators that may exist between Punjab & Haryana High Court and the Himachal Pradesh High Court and also as to the mode of their recruitment/placement in the service. Moreover, any change in the pay- scales following Punjab & Haryana High Court can set in motion chain reaction for other employees which may give rise to multiplicity of litigation among various categories of employees. Rules of each High Court have to be examined independently. There cannot be any such law that Himachal Pradesh High Court has to suo motu follow the same rules as applicable to the employees working in the Punjab & Haryana High Court."

62. Thus, what has been stated by the Hon'ble Supreme Court is that one State is not bound to follow the rules and regulations applicable to the employees of another State since the budget sanction or allocation to a particular head differ from State to State. Moreover, the Central Government has more resources of its own. Hence, the granting of benefits by the Central Government cannot be compared with that of the States.

63. The ratio of the judgment in ***P.D. Attri's case*** (supra) is not at all applicable to the facts of the instant case, more particularly, when the

recommendations in the instant case have been made in exercise of the powers vested with Hon'ble the Chief Justice under Article 229 of the Constitution of India and as mentioned above the recommendations so made are based upon a judgment in ***Hari Mohan Dixit's case*** (supra). Here, the petitioner is not simply claiming parity with its counter parts in the Punjab and Haryana High Court, but is armed with the judgment rendered by the Punjab and Haryana High Court in ***Hari Mohan Dixit's case*** (supra) and hosts of other judgments already referred to hereinabove.

64. Thus, from the above stated factual and legal position, it is quite evident that the decision making process while passing order (Annexure P-19) suffers from non-consideration of material and official respondents have otherwise considered the material which was wholly irrelevant. The said decision, therefore, cannot withstand judicial scrutiny.

65. In the instant case, report of the Hon'ble Committee was placed before Hon'ble the Chief Justice for consideration and orders and Hon'ble the Chief Justice recommended the same in its powers conferred upon him under Article 229 of the Constitution of India. Since, no rules were framed under Article 229(2) of the Constitution of India relating to the conditions of service of employees of the Himachal Pradesh High Court, therefore, in absence of a statutory rule, the proposal itself has to be treated as a rule within the meaning of Article 229(2) of the Constitution of India.

66. In coming to such conclusion, we are duly supported and fortified by the Full Bench decision of the Bombay High Court in the case of ***Chandrakant Sakharam Karkhanis and others*** *vs.* ***State of Maharashtra and others, AIR 1977 Bombay 193*** wherein it has been held as follows:

> "31-32.....Circulars, Orders or Resolutions or parts thereof laying down the rules or principles of general application, which have to be observed in the recruitment or fixation of seniority of Government servants generally or a particular class of them, and

> which have been duly authenticated by a signature under the endorsement "By order and in the name of the Governor of Maharashtra" and intended to be applicable straightway are or amount to the rules framed in exercise of the powers conferred under the proviso to Article 309 of the Constitution of India, although the said Circulars, Orders or Resolutions do not expressly state that the same are made or issued in exercise of the powers conferred under the proviso to Article 309 of the Constitution of India and are not published in the Government Gazette."

67. In view of the aforesaid discussion, even a letter, memorandum or circular so issued on behalf of Hon'ble the Chief Justice of the High Court to the State Government is essentially required to be treated as the one issued in exercise of the powers under Article 229 of the Constitution of India.

68. Here, it would be apposite to take note of the Division Bench judgment of the Gujarat High Court in the case of ***High Court of Gujarat*** *vs.* ***K.K. Parmer 1992 (2) GLH (DB) 379*** wherein it was held that Article 229 (2) of the Constitution of India nowhere prescribes or indicates any particular form in which the rule should be framed nor does it prescribe any formality required to be gone through. Even though the decision is not expressed in the form or in words in which the rule is framed or an order is issued, the same amounts to a rule framed in exercise of the powers conferred under Article 229(2) of the Constitution of India.

69. At this stage, it would also be necessary to take note of a decision of the Division Bench of the Karnataka High Court in ***Writ Appeal No. 4411 of 2011*** case titled ***Nijaguni*** *vs.* ***The High Court of Karnataka and another***, decided on 12.10.2011, wherein it was held that the recommendatory letter with model pay scale attached thereto by way of an annexure in itself is to be taken as a rule and the Government is required to act on the same as if it was a rule framed by Hon'ble the Chief Justice in

exercise of the powers under Article 229(2) of the Constitution of India.

70. This decision of the Karnataka High Court was also affirmed by the Hon'ble Supreme Court in ***Civil Appeal No. 5914-5915 of 2012*** case titled ***State of Karnataka*** *vs.* ***Nijaguni and others*** vide order dated 18.11.2015 which reads as thus:

> "1. These appeals are directed against the judgment(s) and order(s) passed by the High Court of Karnataka at Bangalore in Writ Appeal No. 4411 of 2011, dated 12.10.2011 and Review Petition No. 63 of 2012, dated 30.03.2012.
> 2. We have heard learned counsel for the parties to the *lis.*
> 3. After going through the judgment(s) and order (s) passed by the High Court and the material available on record we see no infirmity in the impugned judgment(s) and order(s) passed by the High Court. Accordingly, the Civil Appeals are dismissed.
> 4. As a sequel to the above, the interim stay granted by this Court on 13.08.2012 stands vacated.
> 5. Application(s) for impleadment are dismissed."

71. The Division Bench of the Karnataka High Court after elaborate consideration of the rival submissions held that in spite of the recommendations made by Hon'ble the Chief Justice of the High Court of Karnataka way back on 06.10.2004, the Government had not taken any steps to implement the recommendations. It was also held that the recommendations of Hon'ble the Chief Justice of the High Court should ordinarily be approved by the State and refusal thereof must be for strong and adequate reasons and one cannot treat the same lightly.

72. After concluding so, the Division Bench of the High Court allowed the writ appeal and set aside the order passed by the learned single Judge on 12.10.2011. It needs to be noticed that despite the orders of the Hon'ble Supreme Court dismissing the appeal filed by the State of Karnataka, Contempt Petitions in C.C.C. (Civil) Nos. 1241 and 1244 of 2016 were filed before the Division Bench of the Karnataka High Court.

73. The Division Bench of the Karnataka High Court vide its order dated 14.07.2017 held that the State Government had not complied with the order dated 12.10.2011 and, therefore, refused to drop the contempt proceedings. Even this order dated 14.07.2017 was again unsuccessfully assailed by the Government of Karnataka before the Hon'ble Supreme Court.

74. The Hon'ble Supreme Court vide its order dated 18.09.2017 not only dismissed the SLP, but also directed the State Government to accordingly implement the order of the Division Bench of the Karnataka High Court within a period of four months. It was pursuant to these orders that the State Government thereafter issued a government order on 11.01.2018 conferring Central Government Pay Scales to the employees of the State of Karnataka. Similar benefits have already been extended to the employees of the Punjab and Haryana High Court pursuant to the directions passed by the learned single Judge in the case of ***Hari Mohan Dixit's case*** (supra).

75. Moreover, there is nothing on record to suggest that the recommendations made by Hon'ble the Chief Justice were in any way arbitrary or that the relevant factors have not been considered.

76. The Hon'ble Chief Justice asked the High Court to recommend the grant of benefits to the employees of the High Court and asked the concerned Registry to take up the matter with the State Government. Therefore, in such circumstances, the recommendations made by Hon'ble the Chief Justice of the High Court cannot be said to be without application of mind.

77. The respondents appear to have been totally oblivious of the fact that it was the Hon'ble Supreme Court that in the case of ***State of Maharashtra*** *vs.* ***Association of Stenographers AIR 2002 SC 555*** had directed the Registrar General of the Supreme Court to issue a circular that the High Courts can have their own pay scales to its employees after considering the special nature of their duties and functions.

78. The State Government further appears to have been totally oblivious to the fact that it is Hon'ble the Chief Justice and the Hon'ble companion Judges of the High Court, who are better equipped to assess the requirements of the High Court staff and servants. The decision so taken by Hon'ble the Chief Justice cannot be lightly discarded or sidelined. Moreover, the High Court staff and servants render the services which are quite different from the services rendered by the staff of the Secretariat. Further, neither the High Court staff/servants nor Secretariat staff can, as a matter of right, demand increase in salary. This power to pay pension, allowance and leave is vested with Hon'ble the Chief Justice of the High Court for the staff and servants.

79. As far as the nature of duties and responsibilities shouldered by the staff of the State Secretariat and the High Court are concerned, there is a vast difference. Unlike, the State Secretariat, the staff of the High Court have to strive hard to accomplish the given task as is other contended by the learned Senior Counsel for the petitioner. This submission needs to be considered and analyzed to arrive at an appropriate decision. The duty hours of the staff of the High Court normally and invariably get stretched and extended to odd hours and they are more often than not required to work till late in the night.

80. It is needless to mention that most of the work assigned to the staff of the High Court is required to be accomplished and/or completed in a time bound manner and cannot be delayed. Such nature of work is required to be discharged by the employees of the High Court from the date of the commencement of their service till their retirement. Therefore, when a comparison is made between the nature of the work discharged by the staff of the Judiciary on the whole with that of the staff of the State Secretariat, there is vast difference. Therefore, fixation of same scale of pay to the staff of the State Secretariat and the staff of the High Court is not warranted taking

into account the peculiar nature of work expected out of the staff of the Judiciary.

81. Noticeably, a similar contention was raised before the Karnataka High Court wherein it was contended that the employees of the various High Courts draw wages and pay scales equivalent to the Central Government employees or even more. The comparative statement produced by the employees was also reproduced in the judgment of the Division Bench of the Karanataka High Court. On comparing the scale of pay as also the nature of work and responsibilities and the working hours of the employees of the High Court of Karnataka, the Division Bench held that the work that is required to be turned out by the employees of the High Court, more particularly, the Senior Judgment Writers, Judgment Writers, Stenographers etc. is not only time bound but the employees of the High Court are made to work beyond normal office hours.

82. All these aspects of the matter have been eloquently set out and dealt with by the Division Bench of the Madras High Court in ***R.N. Arul Jothi and others*** *vs.* ***Principal Secretary to Government Home (Cts. V) Department Secretariat, Chennai and another 2020 Labour and Industrial Cases 3324***, when the Madras High Court proceeded to observe as under:-

> "76. In the order of refusal dated 29.01.2019, which is challenged in WP No. 21586 of 2019, the Government has mainly reiterated that the revision of pay scales of the staff of the Madras High Court is always determined in the Pay Commission/Pay Panels. It was also reasoned that the revision of pay of the staff of the Madras High Court was recently given effect to on the basis of the recommendations made by the Official Committee constituted for the purpose of giving effect to the Seventh Pay Commission. While so, any change in the revision of pay of the members of the staff of the High Court, will have a spiraling and cascading effect on the pay scale of the staff of the State Secretariat as well as other Departments of the Government. It was also reasoned that the pay structure of the staff members of the Madras High Court

cannot be compared with the Delhi High Court, where the pay structure is different and the expenses of which are borne by the Central Government, which has its own resources at its command. Thus, it is evident that the order of rejection mainly proceeds on the footing that the revision of scale of pay, if effected to the staff of the Madras High Court, will have a spiralling and cascading effect on the pay scales of the staff of the Secretariat and other wings of the Department and it will lead to multiplicity of claims by others. This reason in the impugned order cannot be accepted for more than one reason. First of all, the comparison between the scale of pay between the staff of the High Court and the State Secretariat, cannot be made. The nature of work discharged by the staff of the High Court is not akin to or comparable with the nature of work discharged by the members of the State Secretariat. This has been reiterated time and again by this Court as well as the Honourable Supreme court. In one of the decisions rendered by the Honourable Supreme Court in the case of SAIL vs. Dibyendu Bhattacharya, 2011 11 SCC 122, it was held by the Honourable Supreme Court that granting parity in pay scales depends upon the comparative evaluation of job and equation of posts. It was also held in that judgment that the functions may be the same, but the skills and responsibilities may be really and substantially different. **Since the Chief Justice of the High Court is better equipped to assess the requirements of High Court staff and servants, the decision taken by the Chief Justice of the High Court cannot be ignored by citing the spiralling and cascading effect. The High Court staff and servants render service which are quite different from the service rendered by the staff of the Secretariat. Further, neither the High Court staff/ servants nor Secretariat staff can, as a matter of right, demand increase in salary. Constitutionally, the power to fix pay, allowance, pension, leave etc., is vested with the Chief Justice of the High Court for the staff and servants. The framers of the Constitution, have in their wisdom, bestowed the powers to fix salary and allowance of such staff and servants by Rules with the Chief Justice of the High Court.**

77. As far as the nature of duties and responsibilities shouldered by the staff of the State Secretariat and the High Courts, there is a vast difference. It is the contention of the learned Senior Counsel appearing for the petitioners that unlike the State Secretariat, the staff of the High Courts

have to strive hard to accomplish the given task. This submission of the learned Senior Counsel appearing for the petitioners needs to be considered and analysed to arrive at appropriate decision. The duty hours of the staff of the High Court normally get stretched and extended to odd hours and they are required to work quite often till late in the night. It is needless to mention that most of the work assigned to the staff of the Madras High Court, are to be accomplished and/or completed in a time-bound manner and it cannot be delayed. Such nature of work is required to be discharged by the employees in the High Court from the date of commencement of their service till their retirement. Therefore, when a comparison is made between the nature of work discharged by the staff of the Judiciary on the whole, with the staff of the State Secretariat, there is vast difference. Therefore, fixation of same scale of pay to the staff of the State Secretariat and the staff of the High Court, is not warranted taking into account the peculiar nature of work expected out of the staff of the Judiciary. It is in the light of the above traits and characteristic, the Staff Grievance Committee made a comparison of the pay scale prevailing among the staff of the various High Courts and not among the staff of the various State Secretariat. The Staff Grievance Committee has also concluded that the pay pattern prevailing in the Delhi High Court is suitable for being adopted to the staff of the Madras High Court and accordingly, a report was filed before the Honourable Chief Justice of Madras High Court."

83. Earlier to that the Karnataka High Court while dealing with the similar issue drew up a comparative statement produced by the employees which was also reproduced in the judgment. On comparing the scales of pay as also the nature of work and responsibilities and working hours of the employees of the High Court of Karnataka, the Division Bench held that the work that is required to be turned out by the employees of the High Court, more particularly, the Senior Judgment writers, Judgment Writers, Stenographers etc., is not only time-bound and even the employees of the High Court are made to work beyond the normal office hours. These

observations have been applied by the Madras High Court and the same squarely apply to the facts and circumstances of the instant case also.

84. We otherwise see no reason why the State Government should not follow the pattern of pay of the Delhi High Court. After-all, prior to establishment of the present High Court on 25th January, 1971, on attainment of statehood, it was being administered by the Delhi High Court, Himachal Bench, at Shimla and earlier to that the Punjab High Court. This is evident from the history of the High Court of Himachal Pradesh as given in the official website, the relevant portion whereof reads as under:

> "The Princely States in Pre Independence India had different systems of Administration and set of laws. In most of the Princely States, the administration was run on the whims of the Rulers or the Wazirs and their saying were considered to be the law. Himachal Pradesh was formed as a result of integration of 26 Shimla and 4 Punjab hill States into a Centrally Administered Area on April 15, 1948. On 1st April, 1954, the parts of Bilaspur were also merged with Himachal Pradesh having its Headquarters at Shimla, which was headed by the Chief Commissioner. The first Chief Commissioner was Mr. N.C. Mehta and he was assisted by his deputy Mr. E. Penderal Moon, ICS. On September 30, 1948, an advisory council was formed for the advice of the Chief Commissioner for administrative functions. The Central Government promulgated the Himachal Pradesh (Courts) Order, 1948 on 15th August, 1948. As per Paragragh 3 of this Order, the Court of Judicial Commissioner was established for Himachal Pradesh and the Court was housed at "Harvingtan" (Kelston area, Shimla). It was vested with the powers of a High Court under the Judicial Commissioner's Court Act, 1950. Besides the Court of Judicial Commissioner, two Courts of District and Sessions Judges and 27 subordinate Courts were also set up. The Court of Judicial commissioner started functioning on August 15, 1948 and in the same year, two Courts of District and Sessions Judges were also established. The Punjab High Court rules and orders with suitable amendments were made applicable to the courts in Himachal Pradesh. On April 29, 1967, two more District and Sessions Judges Courts for Shimla and Kangra were established. However in the year 1966, the Delhi High Court Act was enacted by the

> Government of India w.e.f. May 1, 1967. The Central Government of India extended the operation of the said Act to the Union Territory of Himachal Pradesh, replacing the Court of Judicial Commissioner by the Himachal Bench of Delhi High Court, at Shimla. It started functioning in old High Court building known as "Ravenswood". At that time, Hon'ble Mr. Justice K. S. Hegde was the Chief Justice of the Delhi High Court. Hon'ble Mr. Justice S. K. Kapoor and Hon'ble Mr. Justice Hardayal Hardy constituted the first circuit bench of the Delhi High Court which held Court at Ravenswood (Shimla). Himachal Pradesh attained Statehood in the year, 1971, and established its own High Court with Headquarters at "Ravenswood", Shimla, having one Hon'ble Chief Justice and two Hon'ble Judges. The first Chief Justice of the High Court of Himachal Pradesh was Hon'ble Mr. Justice M. H. Beg and the other two Hon'ble Judges were Hon'ble Mr. Justice D. B. Lal and Hon'ble Mr. Justice C. R. Thakur."

85. Thus, the comparison of the pay pattern is among the various High Courts in this Country. The nature of duties discharged by the employees of High Court is different and it cannot be compared with the duties and responsibilities shouldered by the employees in the State Secretariat or other Departments of the Government.

86. Therefore, in such circumstances, the endeavour of the State in trying to draw a parity in the nature and duties of the employees of the High Court vis-a-vis the employees of the Secretariat and other Departments, while rejecting the case of the petitioner, cannot be accepted and is rejected being devoid of any merit.

87. The recommendations of Hon'ble the Chief Justice are required to be placed for approval of His Excellency the Governor of Himachal Pradesh and the same should not have been rejected unless there are strong and cogent reasons for refusal of the same.

88. A decision on the scales of pay to be granted to the employees of the High Court ignoring the recommendations of Hon'ble the Chief Justice is completely impermissible going by the decision of the Hon'ble Supreme

Court in ***S.B.Vohra's case*** (supra). We have no hesitation in holding that the consideration of the claim of the employees of the High Court as if they were the employees of the component departments of the Government is completely unsustainable and bad in law.

89. We are of the considered view that the Chief Secretary to the Government of Himachal Pradesh ought to have placed the recommendations of Hon'ble the Chief Justice of this High Court before His Excellency the Governor of Himachal Pradesh for approval on the principle of comity. The recommendations so made by Hon'ble the Chief Justice of this High Court ought not to have been filtered at any level lower than that of His Excellency the Governor of Himachal Pradesh. Since this course was admittedly not followed by the respondent-State, therefore, the decision taken by them in the meeting held on 24.07.2019 (Annexure P-19) refusing to accede to the recommendations made by Hon'ble the Chief Justice is set aside.

90. In light of the aforesaid discussion, we are clearly of the view that the proposal sent by the High Court could not have been rejected by the State Government and due deference had to be accorded to the same. Once, Hon'ble the Chief Justice in the interest of High Court Administration had taken a progressive step specially to ameliorate the service conditions of the Officers and staff working under him, the State Government should not and ought not to have raised any objection to such recommendations unless there were very good reasons for not granting the approval which do not exist in the instant case.

91. What would then be the further course of action required to be drawn in the instant case is clearly laid down by the Hon'ble Supreme Court in three Hon'ble Judge Bench decision in ***State of Rajasthan and others*** *vs.* ***Ramesh Chandra Mundra and others (2020) 20 SCC 163*** in paragraph 28 which reads as under:

> "28. The scheme of Article 229 of the Constitution of India obviously requires a joint consideration of the proposal which the Chief Justice may make in regard to appointment, conditions of service, etc. in accordance with the Rules. Undoubtedly, if the Chief Justice takes a decision which has financial implications and that decision cannot be questioned by any authority, the financial implications which such decision may have imposed, should receive due consideration at the hands of the State Government and eventually the Governor……"

92. As noticed above, the petitioner is claiming 20% hike in the pay scales (Grade Pay) on the basis of the judgment rendered by Punjab and Haryana High Court in ***Hari Mohan Dixit's case*** (supra) whereby the Union of India was directed to consider the recommendations made by three Judges' Committee which had been accorded approval by Hon'ble the Chief Justice of the Punjab and Haryana High Court and to take an appropriate decision in accordance with law and especially keeping in view the guiding principles reiterated in ***S.B. Vohra's case*** (supra). It was pursuant to these directions that the Government of India eventually granted 20% hike in the pay scales (Grade Pay). The Government of India vide memorandum dated 27.02.2012 granted hike of 20% in the existing pay including Grade Pay to the employees specified in the memorandum and serving in Punjab and Haryana High Court with effect from 01.01.2006.

93. This is an issue which is required to be analyzed and examined by a Committee as held by the Hon'ble Supreme Court in ***High Court Employees Welfare Association, Calcutta and others*** *vs.* ***State of West Bengal and others (2004) 1 SCC 334*** (supra), wherein it was held as under:

> "11. The Government will have to bear in mind the special nature of the work done in the High Court which the Chief Justice and his colleagues alone could really appreciate. If the Government does not desire to meet the needs of the High Court, the administration of the High Court will face severe crisis. Hence, a special Pay Commission consisting of Judges and Administrators

> shall be constituted by the Chief Justice in consultation with the Government to make a report and on receipt of such report, the Chief Justice and the Government shall thrash out the problem and work out an appropriate formula in regard to pay scales to be fixed for the High Court employees. Let such action be taken within six months from today."

94. In light of the aforesaid discussion, we deem it appropriate to direct that this judgment be placed before Hon'ble the Chief Justice of this High Court to constitute a Committee consisting of at least two Hon'ble Judges of this High Court, Additional Chief Secretary (Home), Additional Chief Secretary (Finance) to the Government of Himachal Pradesh, Principal Secretary, Law, to the Government of Himachal Pradesh or any other person, Registrar General, Registrar (Vigilance) and Registrar (Judicial) of this High Court and two representatives of the Petitioner-Association. The Hon'ble Committee shall go into the details with respect to grant of hike as per prayer clause of the petition keeping in view the nature of duties and responsibilities discharged by the staff working under various cadres in the adjoining High Courts of Punjab and Haryana and Delhi before recommending the pay pattern as was done by the Division Bench of the Madras High Court in ***R.N. Arul Jothi's case*** (supra). Since, Article 229 of the Constitution of India contemplates framing of rules for salary, allowance, leave or pension etc., Hon'ble the Chief Justice may empower the Hon'ble Committee to frame the appropriate rules for the aforesaid purpose for the future. The above exercise may be completed preferably within a period of four months. Ordered accordingly.

95. The writ petition is accordingly allowed in the aforesaid terms, leaving the parties to bear their own costs. Pending application(s), if any, also stands disposed of.

96. For compliance to come up on **10.05.2023.**

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

Bal Krishan Sharma .....appellant

Versus

Punjab and Sind Bank and another ...Respondents

For the appellant: Mr. Prantap Sharma, Advocate.
For the respondents: Mr. Raman Prashar, Advocate for respondent No.1.

LPA N. 218 of 2016
Reserved on: 17.11.2022
Decided on: 13.01. 2023

Industrial Disputes Act, 1947- Sections 25F and 25G- Wrongful termination- Relief entitled- Where termination is found to be in violation of Sections 25F and 25G of the Act, reinstatement is not the Rule, but an exception and ordinarily grant of compensation would meet ends of justice- Labour Court has rightly awarded compensation instead of reinstatement- Appeal dismissed. (Paras 21 to 25)

Cases referred:
Rashtrasant Tukdoji Maharaj Technical Education Sanstha, Nagpur vs. Prashant Manikrao Kubitkar (2018) 12 SCC 294;
T.C. Basappa versus T. Nagappa and another, AIR 1954 S.C. 440 (Vol. 41, C.N. 106);

The following judgment of the Court was delivered:

Virender Singh, Judge

Appellant Bal Krishan Sharma has filed the present appeal under Clause 10 of Letters Patent Appeal of Delhi High Court as applicable to the H.P. High Court against the judgment dated 07.11.2016 passed by the learned Single Judge in CWP No. 5057 of 2010.

2. By way of judgment dated 07.11.2016, the learned Single Judge has dismissed the writ petition of the appellant filed against the award dated 12.04.2010 passed by the Presiding Officer, Central Government Industrial Tribunal-cum- Labour Court-1, Chandigarh.

3. The parties to the present appeal are hereinafter referred, in the same manner, in which, they were referred to by the learned writ Court.

4. Petitioner Bal Krishan Sharma has sought the indulgence of the High Court under Article 226 of the Constitution of India for the issuance of writ of certiorari against the award dated 12.04.2010 passed by the Presiding Officer, Central Government Industrial Tribunal-cum- Labour Court-1, Chandigarh (hereinafter referred to as the 'Labour Court).

5. As per the award assailed by way of writ, the learned Labour Court has awarded a sum of Rs. 1,00,000/- to the petitioner as compensation. The operative part of the award is reproduced as under:-

> *".....Considering all the above factors, I am of the view that Rs. 1,00,000/-(one lakh only) will be appropriate compensation to the workman. Accordingly, management of respondent bank is directed to pay Rs. 1,00,000/- (one lakh only) within one month from the date of publication of award to the workman. If the management pays/deposited this amount within one month from the date of publication of award, no interest need to be paid. If the management fails to comply with the direction the workman will also be entitled for the interest at the rate of 8 per cent per annum from the date of filing the claim petition till final payment. Let Central Government be approached for publication of award, and thereafter, file be consigned to record room."*

6. The writ petition has been filed on the ground that the petitioner was appointed as daily rated Peon by respondent No.1-bank, in its branch at Amb on 14.02.2001 and his services were terminated on 31.03.2002. Thereafter, the petitioner had raised the industrial dispute before the Conciliation Officer-cum-Assistant Labour Commissioner (Central) Kendriya Sadan, Sector-9, Chandigarh by moving a demand notice dated 17.10.2004 (Annexure P-2). By virtue of the reply (Annexure P-3), the said notice was

contested. Efforts for conciliation were made, but could not materialize, as such, the Labour Court-cum- Conciliation Officer has submitted the report under Section 12(4) of the Industrial Disputes Act to the competent authorities. Consequently, the following reference has been made by the appropriate Government:-

> *"Whether the action of the management of Punjab and Sind Bank Chandigarh, in terminating the services of Balkrishan Sharma with effect from 1.4.2002 is illegal and unjustified? If so to what relief the concerned workman is entitled to and from which date?"*

7. On notice, the petitioner has filed claim petition. After completion of the pleadings and after hearing the learned counsel for the parties, the learned Labour Court has concluded that the petitioner workman has completed 240 days in the preceding year.

8. It has also been held that the services of the petitioner were terminated illegally against the provisions of the Industrial Disputes Act.

9. According to the petitioner, once the learned Labour Court has concluded that the services of the petitioner were terminated illegally, then two courses were available. Firstly, to reinstate the petitioner with back wages for services and in exceptional circumstances, the petitioner can be awarded a reasonable compensation. The learned Labour Court has awarded compensation of Rs.1,00,000/- with the condition that in case the said payment is not made within one month, then the petitioner would be entitled to interest @ 8% per annum from the date of filing of the claim petition.

10. The award has further been challenged on the ground that the learned Labour Court has wrongly awarded the compensation, rather the petitioner is entitled for the re-instatement with full back wages. The award has further been assailed on the ground that the learned Labour Court has not considered the fact that the petitioner is the sole bread earner of his family, as such, he is in dire need of job. The learned Labour Court has

wrongly endorsed the act of the respondent-bank to dispense with the services of the petitioner being surplus work force.

11. On the basis of above facts, a prayer has been made to allow the writ petition by setting aside the award dated 12.04.2010, demanding the re-instatement with full back wages along-with interest @ 18%.

12. When put on notice, respondent No.1-bank has contested the writ petition by supporting the award passed by the learned Labour Court. The factual position regarding the employment of the petitioner as daily rate Peon on temporary basis w.e.f. 14.02.2001 to 31.03.2002 has not been disputed. The order of the leaned Labour Court, awarding the compensation of Rs.1,00,000/- has been supported on the ground that the learned Labour Court has rightly awarded the compensation to the petitioner.

13. Petitioner filed the rejoinder, denying the preliminary objections as well as the contents of the reply, by virtue of which, the same has been contested/controverted.

14. The learned Single Judge has dismissed the writ petition on the ground that the petitioner was appointed by the authorities without advertising the post and without following the prescribed norms. According to the learned Single Judge, the legality of the appointment of workman is an important circumstance, which is liable to be considered at the time of deciding his claim for re-instatement along-with wages or otherwise.

15. The findings of the learned Single Judge are assailed before this Court by virtue of the present appeal. According to the petitioner, the learned Single Judge has held that the termination of the services of the petitioner was illegal and void and those findings have not been challenged by the respondent-bank, as such, the petitioner is liable to be re-instated with all consequential benefits, including the back wages. The learned Single Judge, according to the petitioner, has not considered the fact that the learned

Labour Court should have re-instated him instead of awarding the compensation.

16. On the basis of the grounds of appeal, Mr. Prantap Sharma, learned counsel appearing the appellant has prayed that the appeal may kindly be accepted by setting aside the order passed by the learned Single Judge and prayed for the relief as claimed in the claim petition filed before the learned Labour Court, in pursuance to the reference made by the appropriate Government.

17. The petitioner has filed the writ petition for the following substantive reliefs:-

> *"(iii) That writ in the nature of certiorari may kindly be issued and the impugned award dated 12.4.2010 may kindly be moulded and the respondent Bank may very kindly be directed to reinstate the petitioner on job with full back wages at the rate of 18% interest with all consequential benefits including continuity in service and seniority benefits instead of compensation amounting to Rs. 1.00 lac with rate of interest.*
>
> *(iv) That the compensation, as this Hon'ble Court may kindly consider just for the poor and low-paid workman who suffered and still is suffering mental agony for loss of his livelihood and was compelled for this forced litigation; may be paid to the petitioner."*

18. Perusal of the order passed by the learned Labour Court shows that the termination of the petitioner has been held to be illegal, being against the provisions of the Industrial Disputes Act. The said findings of the learned Labour Court have not been assailed by the respondent-bank, as such, those findings attained finality.

19. The petitioner has sought the relief that instead of awarding compensation, his services may kindly be re-instated as per his prayer.

20. The scope of issuance of writ of certiorari has elaborately been discussed by the Hon'ble Supreme Court in ***T.C. Basappa*** versus ***T. Nagappa and another***, ***AIR 1954 S.C. 440 (Vol. 41, C.N. 106)***. 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 (I [1953] S.C.R. 1114 at 1150, 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 (1) : " 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."

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(2), vide Per Lord Cairns in- Walsal's overseas v. L. & N W. Rly. Co.'(1879) 4 AC 30 at p.39(D).

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 (3). 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(1). 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(3). 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. Ramon & 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."

21. The learned Single Judge has dismissed the writ petition, by holding that the relief, which has been awarded to the petitioner, is just and proper. The Hon'ble Apex Court in ***Rashtrasant Tukdoji Maharaj Technical Education Sanstha, Nagpur*** vs. ***Prashant Manikrao Kubitkar (2018) 12 SCC 294*** has held that where the termination is found to be in violation of Sections 25-F & 25-D of I.D. Act, reinstatement is not the Rule, but an exception and ordinarily grant of compensation would meet ends of justice. The relevant para 2 of the judgment is reproduced as under:-

> *"**2**. The respondent workman had worked under the appellant for a period of two years and three months whereafter he was terminated on 1-6-1994. Judicial opinion has been consistent that if the termination is found to be contrary to Sections 25-F and 25-G of the Industrial Disputes Act, 1947, reinstatement in service is not the rule but an exception and ordinarily grant of compensation would meet the ends of justice."*

22. The Labour Court is the Court of facts and it has specifically been held that the reinstatement of the petitioner is not justifiable as in the year 2010, the respondent-bank has started VRS for the purpose of reducing work force. Thousands of workers took VRS. The learned Labour Court has considered all these facts and then decided to award the compensation.

23. Learned counsel appearing for the appellant could not point out any fault in the criteria adopted by the learned Labour Court to assess the compensation, which has been granted to the petitioner. The petitioner had worked only for about one year and considering his length of service, the amount of compensation of Rs.1,00,000/- has been awarded to him.

24. The learned Single Judge has rightly considered all these facts and then dismissed the writ petition.

25. In view of the aforesaid discussion, this Court is in full agreement with the view taken by the learned Single Judge and the same is

not required to be interfered with. Accordingly, the appeal is dismissed. Pending applications, if any, also stand disposed of.

BEFORE HON'BLE MS. JUSTICE SABINA, J. AND HON'BLE MR. JUSTICE SUSHIL KUKREJA, J.

State of H.P. ....Appellant

Versus

Akash ....Respondent

Cr. Appeal No. 219 of 2022

Akash ....Appellant

Versus

State of H.P. ....Respondent

For the appellant(s) : Mr. Vikrant Chandel, Deputy Advocate General, for the appellant/State in DSR No.1 of 2022.
Mr. Sahil Malhotra, Advocate, for the appellant in Cr. Appeal No. 219 of 2022.

For the respondent(s) : Mr. Sahil Malhotra, Advocate, for the respondent in DSR No.1 of 2022.
Mr. Vikrant Chandel, Deputy Advocate General, for the respondent/State in Cr. Appeal No. 219 of 2022.

Reserved on: 05.12.2022
Decided on: 30.12.2022

Code of Criminal Procedure, 1973- Section 366 (1) – **The Protection of Children from Sexual Offences Act, 2012**- Section 6- **Indian Penal Code, 1860**- Sections 302 and 376- Death sentence reference made by the Ld. Special Judge (POCSO), Solan to the Hon'ble High Court for confirmation of death sentence of accused, who has also assailed judgment of conviction and order of sentence- Held:

A. Chain incriminating circumstances has been duly proved by the prosecution and it unerringly pointed to the guilt of the accused beyond reasonable doubt. (Paras 49 & 50)

B. The manner in which the deceased was raped and thereafter murdered may be brutal, but it could have been a momentary lapse on the part of the accused- He had no premeditation for commission of the offence- The offence may look heinous, but, under no circumstances, it can be said to be a rarest of rare case- Appeal partly allowed and death sentence is converted to life imprisonment. (Paras 61, 62 & 63)

Cases referred:

Amit vs. State of U.P., (2012) 4 SCC 107;
Ashok kumar Vs. State of Haryana, (2010) 12 SCC 350;
Bachan Singh vs. State of Punjab, (1980) 2 SCC 684;
Dattu Ramrao Sakhare and Others vs. State of Maharashtra, (1997) 5 SCC 341;
Ganpat Singh Vs. State of Madhya Pradesh, AIR 2017 Supreme Court 4839;
Machhi Singh and Ors. vs. State of Punjab (1983) 3 SCC 470;
Nizam Vs. State of Rajasthan, AIR 2015 Supreme Court 3430;
Raju vs. State of Haryana, (2001) 9 SCC 50;
State of Goa Vs. Sanjay Thakran & Anr., (2007) 3 SCC 755;
Vijay Raikwar Vs. State of Madhya Pradesh, (2019) 4 SCC 210;
Viran Gyanlal Rajput vs. State of Maharashtra, (2019) 2 SCC 311;

The following judgment of the Court was delivered:

Sushil Kukreja, Judge

Accused Akash, was tried by the learned Additional District & Sessions Judge, Fast Track, Special Court (POCSO), Solan, District Solan, H.P., in Sessions Trial No. 93-S/7 of 2020/2017, under Sections 376 & 302 of

the Indian Penal Code (hereinafter referred to as "IPC") and Sections 6 & 10 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "POCSO Act"), in case FIR No. 03/2017, dated 21.02.2017, registered at Women Police Station, Baddi, District Solan, H.P.

2. The learned Special Judge, Fast Track, Special Court (POCSO) (hereinafter referred to as the "trial Court"), vide judgment/order of conviction/sentence, dated 14.01.2022/17.02.2022, convicted and sentenced the accused as under:-

> *"(a) The convict Akash is sentenced to death for offence punishable under Section 302 of IPC. The convict is also sentenced to pay fine of Rs. 25,000/- under Section 302 of IPC and in default of payment of fine, to undergo simple imprisonment for a period of six months. The convict is directed to be hanged by neck till he is dead.*
>
> *(b) With regard to the commission of offence under Section 6 of POCSO Act read with Section 376 of IPC, I am of the considered view that ends of justice would be met by sentencing the convict to undergo rigorous imprisonment for life and also to pay fine of Rs. 25,000/- and in default of payment of fine to further undergo simple imprisonment f*or a period of six months."

3. Being aggrieved and dissatisfied with the judgment of conviction and order of sentence, passed by the learned trial Court, accused Akash has preferred Criminal Appeal No. 219 of 2022, praying therein for his acquittal after setting aside the aforesaid judgment of conviction and order of sentence.

4. Death Sentence Reference No.1 of 2022 arises out of the Reference made by the learned trial Court under Section 366 (1) of the Code of Criminal Procedure, 1973 to this Court for confirmation of the death sentence of accused Akash.

5. Since the above captioned Death Sentence Reference and Criminal Appeal arise out of a common factual matrix and impugned

judgment/order dated 14.01.2022/17.02.2022, this Court proceeds to decide the same by the common judgment.

6. The case of the prosecution, in brief, is that on 21.02.2017, the complainant (name withheld) moved a written complaint at Women Police Station, Baddi, District Solan, wherein it has been alleged that he is resident of Bengal and is residing alongwith his family at a place (name withheld) as a tenant and his wife is serving in a company. On 20.02.2017, when he and his wife returned home in the evening after their duty, they found that their daughter was not at home and they could not trace her. It has been further alleged in the complaint that on 21.02.2017, his son (name withheld) told him that on 20.02.2017, at 3:00 p.m., he had seen the accused taking the victim (name withheld) (hereinafter referred to as "the victim") by her hands towards the road. The complainant also alleged in the complaint that accused is resident of U.P., but he is residing in a rented accommodation at some distance from his house. During investigation of the case, search of victim was conducted in the forest of *Judi Khurd*. The father of the victim and one Rakesh Singh were associated in the search. When police entered the forest, they found one slipper and after 10 feet ahead, one *chatai* (mat) alongwith disposable glasses and an empty packet of *Kurkure*. After moving 80 feet ahead, body of a girl was found in the bushes. The body was in a semi naked condition and the complainant identified the body to be of his missing daughter. The inspection of the body revealed that the victim was wearing a T-Shirt alongwith a black coloured thread, while her *payjami* was found hanging down near left foot. There was a blue colour mark on the right side of the neck of the victim and a wooden piece was found inserted in her private part. A part of the intestine was found coming out from the private part. The photographs of the body of the victim were clicked. Inquest report was filled-in and the body was preserved. Spot map was prepared. The other part of yellow coloured slipper was found near body of the victim. The sample of blood stained soil

was preserved from the spot alongwith the control sample. One packet of Potato Wafers Easy Fun (green in colour), in which there were some chips, was also preserved. The wooden piece found inserted in the private part of the victim was taken out and preserved in a cloth parcel and sealed with seal 'A'. The part of intestine was also preserved in a plastic jar and sealed. One red and black coloured *chatai* alongwith piece of *bidi*, two disposable glasses, empty wrapper of *Kurkure*, half filled liquor bottle of '*Rasila Santra*' alongwith cap were preserved from the spot and sealed in a parcel.

7. The body of the victim was initially sent to CHC, Nalagarh, for postmortem, but thereafter the same was referred to IGMC, Shimla for postmortem and forensic examination and as per post-mortem report Ex PW-17/B, ante-mortem injuries were observed and it has been opined by the Doctor that victim died as a result of manual strangulation in a case of gross perineal tear and foreign body insertion into genitals reaching upto abdominal wall, and the death was Homicidal in nature.

8. The accused was arrested on 22.02.2017 and report of his medical examination was obtained. The accused made a disclosure statement under Section 27 of Indian Evidence Act and as such, red coloured shirt and blue coloured jeans were recovered from his home, which he was wearing on 20.02.2017. The said recovery was preserved and sealed in a parcel with seal impression 'H'.

9. As regards scientific reports, fourteen sealed samples were sent to SFSL, Junga, for chemical analysis and as per its report, human blood of group 'A' was detected on the blood stained soil and leaves, blood stained wooden piece, sacred thread worn by the victim and in the blood samples of the deceased. Human blood of group 'A' was detected on the underwear of the accused and human semen was also detected on the same. Human blood was also detected on the pubic hair of the accused, *payjami* of the victim, but the result was inconclusive with respect to the blood group. Human blood of

group 'A' was also detected on the underwear and the T-Shirt of the victim. Human blood was also detected on the wooden stick recovered from the abdomen of the victim and parts of intestine preserved from the body, but was inconclusive in respect of blood group. Human blood was also detected on the anal and perianal swab, vaginal swab of the victim, but was insufficient for blood grouping. Similarly, human hair was found on the jeans and shirt of the accused. As per another report of SFSL, Junga, the blood stained soil was found consistent with the control sample of the soil. The torn wrapper piece was found to be part of torn Masala Munch *Kurkure* Wrapper before tearing.

10. As per report of DNA Division of SFSL, Junga, the DNA profile pertaining to a female individual was obtained from the pants of the accused, which completely matched with the DNA profile obtained from blood samples of the victim. A mixed DNA profile was obtained from the pubic hair of the accused, from which, two DNA profiles could be identified, one of which matched with the DNA profile obtained from the blood sample of the victim and the other one matched with the DNA profile obtained from the blood samples of the accused. The DNA profile obtained from the part of intestine preserved from the body of the victim completely matched with the DNA profile obtained from her blood sample. As per report, no alcohol/poison was detected in the viscera preserved from the body of the victim.

11. After completion of investigation, it was revealed that on 20.02.2017, the accused enticed away the victim and took her to his room, however, he could not succeed in sexually assaulting her and as such, he took her to a lonely place at *Judi Khurd* forest, where he had committed penetrative sexual assault on the victim and then murdered her by strangulation and also inserted a wooden piece in her private parts. The accused was charge-sheeted for the commission of offence punishable under Sections 302 & 376 of IPC and Sections 6 & 10 of POCSO Act.

12. Charges were framed by the learned trial Court against the accused, vide order dated 15.12.2017, wherein, he did not plead guilty of the charges framed against him and claimed to be tried.

13. In order to prove its case, the prosecution examined as many as 19 witnesses. Statement of the accused was recorded under Section 313 Cr. P.C., wherein he denied the prosecution case. However, he did not lead any evidence in his defence.

14. On the basis of evidence led on record by the prosecution, the learned trial Court held the accused guilty of his having committed offence punishable under Sections 302 & 376 of IPC and Section 6 of the POCSO Act and sentenced him as per description given hereinabove.

15. We have heard the learned Legal Aid counsel for the accused/convict and learned Deputy Advocate General for the State and also gone through the records carefully.

16. The learned legal aid counsel for the accused has submitted that the "last seen theory" is not applicable to the instant case. He has further submitted that the circumstances relied upon by the prosecution are not firmly established and the circumstances do not form a complete chain establishing the guilt of the accused.

17. On the other hand, learned Deputy Advocate General has contended that there is ample evidence available on record to prove that the deceased was seen lastly with the accused and the scientific evidence as well as the recovery at the instance of the accused was also proved beyond any reasonable doubt, therefore, the trial Court was right in convicting and sentencing the accused-appellant. He, therefore, contended that there is no merit in the appeal filed by the accused and the same is liable to be dismissed by this Court.

18. The accused has been charged for the commission of offence of rape & aggravated penetrative sexual assault on the minor child and

thereafter for committing her murder, who was aged about 7 years. Now let us examine as to whether the prosecution has been able to establish the guilt of the accused by leading convincing and cogent evidence on record. At the very outset it may be noted here that there is no eye-witness to the incident in question. PW-7, who is the father of the victim has specifically deposed that on 20.02.2017, when he alongwith his wife came back to his rented accommodation after doing job in the company, they found their daughter missing. They searched her in the locality, but could not find her anywhere. He further deposed that on 21.02.2017 his son disclosed that on 20.02.2017 at 3:00 p.m., accused Akash, who was residing in a rented room, took his daughter towards jungle and thereafter he moved an application, Ext. PW-7/A to Women Police Station, Baddi. He further deposed that after arrival of the police on the spot, he alongwith one Rakesh and some other persons went to search his daughter and during search, right foot *chappal* of his daughter was found near Temple towards Gas Plant and after moving slightly ahead, one *chatai* (mat) was also found in the bushes alongwith two plastic glasses, one empty liquor bottle of 350 ml and its cap, empty wrapper of *Kurkure* and two *Bidi* butts. On further moving ahead, dead body of his daughter was found lying half naked. A wooden piece was found inserted in her private part and intestine was also found coming out of her private part.

19. PW-1 Rakesh Singh Bhadauria, corroborated the statement of PW-7 and deposed that on 21.02.2017, he alongwith the complainant and the police went in search of the victim and found her dead body lying half naked with a wooden piece inserted in her private part and her intestine was also found coming out of her private part. He further deposed that body of the victim was identified by her father and articles recovered near the dead body were also taken into possession.

20. PW-18, Inspector Bhadur Singh, has deposed that during investigation, he alongwith other police officials, witness Rakesh Singh

Bhadauria and the complainant went in search of the victim and found her half naked dead body in the forest with a wooden piece inserted in her private part and her intestine was also found coming out of the private part. He further deposed that articles lying near the dead body of the victim were also taken into possession.

21. Thus, from the perusal of the statements of the complainant PW-7, who is father of the victim and PW-1 Rakesh Singh Bhadauria, who is an independent witness and their statements being duly corroborated by the statement of PW-18, who is Investigating Officer in the present case, it has been duly established on record that the victim had gone missing on 20.02.2017 and her dead body was recovered from the forest on 21.02.2017, with a wooden piece inserted in her private part and part of her intestine was also found coming out therefrom. From the testimonies of the aforesaid witnesses, it has also been proved on record that the dead body of the victim was identified by her father and the articles which were found lying near the dead body were also taken into possession by the police.

22. Thereafter, the post-mortem on the body of the victim was conducted. PW-18, Investigating Officer, has specifically deposed that the body of the victim was sent to CHC Nalagarh for conducting the post-mortem from where the Medical Officer had referred the body of the victim for post-mortem to IGMC, Forensic Department, Shimla.

23. So far as the homicidal death of the deceased is concerned, suffice it to say that through the evidence of PW-17, Dr. Piyush Kapila, Associate Professor, Forensic Medicine, IGMC Shimla, H.P., the prosecution has succeeded in establishing that the death of the child victim was a homicidal one. He had performed post-mortem on the dead body of the deceased and submitted his report Ext. PW-17/B as under:-

"**List of Antemortem Injuries**

1. Multiple abraded contusions was present in an area of 7x5 cm over left side of face, preauricular area, ear and temporal region. On reflection of scalp left temporalis muscle contused. No under lying fracture of skull or facial bones. On opening the skull cap no extradural haemorrhage present, but on opening dura gross subdural bleed present over frontal temporal area of left side and also on medial aspect of right hemisphere around falx cerebri.

2. 5X5 cm abraded (pressure) contusion present over right side of neck just below angle of mandible resembling finger like pattern with gross contusion below after opening skin and subcutaneous tissue, deep up to muscles. Linear abraded contusion 2 x0.5 cm on Helix of right pinna also present.

3. 6X7 cm abraded, pressure contusion present just below injury No.2 on right side of neck, reddish. After opening skin there is gross extravasation of blood in sub cutaneous tissue and muscles. The hematoma around thyroid gland present and extending upto upper mediastinum.

4. 2x2 cm, round contusion, reddish present over right submandibular area with gross contusion in subcutaneous tissue and submandibular gland after opening the skin.

5. Gross contusion over clavicular area of both sides with multiple abrasion reddish. On opening gross contusion present below the skin.

6. 2 cm long oblique red scratch abrasion on posterior aspect of right arm in lower 1/3 rd alongwith ½ cm abrasion just blow & distal to injury explained earlier in the para.

7. Multiple small, dotted pressure abrasions of various sizes and shapes present over posterior / extensor aspect of left forearm in an area of 17cm x 3 cm.

8. Gross third degree perineal tear in vaginal canal, perineal skin perineal muscles extending into anal canal. Walls of vaginal and anal canal are ruptured and forming a single large opening extending to abdominal cavity & internal organs visible from the opening."

On opening the abdominal cavity, whole of the large intestine was not present. There were two wooden sticks present inside the peritoneal cavity entangled in mesentary.

1. 14 cm in length maximum diameters 2 cm pointed and broken.

2. Splinter from above wooden stick present seperately in peritoneal cavity entangled in tissue measuring 7 cm with maximum width 1 cm.

> *.....After the thorough examination of the deadbody we were of the opinion that the deceased died as a result of manaul strangulation in case of gross perineal tear and foreign body insertion into genitals reaching up to abdominal wall. Homicidal in nature.*
>
> *The probable time which might have elapsed between death and postmortem was opined to be 48 to 72 hours and that which might have elapsed between injury and death was opined to be immediate.....”*

24. Thus, having regard to the said evidence of PW-17 and the post-mortem report Ext. PW-17/B, prepared by him, there remains no shadow of doubt that the victim, aged about 7 years was subjected to the sexual assault and had died due to manual strangulation in case of gross perineal tear and foreign body insertion into genitals reaching upto abdominal wall. Thus, her death was a homicidal death and not the death in ordinary course of nature.

25. So far as the age of the victim is concerned PW-7, the complainant, who is father of the victim, has deposed that the victim was born on 22.07.2009 and he produced the birth certificate Ext. P-22 before the police in this respect. The birth record of the victim was also got verified from Gram Panchayat, Raipur of District Mushridabad, West Bengal. In this regard, certificate Ext. PW-10/C was issued by the Pradhan of Gram Panchayat, Raipur. Copy of birth certificate register Ext. PW-10/D had been obtained from Sub-Registrar Birth & Death, Raipur Panchayat. PW-11, Pradhan-cum-sub Registrar (Birth and Death), Gram Panchayat, Raipur, brought the original birth record of the victim as entered in the birth Register of Gram Panchayat, Raipur and as per the record, date of birth of the victim was 22.07.2009.

26. Hence, in view of the aforesaid evidence produced on record, it has been established that the victim was born on 22.07.2009 and she was around seven years and seven months of age on the date of incident i.e.

20.02.2017. As such, it has been proved beyond reasonable doubt by the prosecution that the victim was minor and below eight years of age at the time of incident.

27. Now the next question which is to be considered is whether the accused is the author of the death of the victim after committing sexual assault on her. The case of the prosecution is that the victim was last seen alive in the company of the accused. In this respect, the prosecution has relied upon the testimonies of PW-2, brother of the victim and another witness i.e. PW-4, Manmohan Dass and their statements corroborated by the following circumstances:-

> *"(1) The accused while in police custody made a disclosure statement under Section 27 of the Indian Evidence Act and got recovered some of his clothes as well as wrapper of Kurkure.*
>
> *(2) Presence of DNA profile of the victim on the sample of the pubic hair of the accused and on his jeans."*

28. Before coming to the conclusion whether the victim and the accused were last seen together, we may first discuss the law on the subject. The theory of 'last seen together' is one where two persons are 'seen together' alive and after an interval of time, one of them is found alive and the other dead. If the period between the two is short, presumption as to the person alive being the author of death of the other can be drawn. Time gap should be such as to rule out possibility of somebody else committing the crime.

29. In ***State of Goa*** Vs. ***Sanjay Thakran & Anr.***, (2007) 3 SCC 755, the Hon'ble Apex Court observed that there can be no fixed or straight jacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, Para 34 of the judgment is reproduced as under:-

> " 34. *From the principle laid down by this Court, the circumstance of last-seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused. But, in all cases, it cannot be said that the evidence of last seen together is to be rejected merely because the time gap between the accused persons and the deceased last seen together and the crime coming to light is after a considerable long duration. There can be no fixed or straight jacket formula for the duration of time gap in this regard and it would depend upon the evidence led by the prosecution to remove the possibility of any other person meeting the deceased in the intervening period, that is to say, if the prosecution is able to lead such an evidence that likelihood of any person other than the accused, being the author the crime, becomes impossible, then the evidence of circumstance of last seen together, although there is long duration of time, can be considered as one of the circumstances in the chain of circumstances to prove the guilt against such accused persons. Hence, if the prosecution proves that in the light of the facts and circumstances of the case, there was no possibility of any other person meeting or approaching the deceased at the place of incident or before the commission of the crime, in the intervening period, the proof of last seen together would be relevant evidence. For instance, if it can be demonstrated by showing that the accused persons were in exclusive possession of the place where the incident occurred or where they were last seen together with the deceased, and there was no possibility of any intrusion to that place by any third party, then a relatively wider time gap would not affect the prosecution case."*

30. In ***Ganpat Singh*** Vs. ***State of Madhya Pradesh,*** AIR 2017 Supreme Court 4839, after taking note of the decisions of the Hon'ble Apex

Court that the last seen evidence assumes significance when the lapse of time between the point when the accused and the deceased were seen together and when the deceased is found dead is so minimal as to exclude the possibility of a supervening event involving the death at the hands of another. Paragraph No. 10 of the judgment, reads as under:-

> *"10 Evidence that the accused was last seen in the company of the deceased assumes significance when the lapse of time between the point when the accused and the deceased were seen together and when the deceased is found dead is so minimal as to exclude the possibility of a supervening event involving the death at the hands of another. The settled formulation of law is as follows :*
> *"The last seen theory comes into play where the time gap between the point of time when the accused and deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that accused and deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases."*

31. Thus, in view of the aforesaid principles, it is to be seen in the facts and circumstances of this case as to whether the court below was right in invoking the "last seen theory and whether the prosecution has succeeded in establishing by definite evidence that the deceased was seen alive in the company of the accused in such close proximity of time so as to exclude the possibility of a third person entering in the scene of crime in all reasonableness, and, thus, enabling the Court to draw a reasonable inference against the accused to shift onus on the accused to explain the circumstance in accordance with the provisions of Section 106 of the Evidence Act.

32. So far as the first point regarding last seen of the victim with the accused is concerned, it is relevant to refer to the statements of PW-2, brother of the victim and PW-4, Manmohan Dass.

33. PW-2, brother of the victim, who was 10 years old, has stated that the accused present in the Court took her sister towards Temple and nearby jungle on that day at 3:00 p.m. However, he could not state the date of the occurrence. In cross-examination, he has stated that he was playing with marbles with his friends, when accused took his sister. He also stated that he disclosed this fact to his father on the same day around 8:00 p.m. after he returned from his duty. Although he has been examined without oath, but, despite that his testimony inspires confidence, as his statement is quite natural and true with respect to the fact that he had seen the accused taking her sister (victim) towards Temple and nearby jungle.

34. The Hon'ble Supreme Court in ***Dattu Ramrao Sakhare and Others*** vs. ***State of Maharashtra***, (1997) 5 SCC 341, has held that a child witness if found competent to depose to the facts and reliable one, such evidence could be the basis of conviction. The relevant portion of paragraph 5 of the judgment reads as under:-

> *"5……A child witness if found competent to depose to the facts and reliable one such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. There is no rule or practice that in every case the evidence of such a witness be corroborated before a conviction can be allowed to stand, but as a rule of prudence the court*

always finds it desirable to have the corroboration to such evidence from other dependable evidence on record.....”

35. The statement of PW-2 is further corroborated by PW-4 Manmohan Dass, who deposed that the complainant was his tenant and was residing in one room on the ground floor. The accused was also known to him and was residing with his father as tenant in the same building on first floor. On 20.02.2017, the accused came to his shop at about 2:00 p.m. and purchased one packet of *Kurkure.* Number of children were playing near the building including the girl. He saw the accused taking the victim towards the Temple. However, on the next day he came to know that dead body of the victim was found in the bushes near the Temple. In cross-examination, he deposed that his building is two storeyed. Old Village *Judi Khurd* is adjoining to his building. There are other residential houses on the Barotiwala road. He denied that his shop is not visible from the lintel of the building. He deposed that he came to know about the incident on 21.02.2017 from the public and police recorded his statement on the same day. He denied the suggestion of the defence counsel that the accused had neither visited his shop on 20.02.2017, nor he purchased *Kurkure.* Both PW-2 and PW-4 were cross-examined at length, however, nothing favourable could be elicited from their cross-examination and their statements remained un-impeached to the effect that the victim was last seen alive with the accused.

36. Thus, from the statements of PW-2 and PW-4, it is revealed that the victim was last seen alive with the accused prior to the recovery of her dead body from the forest. As observed earlier, from the statement of PW-1, duly corroborated by complainant PW-7 and Investigating Officer PW-18, it has been established that dead body of the victim was recovered on 21.02.2017 and the Investigating Officer had prepared inquest report on 21.02.2017 at 8:00 p.m. and thereafter the body was sent for conducting post-mortem. The perusal of the post-mortem report, Ext. PW-17/B reveals that

the body was received at 10:30 a.m. on 23.02.2017 and the examination was conducted at 11:45 a.m. and it has been concluded in the post-mortem report that probable duration of the death was within 48 to 72 hours of the time of post-mortem. As such, it has become clear that the victim was murdered within probable time of 11:45 a.m. on 20.02.2017 to 11:45 a.m. of 21.02.2017, which suggests that there was a minimal amount of time gap between the death of the victim and time when she was seen alive alongwith the accused.

37. It is well-settled that the burden to prove the guilt of the accused is always on the prosecution. If the prosecution has succeeded in proving the fact by definite evidence that the deceased was last seen alive in the company of the accused, a reasonable inference could be drawn against the accused and only thereafter the onus can be shifted on the accused under Section 106 of the Indian Evidence Act. The last seen theory i.e. the evidence that the deceased was last seen alive in the company of the accused is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. As observed in ***Nizam*** Vs. ***State of Rajasthan,*** AIR 2015 Supreme Court 3430, the "last seen theory" holds the courts to shift the burden of proof to the accused and the accused to offer a reasonable explanation as to the cause of death of the deceased. The principle is based on the provisions of Section 106 of the Indian Evidence Act which lay down that when any fact is established within the knowledge of the person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of

the Indian Evidence Act. It has been held in paragraph 15 of the judgment as under:-

> *"15. Elaborating the principle "last seen alive" in State of Rajasthan Vs. Kashi Ram, (2006) 12 SCC 254, (AIR 2007 SC 144), the Court held as under:-*
> *"23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Naina Mohd., Re. (AIR 1960 Mad 218)"*
> *The above judgment was relied upon and reiterated in Kiriti Pal Vs. State of West Bengal, (2015) 5 Scale 319: (2015 AIR SCW 3545).*

38. Hence, the onus shifts upon the accused under Section 106 of the Indian Evidence Act to offer an explanation that he was not the last person who was with the victim at the time of commission of offence. However, in his statement recorded under Section 313 Cr. P.C., the accused has only stated that he was innocent and a false case has been registered

against him at the instance of the complainant, who had enmity with him due to some money matter and had earlier also quarreled with him and threatened him to meet with dire consequences. The accused has failed to explain that what had happened to the victim during the intervening time when he was last seen with the victim taking her towards the Temple and between the death of the victim. It is not the case of the accused that after taking victim towards Temple, he had left her or that some other person was in the company of the victim.

39. The object of recording the statement of the accused under Section 313 Cr.P.C. is to bring to the notice of the accused the incriminating evidence and to give him an opportunity to explain the same, if he chooses to do so. The essential features of Section 313 Cr.P.C. and the principles of law enunciated in various judgments have been summarized in case of ***Ashok kumar*** Vs. ***State of Haryana***, reported in (2010) 12 SCC 350. The paragraphs 29 to 31 thereof read as under:-

> ***"29. Now we may proceed to discuss the evidence led by the prosecution in the present case. In order to bring the issues raised within a narrow compass we may refer to the statement of the accused made under Section 313, Cr.P.C. It is a settled principle of law that dual purpose is sought to be achieved when the Courts comply with the mandatory requirement of recording the statement of an accused under this provision. Firstly, every material piece of evidence which the prosecution proposes to use against the accused should be put to him in clear terms and secondly, the accused should have a fair chance to give his explanation in relation to that evidence as well as his own versions with regard to alleged involvement in the crime. This dual purpose has to be achieved in the interest of the proper administration of criminal justice and in accordance with the provisions of the Cr.P.C.. Furthermore, the statement under Section 313of the Cr.PC can be used by the Court in so far as it corroborates the case of the prosecution. Of course, conviction per se cannot be based***

upon the statement under Section 313 of the Cr.PC.

30. Let us examine the essential features of this section and the principles of law as enunciated by judgments of this Court, which are the guiding factor for proper application and consequences which shall flow from the provisions of Section 313 of the Cr.PC. As already noticed, the object of recording the statement of the accused under Section 313 of the Cr.PC is to put all incriminating evidence to the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time, also permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime.

