THE

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HIMACHAL SERIES, 2022

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SUBJECT INDEX

'A'

Arbitration and Conciliation Act, 1996- Section 34- The objector (HPSEBL) has assailed the award dated 20.01.2020 passed by the sole Arbitrator- Maintainability- Held- Award could have been assailed by the petitioner before a Court envisaged under Section 2(e) of the 1996 Act, as it stands amended from time to time, in the State of Haryana and not this Court as after reference of the dispute to the Haryana Micro Small and Medium Enterprises Facilitation Council, no cause of action accrued within the State of Himachal Pradesh as admittedly the arbitration proceedings were also conducted in the state of Haryana- Objections not maintainable ordered to be returned to Objector in original for their presentation before the appropriate Court of Law. Title: HP State Electricity Board vs. M/s Relemac Technologies Pvt. Ltd & another Page-1

Army Welfare Education Society Rules and Regulations, 2011- Rule 128- Minimum percentage of regular & Contractual TGTs- Held- That it is evident that contractual TGTs will be appointed for a maximum period of three years in the school- After expiry of this period, the appointment will automatically stand terminated- Rule 128(j) provides that contractual TGTs will be appointed as regular TGT after completion of five year works experience in the same school as contractual TGT in the relevant category- This is, however, subject to the percentage laid down in the SOP for teachers selection- This rule is subjected to percentage laid down for regular and contractual TGTs in the Standard Operating Procedure (SOP)- The SOP for teachers selection were framed vide circular No.8, dated 25.9.2003 (relevant part already extracted above)- A combined reading of the Rules and SOP does not point out any vested right of the TGT (appointed for a fixed term on the basis of a contract) for regularization of his/ her services merely on the strength of having completed five years of contractual service- The rules entail different procedure for regularizations. (Para 4) Title: The Chairman, Army Public School & another vs. Urmila Chauhan & others **(D.B.)** Page-595

'C'

Code of Civil Procedure, 1908- Order I Rule 10 – Section 14 of H.P. Urban Rent Control Act, 1987- Addition of parties- Application dismissed- Inordinate and unexplained delay of 12 years- Petitioner claiming to be co-owners and entitled for arrears of rent of premises- As per revenue record landlords are exclusive owners of premises and entitled to maintain rent petition independently- Held- Application rightly dismissed. (Paras 13, 14, 16) Title: Smt. Sweety @ Savita vs. Tarun Sahni & others Page-30

Code of Civil Procedure, 1908- Order 6 Rule 17- **Specific Relief Act, 1963**- Sections 21 and 40- Plaintiff's application for amendment of plaint qua alternative relief of recovery was allowed- Held- Section 21 of Specific Relief Act entitles the plaintiff to amend the plaint to claim compensation whereas Section 40 entitles the plaintiff to amend the plaint to claim the damages with mandate that court shall allow such amendment at any stage of proceedings in terms of these Sections- Claim of the plaintiff is also covered by Section 21 of the Specific Relief Act- Code of Civil Procedure is a general law prescribing general procedure whereas Specific Relief Act is a special law with reference to CPC wherein Section 21 and 40 provides allowing for amendment of the plaint to include the claim for compensation or damages, as the case may be, at any stage of proceedings- order of the Trial Court is not perverse- Petition dismissed. Title: Gaurav Kakkar & another vs. Arun Bansal & another Page-222

Code of Civil Procedure, 1908 – Order 7 rule 11 - Rejection of plaint -- Written statement not filed for two years after institution of the suit -- Application for rejection of plaint filed after two years -- Held -- The application under order 7 rule 11 CPC filed after two years cannot be taken as an excuse for not filing the written statement -- Provisions of order 8 Rule 1 CPC cannot be simply ignored or else under the guise of moving application under order 7 rule 11 CPC the defendants can protract the trials thereby defeating not only the object of the provision, but also the cause of justice -- Last opportunity granted to the defendant to file the written statement - Petition disposed of accordingly. [Para 4 (iv)] Title: Rama alias Rita Devi & another vs. Ashwani Kumar & others Page-347

Code of Civil Procedure, 1908 - Order 8 Rule 1 – Striking of defence in commercial suits – Plaintiff filed application within 120 days - Held - Till the period of 120 days is over the plaintiff cannot call up on the Court to close the right of defendant from filing the written statement – Application without merits – Application dismissed. (Para 34) Title: Boehringer Ingelheim International vs. Dr. Reddy's Laboratories Ltd. Page-627

Code of Civil Procedure, 1908 – Order 39 rules 1 and 2 read with Section 43 of Patent Act, 1970 - Interim injunction - The Subject Patent is old and well established - Defendant neither has any patent in its name nor did it lay any challenge at time when plaintiff if had applied for the subject patent or even after the patent was granted in favour of the plaintiff – Held – The facts do create prima facie case and balance of convenience in favour of the plaintiff – Temporary injunction granted. Title: Boehringer Ingelheim International vs. Dr. Reddy's Laboratories Ltd. Page-627

Code of Civil Procedure, 1908- Order XXXIX Rule 1 & 2- Civil Judge directed the parties to maintain status quo qua nature, possession, construction and alienation on the suit, however, in appeal Ld. Additional District Judge-III, set aside the order and dismissed application having been filed under Order XXXIX Rule 1 & 2 of CPC- Held- Parties are not co-sharers or co-owners of the joint property rather they are independent owners of respective portions owned by them in one and the same building, therefore, order of the Trial Court treating them as co-owners is not sustainable- Reasons assigned by the Ld. ADJ are also not logical- Expert Committee appointed for examining the claim and counter-claim of the parties with respect to safety of existing and proposed building including structure stability of hybrid construction undertaken on the spot and to suggest appropriate type of stable structure possible on the spot- Matter remanded with the direction to Trial Court to decide afresh taking into consideration the technical report of expert committee.Title: Shyam Sunder vs. Vikram Kanwar & another Page-12

Code of Civil Procedure, 1908- Section 100- Appeal- Will- Suit of the plaintiff for declaration with consequential relief of injunction was decreed and subsequent appeal was also dismissed- Held- Propounder of the will has to discharge the initial onus to prove the will- There is neither any misreading nor any misappreciation of documentary or oral evidence on record in this regard by the Ld. Courts below- Appeal dismissed. Title: Tabe Ram & another

vs. Prittam Singh & others Page-203

Code of Civil Procedure, 1908- Section 100- **H.P. Co-operative Societies Act, 1968**- Section 76- Appeal- Suit of the plaintiff for declaration and mandatory injunction was dismissed and subsequently appeal was also dismissed- Held- Plaintiff did not serve notice upon defendant No. 3 before instituting the suit, as per the mandate of Section 76 of H.P. Co-operative Societies Act, 1968, as such the suit is not maintainable being filed without complying with provisions of Section 76 of the H.P. Co-operative Societies Act- Appeals dismissed. Title: Akashdeep Singh vs. Administrator, The Mandi Urban Co-Operative Bank Ltd. & others Page-193

Code of Civil Procedure, 1908- Section 100- Plaintiff's suit for declaration was dismissed and subsequently appeal was also dismissed- Plaintiff has challenged the Gift Deed procured by the defendant on the ground of fraud and mirepresentation- Held- Execution of gift deed has been duly proved and findings of courts below are not perverse- Appeal dismissed. Title: Satya Devi vs. Sham Lal Page-217

Code of Civil Procedure, 1908- Section 115- Petitioner assailed order of Senior Civil Judge, Una, vide which application filed by petitioner under Order IX Rule 13 of Code of Civil Procedure was dismissed and further judgment passed by Ld. Additional District Judge-I, Una, vide which appeal was also dismissed- Held- Petitioner failed to demonstrate that the ex parte judgment and decree passed against her was bad as she was never served in the Civil Suit- Revision dismissed. Title: Raj Rani vs. Seeta Devi Page-108

Code of Criminal Procedure, 1973 - Section 320 (6), section 482 - Inherent jurisdiction and the power of Court to allow compromise - Scope of - Complaint while getting his statement recorded under section 154 CrPC had nowhere stated about occupants of vehicle in question, ran over their vehicle over his father with an intention to kill him, rather it was very categorically stated that occupants of vehicle made an attempt to flee from the spot after having seen people gathered at the shop but when they were stopped by his father, driver of the vehicle namely Narinder Singh wrongly and negligently turned the vehicle, as a consequence of which father fell down and sustained injuries – Held - Court after having perused material available on record has no hesitation to conclude that the evidentiary material on record would not reasonably connect the petitioner with the crime and further there is also lack

of evidence to conclude that on the date of alleged accident petitioner had any intention to kill the deceased father of the complainant - Petitioners would suffer irreparable loss, harassment and mental agony if criminal proceedings in this case which are result of misconstruction & mis-understanding of statement of complaint recorded after lodging of FIR proceed further, so, are required to be quashed - The FIR number 159 of 2016 registered police station Fatehpur, District Kangra is order to be quashed and subsequent proceedings are also quashed and set aside -- Petition disposed of. (Paras 15, 16 & 17) Title: Narinder Singh vs. State of H.P. & another Page-475