31. The Court has been empowered to examine the accused but only after the prosecution evidence has been concluded. It is a mandatory obligation upon the Court and besides ensuring the compliance thereof, the Court has to keep in mind that the accused gets a fair chance to explain his conduct. The option lies with the accused to maintain silence coupled with simplicitor denial or, in the alternative, to explain his version and reasons, for his alleged involvement in the commission of crime. This is the statement which the accused makes without fear or right of the other party to cross-examine him. However, if the statements made are false, the Court is entitled to draw adverse inferences and pass consequential orders, as may be called for, in accordance with law. The primary purpose is to establish a direct dialogue between the Court and the accused and to put every important incriminating piece of evidence to the accused and grant him an opportunity to answer and explain. Once such a statement is recorded, the next question that has to be considered by the Court is to what extent and consequences such statement can be used during the enquiry and the trial. Over the period of time, the Courts have explained this concept and now it has attained, more or less, certainty in the field of criminal jurisprudence."

40. In the instant case, though the incriminating evidence was brought to the notice of the appellant/ accused while recording his statement, but, the accused had failed to explain the same. The accused

was given the opportunity to answer the incriminating circumstance which had come on record, however, except for the denial, he had not made any attempt to explain the same. Furthermore, no suggestion has been put by the defence counsel to the complainant that he was having enmity with the accused. He has even failed to lead any evidence in his defence despite opportunity granted to him in this respect. Thus, in view of the law laid down by the Hon'ble Apex Court, the accused has failed to rebut the prosecution evidence with respect to the last seen theory. Hence, it has been duly established that victim was last seen alive in the company of the accused, which circumstance establishes the guilt of the accused.

41. Further, while in police custody, the accused got recovered his red coloured shirt and blue coloured jeans from his house, which was worn by him at the time of incident. PW-12, Som Dutt, has deposed that on 24.02.2017, the accused while in police custody made a disclosure statement in his presence and also in the presence of Naushad Ali that he can get his red coloured shirt and blue coloured jeans recovered from his house, which was worn by him at the time of incident, i.e. on 20.02.2017 and in this regard, memo Ext. PW-12/A was prepared, which bears his signatures as also the signatures of Naushad Ali and the accused. He further deposed that on the same day while in custody the accused led the police party to village *Judi Khurd* and from the second floor of the building he got recovered red coloured shirt and blue coloured jeans from his room, which was kept on the shelf behind the bag. He also deposed that on the same day, the accused led the police party towards bushes, where one red coloured wrapper of *Kurkure* was recovered. 42. PW-18 also corroborated the statement of PW-12 to the effect that while in police custody, the accused made a disclosure statement and got recovered his

red coloured shirt and blue coloured jeans from his house, which were worn by him at the time of incident, i.e. 20.02.2017 and also got recovered red coloured wrapper of *Kurkure*.

43. So far as the scientific evidence is concerned, PW-13 Dr. Yuvraj Shori, has deposed that on 23.02.2017 he medically examined the accused and issued MLC and also obtained the blood sample of the accused on FTA Card, which he handed over to the police after seal. He further deposed that at the time of medical examination of the accused, he had taken samples of the penile swab, pubic hair and underwear of the accused which were sealed and then handed over to the police on 23.02.2017. 44. PW-17, Dr. Piyush Kapila, has deposed that clothes of the victim, Ext. P-30 to P-32 and black thread around the neck of the victim Ext. P-33 were sealed and handed over to the police. He also deposed that sample of the blood was taken from the body of the deceased on FTA Card, which was handed over to the police. He further deposed that wooden stick present inside the peritoneal cavity entangled in mesentary was sealed, preserved and handed over to the police. 45.

PW-16, Khajana Ram, has deposed that articles seized/preserved in this case were sent to SFSL, Junga, vide letter Ext. PW-16/F, which was signed by him. PW-8, Constable Bahadur Singh has deposed that on 15.03.2017, vide RC No. 4/16-17 he had deposited the recovered articles at SFSL, Junga and receipt was handed over to MHC. PW-10, Inspector Rita, has deposed that DNA profile result Ext. PW-10/E alongwith another report from SFSL, Junga Ext. PW-10/F were received and made part of the *challan*. She further deposed that FSL reports Ext. PW-10/G and Ext. PW-10/H were also received from FSL and made part of the *challan*. Thus the prosecution has duly proved the proper preservation of these samples with MHC (PW-19) and that these were

handed over to PW-8, who deposited it at the Laboratory.

46. The prosecution has also placed reliance upon the FSL reports Ext. PW-10/E, Ext. PW-10/F, Ext. PW-10/G and Ext. PW-10/H. The DNA profile report Ext. PW-10/E, reveals that DNA profile pertaining to a female individual was obtained from the pants of accused Akash, Ext. P-25 and the said DNA profile completely matched with the DNA profile obtained from the blood sample of the victim. It is further concluded that a mixed autosomal STR DNA profile was obtained from the pubic hair of accused Akash, from which two DNA profiles could be identified and one of the said profile matched with the DNA profile obtained from the blood sample on FTA Card of the victim, while the other matched with the DNA profile obtained from the blood sample on FTA Card of accused Akash. The report also concludes that the DNA profile obtained from the part of intestine completely matched with the DNA profile obtained from the blood sample on FTA Card of the victim.

47. Thus, DNA report, Ext. PW-10/E has established the connection of accused with the crime, due to presence of DNA profile of the victim on the jeans of the accused as well as on the sample of his pubic hair. Furthermore, as per FSL report, Ext. PW-10/G, blood group of victim was 'A' and human blood of group 'A' was detected on the underwear of the accused and human semen was also detected on the same. The perusal of the report further reveals that the human blood of group 'A' was detected on the underwear and T-shirt of the victim as well as the anal, perianal and vaginal swab of the victim. The accused has failed to explain the presence of DNA profile of the victim on the sample of his pubic hair and on his jeans.

48. Thus, from the perusal of the entire evidence on record, the following incriminating circumstances have clearly been established

against the accused:-

> *"(1) That on the afternoon of 20.02.2017, he was seen with the victim and was also seen taking the victim towards the temple and nearby forest;*
> *(2) That the dead body of the victim was recovered on 21.02.2017 in a forest adjoining to the temple;*
> *(3) The accused has failed to explain that after the time he was seen with the victim, there were any other event which rules out his culpability; and*
> *(4) The accused has failed to give any explanation as to how the DNA profile of the deceased victim was found on the sample of his pubic hair as well as that on the jeans."*

49. The chain of aforesaid incriminating circumstances duly proved by the prosecution, taken cumulatively formed a chain so complete that it unerringly pointed to the guilt of the accused so far as the charges leveled against him are concerned. At this stage it would be relevant to note that as per Section 29 of the POCSO Act, where the person is prosecuted for committing or abetting or attempting to commit any offence underSections 3,5,7, and Section 9 of the Act, the Court shall presume that such person had committed or abetted or attempted to commit the offence as the case may be, unless the contrary is proved. The presumption of culpable mental state of the accused is also envisaged in Section 30 of the said Act. In the instant case, as observed earlier, the accused had failed to rebut the said statutory presumption contained in the Act either by bringing on record the facts during the course of cross-examination of witnesses or during his statement recorded under Section 313 of Cr.P.C.

50. Having regard to the aforesaid chain of incriminating circumstances proved by the prosecution, and to the legal provisions contained in the POCSO Act and in the IPC, the Court is of the opinion that it has duly been established by the prosecution that the accused had committed murder of the victim punishable under Section 302 of the IPC. and aggravated penetrative sexual assault on the victim, punishable

under Section 6 of the POCSO Act as she was under 12 years of age. It has also been duly proved that the accused had committed rape upon her, as described in Section 375 of the IPC punishable under Section 376 of the IPC. Therefore, the prosecution has conclusively proved the guilt of the appellant/accused beyond reasonable doubt.

51. As regards the sentence of death penalty awarded by the Special Court, the learned Legal Aid Counsel for the appellant/accused submitted that the death penalty should be imposed only when the alternative of life-imprisonment is totally inadequate. He also submitted that the Special Court ought to have considered the age of the accused and the probability that the accused can be reformed and rehabilitated. According to him, in a catena of decisions, the Hon'ble Supreme Court in similar cases has substituted the death penalty by life-imprisonment. He has also relied upon several decisions, including the latest decisions in case of *Vijay Raikar* vs. *State of M.P.*, reported in (2019) 4 SCC 210, *Viran Gyanlal Rajput* vs. *State of Maharashtra*, reported in (2019) 2 SCC 311, as also in cases of*Raju* vs. *State of Haryana*, (2001) 9 SCC 50 and *Amit* vs. *State of U.P.*, (2012) 4 SCC 107, to submit that the instant case can not fall within the category of 'rarest of rare' case.

52. As against that, the learned Deputy Advocate General has vehemently submitted that this case is one of the rarest of rare cases, where the seven years old helpless child was sexually assaulted and brutally murdered.

53. Whether the case falls within the rarest of rare case so as to impose death penalty or not, is always a matter of great concern for every Court. Though, the Hon'ble Supreme Court in various decisions dealing with various situations has laid down certain guidelines as to which case should be treated as the rarest of rare case, there is no straight-jacket formula and yardstick set to decide the vexed issue.

54. In the case of *Bachan Singh* vs. *State of Punjab*, (1980) 2 SCC 684, the Hon'ble Supreme Court had laid down elaborate guidelines as to what are the mitigating circumstances and aggravating circumstances which should be taken into consideration before awarding the extreme penalty of death. Thereafter in *Machhi Singh and Ors.* vs. *State of Punjab* (1983) 3 SCC 470, the Hon'ble Supreme Court culled out the guidelines indicated in *Bachan Singh* vs. *State of Punjab* (supra) as under:-

> ***"38. In this background the guidelines indicated in Bachan Singh's case (supra) will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentences arises. The following propositions emerge from Bachan Singh's case:***
> ***(i) the extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;***
> ***(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration alongwith the circumstances of the 'crime'.***
> ***(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.***
> ***(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."***

55. There is no quarrel with the settled legal position that the death sentence should be awarded in rarest of rare cases. However, the question

that arises for consideration in the present case is as to whether this is a rarest of rare case. 56. In ***Bachan Singh*** Vs. ***State of Punjab*** *(supra)*, wherein the Apex Court has enjoined giving importance to the antecedents of the prisoner, apart from the gravity of the crime, for reaching the conclusion whether only a death sentence was appropriate. One important mitigating circumstance to be taken into account was the age of the accused and as to whether the accused had a previous criminal history, or whether there was any material to suggest that his reform was wholly improbable and that he was likely to commit such crimes in the future. Paragraphs 206 and 209 of the said judgment are reproduced as under:-

> "206. Dr. Chitale has suggested these mitigating factors :
> *Mitigating circumstances: In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances :*
> *(1) That the offence was committed under the influence of extreme mental or emotional disturbance.*
> *(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.*
> ***(emphasis supplied).***
> *(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.*
> *(4) The probability that the accused can be reformed and rehabilitated.*
> *The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.*
> *(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.*
> *(6) That the accused acted under the duress or domination of another person,*
> *(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.*
>
> *209. There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing*

> *circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be overemphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354 (3). Judges should never be blood-thirsty. Hedging of murderers has never been too good for them. Facts and figures, albeit incomplete, furnished by the Union of India, show that in the past, Courts have inflicted the extreme penalty with extreme infrequency-a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354 (3), viz, that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.*

57. In ***Amit*** vs. ***State of U.P.***, (2012) 4 SCC 107, where a 3 year old girl had been murdered by a 28 year old man, the Court converted a sentence of death to a sentence of life imprisonment, to run for the whole life of the prisoner, as he had no criminal antecedents, and it was not likely that the accused would repeat the offence. Thus, it was mentioned in the decision in para 22 of the said judgment, as under:-

> *"22. In the present case also, we find that when the appellant committed the offence he was a young person aged about 28 years only. There is no evidence to show that he had committed the offences of kidnapping, rape or murder on any earlier occasion. There is nothing on evidence to suggest that he is likely to repeat similar crimes in future. On the other hand, given a chance he may reform over a period of years. Hence, following the judgment of the three-Judge Bench in*

Rameshbhai Chandubhai Rathod (2) v. State of Gujarat, (2011) 2 SCC 764 we convert the death sentence awarded to the appellant to imprisonment for life and direct that the life sentence of the appellant will extend to his full life subject to any remission or commutation at the instance of the Government for good and sufficient reasons."

58. In ***Viran Gyanlal Rajput*** Vs. ***State of Maharashtra***, (2019) 2 SCC 311, where a 13 years old girl had been raped and killed by a 22 years old boy, the Hon'ble Supreme Court converted the sentence of death to a sentence of life imprisonment. Paragraphs 25 and 26 of the aforesaid judgment read as under:-

"25. *Though we agree that the crime committed is of an abominable nature, it cannot be said to be of such a brutal, depraved, heinous or diabolical nature so as to fall into the category of the rarest of rare cases and invite punishment with death. We also find ourselves unable to agree with the view of the Courts that the appellant is such a menace to society that he cannot be allowed to stay alive. On the other hand, we are of the view that the prosecution did not establish that the appellant was beyond reform, especially given his young age. We are also mindful of the appellant's lack of criminal antecedents prior to the commission of this crime, and of his post incarceration conduct, which in no way suggests the impossibility of his reform. It would be pertinent to observe at this point that although the Trial Court noted his lack of remorse during the hearing, and the High Court noted his lack of remorse after committing the crime, as he was found calmly wandering around the locality, this does not in any way indicate that there is no scope of reform for the appellant.*

26. Thus, neither the circumstances of the crime nor the circumstances of the criminal, i.e. the appellant, would go to show that the instant matter falls into the category of the rarest of rare cases, or that the sentence of life imprisonment is unquestionably foreclosed and grossly disproportionate. Therefore, in the totality of the facts and circumstances of this case, we find it fit to commute the death sentence of the appellant to life imprisonment.

59. In ***Vijay Raikwar*** Vs. ***State of Madhya Pradesh***, (2019) 4 SCC 210, where a minor girl of seven and half years of age was raped and

murdered by the accused, aged about 19 years, the Hon'ble Supreme Court converted the sentence of death to a sentence of life imprisonment. Paragraph 10 of the aforesaid judgment reads as under:-

> *"10. Now, so far as the request and the prayer made on behalf of the accused to commute the death sentence to life imprisonment is concerned, having heard the learned counsel appearing on behalf of the accused on the question of death sentence imposed by the learned Sessions Court, confirmed by the High Court and considering the totality and circumstances of the case and the decisions of this Court in the cases of Bachan Singh (supra) and Shyam Singh (supra), we are of the opinion that the present case does not fall within the category of 'rarest of rare case' warranting death penalty. We have considered each of the circumstance and the crime as well as the facts leading to the commission of the crime by the accused. Though, we acknowledge the gravity of the offence, we are unable to satisfy ourselves that this case would fall in the category of 'rarest of rare case' warranting the death sentence. The offence committed, undoubtedly, can be said to be brutal, but does not warrant death sentence. It is required to be noted that the accused was not a previous convict or a professional killer. At the time of commission of offence, he was 19 years of age. His jail conduct also reported to be good. Considering the aforesaid mitigating circumstances and considering the aforesaid decisions of this Court, we think that it will be in the interest of justice to commute the death sentence to life imprisonment."*

60. In ***Raju*** vs. ***State of Haryana***, (2001) 9 SCC 50, the appellant had committed the rape and murder of the 11 year old girl after enticing her with toffees. On his arrest, his shirt and and pant had bloodstains and his underwear had blood and seminal stains. The accused gave no explanation of the blood stains. The Hon'ble Supreme Court held that as the appellant appeared to have acted without premeditation in giving two brick blows to the deceased after she threatened to expose him, and had no criminal antecedents, and it could not be concluded that he would be a danger to society, the sentence of death awarded by the Courts below be commuted to a sentence of imprisonment for life.

61. Coming to the facts of the instant case, we do not think that this is a ''rarest of rare case' in which death penalty should be imposed on the accused. The manner in which the deceased was raped and thereafter murdered may be brutal, but it could have been a momentary lapse on the part of the accused. He had no premeditation for commission of the offence. The offence may look heinous, but, under no circumstances, it can be said to be a rarest of rare case. The accused who has been awarded death sentence was aged about 19 years only at the time of commission of offence and there is no evidence that the accused had been involved in any other criminal case previously and it cannot be said that he would be a menace to society in future.The prosecution did not establish that he was beyond reform. No material has been placed before us to draw such a conclusion. In our opinion, the accused should have been given a chance by the trial court to reform himself. Therefore, the Special Court had committed gross error in not following the guidelines issued by the Supreme Court in case of ***Bachan Singh*** vs. ***State of Punjab*** *(supra)* and in the case of***Machhi Singh and Ors.*** vs. ***State of Punjab*** *(supra)* by not comparing the mitigating circumstances with the aggravating circumstances and also the fact that the accused was only 19 years of age at the time of commission of offence.

62. On these considerations, we are of the view that the judgment of the trial judge, dated 14.01.2022 convicting the accused as above, is upheld. However, considering the fact that accused was aged only about 19 years at the time of commission of offence and is in the prime youth of his life, we are of the view that the death penalty awarded to him should be converted to imprisonment for life and direct that the life sentence of the accused will extend to his whole life subject to any remission or commutation at the instance of the Government.

63. Accordingly, the appeal is partly allowed. The impugned order of sentence dated 17.02.2022 is modified to the extent that the death penalty

awarded to the accused under section 302 of the Indian Penal Code is converted to life imprisonment and direct that the life sentence of the accused will extend to his whole life subject to any remission or commutation at the instance of the Government.

64. The reference No.1 of 2022 for confirming the death sentence, is rejected.

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

M/s SS Construction Company ...Petitioner

Versus

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

For the petitioner: Mr. Ramakant Sharma, Advocate.

For the respondents: Mr. Anup Rattan, Advocate General, with Mr. Shiv Pal Manhans, Additional Advocate General and Mr. Rajat Chauhan, Law Officer, for respondents No. 1 to 4.

Mr. Neeraj Gupta, Senior Advocate, with Mr. Ajeet Pal Singh Jaswal, Advocate, for respondent No. 5.

Mr. Shashipal Dhiman, Executive Engineer, HPPWD Bangana, District Una, H.P., present in person.

CWP No. 7492 of 2022
Reserved on: 21.12.2022
Decided on : 11.01.2023

Constitution of India, 1950- Article 226- Quashing and setting aside of technical bid being contrary to the provisions of Standard Bidding Document**- Held-** Respondent No. 4 has exceeded its power by not adhering to the terms and conditions of Standard Bidding Document and acts of Respondent No. 4 are clothed with arbitrariness and violative of the concept of level playing field- Petition allowed and letter of intent awarding the construction work is set aside. (Paras 63, 64, 65)

Cases referred:

B.S.N. Joshi & Sons Ltd. vs. Nair Coal Services Ltd. & others, (2006) 11 SCC 548;

Global Energy Ltd. & another vs. Adani Exports Ltd. & others, (2005) 4 SCC 435;
Michigan Rubber (India) Ltd. vs. State of Karnataka & others (2012) 8 SCC 216;
Reliance Energy Ltd. & another vs. Maharashtra State Road Development Corpn. Ltd. & others (2007) 8 SCC 1;
Tata Cellular versus Union of India, (1994) 6 Supreme Court Cases 651;
The Silppi Constructions Contractors vs. Union of India & anr., 2019 (11) Scale 592;
Uflex Limited versus Government of Tamil Nadu and others, (2022) 1 SCC 165;

The following judgment of the Court was delivered:

Virender Singh, Judge.

Petitioner-M/s. SS Construction Company has invoked the extra ordinary jurisdiction of this Court, under Article 226 of the Constitution of India, seeking the following substantive reliefs:

> *"I. That the technical bid dated 10.10.2022 at Annexure P-8 may very kindly be quashed and set aside to the extent that the technical bid of the respondent No. 5 Company has been accepted by the respondents No. 3 & 4 contrary to the provisions of standard bidding document at Annexure P-5, in the interest of justice.*
>
> *II. That the Financial bid dated 10.10.2022 and letter of intent issued in favour of respondent No. 5 may kindly be summoned from the respondents No. 3 & 4 and after perusing the same may very kindly be quashed and set aside and the respondents No. 3 & 4 may very kindly be restrained from award of work of RIDF XXVII for construction and maintenance of road in M/T on link road Saily to Handola Via Kamoon Pattian and construction of link road Saili to Mahadev mandir via GPS Laubowal from 0/0 to 14/640 Kms to the respondent No. 5 Company, in the interest of justice."*

2. Factual position, as pleaded, in the writ petition, is that the petitioner-firm is a Government Contractor in Himachal Pradesh.

3. Respondents No. 2 to 4 had uploaded the Standard Bidding Document for the construction of road in M/T on link road Saily to Handola via Kamoon Pattian and construction of link road Saili to Mahadev mandir via GPS Laubowal from 0/0 to 14/640 (SH: Formation Cutting, CWO retaining wall, Wire crate, CS works CC pavement, P/L GCB, WMM, M/T Road side drain, parapets, P/F km stone and sign board in Km 0/000 to 14/640) under NABARD RIDF/XXVII.

4. In this regard, respondent No. 4, invited online tenders on 1st July, 2022, for the construction of M/T on link road Saily to Handola via Kamoon Pattian and construction of link road Saili to Mahadev mandir via GPS Laubowal from 0/0 to 14/640 (SH: Formation Cutting, CWO retaining wall, Wire crate, CS works CC pavement, P/L GCB, WMM, M/T Road side drain, parapets, P/F km stone and sign board in Km 0/000 to 14/640) under NABARD RIDF/XXVII, for construction and maintenance.

5. The online tenders were invited from 18th July, 2022 to 1st August, 2022. Thereafter, the physical submission of EMD and cost of tender documents was fixed for 2nd August, 2022. Date for opening of technical bid was fixed as 2nd August, 2022.

6. In response to the said notice inviting tender, the petitioner-firm has also submitted its bid, alongwith other bidders. However, the said tender has been cancelled by respondents No. 3 and 4, on 17th September, 2022 and the same was again notified. Consequently, the petitioner-firm had again made its bid. Respondent No. 4 opened the technical bid on 10th October 2022, whereby the technical bid of the petitioner as well as respondent No. 5 was accepted by respondents No. 3 and 4.

7. According to the petitioner, respondent No. 5 was not eligible in view of Clause 3.2 of the instruction to bidder (ITB) and Clause 31.3 of the Standard Bidding Document, as the affidavit sworn by the authorized representative of respondent No. 5 was contrary to the factual position.

Moreover, respondent No. 5 has submitted the certificate of quality control consultant after the opening of the technical bid.

8. Similarly, the petitioner has also pleaded that the technical bid was opened on 10th October, 2022 at 5.13 p.m. and financial bid was opened on 11th October, 2022 at 11.00 a.m., which, according to the stand of the petitioner, is in contravention of Clause 22.6 of the bid opening and evaluation of the Standard Bidding Document.

9. According to the petitioner, respondent No. 4 had pointed out that agreement with the quality control consultant has not been attached at the time of submission of bid, however, on the same day, i.e. on 10th October, 2022, it has been informed by the petitioner to respondent No. 4 that the said document has already been attached in pdf format.

10. Highlighting Clause 3.2 of the Standard Bidding Document, it is the case of the petitioner that the above clause provides that the bidder shall not be debarred/held ineligible for corrupt and fraudulent practices by the Central Government or the State Government or any public undertaking, autonomous body or Government authority.

11. In the similar way, Clause 31.3 of the General Conditions of Contract of the Standard Bidding Document has also been highlighted, by virtue of which, the contractor was bound to engage a competent and independent quality control consultant or any Engineer, in the rank of Executive Engineer and above, retired from HPPWD, to be approved by the employer/Superintending Engineer to exercise effective control over the construction operations, so as to produce quality works.

12. It is the further case of the petitioner that respondent No. 5 was not eligible to participate in the bid as it was debarred from participating in any tender under HPPWD, Hamirpur Zone, for a period of six months, with effect from 30th November, 2021, whereas, the contrary factual position has been mentioned in the affidavit, submitted by respondent No. 5. Respondent

No. 5 could not furnish the certificate from the eligible quality control consultant alongwith the bid and its bid has wrongly been accepted by respondents No. 3 and 4 .

13. Highlighting another violation, the petitioner has pleaded that Clause 22.6 of the bid opening and the evaluation of the Standard Bidding Document, provides that the result of the evaluation of Part-I of the bid shall be published on e-procurement system by giving the opportunity to file such complaint, within a period of five working days. The complaint, if any, is liable to be considered before opening Part-II of the bid.

14. The petitioner has also made the representation to respondents No. 1 to 4 with a request to reject the bid of respondent No. 5, but, respondents No. 3 and 4, without verifying the documents, firstly accepted the technical bid of respondent No. 5 and later on, letter of intent has been issued to it despite the irregularities, so highlighted, as well as, the concealment of material facts by respondent No. 5.

15. Alleging that the act of respondents No. 3 and 4, is contrary to the provisions of Standard Bidding Document, the reliefs, as claimed in the petition, have been sought.

16. When put on notice, the stand of the petitioner has been contested by the respondents. Respondents No. 1 to 4 have filed their joint reply, wherein, they have taken various preliminary objections, viz., the petition is not maintainable; the petitioner has no right to file the present petition; the petitioner has no *locus standi* to file the present petition; the relief, as sought, by the petitioner, is not sustainable in the eyes of law.

17. It is the stand of respondents No. 1 to 4 that the tender, as detailed in the petition, was floated on 1st July, 2022. The technical part of the bid was opened on 5th August, 2022. The same was technically evaluated by the circle Level Evaluation Committee on 1st September, 2022 and the proceedings of the same were uploaded on the e-procurement portal on 7th

September, 2022. The petitioner, respondent No. 5 and six other bidders had participated in the e-tender process, at the first instance, however, the same was cancelled by respondent No. 4, on 16th September, 2022.

18. The petitioner has never raised any question regarding the disqualification of respondent No. 5, in the tender floated, at the first instance, i.e. with effect from 5th August, 2022 (date of opening of bid) till 16th September, 2022 (cancellation of the tender).

19. The tender, thereafter, was re-invited by respondent No. 4 on 16th September, 2022, published on e-procurement portal with effect from 22nd September, 2022 to 6th October, 2022. Three persons had submitted their technical bid, which was downloaded on 7th October, 2022 by the Tender Opening Committee and was sent to 15th Circle, HPPWD, Una for technical evaluation.

20. The clarification was sought from respondent No. 5 by respondent No. 4, as well as, from the petitioner. In response to the said query, respondent No. 5, as well as, the petitioner has responded on 10th October, 2022 through e-mail. After the evaluation by the Tender Evaluation Committee, at the Circle Level, the tenders of three persons were found eligible and thereafter, the proceedings of technical bid evaluation were uploaded on the e-procurement portal on 10th October, 2022 at 05.13 p.m. and financial bid of all the eligible bidders was opened on 11th October, 2022 at 01.34 p.m.

21. Explaining Clause 22.6 of the Standard Bidding Document, it is the case of the respondents that the said clause gives an opportunity to the non-responsive bidders to file complaint/grievances. Since, in this case, no bidder was found to be non-responsive and all the bidders were found to be responsive, so five days' time period was not granted. The project under consideration is also stated to be sanctioned under NABARD RIDF-XXVII and technical sanction of ₹ 1118.09 Lakh has already been accorded.

22. Another ground regarding the non-compliance of Clause 22.6 of the Standard Bidding Document has also been pleaded that the respondents were apprehending that the "model code of conduct" for ensuing Vidhan Sabha Elections, 2022, will be promulgated, if the time, as per Clause 22.6 of the Standard Bidding Document, is granted for objections.

23. The other reason, which has been assigned in the reply, is that the time has not been granted just to achieve the target fixed by NABARD, for the project in question.

24. The prayer of the petitioner has further been opposed on the ground that the petitioner had represented on 11th October, 2022, at 3.55 p.m., after getting the knowledge, on opening of the financial part of the bid at 1.34 p.m., that it was not a successful bidder, being L-2. The petitioner had raised its objection that respondent No. 5 had not attached the documents relating to quality control with its bid. On 12th October, 2022, the petitioner had again represented to respondents No. 1 to 4 that respondent No. 5, the lowest bidder, has not uploaded the required documents and it has been debarred by the Chief Engineer (HZ), HPPWD, Hamirpur, for a period of six months.

25. Admitting the fact that the Chief Engineer (HZ), HPPWD, Hamirpur, had debarred respondent No. 5 from participating in any tender under Hamirpur Zone, for a period of six months, from the date of the issuance of the order, i.e. 30th November, 2021, the stand of respondents No. 1 to 4 is that the period, for which, respondent No. 5 has been debarred, has already been over on 29th May, 2022, as such, respondent No. 5 can participate in any tender in Hamirpur Zone.

26. Relying upon the award letter, uploaded by respondent No. 5, with its bid, the instances have been cited that respondent No. 5 had also participated in the tendering of HPPWD Sangrah Division and Sundernagar Division. According to respondents No. 1 to 4, respondent No. 5 was not

blacklisted, but, was debarred only for a period of six months and the said time has already been over.

27. So far as engagement of the consultant for quality control is concerned, respondents No. 1 to 4, while admitting that the agreement with the quality control consultant was not attached by respondent No. 5, at the time of submission of the bid, have relied upon Clause 31.3 of the Standard Bidding Document, to contend that the department can ask any clarification from the bidder for technical evaluation, as per the instructions issued by respondent No. 1, vide letter, dated 8th March, 2022.

28. It is the further stand of respondents No. 1 to 4 that all the bidders, in the present case, were found responsive in technical bid evaluation at Circle Level and accordingly, the financial part of the bid was opened on 11th October, 2022 at 1.34 p.m., however, the financial evaluation of the tender could not be uploaded on the website due to network problem, heavy rush of work and shortage of staff in HPPWD Division. The representation of the petitioner, dated 14th October, 2022, is stated to have been duly replied by respondent No. 4 on 19th October, 2022.

29. Refuting the allegation of the petitioner that the financial bid has been opened in a haste manner, it is the stand of respondents No. 1 to 4 that, since all the bidders were qualified in the Circle Level Technical Evaluation and no one was non-responsive bidder, to whom, time was to be granted, to file complaint/grievances, as per the instructions contained in the Standard Bidding Document, it cannot be said that they had opened the financial bid, in a haste manner.

30. It has been submitted on behalf of respondents No. 1 to 4 that respondent No 4 had requested respondent No. 5 on 12th October, 2022, to start the execution of the work, but, in view of the order, dated 21st October, 2022, passed by this Court, the contractor has been requested to stop the execution of the work.

31. On all these submissions, a prayer has been made by respondents No. 1 to 4 to dismiss the writ petition.

32. Respondent No. 5 has filed its reply, taking the preliminary objections that the writ is not maintainable; the petitioner is having no fundamental right to file the present writ petition; the petitioner had raised its grievances after opening of the technical bid and the financial bid.

33. On merit, supporting the stand, as taken by respondents No. 1 to 4, it is the case of respondent No. 5 that all the documents, which were submitted by it, were in order and have rightly been considered by respondents No. 1 to 4. The petitioner, as well as, respondent No. 5 had participated in the tendering process. Respondents No. 3 and 4, after accepting the technical bid, had proceeded to open the financial bid on 11th October, 2022, which was found to be in order and in conformity with the procedure laid down in the Standard Bidding Document. Clause 22.6 of the Standard Bidding Document is stated to be not applicable, in the present case. The other contents of the writ petitions have also been denied.

34. The petitioner has filed the rejoinders to the replies filed by the respondents, denying the stand taken by them and re-asserting that of the writ petition.

35. Before dwelling upon the controversy involved, in the present case, the material question, which arises for consideration before this Court, is, about the scope of interference by this Court, in tender matters.

36. The scope of judicial review in tender matters has elaborately been discussed by the three Judges' Bench of the Hon'ble Supreme Court in case titled as **Tata Cellular versus Union of India,** reported in **(1994) 6 Supreme Court Cases 651.** The relevant portion of the judgment, as contained in paras 70 to 94, is reproduced, as under:

> *"70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by*

government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the government tries to get the best person or the best a quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

71. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.

72. Lord Scarman in Nottinghamshire County council v. secretary of State for the Environment, 1986 AC 240, 251, proclaimed :

> *" 'Judicial review' is a great weapon in the hands of the judges; but the judges must observe the constitutional limits set by our parliamentary system upon the exercise of this beneficial power."*

Commenting upon this Michael Supperstone and James Goudie in their work Judicial Review (1992 Edn.) at p. 16 say :

> *"If anyone were prompted to dismiss this sage warning as a mere obiter dictum from the most radical member of the higher judiciary of recent times, and therefore to be treated as an idiosyncratic aberration, it has received the endorsement of the Law Lords generally. The words of Lord Scarman were echoed by Lord Bridge of Harwich, speaking on behalf of the Board when reversing an interventionist decision of the New Zealand court of Appeal in Butcher v. Petrocorp Exploration Ltd. 18/3/1991."*

73. Observance of judicial restraint is currently the mood in England. The judicial power of review is exercised to rein in any unbridled executive functioning. The restraint has two contemporary manifestations. One is the ambit of judicial intervention; the other covers the scope of the courts ability to quash an administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action.

74. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself.

75. In Chief Constable of the North Wales Police v. Evans, (1982) 3 All ER 141, 154, Lord Brightman said:

> *"Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made.*
>
> * * *
>
> *Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."*

In the same case Lord Hailsham commented on the purpose of the remedy by way of judicial review under RSC, Ord. 53 in the following terms :

> *"This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practised at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the*

bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner."

In R. v. Panel on Take-overs and Mergers, ex p Datafin plc, (1987) 1All ER 564, Sir John Donaldson, M.R. commented:

"An application for judicial review is not an appeal."

In Lonrho plc v. Secretary of State for Trade and Industry, (1989) 2 All ER 609, Lord Keith said:

"Judicial review is a protection and not a weapon."

It is thus different from an appeal. When hearing an appeal the court is concerned with the merits of the decision under appeal. In Amin v. Entry Clearance Officer, (1983) 2 All ER 864, Lord Fraser observed that:

"Judicial review is concerned not with the merits of a decision but with the manner in which the decision was made.... Judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing the administrative decision without substituting its own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that of the administrative officer."

76. In R. v. Panel on Take-overs and Mergers, ex p in Guinness plc, (1990) 1 QB 146, Lord Donaldson, M.R. referred to the judicial review jurisdiction as being supervisory or 'longstop' jurisdiction. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing the abuse of power, be itself guilty of usurping power.

77. <u>The duty of the court is to confine itself to the question of legality. Its concern should be :</u>

1. *<u>Whether a decision-making authority exceeded its powers?</u>*

2. *<u>Committed an error of law,</u>*

3. *<u>committed a breach of the rules of natural justice,</u>*

4. reached a decision which no reasonable tribunal would have reached or,

5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under :

(i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in R. v. secretary of State for the Home Department, ex Brind, (1991) 1 AC 696, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

78. What is this charming principle of Wednesbury unreasonableness? Is it a magical formula? In R. v. Askew, (1768) 4 Burr 2186, Lord Mansfield considered the question whether mandamus should be granted against the College of Physicians. He expressed the relevant principles in two eloquent sentences. They gained greater value two centuries later :

"It is true, that the judgment and discretion of determining upon this skill, ability, learning and sufficiency to exercise and practise this profession is trusted to the College of Physicians and this court will not take it from them, nor interrupt them in the due and proper exercise of it. But their

conduct in the exercise of this trust thus committed to them ought to be fair, candid and unprejudiced; not arbitrary, capricious, or biased; much less, warped by resentment, or personal dislike."

79. To quote again, Michael Supperstone and James Goudie; in their work Judicial Review (1992 Edn.) it is observed at pp. 119 to 121 as under :

"The assertion of a claim to examine the reasonableness been done by a public authority inevitably led to differences of judicial opinion as to the circumstances in which the court should intervene. These differences of opinion were resolved in two landmark cases which confined the circumstances for intervention to narrow limits. In Kruse v. Johnson a specially constituted divisional court had to consider the validity of a bye-law made by a local authority. In the leading judgment of Lord Russell of Killowen, C.J., the approach to be adopted by the court was set out. Such bye-laws ought to be benevolently interpreted, and credit ought to be given to those who have to administer them that they would be reasonably administered. They could be held invalid if unreasonable : Where for instance bye-laws were found to be partial and unequal in their operation as between different classes, if they were manifestly unjust, if they disclosed bad faith, or if they involved such oppressive or gratuitous interference with the rights of citizens as could find no justification in the minds of reasonable men. Lord Russell emphasised that a bye-law is not unreasonable just because particular judges might think it went further than was prudent or necessary or a convenient.

In 1947 the court of Appeal confirmed a similar approach for the review of executive discretion generally in Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn This case was concerned with a complaint by the owners of a cinema in Wednesbury that it was unreasonable of the local authority to licence performances on Sunday only subject to a condition that no children under the age of 15 years shall be admitted to any entertainment whether accompanied by an adult or not. In an extempore judgment, Lord Greene, M.R, drew attention to the fact that the word unreasonable had often been used in a sense which comprehended different grounds of review. (At p. 229, where it was said that the dismissal of a teacher for

having red hair (cited by Warrington, L.J. in Short v. Poole Corpn. as an example of a frivolous and foolish reason) was, in another sense, taking into consideration extraneous matters, and might be so unreasonable that it could almost be described as being done in bad faith; see also R. v. Tower Hamlets London Borough council, ex p Chetnik Developments Ltd. Ch. 4, p. 73, supra). He summarised the principles as follows:

> *'The Court is entitled to investigate the action of the local authority with a view to seeing whether or not they have taken into account matters which they ought not to have taken into account, or, conversely, have refused to take into account or neglected to take into account matter which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority had kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority has contravened the law by acting in excess of the power which Parliament has confided in them.'*

This summary by Lord Greene has been applied in countless subsequent cases.

"The modern statement of the principle is found in a passage in the speech of Lord Diplock in council of Civil Service Unions v. Minister for Civil Service :

By "irrationality" I mean what can now be succinctly referred to as "Wednesbury unreasonableness". (Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at. "

80. At this stage, The Supreme Court Practice, 1993, Vol. 1, pp. 849850, may be quoted :

> *"4. Wednesbury principle. A decision of a public authority will be liable to be quashed or otherwise dealt with by an appropriate order in judicial review proceedings where the court concludes that the decision is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it. (Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn. per Lord Greene, M.R.)"*

81. Two other facets of irrationality may be mentioned.

(1) It is open to the court to review the decision-maker's evaluation of the facts. The court will intervene where the facts taken as a whole could not logically warrant the conclusion of the decision-maker. If the weight of facts pointing to one course of action is overwhelming, then a decision the other way, cannot be upheld. Thus, in Emma Hotels Ltd. v. secretary of State for Environment the secretary of State referred to a number of factors which led him to the conclusion that a non-resident's bar in a hotel was operated in such a way that the bar was not an incident of the hotel use for planning purposes, but constituted a separate use. The Divisional court analysed the factors which led the secretary of State to that conclusion and, having done so, set it aside. Donaldson, L.J. said that he could not see on what basis the Secretary of State had reached his conclusion.

(2) A decision would be regarded as unreasonable if it is impartial and unequal in its operation as between different classes. On this basis in R. v. Barnet London Borough council, ex p Johnson the condition imposed by a local authority prohibiting participation by those affiliated with political parties at events to be held in the authority's parks was struck down.

82. Bernard Schwartz in Administrative Law, 2nd Edn., p. 584 has this to say:

"If the scope of review is too broad, agencies are turned into little more than media for the transmission of cases to the courts. That would destroy the values of agencies created to

secure the benefit of special knowledge acquired through continuous administration in complicated fields. At the same time, the scope of judicial inquiry must not be so restricted that it prevents full inquiry into the question of legality. If that question cannot be properly explored by the judge, the right to review becomes meaningless. It makes judicial review of administrative orders a hopeless formality for the litigant. ... It reduces the judicial process in such cases to a mere feint.'

Two overriding considerations have combined to narrow the scope of review. The first is that of deference to the administrative expert. In chief justice Neely's words :

'I have very few illusions about my own limitations as a judge and from those limitations I generalise to the inherent limitations of all appellate courts reviewing rate cases. It must be remembered that this court sees approximately 1262 cases a year with five judges. I am not an accountant, electrical engineer, financier, banker, stock broker, or systems management analyst. It is the height of folly to expect judges intelligently to review a 5000 page record addressing the intricacies of public utility operation.'

It is not the function of a judge to act as a superboard, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator.

The result is a theory of review that limits the extent to which the discretion of the expert may be scrutinised by the non-expert judge. The alternative is for the court to overrule the agency on technical matters where all the advantages of expertise lie with the agencies. If a court were to review fully the decision of a body such as state board of medical examiners 'it would find itself wandering amid the maze of therapeutics or boggling at the mysteries of the pharmacopoeia'. Such a situation as a state court expressed it many years ago 'is not a case of the blind leading the blind but of one who has always been deaf and blind insisting that he can see and hear better than one who has always had his eyesight and hearing and has always used them to the utmost advantage in ascertaining the truth in regard to the matter in question'.

The second consideration leading to narrow review is that of calendar pressure. In practical terms it may be the more important consideration. More than any theory of limited review it is the pressure of the judicial calendar combined with the elephantine bulk of the record in so many review proceedings which leads to perfunctory affirmance of the vast majority of agency decisions."

83. A modern comprehensive statement about judicial review by Lord Denning is very apposite; it is perhaps worthwhile noting that he stresses the supervisory nature of the jurisdiction :

> *"Parliament often entrusts the decision of a matter to a specified person or body, without providing for any appeal. It may be a judicial decision, or a quasi-judicial decision, or an administrative decision. Sometimes Parliament says its decision is to be final. At other times it says nothing about it. In all these cases the courts will not themselves take the place of the body to whom Parliament has entrusted the decision. The courts will not themselves embark on a rehearing of the matter. See Healey v. Minister of Health But nevertheless, the courts will, if called upon, act in a supervisory capacity. They will see that the decision-making body acts fairly. See H.K. (an infant), Re and R. v. Gaming Board for Great Britain, ex p Benaim and Khaida The courts will ensure that the body acts in accordance with the law. If a question arises on the interpretation of words, the courts will decide it by declaring what is the correct interpretation. See Punton v. Ministry of Pensions and National Insurance And if the decision-making body has gone wrong in its interpretation they can set its order aside. See Ashbridge Investments Ltd. v. Minister of Housing and Local government. (I know of some expressions to the contrary but they are not correct). If the decision-making body is influenced by considerations which ought not to influence it; or fails to take into account matters which it ought to take into account, the court will interfere. See Padfield v. Minister of Agriculture, Fisheries and Food If the decision-making body comes to its decision on no evidence or comes to an unreasonable finding so unreasonable that a reasonable person would not have come to it then again the courts will interfere. See*

Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn If the decision making body goes outside its powers or misconstrues the extent of its powers, then, too the courts can interfere. See Anisminic Ltd. v. Foreign Compensation Commission And, of course, if the body acts in bad faith or for an ulterior object, which is not authorised by law, its decision will be set aside. See Sydney Municipal council v. Campbell In exercising these powers, the courts will take into account any reasons which the body may give for its decisions. If it gives no reasons in a case when it may reasonably be expected to do so, the courts may infer that it has no good reason for reaching its conclusion, and act accordingly. See Padfield case (as AC pp. 1007, 106141."

84. We may usefully refer to Administrative Law Rethinking Judicial Control of Bureaucracy by Christopher F. Ediey, JR 1990 Edn.), At p. 96 it is stated thus:

"A great deal of administrative law boils down to the scope of review problem; defining what degree of deference a court will accord to an agency's findings, conclusions, and choices, including choice of procedures. It is misleading to speak of a 'doctrine', or 'the law', of scope of review. It is instead just a big problem, that is addressed piecemeal by a large collection of doctrines. Kenneth Culp Davis has offered a condensed summary of the subject : 'Courts usually substitute (their own) judgment on the kind of questions of law that are within their special competence, but on other question they limit themselves to deciding reasonableness; they do not clarify the meaning of reasonableness but retain full discretion in each case to stretch it in either direction.' "

85. In Universal Camera Corpn. v. National Labor Relations Board Justice Frankfurter stated :

"A formula for judicial review of administrative action may afford grounds for certitude but cannot assure certainty of application. Some scope for judicial discretion in applying the formula can be avoided only by falsifying the actual process of judging or by using the formula as an instrument of futile casuistry. It cannot be too often repeated that judges are not automata. The ultimate reliance for the fair operation of any standard is a judiciary of high competence and character and

the constant play of an informed professional critique upon its work. Since the precise way in which courts interfere with agency findings cannot be imprisoned within any form of words, new formulas attempting to rephrase the old are not likely to be more helpful than the old. There are no talismanic words that can avoid the process of judgment. The difficulty is that we cannot escape, in relation to this problem, the use of undefined defining terms."

86. An innovative approach is made by Clive Lewis as to why the courts should be slow in quashing administrative decisions (in his Judicial Remedies in Public Law 1992 Edn. at pp. 294-95. The illuminating passage reads as under:

"The courts now recognise that the impact on the administration is relevant in the exercise of their remedial jurisdiction. Quashing decisions may impose heavy administrative burdens on the administration, divert resources towards reopening decisions, and lead to increased and unbudgeted expenditure. Earlier cases took the robust line that the law had to be observed, and the decision invalidated whatever the administrative inconvenience caused. The courts nowadays recognise that such an approach is not always appropriate and may not be in the wider public interest. The effect on the administrative process is relevant to the courts' remedial discretion and may prove decisive. This is particularly the case when the challenge is procedural rather than substantive, or if the courts can be certain that the administrator would not reach a different decision even if the original decisions were quashed. Judges may differ in the importance they attach to the disruption that quashing a decision will cause. They may also be influenced by the extent to which the illegality arises from the conduct of the administrative body itself, and their view of that conduct.

The current approach is best exemplified by R. v. Monopolies and Mergers Commission, exp Argyll Group plc."

87. Sir John Donaldson, M.R. in R. v. Monopolies and Mergers Commission, ex p Argyll Group plc observed thus :

"We are sitting as a public law court concerned to review an administrative decision, albeit one which has to be reached by

the application of judicial or quasi-judicial principles. We have to approach our duties with a proper awareness of the needs of public administration. I cannot catalogue them all but, in the present context, would draw attention to a few which are relevant.

Good public administration is concerned with substance rather than form.

... Good public administration is concerned with the speed of decision, particularly in the financial field.

... Good public administration requires a proper consideration of the public interest. In this context, the secretary of State is the guardian of the public interest.

... Good public administration requires a proper consideration of the legitimate interests of individual citizens, however rich and powerful they may be and whether they are natural or juridical persons. But in judging the relevance of an interest, however legitimate, regard has to be had to the purpose of the administrative process concerned.

... Lastly, good public administration requires decisiveness and finality, unless there are compelling reasons to the contrary."

88. We may now look at some of the pronouncements of this court including the authorities cited by Mr Ashoke Sen. Fasih Chaudhary v. Director General, Doordarshan was a case in which the court was concerned with the award of a contract for show of sponsored TV serial. At p. 92 in paragraphs 5 and 6 it was held thus :

"It is well settled that there should be fair play in action in a situation like the present one, as was observed by this court in Ram & Shyam Co. v. State of Haryana It is also well settled that the authorities like Doordarshan should act fairly and their action should be legitimate and fair and transaction should be without any aversion, malice or affection. Nothing should be done which gives the impression of favouritism or nepotism. See the observations of this court in Haji T.M. Hassan Rawther v. Kerala Financial Corpn.

While, as mentioned hereinbefore, fair play in action in matters like the present one is an essential requirement, similarly, however, 'free play in the joints' is also a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere as the present one. Judged from that standpoint of view, though all the proposals might not have been considered strictly in accordance with order of precedence, it appears that these were considered fairly, reasonably, objectively and without any malice or ill-will."

89. In G.B. Mahajan v. Jalgaon Municipal council, the concept of reasonableness in administrative law came to be dealt with elaborately by one of us, Venkatachaliah, J. (as he then was). In paragraphs 37 to 41 the court observed thus :

"It was urged that the basic concept of the manner of the development of the real estate and disposal of occupancy rights were vitiated by unreasonableness. It is a truism, doctrinally, that powers must be exercised reasonably. But as Prof. Wade points out :

'The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended. Decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the court's function to look further into its merits. "With the question whether a particular policy is wise or foolish the court is not concerned; it can only interfere if to pursue it is beyond the powers of the authority"…'

In the arguments there is some general misapprehension of the scope of the 'reasonableness' test in administrative law. By whose standards of reasonableness that a matter is to be

decided? Some phrases which pass from one branch of law to another as did the expressions 'void' and 'voidable' from private law areas to public law situations carry over with them meanings that may be inapposite in the changed context. Some such thing has happened to the words 'reasonable', 'reasonableness' etc. In Tiller v. Atlantic Coast Line Rail Road Co , Justice Frankfurter said:

'A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas.'

Different contexts in which the operation of 'reasonableness' as test of validity operates must be kept distinguished. For instance as the arguments in the present case invoke, the administrative law test of 'reasonableness' as the touchstone of validity of the impugned resolutions is different from the test of the 'reasonable man' familiar to the law of torts, whom English law figuratively identifies as the 'man on the Clapham omnibus'. In the latter case the standards of the 'reasonable man', to the extent such a 'reasonable man' is court's creation, is in a manner of saying, a mere transferred epithet. Lord Radcliffe observed : (All ER p. 160)

'By this time, it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is, and must be, the court itself....'

(emphasis supplied)

See Davis Contractors Ltd. v. Fareham U.D.C.

Yet another area of reasonableness which must be distinguished is the constitutional standards of 'reasonableness' of the restrictions on the fundamental rights of which the court of judicial review is the arbiter.

The administrative law test of reasonableness is not by the standards of the 'reasonable man' of the torts law. Prof. Wade says :

'This is not therefore the standard of "the man on the Clapham omnibus". It is the standard indicated by a true construction of the Act which distinguishes between what the statutory authority may or may not be authorised to do. It distinguishes between proper use and improper abuse of power. It is often expressed by saying that the decision is unlawful if it is one to which no reasonable authority could have come. This is the essence of what is now commonly called "Wednesbury unreasonableness", after the now famous case in which Lord Greene, M.R. expounded it.' "

(emphasis supplied)

90. Referring to the doctrine of unreasonableness. Prof. Wade says in Administrative Law (supra):

"The point to note is that a thing is not unreasonable in the legal sense merely because the court thinks it is unwise."

91. In Food Corpn. of India v. Karndhenu Cattle Feed Industries

"In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law : A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fairplay in action'."

92. In Sterling Computers Limited v. M&N Publications Ltd, this court observed thus : (SCC p. 455, para 12)

"In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue. But even in such matters they have to follow the norms recognised by courts while dealing with public property. It is not possible for courts to question and adjudicate every decision taken by an authority, because

many of the government Undertakings which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by Justice Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of 'play in the joints' to the executive."

93. In Union of India v. Hindustan Development Corpn., this court held thus : (SCC p. 515, para 9)

"... the Government had the right to either accept or reject the lowest offer but that of course, if done on a policy, should be on some rational and reasonable grounds. In Erusian Equipment & Chemicals Ltd. v, State of W.B. this court observed as under :(SCC p. 75, para 17)

'When the Government is trading with the public, "the democratic form of government demands equality and absence of arbitrariness and discrimination in such transactions". The activities of the government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure.' "

94. The principles deducible from the above are :

(1) <u>The modem trend points to judicial restraint in administrative action.</u>

(2) <u>The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.</u>

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by malaf ides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

(self emphasis supplied)

37. This view has again been reiterated by a two Judges' Bench of the Hon'ble Supreme Court in case titled as **Global Energy Ltd. and another versus Adani Exports Ltd. and others,** reported in **(2005) 4 Supreme Court Cases 435.** The relevant para-10 of the judgment is reproduced, as under:

"*10. The principle is, therefore, well settled that the terms of the invitation to tender are not open to judicial scrutiny and the Courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice. This being the position of law, settled by a catena of decisions of this Court, it is rather surprising that the learned Single Judge passed an interim direction on the very first day of admission hearing of the writ petition and allowed the appellants to deposit the earnest money by furnishing a bank guarantee or a bankers' cheque till three days after the actual date of opening of the tender.*

The order of the learned Single Judge being wholly illegal, was, therefore, rightly set aside by the Division Bench."

38. Even otherwise, in a later judgment in case titled as **B.S.N. Joshi & Sons Ltd. versus Nair Coal Services Ltd. and others,** reported in **(2006) 11 Supreme Court Cases 548,** the Hon'ble Supreme Court has classified the terms and conditions of the tender notice into two categories : (a) essential conditions; and (b) ancillary or subsidiary conditions. Relevant paras-66 and 67 of the judgment, are reproduced, as under:

"66. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarized as under :

(i) if there are essential conditions, the same must be adhered to;

(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance of another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact

substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;

(vi) the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;

(vii) where a decision has been taken purely on public interest, the Court ordinarily should exercise judicial restraint.

67. Law operating in the field is no long res integra. The application of law, however, would depend upon the facts and circumstances of each case. It is not in dispute before us that there are only a few concerns in India who can handle such a large quantity of coal. Transportation of coal from various collieries to the thermal power stations is essential. For the said purpose, apart from transportation job, the contractor is required to see that coal of appropriate grade is supplied. Appellant herein is in business for the last 52 years. It had been taking part in contracts involving similar jobs in various parts of India. It had all along been quoting a low rate. According to it, despite the same it has been generating profits."

(self emphasis supplied)

39. The Hon'ble Supreme Court, in a decision in case titled as **Reliance Energy Ltd. and another versus Maharashtra State Road Development Corpn. Ltd. and others,** reported in **(2007) 8 Supreme Court Cases 1,** has discussed the necessity to satisfy the test of reasonableness and has elaborated the concept of 'level playing field'. Relevant paras-36 to 39 of the judgment are reproduced, as under:

" 36.We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the Constitution embodies the principle of "non-discrimination". However, it is not a free-

standing provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to "right to life". In includes "opportunity". In our view, as held in the latest judgment of the Constitution Bench of nine-Judges in the case of I.R. Coelho vs. State of Tamil Nadu, (2007) 2 SCC 1, Article 21/14 is the heart of the chapter on fundamental rights. It covers various aspects of life. "Level playing field" is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of "level playing field". We may clarify that this doctrine is, however, subject to public interest. In the world of globalization, competition is an important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally-placed competitors are allowed to bid so as to subserve the larger public interest. "Globalization", in essence, is liberalization of trade. Today India has dismantled licence-raj. The economic reforms introduced after 1992 have brought in the concept of "globalization". Decisions or acts which results in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforestated doctrine of "level playing field". According to Lord Goldsmith - commitment to "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is legal certainty. Article 14 applies to government policies and if the policy or act of the government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional.

37. In Union of India vs. International Trading Co., (2003) 5 SCC 437, the Division Bench of this Court speaking through Pasayat, J. had held :

"14. It is trite law that Article 14 of the Constitution applies also to matters of governmental policy and if the policy or any action of the Government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional.

15.While the discretion to change the policy in exercise of the executive power, when not trammelled by any statute or rule is wide enough, what is imperative and implicit in terms of Article 14 is that a change in policy must be made fairly and should not give impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone irrespective of the field of activity of the State is an accepted tenet. The basic requirement of Article 14 is fairness in action by the state, and non-arbitrariness in essence and substance is the heart beat of fair play. Actions are amenable, in the panorama of judicial review only to the extent that the State must act validly for a discernible reasons, not whimsically for any ulterior purpose. The meaning and true import and concept of arbitrariness is more easily visualized than precisely defined. A question whether the impugned action is arbitrary or not is to be ultimately answered on the facts and circumstances of a given case. A basic and obvious test to apply in such cases is to see whether there is any discernible principle emerging from the impugned action and if so, does it really satisfy the test of reasonableness."

38.When tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. This "legal certainty" is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of "level playing field".

39. In Reliance Airport Developers (P) Ltd. v. Airports Authority of India, (2006) 10 SCC 1, the Division Bench of this Court has held that in matters of judicial review the basic test is to see whether there is any infirmity in the decision-making process and not in the decision itself. This means that the decision-maker must understand correctly the law that regulates his decision-making power and he must give effect to it otherwise

it may result in illegality. The principle of "judicial review" cannot be denied even in contractual matters or matters in which the Government exercises its contractual powers, but judicial review is intended to prevent arbitrariness and it must be exercised in larger public interest. Expression of different views and opinions in exercise of contractual powers may be there, however, such difference of opinion must be based on specified norms. Those norms may be legal norms or accounting norms. As long as the norms are clear and properly understood by the decision-maker and the bidders and other stakeholders, uncertainty and thereby breach of rule of law will not arise. The grounds upon which administrative action is subjected to control by judicial review are classifiable broadly under three heads, namely, illegality, irrationality and procedural impropriety. In the said judgment it has been held that all errors of law are jurisdictional errors. One of the important principles laid down in the aforesaid judgment is that whenever a norm/benchmark is prescribed in the tender process in order to provide certainty that norm/standard should be clear. As stated above "certainty" is an important aspect of rule of law. In the case of Reliance Airport Developers (supra), the scoring system formed part of the evaluation process. The object of that system was to provide identification of factors, allocation of marks of each of the said factors and giving of marks had different stages. Objectivity was thus provided."

(self emphasis supplied)

40. Misuse of the statutory powers has also been held to be one of the grounds, enabling the Court, to interfere in the tender matters, by the Hon'ble Supreme Court in case titled as **Michigan Rubber (India) Limited versus State of Karnataka and others,** reported in **(2012) 8 Supreme Court Cases 216.** Relevant paras-23 and 24 of the judgment are reproduced, as under:

"23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are

amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.

20. Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and

> *(ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226."*
>
> *(self emphasis supplied)*

41. The earlier view taken by the Hon'ble Supreme Court, especially in **Tata Cellular's case (supra),** has again been reiterated in a case titled as **The Silppi Constructions Contractors versus Union of India and anr. etc. etc.,** reported in **2019 (11) Scale 592.** Relevant paras-19 and 20 of the judgment are reproduced, as under:

> *"19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clearcut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.*

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case."

(self emphasis supplied)

42. In a recent decision, in case titled as **Uflex Limited versus Government of Tamil Nadu and others,** reported in **(2022) 1 Supreme Court Cases 165,** the Hon'ble Supreme Court has reiterated the Wednesbury principle. The relevant para-4 of the judgment is reproduced, as under:

"4. In a sense the Wednesbury principle is imported to the concept, i.e., the decision is so arbitrary and irrational that it can never be that any responsible authority acting reasonably and in accordance with law would have reached such a decision. One other aspect which would always be kept in mind is that the public interest is not affected. In the conspectus of the aforesaid principles, it was observed in Michigan Rubber v. State of Karnataka, (2012) 8 SCC 216 as under:

"23. From the above decisions, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior

purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government."
(self emphasis supplied)

43. In view of the legal position, as settled by the Hon'ble Supreme Court, in the decisions, referred to above, now, this Court would advert to the controversy involved, in the present case.

44. The notice inviting for bids was published in a weekly newspaper, namely, '*Giriraj*' (Annexure P-1). Thereafter, vide corrigendum, dated 21st July, 2022 (Annexure P-2), the time period for execution of the work was extended from twelve months to twenty four months. However, vide corrigendum, dated 25th July, 2022 (Annexure P-3), the key dates were re-fixed, which are as under:

1.	*Date of Online Publication*	*18.07.2022 11:00 HRS*
2.	*Document Download Start and End Date*	*18.07.2022 11:30 HRS* *01.08.2022 upto 17:00 HRS*
3.	*Bid Submission Start and End Date*	*18.07.2022 11:30 HRS* *01.08.2022 upto 17:00 HRS*
4.	*Physical Submission of EMD and Cost of Tender Document*	*02.08.2022 upto 10:30 HRS*
5.	*Date of Technical Bid Opening*	*02.08.2022 11:00 HRS*
6.	*Evaluation of Technical Bid*	*Evaluation of technical Bid will be followed after verification of the documents*

45. Thereafter, respondents No. 1 to 4 had uploaded the Standard Bidding Document (Annexure P-5), however, this tender was cancelled on 17th September, 2022, as is evident from Annexure P-6, which is copy of e-mail. Vide Annexure P-7, petitioner-company has again applied, in response to the notice inviting tender, issued by respondents No. 1 to 4.

46. Annexure P-5 has been issued by the department, after following the format of the MoRTH Bidding Document. This document, i.e. Annexure P-5, contains the instructions for the bidders as well as the process, in which the bid is to be opened and evaluated.

47. Clause 3 of the Standard Bidding Document contains the eligibility criteria for the bidders. Relevant instructions 3.1 and 3.2, are reproduced as under:

> ***"3. Eligible Bidders:***
>
> *3.1. This Invitation for Bids is open to all eligible bidders meeting the eligibility criteria as defined in ITB. The applicant should be a private or government-owned legal entity. For*

package size exceeding Rs. 10 Crore, the Joint Ventures are allowed.

3.2. Bidders shall not be under a declaration of ineligibility for corrupt and fraudulent practices by the Central Government, the State Government or any public undertaking autonomous body, authority by whatever name called under the Central or the State Government.*"*

48. Chapter-E of the Standard Bidding Document contains the procedure regarding the bid opening and evaluation of the bid. The relevant clauses 22.1 to 22.6, are reproduced, as under:

"22. Bid Opening:

22.1 *The Employer inviting the bids or its authorised representative will open the bids online and this could be viewed by the bidders also online. In the event of the specified date for the Opening of bids being declared a holiday for the Employer, the Bids will be opened at the appointed time and location on the next working day.*

22.2 The file containing the Part-I of the bid will be opened first.

22.3 *In all cases, the amount of Bid Security, cost of bid documents, and the validity of the bid shall be scrutinized. Thereafter the bidders' names and such other details as the Employer may consider appropriate, will be notified as Part-I bid opening summary by the Authority inviting bids at the online opening. A separate electronic summary of the opening is generated and kept on-line.*

22.4 *The Employer will also prepare minutes of the Bid opening including the information disclosed in accordance with Clause 22.3 of ITB and upload the same for viewing online.*

22.5 *Evaluation of Part-I of bids with respect to Bid Security, qualification information and other information furnished in Part I of the bid in pursuant to Clause 12.1 of ITB, shall be taken up and completed within five working days of the date of*

bid opening, and a list will be drawn up of the qualified bidders whose Part-II of bids are eligible for opening.

22.6 The result of evaluation of Part-I of the Bids shall be made public on e-procurement systems following which there will be a period of five working days during which any bidder may submit complaint which shall be considered for resolution before opening Part-II of the bid."

49. Part I of Section 4 of the Standard Bidding Document contains General Conditions of Contract. As per Clause 31.3 of the said conditions, which is being reproduced hereinbelow, a stipulation is there for the contractors to engage a competent and independent quality control consultant or any Engineer of the rank of Executive Engineer and above retired from HPPWD to be approved by the Employer/Superintending Engineer to exercise the effective control over the construction operation so as to produce the quality work.

"31.3 Consultants for Quality Controls:

It is expected that every Contractor will have proper quality control staff and procedures in order to ensure quality. They are also expected to improve their procedures in line with ISO 9002 and get the certification. The Contractor shall engage a competent and Independent Quality Control Consultant or any Engineer of the rank of Executive Engineer and above retired from HPPWD to be approved by the employer/Superintending Engineer to exercise effective control over the construction operations so as to produce quality works. The fully equipped laboratory shall be set up and trained staff shall be employed by the said consultant in addition to the laboratory/QC staff of the contractor or he will be responsible to conduct required tests from any NABL accredited laboratory at his own cost. The contractor shall supply to the Engineer a copy of his agreement and the fee for quality control should generally be 0.5% of the contract value. The payment of the quality control consultant shall be made by the Engineer direct as per the copy of the agreement supplied

by the contractor. This payment shall be recoverable from the Contractor. The Consultant shall guide the contractor for production of quality works at all stages and shall maintain records, reports and test results so as to indicate the extent of quality achieved. The consultant shall also supply a copy of all these reports, tests and check to the Engineer regularly. The contractor shall also attach a copy of these reports, tests and checks with his bill, without which no payment shall be made. The Employer/Superintending Engineer can also order the change of consultant, if in his opinion he is not performing competently. The Engineer or his representatives will be free to conduct surprise, random or in situ checks so as to have cross check in quality. In case the contractor fails to employ for the whole or part of the period of execution a quality control consultant, the Employer/Superintending Engineer may order employment of consultant at the cost of the Contractor or may order the departmental staff to carry out the quality control checks and a deduction @ 1.5% of the total cost of the work shall be made from the bill of the contractor, even if the actual expenditure incurred on private consultant or departmental quality control is less. Nothing in this clause shall reduce the overall responsibility of the Contractor regarding quality and he shall remain liable for any defect in the execution."

50. The Standard Bidding Document, according to its contents, is the document, containing the terms and conditions for the contractors as well as direction to respondents No. 1 to 4 as to how to award the work to the contractors. Meaning thereby, the conditions, which have been reproduced hereinabove, are essential conditions. By any stretch of imagination, these conditions cannot be said to be ample formalities or ancillary conditions.

51. So far as the condition, as enumerated in Clause 3.2 of the Standard Bidding Document, is concerned, respondent No. 5, in its affidavit, the copy of which has been annexed as Annexure P-13 (colly), has mentioned at serial No. 2 *'That I am not been blacklisted by any Govt. Department or any Govt. undertaking etc.'* This affidavit was attested on 1st October, 2022, whereas, respondent No. 5 has been debarred from participating in any tender under HPPWD, Hamirpur Zone, for a period of six months, from the date of

issue of the order, dated 30th November, 2021. Meaning thereby, important information has been withheld by respondent No. 5, in the requisite affidavit, filed alongwith the tender document. No doubt, on the date of filing of the affidavit, the penalty, so imposed upon respondent No. 5 has ceased to exist, but, the fact of the matter is that this material fact has been withheld by respondent No. 5. Although, these facts have been brought to the notice of Executive Engineer, HHPWD, Bangana, by the petitioner, vide letter, dated 14th October, 2022.

52. Another fact, which has rightly been highlighted, is that in the affidavit, which was sworn by the partner of respondent No. 5, on 1st October, 2022, he has made a false declaration by stating that the firm M/s. Arya Construction Company, has never been blacklisted or debarred by any State Government/Central Government/autonomous body/authority in law. From this declaration, a futile attempt has been made to conceal the material facts with regard to the passing of the order, dated 30th November, 2021, by the Chief Engineer, HPPWD, Hamirpur.

53. As per Clause 22.6 of the Standard Bidding Document, the result of evaluation of Part-I of the bid shall be made public on e-procurement system, following which, there will be a period of five working days, during which, any bidder may submit complaint(s), which shall be considered for resolution before opening Part-II of the bid. Part-I of the bid is technical evaluation of the bid. As per Annexure P-8, technical bid of respondent No. 5 was opened on 4th October, 2022 at 1.47 p.m. and the same was accepted. The technical bid of the petitioner was opened on 6th October, 2022 at 4.26 p.m. and the same was also accepted. The Technical Evaluation Summary Details were updated on 10th October, 2022 at 5.13 p.m. and financial bid was opened on 11th October, 2022 at 11.00 a.m.

54. When the status regarding the technical evaluation of the bids of the petitioner and respondent No. 5, was updated on 10th October, 2022 at

5.13 p.m., then, how the financial bid has been opened, without adhering to the condition, as mentioned in Clause 22.6 of the Standard Bidding Document, is a question, which remained unanswered and unexplained by the respondents, in this case.

55. Bare reading of Clause 22.6, as reproduced hereinabove, makes out a case in favour of the petitioner that the result of the evaluation of Part-I of the bid is to be made public on e-procurement system, so that, any bidder may submit complaint, if any. That valuable right has been snatched by respondents No. 1 to 4, from the petitioner as well as the other bidder, namely M/s Satish Kumar Sharma.

56. The learned Additional Advocate General could not point out any clause in the Standard Bidding Document (Annexure P-5), enabling respondents No. 1 to 4 to relax any of the conditions, on the alleged ground qua "meeting the deadline fixed by NABARD".

57. Admittedly, there is nothing on the file to demonstrate that any efforts were made by respondent No. 4 to seek the permission of the competent Government to grant relaxation, if any, or to point out that the Standard Bidding Document contains any clause to relax the tender conditions.

58. The requisite documents were not annexed by respondent No. 5, at the time of submission of the initial bid, as per Clause 31.3 of the General Conditions of Contract of the Standard Bidding Document (Annexure P-5). The agreement of respondent No. 5 with NPS Test House was forwarded to respondents No. 1 to 4-authorities on 10th October, 2022 at 11.28 a.m. The said agreement was executed on the same day. Meaning thereby, when the bid was submitted by respondent No. 5 online, it has not complied with the provisions of Clause 31.3 of the General Conditions of Contract of the Standard Bidding Document (Annexure P-5).

59. Bare perusal of Clause 31.3 of the General Conditions of Contract of the Standard Bidding Document (Annexure P-5) makes out a case in favour of the petitioner that the document, depicting the engagement of the consultant for quality control, has to be annexed with the bid, as per Clause 4.2 of the Standard Bidding Document. The said Clause 4.2 of the Standard Bidding Document is reproduced, as under:

> *"**4.2.** All bidders shall include the following information and documents with their bids in Section 3, Qualification Information unless otherwise stated in the Appendix to ITB:*
>
> *(a) copies of original documents defining the constitution or legal status, place of registration, and principal place of business; written power of attorney of the signatory of the Bid to commit the Bidder.*
>
> *(b) Total monetary value of civil construction works performed for each of the last five years.*
>
> *(c) Experience in works of a similar nature and size for each of the last five years, and details of works in progress or contractually committed with certificates from the concerned officer not below the rank of Executive Engineer or equivalent.*
>
> *(d) Evidence of ownership of major items of construction equipment named in Clause 4.4B (b) (i) of ITB or evidence of arrangement of possessing them on hire/lease/buying as defined therein.*
> *(e) Details of the technical personnel proposed to be employed for the Contract having the qualifications defined in Clause 4.4B(b) (ii) of ITB for the construction.*
>
> *(f) Reports on the financial standing of the Bidder, such as profit and loss statements and auditor's reports for the past Five (5) years.*
>
> *(g) Evidence of access to line(s) of credit and availability of other financial resources/facilities (10 percent of the contract value) certified by banker (the certificate being not more than 3 months old.)*

(h) Authority to seek references from the Bidder's bankers.

(i) Information regarding any litigation or arbitration during the last five years in which the Bidder is involved, the parties concerned, the disputed amount, and the matter.

(j) Proposals for subcontracting the components of the Works for construction/up-gradation, aggregating to not more than 25 percent of the Contract Price and subcontracting of part/full routine maintenance of roads after completion of construction work.

(k) The proposed programme of construction and Quality Management Plan proposed for completion of the work as per technical specifications and within the stipulated period of completion."

60. A futile attempt has been made by respondents No. 1 to 4, in this case, when a stand has been taken that the financial evaluation of the tender could not be uploaded on the website, due to network problem, heavy rush of work and shortage of staff in HPPWD Division. However, no such document, probabilizing the said stand, has been brought before us, for scrutiny. As such, the said plea is liable to be ignored.

61. Respondents No. 1 to 4 have made another feeble attempt to justify the act of respondent No. 5, in submitting the document, demonstrating the engagement of quality control services on 11th October, 2022, on the basis of the letter, dated 8th March, 2022 (Annexure R-III). There is nothing, in this letter, that the bidder is free to engage the quality control services, after submitting the bid. The said document is also silent about the fact that the said agreement could be executed even after opening Part-I of the bid. Annexure R-III provides that if the authorities require any clarification on the submitted scanned copies of the original documents, the bidder will be asked in writing. No help can be derived from this document to justify the act of respondent No. 4 in accepting the document pertaining to hiring of the

quality control services, from respondent No. 5, on 10th October, 2022. Moreover, from this document, no inference can be drawn that the requisite document could be executed, after opening Part-I of the bid.

62. The technical bid was opened on 10th October, 2022, and financial bid was opened on 11th October, 2022, whereas the requisite document, i.e. document pertaining to engaging the quality control services was executed only on 10th October, 2022, by respondent No. 5. Immediately, after the execution of the document, copy of the same was forwarded to respondent No. 4 by e-mail. The agreement, in terms of Clause 31.3 of the General Conditions of Contract of the Standard Bidding Document, was an essential document, to be attached with the bid, as per Clause 4.2.

63. As discussed above, the act of respondents No. 3 and 4, if could be said to be short of "mala fide", the same certainly falls within the "mischief of arbitrariness", thus, giving the occasion for this Court to interfere in the present matter. Respondent No. 4 has exceeded its power by not adhering to the terms and conditions of Annexure P-5.

64. Hence, all the above acts of respondent No. 4 are clothed with arbitrariness and violative of the concept of level playing field.

65. Considering all these facts, the present writ petition is allowed and Annexure P-8 and the letter of intent issued in favour of respondent No. 5, awarding the construction of M/T on link road Saily to Handola via Kamoon Pattian and construction of link road Saili to Mahadev Mandir via GPS Laubowal from km. 0/0 to 14/640 (SH: Formation Cutting, C/O retaining wall, Wire crate, CS works CC pavement, P/L GSB, WMM, M/T Road side drain, parapets, P/F kilometer stone and sign board in Km 0/000 to 14/640) under NABARD RIDF/XXVII, are set aside. However, respondents No. 1 to 4 are at liberty to float the tender afresh, after following the guidelines, governing the area.

66. Pending miscellaneous applications, if any, are also disposed of accordingly.

BEFORE HON'BLE MR. JUSTICE A.A. SAYED, C.J. AND HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J.

Mohammad Ali

.....Petitioner

Versus

Land Acquisition Collector and others

..... Respondents

2.<u>CWP No.8804 of 2010</u>

Daftar Singh

.....Petitioner

Versus

HPSEB Limited and others

.....Respondents

3.<u>CWP No.5225 of 2012</u>

Lumbi Devi

.....Petitioner

Versus

HPSEB Limited and others

.....Respondents

4.<u>CWP No.5831 of 2012</u>

Gurjan Devi

.....Petitioner

Versus

HPSEB Limited and others

.....Respondents

5.<u>CWP No.5832 of 2012</u>

Thangloo

.....Petitioner

Versus

HPSEB Limited and others

.....Respondents

6.<u>CWP No.5858 of 2012</u>

Suresh Kumar

.....Petitioner

Versus

HPSEB Limited and others

.....Respondents

7.CWP No.8481 of 2012

Kalu Ram

.....Petitioner

Versus

HPSEB Limited and others

.....Respondents

Mr. Vinay Kuthiala, Senior Advocate with Ms. Vandana Kuthiala and Mr. Diwan Singh Negi, Advocates, for the petitioner(s) in all the petitions.
Mr. Tara Singh Chauhan, Advocate, for respondent Nos.1 and 2-HPSEB Limited.
Mr. Anup Rattan, Advocate General with Mr. Rakesh Dhaulta, Additional Advocate General, for respondent No.3-State in CWP No.3803 of 2010.
Mr. Balram Sharma, Deputy Solicitor General of India, for respondent No.4 in CWP No.3803 of 2010 and respondent No.3 in CWP Nos.8804 of 2010 and 5225, 5831, 5832, 5858 and 8481 of 2012.
None for respondent Nos.4 to 11 in CWP No.8804 of 2010, 4 to 7 in CWP No.5831 of 2012, 4 and 5 in CWP No.5832 of 2012, 4 to 6 in CWP No.5858 of 2012 and respondent No.4 in CWP No.8481 of 2012.
Respondent No.7 in CWP No.5858 of 2012 stands deleted vide order dated 22.05.2012.

CWP No.3803 of 2010
alongwith connected matters
Reserved on: 05.1.2023
Decided on: 13.01.2023

Constitution of India, 1950—Article 226- Articles 31, 14, 19 & 21- **Land Acquisition Act, 1894**- Sections 18 & 28A- Petition to quash Sections 18 and 28A of the Act and to declare these provisions unconstitutional and invalid to the extent these provide for limitation period**- Held-** Statute can provide for extinguishment of a right if it is not exercised within the prescribed limitation period- Providing the limitation period to the exercise of such rights in terms of Sections 18 and 28A is based upon good public policy as otherwise there will be no end to litigation and even settled land acquisition proceedings will get unsettled and reopened- Prescription of limitation period under Sections 18 and 28A of the Land Acquisition Act for the exercise of rights and for

enforcement of such rights available in these provisions is not unconstitutional- The provision of time period stipulated in these provisions is intra vires of the Constitution and is valid. (Paras 5, 6)

Cases referred:

A. Viswanatha Pillai and others v. Special Tahsildar for Land Acquisition No.IV and others AIR 1991 SC 1966;

Ajit Singh v. State of Punjab and another AIR 1967 SC 856;

Babua Ram and others Vs State of U.P. and another (1995) 2 SCC 689;

Bank of Baroda Versus Kotak Mahindra Bank Ltd. (2020) 17 SCC 798;

Bhag Singh & others Vs. Union Territory of Chandigarh (1985) 3 SCC 737;

Dattatraya Govind Mahajan & others v. The State of Maharashtra & another AIR 1977 SC 915;

Gauri Shanker & others Vs Union of India and others (1994) 6 SCC 349;

Hamdard Dawakhana & another Vs. The Unionof India & others AIR 1960 SC 554;

Jalandhar Improvement Trust Versus State of Punjab and others (2003) 1 SCC 526;

Janabai v. Laxman Gunaji Wanole and another AIR 1985 Bombay 290;

Maniben Devraj Shah Vs. Municipal Corporation of Brihan Mumbai(2012) 5 SCC 157;

Narendra & others Vs State of Uttar Pradesh & others (2017) 9 SCC 426;

Popat and Kotecha Property Versus State Bank of India Staff Association (2005) 7 SCC 510;

Popat Bahiru Govardhane & others Vs Special Land Acquisition Officer & another (2013) 10 SCC 765;

Prem Singh & Ors. v. Birbal & Ors AIR 2006 SC 3608;

State of Haryana & another Vs. Chanan Mal & others (1977) 1 SCC 340;

State of Karnataka Versus Laxuman (2005) 8 SCC 709;

State of Uttarakhand Versus Sudhir Budakoti and others 2022 (4) JT 18;

Steel Authority of India Ltd. Vs. Sutni Sangam & others (2009) 16 SCC 1;

Union of India & another Vs. Pradeep Kumari & others (1995) 2 SCC 736;

Vidya Devi Vs. State of H.P. and others (2020) 2 SCC 569;

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge

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In all these connected matters, a common issue has been raised, hence, these are being decided vide this common judgment.

2. **Thequestion** raised by the petitioners is whether the limitation period provided under Sections 18 and 28A of the Land Acquisition Act (in short 'Act') for availing the remedies provided under these sections, i.e. for seeking reference or for payment of correct market value of acquired land, is violative of second proviso to Article 31A(1) of the Constitution of India. Main prayer of the petitioners is to quash Sections 18 and 28A of the Act and to declare these provisions unconstitutional and invalid to the extent these provide for limitation period.

3. **Facts:-**

For sake of convenience, facts from CWP No.3803 of 2010 have been referred to.

3(i). Petitioner was owner in possession of land denoted by Khata/Khatauni No.149/488, Khasra Nos.1263 and 1266, measuring 0-35-42 hectares, situated in Mauza Ganvi, Tehsil Rampur Bushahar, District Shimla. This land alongwith other parcels of land was acquired by the respondents for construction of a hydel power project. Notification under Section 4 of the Act was issued on 08.09.1988. Declaration under Sections 6 and 7 of the Act was issued on 04.09.1989.

3(ii). After completing codal formalities, Award No.316 was passed by the Land Acquisition Collector on 20.11.1991, acquiring the land including the above described land of the petitioner. Compensation amount in terms of the award was paid to all the right holders including the petitioner.

3(iii). The petitioner received compensation awarded by the Land Acquisition Collector amounting to Rs.32,277/- vide Cheque No.194081, dated 03.02.1995, without any protest. Petitioner did not challenge the award of the Land Acquisition Collector. He did not take recourse to Section 18 of the Act and accepted the award passed by the Collector on 20.11.1991. Some of the parties preferred reference petition against the award passed by the Land Acquisition Collector under Section 18 of the Act. Learned District Judge decided these reference petitions vide award dated 07.03.2003. The compensation for the acquired land was enhanced by the learned Reference Court at the rate of about Rs.88,000/- per bigha. Respondent-HPSEB Limited challenged the award passed by the learned Reference Court by filing Regular First Appeal, bearing RFA No.112 of 2003. The appeal was decided by this Court on 02.09.2008. The enhanced compensation was reduced to Rs.48,400/- per bigha alongwith all statutory benefits.

3(iv). Petitioner neither filed any reference petition under Section 18 of the Act against the award passed by the Collector on 20.11.1991 nor he made any application under Section 28A of the Act for redetermination/ enhancement of compensation for his acquired land on the basis of

enhancement ordered by the learned District Judge vide his award dated 07.03.2003. The petitioner had accepted the award dated 20.11.1991 on 03.02.1995 when he received the compensation. Petitioner moved this Court on 04.07.2010 invoking extra-ordinary jurisdiction under Article 226 of the Constitution of India seeking full and correct market value for his acquired land in the same manner as had been done in case of persons whose land was acquired under the same notification issued under Section 4 of the Land Acquisition Act. It has been pleaded that the acquired land of the petitioner was in his personal cultivation and within the applicable ceiling limit. Petitioner's claim was barred by limitation prescribed under Sections 18 and 28A of the Land Acquisition Act. Hence, the petitioner has primarily prayed for declaring the limitation period set out in Sections 18 and 28A of the Act as unconstitutional and invalid.

4. Submissions:-

We have heard the arguments advanced on the above legal issue by Sh. Vinay Kuthiala, learned Senior Counsel for the petitioners, Sh. Ashok Sharma, former Advocate General, who represented the State in these matters on several hearings, Sh. Anup Rattan, learned Advocate General (present), Sh. Balram Sharma, learned Deputy Solicitor General of India and Sh. Tara Singh Chauhan, learned Standing Counsel for the respondent-HPSEB Limited. To avoid repetitiveness, we have discussed hereinafter the points emphasized by learned counsel for the parties alongwith our observations.

4(i). Article 31A is placed in Part III of the Constitution of India, which pertains to Fundamental Rights. The article with its first proviso was inserted in the Constitution by the Constitution (First Amendment) Act, 1951. This Article as it stands today is as under:-

> *"31A. Saving of laws providing for acquisition of estates, etc.-* ***(1) Notwithstanding anything contained in article 13, no law providing for—***

(a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or

(b) the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or

(c) the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or

(d) the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or

(e) the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence,

shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by [article 14 or article 19:

Provided that where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent:

Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof.

(2) In this article,—

(a) the expression "estate" shall, in relation to any local area, have the same meaning as that expression or its local

equivalent has in the existing law relating to land tenures in force in that area and shall also include—

(i) any jagir, inam or muafi or other similar grant and in the States of Tamil Nadu and Kerala, any janmam right;

(ii) any land held under ryotwari settlement;

(iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans;

(b) the expression "rights", in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, [raiyat, under-raiyat] or other intermediary and any rights or privileges in respect of land revenue.]"

Article 13 of the Constitution also falls in Part III of the Constitution and reads as under:-

"13. Laws inconsistent with or in derogation of the fundamental rights.-

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,-

(a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law;

(b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368."

Second Proviso to Article 31A(1), around which petitioners' case revolves, was addedby the Constitution (Seventeenth Amendment) Act, 1964. Article 31A, inter alia, provides that notwithstanding anything contained in Article 13, no law providing for the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of such rights shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges the rights conferred by Article 14 or Article 19 of the Constitution. The protection made available to the State under Article 31A is subject to two riders. *Firstly*, that such law if made by the State Legislature must have received assent of the President. Since in this case, we are concerned with the Land Acquisition Act, i.e. Central Enactment, the above rider, i.e. First Proviso to Article 31A(1), is not attracted. The *second rider* is provided by the second proviso. Article 31A(1)(a), when read with second proviso, states that a law providing for acquisition by the State of any estate or any rights therein/extinguishment or modification of any such rights, shall not be deemed to be void on the ground that it takes away or abridges fundamental rights conferred by Article 14 or Article 19.But saving of such law comes with one guaranteed protection that in case the land comprised therein is held by a person under his personal cultivation and is within the ceiling limit applicable to him under any law for the time being in force then, it shall not be lawful for the State to acquire any portion of such land, any building or structure standing thereon or appurtenant thereto, **unless the law relating to acquisition of such land, building or structure provides for payment of compensation at a rate which shall not be less than the market value thereof.**

4(ii). The **main contention of learned Senior Counsel for the petitioner** is that Article 31A(1) second proviso of the Constitution of India injuncts the State from acquiring agricultural land held by a person within the land ceiling limit without paying the market value. The owner of such land has

a fundamental right to receive the market value for his acquired land. Article 13 of the Constitution of India specifically provides that any law which takes away or abridges the fundamental rights conferred by Part III of the Constitution of India or any law which is inconsistent with the provision of Part III of the Constitution of India, shall to the extent of such inconsistency or contravention be void. The limitation period prescribed under Sections 18 and 28A of the Act is in gross contravention and violation of Article 31A(1) second proviso of the Constitution of India inasmuch as these provisions permit the State to acquire land within the ceiling limit without paying the market value on the ground that the owner of the land or the person concerned had not taken resort to the legal remedies within the time stipulated by these provisions.

4(ii)(a). It was submitted that the Hon'ble Apex Court in ***(2017) 9 SCC 426 (Narendra and others Versus State of Uttar Pradesh and others)***, had held that a person covered under the same notification under Section 4 of the Land Acquisition Act should be paid same compensation. No person should be discriminated against on technical grounds. Purpose and objective behind Section 28A of the Act is salutary in nature.

4(ii)(b). ***AIR 1977 SC 915 (Dattatraya Govind Mahajan and others v. The State of Maharashtra and another), AIR 1967 SC 856 (Ajit Singh v. State of Punjab and another)*** and ***AIR 1985 Bombay 290 (Janabai v. Laxman Gunaji Wanole and another)***, were highlighted to project that paying market value for the acquired land, which falls within the ceiling limit has been held to be the duty of the State as the land owner has a fundamental right to receive proper and adequate compensation/market value for his land. That Article 31A(1) protects property against deprivation by executive action, which is not supported by law. Article 31 confers a fundamental right of property on an individual by declaring that his property shall not be liable to be compulsorily acquired or requisitioned except for a public purpose and the

law which authorizes such acquisition or requisition must provide for payment of an amount, which may be either fixed by such law or which may be determined in accordance with the principles and given in the manner specified in such law. The second proviso confers a right on a person to get compensation at a rate which is not less than the market value in respect of such portion of land under his personal cultivation as is within the ceiling limit applicable to him. This is a fundamental right and creative of second proviso to Article 31A(1).

4(ii)(c). ***(1985) 3 SCC 737 (Bhag Singh and others Versus Union Territory of Chandigarh)***, was cited to point out that apart from socio-economic inequalities accentuating the disabilities of the poor and in an unequal fight, the adversarial process itself operates to the disadvantage of the weaker part and the Court invokes the principle of fairness and equality, which are essential for dispensing justice.

4(ii)(d). A full Bench decision of this Court rendered on 30.03.2022 in ***LPA No.33 of 2021(State of Himachal Pradesh and others Versus Sita Ram Sharma)***was referred, wherein it was, inter alia, held that the State authorities cannot acquire any land of a citizen except by paying adequate compensation.

4(ii)(e). Learned Senior Counsel also submitted that in its various recent pronouncements, more specifically in ***(2020) 2 SCC 569 (Vidya Devi Versus State of Himachal Pradesh and others)***and***Civil Appeal No.2273 of 2022 (Sukh Dutt Ratra and another Versus State of Himachal Pradesh & Ors.)***, decided on 06.04.2022, Hon'ble Apex Court has allowed payment of market value of the acquired land to those who had approached the Court very late in the day.

4(ii)(f). Referring to ***AIR 1991 SC 1966 (A. Viswanatha Pillai and others v. Special Tahsildar for Land Acquisition No.IV and others)*** and ***(2003) 1 SCC 526 (Jalandhar Improvement Trust Versus State of Punjab***

and others), it was submitted that a co-owner is an agent of all co-owners and the reference petition by a co-owner isto be considered on behalf of all. Co-villagers of the petitioners had been paid enhanced compensation at the market value determined by this Court in RFA No.112 of 2003. On the same analogy, the petitioneris entitled to be paid the same compensation as was paid to other co-villagers.

4(ii)(g). The gist of submissions made by learned Senior Counsel for the petitioners is that the petitioners are entitled to market value of acquired land determined by this Court in RFA No.112 of 2003, which was instituted by their co-villagers. Their grievance is that they cannot exercise their right to claim the market value at this stage in view of the restraint imposed by the State by prescribing limitation period for the exercise of rights under Sections 18 and 28A of the Act, hence, these provisions be declared unconstitutional and invalid to the extent they provide limitation period for exercise of these remedies.

4(iii). Common core of **submissionsadvanced** for the **respondents** is that right has to be exercised within the limitation prescribed for the exercise of such right. Prescribing limitation period for enforcement of a right is based on public policy. Placing reliance upon several pronouncements of Hon'ble Apex Court, it was emphasized that there is no illegality or unconstitutionality in prescribing limitation period for exercise of rights under Sections 18 and 28A of the Act. In case, the rights are not enforced within the stipulated limitation period, then, the remedy to enforce them goes.

5. Observations:-

5(i). Petitioners have challenged the constitutionality of Sections 18 and 28A of the Land Acquisition Act to the extent these provide period of limitationfor exercise of remedies made available under these provisions. Part III of the Land Acquisition Act is titled 'reference to Court and procedure thereon'. Section 18 is the first section of this part. It provides the remedy of

making reference to an aggrieved person from the award passed by the Collector to the Court. 'The Court' referred to under Section 18 means Principal Civil Court of original jurisdiction. Section 28A is the last section of this part. These sections are as follows:-

> *"18. Reference to Court.–(1) Any person interested who has not accepted the award may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court, whether his objection be to the measurement of the land, the amount of the compensation, the persons to whom it is payable, or the apportionment of the compensation among the persons interested.*
>
> *(2) The application shall state the grounds on which objection to the award is taken:*
>
> *Provided that every such application shall be made,-*
>
> *(a) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award;*
>
> *(b) in other cases, within six weeks of the receipt of the notice from the Collector under section 12, sub-section (2), or within six months from the date of the Collector's award, whichever period shall first expire.*
>
> *Provided further that the Collector may entertain an application under this section, after the expiry of the period of six weeks but within a period of six months, if he is satisfied that the applicant was prevented by sufficient cause from making the application in time.*
>
> *[Vide Himachal Pradesh Act 17 of 1986, sec. 2 (w.e.f. 22-7-1986)].*
>
> *28A. Re-determination of the amount of compensation on the basis of the award of the Court.–(1) Where in an award under this part, the Court allows to the applicant any amount of compensation in excess of the amount awarded by the Collector under section 11, the persons interested in all the other land covered by the same notification under section 4, sub-section (1) and who are also aggrieved by the award of the Collector may, notwithstanding that they had not made an application to the Collector under section 18, by written application to the Collector within three months from the date of the award of the Court require that the amount of compensation payable to them*

may be re-determined on the basis of the amount of compensation awarded by the court:

Provided that in computing the period of three months within which an application to the Collector shall be made under this sub-section, the day on which the award was pronounced and the time requisite for obtaining a copy of the award shall be excluded.

(2) The Collector shall, on receipt of an application under sub-section (1), conduct an inquiry after giving notice to all the persons interested and giving them a reasonable opportunity of being heard, and make an award determining the amount of compensation payable to the applicants.

(3) Any person who has not accepted the award under sub-section (2) may, by written application to the Collector, require that the matter be referred by the Collector for the determination of the Court and the provisions of sections 18 to 28 shall, so far as may be, apply to such reference as they apply to a reference under section 18."

Article 31A was added in the Constitution in the year 1951 to make it clear that a law providing for acquisition of an 'estate' shall not be open to attack on the ground that it infringes any right of the individual guaranteed by Part III of the Constitution of India. The protection made available to the law under Article 31A is not absolute, but is restricted by its second proviso incorporated in the Article in the year 1964. The second proviso mandates that protection to such law made under Article 31A(1)(a) will be available if the law made for such acquisition provides for payment of compensation at the rate which shall not be less than the market value.

Petitioners' case is that in terms of Article 31A(1) second proviso of the Constitution, they have a fundamental right to receive market value for their acquired land, but the limitation period prescribed under Sections 18 and 28A of the Act comes in their way and takes away from them their right to get the market value for their acquired land; The limitation period prescribed in these two sections of the Act is violative of Article 31A(1) second proviso of

the Constitution of India; Petitioners are entitled to compensation that has been paid to their co-villagers.

5(ii). Presumption in favour of constitutionality of the enactment:-

In ***AIR 1960 SC 554(Hamdard Dawakhana and another Versus The Unionof India and others),*** Hon'ble Supreme Court held that when the constitutionality of an enactment is challenged on the ground of violation of any of the Articles in Part III of the Constitution, the ascertainment of its true nature and character becomes necessary, i.e., its subject matter, the area in which it is intended to operate, its purport and intent have to be determined. In order to do so, it is legitimate to take into consideration all the factors such as history of the legislation, the purpose thereof, the surrounding circumstances and conditions, the mischief which it intended to suppress, the remedy for the disease which the legislature resolved to cure and the true reason for the remedy. Another principle which has to be borne in mind in examining the constitutionality of a statute is that it must be assumed that the legislature understands and appreciates the need of the people and the laws it enacts are directed to problems which are made manifest by experience and that the elected representatives assembled in a legislature enact laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is, therefore, in favour of the constitutionality of an enactment.

5(ii)(a). The exerts from the statement of objects and reasons for the Constitution (Seventeenth Amendment) Act in inserting second proviso to Article 31A(1) are as under:-

> *"Article 31A of the Constitution provides that a law in respect of the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights shall not be deemed to be void on the ground that it is*

inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31. The protection of this article is available only in respect of such tenures as were estates on the 26th January, 1950, when the Constitution came into force. The expression "estate" has been defined differently in different States and, as a result of the transfer of land from one State to another on account of the reorganisation of States, the expression has come to be defined differently in different parts of the same State. Moreover, many of the land reform enactments relate to lands which are not included in an estate. Several State Acts relating to land reform were struck down on the ground that the provisions of those Acts were violative of articles 14, 19 and 31 of the Constitution and that the protection of article 31A was not available to them. It is, therefore, proposed to amend the definition of "estate" in article 31A of the Constitution by including therein, lands held under ryotwari settlement and also other lands in respect of which provisions are normally made in land reform enactments. It is further proposed to provide that where any law makes a provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure provides for payment of compensation at a rate not less than the market value thereof.

2. It is also proposed to amend the Ninth Schedule by includingtherein certain State enactments relating to land reform in order toremove any uncertainty or doubt that may arise in regard to theirvalidity.

3. The Bill seeks to achieve these objects……"

5(ii)(b). Article 31A(1)(a) was originally aimed to operate in the field of agrarian reforms. The purpose was to acquire lands held by 'zamindars' and intermediaries who were mere rent receivers and to save laws providing for compulsory acquisition of such lands from challenge of constitutionality under Article 19(1)(f) or 31(2). The object of Constitution (Fourth Amendment) Act, 1955 was to take out not only laws relating to abolition of 'Zamindari', but also

other agrarian and social welfare legislation, which affect proprietary rights altogether, from the purview of Articles 14, 19 and 31. Since this amendment, Article 31A is no longer confined to legislation for agrarian reforms. [Re: ***(1977) 1 SCC 340, State of Haryana and another Versus Chanan Mal and others***]

Second Proviso was inserted by the Constitution (Seventeenth Amendment) Act, 1964, in view of the fact that lands held under a *ryotwari* settlement were brought under the purview of Article 31A(1)(a) by inserting Cl.(2)(a)(ii) by the same amendment. It was realized that where large tracks were held by the tenants under a *ryotwari* system, any scheme of agrarian reforms in such areas could not be successful unless lands held in excess of the requirements of personal cultivation of the tenant were also acquired and distributed by the State amongst the landless. Hence, it was provided by the second proviso that any law for acquisition of lands (within the applicable ceiling limit) could not get protection of Article 31A(1)(a) unless the law provided for paying full market value of the acquired land as distinguished from a mere nominal sum, which satisfies the requirements of original Article 31-31A in case of estates held under the permanent settlement. Insertion of second proviso was necessitated by the enactment of ceiling laws by the States. It was inserted by way of exception to provide for compensation in cases covered by the second proviso.

5(iii). Article 31A(1) second proviso vis-à-vis Land Acquisition Act:-

Article 31A(1) second proviso of the Constitution of India mandates that where any law makes any provision for acquisition by the State of any estate or of any rights therein or the extinguishment or modification of such rights, such law shall not be deemed to be void on the ground that it is

inconsistent with or takes away or abridges the rights conferred by Article 14 or Article 19 provided that such law provides for payment of compensation for acquisition of land/building or structure standing thereon or appurtenant thereto, which is under personal cultivation of the person and within the applicable ceiling limit, for payment of compensation at a rate which shall not be less than market value thereof. Land Acquisition Act is a law that provides for payment of compensation at a rate which shall not be less than the market value of the land. Section 18 of the Act gives a remedy to any interested person who has not accepted the award passed by the Collector. Such person can avail the remedy available in this section by making a written application to the Collector, requiring that the matter be referred by the Collector for the determination of the Court. Similarly, Section 28A of the Act states that where in an award passed under Part III of the Act, the Court allows the applicant any amount of compensation in excess of the amount awarded by the Collector under Section 11, the persons interested in all the other land covered by the same notification under Section 4(1) and who are also aggrieved by the award of the Collector, may notwithstanding that they had not made any application to the Collector under Section 18, by written application to the Collector, require that the amount of compensation payable to them may be re-determined on the basis of the amount of compensation awarded by the Court.

Land Acquisition Act thus has provisions in form of above two sections that are aimed to provide market value to those whose land is acquired by the State. Therefore, it cannot be said that law (the Land Acquisition Act) does not provide for giving market value of acquired land. Requirement of second proviso to Article 31A(1) for saving the law of the nature stated in this Article is that such law must provide for payment of compensation at a rate which shall not be less than the market value thereof. The Land Acquisition Act fulfils this requirement. The Land Acquisition Act

makes provision for acquisition of estates. The protection under Article 31A will not be available to this law (the Land Acquisition Act) unless the law provides for payment of compensation at the market value rate. Sections 18, 23 and 28A etc. of the Land Acquisition Act provide for paying compensation at the market value of the acquired land. In terms of these provisions, mandate of constitutional provision under second proviso to Article 31A(1) is fulfilled. The second proviso only mandates requirement of a provision under the Land Acquisition Act relating to provide compensation at market value and nothing more. The second proviso does not state that a person has to be given compensation at the market value in disregard to other statutory stipulations. To exercise such right under the law, period of limitation has been prescribed.

Section 28A of the Land Acquisition Act provides for redetermination of the amount of compensation on the basis of award of the Court. In terms of this section, interested person has the right to submit his application within three months from the date of the award of the Court. Prescribing limitation period, in a manner,provides for extinguishment of right after the expiry of the stipulated period. This extinguishment of right by prescribing limitation period for exercising the right cannot be held to be unconstitutional. It is protected under Article 31A(1)(a).

5(iv). Exercise of rights under Sections 18 and 28A and limitation provided thereunder for exercising such rights:-

5(iv)(a). Law of limitation is founded on most salutary principle of public policy. Its aim being to secure the quiet of the community, to suppress fraud and perjury, to quicken diligence and to prevent oppression. Limitation Act is not an equitable piece of legislation, but has been termed as a statute of repose, peace and justice. The statute discourages litigation by burying in one common receptacle all the accumulations of past times which are unexplained and have not from lapse of time become inexplicable. Rules of limitation are

meant to see that parties do not resort to dilatory tactics, but seek their remedy promptly. Law of limitation fixes a life-span for such legal remedy for the redress of the legal injury so suffered. During efflux of time, newer causes would sprout up necessitating newer persons to seek legal remedy by approaching the Courts. So a life span must be fixed for each remedy. Unending period for launching the remedy may lead to unending uncertainty and consequential anarchy. The law of limitation is founded on public policy that is enshrined in the maxim *interest reipublicae ut sit finis litium* (it is for the general welfare that a period be put to litigation). The idea is that every legal remedy must be kept alive for legislatively fixed period of time. The right undoubtedly available to a litigant becomes unenforceable if the litigant does not approach the Court within the time prescribed. It is in this context that it has been said that the law is for the diligent. [Re: ***(2012) 5 SCC 157,Maniben Devraj Shah Versus Municipal Corporation of Brihan Mumbai;(2005) 7 SCC 510,Popat and Kotecha Property Versus State Bank of India Staff Association*;** and ***(2005) 8 SCC 709,State of Karnataka Versus Laxuman***]

In ***AIR 2006 SC 3608 (Prem Singh & Ors. v. Birbal & Ors.)***, Hon'ble Apex Court had observed that limitation is a statute of repose. It ordinarily bars a remedy, but does not extinguish a right. The only exception to the said rule is to be found in Section 27 of the Limitation Act, which provides that at the determination of the period prescribed thereby, limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished. The Court observed that an extinction of right, as contemplated by the provisions of the Limitation Act, prima facie, would be attracted in all types of suits. The Schedule appended to the Limitation Act, as prescribed by the Articles, provides that upon lapse of the prescribed period, the institution of a suit will be barred. Section 3 of the Limitation Act provides that irrespective of the fact as to whether any defence is set out or is raised by the defendant or not, in the event a suit is found to be

barred by limitation, every suit instituted, appeal preferred and every application made after the prescribed period shall be dismissed.

5(iv)(b). Law of limitation cannot be treated as a purely procedural law specially when it leads to extinguishment of rights or remedies. Law of limitation is a substantive law. [Re: ***(2020) 17 SCC 798*, *Bank of Baroda Versus Kotak Mahindra Bank Limited***]

5(iv)(c). The right available to a person becomes unenforceable if that right is not exercised within the prescribed time. Providing specific period for exercise of right is not unconstitutional. Providing time for exercising any right cannot be held as illegal and void act. Such provision would be in furtherance of public policy. Considering the justifiability of the period of limitation provided in Section 18 as enforced in the State of Karnataka, the Hon'ble Apex Court in ***(2005) 8 SCC 709*(*State of Karnataka Versus Laxuman)***, held that Section 18 of the Act as amended and in force in Karnataka, confers additional rights on a claimant by providing an extended time for making anapplication for reference and a further right of the claimant to approach the Land Acquisition Court for directing a reference to it, based on the application already made by him before the Deputy Commissioner. Under the scheme of Section 18 of the Act as in Karnataka, the claimant loses his right to move the Court for reference on the expiry of three years and ninety days from the date of his making an application to the Deputy Commissioner under Section 18(1) of the Act within the period fixed by Section 18(2) of the Act. This loss of right to move the Court precludes him from seeking a remedy from the Court in terms of Section 18 of the Act. This loss of right in the claimant puts an end to the right of the claimant to seek enhancement of compensation. Apex Court further held that this, however, does not deprive a claimant, who had protested, of his right to enhanced compensation in view of the introduction of Section 28A of the Land Acquisition Act. He could seek an enhancement based on any award that might have been made within the time prescribed therefor

in respect of the land covered by the same notification. It was further held that it is not possible to hold that by invoking Section 5 of the Limitation Act before the Land Acquisition Court, the claimant can get over the bar to the remedy created by Section 18 of the Act. Extinguished right cannot be revived by resorting to Section 5 of the Limitation Act.

(2009) 16 SCC 1 (Steel Authority of India Limited Versus Sutni Sangam and others) holds that a holistic approach is required for interpreting the provisions of the Land Acquisition Act, which must be read in its entirety. The provisions must meet the tests of Article 300-A of the Constitution of India. The Act provides for a fair procedure. Even if a holder of a land fails to file an application for reference under Section 18 due to his ignorance, in terms of Section 28-A, he is entitled to receive a just amount of compensation on the basis of similar awards. The finality of the awards under Section 12 is subject to review by the Reference Court under Section 18 read with Section 31(2) or Section 30. The validity of the award can be called into question in a court of law on any judicially recognized grounds. When a land (private or State land) is acquired in terms of the provisions of the Act in exercise of State's power of eminent domain, there is no doubt that such acquisition is permissible not only for a public purpose but also for a company. But a public purpose therefor must exit and acquisition must take place within a required time-frame. The Act provides elaborate provisions for payment of compensation and appellate forums to safeguard the rights of owners of the land as envisaged under Article 300-A of the Constitution of India.

5(iv)(d). It will be apt to refer to some judgments, wherein the Hon'ble Apex Court considered the period of limitation prescribed under Section 28A of the Act. In ***(1995) 2 SCC 689 (Babua Ram and others Versus State of U.P. and another)***, Hon'ble Supreme Court held that Section 28A of the Act is a complete code in itself providing substantive right to an interested owner, who

received compensation under Section 18 without protest for higher compensation. Remedy has been provided to make a written application within the prescribed period. Any interested person in the land acquired under the same notification published under Section 4(1) who failed to avail the right and remedy under Section 18(1) read with second proviso to Section 31(2), becomes a person aggrieved under Section 28-A(1) of the Act when the owner of the another land covered by the same notification is awarded higher compensation by the civil court on a reference got made by him under Section 18. The legislature intended to relieve hardship to the poor, indigent and inarticulate interested person, who failed to avail the reference under Section 18. Section 28A of the Act was enacted giving remedy for redetermination when another person had got higher compensation under Section 26 in excess of the compensation awarded under Section 11 of the Act. In other words, the statute makes the person to be conscious of his right even though the presumption that everyone knows law goes against him and failed to avail the right and remedy under Section 18, yet Section 28A gives the self-same relief. Class of similar persons who availed the right and remedy but were unsuccessful are treated as a distinct class. It can by no means be said to be arbitrary as the classification is based on intelligible differentia and bears reasonable relation to the object of according another opportunity. The legislature appears to have presumed that the same state of affairs continues to subsist among the poor and inarticulate persons and they generally fail to avail the right under Section 18 due to poverty or ignorance or avoidance of expropriation. Parliament made conscious discrimination between the poor and inarticulate as a class and comparatively affluent as another class and conferred the rights under Section 28A in favour of the former. It was thus held that Section 28A is just & fair and does not violate Article 14. The procedure prescribed under Section 28A was also held to be not violative of Article 21 of the Constitution of India. It was also held that bare reading of

Section 28A(1) alongwith its proviso would indicate that making of the award by the Civil Court, which becomes the judgment and decree under Section 26 is the starting point from which the period of limitation is allowed for making an application under Section 28A. The legislature prescribed three months limitation to quicken diligence like caveat emptor and provided to a non-protester right to redetermination provided the application in writing is made to the Collector within three months from the date of award of the Civil Court of original jurisdiction excluding the requisite time taken to obtain a copy of the award. In other words, the right and remedy provided by Section 28A(1) stand extinguished with the expiry of three months from the date of award under Section 26. In a given set of facts, there could be more than one reference under Section 18 at the behest of different claimants of the land covered by Section 4(1) notification as the Court may make successive awards at various times. The compensation given in the respective awards may vary and may be higher than the one given in the earlier award. In the teeth of the express language in Sub-section (1) of Section 28A, limitation of three months once expires in respect of earliest award by efflux of time, none of the later awards could provide any assistance to revive the lapsed time under Section 28A(1) nor provide fresh cause of action or successive causes of action when multiple awards are made on different times or dates.

(1995) 2 SCC 736(Union of India and another Versus Pradeep Kumari and others), holds that the object underlying the enactment of Section 28A is to remove inequality in the payment of compensation for same or similar quality of land arising on account of inarticulate and poor people not being able to take advantage of the right of reference to the Civil Court under Section 18 of the Act. The object underlying Section 28A would be better achieved by giving the expression “an award” in Section 28A its natural meaning as meaning the award that is made by the Court in Part III of the Act after coming into force of Section 28A. If the expression in Section 28A(1) is

thus construed, a person would be able to seek redetermination of the amount of compensation payable to him provided the following conditions are satisfied:-

> *"(i) An award has been made by the court under Part III after the coming into force of Section 28-A;*
> *(ii) By the said award the amount of compensation in excess of the amount awarded by the Collector under Section 11 has been allowed to the applicant in that reference;*
> *(iii) The person moving the application under Section 28-A is interested in other land covered by the same notification under Section 4(1) to which the said award relates;*
> *(iv) The person moving the application did not make an application to the Collector under Section 18;*
> ***(v) The application is moved within three months from the date of the award on the basis of which the re-determination of amount of compensation is sought; and***
> *(vi) Only one application can be moved under Section 28-A for re-determination of compensation by an applicant."*

In ***(2013) 10 SCC 765 (Popat Bahiru Govardhane and others Versus Special Land Acquisition Officer and another),*** while discussing Section 28A of the Land Acquisition Act, Hon'ble Supreme Court observed that the statute provides limitation of three months from the date of award by the Court excluding the time required for obtaining the copy from the date of the award. It has no relevance so far as the date of acquisition of knowledge by the applicant is concerned. The plea of the applicant that limitation of three months would begin from the date of knowledge was not accepted and held to be unsustainable. The Court held that it is a settled legal proposition that law of limitation may harshly affect a particular party, but it has to be applied with all its rigour, when the statute so prescribes. The Court has no power to extend the period of limitation on equitable grounds. The statutory provision may cause hardship or inconvenience to a particular party, however, the Court has no choice, but to enforce it giving full effect to the same. The legal maxim *"dura lex sed lex"*, which means "the law is hard but it is the law",

stands attracted in such a situation. It has been consistently held that "inconvenience is not" a decisive factor to be considered while interpreting a statute. "A result flowing from a statutory provision is never an evil. A Court has no power to ignore that provision to relieve what it considers a distress resulting from its operation".

5(v). Payment of compensation and Article 14 of the Constitution of India:-

5(v)(a). Article 14 of the Constitution of India ensures equality amongst equals. Equals should not be treated unlike and unlikes should not be treated alike. Likes should be treated alike. [Re: ***(1994) 6 SCC 349, Gauri Shanker and others Versus Union of India and others***]. Valid classification is nothing but a valid discrimination. Mere differential treatment is not anathema to Article 14 of the Constitution of India. [Re: ***2022 (4) JT 18, State of Uttarakhand Versus Sudhir Budakoti and others***].

Those who might beequally placed at the time of acquisition of their land may subsequently become unequals due to the fact that some of them were vigilant in exercising their right to seek reference/compensation at market value of acquired land within the prescribed limitation period whilst others did not. Article 14 does not operate against rational classification. If right is not exercised within the limitation period, the remedy provided for enforcing it goes. Providing for limitation to exercise a right has well intended object behind it.

5(v)(b). Statute can provide for extinguishment of a right if it is not exercised within the prescribed limitation period. Claimant loses his right by not enforcing it within the period available for its exercise or in other words, the remedy to avail the right cannot be exercised after the prescribed period. Providing limitation period is based upon public policy that a right should not be allowed to remain a right indefinitely to be used against another at the will

and pleasure of holder of right by approaching the Court whenever he chooses to do so. It cannot be postulated that right to seek reference or to get market value of acquired land will survive forever without any regard to the limitation. Providing the limitation period to the exercise of such rights in terms of Sections 18 and 28A is based upon good public policy as otherwise there will be no end to litigation and even settled land acquisition proceedings will get unsettled and reopened.

The Land Acquisition law would have been invalid and unconstitutional on touchstone of Article 31A(1) second proviso had it not contained provisions for making reference and for payment of market value for the acquired land. Sections 18 and 28A are in furtherance of the right guaranteed under Article 31A(1) second proviso. Had the law not provided for Sections 18 and 28A, perhaps the situation might have been different. But the law provides these rights to an aggrieved person. Providing fetters in form of prescribing limitation period to exercise such rights, cannot be termed as unconstitutional or invalid.

6. Conclusions:-

We conclude as under:-

6(i). Fundamental right that is enshrined under Article 31A(1) second proviso is that law providing for acquisition of the property, which is within personal cultivation and within applicable ceiling limit of a person, must have provision for payment of market value of acquired land. This is to enable aggrieved person to seek market value of his acquired land.

6(ii). The Land Acquisition Act contains provisions in form of Sections 18, 23 and 28A etc. for providing market value of the acquired land. These sections satisfy the mandate of second proviso to Article 31A(1) of the Constitution.

6(iii). The second proviso to Article 31A(1) does not prohibit prescribing period of limitation in seeking market value of acquired land in legislations

pertaining to acquisition of land within personal cultivation and within applicable ceiling limit of the person concerned.

6(iv). Prescription of limitation period under Sections 18 and 28A of the Land Acquisition Act, for the exercise of rights and for enforcement of such rights available in these provisions is not unconstitutional. The provision of time period stipulated in these provisions is intra vires of the Constitution and is valid.

7. In view of the above discussion and for the foregoing reasons, the writ petitions fail and are accordingly dismissed alongwith pending miscellaneous application(s), if any.

BEFORE HON'BLE MS. JUSTICE JYOTSNA REWAL DUA, J. AND HON'BLE MR. JUSTICE VIRENDER SINGH, J.

Neelam Sharma .....Appellant

Versus

State of Himachal Pradesh and others .....Respondents

For the Appellant: Mr. Bipin C. Negi, Senior Advocate with Mr. Nitin Thakur, Advocate.

For the Respondents: Mr. Y.P.S. Dhaulta, Additional Advocate General, for respondents No.1 and 2-State.

Mr. Ramesh Kaundal, Advocate, for the Caveator/respondent No.3.

LPA No.13 of 2023
Decided on:27.01.2023

Constitution of India, 1950- Article 226- Recruitment and Promotion Rules- Retrospective promotion and consequential seniority- Appellant has assailed the judgment passed by the Ld. Single Judge**- Held-** There were two channels of promotions available to the eligible holders of the post of Sub-Inspector i.e. either to the post of Inspector Grade-I or to the post of Head Analyst and appellant specifically opted for promotion to the post of Head analyst, as such, it was not open for her to take a 'U' turn a year later and to seek reversion to the post of Inspector Grade-II in order to change her option for promotion to the other channels of promotion i.e. to the post of Inspector Grade-I- Appellant could not have been assigned retrospective seniority- Appeal dismissed. (Para 5)

Cases referred:

Ali M.K. and others Versus State of Kerala and others (2003) 11 SCC 632;

Life Insurance Corporation of India & another Vs Raghavendra Seshagiri Rao Kulkarni (1997) 8 SCC 461;

State of Punjab and others Versus Labhu Ram and others (1976) 4 SCC 339;

Union of India & Ors. Versus Manju Arora & Anr.2022 (1) Scale 1;

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge

Caveat Pet. No.3 of 2023

Discharged. The caveat petition stands disposed of.

LPA No.13 of 2023

Notice. Mr. Y.P.S. Dhaulta, learned Additional Advocate General and Mr. Ramesh Kaundal, Advocate, appear and waive service of notice on behalf of respondents No.1 & 2 and respondent No.3, respectively.

With consent of learned counsel for the parties and in view of the urgency expressed by the appellant, the matter has been heard at this stage.

2. Sh. Puran Chand (present respondent No.3) had instituted the writ petition, wherein, Smt. Neelam Sharma (present appellant) was impleaded as respondent No.3. Sh. Puran Chand had raised grievances concerning grant of retrospective promotion to Smt. Neelam Sharma on the post of Inspector Grade-I and consequential assigning of seniority to her over him in that grade. Learned Single Judge found merit in writ petitioner's claims. The writ petition was allowed on 26.12.2022. Feeling aggrieved, Smt. Neelam Sharma (writ respondent No.3) has moved instant Letters Patent Appeal. The private parties are being referred to hereinafter according to the status enjoyed by them before the learned Writ Court.

3. Some relevant **facts**are being noticed hereinafter:-

3(i). Sh. Puran Chand (writ petitioner-present respondent No.3) and Smt. Neelam Sharma (writ respondent No.3-present appellant) were appointed as Sub-Inspectors in the year 1988 in the Department of Food, Civil Supplies and Consumer Affairs, Government of Himachal Pradesh. This post was subsequently re-designated as Inspector Grade-II. Smt. Neelam Sharma enjoyed higher rank in the seniority list of Inspector Grade-II over the writ petitioner-Sh. Puran Chand.

3(ii). Under the applicable Recruitment & Promotion Rules (Annexure P-3), two channels of promotion were available to the eligible incumbents of

the post of Inspector Grade-II. An Inspector Grade-II could either opt for promotion to the post of Inspector Grade-I or to the post of Head Analyst.

3(ii)(a). Writ respondent No.3-Smt. Neelam Sharma on 18.07.2006 (Annexure P-4), specifically opted for promotion to the post of Head Analyst. She was accordingly promoted as Head Analyst on 30.08.2006 (Annexure P-5). In terms of this promotion order, Smt. Neelam Sharma was to remain on probation for a period of two years.

3(ii)(b). The writ petitioner-Sh. Puran Chand opted to be promoted on the post of Inspector Grade-I. He was accordingly promoted as Inspector Grade-I on 09.02.2007. Tentative seniority list of Inspector Grade-I was circulated on 12.07.2007 (Annexure P-8), reflecting the position as on 01.07.2007. Name of the petitioner-Sh.Puran Chandappeared in the said seniority list at Sr. No.51. Smt. Neelam Sharma did not figure in this seniority list as she stood promoted as per her option to the post of Head Analyst on 30.08.2006.

3(iii). After serving on the post of Head Analyst for more than a year, Smt. Neelam Sharma submitted a representation on 06.09.2007 (Annexure P-6) with a request to promote and post her as Inspector Grade-I. Her representation was favourably considered by the Department. The matter was forwarded to the Departmental Promotion Committee (DPC). On the basis of recommendations of the DPC, Smt. Neelam Sharma's request for reversion from the post of Head Analyst was accepted. Vide office order dated 09.04.2008 (Annexure P-7), she was given retrospective promotion to the post of Inspector Grade-I w.e.f. 10.01.2007. The order dated 09.04.2008 also assigned placement No.49 to Smt. Neelam Sharma in the tentative seniority list of Inspector Grade-I issued on 12.07.2007 (Annexure P-8), reflecting the position as on 01.07.2007. The final seniority list of Inspector Grade-I, reflecting the position as on 01.07.2007, was circulated on 30.12.2009 (Annexure P-9), wherein name ofwrit respondent No.3-Smt.

Neelam Sharma figured at Sr. No.49, whereas the name of the writ petitioner-Sh. Puran Chand was reflected at Sr. No.52.

3(iv). Aggrieved against assigning of higher seniority position to Smt. Neelam Sharma as Inspector Grade-I and her retrospective promotion to the post of Inspector Grade-I, Sh. Puran Chand filed CWP No.8077 of 2011. In this writ petition, besides seeking relief against assigning of higher seniority position to Smt. Neelam Sharma, Sh. Puran Chand had also claimed several other reliefs against certain other individuals on different cause of actions/grounds. This writ petition was transferred to the erstwhile H.P. Administrative Tribunal as T.A. No.4147 of 2015. On abolition of the Tribunal, the petition was again transferred to this Court and registered as CWPOA No.443 of 2019. Vide order dated 09.03.2021, the writ petitioner-Sh. Puran Cahnd was permitted to withdraw the said writ petition insofar as his claim against respondent No.5 therein (Smt. Neelam Sharma) was concerned. He was granted liberty to agitate his pleaded cause against respondent No.5 by filing a separate writ petition.

3(v). Sh. Puran Chand thereafter instituted CWP No.3198 of 2021 against Smt. Neelam Sharma, inter-alia, praying for quashing of seniority placement provided to her in the order dated 09.04.2008 (Annexure P-7). Challenge was also laid to the seniority list of Inspector Grade-I circulated in compliance and as a consequence to the order dated 09.04.2008. Prayer was also made for grant of consequential benefit to the writ petitioner after redrawing the seniority list of Inspector Grade-I by placing the writ respondent No.3 in the seniority list on the basis of her actual date of joining as Inspector Grade-I. This writ petition was allowed by the learned Single Judge vide judgment dated 26.12.2022, operative portion of which reads as under:-

> *"23. In light of the above discussion, the petition is allowed and order dated 09.04.2008, Annexure P-7 is held inoperative in so far as it has affected the seniority position of the petitioner as Inspector Grade-I. Accordingly, seniority list, Annexure P-9 is*

quashed and set aside to the extent it placed respondent No.3 above the petitioner. Respondents No.1 and 2 are directed to redraw the seniority list, Annexure P-9 by placing respondent No.3 at appropriate place on the basis of her promotion to the post of Inspector Grade-I w.e.f. 09.04.2008. Respondents No.1 and 2 are further directed to allow all consequential benefits to the petitioner as will be available to him by recasting the seniority list of Inspector Grade-I. Needful be done within eight weeks from the date of passing of this order. The petition is accordingly disposed of, so also, the pending applications, if any."

4. Writ respondent No.3-Smt. Neelam Sharma (present appellant) has assailed the judgment passed by the learned Single Judge **primarily on following two counts**: -

(i). The writ petition preferred by Sh. Puran Chand was barred by delay and laches; and

(ii). Even on merits, the writ petition deserved to be dismissed. Smt. Neelam Sharma (writ respondent No.3) had lien on the feeder category post of Inspector Grade-II as she had not been confirmed against the promotional post of Head Analyst. She was on probation as a Head Analyst on 06.09.2007, when she submitted a written request seeking reversion to the post of Inspector Grade-II. In view of the lien enjoyed by her on the lower post of Inspector Grade-II, she had a right to seek reversion to this post during her probation period on the promotional post of Head Analyst. The action of the official respondents, reverting her to the post of Inspector Grade-II vide order dated 09.04.2008 and retrospectively promoting her to the post of Inspector Grade-I under the same order w.e.f. 10.01.2007, did not suffer from any infirmity or illegality. Hence, the writ petitioner had no justifiable cause of action. The writ petition instituted against assigning higher seniority position to Smt. Neelam Sharma on the basis of her retrospective promotion to

the post of Inspector Grade-I w.e.f. 10.01.2007 ought to have been dismissed.