Code of Criminal Procedure, 1973 - Section 320(6) -- Compounding of offence and the power of the Court to allow compromise – Held -- Provisions contained under section 320 enables the High Court or Court of Sessions in exercise of its powers of revision under section 401 to allow any person to compound any offence which such person is competent to compound under the section – The schedule attached to Section 320 CrPC reveals that this Court has power to compound the offence punishable under section 325 but not under section 452 and in order to compound the offence punishable under section 452, this Court can always exercise power under section 482 CrPC which clearly provides that nothing in this code shall be deemed to limit or affect the inherent powers of High Court to make such orders as may be necessary to give effect to any order under this code to prevent abuse of process of any Court or otherwise to secure the ends of Justice -- In view of the peculiar facts and circumstances of this case, parties have compromised the matter at hand, this Court deems it fit to exercise its power under section 482 CrPC, so, FIR is order to be quashed along with consequent proceedings - Petition disposed of. (Paras 11 & 16) Title: Prakash Chand & another vs. State of H.P. & another Page-419

Code of Criminal Procedure, 1973 - Section 378 - Appeal against acquittal - -Credibility of testimony of police officials - Availability of independent witnesses – Held -- From the perusal of impugned judgment, it is clear that Ld. Special Judge has not scrutinized testimonies of police officials in the light of the fact that there was possibility of associating independent witnesses, so, such approach of Ld. Special Judge with respect to appreciation of evidence cannot be countenanced --The matter remitted back to Ld. Special Judge, Chamba to decide the case afresh -- The petition stands disposed of. (Paras

10, 11 &12) Title: State of H.P. vs. Lakhvinder Singh **(D.B.)** Page-405

Code of Criminal Procedure, 1973- Sections 397 and 401- Revision petition directed against the order of Sub Divisional Magistrate, Theog vide which complaint filed under Section 133 Cr.P.C. stands dismissed- Held- Competent Authority has not passed a reasoned or speaking order- Neither the contentions of the respective parties have been taken note of nor the statements of the witnesses have been discussed- Petition allowed and impugned order is quashed and set aside. Title: Renu Chauhan vs. State of H.P. & another Page-96

Code of Criminal Procedure 1973 – Section 438 read with Sections 409, 420, 467, 468, 471, 120 B of Indian Penal Code, 1860 and Section 13(1) of Prevention of Corruption Act, 1988 - Approval of government to conduct detailed enquiry into the allegations that a loan of rupees 19.50 crores was disbursed to a bogus firm by Kangra Central Cooperative Bank –Held - Members of loan committee are facing accusations not only under the Prevention of Corruption Act but also under the provisions of Indian Penal Code - Looking to the nature and graveness of accusations being faced by all the petitioners, their custodial interrogation cannot be refused at this initial stage for the investigation merely because allegation pertains to economic offences or that according to the petitioners the investing agency can carry out further investigation only on the strength of documents collected by it - The prosecution apprehends that there could be many more dubious transactions, there could be many more persons whose dubious role in the matter may come to light on custodial Investigation from the petitioners and other accused persons and further influencing the investigation evidence also cannot be ruled out - Custodial interrogation is necessary for protecting the interest of the bank as well as public at large whose hard earned money has been deposited in the banks - Petitions dismissed. [Para 5-XI] Title: Shivam Seth vs. State of H.P. Page-672

Code of Criminal Procedure, 1973 – Sections 438 read with Sections 420, 120 B of Indian Penal Code, 1860 and Sections 5 and 6 of Price and Money Circulation Scheme (Banking) Act 1978 - Scope of anticipatory bail in economic offences – The petitioners found involved in duping large number of people for crores of rupees - Petitioners created 650 IDs whereby people invested Rupees 5 crores –Petitioners pleaded they were only up liners and no

control on money and are not accused – Held - Balancing the Personal interest vis –a vis public interest - No case for anticipatory bail is made out - Bail Rejected (Para 19) Title: Pawan Kumar vs. State of H.P. Page-549

Code of Criminal Procedure, 1973 - Section 439 Cr.PC read with Sections 20 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985-Bail -- Recovery of 1 kg and 790 gram of charas from vehicle -- Commercial quantity – Held -- Quantity recovered in this case is of commercial quantity therefore rigors of section 37 of NDPS Act are applicable , however, this Court is not precluded from looking into the material placed before it in order to have primafacie assessment of nature and gravity of allegations against the petitioners and the material collected by the investigating agency to substantiate the same -- Complicity of the petitioner in the alleged crime is not prima facie made out and there is no criminal history attributable to the petitioner – Pre-trial incarceration of a petitioner is not going to serve any fruitful purpose -- Bail granted – Petition allowed. (Paras 7 &10) Title: Manoj vs. State of H.P. Page-699

Code of Criminal Procedure, 1973 - Section 439 read with Sections 22 and 29 of Narcotic Drugs and Psychotropic Substances Act ,1985 – Bail -- Petitioner was occupant of a car along with four other persons and has taken the plea in the petition that he had no knowledge about the conduct of other occupants of the vehicle since he had taken lift in the vehicle -- Contraband recovered in this case is intermediate quantity and hence, rigors of section 37 of NDPS Act will not be applicable - From the status report filed by the respondent it cannot be inferred that petitioner had knowledge of conduct of co occupant of the car who was carrying the contraband on her person – Pre-trial incarceration is not warranted as the same will not serve any fruitful purpose - Bail granted – Petition allowed. (Paras 5, 6 & 8) Title: Himanshu Sahotra vs. State of H.P. Page-524

Code of Criminal Procedure, 1973 - Section 439 read with Sections 22 and 29 of Narcotic Drugs and Psychotropic Substances Act ,1985 – Bail -- Petitioner was occupant of a car along with four other persons and has taken the plea of innocence in the petition alleging that he had no knowledge about the conduct of other occupant of the vehicle -- Contraband recovered in this case is intermediate quantity and hence, rigors of section 37 of NDPS Act will not be applicable - From the status report filed by the respondent it cannot be

inferred that petitioner had knowledge of conduct of co-occupant of the car namely Avneet Aulokh who was carrying the contraband on her person -- Pre trial incarceration is not warranted as the same will not serve any fruitful purpose - Bail granted – Petition allowed. (Paras 5, 6 & 8) Title: Lalit Kumar vs. State of H.P. Page-528

Code of Criminal Procedure, 1973- Section 439- Bail- **Indian Penal Code, 1860**- Sections 302, 201 and 34- Bail on the ground that investigation is complete and there is no legal evidence against the petitioner- Held- Allegation against the bail petitioner and his co-accused are very serious in nature- Bail petition dismissed. Title: Mohammad Aadil vs. State of H.P. Page-91

Code of Criminal Procedure, 1973- Section 439- Bail- **Indian Penal Code, 1860**- Sections 363 and 376 and Section 4 of Protection of Children from Sexual Offences Act, 2012- Prosecutrix in contact with petitioner for the last three years and even after arrest prosecutrix has been meeting petitioner in the jail and in her statement under Section 164 Cr.P.C. before the Magistrate she has categorically stated that she loves the bail petitioner and wants to solemnize marriage with him- Held- Normal rule is of bail and not jail- Bail is not to be withheld as a punishment- Bail granted subject to conditions. Title: Dharam Pal vs. State of H.P. Page-265

Code of Criminal Procedure, 1973- Section 439- Bail- **Indian Penal Code, 1860**- Sections 341, 354, 323, 376 and 506- Section 7 of Protection of Children from Sexual Offences Act, 2012- Section 3(1)(w)(i) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989- Held- Pre-trial incarceration cannot be ordered as a matter of rule- Bail granted subject to conditions. Title: Yash Thakur vs. State of H.P. Page-275

Code of Criminal Procedure, 1973- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 15, 29, 27-A- Recovery of 200.278 Kg. poppy straw from Truck- Held- The general rule bail but not jail cannot be used as a weapon to render the provisions, empowering the Court to reject the bail, redundant and/or as a guiding factor to enlarge an accused on bail, in every case- Bail petitions dismissed. Title: Ajmer Singh vs. State of H.P. & others Page-52