5. We have heard Mr. Bipin C. Negi, learned Senior Counsel for the appellant (writ respondent No.3), Mr. Y.P.S. Dhaulta, learned Additional Advocate General for respondents No.1 and 2-State and Mr. Ramesh Kaundal, learned counsel for respondent No.3-Sh. Puran Chand (original writ petitioner) on the above two points. Our **observations** are as under:-

5(i). Delay and laches:-

We do not find any substance in this ground. This is in view of the fact that name of Smt. Neelam Sharma had not been reflected in the tentative seniority list of Inspector Grade-I circulated on 12.07.2007 (depicting the position as on 01.07.2007). Rightly so, since she stood promoted to the post of Head Analyst on 30.08.2006 in light of her specific option. She was working as Head Analyst as on 01.07.2007 in view of her promotion on 30.08.2006. The final seniority list of Inspector Grade-I was issued by the respondent-Department on 30.12.2009, wherein name of Smt. Neelam Sharma, for the first time, figured as an Inspector Grade-I and that too over and above Sh. Puran Chand. The writ petitioner-Sh. Puran Chandcan reasonably be assumed to have become aware of retrospective promotion of Smt. Neelam Sharma as Inspector Grade-I only on 30.12.2009, when the latter was assigned higher seniority position over the petitioner as Inspector Grade-I. Order dated 09.04.2008, vide which Smt. Neelam Sharma was actually promoted as Inspector Grade-I with retrospective seniority, was not communicated to the writ petitioner. Name of Smt. Neelam Sharma was not there in the tentative seniority list of Inspector Grade-I circulated on 12.07.2007. Petitioner had no occasion to furnish objections to assigning of retrospective promotion/seniority to Smt. Neelam Sharma as Inspector Grade-I. After circulation of the final seniority list of Inspector Grade-I on 30.12.2009, petitioner submitted his representation on 09.02.2010 (Annexure

P-10) against the final seniority list of Inspector Grade-I. Hearing no response to the representation, the petitioner knocked the doors of this Court by instituting CWP No.8077 of 2011. Vide order dated 09.03.2021 passed in CWP No.8077 of 2011 (renumbered as CWPOA No.443 of 2019), the writ petitioner-Sh. Puran Chand was permitted to withdraw his writ petition against Smt. Neelam Sharma (respondent No.5 therein). Liberty was granted to him to agitate his grievances against Smt. Neelam Sharma by filing a fresh substantive writ petition. This was in lieu of misjoinder of causes of actionin the said writ petition as the petitioner had apparently challenged seniority positions of several individuals on different grounds and cause of actions. Subsequently, petitioner preferred CWP No.3198 of 2021 on 03.06.2021 against Smt. Neelam Sharma, which was decided vide impugned judgment dated 26.12.2022. In the facts and circumstances of the case, it cannot be said that the grievances raised by the petitioner were hit by delay and laches.

5(ii). Merits of the matter:-

On merits of the matter also, we are not inclined to accept the submissions advanced on behalf of writ respondent No.3-Smt. Neelam Sharma (the appellant herein). This is for the following reasons:-

5(ii)(a). There were two channels of promotion available to the eligible holders of the post of Sub-Inspector (re-designated as Inspector Grade-II), i.e. either to the post of Inspector Grade-I or to the post of Head Analyst. Smt. Neelam Sharma specifically opted for promotion to the post of Head Analyst on 18.07.2006. She was accordingly promoted as Head Analyst on 30.08.2006 and was to remain on probation for a period of two years.

5(ii)(b). The argument raised on behalf of Smt. Neelam Sharma is that she, during her probation period on the promotional post of Head Analyst, enjoyed lien on the feeder category post of Inspector Grade-II, therefore, had a right to seek reversion to the lower post of Inspector Grade-II. She accordingly exercised this right to seek reversion to the post of Inspector Grade-II in order

to further seek promotion to the other channel of promotion, that being of Inspector Grade-I. In support of such submissions, reliance was also placed upon***(1976) 4 SCC 339***, titled ***State of Punjab and others Versus Labhu Ram and others, (1997) 8 SCC 461,*** titled ***Life Insurance Corporation of India and another Versus Raghavendra Seshagiri Rao Kulkarni*** and ***(2003) 11 SCC 632,*** titled ***Ali M.K. and others Versus State of Kerala and others.***

5(iii). There can be no quarrel with the settled legal position enunciated in the above pronouncements cited for the appellant that a person can be said to acquire a lien on a post only when he has been confirmed and made permanent on that post and not earlier. However, in service jurisprudence, an employee during his probation period on the promotional post does not enjoy any vested right to seek reversion to the feeder category post merely on the ground that till the time he was confirmed on the promotional post occupied by him, he had a lien on the feeder category post. It is the prerogative of the employer to revert an employee based upon his work, performance, act, conduct and all other attending factors. After having opted for promotion to a particular channel of promotion, i.e. after having opted for promotion to the post of Head Analyst, it was not open for writ respondent No.3-Smt. Neelam Sharma to take a 'U' turn a year later and to seek reversion to the post of Inspector Grade-II in order to change her option for promotion to the other channel of promotion, i.e. to the post of Inspector Grade-I.In this regard, it would also be appropriate to refer to a judgment dated 26.7.2010, rendered in ***CWP(T) No.14932 of 2008***, titled ***Neelam Kaushal Versus State of H.P. & others***, wherein it was held that once an employee gives an option, he will not be permitted to change the option and further that once an employee opts to be promoted as Lecturer/Head Master (as applicable in that case), he cannot claim that he should be considered for the other post. In the judgment rendered in Neelam Kaushal's case, *supra,* on 26.07.2010, following

instructions issued by the Government on 24.12.1981, providing for option from incumbent of posts having more than one avenue of promotion, were noticed:-

> *"6. Reference may now be made to the instructions issued by the Government vide department of personnel letter No. H.P. Govt. Deptt. Of Personnel letter No. Per(AP-II)A(3)-4/78 dated 24.12.1981 (Annexure-16.14),which reads as follows:*
>
> ***"Options from incumbents of posts having more than one avenue of promotion.***
>
> *"Various complications arise in cases where according to the Recruitment and Promotion Rules as category of post has more than one channels of promotion in-as-much as an incumbent promoted to one category of post after observing all formalities indicates that he has preference for being promoted against the second channel of promotion. To prevent this from occurring, options should invariably be obtained from the persons concerned and kept in the record before he is considered for promotion against one of the channels provided in the rules."*

After noticing the above instructions, the Court observed in the following para that once a preference is indicated, the same cannot be withdrawn or changed:-

> *"7. It is apparent that as per these instructions when there is more than one channel of promotion available for a particular category of post(s) then at the time of consideration of the candidates for such post(s), the candidate must indicate his/her preference and once preference is indicated the same cannot be withdrawn or changed. Pursuant to these instructions, a letter dated 23rdApril, 1998 was issued by the Director of Education H.P, relevant portion of which reads as follows :*
>
> *"As per the R & P Rules 50% of the posts of School cadre Lecturers are filled up from the TGT teachers who are MA/MSc qualified and have got their names entered in the PGT list for the purpose of promotion.*
>
> *You should apprise al TGT teachers working under you that those of the TGT teachers who are promoted to the post of*

Lecturer shall not be promoted to the post of Headmaster. The TGTs shall either be promoted to the post of Lecturer or to the post of Headmaster.

Before sending cases to this Directorate for inclusion of names in the PGT list option may be obtained from the concerned teacher that he wants to be promoted to the post of Lecturer and not to the post of Headmaster. Hence, it may be ensured that theTGTs should get their names included in the list of PGT because once a person is promoted to the post of Lecturer he shall not be afforded opportunity to change the option."

After taking note of the instructions holding the field, it was held in the following para that once an option is exercised for a particular promotional category, then the same cannot be withdrawn notwithstanding retention of lien:-

"11. A perusal of the rules and instructions set out in detail above clearly show that what was envisaged in the rules and instructions was that when there are two avenues of promotion, the person in the feeder category must be asked to exercise his option as to for which promotional category he wants to be considered. ***Once such option is exercised then the same can not be withdrawn. If options are taken then even if lien is retained that will not help the employee. However, if no options are taken then the promoted employee would be justified in claiming that he can be considered against the other post."***

The judgment in Neelam Kaushal's case, supra, was relied upon in CWP No.1545 of 2011 (Vinod Kumar and others Versus State of Himachal Pradesh and others), decided on 05.07.2012.

The instructions dated 24.12.1981 are part of writ record as Annexure P-11 and were in force at the relevant time. In view of these instructions, Smt. Neelam Sharma could not have been permitted to change her option for promotion especially when it had already been acted upon and implemented.

2022 (1) Scale 1 (Union of India & Ors. Versus Manju Arora & Anr.) was a case where the Hon'ble Apex Court held that if a regular promotion was offered, but refused by the employee before becoming entitled to financial upgradation, he shall not be entitled to financial upgradation only because he has suffered stagnation. Not because of this being a case of lack of promotion, but an employee opting to forfeit offered promotion. While declaring that the employees who had refused the offer of regular promotion are disentitled to the financial upgradation benefits envisaged in the circular in question, the Hon'ble Apex Court in following para held that "employees cannot be allowed to approbate and reprobate or to put it colloquially eat their cake and have it too":-

> *"18. In the above circumstances, we find merit in the submissions made on behalf of the appellants. Consequently, it is declared that the employees who have refused the offer of regular promotion are disentitled to the financial upgradation benefits envisaged under the O.M. dated 9.8.1999. In this situation, the Scottish doctrine of "Approbateand Reprobate" springs to mind. The English equivalent of the doctrine was explained in Lissenden v. CAV Bosch Ltd.1 wherein Lord Atkin observed at page 429,*
>
> *".....In cases where the doctrine does apply the person concerned has the choice of two rights, either of which he is at liberty to adopt, but not both. Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with knowledge adopts the one he cannot afterwards assert the other....."*
>
> *The above doctrine is attracted to the circumstances in this case. The concerned employees cannot therefore be allowed to simultaneously approbate and reprobate, or to put it colloquially, "eat their cake and have it too". It is declared accordingly for the respondents in the C.A. Nos.7027-28/2009."*

5(iv). In the instant case, Smt. Neelam Sharma had specifically opted for promotion to a particular stream. She was accordingly promoted to that stream, where she had joined as such. Mere factum of her being on probation on the promotional post will not bestow any right upon her to seek reversion

to the feeder category post just because she had a change of mind a year after serving on the promotional stream opted by her. Reversion of an employee during probation period can be resorted to by the employer based on several attending factors like performance, work, conduct etc. and not otherwise. Such fact situation did not exist in the instant case. Mere assertion that the writ respondent No.3 (Smt. Neelam Sharma) had a lien over the feeder category post, is not sufficient to seek reversion as a matter of right to the lower feeder post of Inspector Grade-II, more so, in the facts of the case, where she had herself opted for promotion to the post of Head Analyst, had been serving there for more than a year with no complaints from the employer.

5(v). Notwithstanding the above aspect, the respondent-Department favourably considered the representation of Smt. Neelam Sharma. The matter was placed before the DPC. A perusal of office order dated 09.04.2008 (impugned in the writ petition) gives an indication that the DPC recommended the case of Smt. Neelam Sharma for reversion from the post of Head Analyst for further promotion to the post of Inspector Grade-I. It appears from the record that Smt. Neelam Sharma was factually never reverted from the post of Head Analyst to the feeder category post of Inspector Grade-II. Had she been reverted to the post of Inspector Grade-II, then that order and fact situation would have come into being only on 09.04.2008, meaning thereby that Smt. Neelam Sharma would have been in a position to exercise her fresh option for promotion to the post of Inspector Grade-I only after 09.04.2008 and not prior to that. No order, reverting Smt. Neelam Sharma from the post of Head Analyst to the post of Inspector Grade-II, is available on record, yet she has been retrospectively promoted to the post of Inspector Grade-I w.e.f. 10.01.2007 vide impugned order issued on 09.04.2008.

5(vi). Even if it is to be considered as an implied case of reversion of Smt. Neelam Sharma to the feeder category post of Inspector Grade-II vide order dated 09.04.2008 as contended by learned Senior Counsel for the

appellant, then also, she would have been entitled to exercise her fresh option for promotion to the post of Inspector Grade-I only after 09.04.2008 asSmt. Neelam Sharma was actually serving on the promotional post of Head Analyst from 30.08.2006 to 08.04.2008 in view of her earlier option. Inspite of all this, the official respondents had granted her retrospective promotion to the post of Inspector Grade-I w.e.f. 10.01.2007, which was not justified in the facts and circumstances of the case. We have been apprised that Smt. Neelam Sharma has been actually serving as Inspector Grade-I ever since 09.04.2008. Even if her promotion to the post of Inspector Grade-I is to be protected considering her long service on that post, the fact would remain that she could not be assigned seniority as Inspector Grade-I over and above the writ petitioner-Sh. Puran Chand, who was promoted to the post of Inspector Grade-I on 09.02.2007. Writ respondent No.3-Smt. Neelam Sharma ought to have been assigned seniority to the post of Inspector Grade-I by taking her date of promotion as Inspector Grade-I not earlier than 09.04.2008.

5(vii). Therefore, we **conclude** as under:-

5(vii)(a). After exercising her specific written option on 18.07.2006 for promotion to the post of Head Analyst; after accepting her promotion to the post of Head Analyst ordered on 30.08.2006; after serving on the promotional post of Head Analyst for more than a year, Smt. Neelam Sharma (present appellant & writ respondent No.3) could not have been allowed to change her option merely because she changed her mind later on and desired to be promoted as Inspector Grade-I, i.e. the other channel of promotion, which was initially not opted by her. Action of official respondents in entertaining Smt. Neelam Sharma's application dated 06.09.2007 for change of option and allowing her prayer vide order dated 09.04.2008 was not in order. However, considering the fact that Smt. Neelam Sharma had been working as Inspector Grade-I w.e.f. 09.04.2008, learned Single Judge correctly did not interfere with

her promotion order dated 09.04.2008, even though this order was under challenge in the writ petition.

5(vii)(b). The appellant-writ respondent No.3 promoted as Head Analyst on the basis of her option, could not seek reversion to the feeder post of Inspector Grade-II for exercising fresh option merely on the assertion that she had lien on the lower post during her probation period on the promotional post. An employee during probation on the promotional post cannot seek reversion to the lower post as a matter of right. To revert an employee during the period of probation, is the prerogative of the employer that can be exercised after viewing all attending factors including work, act, conduct and performance etc. of the concerned employee.

5(vii)(c). Notwithstanding point No.(b) above, even if the appellant-writ respondent No.3 is construed to be reverted to the post of Inspector Grade-II as contended by her, then also, such reversion would not have been possible prior to passing of the order dated 09.04.2008, as she had been serving on the promotional post of Head Analyst w.e.f. 30.08.2006 to 08.04.2008. It was only after 08.04.2008 that the respondents could have promoted the appellant as Inspector Grade-I. Despite the stand taken by the writ respondents including the appellant, the case record, however, does not show any order actually reverting the appellant to the post of Inspector Grade-II. The only order available is the one passed on 09.04.2008, which straightway promotes the appellant-the then holder of the post of Head Analyst, to the post of Inspector Grade-I. Such course was impermissible in law.

5(vii)(d). Viewing from any angle, under no circumstances, the appellant-Smt. Neelam Sharma could have been assigned retrospective seniority as Inspector Grade-I w.e.f. 10.01.2007. Even under the above noticed facts as they existed, at best, she could be assigned seniority as Inspector Grade-I only from 09.04.2008, i.e. the date when she started serving as Inspector Grade-I and not prior to that. She could not be placed senior to the writ petitioner in

the seniority list of Inspector Grade-I as the writ petitioner had been promoted to the post of Inspector Grade-I on 09.02.2007.

In view of the above discussion, we do not find any merit in this appeal. The same fails and is accordingly dismissed alongwith pending miscellaneous application(s), if any.

BEFORE HON'BLE MS. JUSTICE SABINA, J. AND HON'BLE MR. JUSTICE SUSHIL KUKREJA, J.

State of Himachal Pradesh & others

.....Appellants

Versus

Tara Dutt Sharma (deceased)
through his LRs & others .....Respondents

LPA No.75 of 2022

State of Himachal Pradesh & others

.....Appellants

Versus

B.C. Gupta

.....Respondent

LPA No.93 of 2022

State of Himachal Pradesh & others

.....Appellants

Versus

Ashok Kumar

.....Respondent

For the appellants: Mr. Ashok Sharma, Advocate General with Mr. Ashwani Sharma, Additional Advocate General, in all the appeals.

For the respondents: Mr. B. Nandan Vasishta, Advocate, for respondents No.1 to 6 in LPA No.139 of 2022.

Mr. Rajnish Maniktala, Senior Advocate with Mr. Naresh K. Verma, Advocate, for the respondent in LPA No.75 of 2022.

Mr. S.S. Sood, Advocate, for the respondent in LPA No.93 of 2022.

LPA No.139 of 2022 alongwith
LPA Nos. 75 and 93 of 2022
Reserved on 01.12.2022
Decided on: 21.12. 2022

H.P. Civil Services (Revised Pay) Rules, 2009- **CCS (Pension) Rules, 1972**- Fixation of pension**- Held-** Financial burden can be a valid ground to fix a cutoff date for the purpose of granting the actual benefit of revision of pension/ pay, as such, cutoff date fixed as 01.04.2013 in the Office Memorandum dated 21.05.2013 by the State cannot be said to be arbitrary and discriminatory- Appeal allowed. (Paras 24, 25)

Cases referred:

H.R.T.C. & another Vs. H.R.T.C. Retired Employees Union, (2021) 4 SCC 502;
K.S. Puttaswamy (retired) and another Vs. Union of India and another, (2019) 1 SCC 1;
Mohd. Ali Imam Vs State of Bihar Through its Chief Secretary and others, (2020) 5 SCC 685;
Pepsu RTC Vs. Mangal Singh & others (2011) 11 SCC 702;
Secretary Mahatama Gandhi Mission and another vs. Bhartiya Kamgar Sena and others, (2017) 4 SCC 449;
State of H.P. Versus P.D. Attri and others, (1999) 3 SCC 217;
State of Rajasthan & another Vs Amrit Lal Gandhi & others, (1997) 2 SCC 342;
State of Rajasthan & others Versus Mahendra Nath Sharma, (2015) 9 SCC 540;
The State of Tripura & Ors. Vs. Smt. Anjana Bhattacharjee & Ors., 2022 LiveLaw (SC) 706;
U.P. Raghavendra Acharya & others vs. State of Karnataka & others, (2006) 9 SCC 630;

The following judgment of the Court was delivered:

Sushil Kukreja, Judge

Vide this judgment, the above mentioned three appeals would be disposed of as the issue involved in all these cases is the same.

2. The instant appeals have been filed by the appellants-State, assailing the impugned common order dated 15.07.2021, passed by the learned Single Judge in the petitions (CWPOA Nos.6391, 6220 & 7876 of 2019) filed by the respondents-petitioners, thereby while allowing the petitions, it was ordered that the revised pension in terms of Office Memorandum dated 21st May, 2013, shall be payable to the respondents-petitioners w.e.f. 01.01.2006 alongwith arrears. For avoiding repetition of facts, the pleadings raised in CWPOA No.6391 of 2019 shall be taken up for discussion.

3. According to the respondents-petitioners, after attaining the age of superannuation, they retired from the Government service prior to 01.01.2006 and their pre-revised pay scales were revised vide Resolution dated 29th August, 2008. The Central Government accepted the recommendations of 6th Pay Commission, whereby the pension was required to be 50% of the average emoluments received during the past 10 months or the last pay drawn, whichever was more beneficial to the retiring employee and the revised pension structure was to become effective from 01.01.2006 and 40% of the arrears were to be paid in cash for the years 2006-09 and the remaining 60% in the years 2009-10. The recommendation No.2, accepted by the Government, was as follows:-

> "*2. Linkage of full pension with 33 years of qualifying service should be dispensed with. Once an employee renders the minimum pensionable service of 20 years, pension should be paid at 50% of the average emoluments received during the past 10 months or the pay last drawn, whichever is more beneficial to the retiring employee. Simultaneously, the extant benefit of adding years of qualifying service for purposes of computing pension/related benefits should be withdrawn as it would no longer be relevant. (5.1.33)*"

4. Vide Office Memorandum dated 01.09.2008, the sanction of the President was accorded qua revision of pension of pre-2006 pensioners and Clause-1 and Clause-4.2 of the said Office Memorandum read as under:

> "*1. The undersigned is directed to say that in pursuance of Government's decision on the recommendations of Sixth Central Pay Commission, sanction of the President is hereby accorded to the regulation, with effect from 1.1.2006, of pension/ family pension of all the pre-2006 pensioners/family pensioners in the manner indicated in the succeeding paragraphs. Separate orders will be issued in respect of employees who retired/died on or after 1.1.2006.*
>
> *.... ....*
>
> *4.2 The fixation of pension will be subject to the provision that the revised pension, in no case, shall be lower than fifty percent of the minimum of the pay in the pay band plus the grade pay corresponding to the pre-revised pay scale from which the pension had retired. In the case of HAG+ and above scales, this will be fifty percent of the minimum of the revised pay scale."*

5. Vide Office Memorandum dated 14th October, 2009, the Government of Himachal Pradesh accorded sanction to the Regulation w.e.f. 01.01.2006 of pension/family pension of all the pre-2006 pensioners/family pensioners and Clause 4.2 of the Office Memorandum provided that the fixation of pension will be subject to the provision that the revised pension, in no case, shall be lower than 50% of the minimum of the Pay Band plus the Grade pay, corresponding to the pre-revised pay scale from which the pensioner had retired. Thereafter, vide Office Memorandum dated 21st May, 2013 on the subject 'Revision of pension of pre-2006 pensioners-reg.', the Finance (Pension) Department of the Government of Himachal Pradesh, ordered that in pursuance to instructions contained in Office Memorandum dated 14th October, 2009, the Governor of Himachal Pradesh was pleased to order that pension of pre-2006 pensioners, as revised w.e.f. 01.01.2006, in terms of Para 4.1 or Para 4.2 of the aforesaid OM, would be further stepped up

to 50% of the sum of minimum of pay in the pay band and the grade pay corresponding to the pre-revised pay scale from which the pensioner had retired, as arrived at with reference to fitment tables attached with H.P. Civil Services (Revised Pay) Rules, 2009, notified on 26.08.2009. This was followed by issuance of Communication dated 31st July, 2013 in case of the petitioner in CWPOA No.6391 of 2019, in terms whereof, the family pension of the respondents-petitioners was revised, but w.e.f. 01.04.2013.

6. The grievance of the respondents-petitioners, thus, is that vide Office Memorandum dated 21.05.2013, their pension in accordance with Office Memorandum dated 14th October, 2009 is required to be fixed at 50% of the emoluments w.e.f. 01.01.2006 and not w.e.f. 01.04.2013, as has been done by the respondents-State. Hence, these petitions were filed praying therein that the respondents-State be directed to revise the pension of the respondents-petitioners w.e.f. 01.01.2006 instead of 01.04.2013 and arrears be paid to them for the period between 01.01.2006 to 31.03.2013.

7. The respondents-State filed reply, wherein it has been averred that the State Government has absolute powers to make its own service rules for its employees and pensioners under proviso to Article 309 of the Constitution of India and the pension to the State Government employees is the subject matter of the State Government and the State Government had decided to adopt the Central Civil Services (Pension) Rules, 1972 for its employees and pensioners, however, subsequent amendments made under CCS (Pension) Rules, 1972 by the Government of India are within the power of State Government to amend, modify and adopt these rules in accordance with the suitability and feasibility of the same with respect to the State of Himachal Pradesh. The State Government does not follow the recommendations of the Central Pay Commission, therefore, the Government of India instructions/orders issued as per the recommendations of Central Pay Commission are not applicable to the State Government servants. The State

Government had taken a conscious decision for regulation of pension/family pension of pre-2006 pensioners/family pensioners and for this purpose issued own instructions for revision of pension/family pension of pre-2006 pensioners/family pensioners vide Office Memorandum dated 14.10.2009 after considering all the aspects. The State Government in the year 2013-14 had taken its own decision to step up the pension and family pension of pre-2006 pensioners to 50% and 30% respectively to the sum of the pay of minimum of pay in the Pay Band plus Grade Pay corresponding to pre revised pay scale from which the Government servant had retired/died and accordingly the State Government had issued instructions vide Office Memorandum dated 21.05.2013, making provision for further stepping up of pension and family pension of pre-2006 pensioners upto 50% and 30% respectively of the sum of minimum of pay in the pay band and grade pay corresponding to the pre revised pay scale from which the pensioner had retired. The Government of India had issued its own instructions for revision of pension of pre-2006 pensioners from time to time. The State Government neither follows the recommendations of the Central Pay Commission nor any instructions issued by the Government of India based on the report of the Central Pay Commission. Hence, instructions dated 01.09.2008 and further clarification issued on 03.10.2008 and Office Memorandum of even number dated 14.10.2008, which were subject matter of the dispute in CAT and High Court of Punjab and Haryana are not applicable to the State of Himachal Pradesh as all these orders are based on the recommendations of the 6th pay commission. It has also been stated that all the pensioners/family pensioners have already been getting the benefits of enhanced pension/family pension w.e.f. 01.04.2013 without any discrimination. Office Memorandum dated 14.10.2009 clearly stipulates that these orders apply to all the pensioners/family pensioners, who were drawing pension/family pension on 01.01.2006 under the CCS (Pension) Rules, 1972. The State Government has

not adopted the Government of India instructions contained in Office Memorandum dated 01.09.2008 and other related instructions in any manner. It has also been submitted that the Government of Himachal Pradesh vide Office Memorandum dated 21.05.2013 has already allowed revised benefit w.e.f. 01.04.2013 despite financial constraints and it is well within the State Government jurisdiction to allow financial benefit from a specific cut off date keeping in view the financial position of the State. It has also been submitted that if the prayer of the respondents-petitioners was to be accepted for allowing financial benefits from 01.01.2006, an estimated liability of Rs.350/- Crore (arrears) will fall on the State exchequer which would be a huge burden on State finances.

8. We have heard the learned Advocate General for the appellants-State as well as the learned counsel for the respondents-petitioners and also gone through the record of the case carefully.

9. The learned Advocate General contended that the State Government has absolute powers to make its own service rules for its employees and pensioners under proviso to Article 309 of the Constitution of India and the State Government neither follows the recommendations of the Central Pay Commission nor any instructions issued by the Government of India based on the report of the Central Pay Commission. He further contended that it is well within the State Government jurisdiction to allow the financial benefits from a specific cut off date keeping in view of the financial position of the State as for allowing the financial benefits w.e.f. 01.01.2006, additional financial burden will fall upon the State exchequer, which would be a huge burden on the State finances.

10. On the other hand, learned counsel for the respondents-petitioners contended that Office Memorandum dated 21.05.2013 is arbitrary and discriminatory and the cut off date cannot be fixed by the State in an arbitrary manner. They further contended that the Government of Himachal

Pradesh is following the recommendations of 6th Pay Commission and the instructions issued by the Government of India from time to time for fixing/revising pay/pension of the State Government employees/pensioners and after the Government of India order dated 30.07.2015, which was issued in compliance with the final verdict of the Hon'ble Supreme Court of India in Special Leave Petition(s) No.23055/13 and 36148-50/2013, the State Government was required to issue the revised orders for revision of pension of pre-2006 pensioners w.e.f. 01.01.2006 instead of 01.04.2013. In support of their contentions, learned counsel for the respondents-petitioners also placed reliance upon ***U.P. Raghavendra Acharya & others vs. State of Karnataka & others, (2006) 9 SCC 630, Pepsu RTC Vs. Mangal Singh & others (2011) 11 SCC 702, State of Rajasthan & others Versus Mahendra Nath Sharma, (2015) 9 SCC 540*** and ***K.S. Puttaswamy (retired) and another Vs. Union of India and another, (2019) 1 SCC 1.***

11. In ***U.P. Raghavendra Acharya & others vs. State of Karnataka & others, (2006) 9 SCC 630***, the Hon'ble Apex Court held that pension is not a bounty and it is treated to be a deferred salary. The relevant portion of the judgement reads as under:-

> *"25. Pension, as is well known, is not a bounty. It is treated to be a deferred salary. It is akin to right of property. It is co-related and has a nexus with the salary payable to the employees as on the date of retirement.*
> *xxx xxx xxx*
> *32. In Subrata Sen and Ors. vs. Union of India and Ors., a Division Bench of this Court applying the principles laid down in D.S. Nakara vs. Union of India, observed:*
>
> > *"14. In our view the aforesaid para does not in any way support the contention of the respondents. On the contrary, on parity of reasoning, we would also reiterate that let us be clear about this misconception. Firstly, the Pension Scheme including the liberalised scheme available to the employees is non-contributory in character. Payment of pension does not depend upon Pension Fund. It is the liability undertaken by the Company under the Rules and whenever becomes*

due and payable, is to be paid. As observed in Nakara case (1983 (1) SCC 305), pension is neither a bounty, nor a matter of grace depending upon the sweet will of the employer, nor an ex gratia payment. It is a payment for the past services rendered. It is a social welfare measure rendering socio-economic justice to those who in the heyday of their life ceaselessly toiled for the employer on an assurance that in their old age they would not be left in the lurch. Maybe that in the present case, the trust for Pension Fund is created for income tax purposes or for smooth payment of pension, but that would not affect the liability of the employer to pay monthly pension calculated as per the Rules on retirement from service and this retirement benefit is not based on availability of Pension Fund. There is no question of pensioners dividing the Pension Fund or affecting the pro rata share on addition of new members to the Scheme. As per Rule 1 quoted above, an employee would become a member of the Fund as soon as he enters into a specified category of service of the Company. Under Rule 8, trustees may withhold or discontinue a pension or annuity or any part thereof payable to a member or his dependants, and that pension amount is non-assignable. Further, the payment of pension was the liability of the employer as per the Rules and that liability is required to be discharged by the Union of India in lieu of its taking over of the Company. The rights of the employees (including retired) are protected under Section 11 of the Burmah Oil Company [Acquisition of Shares of Oil India Limited and of the Undertakings in India of Assam Oil Company Limited and the Burmah Oil Company (India Trading) Limited] Act, 1981."

12. In ***Pepsu Road Transport Corporation Vs. Mangal Singh & others (2011) 11 SCC 702,*** the Hon'ble Apex Court observed that although pension is not a bounty but is claimable as a matter of right, yet the right is not absolute or unconditional. The relevant para of the judgement reads as under:-

"34. Pension is a retirement benefit partaking of the character of regular payment to a person in consideration of the past services rendered by him. We hasten to add that although

pension is not a bounty but is claimable as a matter of right, yet the right is not absolute or unconditional. The person claiming pension must establish his entitlement to such pension in law. The entitlement might be dependent upon various considerations or conditions. In a given case, the retired employee is entitled to pension or not depend on the provisions and interpretation of Rules and Regulations. The Contributory Provident Fund appears to be simple mechanism where an employee is paid the total amount which he has contributed along with the equal contribution made by the employer ordinarily at the time of retirement of an employee. In short, we quote what was repeatedly said by this Court that "pension is payable periodically as long as the pensioner is alive whereas C.P.F. is paid only once on retirement". Therefore, conceptually, pension and C.P.F. are separate and distinct."

13. In ***State of Rajasthan & others Versus Mahendra Nath Sharma, (2015) 9 SCC 540,*** the Hon'ble Apex Court held that pension is not a bounty and the benefit of pension is conferred upon an employee for his unblemished career. The relevant portion of the judgement reads as under:-

"28. It is a well known principle that pension is not a bounty. The benefit is conferred upon an employee for his unblemished career. In D.S. Nakara v. Union of India, D.A. Desai, J. speaking for the Bench opined that:-

"18. The approach of the respondents raises a vital and none too easy of answer, question as to why pension is paid. And why was it required to be liberalised? Is the employer, which expression will include even the State, bound to pay pension? Is there any obligation on the employer to provide for the erstwhile employee even after the contract of employment has come to an end and the employee has ceased to render service?

19. What is a pension? What are the goals of pension? What public interest or purpose, if any, it seeks to serve? If it does seek to serve some public purpose, is it thwarted by such artificial division of retirement pre and post a certain date? We need seek answer to these and incidental questions so as to render just justice between parties to this petition.

20. The antiquated notion of pension being a bounty a gratuitous payment depending upon the sweet will or grace of

the employer not claimable as a right and, therefore, no right to pension can be enforced through court has been swept under the carpet by the decision of the Constitution Bench in Deokinandan Prasad v. State of Bihar wherein this Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon anyone's discretion. It is only for the purpose of quantifying the amount having regard to service and other allied matters that it may be necessary for the authority to pass an order to that effect but the right to receive pension flows to the officer not because of any such order but by virtue of the rules. This view was reaffirmed in State of Punjab v. Iqbal Singh."

We may hasten to add that though the said decision has been explained and diluted on certain other aspects, but the paragraphs which we have reproduced as a concept holds the filed as it is a fundamental concept in service jurisprudence. It will be appropriate and apposite on the part of the employers to remember the same and ingeminate it time and again so that unnecessary litigation do not travel to the Court and the employers show a definite and correct attitude towards employees. We are compelled to say so as we find that the intention of the State Government from paragraph 5 of the circular/ memorandum has been litigated at various stages to deny the benefits to the respondents. It is the duty of the State Government to avoid unwarranted litigations and not to encourage any litigation for the sake of litigation."

14. In ***K.S. Puttaswamy (retired) and another Vs. Union of India and another, (2019) 1 SCC 1***, the Hon'ble Apex Court has held that the pension is not a largesse or bounty conferred by the State. The relevant para of the judgment reads as under:-

"1371. Pension, it is well settled, is not a largesse or bounty conferred by the state. Pension, as a condition of service, attaches as a recompense for the long years of service rendered by an individual to the state and its instrumentalities. Pensioners grow older with passing age. Many of them suffer from the tribulations of old age including the loss of biometrics. It is unfair and arbitrary on the part of the state to deny pension to a person entitled to it by linking pensionary payments to the possession of

> *an Aadhaar number or to its authentication. A right cannot be denied on the anvil of requiring one and only one means of identification. The pension disbursing authority is entitled to lay down regulations (which are generally speaking, already in place) to ensure the disbursal of pension to the person who is rightfully entitled. This aim of the government can be fulfilled by other less intrusive measures. The requirement of insisting on an Aadhaar number for the payment of pensionary benefits involves a breach of the principle of proportionality. Such a requirement would clearly be contrary to the mandate of Article 14."*

15. Therefore, in view of the case law cited by the learned counsel for the respondents-petitioners, it is clear that the pension is not a bounty and is claimable as a matter of right. However, the ratio laid down in case law cited by the learned counsel for the respondents-petitioners cannot be made applicable to the facts of this case as the facts in the case in hand, are all together different. In the instant case, the grievance of the respondents-petitioners, is that their pension is required to be revised w.e.f. 01.01.2006 instead of 01.04.2013 and arrears have to be paid to them for the period between 01.01.2006 to 31.03.2013. Conversely, the stand of the appellants/State is that the decision taken by the State Government to grant revised pension to pre-2006 pensioners by conferring upon them the actual benefits of revised pension w.e.f. 01.04.2013 was a policy decision keeping in view the financial position of the State because if the financial benefits are allowed w.e.f. 01.01.2006, additional financial burden will fall upon the State exchequer.

16. It is not in dispute that the State of Himachal Pradesh had decided to adopt the Central Civil Services (Pension) Rules, 1972, vide Notification dated 30.04.1974 for its employees and pensioners. It is also not in dispute that the provisions of CCS (Pension) Rules, 1972 as amended and modified by the Government of India from time to time, are applicable to the State Government employees, subject to adoption and modifications, if any,

made by the State Government in the rules under proviso to Article 309 of the Constitution of India. The contention of the learned counsel for the respondents-petitioners that after the Government of India order dated 30.07.2015, which was issued in compliance with the final verdict of the Hon'ble Supreme Court of India in Special Leave Petition(s) No.23055/13 and 36148-50/2013, the State Government was required to issue the revised orders for revision of pension of pre-2006 pensioners w.e.f. 01.01.2006 instead of 01.04.2013 deserves to be rejected as each State has its own individualistic way of governance under the Constitution and one State is not bound to follow the rules and regulations applicable to the employees of the other State or Central Government. In ***State of H.P. Versus P.D. Attri and others, (1999) 3 Supreme Court Cases 217***, the Hon'ble Apex Court held as under:-

> *"5. .....India is a union of States. Each State has its own individualistic way of governance under the Constitution. One State is not bound to follow the rules and regulations applicable to the employees of the other State or if it had adopted the same rules and regulations, it is not bound to follow every change brought in the rules and regulations in the other State. The question then arises before us is if the State of Himachal Pradesh has to follow every change brought in the States of Punjab & Haryana in regard to the rules and regulations applicable to the employees in the States of Punjab & Haryana. The answer has to be in the negative....."*

17. In ***Secretary Mahatama Gandhi Mission and another vs. Bhartiya Kamgar Sena and others, (2017) 4 SCC 449***, it was held by the Hon'ble Apex Court that even the recommendations of pay commission are not binding on the Government of India. They are meant for administrative guidance. The Government of India may reject or accept the recommendations either fully or partly. The relevant para of the judgment reads as under:-

> ***"60. The Sixth Pay Commission appointed by the Government of India is only a body entrusted with the job of making an assessment of the need to revise the pay***

structure of the employees of the Government of India and to suggest appropriate measures for revision of the pay structure. The recommendations of the pay commission are not binding on the Government of India, much less any other body. They are only meant for administrative guidance of the Government of India. The Government of India may accept or reject the recommendations either fully or partly, though it has never happened that the recommendations of the pay commission are completely rejected by the Government so far."

18. Thus, even the recommendations of the Central Pay Commission are not binding on the Government of India and even if Government of India accepts the recommendations of Pay Commission, then also it has no authority to compel the States to adopt structure applicable to Government of India. The State Government is well within its jurisdiction in not following the recommendations of the Central Pay Commission and the instructions/ orders issued by the Government of India with respect to the regulation of pension/family pension. For regulation of pension/ family pension of pre-2006 pensioners/family pensioners, the Government of Himachal Pradesh had issued its own instructions for revision of pension/family pension of pre-2006 pensioners/family pensioners, vide Office Memorandum dated 14.10.2009, the relevant portion of which reads as under:-

> *"The undersigned is directed to say that Governor, Himachal Pradesh is pleased to accord sanction to the regulation, with effect from 01.01.2006, of pension/ family pension of all the pre-2006 pensioners/family pensioners in the manner indicated in the succeeding paragraphs. Separate orders will be issued in respect of employees who retired/died on or after 01.01.2006.*
> *xxxx xxxx xxxx*
> 4.1 The pension / family pension of existing pre-2006 pensioners/family pensioners will be consolidated with effect from 01.01.2006 by adding together:-
> (i) The existing pension/family pension
> (ii) Dearness Pension, where applicable
> (iii) Dearness Relief upto AICPI (IW) average index 536 (Base Year 1982=100) i.e. @ 24% of Basic Pension/ Basic family

pension plus dearness pension as admissible vide this department O.M. No. Fin(Pen)B(10)-6/98-I dated 23.6.2006.
(iv) Fitment weightage @40% of the existing pension/ family pension.

Where the existing pension in (i) above includes the effect of merger of 50% of dearness relief w.e.f. 01.04.2004, the existing pension for the purpose of fitment weightage will be re-calculated after excluding the merged dearness relief of 50% from the pension.
The amount so arrived at will be regarded as consolidated pension/family pension with effect from 01.01.2006.
4.2 The fixation of pension will be subject to the provision that the revised pension, in no case, shall be lower than fifty percent of the minimum of the pay band plus the grade pay corresponding to the pre-revised pay scale from which the pensioner had retired. The pension will be reduced pro-rata, where the pensioner had less than the maximum required service for full pension as per rule 49 of CCS (Pension) Rules,1972 as applicable on 1.1.06 and in no case it will be less than Rs.3500 p.m. Similarly, the fixation of family pension will be subject to the provision that the revised family pension, in no case, shall be lower than thirty percent of the minimum of the pay band plus grade pay corresponding to the pre-revised pay scale in which the pensioner/ deceased Govt. servant had last worked. In case the pension/family pension consolidated as per para 4.1 above is higher than the pension/family pension calculated in the manner indicated above the same (higher consolidated pension/family pension) will be treated as Basic Pension/family pension."

19. However, in the year 2013-14, pension and family pension of pre-2006 pensioners was stepped up to 50% and 30% respectively to the sum of the pay of minimum of pay in the Pay Band plus Grade Pay corresponding to pre revised pay scale from which the Government servant had retired/died and the State Government had accordingly issued notification dated 21.05.2013 and these instructions were made effective w.e.f. 01.04.2013. The relevant portions of which read as under:-

> *"The undersigned is directed to say that in continuation to instructions contained in this Departments' Office Memorandum No.Fin (Pen) A(3)-1/09-Part-II dated 14th October,2009 the Governor, Himachal Pradesh, is pleased to order that the pension of pre-2006 pensioners as revised w.e.f.1.1.2006 in terms of para 4.1 or para 4.2 of the aforesaid OM dated 14.10.2009, would be further stepped up to 50% of the sum of minimum of pay in the pay band and the grade pay corresponding to the pre-revised pay scale from which the pensioner had retired, as arrived at with reference to the fitment tables attached to H.P.Civil Services (Revised Pay)Rules, 2009 notified vide No. Fin- (PR)B(7)-1/2009 dated 26.08.2009.*
>
> *2. The normal family pension in respect of pre-2006 pensioners/family pensioners as revised w.e.f. 1.1.2006 in terms of para 4.1 or para 4.2 of the aforesaid OM dated 14.10.2009 would also be further stepped up to 30% of the sum of minimum of pay in the pay band and the grade pay corresponding to the pre-revised pay scale in which the Government servant had retired, as arrived at with reference to the fitment tables attached to H.P.Civil Services (Revised Pay) Rules, 2009 notified vide No. Fin-(PR) B (7)-1/2009 dated 26.08.2009.*
>
> *xxxx xxxx xxxx*
>
> *8. These orders will take effect from 1.04.2013. There will be no change in the amount of revised pension/family pension paid during the period 1.1.2006 and 31.3.2013 and, therefore, no arrears will be payable on account of these orders for that period."*

20. Thus, vide the aforesaid Office Memorandum dated 21.05.2013, the State Government has fixed cut off date with respect to the revised pension of pre-2006 pensioners as 01.04.2013 instead of 01.01.2006. Now, the question which arises for consideration before this Court is as to whether the financial constraints could be a valid ground for introducing a cut off date while implementing a pension scheme on a revised basis. There are long line of cases, where the validity of fixation of cut off date has been considered by the Honble Apex Court keeping in view the financial implications of the State while providing benefits for its employees/pensioners. In ***State of Rajasthan and***

another Versus ***Amrit Lal Gandhi and others, (1997) 2 Supreme Court Cases 342***, the Hon'ble Apex Court observed that whenever a revision takes place, a cut off date becomes imperative because the benefit has to be allowed within the financial resources available with the Government. The relevant para of the judgment reads as under:-

> *"15. In P.N. Menon case the question again arose with regard to fixing of cut-off date for payment of gratuity and pension. In that case the cut-of date, which was fixed, was 30.9.1977. While allowing the appeals and repelling the challenge to the fixation of the said date, it was observed at pages 73-74 as under:*
>
> > *"Whenever the Government or an authority, which can be held to be a State within the meaning of Article 12 of the Constitution, frames a scheme for persons who have superannuated from service, due to many constraints, it is not always possible to extend the same benefits to one and all, irrespective of the dates of superannuation. As such any revised scheme in respect of post- retirement benefits, if implemented with a cut-off date, which can be held to be reasonable and rational in the light of Article 14 of the Constitution, need not be held to be invalid. It shall not amount to "picking out a date from the hat, as was said by this Court in the case of D.R. Nim "V. Union of India in connection with fixation of seniority. Whenever a revision takes place, a cut-off date becomes imperative because the benefit has to be allowed within the financial resources available with the Government."*
>
> *It again reiterated at page 75 that:*
>
> "not only in matters of revising the pensionary benefits, but even in respect of revision of scales of pay, a cut-off date on some national or reasonable basis, has to be fixed for extending the benefits."

21. In ***Mohd. Ali Imam*** Versus ***State of Bihar Through its Chief Secretary and others, (2020) 5 SCC 685***, the Hon'ble Apex Court held that even if no particular reasons are given for the cut off date by the Government, the choice of cut off date cannot be held to be arbitrary unless it is shown to be totally capricious or whimsical. The relevant paras of the judgment read as under:-

"9. If we see the rationale of the impugned judgment as set out para 29 onwards, we may notice that the same is predicated on the absence of arbitrariness in the applicability of the cut-off date of the amendment in the Triple Benefit Scheme statute as well as the rationality behind it based on the date of the Cabinet decision granting Triple Benefit Scheme to such deficit grant colleges. We cannot find any fault with the reasoning in the impugned order.

10. We must notice that firstly there was really no obligation for exercise of powers of the Government or University in the absence of the institutions being not constituent colleges, but only affiliated colleges. In order to support education, a decision was taken to provide deficit financing. There was again no requirement that the Triple Benefit Scheme ought to be extended to the 1 (1983) 1 SCC 305 2 (1993) 4 SCC 62 employees of these colleges and was not so initially extended. A second step was taken in this direction by extending the scheme. The third step was the Amendment of the Scheme. It can hardly be said that by taking these beneficial steps, the State Government is not liable to take into consideration the financial implications of the same, and that the benefits should be extended across the board. The amendments could have, in fact, been implemented prospectively, but were given part-retrospective effect based on the rationale of the date of the Cabinet decision.

11. Apart from this, there may be other considerations in the mind of the Executive authority while fixing a particular date i.e. economic conditions, financial constraints, administrative and other circumstances, and if no reason is forthcoming from the executive for fixation of a particular date, it should not be interfered with by the Court unless the cut-off date leads to some blatantly capricious or outrageous result. In such cases it has been opined that there must be exercise of judicial restraint and such matters ought to be left to the Executive authorities, to fix the cut-off date, and the Government thus, must be left with some leeway and free play at the joints in this connection. Even if no particular reasons are given for the cut-off date by the Government, the choice of cut-off date cannot be held to be arbitrary (unless it is shown to be totally capricious or whimsical)."

22. In ***Himachal Road Transport Corporation and another*** Vs. ***Himachal Road Transport Corporation Retired Employees Union, (2021)***

4 SCC 502, the Hon'ble Apex Court has held that the financial constraint pleaded by the Government was a valid ground for fixation of cut off date. The relevant portion of the judgment reads as under:-

> *"18. Though there are long line of cases, where validity of fixation of cut-off date is considered by this Court, we confine and refer to the case law which is relevant to the facts of the case on hand. In the case of State of Punjab v. Amar Nath Goyal, while examining the validity of cut-off date fixed for grant of benefit of increased quantum of death-cum- retirement gratuity, this Court has held that the financial constraint pleaded by the Government, was a valid ground for fixation of cut-off date and such fixation was not arbitrary, irrational or violative of Article 14 of the Constitution. While differentiating the facts with the case of D.S. Nakara1, this Court held in para 29 of the judgment, which reads as under:*
>
> > *"29. D.S. Nakara which is the mainstay of the case of the employees arose under special circumstances, quite different from the present case. It was a case of revision of pensionary benefits and classification of pensioners into two groups by drawing a cut-off line and granting the revised pensionary benefits to employees retiring on or after the cut-off date. The criterion made applicable was "being in service and retiring subsequent to the specified date". This Court held that for being eligible for liberalised Pension Scheme, application of such a criterion is violative of Article 14 of the Constitution, as it was both arbitrary and discriminatory in nature. The reason given by the Court was that the employees who retired prior to a specified date, and those who retired thereafter formed one class of pensioners. The attempt to classify them into separate classes/groups for the purpose of pensionary benefits was not founded on any intelligible dirrerentia, which had a rational nexus with the object sought to be achieved. However, it must be noted that even in cases of pension, subsequent judgments of this Court have considerably watered down the rigid view taken in D.S. Nakara1 as we shall see later in T.N. Electricity Board v. R.Veerasamy ("Veerasamy"). In any event, this is not a case of a continuing benefit like pension; it is a one-time benefit like gratuity."*
>
> *19. In State of A.P. v. N. Subbarayudu & others, by noticing that a rigid view was taken in the case of D.S. Nakara1, this Court has considerably watered down the same and has held that fixing the*

cut-off date is an executive function based on several factors like economic conditions, financial constraints, administrative and other circumstances. This Court further held that even if no reason is forthcoming from executive, for fixation of a particular date, it should not be interfered by Court, unless cut-off date leads to some blatantly capricious or outrageous result."

23. In a recent judgment of ***The State of Tripura & Ors.*** versus ***Smt. Anjana Bhattacharjee & Ors., 2022 LiveLaw (SC) 706***, the Hon'ble Apex Court has held that the financial burden can be a valid ground to fix a cut off date for the purpose of granting the actual benefit of revision of pension/pay. The relevant paras of the judgment read as under:-

5.3 Whether the financial crunch/financial constraint due to additional financial burden can be a valid ground to fix a cut-off date for the purpose of granting the actual benefit of revision of pension/pay has been dealt with and/or considered by this Court in the case of Amar Nath Goyal (supra). In the aforesaid decision, it is observed and held by this Court that financial constraint can be a valid ground for fixation of cut-off date for grant of benefit of increased quantum of death-cum-retirement gratuity. In paragraphs 26, 32 and 33 of the said judgment, it is observed and held as under:-

"26. It is difficult to accede to the argument on behalf of the employees that a decision of the Central Government/State Governments to limit the benefits only to employees, who retire or die on or after 1.4.1995, after calculating the financial implications thereon, was either irrational or arbitrary. Financial and economic implications are very relevant and germane for any policy decision touching the administration of the Government, at the Centre or at the State level.

xxxx xxxx xxxx

32. The importance of considering financial implications, while providing benefits for employees, has been noted by this Court in numerous judgments including the following two cases. In State of Rajasthan v. Amrit Lal Gandhi [(1997) 2 SCC 342 : 1997 SCC (L&S) 512 : AIR 1997 SC 782] this Court went so as far as to note that:

"Financial impact of making the Regulations retrospective can be the sole consideration while fixing a cut-off date. In our opinion, it cannot be said that this cut-off date was fixed

> *arbitrarily or without any reason. The High Court was clearly in error in allowing the writ petitions and substituting the date of 1-11986 for 111990."*
>
> *33. More recently, in Veerasamy [(1999) 3 SCC 414 : 1999 SCC (L&S) 717] this Court observed that, financial constraints could be a valid ground for introducing a cut-off date while implementing a pension scheme on a revised basis. In that case, the pension scheme applied differently to persons who had retired from service before 1-7-1986, and those who were in employment on the said date. It was held that they could not be treated alike as they did not belong to one class and they formed separate classes."*
>
> *5.4 In the aforesaid decision this Court after considering the earlier decisions of this Court in the cases of State of Punjab Vs. Boota Singh; (2000) 3 SCC 733 and State of Punjab Vs. J.L. Gupta; (2000) 3 SCC 736, it is specifically observed and held that for the grant of additional benefit, which had financial implications, the prescription of a specific future date for conferment of additional benefit, could not be considered arbitrary.*
>
> *5.5 In the subsequent decision in Bihar Pensioners Samaj (supra), the decision in the case of Amar Nath Goyal (supra) is followed and it is observed and held that financial constraints could be a valid ground for introducing a cut-off date while introducing a pension scheme on revised basis. It is further observed and held by this Court in the aforesaid decision that fixing of a cut-off date for granting of benefits is well within the powers of the Government as long as the reasons therefor are not arbitrary and are based on some rational consideration."*

24. Thus, from the law laid down by the Hon'ble Supreme Court, it is clear that the financial burden can be a valid ground to fix a cut off date for the purpose of granting the actual benefit of revision of pension/pay. In the instant case, the stand of the State Government is that if the cut off date for allowing the financial benefits is fixed w.e.f. 01.01.2006, then the estimated liability of Rs.350/- crore will fall on the State exchequer, which would be a huge burden on the State finances. Therefore, in view of the law laid down by

the Hon'ble Supreme Court, it is well within the State Government jurisdiction to allow the financial benefits from a specific cut off date keeping in view the financial position of the State. Hence, the cut off date fixed as 01.04.2013 in the Office Memorandum dated 21.05.2013 by the appellants-State cannot be said to be arbitrary and discriminatory and, in our opinion, the same has been fixed on a very valid ground, i.e. the financial constraints and as such, the learned Single Judge had erred in quashing the Office Memorandum dated 21.05.2013 to the effect that it makes orders effective w.e.f. 01.04.2013 and in ordering that revised pension in terms of the said Office Memorandum would be payable to the respondents-petitioners w.e.f. 01.01.2006 alongwith arrears.

25. In view of the above, the impugned judgment dated 15.07.2021, passed by the learned Single Judge is unsustainable and the same deserves to be set aside and is, accordingly, set aside. Hence, all the appeals are allowed and consequently all the three writ petitions filed by the respondents-petitioners are dismissed.

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

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

1. 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.

2. 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

Specific Relief Act, 1963- Specific performance of agreement- Pursuant to advertisement issued by the defendants, plaintiff applied for specific flat and paid Rs.1,10,000/- to defendant No. 1 who accepted the application, however, flat in question was not sold to plaintiff, he filed suit for specific performance of agreement- The suit was decreed and against this judgment and Decree, two original side appeals have been preferred**- Held-** Suit filed by the plaintiff was within limitation period and in the facts and circumstances of the case, the suit for specific performance, was liable to be decreed and decree passed by the Ld. Single Judge was in accordance with the agreement- Appeals dismissed. (Para 5)

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;
Hansa V Gandhi Versus Deep Shanker Roy (2013) 12 SCC 776;
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. Krishnamurthy 2022 SCC Online 840;

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge

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Sr. No.1	**Particulars**	**Pages**

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 VIVEK SINGH THAKUR, J.

Rajesh Kumar Rao & another …Appellants

Versus

Ravinder Kumar Gupta ….Respondent

For the Appellants: Mr. Suneet Goel, Advocate.

For the Respondent: Mr. Naveen K. Bhardwaj, Advocate

Arbitration Appeal No. 12 of 2020
Date of Decision : January 12, 2023

Arbitration and Conciliation Act, 1996- Section 8(1)- Arbitration Clause of Partnership Deed- Referring the matter to Arbitrator- Held that Civil Court was required to refer the matter to Arbitrator in terms of Arbitration Clause- Arbitration Clause of Partnership Deed covers the dispute related to selling of half share by partner to remaining partner, therefore, keeping in view the provisions of Section 8 of Arbitration Act, Civil Court had no other option but to refer the matter to Arbitrator in terms of Arbitration Clause and thus, Senior Civil Judge has committed an error by dismissing the application filed by appellants to refer the dispute for arbitration. (Paras 17 & 18)

Cases referred:

Haryana Telecom Company Ltd. V. Sterlite Industries (India) Ltd., (1999)5 SCC 688;

Hindustan Petroleum Corpn. Ltd. vs. Pinkcity Midway Petroleums, (2003)6 SCC 503;

N. Radhakrishnan vs. Maestro Engineers and others (2010)1 SCC 72;

P. Anand Gajapathi Raju vs. P.V. G. Raju (dead) and others, (2000)4 SCC 539;

SBP & Co. vs. Patel Engineering Ltd. and another (2005) 8 SCC 618;

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

Instant Arbitration Appeal has been preferred by appellants against order dated 23.11.2020, passed by Senior Civil Judge, Lahaul & Spiti at Kullu in CMA No. 145-VI/2020 in Case No. 25/2020, titled Ravinder Kumar

vs. Rajesh Kumar Rao and another, whereby application preferred by appellants under Section 8(1) of Arbitration and Conciliation Act, 1996 (hereinafter referred as the "Act"), praying for referring the dispute to Arbitrator has been dismissed, on the ground that dispute in reference in Civil Suit does not fall within the purview of Clauses of Deed of Partnership dated 17.4.2014 executed between appellant No.1 and respondent and, therefore, Arbitration Clause of Deed of Partnership was not applicable in the case in hand.

2. Undisputed facts, in present case, are that on 17.4.2014, a Deed of Partnership was entered between Ravinder Kumar respondent and Rajesh Kumar (appellant No.1) to run a Crusher namely M/s Bhawani Stone Crusher in partnership and to use the stone extracted from land referred in Partnership Deed, in partnership business. The land comprised in Khasra Nos. 844 and 845, referred in agreement, whereupon Crusher had already been installed by previous owner Daulat Ram, is in joint ownership and possession of Ravinder Kumar and Rajesh Kumar in equal shares. Land measuring 5-8-0 bighas has been taken on lease by Ravinder Kumar for extraction of stones and stones extracted therefrom were agreed to be used only in M/s Bhawani Stone Crusher with condition that profit of stone extracted shall be distributed between both partners in equal shares. Apart from other terms and conditions, there was Arbitration Clause No. 9 which reads as under:-

> "9. That in case of any dispute between the partners the matter shall be dealt under the provisions of Indian Arbitration Act and the Arbitrator shall be appointed with the mutual consent of both the partners and the award issued by them shall be binding on both the partners."

3. Clause 10 of Partnership Deed is also relevant for adjudication of present matter, which reads as under:-

> "10. That in case any of the partner wants to leave the partnership business in that event it would be incumbent upon the leaving partner to sell his share in favour of remaining partner. The leaving partner shall not have the right to sell his share any outsider."

4. It is the case of appellants that vide Agreement dated 20.9.2020, respondent Ravinder Kumar Gupta had sold movable and immovable property of Stone Crusher along with land comprised in Khasra Nos. 844 and 845 measuring 54 biswas to its partner Rajesh Kumar Rao for consideration of `1.50 crore and `70 lacs was agreed to be paid by 10.10.2020 and balance amount of `75 lacs was to be paid within two months, and partners, i.e. Ravinder Kumar Gupta and Rajesh Kumar Rao, had also agreed to close the limit by depositing amount payable for that in equal shares. It was agreed that any liability or right, as existing on 20.9.2020, was to be shared by both partners equally whereas from 21.9.2020 Crusher was to be run by Rajesh Kumar Rao with all rights and liabilities of Crusher thereafter. Appellant No.2 Abhimanu Gorsi, who is son of Rajesh Kumar Rao, is one of the witnesses to this agreement.

5. It is also an admitted fact that another Agreement dated 24.3.2021 was executed between parties i.e. Ravinder Kumar and Rajesh Kumar Rao, in continuation of previous agreement dated 20.9.2020, wherein it was recorded that petitioner has paid Rs.10 lacs vide cheque dated 21.9.2020, `65 lacs vide cheque dated 22.9.2020 and `75 lacs vide cheque dated 5.4.2021 to Ravinder Kumar Gupta and Ravinder Kumar Gupta had agreed to pay his share of 50% in CC Limit and in FITL Loan of M/s Bhawani Stone Crusher by depositing the same in accounts maintained in SBI Bhuntar Branch and Ravinder Kumar had agreed to execute the sale deed in favour of Rajesh Kumar Rao on or before 10.5.2021.

6. Later on, it has been claimed that amount of consideration for sale was revised vide agreement dated 24.3.2021 and thereafter entire sale consideration has been paid by Rajesh Kumar Rao to Ravinder either through cheques or by remitting/transferring the amount in the account of Ravinder Kumar Gupta.

7. On 7.10.2020, respondent Ravinder Kumar preferred a suit for declaration that he was owner in possession of half share of total land comprised Khasra Nos 844 and 845 along with Stone Crusher thereon and for declaring that Agreement dated 20.9.2020 was null and void, not binding on him, with consequential relief of permanent prohibitory injunction restraining the appellants from taking over possession of the same forcibly and also from ousting and dispossessing the plaintiff from Stone Crusher.

8. In aforesaid suit, appellants preferred an application under Section 8(1) of the Act with prayer to Civil Court to refer the dispute for arbitration in view of Arbitration Clause No. 9 of Partnership Deed dated 17.4.2014.

9. Application was opposed on the ground that Clause 9 of Partnership Deed was regarding dispute between partners in relation to partnership business only and there was no dispute between the parties regarding partnership business but suit filed was against the Agreement obtained by defendants/ appellants in connivance with each other and other witnesses by putting pressure on respondent and, therefore, matter was not required to be referred to arbitration as Clause 9 was related to partnership business only not for title of land and crusher.

10. Learned Civil Judge accepted the plea of respondent and dismissed the application.

11. Learned counsel for appellants has relied upon pronouncements of Supreme Court in ***P. Anand Gajapathi Raju vs. P.V. G. Raju (dead) and others,*** reported in **(2000)4 SCC 539**; ***Hindustan Petroleum Corpn. Ltd. vs. Pinkcity Midway Petroleums,*** reported in **(2003)6 SCC 503; *SBP & Co. vs.***

Patel Engineering Ltd. and another, reported in **(2005) 8 SCC 618;** and ***N. Radhakrishnan vs. Maestro Engineers and others,*** reported in **(2010)1 SCC 72**.

12. Learned counsel for respondent has relied upon ***N. Radhakrishnan vs. Maestro Engineers and others,*** reported in ***(2010)1 SCC 72,*** as well as ***Haryana Telecom Company Ltd. V. Sterlite Industries (India) Ltd.,*** reported in **(1999)5 SCC 688.**

13. It has been submitted by learned counsel for appellants that respondent has received entire sale consideration amount and despite that, he is not coming forward to execute the sale deed but has filed a suit to frustrate the right of appellants.