Code of Criminal Procedure, 1973- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Held- Recovered quantity is less than commercial quantity, so rigorous of Section 37 of the ND&PS Act are not applicable in the present case- Accused first offender and challan has already been presented in the Court- Bail granted subject to conditions.Title: Shahjad Ali vs. State of H.P. Page-241

Code of Criminal Procedure, 1973- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 21 and 29- Recovery of 17.57 gms of Heroin- Held- Recovered quantity of contraband is less than commercial quantity, so rigors of Section 37 of ND&PS Act are not attracted- Investigation is complete and challan stand presented in the Court- Bail granted subject to conditions. Title:Baldev Singh vs. State of H.P. Page-261

Code of Criminal Procedure, 1973- Section 439- **Indian Penal Code, 1860**- Sections 489-A, 489-B, 489-C, 420 and 34- Held- Investigation is complete- Challan is ready- Petitioners are serving as Constables in Punjab police, therefore, possibility of their evading the trial can be ruled out- Bail petitions are allowed subject to conditions. Title: Varinder Singh vs. State of H.P. Page-254

Code of Criminal Procedure, 1973 – Section 482 read with Section 336 Indian Penal Code, 1860 - Quashing of final report prepared under section 173 of Cr. P. C. - Held - Provisions of section 482 CrPC cannot be invoked by a party at the throw of the hat when there is a procedure prescribed under CrPC which has to be adhered to after lodging of FIR -- In case the High Courts start interfering with this procedure by invoking section 482 of Criminal Procedure Code at any and every stage without permitting the trial courts to exercise the jurisdiction which stands conferred upon them the entire machinery of trial court is likely to collapse as every accused would approach this Court under section 482 of code of criminal procedure asking for quashing of FIR as well as subsequent criminal proceedings -- Proceedings are ordered to be closed but with the observations that petitioner shall be at liberty to raise the issue before Ld. Trial Court at appropriate stage – Petition stands disposed of. (Para 4 & 5) Title: Dinesh Dutt vs. State of H.P. & others Page-611

Code of Criminal Procedure, 1973 - Section 482 - Negotiable Instrument Act, 1881 - Section 138 – Inherent jurisdiction Compounding in cases relating to dishonor of cheque - Held - Effect of a General Act can be curtailed by the Special Act even if a General Act contains a non obstante clause and as such provisions contained under section 320 Cr.P.C. would not come in the way in recording the compromise or in compounding the offence punishable under section 138 of the Act - To the contrary provision of section 147 of the Negotiable Instrument Act though start with non-obstante clause, but has overwriting effect on the provisions contained under section 320 CrPC - In view of compromise arrived inter-se parties the judgment of conviction and order of sentence passed by JMFC – 3, Shimla is annulled – Accused acquitted - Petition disposed of. (Paras 12 &13) Title: Hira Nand Shastri vs. Ram Rattan Thakur & another Page-496

Code of Criminal Procedure, 1973 - Section 482 - Exercising power - Consideration – Petitioner challenged summons issued against him by learned Magistrate under Section 138 of Negotiable Instrument Act, 1881 - There is difference between an ordinary criminal case and a complaint under section 138 of N.I Act since, in ordinary criminal case presumption of Innocence is in favour of accused whereas in a case in complaint under N.I Act, presumption is in favour of complainant with reverse onus upon the accused - In case ingredients for filing complaint under section 138 of N.I Act are in existence then presumption is there, as provided under law and to rebut the same, definitely, evidence would be required, which would be possible only in trial court but in case essential ingredients are lacking, then the trial court at the time of framing of charge/ putting notice of accusation, can quash the criminal proceedings - Petition found without merits – Petition dismissed. (Paras 29, 30 & 32) Title: Bhim Singh vs. Tikmi Devi Page-532

Code of Criminal Procedure, 1973- Section 482- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Section 21- Revisional Court set aside the order passed by the Ld. Trial Court of bail in favour of the present petitioner under Section 437 of the Code of Criminal Procedure- Held- An order passed on a bail application is an interlocutory order against which no revision maintainable in terms of the provisions of Section 397(2) of the 1973 Act- Petition dismissed. Title: Harish Kumar vs. State of H.P. Page-74

Code of Criminal Procedure, 1973- Section 482- Petition for setting aside

order passed by Ld. Special Judge, Manali, vide which application under Section 439(2) Cr.P.C. for cancellation of bail granted to respondent No. 2 has been dismissed- Held- Petitioner has invoked criminal process for settling the personal scores- Petition dismissed. Title: Indra Devi vs. State of H.P. & another Page-88

Code of Criminal Procedure, 1973- Section 482- Petitioner has assailed the orders of Deputy Conservator of Forests, Nalagarh vide which application for release of vehicle in case FIR No. 365/20 dated 25.11.20 under Sections 379, 427 read with Section 34 of Indian Penal Code and Sections 41, 42 of Indian Forest Act, PS Nalagarh, has been dismissed and also of Ld. Additional Sessions Judge, vide which appeal has been rejected- Held- Order passed by the Ld. Additional Sessions Judge, Nalagarh, is perverse order as appeal being maintainable- Ld. Appellate Court was duty bound to have had adjudicated the same on merit- Petition allowed- Vehicle released on supurdari. Title: Sodhi Ram vs. State of H.P. Page-81

Code of Criminal Procedure, 1973- Section 482- **Protection of Women from Domestic Violence Act, 2005**- Section 12 and 29- Held- Order passed by Magistrate under Section 12 of the Protection of Women from Domestic Violence Act on a complaint dismissing the same without adjudication on merit cannot be assailed directly in the High Court under Section 482 of the Code of Criminal Procedure, as the same has to be assailed by invoking the statutory remedy of appeal envisaged under Section 29 of the Domestic Violence Act. Title: Babita & another vs. Arsh Vardhan Singh & others Page-193

Code of Criminal Procedure, 1973- Section 482- Quashing of F.I.R. under Sections 3(1)(r) and 3(1)(s) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities), Act 1989 (Amendment 2015) registered at P.S. Jawali, District Kangra, H.P., on the ground that pursuant to her marriage in to Scheduled Caste family- She also inherits the status of a Scheduled Caste- Held- Very genesis of contention of the petitioner is not sustainable in the eyes of law as by birth she does not belong to scheduled caste, as such petitioner will not get protection by virtue of a marriage to a person who belongs to scheduled caste- Petition dismissed. Title: Rajni vs. State of H.P. & another Page-86

Code of Criminal Procedure, 1973- Section 482- ***T*he Protection of Women**

from Domestic Violence Act, 2005- Sections 12, 23 & 29- Held- Where a statutory remedy is available then the powers so vested with the High Court under Section 482 of Code of Criminal Procedure stood not to be invoked- Hence, proceedings under Section 482 of Code of Criminal Procedure are not maintainable- Petitioner may approach the Appellate Court. Title: Babita & another vs. Arsh Vardhan Singh & others Page-67

Code of Criminal Procedure, 1973- Section 482- **The Protection of Women from Domestic Violence Act, 2005**- Section 12- Petitioners have sought the quashing of proceedings under Section 12 of the Protection of Women from Domestic Violence Act, 2005, pending before the Ld. Judicial Magistrate First Class, Amb, District Una- Petitioner have every right to put forth their respective contentions before the Ld. Magistrate and the powers conferred under Section 482 of Code of Criminal Procedure are to be used sparingly and not in routine manner- Petition dismissed being misconceived. Title: Anbar Bibi & others vs. Raveena Bibi Page-78

Code of Criminal Procedure, 1973- Sections 482, 291 and 220- Petitioner assailed the order of Ld. Judicial Magistrate First Class, vide which his application under Section 219 and 220 of Code of Criminal Procedure was dismissed- Held- The payee may combine the cause of action by covering all instances of dishonour of cheque in a single notice and prefer a single complaint against the accused- Complainant has already combined three cheques in one case and two cheques in another case and has filed only two complaints with respect to five cheques and liability of accused in both cases is different- Order not perverse- Petition dismissed. Title: Saya Chauhan vs. Ankush Arora Page-245

Constitution of India, 1950- Articles 14 and 16 - Service matter- Seniority – Appointments of Direct Recruits in excess of cadre strength- Challenged- Representation made by H.P Judicial Service Officers- Officers Association in which petitioner are also member- Rejected- Three –Judge-Committee framed a Draft Post based Roster with the mandate of Supreme Court in 2002 judgment – Not challenged- The petitioners have failed to challenge the seniority lists notified from time to time, from 2005 till date- Held- That the petitioner cannot be permitted to unsettle the settled seniority since 2005- The petitions are dismissed on the ground of conduct to the petitioner as well as by their waiver and acquiescence.(Para 64) Title: S.C. Kainthla vs. State of