14. It has been further submitted on behalf of appellants that Clause 10 provides that in case any partner intends to leave the partnership business then it would be incumbent upon him to sell his share in favour of remaining partners and leaving partner shall not have any right to sell his right to any outsider, whereas, after entering into Agreement to Sell with appellant No.1, on 20.9.2020, respondent Ravinder Kumar initiated talks with outsiders to sell his share whereupon appellant No.1 came under pressure and executed agreement dated 24.3.2021 whereby sale consideration was enhanced and appellant No.1 had also paid enhanced sale consideration to Ravinder Kumar and, therefore, matter pertains to Partnership Deed wherein Arbitration Clause is there and, thus, impugned order deserves to be set aside.

15. Learned counsel for respondent has submitted that Agreements to Sell entered between the parties were result of coercion and connivance of appellants to pressurize the respondent to sell his share to Rajesh Kumar Rao and, therefore, the issue/dispute arising between the parties is not a subject matter of Partnership Deed which does not contemplate execution of Agreement to Sell. It has been further submitted that respondent does not intend to transfer or sell his share. With respect to receipt of sale

consideration, it has been submitted that said amount was transmitted by appellant No.1 to account of respondent voluntarily without consent of respondent.

16. I have gone through entire record as well as case law cited by parties.

17. Dispute between the parties is with respect to Agreement to Sell pertaining to half share of Ravinder Kumar a partner and according to Clause 10 of Partnership Deed, a partner, intending to sell his share, was bound to sell his share in favour of remaining partners and, therefore, an Agreement to Sell entered between parties is in furtherance to Clause 10 of Partnership Deed and dispute arising between the parties is related to Clause 10 of Partnership Deed. Therefore, Arbitration Clause of Partnership Deed covers the dispute related to selling of half share by partner to remaining partner. Therefore, keeping in view the provisions of Section 8 of Arbitration Act, Civil Court had no other option but to refer the matter to Arbitrator in terms of Arbitration Clause and thus, Senior Civil Judge has committed an error by dismissing the application filed by appellants to refer the dispute for arbitration.

18. It is also apt to record that issue with respect to jurisdiction of Arbitrator to adjudicate the dispute can also be raised before Arbitrator who has power to decide the same without being influenced by any observation made by this Court for adjudicating present appeal.

19. In view of above discussion, impugned order passed by Senior Civil Judge in CMA No. 145-VI/2020 in Case No. 25/20 is set aside and Senior Civil Judge is directed to refer the matter for arbitration by directing the parties to invoke Arbitration Clause of Partnership Deed.

Appeal stands disposed of in the above terms, so also pending application(s), if any.

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

Ghanthu Ram ...Appellant/Applicant

Versus

Chuni Lal and others ...Respondents

For the applicant : Mr. Neeraj Gupta, Senior Advocate, with Ms. Rinki Kashmiri, Advocate.

For the respondents : Mr. Sanjeev Kuthiala, Senior Advocate, with Ms. Shalini, Advocate, for respondents No. 1 to 4.

Respondents No. 5 to 14 and 17 already ex-parte.

Mr. S.D. Vasudeva, Advocate, for respondents No. 15 and 16.

CMP (M) No. 663 of 2022
in RSA No. 137 of 2013
Reserved on: 09.12.2022
Decided on :13.01.2023

Code of Civil Procedure, 1908- Order 22 Rules 4, 9 and 11 read with Section 151- **Limitation Act**,**1963**- Section 5- Taking judicial notice- Held- That liberal approach should be adopted for condoning the delay- The judicial notice of the fact can be taken that the restrictions in the wake of COVID-19 pandemic were imposed throughout the country in the third week of March, 2020, hence, the explanation, which has been given by the applicant in the application, is not liable to be doubted. It cannot be expected from a poor litigant to enquire about the fate of his case regularly from his counsel when his Regular Second Appeal has been admitted for hearing by the Court. Admittedly, the said Regular Second Appeal was not on Board for hearing. (Para 13)

Cases referred:

Ram Nath Sao alias Ram Nath Sahu & others Vs. Gobardhan Sao & others AIR 2002 SC 1201;

Sardar Amarjit Singh Kalra (Dead) by LRs & others Vs. Pramod Gupta (Smt) (Dead) By LRs & others (2003) 3 SCC 272;

The following judgment of the Court was delivered:

Virender Singh, Judge.

Appellant-Applicant-Ghanthu Ram has filed the application, under Order 22 Rules 4, 9 and 11 read with Section 151 of the Code of Civil Procedure (hereinafter referred to as the 'CPC') and Section 5 of the Limitation Act, for bringing on record the legal representatives of deceased respondent No. 7-Nandu, s/o Shri Murlu.

2. As per the averments made in the application, respondent No. 7-Nandu has expired on 24th November, 2017, leaving behind the legal representatives, as mentioned in para-1 of the application.

3. As per the applicant, the Regular Second Appeal has been filed in the year 2013, which was admitted on 9th July, 2013. He was informed by his counsel that as and when the appeal would be listed for final hearing, the intimation will be given to him.

4. According to the applicant, thereafter, he used to enquire about the fate of his case from time to time. In the second week of March, 2020, the applicant has enquired from his counsel about the case. During the discussions, when the counsel representing him, had enquired about the status of the parties, then the applicant disclosed about the death of respondent No. 7-Nandu, who had expired a few years back. On the same day, as per the advice of his counsel, he has obtained the death certificate of respondent No. 7-Nandu and moved the application.

5. It is contended on behalf of the applicant that he has acted, as per the legal advice of his counsel and applied for the death certificate of deceased respondent No. 7-Nandu, which was made available to him on 19th March, 2020. Thereafter, the applicant had to come to Shimla to move the appropriate application, but, in the meanwhile, the restrictions in the wake of

COVID-19 pandemic had been imposed. As such, he could not undertake journey from Kullu to Shimla. In the month of May, 2022, the applicant was advised to come to Shimla and to make the application. Consequently, the application under consideration has been filed.

6. On the basis of the above facts, the applicant has sought the following relief:

> *"It is, therefore, prayed that in the interest of justice application may be allowed and after condoning delay in filing the application, abatement, if any caused on account of death of respondent No. 7 may be set aside and legal heirs of deceased, details of whom have been furnished in para-1 of the application ma be ordered to be brought on record of the appeal and substituted in his place as his legal representatives."*

7. The application is duly supported by the affidavit of applicant-Ghanthu Ram. Alongwith the application, the death certificate of respondent No. 7-Nandu has also been annexed.

8. When put on notice, respondents No. 1 to 4 have contested the application. In the reply, preliminary objections have been taken, that the application is defective, as the application is silent about the number of days, by which the application is time barred and no explanation has been given for the said delay.

9. On merits, the contents of the application have been denied on the ground that the story, which has been narrated by the applicant, in the application, is an afterthought and the same is not liable to be accepted.

10. On all these submissions, a prayer has been made to dismiss the application.

11. Notices of the application were also issued to the proposed legal representatives of deceased respondent No. 7, however, despite service, no one has put in appearance on their behalf. As such, they have been proceeded against ex-parte, vide order, dated 25th November, 2022.

12. Perusal of the record shows that the appeal has been admitted by this Court on 9th July, 2013. Thereafter, the appeal was taken up, when the present application has been moved. The death certificate of deceased respondent No. 7-Nandu bears the date of issuance as 19th March, 2020.

13. Taking the judicial notice of the fact that the restrictions in the wake of COVID-19 pandemic were imposed throughout the country in the third week of March, 2020, the explanation, which has been given by the applicant in the application, is not liable to be doubted. Moreover, it cannot be expected from a poor litigant to enquire about the fate of his case regularly from his counsel when his Regular Second Appeal has been admitted for hearing by this Court. Admittedly, the said Regular Second Appeal was not on Board for hearing.

14. If the facts and circumstances of the present case are seen in the light of the decision of the Hon'ble Supreme Court in case titled **Ram Nath Sao alias Ram Nath Sahu and others versus Gobardhan Sao and others,** reported in **AIR 2002 Supreme Court 1201,** then, it can be said that no negligence or inaction can be attributed against the applicant. As such, his application under Section 5 of the Limitation Act is liable to be allowed. It would be apt to reproduce relevant para-11 of the judgment, as under:

> *"11. Thus it becomes plain that the expression "sufficient cause" within the meaning of Section 5 of the Act or Order 22 Rule 9 of the Code or any other similar provision should receive a liberal construction so as to advance substantial justice when no negligence or inaction or want of bona fide is imputable to a party. In a particular case whether explanation furnished would constitute "sufficient cause" or not will be dependant upon facts of each case. There cannot be a straitjacket formula for accepting or rejecting explanation furnished for the delay caused in taking steps. But one thing is clear that the courts should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in over jubilation of disposal drive. Acceptance*

> *of explanation furnished should be the rule and refusal an exception more so when no negligence or inaction or want of bona fide can be imputed to the defaulting party. On the other hand, while considering the matter the courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right has accrued to the other party which should not be lightly defeated by condoning delay in a routine like manner. However, by taking a pedantic and hyper technical view of the matter the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the lis terminates either by default or inaction and defeating valuable right of such a party to have the decision on merit. While considering the matter, courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way."*

15. Another fact, which has also been highlighted by the learned counsel appearing for the applicant is that respondent No. 7-Nandu has been ordered to be proceeded against ex-parte before the learned Civil Judge (Senior Division), Lahaul & Spiti at Kullu and even, the said respondent-Nandu has not contested the appeal, as is evident from the record of the First Appellate Court.

16. The Constitution Bench of the Hon'ble Supreme Court in case, titled as **Sardar Amarjit Singh Kalra (Dead) by LRs and others versus Pramod Gupta (Smt) (Dead) By LRs and others,** reported in **(2003) 3 Supreme Court Cases 272,** has held that the Courts should adopt a liberal approach in the matter of condonation of the delay. The relevant para-26 of the judgment is reproduced, as under:

> *"26. Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights*

of citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice. A careful reading of the provisions contained in Order 22 of CPC as well as the subsequent amendments thereto would lend credit and support to the view that they were devised to ensure their continuation and culmination into an effective adjudication and not to retard the further progress of the proceedings and thereby non-suit the others similarly placed as long as their distinct and independent rights to property or any claim remain in tact and not lost forever due to the death of one or the other in the proceedings. The provisions contained in Order 22 are not to be construed as a rigid matter of principle but must ever be viewed as a flexible tool of convenience in the administration of justice. The fact that the Khata was said to be joint is of no relevance, as long as each one of them had their own independent, distinct and separate shares in the property as found separately indicated in Jamabandhi itself of the shares of each of them distinctly. We are also of the view that the High Court should have, on the very perception it had on the question of abatement, allowed the applications for impleadment even dehors the cause for the delay in filing the applications keeping in view the serious manner it would otherwise jeopardize an effective adjudication on merits, the rights of other remaining appellants for no fault of them. Interests of justice would have been better served had the High Court adopted a positive and constructive approach than merely scuttle the whole process to foreclose an adjudication of the claims of others on merits. The rejection by the High Court of the applications to set aside abatement, condonation and bringing on record the legal representatives does not appear, on the peculiar nature of the case, to be a just or reasonable exercise of the Court's power or in conformity with the avowed object of Court to do real, effective and substantial justice. Viewed in the light of the fact that each one of the appellants had an independent and distinct right of his own not inter-dependant upon the one or the other of the

> *appellants, the dismissal of the appeals by the High Court in their entirety does not constitute a sound, reasonable or just and proper exercise of its powers. Even if it has to be viewed that they had a common interest, then the interests of justice would require the remaining other appellants being allowed to pursue the appeals for the benefit of those others, who are not before the Court also and not stultify the proceedings as a whole and non-suit the others, as well."*

17. While judging the facts and circumstances of the present case, in the light of the aforesaid judgment, then, there is no legal hesitation for this Court to allow the application under consideration.

18. In such situation, the present application is liable to be accepted. Consequently, the application is allowed by setting aside the abatement, if any, after condoning the delay, in filing the application and the legal representatives of deceased respondent No. 7-Nandu are ordered to be brought on record.

19. The application is disposed of accordingly.

RSA No. 137 of 2013

20. Vide separate order of the even date, passed in CMP(M) No. 663 of 2022, the legal representatives of deceased respondent No. 7 have been ordered to be brought on record. Amended memo of parties be filed within two weeks.

21. List the appeal for hearing in due course.

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

Akshay Katoch & another ...Applicants.

Versus

Jai Singh & others ...Respondents.

For the Petitioner: Mr. Kulwant Singh Katoch, Advocate.
For the Respondents: Ms Devyani Sharma, Advocate, for non-applicant/respondent No.1.

None for non-applicants/ respondents No.4(a) to 4(f) & 5.

Non-applicants/respondents No.3 & 6 are ex-parte.

CIVIL MISCELLANEOUS PETITION NO. 10011 OF 2022
IN CIVIL MISCELLANEOUS PETITION (MAIN)
NO. 446 OF 2020
Date of decision: 12.1.2023

Code of Civil Procedure, 1908- Order 6 Rule 17 read with Section 151- **Limitation Act**,**1963**- Section 5- No merits in application for condoning the delay in filing appeal- Held that ground for delay should be plausible- There is not even a whisper in the application about preparation of appeal, attestation of affidavit and missing of pages. No such plea was even taken during addressing the arguments rather time was taken to look into the record, therefore, proposed amendment is changing the story, putforth in civil miscellaneous petition originally, into entirely different story as earlier cause for not filing the appeal was attributed to lockdown due to COVID-19 but now cause of delay has been attributed about missing of certain pages of certified copy of impugned judgment and decree.Plea of respondent that appeal has been filed after waiting the expiry period of limitation with malafide intention and ulterior motive only to harass the respondent appears to be true. (Paras 14 & 15)

Cases referred:

Gurnam Singh vs. Hari Mohan 2001(2) Civil Court Cases 175 (P&H);

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

O R D E R

This application (CMP No.10011 of 2022) has been preferred under Order 6 Rule 17 CPC read with Section 151 CPC for amending pleadings of application CMP(M) No. 446 of 2020 for insertion of Para 3-A in application filed for condonation of 112 days' delay in filing main appeal RSAST No. 20700 of 2020.

2. Applicants are practicing Advocates. Applicant No.1 is son of applicant No.2. They are conducting this case in person. Applicant No.2 is appearing for both applicants i.e. for himself as well as his son/applicant No.1 being holder of his Power of Attorney.

3. Claim of applicants is that due to inadvertent mistake, applicants could not plead the facts, stated in proposed addition by way of para 3-A, because applicants were under impression that limitation period had already been extended by the Supreme Court, whereas these facts are necessary to be pleaded in application to adjudicate the point of controversy involved in application filed for condonation of delay as well as appeal with further submissions that application for amendment is bonafide one and without any malafide intention for the reasons that proposed amendment is necessary for purpose of determining the real question in controversy involved in appeal and addition of proposed para 3-A is not going to cause loss or prejudice to other parties.

4. Application for amendment has been opposed by appearing respondent on the ground that the same is malafide and applicants are proposing the amendment to place on record completely a new stand which is

complete somersault from the earlier pleadings in CMP(M) No. 446 of 2020 and the proposed amendment is being prayed with a view to overcome the arguments made in the matter on behalf of respondent, which were recorded by the Court in its order dated 19.7.2022, wherefrom it is evident that facts proposed to be brought on record were never pleaded either in application or during arguments and applicants, who are active practicing Advocates, have failed to show as well as plead due diligence on their part for not incorporating these facts in application for condonation of delay.

5. It has been further submitted by learned counsel for contesting respondents that proposed amendment is neither explanatory nor amplificating the earlier version taken in application for condonation of delay but a new twist to the story has been given by cooking a false story which is not permissible under law.

6. Applicants, to substantiate their plea for allowing the amendment, have referred pronouncement of Punjab and Haryana High Court in case ***Gurnam Singh vs. Hari Mohan,*** reported in ***2001(2) Civil Court Cases 175 (P&H);*** and also Paras 23 and 24 of judgment of the Supreme Court in ***Civil Appeal No. 5909 of 2022, titled Life Insurance Corporation of India vs. Sanjeev Builders Private Limited and another,*** decided on 1.9.2022, by contending that equity of justice demands that to prevent the abuse of process of the Court, an amendment in terms as prayed should be allowed with further submissions that power to allow an amendment is undoubtedly wide and may be exercised in the interest of justice notwithstanding the provisions of law of limitation, and by awarding cost for inconvenience or expenses caused to the other side as the error is not incapable of being rectified so long as remedial steps do not unjustifiably injure rights accrued.

7. Learned counsel for contesting respondent, referring Para 70(x) of ***Sanjeev Builders'*** case *supra,* has contended that proposed amendment is

going to change the entire earlier story predicated in the unamended application and shall be amounting to setting up an entirely new case, which is foreign to the case set up in original application, causing grave loss and serious prejudice to the vested rights accrued in favour of respondent and, therefore, injury likely to be caused to respondent cannot be compensated in terms of cost.

8. It is the case of applicants that judgment and decree sought to be assailed in Regular Second Appeal was passed on 26.11.2019, certified copy whereof was applied on 27.11.2019 and was prepared and attested on 11.12.2019 and received on 13.12.2019 and as such, appeal was to be filed on or before 10.3.2020. Reasons for not filing the appeal within time have been originally narrated in para 3 of CMP(M) No. 446 of 2020 which are as under:-

> "3. That applicants have drafted the above titled Appeal in the second week of March 2020 but inadvertently entire Country was lockdown due to Covid-19 and during Lockdown applicants neither came to their office nor could file the same before the Hon'ble Court resultantly there were delay of 112 days in filing the above titled Appeal and the same is due to the reason mentioned above which is beyond the control of applicants. Even otherwise Hon'ble Supreme Court of India pleased to extent the period of limitation due to Covid-19."

9. During hearing of CMP(M) No. 446 of 2020 on 19.7.2022, learned counsel for respondent No.1 had pointed out certain facts dis-entitling the applicants from condonation of delay in filing the appeal. Having no assertion to those points, learned counsel for applicants had sought time to look into the record and matter was adjourned on his request. Order 19.7.2022 reads as under:-

> ".....During hearing, it has been pointed out by learned counsel for respondent No.1 that though it is claimed by applicants that appeal could not be filed before 10th March, 2020 due to COVID-19 Pandemic, however, as evident from the record,

appeal was prepared and signed alongwith applications on 9.3.2020 at Shimla and affidavits in support of applications were also attested by Oath Commissioner on 9.3.2020 at Shimla itself, but despite that appeal was not filed either on 9.3.2020 or 10.3.2020 without any plausible reason refraining from filing the appeal and it has been filed on 3rd July, 2020. It has been further submitted that on 9th or 10th March, 2020 there was no lockdown in the country, rather there was complete lockdown after 23rd March, 2020 and during July, 2020 COVID-19 restrictions were in existence, but applicants did not file the appeal when there was no lockdown, but filed the appeal on 3rd July, 2020 without any plausible reason for doing so.

Faced with aforesaid situation, learned counsel for the applicants seeks time to look into the record. On his request, matter is adjourned....."

10. On 25th July,2022 applicants have filed present application with proposed amendments/insertion by adding para 3-A in application CMP(M) No. 446 of 2020. The proposed amendment Para 3-A reads as under:-

"3-A That Applicant had got attested the Appeal and Applications attached with Appeal on 09.03.2020 but on that day some sheets out of certified copy of impugned judgment and decree 26.11.2019 passed in Appeal No. 21-S/13 of 2013 were missing during process of its Photostate copies and due to that Appeal could not be filed on 09.03.2020 and thereafter Applicant has tried to trace the missing papers in Office, which were traced on 20.03.2020 due to that Applicant could not file Appeal after 10.03.2020 to 20.03.2020 but thereafter due to threat of Covid-19, Applicant could not appear before the Hon'ble Court as Applicant is coming from Solan and in the mean time lock down were imposed in Country. It is submitted that Applicant has filed Appeal during exemption period granted in lockdown but due to inadvertently mistake Applicant could not plead these facts in Application because Applicant was in the impression that limitation period had already been extended by the Hon'ble Apex Court."

11. In Application CMP(M) No. 446 of 2020 it has been claimed that appeal was drafted in second week of March, 2020 but entire country was under lockdown due to COVID-19 and during lockdown applicants neither came to their office nor could file the appeal in Court causing 112 days' delay in filing the appeal and reasons mentioned above i.e. lockdown due to COVID-19 was beyond the control of applicants and Supreme Court has been pleased to extend the period of limitation due to COVID-19.

12. Now applicants have proposed to add the facts as narrated in proposed addition by way of para 3-A quoted supra.

13. Now claim of applicants is that application attached with appeal was attested on 9.3.2020 but for missing of certain sheets out of certified copy of impugned judgment during process of photostat, appeal could not be filed on 9.3.2020 and these missing papers could be traced on 20.3.2020 but thereafter applicants could not file the appeal due to threat of COVID-19.

14. Only reason, in application for condonation of delay, for not filing the appeal within time has been stated to be lockdown due to COVID-19. In the application, there is not even a whisper about preparation of appeal, attestation of affidavit and missing of pages. No such plea was even taken during addressing the arguments on 19.7.2022 rather time was taken to look into the record. Therefore, proposed amendment is changing the story, putforth in CMP(M) No. 446 of 2020 originally, into entirely different story as earlier cause for not filing the appeal was attributed to lockdown due to COVID-19 but now cause of delay has been attributed about missing of certain pages of certified copy of impugned judgment and decree.

15. On perusal of record, it is apparent that appeal was prepared and signed on 9th March, 2020 and applications filed therewith are also dated 9.3.2020 and have been attested by Oath Commissioner in the High Court on 9th March, 2020 itself. As also pointed out by learned counsel for respondent No.1, the applications are placed and tagged after copies of impugned

judgment and decrees with complete pagination of paper book in one go and there is no cutting, correction or re-pagination of paper book on account of addition of missing pages. Therefore, plea of respondent that appeal has been filed after waiting the expiry period of limitation with malafide intention and ulterior motive only to harass the respondent appears to be true.

16. It is also noticeable that application under Section 5 of Limitation Act i.e. CMP(M) No. 446 of 2020 has also been prepared, signed and attested at High Court, Shimla on 9th March, 2020 which causes a serious doubt about bonafide and the contention sought to be incorporated by way of proposed amendment. Applicants are practicing Advocates. According to them, the appeal could not be filed on 9th March, 2020 as they noticed that certain pages of copy of impugned judgment and decree were missing. The application for condonation of delay has been drafted on the same day but no such plea has been taken therein. It is also noticeable that period of limitation was available till 10.3.2020 but application for condonation of delay has been attested one day prior to that, indicating that there was plan to cause delay and to file appeal with application for condonation of delay because for having no merit in appeal, there was possibility of rejection of appeal in limine. There cannot be any inadvertent mistake due to which the appeal could not be filed on the same day. Though there was no lockdown on 9th March, 2020 and in any case, applicants were present in High Court on 9th March, 2020, therefore, there was no occasion for them to say in application, being prepared on that day, that due to COVID-19 they could not file appeal within time.

17. On one side applicants are claiming that they intended to file appeal on 9th March, 2020, but Court fee attached with appeal reflects that it was purchased at Solan on 20.5.2020.

18. From aforesaid facts and circumstances, it is apparent that applicants are hiding true facts from Court and trying to justify delay by way of padding which is contrary to earlier stand taken in application CMP(M) No.

446 of 2020. Even stand taken in CMP(M) No. 446 of 2020 is apparently not true. I am of considered opinion that proposed amendment is neither explanatory nor amplificatory but is an introduction of new story and thus prayer for amendment warrants rejection.

19. Considering the facts in entirety, it is also apparent that proposed amendment would change the nature of cause explained originally in CMP(M) No. 446 of 2020 entirely by setting up completely a new story. Therefore, I do not find any merit in application and accordingly application is dismissed.

Application stands disposed of.

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

Padam Singh ...Petitioner.

Versus

Tota Ram & another ..Respondents.

For the Petitioner: Ms.Reeta Hingmang, Advocate.
For the Respondents: None for respondent No.1.
Ms.Seema Sharma, Deputy Advocate General, for respondent No.2-State.

Cr. Revision No.5 of 2018
Date of Decision: December 12, 2022

Negotiable Instruments Act, 1881- Section 138- Effect of compromise in cheque bounce case on condition of deposit of amount in Legal Services Authority- Held that condition of depositing cheque amount in State Legal Services Authority can be altered by the Court. Condition of depositing 15% of the cheque amount in State Legal Services Authority which is not part of the adjudication of subject matter of case, can be altered by the Court. There is another aspect that petitioner has paid entire agreed amount to complainant and order has been implemented completely, therefore, part of order that order shall take effect on deposit of Rs.75,000/- appears to be superfluous. (Para 10)

Cases referred:

Damodar S. Prabhu Vs. Sayed Babalal H., 2010 (5) SCC 663;
Madhya Pradesh State Legal Services Authority Vs. Prateek Jain and another, 2014 (10) SCC 690;

The following judgment of the Court was delivered:

Vivek Singh Thakur, J (oral)

Cr.M.P. No.2104 of 2021

Applicant-petitioner was convicted in a complaint No.35-II/2014, titled as *Tota Ram vs. Padam Singh,* under Section 138 of Negotiable Instruments Act, vide judgment/order dated 20.04.2015, passed by Judicial Magistrate First Class, Karsog, District Mandi, H.P. The said conviction was upheld by Additional Sessions Judge-1, Mandi, District Mandi, H.P., vide judgment dated 08.09.2017, passed in Criminal Appeal No. 60 of 2015, titled as *Padam Singh vs. Tota Ram.*

2. The aforesaid judgments/orders were assailed by the applicant-petitioner by filing this Cr.Revision No.5 of 2018, titled as *Padam Singh vs. Tota Ram & another.*

3. During pendency of Revision Petition, matter was amicably settled between applicant-petitioner and non-applicant/respondent/claimant and, in terms of compromise, complainant had agreed for compounding the case against receipt of cheque amount of `5,00,000/- instead of `7,00,000/- and, as such, applicant-petitioner had paid a sum of `4,00,000/- in cash to the non-applicant/respondent/claimant and a sum of `1,00,000/- deposited by the applicant-petitioner in the Court of Trial Magistrate, was ordered to be released in favour of respondent-complainant and in furtherance to compromise, vide order dated 30.07.2019 case was ordered to be compounded and Revision Petition was accepted and aforesaid judgments/orders of conviction and sentence were quashed and set aside.

4. However, condition was imposed that the aforesaid order shall take effect only on depositing 15% of the cheque amount by the applicant-petitioner before H.P. State Legal Services Authority, Shimla.

5. By way of this application/petition petitioner has approached this Court for exempting or relaxing the petitioner from deposit of entire compounding fee as he could not arrange and deposit entire compounding fee of `75,000/-.

6. Applicant-petitioner has placed on record material indicating that he has deposited a sum of `30,000/- with the H.P. State Legal Services Authority, Shimla. However, for not depositing rest of the amount, he was arrested and was enlarged on bail by the order passed by the Court during pending adjudication of this application.

7. It has been submitted by learned counsel for the applicant-petitioner that considering financial condition of the applicant-petitioner, respondent-complainant had agreed to compromise the matter on cheque amount only without pressing for entire compensation as awarded by the trial Magistrate @ `7,00,000/-. He has further submitted that applicant-petitioner arranged a sum of `30,000/- by borrowing it from his near and dear, but he could not arrange rest of the compounding fee and, therefore, prayer has been made to reduce the compounding fee from `75,000/- to `30,000/- the amount already deposited with the H.P. State Legal Services Authority, Shimla.

8. Compounding fee is being imposed in furtherance to pronouncements of the Supreme Court in ***Damodar S. Prabhu Vs. Sayed Babalal H., 2010 (5) SCC 663,*** as clarified in ***Madhya Pradesh State Legal Services Authority Vs. Prateek Jain and another, 2014 (10) SCC 690,*** wherein Court has also been granted discretion to reduce or exempt compounding fee. Therefore, in my opinion, alteration in payment of amount of compounding fee is permissible in terms of pronouncements of the Supreme Court.

9. In my opinion pronouncement of the Court, with respect to adjudication of the matter on its merit or on the basis of compromise is complete in first three paragraphs of final order dated 30.07.2019 and fourth paragraph thereof imposing condition for taking effect of the order, cannot, in the nature of order in reference, be considered as a part of the adjudication for passing the final order, which stands concluded in first three paragraphs. Therefore, I am of the opinion that condition of depositing 15% of the cheque

amount which is not part of the adjudication of subject matter of case, can be altered by this Court.

10. There is another aspect that petitioner has paid entire agreed amount to complainant and `1,00,000/- also stands released in favour of the complainant and there in main matter of the case, order has been implemented completely. Therefore, also part of order that order shall take effect on deposit of `75,000/- appears to be superfluous.

11. Taking into consideration aforesaid facts and circumstances, compounding fee, in present case, instead of 15% amount, is reduced to `30,000/- the amount already deposited with H.P. State Legal Services Authority, Shimla by the petitioner and, compounding fee is modified from `75,000/- to `30,000/-, which stands already deposited. Therefore, applicant-petitioner shall not suffer conviction and sentence for depositing `30,000/- only instead of `75,000/- with the H.P. State Legal Services Authority, Shimla on 26.11.2021.

12. Application is disposed of in aforesaid terms.

13. Petitioner is directed to produce copy of this order within two weeks, downloaded from the web-page of the High Court of Himachal Pradesh, before the H.P. State Legal Services Authority, Shimla as well as trial Court, and the said Court/authorities shall not insist for production of a certified copy but if required, may verify passing of order from Website of the High Court.

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

Mohindder Pal. ...Petitioner.

Versus

State of Himachal Pradesh. ...Respondent.

2. **Cr.M.P. (M) No. 2151 of 2022**

Parvinder. ...Petitioner.

Versus

State of Himachal Pradesh. ...Respondent.

3. **Cr.M.P. (M) No. 2246 of 2022**

Radhey Shyam. ...Petitioner.

Versus

State of Himachal Pradesh. ...Respondent.

4. **Cr.M.P. (M) No. 2247 of 2022**

Gurdeep Singh. ...Petitioner.

Versus

State of Himachal Pradesh. ...Respondent.

5. **Cr.M.P. (M) No. 2340 of 2022**

Pardeep Kumar. ...Petitioner.

Versus

State of Himachal Pradesh. ...Respondent.

For the Petitioner(s). Mr.R.K. Gautam, Senior Advocate, alongwith Mr. Y.P.S. Dhaulta, Mr.Jai Ram Sharma and Mr.Bhairav Gupta, Advocates for respective petitioners.

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

Cr.M.P. (M) No. 1843 of 2022 alongwith Cr.M.P (M) Nos. 2151, 2246, 2247 and 2340 of 2022

Date of decision: 12.1.2023

Code of Criminal Procedure, 1973- Section 439- **Indian Penal Code, 1860-** Sections 147, 148, 149, 341, 323, 307, 302, 120B, 201- **Arms Act, 1959-** Section 25- Held that regular bail pending trial has to be considered on parameters of material placed before the Court, nature and gravity of offence and social impact of enlargement on bail - Test Identification Parade conducted wherein accused have been identified by the victim party- Without commenting on merits of the case, but taking into consideration material placed before the Court and nature and gravity of offence and social impact of enlarging the petitioners on bail, and also factors and parameters required to be considered at the time of adjudication of bail application, the Court finds that petitioners are not entitled for bail at this stage. (Para 24)

Cases referred:

Satinder Kumar Antil Vs. Bureau of Investigation, (2022) 10 SCC 51;

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge (Oral)

All these petitions arising out of same FIR, for involvement of common question of law and fact, are being decided together by this common order.

2. Instant petitions have been preferred by the petitioners, seeking regular bail under Section 439 of the Code of Criminal Procedure (in short 'Cr.P.C.), in case FIR No. 147 of 2021, dated 24.5.2021, registered in Police Station, Nalagarh under Sections 147, 148, 149, 341, 323, 307, 302, 120B, 201 IPC and 25, 29B, 30 of the Arms Act.

3. Status report filed and records also made available. Records of cross FIR No.161 of 2021 dated 15.06.2021 registered in Police Station

Nalagarh, District Solan, H.P., under Sections 336, 307, 147, 148 and 149 of IPC and Section 25 of Arms Act, 1959 was also made available.

4. It transpires from the record that on 24.05.2021, FIR in present case was registered on the basis of statement made by one Rajinder Singh, recorded under Section 154 Cr.P.C., wherein it was stated that on 24.05.2021 complainant alongwith his companions namely Simran alias Simmu, Akbar alias Akku, Nazim alias Raja, Iqbal Mohammad alias Pala, Rammi, Rajan and others was going in two vehicles bearing registration Nos.HP-12M-7845 and HP12N7845 from Bhud to Falahi Kotla and when they reached near Petrol Pump Khera, at about 3.00 p.m., some vehicles came from Nalagarh side and out of those vehicles, one black coloured Scorpio hit the car bearing registration No.HP-12M-7845, and 10-15 persons came out of other vehicles including Balbir alias Ballu, Rakesh, Avtar, Jagpal alias Kakku, Vijay Kumar alias Vishu and Bindu and they fired on the car and some of them and others were carrying swords (Kirpan and Darat etc.) and in this incident Simran alias Simmu received bullet shot in his chest whereas Avtar and Nazim received bullet injuries and complainant and Iqbal Mohammad alias Pala were also injured, however, Rammi and Rajan did not receive any injury. Thereafter, the assailants had run away from the spot in their vehicles and injured were taken to hospital, where Simran alias Simmu was declared dead. Two gunshot grievous injuries were found on the body of Akbar. Similarly two grievous bullet injuries were also found on the person of Nazim alias Raja. Whereas, Iqbal alias Pala and complainant had received blunt injuries.

5. It was also stated in the aforesaid statement by the complainant that earlier also, on 22.05.2021 at about 9.00 p.m. petitioner Iqbal Mohammad alias Pala was restrained by Jagpal and 7- 8 other boys near Harison Hotel at Nalagarh and they tried to hit him with sword, but he had run away from the spot swiftly, but Jagpal and his companions had again

intercepted his vehicle and had shown pistol and sword to the petitioner with threat that they would kill him and on the basis of complaint of the petitioner in this regard, a Rapat No.36 dated 22.05.2021 was entered in the Daily Diary of Police Station Nalagarh at 11.15 p.m. According to petitioners, accused party as detailed in FIR No.147 of 2021 was searching Simran alias Simmu and others to kill them and one day before the incident all of them had also visited the native village of Simran alias Simmu in his search.

6. On the basis of aforesaid complaint of Rajinder Singh, after registration of FIR, accused persons were arrested and weapons of offences were also recovered from them. Vehicles used by them as well as Car No.HP-12M-7845 were searched and inspected. As per prosecution case, during inspection of vehicles, one bullet of 8MM was recovered from Scorpio bearing registration No. HP-15E-1717 which was used by accused persons in commission of offence.

7. As per prosecution case, Avtar Singh is main conspirator in present case, wherein one Simran @ Simu has been murdered in sequel to a conspiracy hatched by petitioner and other co-accused. Occurrence of incident in present case is a result of chains of incidents taking place since 27th March, 2021, as on that date during Panchayat Elections coaccused Avtar Singh abused Simran @ Simu and consequently during evening of that day Simran @ Simu and his friends beat Avtar Singh regarding which a case was registered against Simran @ Simu and others as an FIR No. 93 of 2021, dated 27.3.2021 under Sections 147, 148, 149, 323, 506 IPC in Police Station Nalagath. Thereafter group of Avtar Singh beat Ashraf Ali, God brother of Simran @ Simu at Nanawal to take revenge of beating Avtar Singh. Consequently a case was registered against Avtar Singh and others as FIR No. 100 of 2021, dated 3.4.2021, under Sections 147, 148, 149, 323 and 326 IPC and Section 25 of the Arms Act, in Police Station, Nalagarh.

8. According to prosecution case, main target of Avrar Singh and his group was Simran @ Simu, therefore, co-accused Avtar Singh alongwith his companions conspired to kill Simran @ Simu and in furtherance to that conspiracy, on 22.5.2021, group of Avtar Singh had intercepted friends of Simran @ Simu and inquired them about location of Simran @ Simu with their expressed intention to kill him. Avtar Singh's group was searching Simran @ Simu at various places wherever his presence was expected and possible and ultimately on 24.5.2021 Simran @ Simu was killed by gunshot, resulting in lodging of FIR in present case. During the same period marriage of sister of co-accused Avtar Singh was scheduled on 23-24.5.2022.

9. According to status report, during investigation, it has surfaced that on 23-24.5.2022 there was marriage of sister of main accused Avtar Singh @ Thona and, therefore, under the garb of attending the marriage on 23.5.2021, accused Avtar Singh, for taking revenge from Simran @ Simu, called accused Sunny Umri, Balbir @ Balu, Rakesh Kumar, Jagpal Singh alias Kaku, Radhey Shyam (petitioner in Cr.MP.(M) No. 2246 of 2022), Pardeep alias Prince (petitioner in Cr.MP (M) No. 2340 of 2022), Gurdeep (petitioner in Cr.M.P. (M) No. 2247 of 2022), in his village Balbirpur. Accused Vijay alias Viju, Mohinder Pal (petitioner in Cr.M.P. (M) No. 1843 of 2022) and Devinder alias Bindu came to Saudi (Gulabpura) on a Motor Cycle No. PB-12Z-6650, where Vijay alias Viju called his friend Parvinder Singh alias Mangu (petitioner in Cr.M.P.(M) No. 2151 of 2022) and all three of them reached on the address informed by Rakesh Kumar, wherefrom they were taken to the room by Gurdhyan Singh alias Bau, where other co-accused were already present. At that place, all of them planned to teach a lesson to Simran alias Simu and his friends and they decided to take revenge from them in all eventualities by 24.5.2021. As Avtar was receiving repeated calls from home to attend the marriage, he went to his home at Village Balbirpur. Other stayed in a house arranged by Gurdian Singh @ Bau and after taking lunch,

all of them started search of Simran alias Simu in a Car Scorpio and Motor Cycle. From place Mahadev, Gurdhyan Singh alias Bau was sent back by them.

10. As per prosecution case, in a planned manner, accused persons reached at Khera at about 3:00 P.M. and located Simran alias Simu coming in his Car and Balbir alias Ballu collided his Scorpio directly with the Car of Simran alias Simu and all 11 accused deboarded their vehicles and out of them Balbir alias Ballu fired with country pistol targeting Simran @ Simmu and Rakesh resident of Gurumajra also opened fire, whereas Pardeep Kumar alias Prince carrying Kirpan/Talwar/Sword and other accused carrying other arms attacked Simran @ Simmu and his companions. Jagpal alias Kaku opened fire from his double barrel gun causing injury in the chest of Simran @ Simu leading to his death. Akbar and Najeem also received bullet injuries, whereas Rummu and Rajan as well as accused persons did not received any injury. After commission of offence accused persons fled from the spot. During investigation, on the basis of statement of Balbir alias Ballu desi pistol (Katta) was recovered which was taken in possession by Police.

11. As per prosecution case, at the time of incident Mohinder was carrying iron pipe in his hand, which was thrown by him after the incident on the spot. During investigation, Police has taken in possession iron pipe and two other sword like iron arms from the spot. As per status report, after arrest, accused Mohinder Pal, Parvinder, Gurdeep Singh, Radhey Shyam and Pardeep Kumar (petitioners), were subjected to Test Identification Parade on 29.5.2021 in District jail, Solan, in presence of Additional Chief Judicial Magistrate, wherein Rajinder Singh, Rajan and Akbar, who were accompanying Simran @ Simmu on the date of incident and were present on the spot identified all 5 petitioners as accused persons involved in commission of offence, present on the spot on the date of incident.

12. It has been contended on behalf of petitioners that despite suffering almost 2 years detention, charges have not been framed in the present case and there was no motive for the petitioners to commit the crime as according to prosecution case incident took place for taking revenge of an incident of scuffle taken place between complainant party and Balbir @ Ballu and Kaku etc. because of enmity of Avtar, Balbir, Rakesh, Jaspal, Jindu and their companions and there is no mention of name of petitioners either in that scuffle or in FIR lodged with respect to incident in reference in present case, and complainant never stated that petitioners were also involved either in present scuffle or on the date of incident. It has been contended that as per prosecution case petitioner Mohinder Pal was having iron rod in his hand, which as per Police was recovered from the spot, however, there is no disclosure statement by accused Mohinder Pal under Section 27 of the Indian Evidence Act, leading to the said recovery so as to link petitioner Mohinder Pal with the same. It has been contended that no witness has stated that Mohinder Pal and Pardeep were having rod and sword in their hands and otherwise also allegations of having arm in the hands of petitioners, claimed on the basis of Police investigation, are not admissible under the Evidence Act.

13. It has been further stated that death of Simran alias Simmu was not a case of planned manner, but as per prosecution case also accused persons were intending to teach him a lesson, but the said intention nowhere indicates that there was planning or intention to kill Simran @ Simmu.

14. It has been submitted that, as reported in prosecution story, fire arms were opened on Simran, not by the petitioners, but others injuring Simran @ Simmu and there is no evidence of conspiracy of accused persons to kill Simran @ Simmu, as 'teaching a lesson' never means that a person shall be murdered.

15. It has been stated that petitioners are innocent persons and they have been impleaded in the case without any evidence but on the basis of Test Identification Parade which is not sufficient to convict the petitioners, rather it has no relevance and evidentiary value and it shall be subject to cross-examination on behalf of defence and it has been stated that there is every possibility of supply of photographs of the petitioners to the victim party for the purpose of identification as petitioners were already in jail since long before conducting of Test Identification Parade.

16. It has been contended on behalf of petitioners that they are young persons ranging aged between 20 and 25 years having no criminal history and referring ***Satinder Kumar Antil Vs. Bureau of Investigation, (2022) 10 SCC 51,*** it has been contended that 'bail is rule and jail is exception' and there is a presumption of innocence of accused unless contrary is proved and as there is nothing on record to connect the petitioners with commission of offence, as such, they are entitled for bail.

17. It has been contended on behalf of petitioners that alleged murder of Simran @ Simmu was because of gun bullet, whereas allegations against the petitioners are that they were armed with swords, dandas/sticks and there is no mention either in challan or in evidence with respect to causing injuries by the petitioners with sword or danda to anyone. It has been further stated that there is no possibility of influencing the witnesses by the petitioners.

18. It has been further submitted that co-accused Gurdhyan Singh has already been enlarged on bail by this Court vide order dated 20.6.2022 passed in Cr.M.P. (M) No. 1036 of 2022, titled Gurdhyan Singh Vs. State of H.P. and, therefore, petitioners, on the same analogy, are also entitled for bail on the basis of parity.

19. Learned Additional Advocate General submits that on perusal of order dated 22.6.2022 passed in Gurdhyan Singh's case, it is evident that

role and accusation against Gurdhyan Singh was altogether different and he has been arrayed as an accused under Section 120B of IPC, but not for direct involvement of commission of offence under Section 302 IPC. Whereas petitioners have been found, as per evidence collected by the Investigating Agency, present on the spot, participating actively in commission of offence and, therefore, they cannot claim parity.

20. Learned Additional Advocate General, placing on record proceedings of Test Identification Report, has contended that all 5 petitioners were duly identified by Rajinder, Rajan and Akbar and the identification was conducted by following complete prescribed process and each and every accused was identified by three persons each separately by conducting four rounds of Identification Parade of each accused. All of them were identified by Rajinder, Rajan and Akbar in individual Test Identification Parades without any interaction amongst them. He has further submitted that as contended on behalf of petitioners, Test Identification Parade shall be subjected to cross-examination, but that stage has not yet come and, as on date, Test Identification Parade is in existence on record against the petitioners and, therefore, they cannot claim that Test Identification was not conducted in accordance with law, especially for the detailed proceedings available on record.

21. It has been submitted by learned Additional Advocate General that FIR is not an encyclopedia. Absence of names of petitioners in the FIR is an irrelevant fact as in the FIR complainant has categorically stated that there were other persons also who were present with the accused mentioned in the FIR, who could be identified by him by face, and now petitioners stand identified, not only by the complainant, but two other persons of victim party, independently to each other in Test Identification Parade and, therefore, this ground is not available for enlarging the petitioners on bail.

22. It has been further submitted by learned Additional Advocate General that on the basis of disclosure statement recorded under Section 27 of the Indian Evidence Act, made by Gurdeep Singh and Radhey Shyam, sword and danda respectively were recovered. Learned Additional Advocate General has further submitted that after Test Identification Parade, in his supplementary statement Rajinder Singh complainant has corroborated the presence of petitioners on the spot in commission of offence.

23. Learned Additional Advocate General has submitted that petitioners are accused of commission of offence under Section 302 IPC for which they can be punished for life imprisonment or capital punishment and, therefore, plea raised on their behalf about the period of detention is not relevant for enlarging them on bail, particularly keeping in view detention suffered by petitioners as on date.

24. Without commenting on merits of the case, but taking into consideration material placed before me and nature and gravity of offence and social impact of enlarging the petitioners on bail, and also factors and parameters required to be considered at the time of adjudication of bail application as propounded by the Courts, including Supreme Court, I find that petitioners are not entitled for bail at this stage. Accordingly petitions are dismissed.

25. 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.

Petition stands disposed of.

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

Court on its own motion .....Petitioner

Versus

State of H.P.and another ...Respondents

For the petitioner: Mr.Manohar Lal Sharma, Advocate, as Amicus Curiae.

For the respondents: Mr. Desh Raj Thakur, Additional Advocate General with Mr. Narender Thakur, Deputy Advocate General, for respondent No.1/State.

Cr.MMO No.489 of 2022
Reserved on: 07.12.2022
Decided on: 13.01.2023

Code of Criminal Procedure, 1973- Sections 9, 273 & 317- Power of Court of Sessions to hold sittings at any place in the Sessions Division for the convenience of the parties and the witnesses- The Additional Sessions Judge exercises the jurisdiction vested in the Court of Session. As per sub section (6) of Section 9, Cr.P.C., a Court of Session is authorized to hold its sittings at any place in the Sessions Division other than the place specified by the High Court by notification, in case, the Court of Session is of opinion that it will tend to the general convenience of the parties and the witnesses. Additionally, the requirement is that the Court of Session will hold such sitting with the consent of the prosecution and the accused. Considering cumulative effect of Sections 273 and 317 of the Code, it cannot be said as an absolute rule that in no case the evidence in a trial or inquiry before criminal Court can be recorded in absence of the accused. It also cannot be ignored that the recording of evidence through video conferencing is permissible subject to fulfillment of certain conditions. (Paras 10, 14 & 15)

The following judgment of the Court was delivered:

Satyen Vaidya, Judge.

The Registry of this Court received a written request dated 20.4.2022 from learned Additional District and Sessions Judge, Chamba, District Chamba, H.P. seeking permission to visit the place of accused to conduct trial in case No. 27 of 2017 (Sessions Trial) titled as State of H.P. vs. Naresh Kumar, pending before the said Court. It was submitted that the accused Naresh Kumar was bedridden as a known case of "fracture C-5 with quardiplegia" leading to permanent loss of function. He was not able to move from one place to another, although, his memory and speech was normal.

2. The above noted request was ordered to be treated on judicial side and, as such, the instant matter came for adjudication before this Court.

3. Keeping in view the nature of the matter, Sh. Manohar Lal Sharma, Advocate, was appointed as Amicus Curiae. The record of the case (Sessions Trial) No. 27 of 2017 pending before the learned Additional Sessions Judge, Chamba was also requisitioned.

4. It is revealed from the record that learned Judicial Magistrate 1st Class, District Chamba, H.P. took cognizance of offence under Section 304-AA IPC against accused Naresh Kumar and passed committal order.

5. The gist of allegation against the accused is that on 09.12.2015 while driving vehicle (Tata-Sumo) bearing registration No. HP-02-0185 he caused the accident, as a result of which, the vehicle fell into a deep gorge. The other occupant of the vehicle namely Sh. Joginder Singh died on the spot, as a result of injuries suffered in the accident. The accused is alleged to be driving the vehicle at the time of accident under intoxication. 'Ethyl Alcohol' is stated to be present in the blood sample of the accused.

6. The accused himself suffered 100% disability on account of injuries suffered by him in the accident. A copy of disability certificate issued by a Medical Board in respect of the accused is on record, which reveals his

diagnosis as “fracture C-5 resulting in quardiplegia”. His disability has been assessed at 100% in relation to whole body. The disability of the accused is also stated to be permanent.

7. With the disability suffered by the accused, he is stated to be not able to move and is further stated to be permanently bedridden. Due to the physical condition, accused is not able to personally appeared in the Court to face the trial. The matter was repeatedly adjourned for presence of the accused, but for the reasons noted above, his presence could not be procured by the Court.

8. In the above background, the following order came to be passed by learned Additional Sessions Judge, Chamba on 17.01.2022:

> *“Present: Sh. Uday Singh, Ld. PP for the State.*
>
> *Accused is not present.*
>
> *Case file taken up today for proper order. The record shows that in this case, accused is not coming to the Court as he is reported to be bed-ridden. His medical condition is not good and keeping in view such medical condition of accused, an order dated 14.7.2021 was passed by my ld. Predecessor and in the last paragraph, he observed as follows:-*
>
> > *“Keeping in view the report of the Doctor and attending facts and circumstances of the case, accused is not in a position to move as such, request be made to the Hon’ble High Court to guide the further course of action to be conducted in the matter or to permit this Court to visit the place of accused to conduct trial in the matter as the case is pending since long for want of presence of accused and consideration on charge”.*
>
> *Thus, my ld. Predecessor has observed that in view of the report of the Doctor, accused is not in a position to move and ordered to submit the request to Hon’ble High Court to guide the further course of action in the matter or to permit the Court to visit the place of accused to conduct trial in the matter. Since such order has been passed by my ld. Predecessor, therefore, let reference*

be submitted to the Hon'ble High Court through proper channel, in terms of order dated 14.7.2021 as passed by my ld. Predecessor. Let matter be listed for 02.03.2022 for awaiting orders from the Hon'ble High Court."

9. The reference made by learned Additional Sessions Judge, Chamba appears to have been sent to this Court without adverting to the provisions as contained in Section 9 of the Code of Criminal Procedure, which reads as under:

> *"**9**. **Court of Session**.(1) The State Government shall establish a Court of Session for every sessions division.*
> *(2) Every Court of Session shall be presided over by a Judge, to be appointed by the High Court.*
> *(3) The High Court may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in a Court of Session.*
> *(4) The Sessions Judge of one sessions division may be appointed by the High Court to be also an Additional Sessions Judge of another division and in such case he may sit for the disposal of cases at such place or places in the other division as the High Court may direct.*
> *(5) Where the office of the Sessions Judge is vacant, the High Court may make arrangements for the disposal of any urgent application which is, or may be, made or pending before such Court of Session by an Additional or Assistant Sessions Judge, or, if there be no Additional or Assistant Sessions Judge, by a Chief Judicial Magistrate, in the sessions division; and every such Judge or Magistrate shall have jurisdiction to deal with any such application.*
> *(6) The Court of Session shall ordinarily hold its sitting at such place or places as the High Court may, by notification, specify; but, if, in any particular case, the Court of Session is of opinion that it will tend to the general convenience of the parties and witnesses to hold its sittings at any other place in the sessions division, it may, with the consent of theprosecution and the*

accused, sit at that place for the disposal of the case or the examination of any witness or witnesses therein.

Explanation..- *For the purposes of this Code," appointment" does not include the first appointment, posting or promotion of a person by the Government to any Service, or post in connection with the affairs of the Union or of a State, where under any law, such appointment, posting or promotion is required to be made by Government."*

10. The learned Additional Sessions Judge exercises the jurisdiction vested in the Court of Session. As per sub section (6) of Section 9 quoted above, a Court of Session is authorized to hold its sittings at any place in the Sessions Division other than the place specified by the High Court by notification, in case, the Court of Session is of opinion that it will tend to the general convenience of the parties and the witnesses. Additionally, the requirement is that the Court of Session will hold such sitting with the consent of the prosecution and the accused.

11. Thus, the learned Additional Sessions Judge, Chamba failed to exercise jurisdiction vested in him and instead made a reference to this Court.

12. Further it will be relevant to notice that though, Section 273 of the Code of Criminal Procedure, provides for all evidence to be taken, in the course of the trial or other proceeding, in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader, yet, such provision has been made subject to exception provided in the Code.

13. Section 317 of the Code of Criminal Procedure reads as under:

"317. Provision for inquiries and trial being held in the absence of accused in certain cases.- *(1) At any stage of an inquiry or trial under this Code, if the Judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, or that the accused persistently disturbs the proceedings*

> *in Court, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.*
> *(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately."*

14. Considering cumulative effect of Sections 273 and 317 of the Code, it cannot be said as an absolute rule that in no case the evidence in a trial or inquiry before criminal Court can be recorded in absence of the accused.

15. It also cannot be ignored that the recording of evidence through video conferencing is permissible subject to fulfillment of certain conditions. In appropriate cases, such mode can also be made available.

16. In light of above discussion, the instant petition is disposed of with direction to the learned Additional Sessions Judge, Chamba to proceed with the trial of the Case (Sessions Trial) No. 27 of 2017, titled "State of H.P. vs. Naresh Kumar" in terms of observation made hereinabove. Since the trial is already delayed, it is expected from the learned Additional Sessions Judge, Chamba that the same will be concluded as expeditiously as possible. Keeping in view the peculiar circumstances of the case, the Deputy Commissioner, Chamba is directed to provide all assistance to the learned Additional Sessions Judge, Chamba for the purpose of holding of proceedings of above noted case through video conferencing, if required.

17. Pending miscellaneous application(s), if any, also stands disposed of accordingly.

18. Records be sent back forthwith with a copy of this order to the Court of learned Additional Sessions Judge, Chamba, for compliance.

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

Smt. Preet Pratima ....Petitioner

Versus

Sh. Samjeet Singh and others ...Respondents

For the petitioner : Mrs. Sunita Sharma, Sr. Advocate with Ms. Lalita Sharma and Ranbir Singh, Advocates.

For the respondents : Mr. B.S. Chauhan, Senior Advocate with Mr. Munish Datwalia, Advocate.

Cr. Revision No.: 220 of 2020
Decided on: 03.01.2023

Family Courts Act, 1984- Sections 7 and 8- Establishment of Family Courts- Jurisdiction and powers conferred on a Family Court, Sections 7, 8, 12 and 26- **Code of Criminal Procedure, 1973-** Chapter IX- **Protection of Women from Domestic Violence Act, 2005 -** Chapters III, IV, Sections 18, 19, 20, 21, 22 and 26- Held that a petition under Section 12 of the Protection of Women from Domestic Violence Act, 2005, shall not be adjudicated upon by the Family Court- The Protection of Women from Domestic Violence Act, 2005, has been brought into force to provide for more effective protection of the rights of women, guaranteed under the Constitution, who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental therewith. This Court is of the considered view that Section 7 of the 1984 Act is very-very clear as to qua what all a Family Court has jurisdiction. In terms of the provision of Section 7(2)(a) thereof, a Family Court has been conferred jurisdiction exercisable by a Magistrate of the First Class under Chapter IX of the Code of Criminal Procedure. Protection of Women from Domestic Violence Act, 2005, is both a substantive as well as procedural Act. Neither in Section 7(1) nor in Section 7(2) of the Family Courts Act, 1984, there is any provision that a petition under Section 12 of the Protection of Women from Domestic Violence Act, 2005, shall be adjudicated upon by the Family

Court. The Court is alive to the situation that in terms of Section 26 of the Protection of Women from Domestic Violence Act, 2005, any relief available under Section 18, 19, 20, 21 and 22 thereof can also be sought in any legal proceedings before a Civil Court, Family Court or Criminal Court but then legislature in its wisdom did not include Section 12 in this section. Thus, it is apparent that a conscious decision was taken by the Legislature not to include Section 12 in Section 26 of the Act of the 2005 Act. The Court has no hesitation in holding that the order which has been passed by the Principal Judge, Family Court, is in fact without jurisdiction because in terms of the provisions of 1984 Act as also 2005 Act, a petition filed under Section 12 of the 2005 Act cannot be decided by a Principal Judge, Family Court. (Paras 7, 9, 17, 18, 19 and 20)

The following judgment of the Court was delivered:

Ajay Mohan Goel, Judge

By way of the present petition, the petitioner has challenged the order passed by the Court of learned Principal Judge, Family Court, Hamirpur in DV Act Case No.71-1/14, titled as Preet Pratima vs. Samjeet Singh and others, dated 10.01.2020, in terms whereof, the petition preferred under Section 12 of the Protection of Women from Domestic Violence Act, 2005, by the petitioner herein has been dismissed.

2. Brief facts necessary for the adjudication of the present petition are that the petitioner herein preferred a petition under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter to be referred as the 2005 Act for short) and the same was filed before the concerned Magistrate. The petition was subsequently transferred to the Court of learned Principal Judge, Family Court, Hamirpur and in terms of order dated 10th January, 2020, the case has been dismissed by the learned Court below on merit by holding that the petitioner was not entitled to any relief in terms of Section 12 of the Protection of Women from Domestic Violence Act, 2005.

3. Learned Senior Counsel appearing for the petitioner has argued that the order under challenge is void *ab initio* as in terms of the statutory provisions of the Family Courts Act, a petition preferred under Section 12 of the Protection of Women from Domestic Violence Act, 2005, could not have been transferred to the learned Family Court and the same ought to have been adjudicated upon by the Magistrate as defined under the 2005 Act and as the impugned order has been passed by the Court of learned Principal Judge, Family Court, Hamirpur, who was having no jurisdiction to adjudicate the petition, therefore, the present petition be allowed by setting aside the impugned order.

4. Learned Senior counsel appearing for the respondent has argued that there is no infirmity as far as the exercise of jurisdiction by the learned Family Court is concerned because in terms of the statutory provisions, as are contained in the Family Courts Act, 1984 (hereinafter to be referred as the 1984 Act for short) read with the circular that has been issued by the High Court of Himachal Pradesh dated 2nd/3rd April, 2019 to all District and Sessions Judges in Himachal Pradesh on the subject as the matter was rightly transferred from the Court of the Magistrate concerned to the Court of learned Principal Judge, Family Court, Hamirpur, therefore, adjudication upon the same by the Principal Judge, Family Court, Hamirpur, cannot be said to be without jurisdiction.

5. It is clarified that the arguments from both the sides were heard by the Court on the issue of jurisdiction of the learned Principal Judge, Family Court, to decide a petition under Section 12 of the Protection of Women from Domestic Violence Act, 2005.

6. I have heard learned counsel for the parties and also carefully gone through the statutory provisions of both the 1984 Act as well as the 2005 Act, relied upon by the learned Senior counsel for the parties.

7. The Family Courts Act, 1984, was introduced with the statement of objects and reasons that several associations of women, other organizations and individuals had urged, from time to time, that Family Courts be set up for the settlement of Family disputes, where emphasis should be laid on conciliation and achieving socially desirable results and adherence to rigid rules of procedure and evidence should be eliminated. The Law Commission in its 59th report (1974) had also stressed that in dealing with the disputes concerning the family, the Court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make a reasonable efforts for settlement before the commencement of the trial. The bill was accordingly introduced to provide for establishment of Family Courts by the State Governments and to make it obligatory on the State Government to set up a Family Court in terms of the envisaged statutory provisions. The Family Courts Act, 1984, accordingly was brought into force to provide for the Establishment of the Family Courts with a view to promote conciliation in secure and speedy settlement of disputes relating to marriage and family affairs and for matters connected therewith. In terms of Sub Section 3 of Section 1 of 1984 Act, the Act was to come into force on such date as the Central Government may, by notification in the Official Gazette, appoint and different dates may be appointed for different states. Section 3 of the Act, provides for Establishment of Family Courts and the same envisages that for the purpose of exercising the jurisdiction and powers conferred on a Family Court by the said Act, the State Government shall after consultation with the High Court and by way of notification shall, as soon as may be after the commencement of the Act, establish for every area in the State in terms of the Statutory provisions of the Family Courts Act. The Act comprises of VI chapters and chapter III thereof deals with jurisdiction.

8. Sections 7 and 8 of the Act, which are part of Chapter III provide as under:-

7. Jurisdiction.—(1) Subject to the other provisions of this Act, a Family Court shall— (a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation.—The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:—

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstance arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise—

(a) the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment.

> *8. **Exclusion of jurisdiction and pending proceedings**.— Where a Family Court has been established for any area,—*
> *(a) no district court or any subordinate civil court referred to in sub-section (1) of section 7 shall, in relation to such area, have or exercise any jurisdiction in respect of any suit or proceeding of the nature referred to in the Explanation to that sub-section;*
> *(b) no magistrate shall, in relation to such area, have or exercise any jurisdiction or powers under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974);*
> *(c) every suit or proceeding of the nature referred to in the Explanation to sub-section (1) of section 7 and every proceeding under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974),—*
> *(i) which is pending immediately before the establishment of such Family Court before any district court or subordinate court referred to in that sub-section or, as the case may be, before any magistrate under the said Code; and*
> *(ii) which would have been required to be instituted or taken before such Family Court if, before the date on which such suit or proceeding was instituted or taken, this Act had come into force and such Family Court had been established,*
> *shall stand transferred to such Family Court on the date on which it is established."*

9. The Protection of Women from Domestic Violence Act, 2005, has been brought into force to provide for more effective protection of the rights of women, guaranteed under the Constitution, who are victims of violence of any kind occurring within the family and for matters connected therewith or incidental therewith. In terms of Section 2(a) of the Act, an aggrieved person means any women, who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any Act of Domestic violence by the respondent. The 2005 Act, comprises of five chapters and whereas chapter II contains the definition of Domestic Violence etc. Chapter III thereof deals with the powers and duties of Protection Officers, service

providers etc. Chapter IV of the same, provides for the procedure for obtaining orders of reliefs.

10. Section 12 of the Act, which is a part of Chapter IV reads as under:-

> *12. Application to Magistrate.—(1) An aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the Magistrate seeking one or more reliefs under this Act:*
> *Provided that before passing any order on such application, the Magistrate shall take into consideration any domestic incident report received by him from the Protection Officer or the service provider.*
> *(2) The relief sought for under sub-section (1) may include a relief for issuance of an order for payment of compensation or damages without prejudice to the right of such person to institute a suit for compensation or damages for the injuries caused by the acts of domestic violence committed by the respondent:*
> *Provided that where a decree for any amount as compensation or damages has been passed by any court in favour of the aggrieved person, the amount, if any, paid or payable in pursuance of the order made by the Magistrate under this Act shall be set off against the amount payable under such decree and the decree shall, notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908), or any other law for the time being in force, be executable for the balance amount, if any, left after such set off.*
> *(3) Every application under sub-section (1) shall be in such form and contain such particulars as may be prescribed or as nearly as possible thereto.*
> *(4) The Magistrate shall fix the first date of hearing, which shall not ordinarily be beyond three days from the date of receipt of the application by the court.*
> *(5) The Magistrate shall Endeavour to dispose of every application made under sub-section (1) within a period of sixty days from the date of its first hearing.*

11. In terms of Section 12 of 2005 Act, as quoted hereinabove, an aggrieved person or Protection Officer or any other person on behalf of the aggrieved person, may present an application to the Magistrate seeking one or more reliefs under the Act.

12. Sub Section (3) of Section 12 provides that every application under Sub Section (1) shall be in such form and contain such particulars as may be prescribed or as nearly as possible thereto and sub Section (4) thereof provides that the Magistrate shall fix the first date of hearing, which shall not ordinarily be beyond three days from the date of receipt of the application by the Court. Sub Section (5) thereof provides that the Magistrate shall endeavour to dispose of every application under sub Section (1) within a period of 60 days from the date of its first hearing. Magistrate has been defined in Section 2(i) which reads as under:-

> *(i) "Magistrate" means the Judicial Magistrate of the first class, or as the case may be, the Metropolitan Magistrate, exercising jurisdiction under the Code of Criminal Procedure, 1973(2 of 1974) in the area where the aggrieved person resides temporarily or otherwise or the respondent resides or the domestic violence is alleged to have taken place."*

13. In the present case, as already mentioned hereinabove, the petition under Section 12 of the Protection of Women from Domestic Violence Act, 2005, was filed by the petitioner before the Magistrate and subsequently the same was transferred to the Court of Principal Judge, Family Court, Hamirpur, for adjudication. The moot issue involved in the present petition is as to whether the order passed by the learned Principal Judge, Family Court, Hamirpur, is without jurisdiction or not. Before proceeding further, it is necessary to refer to Section 26 of the 2005 Act also, which reads as under:-

> *"26. Relief in other suits and legal proceedings.—*
> *(1) Any relief available under sections 18, 19, 20, 21 and 22 may also be sought in any legal proceeding, before a civil court, family court or a criminal court, affecting the aggrieved person*

and the respondent whether such proceeding was initiated before or after the commencement of this Act.

(2) Any relief referred to in sub-section (1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court.

(3) In case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief."

14. Section 7 of the Family Court Act 1984, which deals with jurisdiction *inter alia* provides that subject to the other provisions of the Act, a Family Court shall have and exercise all the jurisdictions exercisable by any District Court or any Subordinate Civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation. Section 7(i)(b) provides that a Family Court shall be deemed for the purposes of exercising such jurisdiction under such law to be a District Court or as the case may be, such Subordinate Civil Court for the area to which the jurisdiction of the Family Court extends. A perusal of the explanation attached to Section 7(1) demonstrates that the suits and proceedings referred therein inter alia include a suit orproceedings between the parties to a marriage for a decree of nullity of marriage or restitution of conjugal rights or judicial separation or dissolution of marriage, a suit or proceedings for declaration as to the validity of marriage or as to the matrimonial status of any person, a suit or proceedings between the parties to a marriage with respect to the property of the parties or of either of them, a suit or proceedings for an order or injunction in such circumstances arising out of a marital relationship, a suit or proceedings for a declaration as to the legitimacy of any person, a suit or proceeding for maintenance and a suit of proceeding in relation to the guardianship of the person or the custody or excess to any manner.

15. Sub Section (2) of Section 7 further envisages that subject to the other provisions of the Act, a Family Court shall also have and exercise the jurisdiction exercisable by a Magistrate of the First Class under Chapter IX relating to order of maintenance of Wife, Children and Parents of the Code of Criminal Procedure, 1973 and such other jurisdiction as may be conferred upon it by any other enactment.

16. Section 8 of the Act provides that where a Family Court has been established for any area, then no District Court or any Subordinate Civil Courts referred to in sub Section (1) of Section 7 shall, in relation to such area have or exercise any jurisdiction in respect of any suit of proceedings of the nature mentioned in the explanation and further no Magistrate shall in relation to such area, have or exercise any jurisdiction or power under Chapter IX of the Criminal Procedure Code 1973. This Section further provides that the proceedings as are envisaged in Section 7 which are pending before the Court, shall have to be transferred to the concerned Family Courts.

17. This Court is of the considered view that Section 7 of the 1984 Act is very-very clear as to qua what all a Family Court has jurisdiction. In terms of Section 7(1)(a) of 1984 Act and Explanation attached thereto, it exercises jurisdiction in the matter of suits or proceedings as envisaged therein which have been mentioned by me hereinabove and nothing more and nothing less. Similarly, in terms of the provision of Section 7(2)(a) thereof, a Family Court has been conferred jurisdiction exercisable by a Magistrate of the First Class under Chapter IX of the Code of Criminal Procedure.

18. Protection of Women from Domestic Violence Act, 2005, is both a substantive as well as procedural Act. Whereas, Chapter III of the same, provides for the powers and duties of protection officers as also service providers etc. Chapter IV thereof, provides for the procedure for obtaining orders of reliefs. Neither in Section 7(1) nor in Section 7(2) of the Family Courts Act, 1984, there is any provision that a petition under Section 12 of the

Protection of Women from Domestic Violence Act, 2005, shall be adjudicated upon by the Family Court. Incidentally, Sub clause (b) of Section 7(2) of the Family Courts Act, 1984, whereas clearly envisages that subject to the other provisions of the Family Court Act, a Family Court shall also have and exercise such other jurisdiction as may be conferred on it by any other enactment, nothing has been brought into the notice of this Court from which it can be inferred that jurisdiction stands conferred upon the Family Court Act for adjudicating application filed under Section 12 thereof.

19. The Court is alive to the situation that in terms of Section 26 of the Protection of Women from Domestic Violence Act, 2005, any relief available under Section 18, 19, 20, 21 and 22 thereof can also be sought in any legal proceedings before a Civil Court, Family Court or Criminal Court but then legislature in its wisdom did not include Section 12 in this section. Otherwise nothing prevented the legislature from including Section 12 also in Section 26 of the 2005 Act, which *ipso facto* would have had conferred jurisdiction upon the Family Courts to decide a petition under Section 12 of the 2005 Act in the light of sub clause (b) of Section 7(2) of the Family Court Act, 1984. Thus, it is apparent that a conscious decision was taken by the Legislature not to include Section 12 in Section 26 of the Act of the 2005 Act.

20. Therefore, from the above discussions, this Court has no hesitation in holding that the order which has been passed by the learned Principal Judge, Family Court, Hamirpur, is in fact without jurisdiction because in terms of the provisions of 1984 Act as also 2005 Act, a petition filed under Section 12 of the 2005 Act cannot be decided by a Principal Judge, Family Court. Accordingly, the present petition succeeds to this effect and the impugned order is set aside on the ground that the learned Principal Judge, Family Court, Hamipur, was not having any jurisdiction to decide a petition filed under Section 12 of the Protection of Women from Domestic Violence Act, 2005. Since the petition filed by the petitioner necessarily had to be

adjudicated upon by the Magistrate, therefore, it is ordered that the petition which was preferred by the petitioner under Section 12 of the Act, 2005, shall now stand restored in the docket of the Magistrate concerned by returning of the entire file from the Court of learned Principal Judge, Family Court, Hamipur, to the said Court and thereafter, the petition shall be heard afresh and decided on merit by the learned Magistrate. It is made clear that the petition shall be decided by the learned Magistrate on the basis of the pleadings and evidence which is already on record and neither of the parties shall be permitted to add anything more.

With these observations, the petition stands disposed of. Parties are directed to appear before the Court of Magistrate concerned on 19th January, 2023, to apprise the said Court of the order passed by this Court. Registry is directed to ensure that the petition preferred under Section 12 of the Protection of Women from Domestic Violence Act, 2005, by the present petitioner, which was subsequently transferred to the Court of Principal Judge, Family Court, Hamirpur, is returned back to the Court of the Magistrate concerned.

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

Charno Ram ...Petitioner

Versus

Union of India and others …Respondents

For the petitioner : Mr. Jeevan Kumar, Advocate.

For the respondents: Mr. Virbahadur Verma, CGC, for respondent No.1.

Mr. Desh Raj Thakur, Addl. A.G. with Mr. Narinder Thakur, Dy.A.G. for respondents No. 2 to 8.

CWP No. 84 of 2019

Reserved on: 15.12.2022

Decided on: 07.01.2023

Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013- Section 5- **Constitution of India,1950**- Articles 14, 17, 21 & 32- Right to live with human dignity and to live the life which is free from exploitation- **Held**- That it is the obligation of the State to protect its citizens and that the mandate of Constitution is clear as far as the upliftment of the down trodden and unprivileged sections of the Society is concerned. The well-defined amplitude of Article 21 of the Constitution includes the right to live with human dignity and to live the life which is free from exploitation. It also includes right to reputation. Article 17 of the Constitution abolished untouchability and further forbids its practice in any form. Equally important is the right to equality before law enshrined in Article 14 of the Constitution. Petitioner belongs to the Scheduled Caste. Being an unprivileged member of society none heard his representation. The so called inquiries, be it the internal inquiry or the inquiry held by Tehsildar of the area, were nothing more than farce. The violation of the provisions of 2013 Act was writ large from the available bare facts; still no action was taken against the wrongdoers, forcing the petitioner to approach this Court. Petitioner has suffered humiliation, ridicule, disgrace, mortification and consequent embarrassment on account of acts and conduct attributable to the State and its instrumentalities. Respondents have been instrumental not only in violating the fundamental rights of the petitioner but also the legal rights available to him under 2013 Act. Even violation of legal rights has

manifestation of violation of fundamental right, if remains un-redressed. Being custodian of the Constitution, this court cannot remain unmindful of its duties. The respondents have not only violated the rights of petitioner but have also undermined the mandate of law. The petitioner has invoked the writ jurisdiction of this Court for the reliefs as noticed above, on the ground of violation of his fundamental and human rights. Petitioner has sought monetary compensation in addition to the various directions as detailed above. Merely because the petitioner has alternative remedy to claim damages, he cannot be denied the audience in the instant proceedings, this Court being custodian and guardian of fundamental rights of the citizen of the country. (Paras 10, 12, 13, 14, 17, 18, 19, 21 & 22)

Cases referred:

Bandhua Mukti Morcha vs. Union of India and others (1984) 3 SCC 161;

Delhi Jal Board vs. National Campaign for Dignity and Rights of Sewerage and Allied Workers and others (2011) 8 SCC 568;

Harbans Lal Sahnia and another vs. Indian Oil Corpn. Ltd. and others (2003) 2 SCC 107;

Rudal Sah vs. State of Bihar and another (1983) 4 SCC 141;

Safai Karamchari Andolan and others vs. Union of India and others (2014) 11 SCC 224;

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 kindly issue the writ, directions, or orders for the enforcement of fundamental rights of petitioner guaranteed under Articles 14, 17 and 21 of the Constitution of India.*
>
> *(ii) That kindly issue the writ, directions, or orders to take the stringent action against the erring officers of respondents State particularly against the respondent No 8 in accordance with laws this Hon'ble Court deems fit and proper.*
>
> *(iii) That all the respondents may kindly be made answerable to the violation of fundamental rights of the petitioner and they may be condemned as this Hon'ble Court deems fit and proper.*

(iv) That the petitioner may adequately be compensated to the tune of Rs. 50 Lakh for breach of his fundamental rights initially to be paid by respondent No 1 to 3 and subsequently recoverable from the respondent No. 8 as this Hon'ble Court deems fit and proper."

2. The case of the petitioner in nutshell is that he was working as part time Sweeper in Government Polytechnic, Banikhet, District Chamba, H.P. His appointment was under the scheme of 'Student Welfare Fund'. Respondent No.8 conducted the examination for its students from 5.12.2017 to 5.1.2018. The examination centre was in the fourth floor of newly constructed building of said respondent. No toilet facility was available at fourth floor as the toilets were under construction. Petitioner was directed by respondent No.8 to arrange a 'drum' (container) to be kept outside examination centre for enabling the students to urinate in the improvised container. He was further directed to empty the drum on the first floor by carrying the same down from fourth floor. Petitioner showed his inability to undertake the assigned job, but he was forced to do the same. Thus, the petitioner was made to perform the inhuman act continuously right from 05.12.2017 to 05.01.2018. Petitioner further alleged that while performing his duty, as above, he had a fall on the staircase and had suffered injuries. The incident was published in vernacular newspaper 'Punjab Kesari' (Chamba Edition) on 30.12.2017. Petitioner represented to Hon'ble the Chief Minister and Hon'ble the Chief Justice seeking justice, but his grievance was not redressed, forcing him to file the instant petition.

3. In response submitted on behalf of respondents No. 3, 4 and 7, it has been submitted that the building of Government Polytechnic, Banikhet was inaugurated in July, 2017 and classes were shifted to the new campus w.e.f. August, 2017. The factum of petitioner working as part time Sweeper in Government Polytechnic, Banikhet during the year 2017 is not denied.

Rather, it is submitted that he was engaged on part time basis since 2011 and his services were taken on contract w.e.f. 06.02.2019. An inquiry was conducted at institutional level and another inquiry was conducted by the Tehsildar, Dalhousie. Respondents 5 and 6 have also taken a stand that inquiry was conducted by the Tehsildar and in their words the allegations of petitioner were found "baseless, meritless, frivolous and far away from reality".

4. Respondent No.8 filed separate reply. The factum of engagement of petitioner as part time Sweeper is not denied. It is also mentioned that petitioner belongs to Scheduled Caste category. As per respondent No.8, the examination hall of the institution was situated on the third floor at the time when the examinations were held during December 2017. The toilets on the third floor were not completely ready and, therefore, the arrangement was made to create temporary urinal outside the examination hall. As per the stand of respondent No.8, the petitioner was assigned the duty as Sweeper during the entire tenure of examination in lieu of payment of extra remuneration at the rate of Rs.55/- per shift. Petitioner had voluntarily agreed to perform the duty. The temporary urinal outside the examination hall was planned in association with the petitioner. It has also been tried to be explained that to ensure cleanliness of the area, it was decided to provide for a bigger size of the container to avoid spreading of urine drops on the floor and also to make it convenient for the petitioner to drag it to the nearest toilet on the same floor. This arrangement has been justified by respondent No.8 on the ground that in absence of fully installed toilets in the third floor, valuable examination time of the students would have been wasted and it would also have been an impediment in fair conduct of the examination. Respondent No.8 further submitted that there were as many as six toilets on the third floor and were very near to the examination hall with more than ten fully operational drain pipes through which urine was supposed to be drained. In

this way, the allegation of petitioner that he was made to carry the drum containing urine from fourth floor to first floor was contradicted. The conduct of petitioner has been alleged to be motivated.

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

6. As far as factual position with respect to arrangement of improvised toilet, collection of urine in a container and its disposal at a place other than where it was collected are not denied by the respondents. Respondent No.8 has tried to explain that the disposal of collected urine was not being made on the first floor as alleged by the petitioner, but was being done on the third floor in the toilets which were still not fully operational. It is admitted by the said respondent that the petitioner was to dispose the urine in the operational drain pipes in the aforesaid incomplete toilets. The fact remains that the urine was being collected in an improvised container and petitioner was assigned the duty to dispose it off.

7. The law clearly prohibits manual scavenging. Section 5 of the Prohibition of Employment as Manual Scavengers and Their Rehabilitation Act, 2013 (for short, "2013 Act"), specifically prohibits employment and engagement of manual scavengers. Manual scavenger has been defined in Section 2 (g) of the 2013 Act as under:

> *"(g). "Manual Scavengers" means a person engaged or employed, at the commencement of this Act or at any time thereafter, by an individual or a local authority or an agency or a contractor, for manually cleaning, carrying, disposing of, or otherwise handling in any manner, human excreta in an insanitary latrine or in an open drain or pit into which the human excreta from the insanitary latrines is disposed of, or on a railway track or in such other spaces or premises, as the Central Government or a State Government may notify, before the excreta fully decomposes in such manner as may be prescribed and the expression "manual scavenging" shall be construed accordingly.*

Explanation. *– For the purpose of this clause, -*

(a) "engaged or employed" means being engaged or employed on a regular or contract basis;

(b) a person engaged or employed to clean excreta with the help of such devices and using such protective gear, as the Central Government may notify in this behalf, shall not be deemed to be a 'manual scavenger'."

8. Human excreta means fecal and urinary discharge and includes any waste that contains this material.

9. The facts of instant case, as noticed above, clearly reveal the violation of the provisions of the 2013 Act. Assuming the stand of respondent No.8 to be correct, the petitioner would still be covered under the definition of "manual scavenger", as he was assigned the job of discharge/disposal of the collected urine in the incomplete toilets on the same floor. Though, I have serious reservation in considering the version of respondent No.8 as gospel truth for the reason that on one hand, the said respondent has tried to explain that the purpose of arranging improvised toilet was to avoid the wastage of valuable time of the students as also to avoid the chances of use of unfair means, on the other the allegation regarding disposal of collected urine on the first floor has been denied. Both the stances appear to be mutually contradictory. In case the urine was to be disposed on same floor, there hardly was any need to create improvised toilet at some other place. Such arrangement could have been made even in the incomplete toilets, which could have saved the deployment of petitioner as manual scavengers. In this view of the matter, there is no doubt that the petitioner was deployed as manual scavenger by respondent No.8, that too, for a considerable period of about one month.

10. The mandate of Constitution is clear as far as the upliftment of the down trodden and unprivileged sections of the Society is concerned. The

fact of the matter is that the 2013 Act has been enacted with the preamble as under:

> *"An act to provide for the prohibition of employment as manual scavengers, rehabilitation of manual scavengers and their families, and for matters connected therewith or incidental thereto.*
>
> *WHEREAS promoting among the citizens' fraternity assuring the dignity of the individual is enshrined as one of the goals in the Preamble to the Constitution;*
>
> *AND WHEREAS the right to live with dignity is also implicit in the Fundamental Rights guaranteed in Part III of the Constitution;*
>
> *AND WHEREAS Article 46 of the Constitution, inter alia, provides that the State shall protect the weaker sections, and, particularly, the Scheduled Castes and the Scheduled Tribes from social injustice and all forms of exploitation;*
>
> *AND WHEREAS the dehumanizing practice of manual scavenging, arising from the continuing existence of insanitary latrines and a highly iniquitous caste system, still persists in various parts of the country, and the existing laws have not proved adequate in eliminating the twin evils of insanitary latrines and manual scavenging;*
>
> *AND WHEREAS it is necessary to correct the historical injustice and indignity suffered by the manual scavengers, and to rehabilitate them to a life of dignity."*

11. It is pertinent to notice that the 2013 Act was preceded by the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 with the same objective. The 2013 Act came into being with modifications in order to overcome the shortcomings of 1993 Act.

12. The well-defined amplitude of Article 21 of the Constitution includes the right to live with human dignity and to live the life which is free

from exploitation. It also includes right to reputation. Article 17 of the Constitution abolished untouchability and further forbids its practice in any form. Equally important is the right to equality before law enshrined in Article 14 of the Constitution.

13. The State is obligated to protect its citizens against violation of their fundamental, legal and human rights.

14. It is really unfortunate to notice that the respondents, instead of reminding themselves about their constitutional and legal obligations, have taken an adversarial path just to defeat the claim of petitioner in the instant case. At this stage I am reminded of the clear enunciation by Hon'ble Supreme Court in ***Bandhua Mukti Morcha*** *vs*. ***Union of India and others (1984) 3 SCC 161***, as under:

> ***"9.*** *Before we proceed to consider the merits of the controversy between the parties in all its various aspects it will be convenient at this stage to dispose of a few preliminary objections urged on behalf of the respondents. The learned Additional Solicitor-General appearing on behalf of the State of Haryana as also Mr Phadke on behalf of one of the mine lessees contended that even if what is alleged by the petitioner in his letter which has been treated as a writ petition, is true, it cannot support a writ petition under Article 32 of the Constitution, because no fundamental right of the petitioner or of the workmen on whose behalf the writ petition has been filed, can be said to have been infringed. This contention is, in our opinion, futile and it is indeed surprising that the State Government should have raised it in answer to the writ petition. We can appreciate the anxiety of the mine lessees to resist the writ petition on any ground available to them, be it hyper-technical or even frivolous, but we find it incomprehensible that the State Government should urge such a preliminary objection with a view to stifling at the threshold an enquiry by the Court as to whether the workmen are living in bondage and under inhuman conditions. We should have thought that if any citizen brings before the Court a complaint that a large number of peasants or workers are bonded serfs or are being subjected to exploitation by*

a few mine lessees or contractors or employers or are being denied the benefits of social welfare laws, the State Government, which is, under our constitutional scheme, charged with the mission of bringing about a new socio-economic order where there will be social and economic justice for everyone and equality of status and opportunity for all, would welcome an enquiry by the Court, so that if it is found that there are in fact bonded labourers or even if the workers are not bonded in the strict sense of the term as defined in the Bonded Labour System (Abolition) Act, 1976 but they are made to provide forced labour or are consigned to a life of utter deprivation and degradation, such a situation can be set right by the State Government. Even if the State Government is on its own enquiry satisfied that the workmen are not bonded and are not compelled to provide forced labour and are living and working in decent conditions with all the basic necessities of life provided to them, the State Government should not baulk an enquiry by the Court when a complaint is brought by a citizen, but it should be anxious to satisfy the Court and through the Court, the people of the country, that it is discharging its constitutional obligation fairly and adequately and the workmen are being ensured social and economic justice. We have on more occasions than one said that public interest litigation is not in the nature of adversary litigation but it is a challenge and an opportunity to the Government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice which is the signature tune of our Constitution. The Government and its officers must welcome public interest litigation, because it would provide them an occasion to examine whether the poor and the downtrodden are getting their social and economic entitlements or whether they are continuing to remain victims of deception and exploitation at the hands of strong and powerful sections of the community and whether social and economic justice has become a meaningful reality for them or it has remained merely a teasing illusion and a promise of unreality, so that in case the complaint in the public interest litigation is found to be true, they can in discharge of their constitutional obligation

root out exploitation and injustice and ensure to the weaker sections their rights and entitlements. When the Court entertains public interest litigation, it does not do so in a cavilling spirit or in a confrontational mood or with a view to tilting at executive authority or seeking to usurp it, but its attempt is only to ensure observance of social and economic rescue programmes, legislative as well as executive, framed for the benefit of the have-nots and the handicapped and to protect them against violation of their basic human rights, which is also the constitutional obligation of the executive. The Court is thus merely assisting in the realisation of the constitutional objectives.

10. *Moreover, when a complaint is made on behalf of workmen that they are held in bondage and are working and living in miserable conditions without any proper or adequate shelter over their heads, without any protection against sun and rain, without two square meals per day and with only dirty water from a nullah to drink, it is difficult to appreciate how such a complaint can be thrown out on the ground that it is not violative of the fundamental right of the workmen. It is the fundamental right of everyone in this country, assured under the interpretation given to Article 21 by this Court in Francis Mullin case [Francis Coralie Mullin v. Administrator, UT of Delhi, (1981) 1 SCC 608 : 1981 SCC (Cri) 212] to live with human dignity, free from exploitation. This right to live with human dignity enshrined in Article 21 derives its life breath from the Directive Principles of State Policy and particularly clauses (e) and (f) of Article 39 and Articles 41 and 42 and at the least, therefore, it must include protection of the health and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief. These are the minimum requirements which must exist in order to enable a person to live with human dignity and no State — neither the Central Government nor any State Government — has the right to take any action which will deprive a person of the enjoyment of these basic essentials. Since the Directive Principles of State policy*

contained in clauses (e) and (f) of Article 39, Articles 41 and 42 are not enforceable in a Court of law, it may not be possible to compel the State through the judicial process to make provision by statutory enactment or executive fiat for ensuring these basic essentials which go to make up a life of human dignity but where legislation is already enacted by the State providing these basic requirements to the workmen and thus investing their right to live with basic human dignity, with concrete reality and content, the State can certainly be obligated to ensure observance of such legislation for inaction on the part of the State in securing implementation of such legislation would amount to denial of the right to live with human dignity enshrined in Article 21, more so in the context of Article 256 which provides that the executive power of every State shall be so exercised as to ensure compliance with the laws made by Parliament and any existing laws which apply in that State. We have already pointed out in Asiad Construction Workers case [People's Union for Democratic Rights v. Union of India, (1982) 3 SCC 235 : 1982 SCC (L&S) 275 : AIR 1982 SC 1473 : (1983) 1 SCR 456] that the State is under a constitutional obligation to see that there is no violation of the fundamental right of any person, particularly when he belongs to the weaker sections of the community and is unable to wage a legal battle against a strong and powerful opponent who is exploiting him. The Central Government is therefore bound to ensure observance of various social welfare and labour laws enacted by Parliament for the purpose of securing to the workmen a life of basic human dignity in compliance with the Directive Principles of State Policy. It must also follow as a necessary corollary that the State of Haryana in which the stone quarries are vested by reason of Haryana Minerals (Vesting of Rights) Act, 1973 and which is therefore the owner of the mines cannot while giving its mines for stone quarrying operations, permit workmen to be denied the benefit of various social welfare and labour laws enacted with a view to enabling them to live a life of human dignity. The State of Haryana must therefore ensure that the mine lessees or contractors, to whom it is giving its mines for stone quarrying operations, observe various social welfare and labour laws

enacted for the benefit of the workmen. This is a constitutional obligation which can be enforced against the Central Government and the State of Haryana by a writ petition under Article 32 of the Constitution."

15. The grievance of petitioner with respect to violation of his fundamental and legal right is being contested by raising plea of estoppel or acquiescence against him. Respondent No.8 has come up with a plea that petitioner had been the consenting party and was being paid extra remuneration for each shift of examination. Before delving on such an absurd plea, it is necessary to have a glance at the nature of employment of the petitioner at relevant stage. Petitioner was employed on part time basis. He was assigned four hours' job daily for a meagre amount. Admittedly, the petitioner belongs to that stratum of society, which is kept busy in planning two ends meet. In such compelling conditions, the consent becomes totally irrelevant.

16. In **Safai Karamchari Andolan and others** vs. **Union of India and others (2014) 11 SCC 224,** Hon'ble Supreme Court has reiterated the Constitutional resolve and has very categorically underlined the importance of 2013 Act as under:

"21. For over a decade, this Court issued various directions and sought for compliance from all the States and Union Territories. Due to effective intervention and directions of this Court, the Government of India brought an Act called "The Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013 for abolition of this evil and for the welfare of manual scavengers. The Act got the assent of the President on 18.09.2013. The enactment of the aforesaid Act, in no way, neither dilutes the constitutional mandate of Article 17 nor does it condone the inaction on the part of Union and State Governments under the 1993 Act. What the 2013 Act does in addition is to expressly acknowledge Article 17 and Article 21 rights of the

persons engaged in sewage cleaning and cleaning tanks as well persons cleaning human excreta on railway tracks.
24. In the light of various provisions of the Act referred to above and the Rules in addition to various directions issued by this Court, we hereby direct all the State Governments and the Union Territories to fully implement the same and take appropriate action for non-implementation as well as violation of the provisions contained in the 2013 Act. Inasmuch as the Act 2013 occupies the entire field, we are of the view that no further monitoring is required by this Court. However, we once again reiterate that the duty is cast on all the States and the Union Territories to fully implement and to take action against the violators. Henceforth, persons aggrieved are permitted to approach the authorities concerned at the first instance and thereafter the High Court having jurisdiction."

17. There is no gainsaying that it is for the State and its instrumentalities to follow and implement the law in its letter and spirit especially the laws which have been enacted for upliftment of the down trodden.

18. Petitioner belongs to the Scheduled Caste. Being an unprivileged member of society none heard his representation. The so called inquiries, be it the internal inquiry or the inquiry held by Tehsildar of the area, were nothing more than the farce. The violation of the provisions of 2013 Act was writ large from the available bare facts; still no action was taken against the wrongdoers, forcing the petitioner to approach this Court.

19. The violation of fundamental right of petitioner is proved in the facts of instant case. There also is clear violation of provisions of the 2013 Act. Thus, it is clearly established that petitioner has suffered humiliation, ridicule, disgrace, mortification and consequent embarrassment on account of acts and conduct attributable to the State and its instrumentalities.

Respondents have been instrumental not only in violating the fundamental rights of the petitioner but also the legal rights available to him under 2013 Act. Even violation of legal rights has manifestation of violation of fundamental right, if remains un-redressed.

20. It will also be gainful to quote hereafter the following excerpts from ***Bandhua Mukti Morcha*** (*supra)* highlighting the role of Constitutional Courts in the matters relating to underprivileged:

> *"14. Now it is obvious that the poor and the disadvantaged cannot possibly produce relevant material before the court in support of their case and equally where an action is brought on their behalf by a citizen acting pro bono publico, it would be almost impossible for him to gather the relevant material and place it before the court. What is the Supreme Court to do in such a case? Would the Supreme Court not be failing in discharge of its constitutional duty of enforcing a fundamental right if it refuses to intervene because the petitioner belonging to the underprivileged segment of society or a public spirited citizen espousing his cause is unable to produce the relevant material before the court. If the Supreme Court were to adopt a passive approach and decline to intervene in such a case because relevant material has not been produced before it by the party seeking its intervention, the fundamental rights would remain merely a teasing illusion so far as the poor and disadvantaged sections of the community are concerned. It is for this reason that the Supreme Court has evolved the practice of appointing commissions for the purpose of gathering facts and data in regard to a complaint of breach of fundamental right made on behalf of the weaker sections of the society. The Report of the commissioner would furnish prima facie evidence of the facts and data gathered by the commissioner and that is why the Supreme Court is careful to appoint a responsible person as commissioner to make an inquiry or investigation into the facts relating to the complaint. It is interesting to note that in the past the Supreme Court has appointed sometimes a district magistrate, sometimes a district Judge, sometimes a professor of law, sometimes a journalist, sometimes an officer of the court and sometimes an advocate practising in the court, for the purpose of carrying out an inquiry or investigation and making report to the court because the*

commissioner appointed by the Court must be a responsible person who enjoys the confidence, of the court and who is expected to carry out his assignment objectively and impartially without any predilection or prejudice. Once the report of the Commissioner is received, copies of it would be supplied to the parties so that either party, if it wants to dispute any of the facts or data stated in the Report, may do so by filing an affidavit and the court then consider the report of the commissioner and the affidavits which may have been filed and proceed to adjudicate upon the issue arising in the writ petition. It would be entirely for the Court to consider what weight to attach to the facts and data stated in the report of the commissioner and to what extent to act upon such facts and data. But it would not be correct to say that the report of the commissioner has no evidentiary value at all, since the statements made in it are not tested by cross-examination. To accept this contention would be to introduce the adversarial procedure in a proceeding where in the given situation, it is totally inapposite. The learned Additional Solicitor General and Mr. Phadke relied on Order XXVI of the Code of Civil Procedure and Order XLVI of the Supreme Court Rules 1966 for the purpose of contending that a commission can be appointed by the Supreme Court only for the purpose of examining witnesses, making legal investigations and examining accounts and the Supreme Court has no power to appoint a commission for making an inquiry or investigation into facts relating to a complaint of violation of a fundamental right in a proceeding under Article 32. Now it is true that Order XLVI of the Supreme Court Rules 1966 makes the provisions of Order XXVI of the Code of Civil Procedure, except rules 13, 14, 19, 20, 21 and 22 applicable to the Supreme Court and days down the procedure for an application for issue of a commission, but Order XXVI is not exhaustive and does not detract from the inherent power of the Supreme Court to appoint a commission, if the appointment of such commission is found necessary for the purpose of securing enforcement of a fundamental right in exercise of its constitutional jurisdiction under Article 32. Order XLVI of the Supreme Court Rules 1966 cannot in any way militate against the power of the Supreme Court under Article 32 and in fact rule 6 of Order XLVII of the Supreme Court Rules 1966 provides that nothing in those Rules "shall be deemed to limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice." We cannot therefore accept the contention of the learned Addl. Solicitor General and Mr. Phadke that the court

acted beyond its power in appointing M/s. Ashok Srivastava and Ashok Panda as commissioners in the first instance and Dr. Patwardhan as commissioner at a subsequent stage for the purpose of making an inquiry into the conditions of workmen employed in the stone quarries. The petitioner in the writ petition specifically alleged violation of the fundamental rights of the workmen employed in the stone quarried under Articles 21 and 23 and it was therefore necessary for the court to appoint these commissioners for the purpose of inquiring into the facts related to this complaint. The Report of M/s. Ashok Srivastava and Ashok Panda as also the Report of Dr. Patwardhan were clearly documents having evidentiary value and they furnished prima facie evidence of the facts and data stated in those Reports. Of course, as we have stated above, it will be for us to consider what weight we should attach to the facts and data contained in these Reports in the light of the various affidavits filed in the proceedings.

15. We may point out that what we have said above in regard to the exercise of jurisdiction by the Supreme Court under Article 32 must apply equally in relation to the exercise of jurisdiction by the High Courts under Article 226, for the latter jurisdiction is also a new constitutional jurisdiction and it is conferred in the same wide terms as the jurisdiction under Article 32 and the same powers can and must therefore be exercised by the High Courts while exercising jurisdiction under Article 226. In fact, the jurisdiction of the High Courts under Article 226 is much wider, because the High Courts are required to exercise this jurisdiction not only for enforcement of a fundamental right but also for enforcement of any legal right and there are many rights conferred on the poor and the disadvantaged which are the creation of statute and they need to be enforced as urgently and vigorously as fundamental rights."

21. Being custodian of the Constitution, this court cannot remain unmindful of its duties. The respondents have not only violated the rights of petitioner but have also undermined the mandate of law. The violator must not remain un-punished for it will not only deny justice to the petitioner but also prove regressive in our progression and quest for achieving the objectives enshrined in the Constitution.

22. The petitioner has invoked the writ jurisdiction of this Court for the reliefs as noticed above, on the ground of violation of his fundamental and human rights. Petitioner has sought monetary compensation in addition to the various directions as detailed above. Merely because the petitioner has alternative remedy to claim damages, he cannot be denied the audience in the instant proceedings, this Court being custodian and guardian of fundamental rights of the citizen of the country. Support in this regard can be drawn from the following extracts of the judgment passed by the Hon'ble Supreme Court in **Harbans Lal Sahnia and another** vs. **Indian Oil Corpn. Ltd. and others (2003) 2 SCC 107:**

> ***"7.*** *So far as the view taken by the High Court that the remedy by way of recourse to arbitration clause was available to the appellants and therefore the writ petition filed by the appellants was liable to be dismissed, suffice it to observe that the rule of exclusion of writ jurisdiction by availability of an alternative remedy is a rule of discretion and not one of compulsion. In an appropriate case in spite of availability of the alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies:* ***(i) where the writ petition seeks enforcement of any of the Fundamental Rights****; (ii) where there is failure of principles of natural justice or, (iii) where the orders or proceedings are wholly without jurisdiction or the vires of an Act and is challenged [See Whirlpool Corporation v. Registrar of Trade Marks, Mumbai and Ors., (1998) 8 SCC 1. The present case attracts applicability of first two contingencies. Moreover, as noted, the petitioners' dealership, which is their bread and butter came to be terminated for an irrelevant and non-existent cause. In such circumstances, we feel that the appellants should have been allowed relief by the High Court itself instead of driving them to the need of initiating arbitration proceedings."*

23. On maintainability of the writ petition under Article 32 of the Constitution, the Hon'ble Supreme Court in ***Rudal Sah*** *vs*. ***State of Bihar and another (1983) 4 SCC 141***, observed as under:

> *"9. It is true that Article 32 cannot be used as a substitute for the enforcement of rights and obligations which can be enforced efficaciously through the ordinary processes of Courts, Civil and Criminal. A money claim has therefore to be agitated in and adjudicated upon in a suit instituted in a court of lowest grade competent to try it. But the important question for our consideration is whether in the exercise of its jurisdiction under Article 32, this Court can pass an order for the payment of money if such an order is in the nature of compensation consequential upon the deprivation of a fundamental right. The instant case is illustrative of such cases. The petitioner was detained illegally in the prison for over fourteen years after his acquittal in a full-dressed trial. He filed a Habeas Corpus petition in this Court for his release from illegal detention. He obtained that relief, our finding being that his detention in the prison- after his acquittal was wholly unjustified. He contends that he is entitled to be compensated for his illegal detention and that we ought to pass appropriate order for the payment of compensation in this Habeas Corpus petition itself.*
>
> *10. We cannot resist this argument. We see no effective answer to it save the stale and sterile objection that the petitioner may, if so advised, file a suit to recover damages from the State Government. Happily, the State's Counsel has not raised that objection. The petitioner could have been relegated to the ordinary remedy of a suit if his claim to compensation was factually controversial, in the sense that a civil court may or may not have upheld his claim. But we have no doubt that if the petitioner files a suit to recover damages for his illegal detention, a decree for damages would have to be passed in that suit, though it is not possible to predicate, in the absence of evidence, the precise amount which would be decreed in his favour. In these circumstances, the refusal of this Court to pass an order of compensation in favour of the petitioner will be doing mere lip-service to his fundamental right to liberty which the State Government has so grossly violated. Article 21 which guarantees the right to life and liberty will be denuded of its significant*

content if the power of this Court were limited to passing orders to release from illegal detention. One of the telling ways in which the violation of that right can reasonably be prevented and due compliance with the mandate of Article 21 secured, is to mulct its violators in the payment of monetary compensation. Administrative sclerosis leading to flagrant infringements of fundamental rights cannot be corrected by any other method open to the judiciary to adopt. The right to compensation is some palliative for the unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. If civilization is not to perish in this country as it has perished in some others too well-known to suffer mention, it is necessary to educate ourselves into accepting that, respect for the rights of individuals is the true bastion of democracy. Therefore, the State must repair the damage done by its officers to the petitioner's rights. It may have recourse against those officers."

24. In ***Delhi Jal Board*** *vs.* ***National Campaign for Dignity and Rights of Sewerage and Allied Workers and others (2011) 8 SCC 568***, the Hon'ble Supreme Court has held as under:

"31. *These judgments are complete answer to the appellant's objection to the maintainability of the writ petition filed by respondent No.1. What the High Court has done by entertaining the writ petition and issuing directions for protection of the persons employed to do work relating to sewage operations is part of its obligation to do justice to the disadvantaged and poor sections of the society. We may add that the superior Courts will be failing in their constitutional duty if they decline to entertain petitions filed by genuine social groups, NGOs and social workers for espousing the cause of those who are deprived of the basic rights available to every human being, what to say of fundamental rights guaranteed under the Constitution. It is the duty of the judicial constituent of the State like its political and executive constituents to protect the rights of every citizen and every individual and ensure that everyone is able to live with dignity."*

25. Keeping in view the entirety of facts and circumstances of the case as also the exposition of law discussed above, petition is allowed and disposed of with directions as under:

(i) Respondent No.2 is directed to pay a sum of Rs. 2,00,000/- (Rs. Two Lakhs) to the petitioner as compensation within six weeks from the date of passing of this judgment.

(ii) Respondents No.2 to 4 are directed to initiate appropriate action/ proceedings in accordance with law against the official(s)/ person(s) guilty of violating the provisions of "Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013".

(iii) Respondents 1 and 2 are further directed to fully implement the provisions contained in Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013 and take appropriate action for non-implementation as well as violation of the same.

26. Pending miscellaneous application(s), if any, also stands disposed of.

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

Baldev Singh Attri ...Petitioner.

Versus

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

For the petitioner : Mr. B. S. Chauhan, Sr. Advocate with Mr. Ashish Verma, Advocate.

For the respondents : Mr. Desh Raj Thakur, Addl. A.G. for respondents No. 1 to 4.

Mr. Anil Chauhan, Advocate, for respondent No.5.

Mr. Maan Singh, Advocate, for respondent No.6.

Mr. V. S. Chauhan, Sr. Advocate with Mr. Ajay Kashyap, Advocate, for respondent No.7.

CWP No. 4389 of 2019
Reserved on:15.12.2022
Date of decision :13.1.2023

Himachal Pradesh Societies Registration Act, 2006 - Himachal Pradesh Town & Country Planning Act, 1977- Sections 28, 67, 71(b), 84(c)- Powers of the Director- **Himachal Pradesh Town & Country Planning Rules, 2014- Interim Development Plan for Shimla Planning Area-** Clause 10.4.1.2 (x) (viii)**- Special Area Development Authority-** Held that there is no authority with the State Government to grant relaxation in the prescribed norms- The relaxation was not granted by the Authority, rather the same was granted by the State Government. The State Government did not have any authority under the Act to grant the planning permission much less to grant relaxation in the prescribed norms. The Director/Chairman of the Authority i.e. respondent No.5 did not grant any relaxation, therefore, Clause 10.4.1.2 (x)

(viii) of IDP cannot be pressed into service. The plain reading of section 28 reveals its application to the construction of buildings for the government offices and under sub-section (4) of Section 28 of the Act, the decision of the State Government taken under sub-Section (3) has been declared as final. The State Government was not vested with powers either to grant planning permission or to relax the norms prescribed for grant of such permission. Instead of decision being taken by the Authority; the State Government had taken the decision of granting relaxation to the Society which not only was without jurisdiction but was also arrived at in the most casual manner. The Act provides for preparation of Regional Plans, Sectoral Plans and creation of Special Areas from the perspective of sustainable planning, development and land use. Keeping the object of the Act in mind, Shimla Planning Area was declared and an the IDP was framed keeping in view various relevant parameters viz. economic profile, environs, demographic characters, traffic and transportation, ecological conservation and environmental control etc. Needless to say, the norms have been prescribed keeping in mind all above parameters. Such norms cannot be allowed to be violated at whims and fancies of the State authorities. The State Government has not been vested with any authority to grant planning permissions or to relax the prescribed norms. In this view of the matter, the exercise of power by the State Government to grant relaxations in the case of the Society is clearly without jurisdiction hence illegal. Once the statutory provisions are in place none can violate or flout the same be it the Government agencies themselves. The executive by its illegal action cannot nullify the laws enacted by the legislature. The issue attracts more serious dimensions when protector of law itself becomes its violator. (Paras 17, 18, 19, 20, 28, 29, 30 & 31)

Cases referred:

Akhil Bhartiya Upbhokta Congress vs. State of Madhya Pradesh & others 2011 (5) SCC 29;

Bhakra Beas Management Board vs. Krishan Kumar Vij & another 2010 SC 3342;

Chennai Metropolitan Water Supply and Sewerage Board & others vs. T.T. Murali Babu 2014 (4) SCC 108;

Ghulam Quadir vs. Special Tribunal & others 2002 (1) SCC 33;

Municipal Corporation of Greater Mumbai (MCGM) vs. Abhilash Lal & others 2020 (13) SCC 234;

Pradeep Kumar & others vs.Mysore Urban Development Authority 2016 (3) SCC 422;
R & M Trust vs. Koramangala Residents Vigilance Group & others 2005 (3) SCC 91;
Shivajirao Nilangekar Patil vs. Dr. Mahesh Madhav Gosavi 1987 (1) SCC 227;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge:

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

"(i) To direct the respondents to stop all type of construction activities being carried out by the respondent Non.7 on Khasra No. 358/1, 360/1, 362/1, 363/1, 364/1 Kita 5 total measuring 0-25-55 hectare (2555 Sq. Meters) situated at Up Mohal Dochi, Patwar Circle Kasumpti, Tehsil and Distt. Shimla HP being violative of provisions of T&CP Act, 1977, Interim Development Plan, 1979, T&CP Rules, 2014 amended upto 2016.

ii) To direct the respondent No.1 to cancel the planning permission, Annexure P-5 alleged to have been sanctioned in favour of respondent No.7 which is contrary and violative of Act, Bye –laws, Regulations, rules and Interim Development Plan.

iii) To direct the respondent No.2 and 5 to initiate appropriate proceedings against respondent No.7 under T&CP Act, 1977 for carrying out unauthorized construction on the basis of notice issued on 19.12.2018, Annexure P-9 and P-10.

iv) To direct the respondent No.7 to restore the land to its original position which have been indiscriminately/unauthorisedly damaged and dug out including the land which is owned by the State of H.P. which is allegedly used as passage".

2. Brief facts necessary for adjudication of the petition are that certain employees of Himachal Pradesh Civil Secretariat have formed respondent No.7 Society and have registered the same under the Himachal Pradesh Societies Registration Act (for short "the Society").

3. In 2015, the Society purchased land comprised in Khasra No. 358/1, 360/1, 362/1, 363/1, 364/4/1, total measuring 2555 square Meters, situated at Up Mohal Dochi, Patwar Circle Kasumpti, Tehsil and District Shimla H.P. (*hereinafter referred to as "land" for brevity*) from one Shri Shankar Singh forthe purpose of construction of 50 residential flats for its members on self-finance basis. Mutation of sale in favour of the Society was attested on 28.11.2015.

4. The land purchased by the Society falls within the Shimla Planning Area and is thus amenable to the Himachal Pradesh Town & Country Planning Act, 1977 (for short "the Act"), Himachal Pradesh Town & Country Planning Rules, 2014 (for short "the Rules") and Interim Development Plan for Shimla Planning Area (for short "IDP").

5. The seller of the land Sh. Shankar Singh is real brother of the petitioner. In partition effected between the co-owners, the land purchased by the Society had fallen to the share of Sh. Shankar Singh, whereas the adjoining land comprised in Khasra Nos. Khasra No. 358/2, 359/1, 360/2, 361/2, 364/2 and 366/1 total measuring 2553squaremeters has fallen to the share of petitioner.

6. The grievance of the petitioner is that the Society has been raising the construction on the land in utter violation of the provisions of the Act, Rules and IDP. As per petitioner, though respondents No. 1 and 5 have sanctioned the proposed construction plan of the Society but the same is also in violation of statutory provisions. The specific case of petitioner is that though there is no provision for relaxation in the Act, Rules or IDP to allow construction of additional stories and to exempt in maintenanceof the

requisite setbacks, yet respondents No. 1 and 5 have proceeded to sanction the proposed construction plan of the Society by granting the relaxations *de-hors* the provisions of Act, Rules and IDP. Petitioner has alleged that during the course of raising construction, the Society has thrown huge debris and boulderson the adjoining land and has thereby caused destruction and damage to the substantial portion of land of petitioner. Petitioner further alleged that the cuttings of the hills were being done by the Society in excess of the required parameters. The forest wealth was also subjected to destruction.

7. Respondents No. 1 to 5 have contested the petition by filing a joint reply. It has been submitted by respondents No. 1 to 5 that the Society had applied on 25.5.2015 for permission to raise constructions on the land by providing relaxation in the Floor Area Ratio (for short, "FAR") as also the setbacks. Respondent No.5 forwarded the case of the Society to the Government on 27.9.2016. The Government granted sanction to the Society by allowing relaxation in FAR and setbacks. The sanction was conveyed to the Society by respondent No.5 on 19.12.2016 and finally the planning permission was granted on 6.4.2017. As per respondents No. 1 to 5, their acts were strictly in accordance the provisions of the Act, Rules and IDP.

8. It has been further submitted by respondents No. 1 to 5 that petitioner filed a complaint before respondent No.5 on 4.12.2018. The site was inspected by the technical staff of Special Area Development Authority, Shoghi (for short, "the Authority"). Statutory notices under Sections 38 and 39(A)(2) of the Act were issued. The Society in its reply to the notices proposed certain changes necessitated by the site conditions, which were permitted by respondents No. 1 to 5 and the Society was allowed to go ahead with construction.

9. Respondents No. 1 to 5 also pointed out that another brother of the petitioner Sh. Dalip Singh had raised the same issue before National

Green Tribunal (for short "the NGT") in which the factual report was sought. On consideration of the report, the matter was disposed of by the NGT on 29.3.2019 without indicting the construction being raised by the Society in any manner.

10. The Society in its separate reply has also contested the claim of the petitioner on the grounds that the petition was not bona-fide. The initial attempt to stall the construction being raised by the Society was made through a petition, filed by Sh. Dalip Singh before the NGT. Having failed in said attempt, the present petition has been filed. The petition filed before the NGT was a proxy litigation of petitioner. It has further been submitted that petitioner has no *locus-standi* to file the petition as no right of the petitioner has been violated. The petition is also sought to be dismissed on the ground of delay and laches. As per the Society, it started construction immediately after granting of planning permission in its favour on 6.4.2017. At the time of filing of petition by the petitioner, structure of two out of five blocks had already been raised by the Society. Further, the stand taken by Respondents No. 1 to 5 has been reiterated by asserting that the construction is being raised by the Society strictly in accordance with the sanctioned plan. The Government had allowed the relaxation in FAR and setbacks in exercise of its lawful jurisdiction. As per the stand of Society, it has purchased 2555 square meters of land for construction of 50 flats. Each flat required approximate floor area of 1250 to 1300 square meters.Keeping in view the number of permissible floors and height of the buildings, the available FAR i.e. 1.75 was not sufficient to meet the requirements for 50 flats. The required area for 50 flats was much more than the available area by applying the permissible FAR of 1.75, which necessitated the relaxation.

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

12. Indisputably, the "land" falls within the jurisdiction of Special Area Development Authority, Shoghi,(for short, "the Authority") which has been constituted by the State Government,under Section 67 of the Act,*vide* notification dated 16.8.2000. Respondent No.5 is the Chairman of said Authority. Under section 71(b) of the Act, the Authority has been vested with powers of the Director.

13. Society required prior planning permission from the Authority beforestart of construction activity on the land. The permissible norms for construction have been prescribed in the Rules and Chapter-10 of IDP. It is not in dispute that as per prescribed norms FAR ofonly1.75 is permissible. "Floor Area Ratio" means the ratio between the net plot area and the total floor area of all the floors of the building. The limits of setbacks on all four sides have also been prescribed.

14. Respondent No.5 on receipt of application of the Society, seeking relaxation, forwarded the same to respondent No.2 on 27.9.2016 for consideration and further necessary action. Respondent No.2 vide letter dated 2.12.2016 conveyed the grant of relaxation in favour of the Society to the following extent: -

Sr. No.	Particulars	As per Appendix-7 of the H.P. Town and Country Planning Rules, 2014 (Amended upto 2016)	As proposed	Relaxations
1.	Land Use	Original Use (un-defined)	Residential use (Flatted Colony)	Change of Land Use from Original Use (Un-defined) to Residential Use is allowed
2.	Area under Apartments	30-35%	45.86	Relaxation of 10.86% is

				granted
3.	Public and Semi-Public	06-10%	03.67%	Relaxation of 2.33% is granted
4.	FAR	1.75	2.36 (6771.48m 2	Relaxation of 0.61 is granted
5.	Built up area	4471.25m2 (2555x1.75=4471.2 5)	5859.50m 2	Relaxation of 1388.25m2 is granted
6.	Set backs Right side Left side	 (1/3rd of building height) i.g. 6.85m (1/3rd of building height) i.e. 6.85m	 3.20m (Average) 5.63m (Average)	 Relaxation of 3.65 m is granted Relaxation of 1.22m is granted
7.	Block to Block distance	6.00m	5.00m	Relaxation of 1.00m is granted.

It is on the strength of these relaxations that the planning permission was finally granted to the Society by respondent No.5.

15. Petitioner has raised the contention that under the Act, Rules and IDP the Director has been vested with power to grant planning permission(s). The powers of Director are well circumscribed and he is not vested with powers to relax the fixed and prescribed norms. It has further been contended by petitioner that since the land falls within the jurisdiction of the Authority, it was only within the domain of the Authority to grant the planning permission strictly in accordance with prescribed norms. As per petitioner, in the instant case the State Government has exercised the power to relax the prescribed norms fixed under the rules and the IDP and such act of the State Government is without jurisdiction and hence illegal.

16. On the other hand, respondents have tried to justify their action by placing reliance on Section 84 (c) of the Act as also on Clause 10.4.1.2 (x) (viii) of IDP. It is relevant to notice the provisions of Section 84 of the Act and Clause 10.4.1.2 (x) (viii) of IDP, as under: -

> *"**84**. Vacancy not to invalidate proceedings:- No act of a Town and Country Development Authority or a Special Area Development Authority or any of its committee shall be invalid merely by reasons of-*
> *(a) ……..*
> *(b) ……..; or*
> *(c) any irregularity in the procedure thereof not affecting the merits of the case."*
> ***10.4.1.2 (x) (viii) "**In public interest and in the interest of town design or any material consideration the Director may permit more number of storeys, coverage and density or change of land-use. The decision of the director shall be final".*

17. In my considered view, the arguments raised on behalf of the respondents are wholly misconceived. Section 84 of the Act has its application in entirely different domain. It is not a case of irregularity in the procedure. It is a case of exercise of power by an authority without any legal sanction. Admittedly, the Authority is empowered to grant planning permission within its jurisdiction. In the case in hand, the relaxation was not granted by the Authority, rather the same was granted by the State Government.The State Government did not have any authority under the Act to grant the planning permission much less to grant relaxation in the prescribed norms.

18. Similarly respondents cannot derive any benefit of Clause 10.4.1.2 (x) (viii) of IDP. As noticed above, the Director/Chairman of the Authority i.e. respondent No.5 did not grant any relaxation, therefore, Clause 10.4.1.2 (x) (viii) of IDP cannot be pressed into service. Alternatively, assuming the application of such clause, there is nothing on record to suggest that in what manner the relaxation granted to the Society would have served

the public interest or interest of town design. In my considered view it would have served none.Learned Additional Advocate General, representing respondents No. 1 to 5 also made a feeble attempt to justify the action of State Government by asserting that the interest of town design was protected by the State Government, keeping in view the constraint of limited land area, as 50 persons will be getting residential accommodation within a smaller area than what would have been required by them by following the prescribed norms. This argument again cannot stand the scrutiny of the provisions the Act, Rules or IDP, which does not provide for meeting with any such like situation.

19. The respondents have also tried to take the benefit of Section 28 of the Act to justify their act. Such stand of respondent is again incomprehensible as the plain reading of section 28 *ibid*reveals its application to the construction of buildings for the government offices and under sub-Section (4) of Section 28 of the Act, the decision of the State Government taken under sub-Section (3) has been declared as final. The application of aforesaid provision shall be completely alien to the facts of the case.

20. On examination of the above relied and other relevant provisions of the Act, Rules and IDP it is found that the State Government was not vested with powers either to grant planning permission or to relax the norms prescribed for grant of such permission.

21. In the above notedbackground it becomes necessary to lift the veil and to find out the reasons behind commission of patently illegal acts by the instrumentalities of the State, for such an exercise will have effect on the final outcome of instant petition.

22. It is evident from the stand taken on behalf of respondents that the Society knew from the inception that the prescribed norms under the rules and IDP would not permit it to construct 50 flats particularly with the requirement of floor area of 1250 to 1300 square feet for each flat. It was for such reason the Society applied to the Authority on 25.5.2016 seeking

relaxation in prescribed norms in respect of FAR and setbacks.It cannot be said to be a bonafide mistake on behalf of official respondents for the reasons *firstly*, that they still maintain that they had the authority to relax the norms and *secondly*, the contents of record produced by respondents 1 to 4 offered reasons to assume existence of malafides.

23. After the matter was heard, an application came to be filed on behalf of Respondents No. 1 to 4, seeking permission to place on record the copies of office notes dealing with the application of the Society seeking relaxation in norms. The reckless approach adopted by official respondents becomes evident on perusal of said office notes.

24. It is revealed that the Chairman of the Authority (Respondent No.5) on receipt of the application of the Society for relaxation had raised his doubts *vide* office Note No. 14 dated 9.8.2016. The reservations expressed by respondent No.5 were as under: -

> *"14. I have gone through the case file.*
> *(1) Are there no sets of guidelines or law to grant relaxations?*
> *(2) Have such relaxations been given in the past by Chairman, SADA.*
> *(3) With reference to (1) above, what will deter anybody from applying for relaxations if there are no guidelines.*
> *(4) Please make a site report with photographs of setbacks. I would then also want to understand why relaxations in setbacks are required & if the relaxation sought is justified. Similarly, why an increased FAR is required?"*

25. Interestingly, the queries raised by respondent No.5 were dealt with *vide* Note Nos.16 to 18 in following manners: -

> *"16. It is submitted that the site has been visited and the photographs of the same have been furnished by the Architect of applicant society. (Pl. see at Flag 'd'). The reasons adduced by the applicant society for relaxation in the setback as well as in FAR, are to meet the basic requirement to construct 50 flats for their members.*

> *17. In view of above narrated position, if approved we may apprise the worthy Chairman, SADA (s) pleas.*
> *18. In compliance to N.14. The detailed reply is submitted vide N. 16. However, it is understood that the proposed colony is not for sale and doesn't have any profit motive as stated in affidavit. Case has been already recommended vide N. 13.*
> *Accordingly, submitted for perusal and approval Pl."*

26. The record further shows that respondent No.5 was not satisfied and had again raised the query vide office Note No. 19, as under:-

> *"I don't think the case for relaxation can be considered favourably at this level. Also, I would want to know if the demands of relaxation are justified. No comment has been made in that."*

27. Evidently, the Authority at its level had not passed any order to grant relaxations in favour of the Society. However, the following references made *vide* office Note Nos. 26 and 27, need attention and are therefore reproduced as under:-

> *"PUC has been received from the Under Secretary (TCP) to the Govt. of H.P. regarding for relaxation in FAR (Floor Area Ratio) and Setback for the construction of colony in respect of H.P. Secretariat Employees named "Aditya Vihar Employees Housing Society"*
> *In this regard, it is submitted that the case has already been considered by the Govt. for construction of five residential Blocks/Parking stages holding total built up area of 5859.00m on kh. Nos. 358/1, 960/1, 362/1, 363, 364/1 with total plot area 2555.00m at Up Mohal Dochi, Teh. & District Shimla, H.P. with the condition that the applicant shall submit the NOC from different Deptt. & standard stability certificate & the fee has been calculated after submit the drawing.*
> *So if approved we may inform the applicant accordingly."*

28. Thus, there remains no doubt that instead of decision being taken by the Authority; the State Government had taken the decision of

granting relaxation to the Society which not only was without jurisdiction but was also arrived at in the most casual manner.

29. It will also not be out of place to notice here the extent of relaxation granted to the Society. It is not in dispute that the planning permission was granted to the Society by the Authority to construct total floor area by applying the FAR of 2.36 instead of permissible FAR of 1.75. Admittedly, the Society has total 2555 square meters of land. By application of prescribed FAR of 1.75 the Society could be permitted to construct total floor area of 4471.25 sq. meters, whereas it has been permitted to construct 5859.50 sq. meters of floor area in five blocks having 5 storeys with parking floor in each block.The reasons of such allowance were neither lawful nor with any public interest in the background.

30. The Act provides for preparation of Regional Plans, Sectoral Plans and creation of Special Areas from the perspective of sustainable planning, development and land use. Keeping the object of the Act in mind, Shimla Planning Area was declared and an the IDP was framed keeping in view various relevant parameters viz. economic profile, environs, demographic characters, traffic and transportation, ecological conservation and environmental control etc. Needless to say, the norms have been prescribed keeping in mind all above parameters. Such norms cannot be allowed to be violated at whims and fancies of the State authorities.

31. As noticed above, the State Government has not been vested with any authority to grant planning permissions or to relax the prescribed norms. In this view of the matter, the exercise of power by the State Government to grant relaxations in the case of the Society is clearly without jurisdiction hence illegal. Once the statutory provisions are is in place none can violate or flout the same be it the Government agenciesthemselves. The executive by its illegal action cannot nullify the laws enacted by the

legislature. The issue attracts more serious dimensions when protector of law itself becomes its violator.