H.P. & others **(D.B.)** Page-753

Constitution of India, 1950- Articles 14 & 16 – Service matter – Seniority- Whether employee can claim retrospective seniority earlier than his date of appointment - Held- No- The retrospective seniority can not be granted to an employee from a date when the employee was not born in cadre/ service. (Paras 69 &70) Title: S.C. Kainthla vs. State of H.P. & others **(D.B.)** Page-753

Constitution of India, 1950- Articles 14 & 16- Service matter- Seniority- Computation/ Determination –Held- That once the incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not accordingly to the date of confirmation.(Para 68) Title: S.C. Kainthla vs. State of H.P. & others **(D.B.)** Page-753

Constitution of India 1950 – Article 226 – Service matter -- Regularization-- Writ filed for treatment of petitioner at par with notionally appointed JBT at district Kinnaur and further to treat the petitioner for regularization at par with other candidates so appointed on contract basis and regularized vide order 26.05.2017--Petitioner participated in the counseling held on 17.02.2014 -- Other candidates were offered appointments and were regularized in May, 2017 alongwith other contractual appointees, who were appointed in February/March, 2014 – Held -- The petitioner situated similarly vis-a-vis Shri Sarvender Kumar, Rohit Kumar and Vijay Amrit Raj and is entitled to the same treatment given to these persons -- Issue of considering the petitioner having being appointed notionally from the date of his counterparts were appointed is also covered in his favor – Petition allowed – Respondent to treat the petitioner as having been notionally appointed as JBT on contract basis in District Kinnaur in February/ March 2014 with other candidate who were appointed at District Kinnaur in February/ March, 2014 on the basis of counseling held on 17.02.2014 --Respondents are directed to consider the case of petitioner for his regulation at par with other candidates who were appointed on contract basis and regularized vide order dated 26.05.2017 -- Petition disposed of in these terms. [Para 4(iv)] Title: Sushil Kumar Sharma vs. State of H.P. **(D.B.)** Page-742

Constitution of India 1950 - Article 226 – Service Matter -- Selection/appointment to the post of Assistant Engineers in Irrigation and Public Health Department challenged -- Respondent No. 3 applied for the post in capacity of ward of ex-servicemen – Held -- The format of the application

provided that the ward of ex-servicemen applying for the post must be the dependent ward -- Government of H.P., Department of Personnel letter dated 25.07.1983 provides for Eligibility of dependent sons and daughters of ex-servicemen, who full fill the eligibility criteria prescribed for various posts can also be considered on merits against the post reserved for ex-servicemen to the extent of non availability of suitable ex-servicemen after four years and if no suitable ward is available in fifth year the vacancy will lapse – Held - It is admitted position that Sumit Sood was gainfully employed at the time of applying for the post in question and the gain fully employed children cannot be considered dependent - Respondent number 3 deliberately omitted the word dependent while describing the category in his application form - The selection/appointment of Shri Sumit Sood as A.E. cannot be justified as he being not a dependent ward of ex-serviceman was in-eligible for the post in question - Respondent number 3 is 47 years of age and has become over age for government employment - The claim of the appellant on the post in question is genuine, so, respondents are directed to appoint the appellant as AE(C) against the post held by Shri Sumit Sood and the appellant shall be entitled to seniority from due date with all consequential benefits - Appeal disposed of. [Paras 6(c) (i), 6 (c) (ii), 7(a)] Title: Bhushan Lal Sharma vs. State of H.P. & others **(D.B.)** Page-933

Constitution of India 1950 - Article 226 – Service matter - Seniority - Applicability of Catch Up Rule for the cadre strength of Superintendent Grade-II and Section Officers 13 point roster is applicable and in case eligible candidate is not available against a particular roster point the said roster point is to be reflected as unutilized and the vacancy is to be filled by exhausting next roster point - It is the roster point on the basis of which vacancies to be allotted to a particular category either unreserved or reserved and therefore proper wording, which should have been used in DPC proceedings speaks about roster point availability for reserved category is carried forward and the post is filled by exhausting next roster point - The wording used in DPC sounds that the post of reserve category has been consumed by unreserved category where as the fact is that roster point available category was kept unutilized by carrying forward the next roster point available for unreserved category - Respondent number 7 was promoted after petitioner but, respondent number 7 being senior in feeder cadre was entitled for benefit of catch up rule and to be placed above the petitioner in seniority list of Superintendent Grade-II – Held - The instructions dated

30.10.2013 deals with only issue of consequential seniority in reservation in promotion and there is no other instructions providing reservation in promotion - Instructions also contain principle of catch up rule and private respondents held entitled for benefit of catch up rule - Petition found without merits and dismissed.[Paras 44, 45 , 52 & 54] Title: Om Prabha Negi vs H.P. Public Service Commission & Others Page-705

Constitution of India 1950 - Service matter – Seniority - Article 226 –In the seniority list of Senior Scale Stenographers respondent No.1 was placed higher in seniority than respondent number 2 by applying "Catch up Principle", however in the seniority list of personal assistant no.2 was given higher placement - Apprehending the promotion of respondent number 2 to the post of Private Secretary before him, respondent number one approached the State Administrative Tribunal and on abolition of Tribunal matter was transferred to this Court - State contested the claim of petitioner in original application on the ground that petitioner had been working as Personal Assistant on ad-hoc basis, therefore she had no claim to the post of Private Secretary - Held - Ad-hoc service or less than 5 years service of respondent No.1 in the feeder category of Personal Assistant could not be an impediment in grant of relief to him - In this case the judgment passed by learnt single Judge was not to be considered as judgment in rem - Appeal has no merits and accordingly dismissed. (Paras 2,3,6,8 & 9) Title: State of H.P. vs. Pancham Butail & another **(D.B.)** Page-920

Constitution of India, 1950 – Article – 226 - Request made by petitioner for releasing him for parole turned down by the respondents - Grant of the parole - Antecedents of person seeking parole - Held - Merely fact of acquittal would not suffice for determining the antecedents of an individual, rather it would depend whether the acquittal is one based on total evidence or a criminal jurisprudence requires the case to be proved beyond reasonable doubt - Parameters having not been met, benefit of doubt was granted to the petitioner which by itself is no indicator of an honorable acquittal - Petitioner not entitled to be released on parole on consideration of his antecedents – Petition dismissed. (Paras 10 & 11) Title: Rahul Deshwal vs. State of H.P. **(D.B.)** Page-734

Constitution of India, 1950 -- Article 226 - Claim of Petitioner for work charged status was rejected on the ground that forest department is not work charge establishment ---Held-- Petitioners are not covered under the policy

formulated and approved by Supreme Court in Mool Raj Upadhyay's case but in terms of pronouncement of Division Bench of this Court in Rakesh Kumar's case which has attained finality from the Supreme Court read with pronouncement of this Court in Ashwini Kumar's case petitioner are entitled for continuous works charge status immediately on completion of eight years continuous service as daily wages with 240 working days in each calendar year-- Petitioner held entitled for work charge status w.e.f 1.1.2004 with all consequential benefits including seniority, pay fixation and pensionary benefits and accordingly respondents are directed to ensure work charge status to the petitioner on or before 30.6.2022 along with all consequential benefits including payment of interest failing which the petitioner shall be entitled for interest @ 7.50% per annum from the date of accrual till final payment thereof from the respondent - Petition stands disposed of. (Paras 12 & 18) Title: Atma Ram & others vs. State of H.P. Page-908

Constitution of India, 1950 - Article 226 – Extraordinary Jurisdiction - Condonation regarding service gap for purpose of regularization -- State aggrieved with the impugned order passed by the Ld. Tribunal where by the appellant was directed to treat the respondent to be in continuous service onwards – Held -- The respondents have condoned the shortages of many days while regularizing the services of respondents / juniors Nikha Ram, Murari Lal and Shyam Lal, as such the fictional breaks of few days in service of respondent during the year 1999, 2000 and 2001 are required to be condoned -- Respondents as per chart had completed only 78 days in the year 1997 and 179 days in the year 1998 - We modify the order passed by the Ld. Tribunal in T.A. number 4598/2015 dated 17.12.2015 to the extent that shall deemed to have completed 240 days from the year 1999 onwards - Remaining part of directions contained in the impugned order shall remain the same. [Para 5(iii)] Title: State of H.P. & another vs. Chaman Lal **(D.B.)** Page-665