32. It is more than settled that if a statute required for anything to be done in a particular manner, it should be done in that manner or not at all. As noticed above, the Act does not vest with the State Government to either grant the planning permission or to relax the norms. The grant of planning permission is within domain of Director and in the case of Special Area Development, the Chairman exercise the powers of Director. In the instant case, no such power was exercised by the Director.

33. In ***Municipal Corporation of Greater Mumbai (MCGM)*** vs. ***Abhilash Lal & others 2020 (13) SCC 234***, the Hon'ble Supreme Court has held as under:-

> *39. The principle that if a statute requires a thing to be done in a particular manner, it should be done in that manner or not at all, articulated in Nazir Ahmad v. Emperor, AIR 1936 PC 253, has found widespread acceptance. In the context of this case, it means that if alienation or creation of any interest in respect of MCGM's properties is contemplated in the statute through a particular manner, that end can be achieved only through the prescribed mode, or not at all.*
>
> *46. Dharani Sugars & Chemicals Ltd. v. Union of India & Ors. (2019) 5 SCC 480 is a relevant recent decision of this court. The question which arose in that case was the legality and constitutionality of directions issued by the Reserve Bank of India, through a circular of 12th February, 2018 regulating resolution of stressed assets of debtors. This court elaborately dealt with provisions of the Banking Regulation Act, 1949 and the Reserve Bank of India Act, 1934 and held that the power to issue directions regarding initiation of insolvency proceedings vested in the RBI, subject to the approval of the Central Government. The court significantly held that the power was contained "within the four corners" of Section 35AA and observed as follows:*

"53. A conspectus of all these provisions shows that the Banking Regulation Act specifies that the Central Government is either to exercise powers along with the RBI or by itself. The role assigned, therefore, by Section 35AA, when it comes to initiating the insolvency resolution process under the Insolvency Code, is thus, important. Without authorisation of the Central Government, obviously, no such directions can be issued.

54. The corollary of this is that prior to the enactment of Section 35AA, it may have been possible to say that when it comes to the RBI issuing directions to a banking company to initiate insolvency resolution process under the Insolvency Code, it could have issued such directions Under Sections 21 and 35A. But after Section 35AA, it may do so only within the four corners of Section 35AA.

55. The matter can be looked at from a slightly different angle. If a statute confers power to do a particular act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any manner other than that which has been prescribed. This is the wellknown Rule in Taylor v. Taylor, [1875] 1 Ch. D. 426, which has been repeatedly followed by this Court. Thus, in State of U.P. v. Singhara Singh, (1964) 4 SCR 485, this Court held:

> *'8. The Rule adopted in Taylor v. Taylor [(1875) 1 Ch D 426, 431] is well recognised and is founded on sound principle. Its result is that if a statute has conferred a power to do an act and has laid down the method in which that power has to be exercised, it necessarily prohibits the doing of the act in any other manner than that which has been prescribed. The principle behind the Rule is that if this were not so, the statutory provision might as well not have been enacted. A Magistrate, therefore, cannot in the course of investigation record a confession except in the manner laid down in Section 164. The power to*

> *record the confession had obviously been given so that the confession might be proved by the record of it made in the manner laid down.If proof of the confession by other means was permissible, the whole provision of Section 164 including the safeguards contained in it for the protection of Accused persons would be rendered nugatory. The section, therefore, by conferring on Magistrates the power to record statements or confessions, by necessary implication, prohibited a Magistrate from giving oral evidence of the statements or confessions made to him.*
>
> *Following this principle, therefore, it is clear that the RBI can only direct banking institutions to move under the Insolvency Code if two conditions precedent are specified, namely, (i) that there is a Central Government authorisation to do so; and (ii) that it should be in respect of specific defaults. The Section, therefore, by necessary implication, prohibits this power from being exercised in any manner other than the manner set out in Section 35AA."*

34. A similar reproduction of law has been expounded by a Division Bench of this Court while deciding CWP No. 1773 of 2020, as under:-

> *51. A perusal of the aforesaid provisions goes to indicate that the power is conferred upon the Council established under Section 3 to determine the minimum standards of education of school teachers. It is the Council alone which for the purpose of maintaining standards of education in schools may by regulations determine the qualifications of persons for being recruited as teachers. There is a proper mechanism as to how these powers have to be exercised. It is the basic principle of law long settled that if the manner of doing a particular act is provided under the statute, the act must be done in that manner or not at all.*
>
> *52. The origin of this rule is traceable to the decision of the Privy Council in Taylor vs. Taylor 45 LJ CH 373 which was followed by*

Lord Roche in Nazir Ahmad vs. King Emperor, AIR 1936 Privy Council 253, who stated as under:-

> *"where the power is given to do certain thing in a certain way, the thing must be done in that way or not at all."*

35. Thus, this Court has no hesitation to hold that neither the Authority nor the State Government has any power or jurisdiction to relax the prescribed norms save and except the powers vested in Director by virtue of Clause 10.4.1.2 (x) (viii) of IDP, which is available in the case of public interest or the interest of town design only. Though, the matter in respect of grant of relaxation to the Society does not appear to have been dealt with at the touch stone of aforesaid criteria, yet it can be seen that the Society is an entity constituted by private individuals. Merely because the members of the Society are the employees of Himachal Pradesh Civil Secretariat, does not place it at any better footings than any other individual amenable to the mandatory provisions of the Act, Rules or IDP. The respondents themselves have mentioned that since the available FAR as per prescribed norms was not sufficient for construction of 50 flats, relaxation was sought and finally granted. It cannot by any stretch of imagination be said to be a public cause.

36. The claim of the petitioner has then been sought to be defeated by the respondents on the grounds firstly that he has no *locus-standi* to file the petition, secondly that the claim was not *bona-fide* and thirdly, it suffers with vice of delay and laches.

37. Learned counsel for the Society has placed reliance on following excerpts from the judgment passed by Hon'ble Supreme Court in **R & M Trust** *vs.* **Koramangala Residents Vigilance Group & others** reported in **2005 (3) SCC 91**, as under:-

> *"23. Next question is whether such Public Interest Litigation should at all be entertained & laches thereon. This sacrosanct jurisdiction of Public Interest Litigation should be invoked very sparingly and in favour of vigilant litigant and not for the persons*

who invoke this jurisdiction for the sake of publicity or for the purpose of serving their private ends".

24. Public Interest Litigation is no doubt a very useful handle for redressing the grievances of the people but unfortunately lately it has been abused by some interested persons and it has brought very bad name. Courts should be very very slow in entertaining petitions involving public interest in a very rare case where public at large stand to suffer. This jurisdiction is meant for the purpose of coming to the rescue of the down trodden and not for the purpose of serving private ends. It has now become common for unscrupulous people to serve their private ends and jeopardize the rights of innocent people so as to wreak vengeance for their personal ends. This has become very handy to the developers and in matters of public contracts. In order to serve their professional rivalry they utilize the service of the innocent people or organization in filing public interest litigation. The Courts are sometimes persuaded to issue certain directions without understanding implication and giving a handle in the hands of the authorities to misuse it. Therefore, the courts should not exercise this jurisdiction lightly but should exercise in a very rare and few cases involving public interest of large number of people who cannot afford litigation and are made to suffer at the hands of the authorities. The parameters have already been laid down in a decision of this Court in the case of Balco Employees' Union (Regd.) v. Union of India & Ors. reported in (2002) 2 SCC 333, wherein this Court has issued guidelines as to what kind of public interest litigation should be entertained and all the previous cases were reviewed by this Court. It was observed as under:-

> *"77. Public Interest litigation, or PIL as it is more commonly known, entered the Indian Judicial process in 1970. It will not be incorrect to say that it is primarily the Judges who have innovated this type of litigation as there was a dire need for it. At that stage, it was intended to vindicate public interest where fundamental and other rights of the people who were poor, ignorant or in socially or economically disadvantageous position and were unable to seek legal redress were required to be espoused. PIL was*

not meant to be adversarial in nature and was to be a cooperative and collaborative effort of the parties and the court so as to secure justice for the poor and the weaker sections of the community who were not in a position to protect their own interests. Public interest litigation was intended to means nothing more than what words themselves said viz. "litigation in the interest of the public".

78.While PIL initially was invoked mostly in cases connected with the relief to the people and the weaker sections of the society and in areas where there was violation of human rights under Article 21, but with the passage of time, petitions have been entertained in other spheres, Prof. S.B. Sathe has summarized the extent of the jurisdiction which has now been exercised in the following words::

"PIL may, therefore, be described as satisfying one or more of the following parameters. These are not exclusive but merely descriptive;

- Where the concerns underlying a petition are not individualist but are shared widely by a large number of people (bonded labour, undertrial prisoners, prison inmates.)

- Where the affected persons belong to the disadvantaged sections of society (women, children, bonded labour, unorganized labour, etc.)

- Where judicial law making is necessary to avoid exploitation (inter-country adoption, the education of the children, bonded labour, unorganized labour, etc.)

- Where judicial law making is necessary to avoid exploitation (inter-country adoption, the education of the children of the prostitutes).

- Where judicial intervention is necessary for the protection of the sanctity of democratic institutions (independence of the judiciary, existence of grievances redressal forums.)

> *- Where administrative decisions related to development are harmful to the environment and jeopardize people's right to natural resources such as air or water."*
>
> *79. There is, in recent years, a feeling which is not without any foundation that public interest litigation is now tending to become publicity interest litigation or private interest litigation and has a tendency to be counterproductive.*
>
> *80. PIL is not a pill or a panacea for all wrongs. It was essentially meant to protect basic human rights of the weak and the disadvantaged and was a procedure which was innovated where a public spirited person files a petition in effect on behalf of such persons who on account of poverty, helplessness or economic and social disabilities could not approach the Court for relief. There has been in recent times, increasingly instances of abuse of PIL. Therefore, there is a need to reemphasize the parameters within which PIL can be resorted to by petitioner and entertained by the Court. This aspect has come up for consideration before this Court and all we need to do is to recapitulate and reemphasize the same.""*

38. Similarly, he relied upon the judgment of Hon'ble Supreme Court in ***Bhakra Beas Management Board*** vs. ***Krishan Kumar Vij & another 2010 SC 3342***, which reads as under:-

> *"39. Yet, another question that draws our attention is with regard to delay and laches. In fact, respondent no.1's petition deserved to be dismissed only on that ground but surprisingly the High Court overlooked that aspect of the matter and dealt with it in a rather casual and cursory manner. The appellant had categorically raised the ground of delay of over eight years in approaching the High Court for grant of the said relief. But the High Court has simply brushed it aside and condoned such an inordinate, long and unexplained delay in a casual manner. Since, we have decided the matter on merits, thus it is not proper to make*

avoidable observations, except to say that the approach of the High Court was neither proper nor legal."

39. Learned counsel for the Society further asserted that the Court cannot easily brush aside the factor of delay and laches and for such purpose, he placed reliance on ***Chennai Metropolitan Water Supply and Sewerage Board & others*** vs. ***T.T. Murali Babu 2014 (4) SCC 108*** as under:-

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 scrutinize 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.

17. In the case at hand, though there has been four years' delay in approaching the court, yet the writ court chose not to address the same. It is the duty of the court to scrutinize whether such enormous delay is to be ignored without any justification. That apart, in the present case, such belated approach gains more significance as the respondent-employee being absolutely careless to his duty and nurturing a lackadaisical attitude to the responsibility had remained unauthorisedly absent on the pretext of some kind of ill health. We repeat at the cost of repetition that

> *remaining innocuously oblivious to such delay does not foster the cause of justice. On the contrary, it brings in injustice, for it is likely to affect others. Such delay may have impact on others' ripened rights and may unnecessarily drag others into litigation which in acceptable realm of probability, may have been treated to have attained finality. A court is not expected to give indulgence to such indolent persons - who compete with 'Kumbhakarna' or for that matter 'Rip Van Winkle'. In our considered opinion, such delay does not deserve any indulgence and on the said ground alone the writ court should have thrown the petition overboard at the very threshold."*

40. Before entering into the legal aspect dealing with the proposition raised on behalf of the Society, reference to certain facts of the case will be necessary. The planning permission was granted to the Society on 6.4.2017. Petitioner had made complaint to the authorities on 4.12.2018. Site inspections were conducted. Notice was issued to the society to stop the construction. Finally, society was allowed to go ahead with the construction activity by the Authority on 15.5.2019. Petitioner filed the petition in December, 2019. It is averred in the petition that the petitioner had made applications for necessary information under Right to Information Act and had received some of the information on 7.1.2019 and 15.3.2019. His allegation is that information was not complete. It is clearly evident from the record that official respondents had not disclosed at any time about the source of their powers to grant relaxation in favour of the Society. Petitioner was aggrieved as his land was allegedly being disturbed or destroyed by fall of debris and boulders as a result of construction work undertaken by the Society. In this view of the matter, the petition cannot be said to be either the projection of stale claim or having been filed without any *locus-standi*. Petitioner cannot be said to have remained silent for inordinately long period of time, rather he has been vigilant throughout and had filed the petition

within reasonable time, when he did not find proper redressal to his grievance from official respondents.

41. Further, it can also be seen that the respondent No.5 had issued notices under sections 38 and 39 of the Act to the Society on the complaint of petitioner, meaning thereby that the complaints were found correct. It is the case of respondents themselves that the Society had sought certain amendments due to site conditions and the Society was allowed to carry further construction in accordance with such amendments. However, there is nothing on record to suggest that petitioner was ever informed about the decision of Respondent No.5 to allow the Society to carry on with further construction as per amended design.

42. Otherwise also this court cannot remain oblivious to its obligations. Instant petition has been able to expose patently illegal acts of omissions and commission on part of State authorities and in such situation this court will fail in its duties in case the wrong already committed is not remedied.

43. In ***Ghulam Quadir*** vs. ***Special Tribunal & others 2002 (1) SCC 33***, it has been held by the Hon'ble Supreme Court, as under:-

> *"38.There is no dispute regarding the legal proposition that the rights under Article 226 of the Constitution of India can be enforced only by an aggrieved person except in the case where the writ prayed is for habeas corpus or quo warranto. Another exception in the general rule is the filing of a writ petition in public interest. The existence of the legal right of the petitioner which is alleged to have been violated is the foundation for invoking the jurisdiction of the High Court under the aforesaid Article. The orthodox rule of interpretation regarding the locus standi of a person to reach the court has undergone a sea-change with the*

development of constitutional law in our country and the constitutional courts have been adopting a liberal approach in dealing with the cases or dis-lodging the claim of a litigant merely on hyper-technical grounds. If a person approaching the court can satisfy that the impugned action is likely to adversely affect his right which is shown to be having source in some statutory provision, the petition filed by such a person cannot be rejected on the ground of his having not the locus standi. In other words, if the person is found to be not merely a stranger having no right whatsoever to any post or property, he cannot be non-suited on the ground of his not having the locus standi".

44. In ***Akhil Bhartiya Upbhokta Congress*** vs. ***State of Madhya Pradesh & others 2011 (5) SCC 29***, the Hon'ble Supreme Court has held as under:-

"80. The challenge to the locus standi of the appellant merits rejection because it has not been disputed that the appellant is a public spirited organization and has challenged other similar allotment made in favour of Punjabi Samaj, Bhopal, That apart, as held in Shivajirao Nilangekar Patil v. Mahesh Madhav Gosavi (1987) 1 SCC 227 even if a person files a writ petition for vindication of his private interest but raises question of public importance involving exercise of power by men in authority then it is the duty of the Court to enquire into the matter".

45. In ***Pradeep Kumar & others*** vs.***Mysore Urban Development Authority 2016 (3) SCC 422***, the Hon'ble Supreme Court observed as under:-

"28. It has been vehemently argued on behalf of the respondents that the writ petition ought not to have been entertained and any order thereon could not have been passed as it is inordinately delayed and the appellant has made certain false statements in the pleadings before the High Court details of which have been mentioned hereinabove. This issue need not detain the Court. Time and again it has been said that while exercising the

jurisdiction under Article 226 of the Constitution of India the High Court is not bound by any strict rule of limitation. If substantial issues of public importance touching upon the fairness of governmental action do arise the delayed approach to reach the Court will not stand in the way of the exercise of jurisdiction by the Court. Insofar as the knowledge of the appellant – writ petitioner with regard to the allotment of the land to the respondent No.28-Society is concerned, what was claimed in the writ petition is that it is only in the year 1994 when the respondent No.28-Society had attempted to raise construction on the land that the fact of allotment of such land came to be known to the appellant-writ petitioner.

34. The acquisition under the 1903 Act and the allotment of 55 acres of land to the respondent No. 28 having been found to be contrary to law consequential orders of handing over of possession of the entire land should normally follow. However, in granting relief at the end of a protracted litigation, as in the present case, the Court cannot be unmindful of facts and events that may have occurred during the pendency of the litigation. It may, at times, become necessary to balance the equities having regard to the fact situation and accordingly mould the relief(s). How the relief is to be moulded, in the light of all the relevant facts, essentially lies in the realm of the discretion of the courts whose ultimate duty is to uphold and further the mandate of law. If the issue is viewed from the aforesaid perspective the several decisions cited on behalf of the respondents in this regard, particularly by the respondent No. 28, i.e., Competent Authority Vs. Barangore Jute Factory and Others, U.G. Hospitals Pvt. Ltd. Vs. State of Haryana and Others, Gaiv Dinshaw Irani and Others Vs. Tehmtan Irani and Others and Bhimandas Ambwani (Dead) Through Lrs. Vs. Delhi Power Company Limited can at best indicate the manner of exercise of the judicial discretion in the facts surrounding the particular cases in question".

46. In ***Shivajirao Nilangekar Patil*** vs. ***Dr. Mahesh Madhav Gosavi 1987 (1) SCC 227***, the Hon'ble Supreme Court has held as under:-

> *"36. The allegations made in the petition disclose a lamentable state of affairs in one of the premieruniversities of India. The petitioner might have moved inhis private interest but enquiry into the conduct oftheexaminers of the Bombay University in one ofthe highestmedical degrees was a matter of public interest. Such stateof affairs having been brought to the notice of the court,it was the duty of the court to the public that the truthand the validity of the allegations made be inquired into. It was in furtherance of public interest that an enquiryinto the state of affairs ofpublicinstitutionbecomesnecessary and private litigation assumed the character ofpublicinterest litigation and such an inquiry cannot be avoided if it is necessary and essential for the administration of justice.*

47. Another contention of respondents that the petitioner is not bona-fide has also not been substantiated on record. It has not been established that the complaint filed by Sh. Dalip Singh before the NGT was at the instance of petitioner. There is no denying the fact that Sh. Dalip Singh is the other brother of Sh. Shankar Singh from whom the land was purchased by the Society. Sh. Dalip Singh had his independent right to challenge the actions of Society before the NGT. Moreover the NGT had neither delved upon the issue that has arisen in present case, nor had decided the same. Petitioner was not a party to the proceedings before the NGT.

48. Learned counsel for the Society also raised an argument that since there was no express power in the Act regarding relaxation, therefore, the relaxation granted in favour of Society cannot be said to be without authority or jurisdiction. The argument so raised also deserves to be rejected for the reasons that such absurd interpretation will make the provision of the Act otiose. Nothing can be imported into the statute, which has not been expressly incorporated by the Legislature. The prescription of norms itself suggests that there is fixation of optimal limits.

49. In light of above discussion, the petition is allowed and disposed of in following terms:

(i) The relaxation granted in Floor Area Ratio and setback areas in the case of respondent No.7 by respondent No.1 and 2on 2.12.2016 is held to be without jurisdiction and hence illegal. Consequently, the planning permission granted by respondent No.5 on 6.4.2017 is also held invalid to the extent it exceeded the permissible limits ofFloor Area Ratio and setbacks.

(ii) Respondent No. 5 shall be under direction to review and revoke the planning permission dated 6.4.2017 granted in favour of the respondent No.7, within eight weeks from the date of passing of this judgment, so as to bring the planning permission strictly within the prescribed norms as per the provisions of Act, Rules and the IDP.

(iii) Respondent No.5 is further directed to take necessary steps under Section 39 of H.P. Town and Country Planning Act, 1977 and any other applicable provision of law, in respect of construction,if any, already raised by Respondent No.7 in excess of permissible limits prescribed under the Act, Rules and IDP.

The petition is disposed of in above terms so also the pending miscellaneous application(s), if any.

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

Eco Power Solution. ...Petitioner.

Versus

Punjab State Power Corporation Ltd. & another. ...Respondents.

For the Petitioner. Mr.Surinder Saklani & Mr.Sourabh Goel, Advocates.

For the Respondents: Mr.Anand Sharma, Senior Advocate, alongwith Mr.Karan Sharma, Advocate, for defendant No. 1.
Mr.Hemant Vaid, Additional Advocate General, for respondent No. 2.

CWP No. 1575 of 2019
Date of decision: 13.1.2023

Himachal Pradesh, Micro and Small Enterprises Facilitation Council- The Micro, Small and Medium Enterprises Development Act, 2006, Sections 18(1), 18 (3), 24- **The Arbitration and Conciliation Act, 1996-** Section 7(1)- Held about the procedure to be adopted by the Council after unsuccessful effect for conciliation- After receiving the reference, Council has to resort to conducting conciliation in the matter either itself or to seek assistance from any institution or centre providing alternative dispute resolution service. On failure of conciliation, Council has to resolve the dispute by taking it up for arbitration either itself or refer it to any institution or centre providing alternative dispute resolution service. In such arbitration proceedings, provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the arbitration was in pursuance to arbitration agreement. Order directing the parties to resort to the arbitration clause already existing in the agreement to resolve the dispute, is quashed and set aside with direction to the Council to proceed further in accordance with the provisions of MSMED Act as applicable. (Paras 14 & 19)

Cases referred:
M/s Silpi Industries Etc. Vs. Kerala State Road Transport Corporation and another, AIR 2021 SC 5487;
Simplex Infrastructures Ltd. Vs. Himachal Pradesh Micro and Small Facilitation Council and Another, Latest HLJ 2022 (HP) (1) (113),;

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge (oral)

Petitioner Firm has approached this Court for quashing impugned order dated 24.4.2019 (Annexure P-15) passed by Himachal Pradesh, Micro and Small Enterprises Facilitation Council, Shimla (respondent No. 2) (for short 'Council'), whereby by observing that for already existing arbitration clause in agreement executed between supplier (petitioner) and buyer (respondent No. 1), reference from the proceedings of the Council was decided to be dropped with advise to the parties to act as per already existing arbitration clause at the first instance, respondent No. 2 has been directed to refer the dispute, between petitioner and respondent No. 1, to Arbitrator as per provisions of Section 18(3) of the Micro, Small and Medium Enterprises Development Act, 2006 (for short 'MSMED Act').

2. Petitioner Firm is duly registered under provisions of MSME Act since 2009 and is engaged in manufacturing of Distribution Transformers.

3. Respondent No. 2-Punjab State Power Corporation Limited (PSPC), a Public Sector Company, is engaged in power distribution in the State of Punjab.

4. In response to tender invited by respondent No. 1 for supply of Transformers, petitioner participated in the process and was awarded purchase orders for supply of 'Distribution Transformers' and in furtherance whereof, petitioner supplied 'Distribution Transformers' to respondent No. 1.

5. Petitioner's claim is that for supply of Distribution Transformers, some of payments were made by respondent No. 1 on time, however, majority of payments were made beyond period of 45 days, the agreed time for making the payment and, therefore, petitioner raised demand for payment of interest as per MSMED Act on the delayed payments.

6. For non-payment of interest on delayed payments, as claimed by petitioner, respondent No. 2-Council was approached by the petitioner by filing Reference Application under Section 18(1) of the MSMED Act, wherein respondent No. 1 was summoned. After filing reply to the reference, Council conducted conciliation itself and tried to resolve the matter amicably between the parties, but conciliation failed, whereupon respondent No. 2-Council passed the impugned order.

7. Petitioner's case is that petitioner Firm is registered unit under the provisions of MSMED Act and, therefore, for adjudication and resolution of dispute in reference, provisions of MSMED Act were applicable notwithstanding any terms and conditions contained in the contract, purchase orders or any other law in terms of provisions of Section 24 of MSMED Act, which provide that Sections 15 to 23 shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force and, therefore, instead of relegating the parties to avail the recourse in terms of arbitration clause in the agreement, the Council had to follow provisions of Section 18 of MSMED Act, which provides that in case conciliation is not successful and stands terminated without any settlement between the parties, the Council shall either itself take up the dispute for arbitration or refer it to any institution or centre providing alternative dispute resolution services for such arbitration and, therefore, it has been canvassed that impugned order is not sustainable and deserves to be set aside with direction to respondent No. 2-Council to adjudicate the matter by acting as

Arbitrator or to refer the dispute for arbitration as per provisions of Section 18(3) of the MSMED Act.

8. Learned counsel for the petitioner, to substantiate plea of overriding effect of provisions of Section 18 of MSMED Act, has referred pronouncement of this High Court in ***Simplex Infrastructures Ltd. Vs. Himachal Pradesh Micro and Small Facilitation Council and Another, Latest HLJ 2022 (HP) (1) (113)***, wherein it has been observed that Section 24 of MSMED Act has given overriding effect to the provisions of Sections 15 to 23 including Section 18 and, therefore, Arbitrator appointed by the Facilitation Council shall have precedence over the arbitration proceedings conducted by the Arbitrator appointed in terms of arbitration agreement.

9. Learned counsel for the petitioner has also referred pronouncement of the Supreme Court in ***M/s Silpi Industries Etc. Vs. Kerala State Road Transport Corporation and another, AIR 2021 SC 5487***, wherein it has been observed that on failure of conciliation initiated under Section 18 (2) of the MSMED Act, the Council shall either itself take up the dispute for arbitration or refer it to any institution for arbitration.

10. Learned counsel for respondent No. 1 has submitted that at the time of participating in the tender process, it was never disclosed by the petitioner Firm that it was registered under the MSMED Act and had it been disclosed, respondent No. 1 would have never placed purchase orders to the petitioner for supply of Distribution Transformers and to avoid penalty of highly exorbitant interest for delayed payments. He has further submitted that it is not the only case where Council has asked the parties to take recourse of arbitration clause existing in the agreement instead in all cases identical advise has been given by the Council. To substantiate his plea, he has referred another similar order passed by the Council, placed on record as Annexure R-1, in another case between M/s New Bansal Generation and respondent No. 1.

11. It has been further submitted by learned counsel for respondent No. 1 that Council had advised the parties to refer the matter for arbitration in terms of existing agreement, in the year 2019, but instead of doing so, petitioner approached this Court and now referring the matter for arbitration to the Council, would cause grave prejudice to respondent No. 1, as respondent No. 1 may be held liable for interest for these three years also, whereas the interest during pendency of litigation should not be awarded, particularly for the reasons that respondent No. 1 has already paid the principal amount alongwith 0.5% penalty for delayed payments, as agreed under the agreement.

12. Referring clauses 5, 13, 19 and 20 of the agreement, it has been contended that maximum penalty for delayed payments leviable in terms of contract was 0.5% and territorial jurisdiction to adjudicate the dispute in connection with purchase orders/contract, as agreed between the parties is at Patiala and also that purchase orders with complete terms and conditions (commercial and technical) itself forms contract agreement and any dispute or difference arising out of contract is to be referred for arbitration in terms of clause 19 of the agreement. Further that claim of the petitioner was time barred and thus by referring the matter to the Council, petitioner has not become entitled for claiming, agitating and receiving a time barred claim.

13. Issue involved in present petition is limited to the question that what procedure would have been adopted by the Council after unsuccessful effect for conciliation under Section 18(2) of the MSMED Act.

14. Section 24 of MSMED Act gives overriding effect to the provisions of Sections 15 to 23 of MSMED Act, which include Section 18 also. Section 18 of MSMED Act provides complete procedure to be adopted and followed by the Council on receipt of reference by any party entitled to do so under MSMED Act. After receiving the reference, Council has to resort to conduct conciliation in the matter either itself or to seek assistance from any

institution or centre providing alternative dispute resolution service. On failure of conciliation, Council has to resolve the dispute by taking up it for arbitration either itself or refer it to any institution or centre providing alternative dispute resolution service. In such arbitration proceedings, provisions of the Arbitration and Conciliation Act, 1996 shall apply as if the arbitration was in pursuance to arbitration agreement referred to in Section 7(1) of that Act.

15. For overriding effect of provisions of MSMED Act, contract agreement is to be governed by the provisions of MSMED Act and, therefore, clause 5 providing minimum penalty charges of 0.5%, clause 13 providing jurisdiction at Patiala only, clause 19 providing arbitration clause in the agreement shall be eclipsed by the special provision of MSMED Act and procedure provided under MSMED Act shall prevail over clauses of arbitration agreement and interest between the parties.

16. Petitioner Firm is registered under MSMED Act with respondent No. 2 Council at Shimla, therefore, Council has jurisdiction to adjudicate the reference preferred under Section 18 of the MSMED Act for resolution of dispute.

17. Passing of similar order by the Council in other cases does not legalize or cure inherent defect in the order passed by the Council in violation of or ignoring the provisions of Section 18 of MSMED Act. Wrong order can never be a good precedent. Such orders including the impugned order passed by the Council are not in consonance with the provisions of MSMED Act and thus not sustainable.

18. The issue, with regard to limited time barred claim, exemption from payment of interest for the parties spent in litigation especially during pendency of present petition, are the claims which are to be adjudicated and determined in the arbitration proceedings by the Arbitrator, but not in present petition and, therefore, parties are at liberty to raise all contentions with

respect to their respective claims and counter claims before the Arbitrator, who shall adjudicate and determine all such contentions on its own merit in accordance with law as applicable.

19. In view of above discussion, impugned order so far as it is directing the parties to resort to the arbitration clause already existing in the agreement to resolve the dispute, is quashed and set aside with direction to the Council to proceed further in accordance with the provisions of MSMED Act as applicable. The parties are directed to appear before the Chairman/Council-respondent No. 2 on 30th January, 2023, whereafter Council shall proceed further in accordance with law. Learned Additional Advocate General is directed to inform the Chairman of the Council about passing of this order for ensuring necessary compliance on the part of Chairman/Council.

Petition is allowed and disposed of in aforesaid terms alongwith pending application(s).

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

Dinesh Kumar & others ...Petitioners.

Versus

H.P. University ...Respondent

For the petitioners : Mr. Sanjeev Bhushan, Sr. Advocate with Mr. Rajesh Kumar, Advocate.

For the respondent : Mr. Surender Verma, Advocate.

CWPOA No. 1435 of 2020
Reserved on 23.12.2022
Decided on : 7.1.2023

Himachal Pradesh Ministerial Administrative Rules, 1973- The Executive Council is the highest decision making body of the University- Held that the respondent University cannot turn around and say that the petitioners were to get the benefits prospectively- The plea of time barred claim of the petitioners does not hold good in the given facts and circumstances of the case as the Memorandum was not issued by the competent authority, therefore, that cannot be an impediment in adjudication of the rights of the petitioners. Further, the petitioners had submitted their representation which had remained unanswered. It cannot be said that the petitioners had slept over their rights for unduly long period or were grossly negligent in pursuing their remedies. The claim of the petitioners, therefore, cannot be said to be barred by delay and laches. (Paras 13 & 14)

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 respondent-University may very kindly be directed to place/promote the applicants as Junior Assistants with effect from 12.4.2010 and thereafter to promote them as*

Senior Assistants from 12.4.2015, strictly in accordance with recruitment regulations on completion of 5-10 years of service as Clerks combined with Junior Assistants with all consequential benefits of pay, arrears, seniority etc. along with arrears and interest @ 9% per annum.

iii) That the respondent-University may be directed to assign seniority to the applicants as clerks from 12.4.2005 by further assigning consequential seniority from due dates in the interest of law and justice."

2. The Executive Council of respondent University in its meeting held on 28.12.2004 passed a resolution, whereby it was decided to promote Category-D officials serving the Himachal Pradesh University. The respondent promoted some of Class-D officials of the university as Clerks vide orders dated 12.4.2005, 4.5.2005 and 20.9.2005. The officials promoted as Clerks vide orders dated 4.5.2005 and 20.9.2005 were also promoted from retrospective date i.e. 12.4.2005.

3. The petitioners were also promoted as Clerks vide orders dated 19.9.2007 from Category-D. Their promotion was ordered to be made on notional basis w.e.f. 12.4.2005 and with financial benefits from the date of their respective joining.

4. The Clerks in the respondent University were entitled to be placed as Junior Assistants after completion of five years of service as Clerks and thereafter to be as Senior Assistants after completion of further five years of service as Junior Assistants.

5. The grievance of the petitioners is that their service as Clerks has been wrongly reckoned from the date of issuance of office order dated 19.9.2007, whereas they were ordered to be promoted, though on notional basis w.e.f. 12.4.2005. Petitioners were placed as Junior Assistants in the year 2012 and then promoted as Senior Assistants in the year 2017.

Petitioners claim their placement and promotion as Junior Assistants and Senior Assistants respectively w.e.f. 2010 and 2015.

6. The petitioners have alleged discrimination on the ground that the persons who were promoted as Clerks vide orders dated 4.5.2005 and 20.9.2005 were also ordered to be promoted retrospectively on notional basis w.e.f. 12.4.2005 and with financial benefits from the date of joining, but they were granted further placements and promotions by reckoning their date of promotion as 12.4.2005.

7. Respondent University has contested the claim of the petitioners on the grounds, firstly that their claim was time barred as the representation submitted by them was rejected by the respondent on 10.6.2014 and hence the petition filed in January, 2017 was highly belated and secondly, that many persons have been appointed as Clerks between 12.4.2005 to 19.9.2007 and in their absence as parties to the petition, no relief could be granted to the petitioners. On merits, it has been contended that all the Category-D officials promoted vide orders dated 12.4.2005, 4.5.2005 and 20.9.2005 were senior to the petitioners. In fact, the persons promoted vide orders dated 4.5.2005 and 20.9.2005 were inadvertently ignored while issuing the order dated 12.4.2005. Such persons were higher in seniority to some of the persons promoted vide order dated 12.4.2005. Therefore, the persons promoted subsequently vide orders dated 4.5.2005 and 20.9.2005 were placed in the same position as those who were promoted vide order dated 12.4.2005. As per respondent University, ten persons were appointed as Clerks between 12.4.2005 and 19.9.2007. Nine of whom were appointed on compassionate ground and the tenth was appointed on daily wage basis as clerk. The respondent University has further tried to justify its stand on the ground that as per Himachal Pradesh Ministerial Administrative Rules, 1973, all the petitioners were promoted as Clerks in relaxation of prescribed 10% quota. The method of recruitment as per aforesaid rules in the case of clerks is 90%

by direct recruitment and 10% by promotion from amongst the Category-D employees. Respondent had sanctioned cadre strength of Clerks as on 12.4.2005 of 243 posts. Only 24 posts were to be filled up from Category-D employees. However, as on 12.4.2005 against direct recruitment quota, only 108 Clerks were appointed and against promotional quota 59 employees were promoted from Category-D. Since the respondent was facing acute shortage of staff, the Vice Chancellor in exercise of powers vested in him had promoted 17 persons from Category-D on 12.4.2005. Similarly two incumbents were promoted vide order dated 4.5.2005 and another was promoted on 20.9.2005. Lastly, the petitioners were also promoted in pursuance to the decision of Executive Council taken on 28.12.2004.

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

9. Order dated 10.5.2005 (Annexure A-1) reveals that two incumbents namely S/Sh. Mohan Singh and Tilak Raj were promoted on notional basis w.e.f. 12.4.2005 till 4.5.2005. Similarly, vide office order dated 20.9.2005 (Annexure A-2), Sh. Keshwa Nand was promoted on notional basis w.e.f. 12.4.2005 and with financial benefits from the date of joining. Petitioners have alleged that their promotions of S/Sh. Mohan Singh, Tilak Raj and Keshwa Nand has been reckoned for all intents and purposes from 12.4.2005. This fact has not been denied by the respondent, rather it has been submitted that since these persons were senior even to some of the persons promoted vide order dated 12.4.2005, they were given the benefits from the date their juniors were promoted i.e. 12.4.2005. Nonetheless, the fact remains that in cases of persons promoted vide orders dated 10.5.2005 and 20.9.2005, it was clearly stipulated that their promotion w.e.f. 12.4.2005 was on notional basis and with financial benefits from the date of their joining. Similar was the stipulation in office order dated 19.9.2007, whereby the petitioners were promoted.

10. It is also not denied by the respondent that the promotion of Category-D officials, who were promoted vide orders dated 12.4.2005, 4.5.2005 and 20.9.2005 and also that of the petitioners was in pursuance to the same decision of the Executive Council, which was taken vide Resolution No. 24 dated 28.12.2004. Respondent University has categorically submitted in its reply that the petitioners were promoted by relaxing the rules. Noticeably, even the promotion of the persons promoted vide orders dated 12.4.2005, 4.5.2005 and 20.9.2005 was also in relaxation of the rules. It is specific case of respondent that as on 12.4.2005, the promotion quota of clerks was already exceeding, but with a purpose to meet out the exigency, the promotions were made by relaxing the rules. Similar reason would apply to the case of petitioners, as no other specific reason has been assigned for promoting the petitioners by relaxing the rules. That being so, no distinction could be drawn between the petitioners and the persons promoted vide orders dated 12.4.2005, 4.5.2005 and 20.9.2005.

11. Petitioners were promoted on notional basis w.e.f. 12.4.2005 and there was a specific stipulation to that effect in office order dated 19.9.2007 (Annexure A-3). The Executive Council is the highest decision making body of the University. The order Annexure A-3 was issued in pursuance to the decision of the Executive Council. Petitioners are not claiming any financial benefits for the period between 12.4.2005 to 19.9.2007. There is nothing on record to suggest that the office order dated 19.9.2007 was reviewed by the competent authority at any time. In absence of the review of aforesaid orders, the respondent University cannot now turn around and say that the petitioners were to get the benefits prospectively from 19.9.2007 and not from the date of their promotion i.e. 12.4.2005.

12. Respondent has also raised an objection that the representation of the petitioners was rejected by the university on 10.6.2014 vide Annexure R-1/F and since the petitioners have not laid any challenge to such rejection

orders, they were not entitled to any relief. The objection so raised deserves to be rejected for the reasons that the promotion of the petitioners was in pursuance to decision of the Executive Council and perusal of Annexure R-1/F reveals that the representation of the petitioners was considered and rejected by the Recruitment and Promotion Committee. There is nothing on record to suggest that such a Committee had authority to take administrative decision having civil and evil consequence on the rights of the employees of the university. Merely, because the Memorandum dated 10.6.2014 was issued under the signatures of Vice Chancellor cannot be taken to be a factor to legitimize the action of the respondent university.

13. As regards the plea of time barred claim of the petitioners, the same also does not hold good in the given facts and circumstances of the case. As held above, the Memorandum dated 10.6.2014 was not issued by the competent authority. Therefore, that cannot be an impediment in adjudication of the rights of the petitioners. Further, the petitioners had submitted their representation even on 5.12.2015, which had remained unanswered. The O.A. was preferred by the petitioners in January, 2017. It cannot be said that the petitioners had slept over their rights for unduly long period or were grossly negligent in pursuing their remedies. The claim of the petitioners, therefore, cannot be said to be barred by delay and laches, which may be sufficient to defeat their claim.

14. In result, the petition is allowed. The petitioners are entitled to be considered for placement/promotion as Junior Assistants w.e.f. 12.4.2010 and thereafter for promotion as Senior Assistants w.e.f. 12.4.2015, strictly in accordance with regulations applicable to the employees of Himachal Pradesh University. The respondent university is directed to do the needful within eight weeks from the date of production of a copy of this judgment. Needless to say the consequential benefits shall also follow.

15. The petition is disposed of. Pending applications, if any, also stand disposed of.

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

Dr. Shekhar Sharma

.....Petitioner

Versus

State of HP and Ors.

.....Respondents

For the Petitioner: Mr. Bhuvnesh Sharma, Senior Advocate with Mr. Parav Sharma, Advocate.

For the Respondents: Mr. Anup Rattan, Advocate General with Mr. Sudhir Bhatnagar, Additional Advocate General, for the State.

CWPOA No.6997 of 2020
Date of Decision: 21.12.2022

Recruitment & Promotion Rules- Conversion of services to the government contract from RKS- Held that the case of the petitioner being similarly situate to other persons also requires to be considered afresh for conversion to the government contract with the prior approval of the council of the ministers. The proposal of the RKS to continue services of the petitioner under RKS was approved by the Government and as per its approval and for that purpose, two posts of Physiotherapists were created with the prior approval of the finance department. It is not in dispute that petitioner had been continuously working under RKS at RPGMC Tanda. Since other similar situate persons who were though initially appointed under RKS, but after their having completed eight years service, their services were converted into government contract, case of the petitioner is/was also required to be considered for conversion from RKS to government contract. Since Government conveyed its approval for converting services of the petitioner from SRC Project to RKS on the proposal made by the governing council and for that purpose, two posts were created with the prior approval of the Finance Department, it is not open at this stage for the State/respondent department to deny the admissible claim of petitioner for conversion of services from RKS

to government contract on the ground that his initial appointment was not in accordance with the rules and same was not with the RKS. (Para 9)

The following judgment of the Court was delivered:

Sandeep Sharma, J. *(Oral)*

Being aggrieved and dissatisfied with order dated 20.12.2018 (Annexure A-19), whereby though respondents in terms of order dated 11.7.2017, passed by the erstwhile HP State Administrative Tribunal in TA No. 78 of 2016 titled *Shekhar Sharma v. State of HP,* considered the case of the petitioner in light of the judgment dated 5.12.2016, passed by the Erstwhile Tribunal in OA(D) No. 2 of 2016, Ankush Kaushal v. State of Himachal Pradesh and Ors, but rejected his claim on the ground that he is not similarly situate to the case of Ankush Kaushal, petitioner herein approached the Erstwhile Tribunal by way of OA No. 2279 of 2019, which now on account of its abolishment stands transferred to this court for adjudication and has been re-registered as CWPOA No. 6997 of 2020, praying therein for following reliefs:

> "(i). That the order impugned dated 20.12.2018 at Annexure A-19 whereby the claim of the applicant has been rejected, may kindly be quashed and set aside and the applicant may kindly be held entitled for his conversion from RKS to Govt. contract w.e.f. due date and thereafter for regularization of his services w.e.f. due date.
>
> (ii). That the respondents may also be directed to grant regular pay scale of Physiotherapist to the applicant with effect from the due date with all consequential benefits and the arrears accruing may kindly be ordered to be paid with interest."

2. The briefly stated facts as emerge from the record are that pursuant to public notice dated 26.2.2009 (Annexure A-1), whereby Principal, Dr. RPGMC, Kangra at Tanda, invited applications for various posts, petitioner herein being fully eligible appeared in walk-in-interview on

6.6.2009, against the one post of Physiotherapist. Vide office order dated 4.2.2010 (Annexure A-2), Principal, Dr.RPGMC, Kangra at Tanda offered appointment to the petitioner against the post of Physiotherapist in SRC on the recommendation of selection committee and directed him to join in the office of Nodal Officer, SRC Project in Dr.RPGMC Kangra at Tanda. Pursuant to aforesaid offer of appointment, petitioner joined in the office of Nodal Officer, SRC Project, at RPGMC, Tanda. Subsequently, vide order dated 15.6.2012, services of the petitioner were shifted to Rogi Kalyan Samiti (RKS) w.e.f. 9.2.2012 with same terms and conditions as were conveyed to him vide letter dated 4.2.2010 (Annexure A-2) and since then, petitioner had been working against the post of Physiotherapist but under the management and control of the RKS. Subsequently, governing council of Dr.RPGMC, Tanda, in its 5th Meeting, held on 20.9.2013 (Annexure A-4) recommended for creation of one post of Physiotherapist in the concerned medical college at Tanda. Pending decision qua the creation of post in question, Additional Chief Secretary (Health) to the Government of Himachal Pradesh vide communication dated 6.4.2014, addressed to Director, Medical Education and Research, Himachal Pradesh, conveyed the approval of the government to continue the services of the petitioner Shekhar Sharma, Physiotherapist, under RKS on grant-in-aid basis as per decision taken in 5th Meeting of Governing Council of Rogi Kalyan Samiti (RKS), Dr. RPGMC Tanda (Annexure-A5). While sending aforesaid communication, the Additional Chief Secretary (Health) called upon the Director, Medical Education and Research, for sending suitable proposal alongwith financial implication for the creation of post of Physiotherapist at Dr.RPGMC, Tanda, within two days so that proposal regarding creation of post of Physiotherapist is taken with Finance Department well in time.

3. Vide communication dated 7.10.2014 (Annexure-A6), Additional Chief Secretary (Health) apprised the Director, Medical Education and

Research, Himachal Pradesh that government has conveyed its approval for creation/filling up two posts of Physiotherapist in Dr.RPGMC, Kangra at Tanda in the pay scale for Rs. 10300-34600+3600 (GP), subject to certain conditions i.e. **1.)** The department shall abolish one post of Modler in the same scale out of two sanctioned posts; **2.)** All the expenditure to be incurred on this account shall be met from NRHM and; **3.)** All codal formalities be completed in this regard in accordance with the instructions/guidelines issued by the Government (Finance Department) from time to time.

4. Besides above, the Additional Chief Secretary (Health) vide communication dated 12.11.2014(Annexure-A7), addressed to the Director, Medical Education and Research, called upon the aforesaid authority to take action for filling up the newly created post of Physiotherapist. Before action, if any, for filling up the post of Physiotherapist could be taken by the department concerned in terms of direction contained in letter dated 12.11.2014 (Annexure-A7), Medical Superintendent-cum-Principal Secretary (RKS) Dr.RPGMC Kangra at Tanda, converted the services of the petitioner under grant-in-aid, as a result of which, his pay came to be revised to Rs. 13900/- in the pay scale of Rs. 10300-34800+3600 GP (Annexure-A8). It is pertinent to take note of the fact that vide notification/office order dated 28.3.2016, Government of Himachal Pradesh ordered that employees recruited in various societies in the Health Department as per prescribed procedure laid down in Recruitment & Promotion Rules for the concerned posts, shall be eligible for conversion into RKS/society contract on completion of three years and they will be given regular pay scale after completion of eight years. In the aforesaid background, Principal, Dr.RPGMC Kangra at Tanda sent the proposal of regularization of service of the petitioner Shekher Sharma against the post of Physiotherapist vide communication dated 13.12.2017 (Annexure A-9), which is reproduced herein below

"I have the honour to invite a reference to your office letter No. HFW-B(E)3-66/2015 dated 13/11/2017 alongwith U.O. dated 10/9/2017 eceived from Shanta Kumar, Member of Parliament Kangra on the subject cited above.

In this context, it is submitted that initially Sh. Shekhar Sharma was appointed as a Physiotherapist in SRC project "National Programme for Rehabilitation of person with Disability" w.e.f. February 2010 through walk-in-interview held at Tanda which was under Orthopedics and Ophthalmology department at Dr.RPGMC Tanda and latter on funds under project were exhausted.

Further, it was decided in the meeting held on 5/08/2015 regarding regularization of employees working under Rogi Kalyan Samiti to shift his services in Rogi Kalyan Samiti w.e.f. 9/12/2012 and paid Rs. 12000/- pm and decided that his case may be sent to the govt. to pay his salary under GIA due to shortage of funds under user charges.

It shall not be out of place to mention here that when the Govt. conveyed approval to continue his services under RKS on Grant-in-aid basis as per decision taken in the 5th meeting of Governing Council of Rogi Kalyan Samiti, Dr. RPGMC Tanda held on 20.9.2013, but at the time there were no sanctioned posts of Physiotherapist in this institution. Later on two posts have been sanctioned in this institution by the Govt., conveyed by DME vide letter No. HFW-(DME)G -266/2009-Vol-II-4145-47 dated 5/11/2014, one of which has been filled by way of transfer and on the other post Sh. Shekhar Sharma is working under RKS and his salary is being paid from user charges.

Keeping in view of facts as above, it is recommended that he may be converted in Govt. Contract/regularized his services as per policy/rule. This is for your kind information please."

5. Careful perusal of aforesaid communication clearly reveals that Principal, Dr.RPGMC, Kangra at Tanda, having taken note of the fact that two posts of Physiotherapist in the institution stand created and against one of which, petitioner is working under RKS and his salary is being paid from user

charges, made recommendation to the Principal Secretary to convert the services of the petitioner in government contract as per policy. The Principal, Dr.RPGMC, Kangra at Tanda, once again vide communication dated 4.7.2018, recommended the case of the petitioner to the Principal Secretary (Health) for conversion, but since no action, if any, was taken by the Government of Himachal Pradesh on the recommendation made by Principal of the concerned Medical College Tanda, petitioner approached the erstwhile HP State Administrative Tribunal by way of TA No. 78 of 2016 (Annexure A-12), which came to be disposed of vide judgment dated 11.7.2017. Since relief as was being claimed by the petitioner stood already extended to person namely Ankush Kaushal, who had approached the erstwhile Tribunal by way of OA(D) No. 2 of 2016, vide judgment dated 5.12.2016, erstwhile HP State Administrative Tribunal disposed of the petition with direction to the respondent-State to consider and decide the case of the petitioner in light of its earlier judgment dated 5.12.2016 rendered in Ankush Kaushal's case (supra) (Annexure-A11). Pursuant to aforesaid direction issued by the erstwhile HP State Administrative Tribunal, Principal of the concerned medical college at Tanda, again recommended the case of the petitioner as is evident from Annexure-A13, however fact remains that no steps, if any, were taken by the respondent department for converting/regularizing the services of the petitioner as per the government policy/rules. Record further reveals that Governing Council in its meeting dated 14.9.2016 held under the Chairmanship of Minister of Health and Family Welfare, recommended the case of five persons for conversion to government contract after completion of eight years, but interestingly, respondents though accepted the first four recommendations, but refused to convert the services of the petitioner on government contract on the ground that he is not similarly situate to Mr. Ankush Kaushal, whose services were converted into the government contract

after being directed by the erstwhile HP State Administrative Tribunal (Annexures-A14 and A-15).

6. Besides above, Director, Health Services, Himachal Pradesh, vide office order dated 26.8.2017, converted services of many other similarly situate persons, who were working under RKS to government contract, but even at that stage, case of the petitioner was not considered. When despite his being similarly situate to the persons, whose services were converted to the government contract from RKS, services of the petitioner were not converted to government contract, he applied for certain information under RTI. Information received by him under RTI revealed that his case was also considered alongwith other similarly situate persons and it was categorically recorded on the noting placed for approval before the competent authority that case of the petitioner is similar to the case of Shri Ankush Kaushal and seven others, who have been converted to government contract with the prior approval of Council of the Ministers and as such, he being similarly situate is also entitled to be converted to the govt. contract (Annexure-13 Colly). It would be apt to reproduce following paras of noting given in the main file submitted to the competent authority:

> "It is pertinent to mention that this department has converted the services of 8 RKS employees of IGMC and Dr. RPGMC Kangra at Tanda alongwith the petitioner in OA (D) 2/2016 who have been appointed under Rogi Kalyan Samiti against the sanctioned posts with the prior approval of the Government as per the provision of R&P Rules under the policy of the Government dated 27-09-2012. The copy of Cabinet Memorandum and policy dated 27-09-2012 may kindly be seen at pages-414-418 & 386/ante respectively. Therefore, this office is of the view that the case of the petitioner is not a similar situated at par with the judgment passed by the Hon'ble Administrative Tribunal employees in OA (D) 2/2016 and his services cannot be converted into Government contract on the same ground.
> Submitted for consideration/ further orders please.

N/1 onwards:- The Hon'ble HAPT vide its judgment dated 1.7.017 has directed to extend the benefit of their order passed in OA No.(D) 2/2016 titled Ankush Kaushal Versus State o H.P to the applicant if he is similarly situate and the orders have attained finality.

Shri Ankush Kumar and 7 others were engaged on contract basis through RKS against different posts in IGMC with the prior approval of Government during the year 2009-2010 on the basis of walk in interview. The matter was placed before the CMM for their conversion to Government contract in its meeting held on 17.2.2017 and the same was approved as per N/141-142 of Linked file. Accordingly the approval was conveyed to the DME.

Shri Shekher Sharma Physiotherapist was initially appointed as such in SRC project National Programme for Rehabilitation of person with Disability in February, 2010 through walk-in-interview at RPGMC Tanda. Consequent upon the closure of the project, the proposal of the Rogi Kalyan to continue his services under RKS was approved by the Government as per its approval at page 32/c of LF-II and for which two posts of physiotherapist were created with the prior approval of FD (Page 63/cLF-II refers).

The case of Shri Shekher Sharma is similar to the case of Shri Ankush Kumar and 7 others who have been converted to Government contract with the prior approval of CMM. Shri Shekher Sharma being similar situate is also entitled to be converted to Government contract. Before the matter is placed before the CMM, the FD may kindly concur in the proposal so that the orders passed by the HPAT could be complied with"

7. Record further reveals that vide communication dated 27.8.2018, Medical Superintendent of the concerned Medical College, Tanda, requested the Additional Chief Secretary (Health), to the Government of Himachal Pradesh for approval to grant regular pay scale to the petitioner alongwith other similarly situate persons after their having completed eight years service under RKS (Annexure A-24). In response to the aforesaid communication, the

Special Secretary (Health) to the Government of Himachal Pradesh vide communication dated 7.12.2018, addressed to the Principal, Dr.RPGMC Kangra at Tanda, directed the Principal, Medical College, Tanda, to decide the issue at his own level on the analogy of the other medical colleges in the State as per the rules and regulations occupying the field (Annexure A-25).

8. Since nothing came to be heard by the petitioner after issuance of communication dated 7.12.2018, as has been taken note herein above and despite his having completed eight years regular service was not converted from RKS to government contract, he was again compelled to approach the erstwhile HP State Administrative Tribunal in the instant proceedings, praying therein for the reliefs as already reproduced herein above.

9. Pursuant to notice issued in the instant proceedings, respondent-State has filed the reply, perusal whereof reveals that facts as have been noticed herein above are not in dispute, rather stand admitted being matter of record. Precisely the ground as has been set up by the respondent-State for rejecting the claim of the petitioner is that initially, the petitioner was not appointed in terms of Recruitment & Promotion Rules meant for the concerned post. Besides above, it has been further claimed by the respondent-State that petitioner was initially appointed through outsource post in the project and post was created after his conversion into service under RKS. Further, it has been also stated by the respondent that services of the petitioner were converted in the RKS without approval of the government and no walk-in-interview was held at the time of the conversion of service of the petitioner under RKS. However, aforesaid grounds sought to be raised by the respondent for rejecting claim of the petitioner are not tenable for the reasons recorded in the noting given on the file, as has been reproduced herein above, by the Principal Secretary (Health), who in his noting dated 17.5.2018 has categorically recorded that Mr. Ankush Kaushal and 7 others were engaged on contract basis through RKS against different posts in IGMC

with the prior approval of Government during the year 2009-2010 on the basis of walk in interview. As per the aforesaid noting, matter was placed before the CMM for their conversion to Government contract in its meeting held on 17.2.2017 and the same was approved and approval was conveyed to the Director, Medical Education. It has been categorically recorded in the noting that petitioner was initially appointed as Physiotherapist in SRC project National Programme for Rehabilitation of person with disability in February 2010 through walk-in-interview at Dr.RPGMC, Tanda. However, proposal of RKS to continue his services under the RKS was approved by the government as per its approval at page 32/c of LF-II and for that purpose, three posts of Physiotherapist were created with the prior approval of the finance department and as such, case of the petitioner being similarly situate to other persons also requires to be considered afresh for conversion to the government contract with the prior approval of the council of the ministers. It is quite apparent from the record as has been taken note herein above, especially noting given to the Principal Secretary (Health) that though petitioner was appointed as Physiotherapist in SRC under National Programme for Rehabilitation of person with Disability in February, 2010, through walk-in-interview at RPGMC Tanda, but subsequently, on the closure of the aforesaid project, the proposal of the RKS to continue services of the petitioner under RKS was approved by the Government and as per its approval and for that purpose, two posts of Physiotherapist were created with the prior approval of the finance department. It is not in dispute that petitioner had been continuously working under RKS at RPGMC Tanda. Since other similar situate persons including one Sh. Ankush Kaushal, who were though initially appointed under RKS, but after their having completed eight years service, their services were converted into government contract, case of the petitioner is/was also required to be considered for conversion from RKS to government contract. Since Government conveyed its approval for converting services of the petitioner

from SRC Project to RKS on the proposal made by the governing council and for that purpose, two posts were created with the prior approval of the Finance Department, it is not open at this stage for the State/respondent department to deny the admissible claim of petitioner for conversion of services from RKS to government contract on the ground that his initial appointment was not in accordance with the rules and same was not with the RKS. This Court cannot lose sight of the fact that services of the petitioner were converted from SRC to RKS w.e.f. 9.2.2012, as is evident from Annexure A-3 dated 15.6.2012 and since then, he had been continuously working against such post under RKS. Moreover, record clearly reveals that after his being converted from SRC Project to RKS, grant-in-aid under RKS was also extended in favour of the petitioner as is evident from office order dated 18.6.2018, meaning thereby, for all intents and purposes, petitioner has been working as Physiotherapist under RKS and his salary is being paid under Grant in aid. Though material available on record itself suggests that petitioner was initially appointed as Physiotherapist, may be under the SRC Project with the prior approval of the government, but even if it is presumed that his initial selection was not as per the rules that cannot be a ground to reject the claim of the petitioner for conversion of his service from RKS to Government contract because admittedly, respondents despite having known the fact that initial selection of the petitioner is/was not in accordance with the rules, converted his services from SRC Project to RKS w.e.f. 9.2.2012, and since then, he had been regularly rendering services as Physiotherapist under RKS. Moreover, careful perusal of office order dated 28.3.2016, whereby the Governor, Himachal Pradesh, decided to order that employees recruited under various societies in health department as per prescribed procedure laid down in the Recruitment & Promotion Rules qua the concerned post will be entitled for conversion into RKS/Society contract after completion of three years and they will be given regular pay-scales after completion of eight years as on 31st March of the

preceding year subject to the condition that they will continue to work in the same society, reveals that employees recruited in various societies were to be converted into RKS/Society contract after three years and thereafter they are/were to be given regular pay scales after completion of eight years, meaning thereby, petitioner though appointed under project was also required to be considered in terms of aforesaid policy decision taken by the government for conversion from RKS to Government contract. Record reveals that administrative department, after having obtained concurrence from the finance department, prepared the draft to be placed before the council of ministers for consideration. Relevant portion of the draft reads as under:

> "N-65/1-75/11: The Finance Department w.r.t. this department proposal at 71/7 to 74/10/ ante has concurred in the proposal and advised to place the matter before the CMM for consideration with facts of the case.
>
> In this connection, it is stated that Sh. Shekhar Sharma, Physiotherapist, Dr. RPGMC Kangra at Tanda was initially appointed under SRC Project in the year, 2010. In view of the closing of the said Project and requirement of the post of Physiotherapist in the Department, his services were shifted to Rogi Kalyan Samiti by the Principal, Dr. RPGMC Kangra at Tanda after obtaining the approval of this Department vide letter dated 10-04-2014. May kindly see flag-A. Thereafter, two posts were created in the medical college and out of these 2 posts, one post was filled up by transfer and Sh. Shekhar Sharma is working against the other one.
>
> Sh. Shekhar Sharma has filed a TA No. 78/2016 in the Hon'ble Administrative Tribunal and the Hon'ble Court vide its judgment dated 05-12-2016 has directed that the benefit granted to the petitioner in OA (D) No. 2/2016 titled as Ankush Kaushal Vs State may also be extended to the present petitioner in the instant case. The copy of the representation from the petitioner and said judgment passed in TA No. 78/2016 may kindly be seen at page-85-90/ante. The judgment passed by the Hon'ble

> Administrative Tribunal in OA(D) 2/2016 may kindly be seen at pages-91-95/ante.
>
> In view of the judgment passed by the Hon'ble Court in TA No. 78/2016 and from the perusal of the matter, it was found that Sh. Ankush Kaushal and 7 other employees of various categories were appointed under Rogi Kalyan Samiti through walk-in-interview basis in the year, 2009-10. The Cabinet has approved to convert the services of these employees into Government contract as per the policy of the Health Department dated 27-09-2012. The copy of the Cabinet Memo and the copy of the policy may kindly be seen at pages-414-418/ante & 15-16/ante of the linked file No. HFW-B(F)11-4/2007-Loose-I. Therefore, on the basis of the said decision, it was decided at N-71/7 to 74/10/ante that the instant issue of Sh. Shekhar Sharma is a similar situated at par with these 8 RKS employees, as such the services of the incumbent can be converted into government contract.
>
> In view of the above, draft Cabinet Memorandum in this regard has been drafted and placed below for favour of approval please. Thereafter the approval of the Hon'ble Chief Minster is required to place the matter before the CMM Please."