Constitution of India, 1950 – Article 226 – Extraordinary jurisdiction – Purpose of granting work charge status – Held – A daily wager shall only be regularized against availability of vacancy, however for conferring work charge status there shall be availability of vacancy - On completion of requisite period of service as daily wager the status to be conferred on the petitioner and in absence of regular vacancy the daily wager may not be ousted to deprive him from regularization by discontinuing his services being daily wager and for that purpose there is no need of any work charged establishment in the

department, as work charge status is to be conferred upon daily wager -- Work charge status on daily wager cannot be denied for want of work charge establishment in the department -- Petitioner has been regularized from 1.9.2011, however regularization may be governed by availability of vacant regular post but work charge status does not inhibited by such condition and as such petitioner is entitle for work charge status w.e.f. 1.1.2008 along with consequential benefits – Petition allowed. (Paras 15, 21 & 22) Title: Anil Kumar vs. State of H.P. Page-884

Constitution of India, 1950 – Article 226 - Limitation Act, 1963-- Section 3-- Bar of limitation --Petitioner's claim for regularization/ work charge status, after completion of 8 years of services work as Inspector in Irrigation and Public Health Department has been rejected and the persons junior to him have already been regularized after completion of 8 years of continuous daily wage service -- Delay and latches in filing the writ petition – Held - Though law of limitation is not applicable to writ petition however principle of Delay and latches is attracted for adjudication of a petition under Article 226 of Constitution of India – The petition may be ousted for delay and latches in appropriate case – For otherwise strong merits in the case to prevent exploitation of victims for omission and commission on part of mighty state, taking into consideration the circumstances of the petition and in-capability of petitioners to approach the Court invariable for adjudication of issue raised in writ petitions on merits - Petition not liable to be ousted on the ground of delay and latches - Petitioner held entitled for work charge status w.e.f. 01.01.2002 with all consequential benefits - Petition disposed of. (Paras 20 & 24) Title: Chuni Lal vs. State of H.P. Page-895

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

H.P. & others Page-615

Constitution of India, 1950 – Article 226 – Respondent number 1 issued detailed notice inviting tender dated 23.07.2018 for transportation of bulk POL products by road - On the basis of criteria prescribed in DNIT transporters including the petitioners awarded work and the shortfall of tank trucks/ requirement of additional tank truck as may arise during the term of earlier DNIT tender is supposed to fill through existing/ successful transporters including petitioner - Three Transporters who were successful in DNIT, blacklisted for their defaults – The requirement for tank trucks has arisen firstly on account of blacklisting of certain successful transporters in DNIT and secondly on account of additional demand- Held - The court has limited jurisdiction while dealing with the Government contracts - The dispute raised by the petitioners is bereft of any tinge having Public Interest and by all means is in domain of private contractual liability, which cannot be adjudicated in exercise of writ jurisdiction of this court so, the petitioners have remedy by seeking damages if permissible under law - Petition dismissed. [Paras 15,19 & 21] Title: M/s Akash Goyal & others vs. Hindustan Petroleum Corporation Ltd. & others **(D.B.)** Page-584

Constitution of India, 1950 – Article 226 – Service law - Payment of arrears - Petitioners appointed as officers approached this Court in respect of all of them, the respondent state took a conscious decision to pay them entire arrears - The office order dated 14.01.1999 which was common to all 14 officers was quashed and set aside by the judgment passed in case of Balbir Singh Thakur - Reliance placed by the respondent state on the judgment in Kulbir Singh Rana case is misconceived because in that case the officers who were petitioners in that case, were initially appointed on the pay scale of Rs. 7000/- – 10980/- but on the basis of the judgment passed in Balbir Singh Thakur's case supra, their pay scale was ordered to be revised and raised to the pay scale of rupees 7880/- – 11660/- from date of their appointments as BDO's with all notional benefits but restricted the arrears to 3 years prior to the date of Institution of the writ petition i.e. 4.5.2012 - Infirmity was not found in the order passed by Tribunal as judgment passed in Kulbir Singh Rana's case relied upon by the petitioners state is distinguishable – Petition disposed off accordingly. (Paras 6, 9 & 10) Title: State of H.P. vs. Suri Dass

Negi **(D.B.)** Pgae-844

Constitution of India, 1950 – Article 226 – Service matter - Field posting - Candidate has to complete mandatory peripheral service of one year to be eligible to apply for the post of Senior Resident – Held -- There is no serious dispute on the issue that only two incumbents had applied for the post of senior resident in the specialization of hospital administration and the only other candidate was held to be ineligible by the selection committee for want of basic medical educational qualification itself, then, in case this petition is allowed and the petitioner is permitted to join the post of senior resident, no prejudice shall be caused to anyone and rather in turn, State would also be getting a qualified professional to man the post of senior resident in the medical college concerned and his appointment will serve larger interests - The petition allowed by directing the respondent department to offer appointment to the petitioner against the tenure post of senior resident in the specialization of hospital administration, without insisting upon for no objection certificate on the ground of petitioner having served in the peripheral area / field posting. (Paras 10 & 11) Title: Dr. Abhishek Thakur vs. State of H.P. Page-619

Constitution of India, 1950 - Article 226 - Service matter - Regulation - Petitioner filed writ Petition number 6713 of 2014 whereby she claimed regularization as class IV/III employee – In writ petition direction was given to decide it as representation within time schedule - The representation was rejected and feeling aggrieved by the order petitioner filed another writ petition challenging the order, which was transferred to the learned Tribunal, which was dismissed – Held -- There is no clarity with regard to exact nature of work actually performed by the petitioner in addition to her normal duties and the duration thereof during this period, however it is certain that she performed much more work than her normal duty hours from the year 2007 to 06-06-2012 therefore, the balance of scales and in the interest of equity, justice and good conscious, lump sum payment of rupees two lacs is granted in favour of petitioner for additional work performed during the period in question within two months from today failing shall carry interest @ 7% per annum --- Petition disposed of.[Paras 2(ii) 4(iv)] Title: Sudha Devi vs. State of H.P. **(D.B.)** Page-850

Constitution of India, 1950 – Article 226 – Service matter - Sealed cover proceedings - Petitioner felt aggrieved against the sealed cover proceedings

conducted against him due to which he could not get the promotion and the representation made by him was also rejected --Similarly situated persons including Amir Chand were promoted --Held--In view of judgment in K.V. Jankiraman and Rajender Singh versus State of Himachal Pradesh, the petitioner was digested from a right that vested in him without any fault on his part and the petitioner agitating his cause without any delay --All other similar situated persons including Amir Chand, the co accused with the petitioner in FIR number 07 of 2016 were granted financial benefits from date of joining on regular basis -- On opening of sealed cover proceedings the petitioner was held entitled for Promotion --The petitioner held entitled for all consequential benefits from the date he has been ordered to be promoted - Petition disposed of. (Paras 12 & 13) Title: Bhupinder Kumar vs. State of H.P. **(D.B.)** Page-861

Constitution of India, 1950 - Article 226 – University established or incorporated by or under the State Act can operate only within territorial jurisdiction allotted to it under the Act or can operate beyond the territory of state or its location - Jurisdiction of High Court ----Held-- The powers under Article 142 is to do complete justice is entirely of different level or of different quality and any professional restriction contained in ordinary laws cannot act as limitation on constitutional power of Hon'ble Supreme Court – Once the Hon'ble Supreme Court is in seisin of a case or matter before it, it has power to issue any order or direction to do the complete justice in the matter and the constitutional power of Hon'ble Supreme Court cannot be limited or restricted by provisions contained in statue law, however, this power has not been conferred not exercisable by High Court in its jurisdiction – The petition found without merits and accordingly dismissed.(Paras 16 & 17) Title: Promila Devi vs. State of H.P. **(D.B.)** Page-816

Constitution of India, 1950 – Extraordinary jurisdiction – Grant of work charge status/regularization - Petition preferred by petitioners seeking directions to the respondents for granting work charge status regularization with effect from date from which petitioners had completed 8 years of continuous service as per policy of government – Held -- That despite having bestowed status of custodian of rights of its citizens State or its functionaries invariably are adopting exploitative method in field of public employment to avoid its liabilities, depriving the persons employed from their just claim and benefits by making initial appointments on temporary basis i.e. contract adhoc

tenure, daily wage etc. in order to shirk from its responsibility and delay the conferment of work charge status or extension of benefits of regularization policy of State by notifying policies in this regard in future - Present case is also an example of such practice - Regularization may be given by availability of regular post but work charge status does not hit by such condition and as observed supra, petitioner held entitled for work charge status from the date of completion of 8 years of continuous daily wage service in the department with 240 working days in each calendar year with all consequential benefits - Petition allowed.(Paras 15, 21 & 22) Title:Daulat Ram & others vs. State of H.P. Page-870

Constitution of India, 1950- Article 226- Petitioner aggrieved by the transfer order vide which he has been transferred from CID Unit to District Kinnaur- Held- It was routine transfer order and not one which has been issued just to harass the petitioner- Transfer is an incidence of service- No infirmity found with transfer order- Petition dismissed. Title: HHC Sanjeev Kumar vs. State of H.P. Page-148

Constitution of India, 1950- Article 226- Petitioner challenged impugned show cause notice as well as decision of termination of Transport Agreement and forfeiture of security deposit on the ground that action of respondent is illegal, arbitrary and unjust- Held- Reasons assigned for termination of contract is factually incorrect- Therefore, impugned termination of contract is not sustainable- Petition allowed. Title: M/s Vikrant Oil Carrier vs. Hindustan Petroleum Corporation Ltd. & others Page-125

Constitution of India, 1950- Article 226- Petitioner has sought revised pay scales in accordance with the revised pay rules and senior pay scale of Rs.14300-18150 after completion of 14 years of service as Assistant Engineer and further revised pension- Representation of petitioner rejected by the Competent Authority- Held- Petitioner cannot be held entitled for financial benefits allowed to its employees by the Government of Himachal Pradesh after the date on which petitioner retired unless retrospectivity was attached- There is nothing on record to show that any such retrospectivity was allowed by respondent No. 1 – Petitioner can be said to have a claim only to revised pension- Petitioner cannot claim negative parity, which is impermissible under the Article 14 of the Constitution of India- Petition dismissed. (Paras 9, 10, 11 & 12) Title: Jagdish Rai Gupta vs. State of H.P. **(D.B)** Page-307

Constitution of India, 1950- Article 226- Petitioner prayed that writ of *certiorari* may be issued for quashing the notification dated 4.3.2020 whereby department has declared the result of successful candidates and petitioner be declared the successful candidate for the post of Sub-Inspector Police under OBC (BPL) category- Petitioner offered appointment as a Lady Constable just one month back before the evaluation of the petitioner for the post of Sub Inspector- Held- B.P.L. certificate issued in favour of the petitioner was still in force and valid, the respondent Commission could not have had suo moto taken a decision that the petitioner no more could be considered under the BPL category, therefore, the rejection of the candidature of the petitioner under OBC(BPL) category is bad in law- Writ petition allowed with the direction respondent Commission to recommend the name of the petitioner for appointment against the post of Sub-Inspector being eligible candidate from OBC/BPL category. Title: Ritu vs. State of H.P. & others Page-138

Constitution of India, 1950- Article 226- Policy for conferring contractual status to teachers working through School Management Committee (SMC) under local fund basis in the Government schools and regularization of petitioner in due course of time- Held- Lapse on the part of the state to provide a teacher forced SMC to appoint the petitioner to cater the needs of students, therefore, the action of respondents in not paying grant-in-aid is illegal and arbitrary and not sustainable- Respondent directed to release grant-in-aid as per rules. Title: Shyama Rana vs. State of H.P. & others Page-163

Constitution of India, 1950- Article 226- Promotion to the post of Superintendent Grade-II- Respondent Corporation is directed to consider the case of the petitioner and other eligible candidates serving in feeder category for the post of Superintendent Grade-II in the light of observations made. Title: Yashwant Singh vs. State of H.P. & others Page-170

Constitution of India, 1950- Article 226- Writ of mandamus to get the date of birth of the petitioner corrected in the office record- Petitioner has not approached the department at a belated stage, as such, respondent is directed to verify the documents filed by the petitioner showing his correct date of birth and thereafter take appropriate action in this regard. (Para 9) Title: Prem Dutt vs. State of H.P. Page-159

Constitution of India, 1950- Article 226- Writ petition- Interlocutory order- Lawfulness- After dismissal/withdrawal of main petition/ proceedings- Held-

That once the basis of a proceeding is gone, all consequential act, action orders would fall to the ground automatically.(Para 62) Title: S.C. Kainthla vs. State of H.P. & others **(D.B.)** Page-753

Constitution of India, 1950- Article 226- Writ petition- Maintainability- The petition is withdrawn without any liberty being reserved to petitioner to file fresh-Held- That, the permission to file fresh Writ Petition may not bar other remedies like a suit or a petition under Article 32 of Constitution of India but the remedy under Article 226 of Constitution of India should be deemed to have been abandoned by the petitioner in respect of the cause of action relied in the Writ Petition when he withdraws it without such permission.(Para 54) Title: S.C. Kainthla vs. State of H.P. & others **(D.B.)** Page-753

Constitution of India, 1950- Article 226- Writ petition- Maintainability- Whether fresh writ petition is maintainable if first earlier writ petition is withdrawn unconditionally, with any liberty being reserved to petitioner- Held- No- The new writ petition would not maintainable and liable to be dismissed. (Para 51) Title: S.C. Kainthla vs. State of H.P. & others **(D.B.)** Page-753

Constitution of India, 1950- Article 226- Writ petitioner firstly stated that she would be satisfied if representation of writ petitioner shall be decided in time bound manner as the same is still pending before the respondent concerned- Held- Respondent concerned ordered to decide representation of the writ petitioner within three weeks and pass a reasoned order in accordance with law.Title: Anu Kumari vs. State of H.P. Page-280

Constitution of India, 1950- Article 226- Writ petitioner firstly stated that he would be satisfied if representation of writ petitioner shall be decided in time bound manner as the same is still pending before the respondent concerned- Held- Respondent concerned ordered to decide representation of the writ petitioner within three weeks and pass a reasoned order in accordance with law. Title: Anil Kumar vs State of H.P. Page-281

Constitution of India, 1950- Article 227- Evidence of the defendant closed by the Court order on 27.12.2010- Defendant did not assail this order but filed an application on 9.3.2021 seeking permission to appear as defence witness- This application has been rejected by the Ld. Court below- Held- Order attained finality as defendant did not assail said order by way of appropriate proceedings what could not be done directly obviously could not have been

permitted to be done by the present petition indirectly by permitting him to examine himself as defence witness in lieu of an application filed under Section 151 of the Code of Civil Procedure- Petition dismissed. Title: Darshan Dass vs. Goverdhan Singh Page-9

Constitution of India, 1950- Article 227- To set aside the award of National Lok Adalat- Held- On the basis of the statements of the parties award was passed in the National Lok Adalat- Petitioner did not aver in the application filed for release of amount that cross-objection which stood filed by him were wrongly withdrawn- Present petition appears to be an afterthought- Petition dismissed. Title: Lachhmi Chand @ Chandu vs. The Land Acquisition Collector, HPPWD & another Page-38

Constitution of India, 1950- Articles 226 & 227- Petitioner sought for issuance of writ, order or direction in the nature of mandamus directing the respondents to accept the payment of taxes of Rs.68,19,084/- declared by the Petitioner under the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019- Petitioner was required to pay the amount determined by the Designated Committee within 30 days from the date of issue of the form SVLDRS-3 which he failed to pay- Held- Court cannot make operational the SVLDRS,2019, especially when the petitioner has approached the court belatedly after 1 year and 3 months from the last date of payment of determined amount of tax under SVLDRS, 2019- Petition dismissed. Title: M/s HI TEC Point Technologies (P) Ltd. vs. Union of India **(D.B.)** Page-114

Constitution of India, 1950- Fundamental Rules- Rule 56- Due to "Apparent Conflict" decisions rendered by different Benches of Hon'ble High Court regarding interpretation of Rule 56 of Fundamental Rules, the matter has been referred to the larger Bench for authoritative pronouncement on the subject- Held- it is the date of engagement, which is the decisive factor- If the date of engagement/appointment is prior to 10.05.2001, the Class-IV employee will continue to serve till 60 years of age- In case, it is later than 10.05.2001, then restriction in age upto 58 years will apply- Reference is accordingly answered. Title: Baldev vs. State of H.P. & others **(F.B.)** Page-284

Contempt of Courts Act, 1971- Petitioner has sought appropriate action against the respondent for non-compliance of directions passed by erstwhile H.P. Administrative Tribunal- Held- Appropriate Authority has taken a decision in terms of the order passed by the Tribunal, though it is not in

favour of the petitioner, nothing survives in these contempt proceedings, as such, ordered to be closed. Title: Munnu Ram vs. Dr. Pankaj Lalit Page-40

'E'

Employees Compensation Act, 1923- Section 30- Appeal- While working as Drillman with H.P. Public Works Department employee suffered 30% disability on account of injury in an accident on the workplace resulting loss of 100% earning capacity and compensation determined @ 30% loss of earning by Commissioner is erroneous- Held- It cannot be said that the employee has become completely unfit for any kind of job- No merit in appeals and accordingly appeals are dismissed. Title: Sham Mahanan vs. Giri Raj & others Page-313