10. If the aforesaid proposed draft is read in its entirety, it clearly reveals that department ought to have considered the case of the petitioner being similarly situate to other eight RKS employees, whose services stood converted into contract or RKS. It appears that aforesaid proposed draft never came to be placed before the council of the ministers, but Medical Superintendent of the concerned medical college at Tanda sent communication dated 27.8.2018 to the Additional Chief Secretary (Health), seeking therein approval to grant regular pay scale to RKS employees after completion of eight years. In the aforesaid communication, name of the petitioner also figures at Sr. No. 4 alongwith with other candidates, however, The Additional Chief Secretary (Health) to the Government of Himachal Pradesh vide communication dated 7.12.2018, instead of taking action upon the aforesaid recommendation, directed the Principal Dr. RPGMC Kangra at

Tanda, to take decision on its own level on the analogy for other medical colleges in the State as per rules and regulations occupying the field. However, interestingly, till date, no action, if any, has been taken by the Principal of the concerned college at Tanda. Careful perusal of copy of office order dated 18.5.2016 issued by the RKS, IGMC Shimla reveals that service of 39 employees working under RKS were converted into government contract (Annexure A-22), but till date, no action, whatsoever, has been taken in the case of the petitioner, which action of the respondents cannot be held to be justifiable, rather same deserves to be highly deprecated.

11. Having scanned the entire material available on record, this Court is convinced and satisfy that petitioner being similarly situate to Mr. Ankush Kaushal ought to have been granted benefit of conversion of service from RKS to govt. contract after his having completed eight years and as such necessary directions, in this regard, are required to be issued to the respondents.

12. Consequently, in view of the above, this Court finds merit in the present petition and accordingly, the same is allowed and impugned order dated 20.12.2018 (Annexure A-19) is quashed and set-aside, the Principal, Dr.RPGMC Kangra at Tanda, is directed to convert the services of the petitioner from RKS to Government Contract in terms of policy decision dated 28.3.2016, taken by the government vide Annexure A-21 expeditiously preferably, within four weeks, with all consequential benefits. In the aforesaid terms, present petition is disposed of alongwith pending applications, if any.

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

Dinesh Kumar .....Petitioner

Versus

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

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

For the Respondents: Mr. Pranay Pratap Singh, Additional Advocate General.

CWPOA No.5358 of 2020
Decided on: 12th January, 2023

Constitution of India, 1950 - Civil Writ Petition- The law pertaining to suppression of relevant information or submission of false information in verification form pertaining to appointment in regard to the criminal prosecution, arrest or pendency of criminal cases against the candidate/employee**- Held-** That false declaration in affidavit will render termination of service- As per the condition of service, the petitioner was to give in writing as to whether he was ever convicted by the Criminal Court and if so, the particulars of the offence and punishment imposed. The condition further states that failure to disclose these facts will render the incumbent liable to be removed from service without any notice as and when the factual matrix comes to the notice of the authority. The declaration was false to the knowledge of the petitioner as he stood already convicted in a criminal case wherein he was sentenced to undergo two years rigorous imprisonment almost two years prior to the offer of appointment. (Paras 4 & 5)

Cases referred:

Avtar Singh Versus Union of India and others (2016) 8 SCC 471;

Rajasthan Rajya Vidyut Prasaran Nigam Limited and another Versus Anil Kanwariya (2021) 10 SCC 136;

The following judgment of the Court was delivered:

Jyotsna Rewal Dua, Judge

Petitioner's contractual services were terminated by the respondents vide office order dated 26.09.2018. Hence, he has preferred instant writ petition.

2. **Bare minimum facts** required to be noticed for the adjudication of this petition are that the petitioner was appointed as Physical Education Teacher (PET) on contract basis on 27.10.2016 at GSSS Bathu Tippri. On 10.08.2018 (Annexure A-3), the respondents issued a notice to the petitioner calling upon him to explain his position in respect of suppression of material information by him concerning the fact that he had been convicted at the time of his appointment on 27.10.2016 and that he had furnished false information regarding this aspect at the relevant time. The petitioner furnished his reply to the notice on 24.08.2018 (Annexure A-4). The respondents were not satisfied with the explanation given by the petitioner, hence, following office order was passed on 26.09.2018 (Annexure A-6), terminating his contractual services:-

> *"As the matter regarding criminal case against Sh. Dinesh Kumar, PET, GSSS Bathu Tippri has come into the notice of this department. A notice has been served in favour of the above said teacher to explain his position within stipulated time. Now on receipt of reply and its perusal it has been crystal clear that the concerned teacher has been convicted by the Special Judge (CBI) Shimla, on dated 02.12.2014, which further reveals that the above said teacher has mislead this department by giving an affidavit at the time of joining "that he has never been convicted by court of law".*
>
> *Hence taking into consideration the facts adduced above the services of Dinesh Kumar, PET, GSSS Bathu Tippri are hereby terminated with immediate effect."*

It is in the aforesaid background that the petitioner has preferred this writ petition seeking following substantive reliefs:-

> *"i) That the respondents no.3 and 4 may kindly be directed to cancel the termination orders till the pendency and suspension of sentence in the appeal filed before the court of special judge, CBI, Shimla (H.P.) and allow him to join his service.*
>
> *ii) That the office order dated 26.9.2018, passed by Deputy Director Elementary Education, Dharamshala, Kangra for termination of service of applicant may kindly be quashed and set aside.*

iii) That the office order dated 27.9.2018 passed by Principal of Government Senior Secondary School Bathu Tippri (GSSS Bathu Tippri) may kindly be quashed and set aside."

3. Submissions:-

Learned counsel for the petitioner contends that at the time of his appointment, no particular form was made available by the respondents for the purpose of furnishing the affidavit by him. There was neither any specific form nor any particular column requiring the petitioner to give details of any conviction suffered by him in a criminal case as prescribed in Chapter 9 of the Handbook on Personnel Matters, Volume-I, issued by the Government of Himachal Pradesh, Department of Personnel. Nonetheless, the petitioner on his own had furnished an affidavit on 03.11.2016 in compliance to the office order of appointment of the petitioner dated 27.10.2016 and in that affidavit, the petitioner had categorically stated that "one case is pending in the honourable CBI Court Shimla". Hence, the contention of the respondents that the petitioner had misled the Department by giving false affidavit at the time of joining the service, was incorrect. While praying for quashing the office order dated 26.09.2018 (Annexure A-6) with a further prayer to allow the petitioner to join service, reliance was placed upon ***(2016) 8 SCC 471 (Avtar Singh Versus Union of India and others).***

Opposing the prayer, learned Additional Advocate General submitted that in terms of the appointment order dated 27.10.2016, the petitioner was specifically required to furnish a declaration as to whether he was ever convicted by the Criminal Court. The petitioner was required to disclose the particulars about the offence and the conviction/punishmentby the Criminal Court in the affidavit as per the terms & conditions of the contractual appointment offered to him vide office order dated 27.10.2016. The petitioner even though stood convicted by the learned Trial Court vide judgment dated 27.11.2014, yet he did not disclose this fact in his affidavit.

The respondents were within their rights to terminate the contractual services of the petitioner. Learned Additional Advocate General further submitted that there is no illegality or irregularity in the office orders dated 26.09.2018 and 27.09.2018.

4. Observations:-

Having heard learned counsel on both sides and on going through the case record, I find no ground to interfere with the office orders dated 26.09.2018 and 27.09.2018. This is so for the following reasons:-

4(i). It is not in dispute that the petitioner was a co-accused in Criminal Case No.61/2 of 2013. The said case arose out of FIR No.RC 0962012S0007 registered under Sections 120B, 419, 420, 467, 471 and 201 of the Indian Penal Code at Police Station, CBI Shimla. In the aforesaid case, the petitioner was convicted by the Chief Judicial Magistrate, Shimla on 27.11.2014 and was sentenced to undergo rigorous imprisonment for two years alongwith fine with default clauses.

4(ii). The appointment was offered to the petitioner against the post of Physical Education Teacher on contract basis vide office order dated 27.10.2016. Condition No.11 of the terms and conditions of the contractual appointment order, being relevant, is reproduced hereinafter:-

> *"11. He/She will have to give in writing whether he/she was ever convicted by the criminal court and if so the particulars of the offence and punishment be stated. Failing to disclose the facts he/she will render himself/herself to be removed from service without any notice as and when the factual facts comes to light."*

In terms of the above extracted condition, the petitioner was to give in writing as to whether he was ever convicted by the Criminal Court and if so, the particulars of the offence and punishment imposed. The condition further states that failure to disclose these facts will render the incumbent

liable to be removed from service without any notice as and when the factual matrix comes to the notice of the authority.

4(iii). In purported compliance to the above condition, petitioner furnished his following affidavit on 03.11.2016:-

"AFFIDAVIT

I, Dinesh Kumar Aged 44 years Son of Shri G.R. Jaswal, resident of Village Batwar, P.O. Dada Siba, Tehsil Dada Siba, Distt. Kangra H.P. 177106, do hereby solemnly affirm and declare as under:-

1. *That I am married and I have only one spouse living.*
2. *That I am not dismissed employee of the Government/Semi Government/Semi Organization.*
3. *That I have never been convicted by court of law.*
4. *The one case is pending on the honourable CBI Court Shimla.*
5. *That I am citizen of India.*

Place: Dehra *Deponent…….*
Dated: 03-11-2016 *Sd/-*
(Dinesh Kumar)

I, the above named deponent further affirm and declare that the facts stated above made is correct and true to the best of my knowledge and belief and nothing has been concealed therein.

Place: Dehra *Deponent…….*
Dated: 03-11-2016 *Sd/-*
(Dinesh Kumar)"

Though in paragraph 4 of the above affidavit, the petitioner sates that one case is pending against him in CBI Court, Shimla, however, in para 3 thereof, he specifically states that he has never been convicted by Court of Law. The above declaration was false to the knowledge of the petitioner as he stood already convicted in Criminal Case No.61/2 of 2013 vide judgment dated 27.11.2014 and sentenced to undergo two years rigorous imprisonment alongwith fine with default clauses.

4(iv). The law pertaining to suppression of relevant information or submission of false information in verification form pertaining to appointment in regard to the criminal prosecution, arrest or pendency of criminal cases

against the candidate/employee has been summarized in Avtar Singh's case, *supra*, as under:-

> *"38. We have noticed various decisions and tried to explain and reconcile them as far as possible. In view of aforesaid discussion, we summarize our conclusion thus:*
>
> *38.1. Information given to the employer by a candidate as to conviction, acquittal or arrest, or pendency of a criminal case, whether before or after entering into service must be true and there should be no suppression or false mention of required information.*
>
> *38.2. While passing order of termination of services or cancellation of candidature for giving false information, the employer may take notice of special circumstances of the case, if any, while giving such information.*
>
> *38.3. The employer shall take into consideration the Government orders/instructions/rules, applicable to the employee, at the time of taking the decision.*
>
> ***38.4. In case there is suppression or false information of involvement in a criminal case where conviction or acquittal had already been recorded before filling of the application/verification form and such fact later comes to knowledge of employer, any of the following recourse appropriate to the case may be adopted:***
>
> *38.4.1. In a case trivial in nature in which conviction had been recorded, such as shouting slogans at young age or for a petty offence which if disclosed would not have rendered an incumbent unfit for post in question, the employer may, in its discretion, ignore such suppression of fact or false information by condoning the lapse.*
>
> ***38.4.2. Where conviction has been recorded in case which is not trivial in nature, employer may cancel candidature or terminate services of the employee.***
>
> *38.4.3. If acquittal had already been recorded in a case involving moral turpitude or offence of heinous/serious nature, on technical ground and it is not a case of clean acquittal, or benefit of reasonable doubt has been given, the employer may consider all relevant facts available as to antecedents, and may take appropriate decision as to the continuance of the employee.*
>
> ***38.5. In a case where the employee has made declaration truthfully of a concluded criminal case, the employer still has the right to consider antecedents, and cannot be compelled to appoint the candidate.***
>
> *38.6. In case when fact has been truthfully declared in character verification form regarding pendency of a criminal case of trivial*

nature, employer, in facts and circumstances of the case, in its discretion may appoint the candidate subject to decision of such case.

38.7. In a case of deliberate suppression of fact with respect to multiple pending cases such false information by itself will assume significance and an employer may pass appropriate order cancelling candidature or terminating services as appointment of a person against whom multiple criminal cases were pending may not be proper.

38.8. If criminal case was pending but not known to the candidate at the time of filling the form, still it may have adverse impact and the appointing authority would take decision after considering the seriousness of the crime.

38.9. In case the employee is confirmed in service, holding Departmental enquiry would be necessary before passing order of termination/ removal or dismissal on the ground of suppression or submitting false information in verification form.

38.10. For determining suppression or false information attestation/verification form has to be specific, not vague. Only such information which was required to be specifically mentioned has to be disclosed. If information not asked for but is relevant comes to knowledge of the employer the same can be considered in an objective manner while addressing the question of fitness. However, in such cases action cannot be taken on basis of suppression or submitting false information as to a fact which was not even asked for.

38.11. Before a person is held guilty of suppressio veri or suggestio falsi, knowledge of the fact must be attributable to him."

Learned counsel for the petitioner had emphasized upon paragraph 38.10 (extracted above) and submitted that the information required by the employer had to be specific and not vague. That in the instant case, specific information was not sought for. Format in which information was required was not supplied. Inspite of this, the petitioner on his own had furnished the information that a criminal case was pending against him in the Court of Law. Such submission, in the facts of the case, as noticed above, is

wholly untenable. Specific information was sought by the employer in terms of Condition No.11 of the appointment order. The condition required the petitioner to disclose the details of any conviction suffered by him in a criminal case. The reply filed by the petitioner to the notice issued by the respondents clearly shows that the petitioner was very well aware about the necessity of his furnishing the requisite information, yet he omitted to do so. Petitioner clearly misled the respondents by falsely swearing on oath that though a criminal case was pending against him, but he had not been convicted. Whereas, the fact was that he stood convicted and sentenced to two years imprisonment, almost two years prior to the offer of appointment. Petitioner's appeal against the judgment of conviction was pending at that time, wherein the sentence was suspended on 01.11.2015 by the Court of learned Special Judge (CBI), Shimla.

In view of false declaration and suppression of material information by the petitioner, the respondents werewell within their rights in terms of Condition No.11 of the order dated 27.10.2016 to terminate the contractual services of the petitioner. Such a course is permissible in view of the law laid down by the Hon'ble Apex Court in paragraph 38 in Avtar Singh's case, *supra*.

It will also be appropriate to take note of ***(2021) 10 SCC 136 (Rajasthan Rajya Vidyut Prasaran Nigam Limited and another Versus Anil Kanwariya)***, wherein termination on account of loss of credibility and trustworthiness due to failure to disclose criminal antecedents was upheld. Hon'ble Apex Court observed that in such situation, question is not about whether an employee was involved in a dispute or even whether he had subsequently been acquitted or not. The question is about the credibility and/or trustworthiness of such an employee, who at the initial stage of employment, i.e. while submitting the declaration/verification and/or applying for a post, made false declaration and/or did not disclose and/or

suppressed material fact of having involved in a criminal case. If the correct facts would have been disclosed, the employer might not have appointed him. The question is of trust, therefore, in such a situation, where the employer feels that an employee at the initial stage itself had made a false statement and did not disclose the material facts or suppressed the material facts, then, the employee concerned cannot be continued in service because such an employee cannot be relied upon even in future. The employer cannot be forced to continue such an employee. The option whether to continue or not to continue such an employee must be given to the employer.

5. In the backdrop of the settled legal position and the facts of this case, the contractual services of the petitioner, who had furnished false information and had also suppressed the requisite information, have been justifiably terminated by the respondents.

In view of the foregoing discussion, I find no merit in the instant petition and the same is accordingly dismissed alongwith pending miscellaneous application(s), if any.

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

Smt. Dini Devi (deceased) through LRs .....Appellants.

Versus

Smt. Kirana Devi. .....Respondent.

For the appellants : Mr. Sanjeev Kuthiala, Sr. Advocate with Ms.Anaida Kuthiala, Advocate.

For the respondent :Mr. K.R. Thakur, Advocate.

RSA No. : 331 of 2008
Reserved on: 29.12.2022
Decided on : 07.01.2023

Code of Civil Procedure, **1908** - Section 96- **The Indian Evidence Act**,**1872**- Sections 67 & 68- **Indian Succession Act**,**1925**- Section 59- The burden to prove Will lies upon the propounder - Held that the conscience of the Court has to be satisfied as regards the validity and genuineness of Will- The burden is required to be discharged by proving the due execution of the Will in accordance with Sections 67 and 68 of the Indian Evidence Act and simultaneously the Will needs to be proved having been executed while having sound disposing mind, especially when the mental capacity of testator is in question. None of the witnesses produced on behalf of the defendants have murmured even a single word about the mental state of testatrix at the time of execution of Will. The witnesses generally stated that the testatrix was neither dumb nor deaf and she was capable of understanding, but, all of them have remained conspicuously silent as to her mental state at most relevant time. None of them stated that at the time of execution of Will, testatrix was able to understand the consequences of her act or in other words she knew what she was doing. This gains importance in the factual background, when in the plaint as well as in her examination-in-chief plaintiff had specifically mentioned about lack of mental incapacity of testatrix to execute the Will. The weak physical condition by itself may not be a circumstance to raise questions about the mental capacity of a person to dispose his/her property by testamentary succession. The fact that the testatrix was not keeping good

health and was bed ridden on the date of alleged execution of Will and she died within fifteen days thereafter is sufficient to prick the conscience of the Court to peep deep into the facts. (Paras 16, 17, 19, 23, 25 & 26)

Cases referred:

Jaswant Kaur Vs. Kaur and anr, (1997) 1 SCC 369;

Murthy and Ors. Vs. C. Saradambal and Ors. 2022 (2) Civil Court Cases 209 (SC);

Niranjan Umeshchandra Joshi Vs. Mrudula Jyoti Rao and ors. (2006) 13 SCC 333;

The following judgment of the Court was delivered:

Satyen Vaidya, Judge

The judgment and decree dated 28.05.2008, passed by learned Additional District Judge, Fast Track Court, Kullu, in Civil Appeal No. 07/2008, whereby judgment and decree dated 06.12.2007, passed by learned Civil Judge, (Sr. Division) Kullu, in Civil Suit No. 68/2006 was set-aside and reversed, has been assailed by way of instant Regular Second Appeal.

2. Parties hereinafter shall be referred to by the same status as they held before learned Trial Court. Appellants herein were the defendants and respondent herein was the plaintiff.

3. The dispute pertains to the estate of one Smt. Tuli Devi alias Tolu alias Nandhi, who had died issueless on 05.02.2006. She had left behind certain immovable properties. Whereas, plaintiff claimed her entitlement to the estate of Smt. Tuli Devi being her natural heir in the line of succession, defendants claimed their rights in the estate of Smt. Tuli Devi on the basis of an unregistered Will dated 20.01.2006.

4. Plaintiff filed Civil Suit No. 68 of 2006 before learned Trial Court, seeking declaration in her favour as owner in possession of the

immovable property left behind by Tuli Devi with a further prayer to permanently restrain the defendants from interfering in the ownership and possession of plaintiff over the suit property on the strength of unregistered Will dated 20.01.2006 and the order of mutation dated 10.03.2006 passed by Assistant Collector IInd Grade, Kullu. In alternative, decree of possession was also claimed. Plaintiff made a specific averment in the plaint that Smt. Tuli Devi was not capable of executing a Will by reason of her being an infirm person. Smt. Tuli Devi was stated to be deaf and dumb and also not possessing sound mental capacity to dispose of her property/land.

5. Defendants contested the suit and claimed the Will dated 20.01.2006 of Tuli Devi to be a legal and valid document. It was submitted that Tuli Devi used to live with the defendants, who were her real sisters. She was being looked after by the defendants and Will was executed by Tuli Devi in lieu of services rendered by the defendants to her. As per defendants, Smt. Tuli Devi was of sound and healthy mind and she was able to execute the Will. It was specifically denied that Tuli Devi was deaf and dumb. As per defendants, Tuli Devi was having sound disposing mind.

6. On the basis of pleadings of the parties, learned Trial Court framed the following issues:-

> *1. Whether the plaintiff is the sole heir of late Toli Devi. If so, its effect? OPP.*
>
> *2. Whether the plaintiff is entitled to the relief of declaration as prayed for ? OPP.*
>
> *3. Whether Smt. Toli Devi during her life time has executed a valid and genuine will dated 20.01.2006 in favour of the defendants. If so, its effect? OPD.*
>
> *4. Whether the plaintiff has got no cause of action? OPD.*
>
> *5. Relief.*

7. All other issues except issue No. 3 were decided in negative. The suit of the plaintiff was dismissed. Learned Trial Court upheld the legality and validity of Will dated 20.01.2006 executed by Tuli Devi and on such basis held the defendants to have inherited the estate of Smt. Tuli Devi.

8. Plaintiff assailed the judgment and decree passed by learned Trial Court in appeal under Section 96 of the Code of Civil Procedure (for short "CPC"). Learned First Appellate Court on re-appreciation of evidence found that the defendants had not been able to remove or clear the doubts created on account of suspicious circumstances surrounding the Will. The appeal of the plaintiff was accordingly allowed. The judgment and decree passed by learned Trial Court was set aside. Plaintiff was declared to be owner in possession of the suit land and decree for permanent prohibitory injunction restraining defendants from causing interference in the suit land, was passed.

9. The instant appeal has been admitted, vide order dated 10.07.2008, on following substantial questions of law:-

> *"1. Whether the findings of the learned First Appellate Court are a result of complete misreading of pleadings, evidence and the law as applicable to the facts of the case and particularly document exhibit DW3/A and as such palpably erroneous and illegal and if so to what effect?*
>
> *3. Whether the respondent is a successor of the late Smt. Tuli Devi under the provisions of Hindu Succession Act, 1956 or whether the appellant No. 1 and late Smt. Baru Devi real sisters of the deceased are the legal heirs/successors of the deceased under the Hindu Succession Act, 1956 or by virtue of Will exhibit DW3/A?"*

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

11. Learned counsel for the defendants has raised the contention that the execution of Will Ext. DW3/A was duly proved by DW-4, Sh. Hari Singh, who was the attesting witness to the Will. According to learned counsel for the defendants, requirements of Section 68 of the Indian Evidence Act were fully satisfied. He further submitted that there was nothing unnatural in execution of Will by Smt. Tuli Devi in favour of her real sisters, with whom she was residing since long. As per learned counsel for the defendants, there was no suspicious circumstance surrounding the Will and learned First Appellate Court has been swayed by minor contradictions in the statements of witnesses to arrive at the conclusion that the defendants had failed to remove the suspicion surrounding the Will.

12. On the other hand, learned counsel for the plaintiff has submitted that the findings and conclusions drawn by learned First Appellate Court are in conformity with the facts proved on record and law applicable on the issue. He further submitted that learned Trial Court had erred in upholding the validity of Will Ext.DW3/A by ignoring material aspects of the matter.

13. Tuli Devi had three sisters, namely, Juhi Devi, Baru Devi and Dini Devi (Baru Devi and Dini Devi being defendants). Tuli Devi and Juhi Devi were both married to one Nathu Ram. Tuli Devi had no issue, whereas Smt. Juhi Devi had one son named Dabe Ram. Plaintiff is the daughter of Dabe Ram. On death of Nathu Ram, both Tuli Devi and Juhi Devi inherited his estate in equal shares. It is the share of Smt. Tuli Devi, which she had inherited from Nathu Ram that became the subject matter of dispute in the present litigation.

14. Plaintiff while being cross examined on behalf of the defendants had admitted that Tuli Devi was residing with the defendants. The Will Ext.DW3/A was executed on 20.01.2006 in the house of defendant Smt. Dini

Devi. There is another undisputed fact that Smt. Tuli Devi died on 05.02.2006, within fifteen days of the execution of Will Ext. DW3/A.

15. As noticed above, plaintiff had specifically pleaded that Smt. Tuli Devi lacked mental capacity to dispose of her property, which fact was denied by the defendants. They had specifically asserted that Smt. Tuli Devi had sound disposing mind.

16. The burden to prove Will lies upon the propounder. Such burden is required to be discharged by proving the due execution of the Will in accordance with Sections 67 and 68 of the Indian Evidence Act and simultaneously the Will needs to be proved having been executed while having sound disposing mind, especially when the mental capacity of testator is in question. Section 59 of the Indian Succession Act specifically provides that a valid will can be executed by a person who has attained the age of majority and is having a sound mind. The Section also provides explanations and illustrations as under for amplification of the term "*Sound Mind*".

> *Explanation 1.—A married woman may dispose by will of any property which she could alienate by her own act during her life.*
> *Explanation 2.—Persons who are deaf or dumb or blind are not thereby incapacitated for making a will if they are able to know what they do by it.*
> *Explanation 3.—A person who is ordinarily insane may make a will during interval in which he is of sound mind.*
> *Explanation 4.—No person can make a will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing.*
>
> *Illustrations*
>
> *(i) A can perceive what is going on in his immediate neighbourhood, and can answer familiar questions, but has not a competent understanding as to the nature of his property, or the persons who are of kindred to him, or in whose favour it would be proper that he should make his will. A cannot make a valid will.*

(ii) A executes an instrument purporting to be his will, but he does not understand the nature of the instrument, nor the effect of its provisions. This instrument is not a valid will.

(iii) (iii) A, being very feeble and debilitated, but capable of exercising a judgment as to the proper mode of disposing of his property, makes a will. This is a valid will.

17. From the plain reading of aforesaid provisions there remains no doubt that the relevant time for judging the soundness of mind is the time when Will was executed and it also refers to a state of mind in which the person knows what he is doing.

18. The question that arises for determination is whether the defendants have been able to discharge the burden?

19. Noticeably, none of the witnesses produced on behalf of the defendants have murmured even a single word about the mental state of testatrix at the time of execution of Will. The witnesses generally stated that the testatrix was neither dumb nor deaf and she was capable of understanding, but, all of them have remained conspicuously silent as to her mental state at most relevant time. None of them stated that at the time of execution of Will, testatrix was able to understand the consequences of her act or in other words she knew what she was doing. This gains importance in the factual background, when in the plaint as well as in her examination-in-chief plaintiff had specifically mentioned about lack of mental incapacity of Smt. Tuli Devi to execute the Will. The plaintiff had filed her examination-in-chief by way of an affidavit Ext. PW1/A. Paragraphs 4 and 7 of her affidavits are reproduced as under:-

"4. That Smt. Tuli Devi alias Tulu Devi alias Nandi Devi was deaf and dumb and as such she was nick named as "NANDHI" which in local dialect means "deaf and dumb person". She was an imbecile person totally in capable of protecting her interest. It may be added here that Dabe Ram had pre-deceased Smt. Tuli Devi alias Tolu Devi alias Nandi Devi.

> *7. That during the course of attestation of inheritance mutation of the estate of said Smt. Tuli Devi alias Tolu Devi alias Nandi Devi, defendants Baru Devi and Dini Devi set up an unregistered will dated 20.01.2006 where under they jointly claimed the suit land. Smt. Tuli Devi alias Tolu Devi alias Nandi Devi had never made the aforesaid will and this will has been fabricated and fraudulently procured by the defendants in connivance with their nephew Kamal Chand and the scribe and attesting witnesses of the aforesaid will. This Kamal Chand is a very clever person and he had set his eyes on the suit land. It may be added here that Kamal Chand is the son of the pre-deceased brother of the defendants, namely Bala Ram. Defendants are sisters of Juhi Devi and Smt. Tuli Devi alias Tolu Devi alias Nandi Devi deceased. It may be added here that Smt. Tuli Devi alias Tolu Devi alias Nandi Devi was not capable of making a will by reason of her being an infirm person. She was deaf and dumb. She did not have the mental capacity of disposing off her property/ and by way of will or by any other mode."*

Defendants while cross-examining the plaintiff had not disputed her version regarding the lack of mental capacity of Tuli Devi to execute the Will. In this manner, the defendants miserably failed to discharge the onus of proving sound disposing mental condition of the testatrix.

20. Second question that requires adjudication is whether Will Ext DW-3/A was shrouded with suspicion and, if so, whether defendants have been able to remove the same?

21. In ***Jaswant Kaur*** *Vs.* ***Kaur and anr, (1997) 1 SCC 369,*** Hon'ble Supreme Court observed that when a Will is allegedly shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and the defendants. What generally is an adversary proceeding, becomes in such cases, a matter of the Courts conscience and then, the true question which arises for consideration is, whether, the evidence led by the propounder of

the Will is such as would satisfy the conscience of the Court that the Will was duly executed by the testator.

22. In ***Niranjan Umeshchandra Joshi*** *Vs.* ***Mrudula Jyoti Rao and ors. (2006) 13 SCC 333***, Hon'ble Supreme Court has held as under:-

> *"35.We may not delve deep into the decisions cited at the Bar as the question has recently been considered by this Court in B. Venkatamuni v. C.J. Ayodhya Ram Singh & Ors. [2006 (11) SCALE 148], wherein this Court has held that the court must satisfy its conscience as regards due execution of the Will by the testator and the court would not refuse to probe deeper into the matter only because the signature of the propounder on the Will is otherwise proved.*
>
> *36.The proof a Will is required not as a ground of reading the document but to afford the judge reasonable assurance of it as being what it purports to be.*
>
> *37.We may, however, hasten to add that there exists a distinction where suspicions are well founded and the cases where there are only suspicions alone. Existence of suspicious circumstances alone may not be sufficient. The court may not start with a suspicion and it should not close its mind to find the truth. A resolute and impenetrable incredulity is demanded from the judge even there exist circumstances of grave suspicion."*

23. Thus, the Courts, while adjudicating on the validity of Will, have been burdened with duty to scan the facts more minutely than in any other adversarial litigation. The conscience of the Court has to be satisfied as regards the validity and genuineness of Will. Though, the factors which may appear to be suspicious in fact situation of one case may not be so in another and vice-a-versa. Each and every case, for the purposes of suspicious circumstances, has to be decided on its peculiar facts, however, any fact, that directly or indirectly relates to the question of soundness of mind of the testator/ testatrix of the Will, should catch the attention of the adjudicator and if any such fact reasonably appears to be improbable by the standard of

prudent man, such fact can be taken to be suspicious circumstances surrounding the execution of Will.

24. In search for answer to second question, as posed above, again the status of mental faculty of testatrix at the time of execution of Will Ext. DW-3/A gains relevance. As held above, defendants have failed to prove that the testatrix was having sound disposing mind at the time of execution of Will. On the other hand the statement of plaintiff rendered by her on oath remained unchallenged.

25. In addition the existence of frail health of testatrix at the time of execution of Will has been established. It has been proved that she was a patient of epilepsy and was also bedridden. The weak physical condition by itself may not be a circumstance to raise questions about the mental capacity of a person to dispose his/her property by testamentary succession, however, in the facts of the instant case, the physical condition of Tuli Devi becomes relevant for the reasons *firstly,* that defendants have not discharged their burden and *secondly,* she died within fifteen days of the execution of the Will.

26. As noticed above, the fact that the testatrix was not keeping good health and was bed ridden on the date of alleged execution of Will and she died within fifteen days thereafter is sufficient to prick the conscience of the Court to peep deep into the facts.

27. In ***Murthy and Ors.*** *Vs.* ***C. Saradambal and Ors. 2022 (2) Civil Court Cases 209 (SC),*** Hon'ble Supreme Court observed as under:-

> *"33. We shall now discuss each of the aforesaid aspects.*
>
> *(a) The date of the will (Ex-P1) is 04th January, 1978. The testator E. Srinivasa Pillai died on 19th January, 1978, within a period of fifteen days from the date of execution of the will. Even on reading of the will, it is noted that the testator himself has stated that he was sick and getting weak even then he is stated to have "written" the will himself which is not believable. It has been deposed by PW2, one of the attestors of the will, that the will*

could not be registered as the testator was unwell and in fact, he was bedridden. It has also come in evidence that the testator had suffered a paralytic stroke which had affected his speech, mobility of his right arm and right leg. He was bedridden for a period of ten months prior to his death. Taking the aforesaid two circumstances into consideration, a doubt is created as to whether the testator was in a sound and disposing state of mind at the time of making of the testament which was fifteen days prior to his death.

(b) No evidence of the doctor who was treating the testator has been placed on record so as to prove that the testator was in a sound and disposing state at the time of the execution of the will.

(c) The fact that the testator died within a period of fifteen days from the date of the execution of the will, casts a doubt on the thinking capacity and the physical and mental faculties of the testator. The said suspicion in the mind of the Court has not been removed by the propounder of the will i.e. first plaintiff by producing any contra medical evidence or the evidence of the doctor who was treating the testator prior to his death."

28. It can also not be ignored that DW-3 Prem Chand, who allegedly scribed the Will was not a Document Writer. It was also not the case of the defendants that DW-3 had ordinarily been indulging in writing the documents. This witness himself also did not say that he had any experience in scribing the Wills. In such circumstances, it is neither understandable nor explained as to why only DW-3 was called to scribe the Will. Sh. Prem Chand while appearing as DW-3 has deposed in his cross- examination that he knew DW-2 Kamal Chand since his birth. Sh. Kamal Chand has appeared as special attorney of defendants as DW-2. He was also present at the time of execution of Will. Record reveals that during the pendency of the present litigation, DW-3 Prem Chand along with another has now inherited the suit property from original defendants, so he is the ultimate beneficiary. The role of Sh. Kamal Chand, keeping in view the facts and circumstances of the case, cannot be said to be beyond suspicion of being an interested person.

29. At this stage, it is also noticed that none of the defendants had appeared in the witness box. They had not come forward to discharge the onus to prove the mental faculty of testatrix at the time of execution of the Will. Admittedly, both the defendants were present at the time of execution of the Will and defendant Dini Devi had played an active role in its execution by inviting the scribe as well as attesting witnesses. The abstention of defendants from making deposition before the court also appears to have been devised to avoid cross-examination. They were the best persons to depose about the mental health of testatrix and as such their conduct not only is sufficient to draw adverse inference against defendants but also is relevant as far as removal of suspicions is concerned.

30. DW-2 while appearing as witness did not say anything regarding the mental faculty of testatrix except that Tuli Devi was not deaf and dumb and rather was a wise lady able to talk and understand loss and profit and future consequences. Such statement of DW-2 explained the physical and mental state of the testatrix generally. It was definitely not referable to the time when Will was purportedly executed.

31. Additionally, the discrepancy noticed by learned First Appellate Court in the statements of witnesses produced by defendants cannot be said to be insignificant. It was noticed that according to scribe of the Will, DW-3, he had firstly, prepared the rough draft of the Will and thereafter the final Will was scribed on the basis of rough draft. DW-4 the attesting witness to the Will, though, stated that Will was scribed in his presence, but denied knowledge about the rough draft of the Will. Further, DW-2 Kamal Chand when confronted with the factum regarding rough draft of the Will stated that the rough draft was subsequently torn by the scribe, whereas the scribe DW-3 stated that he had kept the rough draft in his bag.

32. In light of above analysis, there is no hesitation to hold that the execution of Will Ext DW-3/A was shrouded with suspicious circumstances

and defendants have failed to remove them. Though the testatrix was being looked after by the defendants and DW-2, Kamal Chand, but that does not necessarily imply that Tuli Devi really intended to bequeath her estate in their favour. Rather, in the given circumstances, the defendants ought to have been more conscious to satisfy the conscience of the Court.

33. Learned Trial Court had upheld the validity of the Will only on getting satisfied about the fulfillment of requirement of Section 68 of the Indian Evidence Act. The remaining mandatory requirement as to legal proof of a Will was clearly left out.

34. In result, the substantial questions of law, as noticed above, are decided accordingly. The judgment and decree dated 28.05.2008, passed by learned Additional District Judge, Fast Track Court, Kullu, in Civil Appeal No. 07/2008, is affirmed as the defendants have failed to prove that the Will Ext. DW3/A was legally and validly executed document.

35. The appeal of the appellants/defendants is accordingly dismissed, so also the pending miscellaneous application, if any.

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

Raj Kumar …Petitioner.

Versus

State of Himachal Pradesh. …Respondent.

2. Cr.M.P. (M) No. 1226 of 2022

Amit Bhardwaj @ Meethu …Petitioner.

Versus

State of Himachal Pradesh. …Respondent.

3. **Cr.M.P.(M) No. 1895 of2022**

Ranjeet Singh @ Billa …Petitioner.

Versus

State of Himachal Pradesh. …Respondent.

For the Petitioner(s). Mr. H.S. Rana, Advocate, in Cr.MP(M) No. 1895 of 2022.
Ms. Reeta Hingmang, Advocate, vice Ms. Rajvinder Sandhu, Advocate, in Cr.MP(M) No. 1226 of 2022
Mr. Rakesh Chauhan, Advocate, in Cr.MP(M) No. 1171 of 2022.

For the Respondent: Mr. Hemant Vaid, Additional Advocate General, with Mr. Raju Ram Rahi and Ms. Seema Sharma, Deputy Advocates General.
Cr.M.P. (M) No. 1171 of 2022 with Cr.MPs(M) No. 1226 & 1895 of 2022

Date of decision: 13th January, 2023

Narcotic Drugs and Psychotropic Substances Act, 1985- Sections 2(xx), 2(xxiii), 2(xxiiia), 2(viia), 8(c), 21 & 22; Rules 65A, 66, 67 **-** The International Narcotic Control Board- **Constitution of India**,**1950**- Article 141- Held that the entire mass is to be considered as psychotropic substance. It is true that Lomotil or Diphenoxylate is not enlisted in the Psychotropic Substances in Schedule attached to the Act, however, Diphenoxylate is a psychotropic substance. The High Court, in view of Article 141 of the Constitution, is bound by the verdict of the Supreme Court and, therefore, orders/judgments passed either before verdict or in contravention thereof are to be ignored and pronouncement of the Supreme Court is to be relied. (Paras 22, 23 & 24)

Cases referred:

Hira Singh & another vs. Union of India & another (2020) 20 SCC 272;

Union of India & another vs. Sanjeev V. Deshpande, 2014 (13) SCC 1;

The following judgment of the Court was delivered:

Vivek Singh Thakur, Judge

In all these petitions an identical plea, for enlarging the petitioners on bail, has been made base and, therefore, for involvement of common question of fact and law, to be appreciated for adjudication of the petitions, these petitions are being decided by this common order.

2. Petitioner-Raj Kumar in Cr.MP(M) No.1171 of 2022, has been arrested in Case FIR No.125 of 2021, dated 26.04.2021, registered under Section 22 of Narcotic Drugs and Psychotropic Substance Act (in short 'NDPS Act') and under Sections 192, 196 and 181 of the Motor Vehicles Act (in short 'MV Act'), in Police Station Nalagarh, Police District Baddi, District Solan, H.P., for having found in possession of total 7860 tablets of Lomotil, without authorization/license or permission for keeping and transporting these tablets, during search of his car, conducted on the basis of reliable information received from a faithful informer. As per State FSL report, tablets recovered from the possession of the petitioner, being transported in his car,

were found having Diphenoxylate Hydorochloride tablets, total weight whereof has been determined as 487.320 gms. Petitioner was arrested on 29.04.2021 and since then he is in custody as an under-trial prisoner. *Challan* was presented in the Court on 28.05.2021.

3. Amit Bhardwaj-petitioner in Cr.MP(M) No.1226 of 2022, has been arrested on 10.10.2020, in case FIR No.316 of 2020, dated 10.10.2020, registered under Section 21 of NDPS Act, in Police Station Nalagarh, Police District Baddi, District Solan, H.P., for having found in possession of total 2840 Lomotil and white tablets (2820+20), during raid and search of his residential room, conducted on the basis of reliable information received from a faithful informer. Every strip of tablets was having printed label of Diphenoxylate Hydrochloride Atropine Sulphate Tablets, containing 2.5 mg Diphenoxylate Hydrochloride and 0.025 mg Atropine Sulphate. As per State FSL report, recovered tablets, stated as tablets of Lomotil, were Diphenoxylate Hydrochloride tablets and total weight of 2820 tablets was determined 180.480 gms. Besides these tablets, white colored 20 tablets were also recovered. These white tablets were also found to be Diphenoxylate Hydrochloride tablets, having total weight of 1.280 gm. *Challan* in present case was presented in the Court on 30.12.2020. Petitioner was arrested on 11.10.2020 and since his arrest, after remaining in police custody, he is in judicial custody.

4. Ranjeet Singh-petitioner in Cr.MP(M) No. 1895 of 2022 has been arrested on 30.08.2021, in case FIR No.210 of 2021, dated 30.08.2021, registered under Section 22 of NDPS Act, in Police Station Baddi, Police District Baddi, District Solan, H.P., for having found in possession of 250 tablets of Clovidol (Tramadol Hydrochloride tablets) and 2940 tablets of Lomotil Diphenoxylate Hydrochloride and Atropine Sulphate from carry-bag hanging on the handle of the motorcycle, during search of his motorcycle, conducted on the basis of secret information received from a faithful informer,

As per chemical analysis report, received from State FSL, Clovidol-100 SR (Tramadol Hydrochloride tablets) were found Acetaminophen, Chlorpheniramine & Diclofance tablets, with total weight of 112.0 gms and Lomotil tablets were found to be tablets of Diphenoxylate Hydrochloride tablet, having total weight 188.160 gms. *Challan* in present case was presented in the Court on 11.11.2021. Petitioner, after his arrest on 30.08.2021, remained in police custody and thereafter he is in judicial custody.

5. It has been submitted that Lomotil itself is not notified Narcotic drug or Psychotropic substance in the Schedule attached to the NDPS Act or Rules framed thereunder. It contains Diphenoxylate salt to the permissible limit of 0.25 mg and it does not fall in the category of manufactured drug, as defined in Section 2(xi) of the NDPS Act, as it has not been manufactured by the petitioners, but, as a medicine, by the pharmacy, having license to manufacture the same and, therefore, manufacturing of Lomotil, recovered from the petitioners, is permissible under Section 2(xi) of the NDPS Act, as it has not been manufactured otherwise than in a pharmacy on prescription and the petitioners were *bonafide* carrying tablets of medicine, which does not amount to be in possession or transportation of prohibited Narcotic drug or psychotropic substance, making out an offence under NDPS Act as what is contained in it, has been described on the leaf of the tablet, which is in consonance with permissible limit of diphenoxylate prescribed for preparation of Lomotil medicine and, therefore, it has been contended that petitioners, for having been in possession of Lomotil, have not committed any offence under NDPS Act, much less an offence of keeping, carrying and transporting with possession narcotic drug or psychotropic substance.

6. Learned counsel for petitioners to substantiate their plea, have placed reliance upon pronouncements of Co-ordinate Benches dated 22.05.2017, passed in ***Cr.MP(M) No. 464 of 2017***, titled ***Mukesh Kumar vs. State of Himachal Pradesh***, dated 18.11.2019, passed in ***Cr.MP(M) No.***

1977 of 2019, titled ***Harish Kumar vs. State of Himachal Pradesh*** and dated 13.05.2022, passed in ***Cr.MP(M) No.858 of 2022***, titled ***Satbir @ Keshav vs. State of Himachal Pradesh***, wherein in Cr.MP(M) No. 464 of 2017, accused person having found in possession of 2.442 kgs Corex cough syrup was enlarged on bail, and in Cr.MP(M) No. 1977 of 2019 and Cr.MP(M) No. 858 of 2022 accused persons therein, who were found in possession of Lomotil tablets were enlarged on bail by Co-ordinate Benches on the basis of plea raised by accused persons that tablet Lomotil, having Diphenoxylate Hydrochloride 2.5 mg dose with 0.025 mg of atropine sulphate, does not fall under the definition of manufactured narcotic drug and as such does not come under the purview of NDPS Act.

7. Reliance has also been placed on behalf of petitioners on pronouncement of the Supreme Court in ***Union of India & another vs. Sanjeev V. Deshpande, 2014 (13) SCC 1***. Referring para 34 of this judgment, it has been contended that there is no prohibition for having in possession of Lomotil tablet, which is not a manufactured drug, but is a medicine prepared by the licensed pharmacy entitled to manufacture the same.

8. Learned Additional Advocate General submits that judgments/orders cited by the learned counsel for petitioners have been passed prior to verdict of the Supreme Court in ***Hira Singh & another vs. Union of India & another,*** reported in ***(2020) 20 SCC 272,*** and after pronouncement in ***Hira Singh's*** case the findings returned in the pronouncements, referred on behalf of petitioners, have become irrelevant. Further that even if it is considered that preparation of diphenoxylate, calculated as base and quantity of Atropine Sulphate equivalent to at least 1% of the dose of diphenoxylate, is not covered under the definition of narcotic drug in terms of Entry at Sr. No. 58 of the Notification referred in ***Harish Kumar's case*** (Cr.MP(M) No. 1977 of 2019) in quoted portion of ***Surjit***

Kumar's case (Cr.MP(M) No. 792 of 2017), then also for the provisions of Section 22 of NDPS Act providing punishment for contravention of provisions of Act and Rules made thereunder in relation to psychotropic substances being a preparation/mixture of psychotropic substance(s) with another psychotropic substance or neutral substance, petitioners are not entitled for bail because, Lomotil is a drug, which contains prohibited psychotropic substances and, therefore, for having possession thereof or to transport the same, license/permit/prescription, shall be necessary, and as the petitioners have failed to produce any licence, permission, authorized prescription, entitling them to possess or to transport the recovered Lomotil, for commercial quantity thereof, in view of pronouncement of Hon'ble Supreme Court in ***Hira Singh's*** case, petitioners are not entitled for bail for recovery of huge commercial quantity of Lomotil, containing psychotropic substance.

9. Learned Additional Advocate General has submitted that even if it is considered that Lomotil is not manufactured Narcotic Drug then also, it shall be of no help to the petitioners because Lomotil has been included in list of Narcotic Drugs under International Control prepared by the International Narcotic Control Board in accordance with the Single Convention on Narcotic Drugs 1961 in consonance with Protocol of 25 March, 1972 amending the Single convention of Narcotic Drugs 1961 wherein with its trade name Lomotil, in addition the names listed in Schedule I and II of 1961 Convention or Groups of the 1931 Convention with reference of Diphenoxylate, has been enlisted in Part 3 of document, containing the current list of narcotic drugs under International Control and additional information, to assist governments in filling in the International Narcotic Control Board questionnaires related to narcotic drugs.

10. It has been further submitted by learned Additional Advocate General that like Sr. No. 58 of Notification referred in ***Surjeet Kumar's*** case, there is Part-2 in above referred List of Narcotic Drugs under International

Control prepared by the International Narcotic Control Board providing list of the Preparations of Narcotic drugs exempted from some provision and included in Schedule III of the 1961 Convention, wherein Preparations of Diphenoxylate containing, per dosage unit,, not more than 2.5 mg of diphenoxylate calculated as base and a quantity of atropine sulphate equivalent to at least 1% of the dose of diphenoxylate, has been included at Serial No. 6. He has contended that despite that Lomotil has been included in Part 3 of the aforesaid List in addition to narcotic drugs enlisted in Part-1 of List and, therefore, irrespective of inclusion and exemption, as per Serial No. 58, referred in ***Surjeet Kumar's*** case, Lomotil is a prohibited and controlled narcotic drug, possession whereof without licence/permit/authorization is an offence under NDPS Act.

11. In ***Hira Singh's*** case, the Hon'ble Supreme Court has observed as under:

> ***"7.3. On considering the aforesaid reasoning given by this Court in the case of E.Micheal Raj (Supra), we are of the opinion that while holding that in the mixture of a narcotic drug or psychotropic substance with one or more neutral substance, the quantity of neutral substance is not to be taken into consideration and it is only the actual content by weight of the narcotic drug which is relevant for the purposes of determining whether it would constitute "small quantity or commercial quantity", this Court has not at all considered the relevant entry in the Notification dated 19.10.2001. As observed herein above, what was seized was heroin which falls in Entry 56. What was seized was not opium and / or opium derivative. There is no specific finding even given by this Court that it would fall under Entry 239 namely any mixture or preparation that of with or without the neutral material. Therefore, the case of mixture of narcotic***

drugs or psychotropic substance was not at all in direct consideration of this Court.

… … … … … … … … …

10. On merits whether any mixture of narcotic drugs or psychotropic substances with one or more neutral substance(s) the quantity of neutral substance(s) is not to be taken into consideration or it is only the actual content by weight of the offending drug which is relevant for the purpose of determining whether it would constitute "small quantity or commercial quantity", the Statement of Objects and Reasons of NDPS Act is required to be considered. As per the preamble of NDPS Act, 1985, it is an Act to consolidate and amend the law relating to Narcotic Drugs, to make stringent provisions for the control and regulation of operation relating to Narcotic Drugs and Psychotropic Substances. To provide for forfeiture of the property derived from or use in illicit traffic in Narcotic Drugs and Psychotropic Substance. The Statement of objects and reasons and the preamble of the NDPS Act imply that the Act is required to act as a deterrent and the provisions must be stringent enough to ensure that the same Act as deterrents.

10.1. In the case of Directorate of Enforcement vs. Deepak Mahajan and Another reported in (1994) 3 SCC 440, it is observed by this Court that every law is designed to further ends of justice but not to frustrate on the mere technicalities. It is further observed that though the intention of the Court is only to expound the law and not to legislate, nonetheless the legislature cannot be asked to sit to resolve the difficulties in the implementation of its intention and the spirit of the law. It is the duty of the Court to mould or creatively interpret the legislation by liberally interpreting the statute. In the said decision this Court has also quoted

following passage in Maxwell on Interpretation of Statutes, 10th Edition page 229:
"Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. ... Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used."

Thereafter, it is further observed that to winch up the legislative intent, it is permissible for courts to take into account the ostensible purpose and object and the real legislative intent. Otherwise, a bare mechanical interpretation of the words and application of the legislative intent devoid of concept of purpose and object will render the legislature inane. It is further observed that in given circumstances, it is permissible for courts to have functional approaches and look into the legislative intention and sometimes it may be even necessary to go behind the words and enactment and take other factors into consideration to give effect to the legislative intention and to the purpose and spirit of the enactment so that no absurdity or practical inconvenience may result and the legislative exercise and its scope and object may not become futile.

10.2. Therefore, considering the statement of objects and reasons and the preamble of the NDPS Act and the relevant provisions of the NDPS Act, it seems that it was never the intention of the legislature to exclude the quantity of neutral substance and to consider only the actual content by weight of offending drug which is

relevant for the purpose of determining whether it would constitute small quantity or commercial quantity. Right from sub-clause (viia) and (xxiiia) of Section 2 of NDPS Act emphasis is on Narcotic and Drug or Psychotropic Substance (Sections 21, 22, 23, 24, 27 and 43). Even in the table attached to the Notification dated 19.10.2001, column no. 2 is with respect to name of Narcotic Drug and Psychotropic Substance and column nos. 5 and 6 are with respect to "small quantity and commercial quantity". Note 2 of the Notification dated 19.10.2001 specifically provides that quantity shown against the respective drugs listed in the table also apply to the preparations of the drug and the preparations of substances of note 1. As per Note 1, the small quantity and commercial quantity given against the respective drugs listed in the table apply to isomers ..., whenever existence of such substance is possible. Therefore, for the determination of "small quantity or the commercial quantity" with respect to Narcotic Drugs and Psychotropic Substance mentioned in column no.2 the quantity mentioned in the clauses 5 and 6 are required to be taken into consideration. However, in the case of mixture of the narcotic drugs / psychotropic drugs mentioned in column no.2 and any mixture or preparation that of with or without the neutral material of any of the drugs mentioned in table, lesser of the small quantity between the quantities given against the respective Narcotic Drugs or Psychotropic Substances forming part of mixture and lesser of commercial quantity between the quantities given against the respective narcotic drugs or psychotropic substance forming part of the mixture is to be taken into consideration. As per example, mixture of 100 gm is seized and the mixture is consisting of two different Narcotic Drugs and Psychotropic Substance with neutral material, one drug is heroin and another is methadone, lesser of

commercial quantity between the quantities given against the aforesaid two respective Narcotic Drugs and Psychotropic Substance is required to be considered. For the purpose of determination of the "small quantity or commercial quantity", in case of entry 239 the entire weight of the mixture / drug by whatever named called weight of neutral material is also required to be considered subject to what is stated hereinabove. If the view taken by this Court in the case of E. Micheal Raj (Supra) is accepted, in that case, it would be adding something to the relevant provisions of the statute which is not there and/or it was never intended by the legislature.

10.3. At this stage, it is required to be noted that illicit drugs are seldom sold in a pure form. They are almost always adulterated or cut with other substance. Caffeine is mixed with heroin, it causes that heroin to vaporize at a lower rate. That could allow users to take the drug faster and get a big punch sooner. Aspirin, crushed tablets, they could have enough powder to amend reversal doses of drugs. Take example of heroin. It is known as powerful and illegal street drug and opiate derived from morphine. This drug can easily be "cut" with a variety of different substances. This means that drug dealer will add other drugs or non - intoxicating substances to the drug so that they can sell more of it at a lesser expense to themselves. Brown-sugar / smack is usually made available in power form. The substances is only about 20% heroin. The heroin is mixed with other substances like chalk powder, zinc oxide, because of these, impurities in the drug, brown-sugar is cheaper but more dangerous. These are only few examples to show and demonstrate that even mixture of narcotic drugs or psychotropic substance is more dangerous. Therefore, what is harmful or injurious is the entire mixture/tablets with neutral substance and Narcotic Drugs or Psychotropic

Substances. Therefore, if it is accepted that it is only the actual content by weight of offending drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity, in that case, the object and purpose of enactment of NDPS Act would be frustrated. There may be few punishment for "commercial quantity". Certainly that would not have been the intention of the legislature.

10.4. Even considering the definition of "manufacture", "manufactured drug" and the "preparation" conjointly, the total weight of such "manufactured drug" or "preparation", including the neutral material is required to be considered while determining small quantity or commercial quantity. If it is interpreted in such a manner, then and then only, the objects and purpose of NDPS Act would be achieved. Any other intention to defeat the object and purpose of enactment of NDPS Act viz. to Act is deterrent.

... ...

12. In view of the above and for the reasons stated above, Reference is answered as under:

12.1. The decision of this Court in the case of E. Micheal Raj (Supra) taking the view that in the mixture of narcotic drugs or psychotropic substance with one or more neutral substance(s), the quantity of the neutral substance(s) is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance and only the actual content by weight of the offending narcotic drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity, is not a good law.

12.2. In case of seizure of mixture of Narcotic Drugs or Psychotropic Substances with one or more neutral

substance(s), the quantity of neutral substance(s) is not to be excluded and to be taken into consideration along with actual content by weight of the offending drug, while determining the "small or commercial quantity" of the Narcotic Drugs or Psychotropic Substances.

12.3. Section 21 of the NDPS Act is not stand-alone provision and must be construed along with other provisions in the statute including provisions in the NDPS Act including Notification No.S.O.2942(E) dated 18.11.2009 and Notification S.O 1055(E) dated 19.10.2001.

12.4. Challenge to Notification dated 18.11.2009 adding "Note 4" to the Notification dated 19.10.2001, fails and it is observed and held that the same is not ultra vires to the Scheme and the relevant provisions of the NDPS Act. Consequently, writ petitions and Civil Appeal No. 5218/2017 challenging the aforesaid notification stand dismissed."

12. Section 8(c) of the Act prohibits possession and transportation etc. of any narcotic drug or psychotropic substances with exception, which reads as under:

"8. Prohibition of certain operations.-

(a) ... ...

(b) ... ...

(c) Produce, manufacture, possess, sell, purchase, transport, warehouse, use, consume, import inter-State, export inter-State, import into India, export from India or transship any narcotic drug or psychotropic substance,

Except for medical or scientific purposes and in the manner and to the extent provided by the provisions of this Act or the rules or orders made thereunder and in a case where any such provision, imposes any requirement by way of licence, permit or authorization also in accordance with the terms and conditions of such licence, permit or authorization:"

13. Where Section 21 of the Act provides punishment for contravention in relation to Narcotic Drugs, Section 22 of the Act provides punishment for contravention in relation to psychotropic substances, which reads as under:

> ***"22. Punishment for contravention in relation to psychotropic substances.—***
>
> ***Whoever, in contravention of any provision of this Act or any rule or order made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any psychotropic substance shall be punishable,-***
>
> ***(a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to six months, or with fine which may extend to ten thousand rupees or with both;***
>
> ***(b) where the contravention involves quantity lesser than commercial quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years and with fine which may extend to one lakh rupees;***
>
> ***(c) where the contravention involves commercial quantity, with rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees:***
>
> ***Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees.]"***

14. Rule 65A of the Narcotic Drugs and Psychotropic Substances Rules, 1985, prohibits sale, purchase, consumption or use of any psychotropic substances, except in accordance with the Drugs and Cosmetics Rules 1945.

15. Rule 66 of the Narcotic Drugs and Psychotropic Substances Rules, 1985, prohibits possession of any psychotropic substances for any purpose covered under 1945 rules, unless he is lawfully authorized to possess such substances for any of the said purposes under these Rules. Similarly, Rule 67 of the Narcotic Drugs and Psychotropic Substances Rules, 1985, prohibits transport of psychotropic substances, except as prescribed under Rules.

16. Section 2(xx) defines "preparation", which reads as under:

> "***2(xx) "preparation", in relation to a narcotic drug or psychotropic substance, means any one or more such drugs or substances in dosage form or any solution or mixture, in whatever physical state, containing one or more such drugs or substances."***

17. Section 2(xxiii)) defines "psychotropic substance", which reads as under:

> "***2(xxiii) "psychotropic substance" means any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule."***

18. Section 2(xxiiia) defines 'small quantity' and Section 2(viia) defines 'commercial quantity', in relation to narcotic drugs and psychotropic substances, which read as under:

preparation", which reads as under:

> "***2(xxiiia) "small quantity", in relation to narcotic drugs and psychotropic substances, means any quantity lesser than the quantity specified by the***

Central Government by notification in the Official Gazettee.

2(viia) "commercial quantity", in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazettee."

19. Notifications issued by the government in official gazettee, i.e. Notification No. S.O.1055(E), dated 19.10.2001, read with Notification No. S.O. 2942(E), dated 18.11.2009, notify, as per Entry No. 44, that Diphenoxylate is a psychotropic substance and as per Entry No. 239, any mixture or preparation that of, with or without natural material of above substance or drug is also narcotic drug/psychotropic substance. Note 4 inserted by S.O. 2942(E), dated 18.11.2009, also provides that entire mixture or any solution of any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible is to be construed narcotic drug or psychotropic substance for the purpose of determining its quantity as small or commercial.

20. In Cr.MP(M) No. 464 of 2017 Co-Ordinate Bench of this Court, vide order dated 22.05.2017, enlarged the accused on bail by taking into consideration percentage of codine in cough syrup Corex, but not the entire mixture. The said order was passed prior to pronouncement of ***Hira Singh's*** case by the Hon'ble Supreme Court (supra).

21. Similarly, order dated 18.11.2019, passed in Cr.MP(M) No. 1977 of 2019, order dated 17.07.2017, passed in Cr.MP(M) No. 792 of 2017 and order dated 12.01.2018, passed in Cr.MP(M) No. 1592 of 2017, were passed

prior to verdict of Hon'ble Supreme Court in ***Hira Singh's*** case, referred supra.

22. In ***Haresh Kumar's*** and ***Surjit Kumar's*** cases, bail was granted mainly on the ground that preparation of Diphenoxylate, calculated as base and quantity of Atropine Sulphate equivalent to at least 1% dose of Diphenoxylate, was not included in the preparation declared as narcotic drugs, but Co-ordinate Benches have not considered that preparation of above referred narcotic drug was exempted from some provisions dealing with manufactured drugs, but not from complying other provisions of law, provided under the relevant Act and Rules made thereunder, which provide to have license, permission to possess and transport etc. any narcotic drug or psychotropic substance or any preparation of mixture thereof, including Lomotil which is mixture of Diphenoxylate. However, without going into this controversy, even otherwise, Lomotil definitely is a mixture of psychotropic substance covered under the definition of 'preparation' of psychotropic substance and in view of verdict of the Hon'ble Supreme Court in ***Hira Singh's*** case, the entire mass is to be considered as psychotropic substance by taking into consideration Notifications dated 19.10.2001 and 18.11.2009.

23. It is true that Lomotil or Diphenoxylate is not enlisted in the Psychotropic Substances in Schedule attached to the Act, however, Diphenoxylate is a psychotropic substance, as notified in Notifications dated 19.10.2001 and 18.11.2009 at Serial No. 44 thereof, as in view of conclusion, especially in para No. 12.3 of ***Hira Singh's*** case, any provision of the NDPS Act is not standalone provision, but must be construed alongwith other provisions of the statutes, including provisions in NDPS Act and Notifications dated 19.10.2001 and 18.11.2009.

24. Order in Cr.MP(M) No. 858 of 2022, dated 13.05.2002, has been passed by a Co-Ordinate Bench of this Court and in the said order bail has been granted to the accused by relying upon ***Harish Kumar's*** case referred

supra and determining the quantity of the recovered contraband not on the basis of entire mass, but only on the basis of percentage of Diphenoxylate Hydrochloride salt. These orders, in my considered view, are in conflict with pronouncement of the Supreme Court in ***Hira singh's*** case. This Court, in view of Article 141 of the Constitution, is bound by the verdict of the Supreme Court and, therefore, orders/judgments passed either before verdict or in contravention thereof are to be ignored and pronouncement of the Supreme Court is to be relied for deciding present petitions.

25. In view of above discussion, I do not find merit in the condition of the petitions and accordingly, the petitions are dismissed.

26. Any observation made hereinabove shall have no bearing on the merits of the case and are confined strictly for disposal of this petition.

Petitions stand disposed of in aforesaid terms.