'H'

H.P. Urban Rent Control Act, 1987- Section 24(5)- Petitioner filed rent petition on the ground of rebuilding and reconstruction- Petition allowed, however, Ld. Appellate Authority set aside the order of Ld. Rent Controller- Petitioner assailed said judgment in this revision petition- Held- Reasons assigned by the Ld. Appellate Authority while setting aside the order of Ld. Rent Controller is not sustainable in the eyes of law- Non-framing of issues is not fatal if the parties to the lis know the case of respective sides- Revision petition allowed- Judgment of Ld. Appellate Authority is set aside and order of Ld. Rent Controller upheld. Title: Rajeev Sood vs. Som Nath Chaudhary Page-101

Himachal Pradesh Value Added Tax Act, 2005 – Sections 7 & 30 – Levy of presumptive tax – Tax invoices / retail invoices – The conjoint reading of Sections 7 and 16(2) of the Act and Rule 45 of the rules, have made it clear that a registered dealer under the Act has option to pay presumptive tax under Section 7 or by way of composition under Section 16(2) in the manner as prescribed in chapter 6 of the rules -- In case the dealer under rule 45 (6) opt to pay the lump sum, he, is not liable to issue tax invoices under section 30 -- The order passed by Ld. Tribunal dated 29.05.2015 is held to be wrong illegal and against the provisions of VAT Act and the rules framed -- Revision petition allowed. (Paras 16, 24 & 25) Title: M/s Pooja Cotspin Ltd. vs. State of H.P. & others **(D.B.)** Page-379

Himachal Pradesh Value Added Tax Act, 2005 - Entry 54(113) of Part-II of

Schedule A- Industrial input and taking material - HSN code adopted by Customs Traffic Act can be used for the purpose of H. P. Vat Act - Held, TET and TV serial number 113 of notification seafood by the respondent detailing industrial input and packing material specified in entry 54 of Part-II of Schedule A of H. P. Vat Act, cannot be said to be used without purpose - The only corollary that can be drawn from the use of HSN code is to have reference of product vis-a-vis Customs Traffic Act, 1975 for the purposes of identification - Since the AVP is referable to item denoted by HSN code 3204 as adopted by Customs Traffic Act, 1975, so cannot be ignored for the purpose of H.P. Vat Act and the product remains AVP, having coverage under Entry 54 (113) of Part-II of schedule A of H. P. Vat Act. (Para 17) Title: M/s Jyothy Laboratories Ltd. vs. Excise & Taxation Inspector, MP Barrier Dherowal, H.P.**(D.B.)** Page-363

'I'

Indian Evidence Act, 1872 – Section 112 – Legitimacy of child - DNA test - Plaintiff has not born out of legal wedlock of defendant with mother of the plaintiff rather he took birth on account of rape by defendant with the mother of the plaintiff for which defendant has been convicted but he is denying paternity of the plaintiff -- No other evidence much less better evidence, to determine the issue in suit, with certainty, would be available except DNA profiling test, as even presumption under section 112 of Indian Evidence Act is also not applicable in a case like present one - As the plaintiff was not born out of wedlock, therefore she is carrying stigma of an unwanted child born on account of rape committed by the defendant with her mother and in such circumstances determination of paternity by DNA profiling shall not cause any adverse impact on her stains rather it would be in her interest to know truth about her biological father as to entitle her to civil consequences - Petition dismissed. (Para 22, 28 & 29) Title: Ram Lal vs. Kumari Priyanka Page-335

Indian Penal Code, 1860- Sections 279 and 337- Motor Vehicle Act, 1988- Sections 181 and 185- Trial Court acquitted the accused- Judgment assailed in appeal- Held- Being criminal offence, the ingredients of the offences must be proved beyond reasonable doubt and evidence must clearly indicate the level of alcohol in excess of 30 mg in 100 ml blood- Prosecution has failed to prove that accused was driving the vehicle under the influence of liquor- Appeal dismissed.Title: State of H.P. vs. Jia Lal Page-47

Industrial Disputes Act, 1947 - Civil Revision - Execution- Petitioner filed execution for the execution of award passed by the Ld. Labour Court- The execution was dismissed on the ground that prayer of petitioner with regard to grant of benefit of regularization from the date when persons junior to him were regularized was not granted by the High Court- Therefore, it was beyond the competence of the Executing Court to venture upon the said issue- Held- Executing Court has not exercised the powers vested in it with due diligence in the course of the adjudication of the execution petition- Revision allowed. Title: Ramesh Kumar vs. MD, H.P. Forest Corporation Ltd, Shimla & another Page-5

Industrial Disputes Act, 1947- Sections 10 and 25F- Challenge has been laid to the judgment passed by the Single Judge whereby award passed by Ld. Presiding Officer, Central Government-cum-Industrial Tribunal-1, Chandigarh, holding the retrenchment of respondent herein to be bad in law and directing the appellants herein to reinstate the workman with all consequential benefits, has been affirmed- The workman worked continuously on daily wages for more than 5 years- The service rendered by the workman to the Bank initially for 5 years and after passing of the award by Ld. Tribunal again for continuous period of more than 11 years, is definitely a circumstance to uphold the order of reinstatement in favour of the workman- No merits in appeal- Appeal dismissed. Title: State Bank of India & another vs. Puja **(D.B.)** Page-324

Industrial Disputes Act, 1947- Section 25- Petitioner has challenged the award passed by the Ld. Presiding Judge, Labour Court-cum-Industrial Tribunal, Dharamshala, H.P.- Labour Court set aside the termination and directed the respondent to pay Rs.20,000 to petitioner as compensation- Held- Workman was engaged in a tribal area and in lieu of the number of years put in it will be in the interest of justice in case of compensation awarded by the Ld. Labour Court is enhanced from Rs.20,000/- to Rs.1,50,000/-. Title: Mohan Lal vs. State of H.P. & others Page-153

'L'

Limitation Act, 1963 - Section 3 – Limitation - Constitution of India, 1950 – Article 226 – Extra ordinary jurisdiction - Reasonable period to challenge - Held -In absence of prescription of any specific period of limitation in a statute, the remedies cannot be said to be available to a party to assail an

order passed under such Act at its whims and the challenge has to be made within reasonable time -- The unjustified and unreasonable delay in making challenge to an order passed by any authority may lead to situation causing grave prejudice to other side - With the passage of time valuable rights are often acquired by the party having favorable order and belated interference therewith may cause in justice -- Appeal found without merits and dismissed. (Paras 8 & 9) Title: Premi Devi & another vs. Bhup Singh & others **(D.B.)** Page-926

'N'

Narcotic Drugs and Psychotropic Substances Act 1985, Section 20 – Recovery of 1kg and 600 grams of charas and conviction passed against the appellant - Defence of false implication taken - The testimonies of police officers/spot witnesses are reliable and trustworthy - No explanation by a appellant why he was on the spot of recovery and what was the probable cause of his false implication– Held – In the case under NDPS Act reverse burden applies and once the prosecution discharges its initial burden, it is for the accused to explain, though the standard of proof for both is different -- Accused has to probabalize his defence -- On the analysis of the material on record, the false implication of appellant by the police has not been proved - Material prosecution witnesses found reliable and trust worthy -- Appeal dismissed. (Paras 12 & 13) Title: Noop Ram vs. State of H.P **(D.B.)** Page-395

Narcotic Drugs and Psychotropic Substance Act, 1985 - Section 20 - Non association of independent witnesses – Conviction in commercial quantity challenged on the ground of non-examination of independent witness despite availability – Held - In the chance recovery non association of independent witnesses cannot be said to be sole circumstance to display the prosecution case and there is lack of convincing evidence to suggest that independent witness was available near to the spot at the time when the appellant was queried by the police party - Once the appellant was with the police with the bag in his hand and was not witnessed at that stage by any independent witnesses subsequent inclusion of independent witnesses becomes meaningless-- More non-association of independent witnesses will not be considered as fatal to the prosecution case and the only Caveat is that in case of such omission testimony of police witnesses is to be scrutinized with caution and care and if found reliable can form basis of a successful

prosecution. [Para 9 and 10] Title: Chander Prakash vs State of H.P. **(D.B.)** Page-459

Narcotic Drugs and Psychotropic Substance Act, 1985 - Section 20-Non association of independent witness challenged on the ground of non examination of independent witnesses-Commercial quantity-Conviction -The fact remains that at 2.30 in night independent witnesses could not associated readily and easily- Held- Non association of independent witnesses is not fatal to case under NDPS Act- Conviction upheld-Appeal dismissed. (Paras 12 &13) Title: Liaq Ram & another vs. State of H.P. **(D.B.)** Page-436

Narcotics and Psychotropic Substances Act, 1985 -Section 20 - Commercial quantity – Accused took defence of false implication -Held- Evidence on the record does not suggest even remotely implication of accused in case for some specific motive. (Para 11) Title: Liaq Ram & another vs. State of H.P. **(D.B.)** Page-436

Narcotics Drug and Psychotropic Substances Act, 1985 - Section 50 – Appellants aggrieved by the conviction passed vide judgment dated 17.7.2017 for commission of offence punishable under section 20 of NDPS Act has preferred appeal - Requirement of personal search in presence of witnesses - Held - Recovery was affected from bag belonging to appellant and not from their personal search - It is more than settled law that compliance of section 50 of NDPS Act is not required while searching the bag carried by any person- No benefit can be allowed to appellant merely for the reason that the police took almost 3 hours to complete the preliminary investigation - Record does not suggest foisting of false case against the appellant and it cannot be believed that the quantity recovered in this case was planted by the police specifically in a bus packed with passengers – Appeal dismissed.(Paras 14&19) Title: Vijender alias Bablu & another vs. State of H.P. **(D.B.)** Page-447

Negotiable Instruments Act, 1881- Section 138- Complaint dismissed on the ground that cheque in question stood issued as security, therefore said cheque did not attract the provisions of Section 138 of the Negotiable Instruments Act- Held- Findings returned by the Ld. Trial Court are not sustainable in the eyes of law- Matter remanded back to the Trial Court for adjudication afresh on merit. Title: Gurbachan Singh vs. Kamli Devi Page-43

'P'

Protection of Children from Sexual Offence Act, 2012 - Section 3 - Penetrative Sexual Assault - Interpretation of - Held - Victim was below 12 years of age at the time of commission of offence - She used the terms "galat kam" and "sexual intercourse" against the appellant and these terms have to be understood in the context of her understanding, which definitely cannot be equated to be that of an adult or at least a person having reached the age of discretion and the injuries suffered by her have also to be understood in the same context - Penetrative sexual assault defined in Section 3 of Protection of Children from Sexual Offences Act is very wide term and can include various forms of sexual attacks - Victim was below 12 years of age, so sexual assault suffered by her became aggravated form of penetrative sexual assault as per section 5K of POCSO Act -- Evidence reveals that offence under section 6 of POCSO Act, 2012 has been committed by the appellant - Appeal dismissed. (Paras16, 19 & 20) Title: Surinder Singh vs. State of H.P. **(D.B.)** Page-411

Protection of Children from Sexual Offence Act, 2016 - Section 10 - Appellant being convicted by the Judgment Order dated 26.06.2019 / 29.06.2019 passed by Ld. Special Judge Kangra at Dharamshala, HP, in Sessions Trial titled State of Himachal Pradesh versus Rajesh Kumar, has preferred appeal - Punishment for aggravated sexual assault – Held - Section 10 of POCSO Act provides that sentence under this section may be of either description for a term which shall not be less than 5 years but which may extend to 7 years with fine, so, there is no provision in the Act for awarding lesser sentence than minimum prescribed sentence for offence punishment under section 10 of POCSO Act - Language of this section indicates legislature intent unambiguously that for punishment under section 10 of minimum sentence shall not be less than 5 years - Sentence cannot be reduced – Appeal dismissed. (Paras 16 & 17)Title: Rajesh Kumar vs. State of H.P. Page-467

'S'

Specific Relief Act, 1963 - Section 19(b) - Relief against subsequent purchaser - Held - Specific performance of an agreement to sell, it is not always obligatory for the plaintiff to seek cancellation of sale deed executed in favour of subsequent buyer, however the plaintiff can join such buyer as co-defendant with the original vendor provided that the agreement to sell in favour of plaintiff was executed prior to execution of sale deed in favour of the subsequent buyer - The only exception to sub-section (b) of Section 19 of Specific Relief Act, 1963 is that specific performance of contract can be enforced against any person claiming under either party there to by a title arising subsequently except a transferee for value who has paid his money in good faith and without the notice of original contract there is no need for the plaintiff to seek cancellation of sale deed in favour of the subsequent buyer - Good faith, bonafide purchase and not having notice of earlier contract are all questions of facts which have to be decided on facts of each case on basis of evidence by the parties. (Para 11) Title: Rakesh Sharma & others vs. Bhushan Lal & others **(D.B.)** Page-651

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'Y'

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

Between:

HIMACHAL PRADESH STATE ELECTRICITY BOARD LIMITED, THROUGH CHIEF ENGINER (MM) VIDYUT BHAWAN, CHAURA MAIDAN, SHIMLA, HIMACHAL PRADESH-171004.

….OBJECTOR.

(BY MR. TARA SINGH CHAUHAN, ADVOCATE)

AND

1. M/S RELEMAC TECHNOLOGIES PVT., LTD., PLOT NO.92, SECTOR-56 PHASE IV, HSIDC, INDUSTRIAL AREA, KUNDLI SONEPAT, HARYANA-131028 THROUGH ITS DIRECTOR.

2. SH. S.P. SINGH SON OF (NOTE KNOWN TO THE OBJECTOR), DISTRICT & SESSIONS JUDGE (RETIRED), KRISHAN VILLA, KOTTHI NO.645, SECTOR-8, KARNAL.

….NON-OBJECTORS.

(BY ATUL JHINGAN, ADVOCATE, FOR RESPONDENT NO.1).

ARB. CASE No. 21 OF 2020
Decided on: 11.11.2021

Arbitration and Conciliation Act, 1996- Section 34- The objector (HPSEBL) has assailed the award dated 20.01.2020 passed by the sole Arbitrator- Maintainability- Held- Award could have been assailed by the petitioner before a Court envisaged under Section 2(e) of the 1996 Act, as it stands amended from time to time, in the State of Haryana and not this Court as after reference of the dispute to the Haryana Micro Small and Medium Enterprises Facilitation Council, no cause of action accrued within the State of Himachal Pradesh as admittedly the arbitration proceedings were also conducted in the state of Haryana- Objections not maintainable ordered to be returned to Objector in original for their presentation before the appropriate Court of Law.

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

J U D G M E N T

By way of these Objections, filed under Section 34 of the Arbitration and Conciliation Act 1996, the Objector (Himachal Pradesh State Electricity Board Limited) has assailed the award dated 20.01.2020, passed in case No. 1194 of 2019, by the Sole Arbitrator, Sh. S.P. Singh, District & Sessions Judge, (Retired).

2. When this petition was taken up for consideration, a preliminary objection has been raised by respondent No.1 with regard to maintainability of these Objections, on the ground that as respondent No.1 had approached the Haryana Micro Small and Medium Enterprises Facilitation Council for redresssal of the grievance of non-payment of their dues from the present petitioner and it was on account of these proceedings that the matter stood referred to the Arbitrator by the said Council, i.e. Sole Arbitrator, Sh. S.P. Singh, Former District & Sessions Judge, who conducted the arbitration proceedings at District Karnal in Haryana, therefore, the Objections, which have been filed against the award so passed are not maintainable as the Court which can be approached by the present petitioner under Section 34 of the

Arbitration & Conciliation Act, 1996 has to be the Principle Court of Civil jurisdiction within the State of Haryana.

3. Mr. Atul Jhigan, learned counsel for respondent No.1 has drawn the attention of this Court to the documents appended with this petition, including the copy of the award passed by learned Arbitrator and on the strength of these documents, submitted that the petitioner has wrongly invoked the jurisdiction of this Court for preferring these Objections as when the Arbitrator stood appointed in a Reference which was invoked under Section 83 of the Micro Small and Medium Enterprises Development Act, 2006, pursuant to an order passed in this regard by the Haryana Micro Small and Medium Enterprises Facilitation Council, then the award passed by the learned Arbitrator could not be challenged in the State of Himachal Pradesh.

4. Mr. T.S. Chauhan, learned counsel for the Objector, justifying the filing of present petition has submitted that as the work to be executed in terms of the agreement between the petitioner and respondent No.1 was to be executed within the State of Himachal Pradesh, therefore, this Court has jurisdiction to decide these Objections and there is no infirmity in the Act of the Objector in filing the present Objections before this Court. He has further submitted that in terms of the Arbitration clause which existed in the agreement entered into between the petitioner and the respondent, all disputes arising between the petitioner and respondent No.1 were referable to sole arbitration of Managing Director, MD, HPSEB and were to be subject to the jurisdiction of Shimla Court only. Therefore, as per him the Objections are maintainable.

5. I have heard learned counsel for the parties and have also gone through the documents appended with the petition including the impugned award.

6. The Micro Small and Medium Enterprises Development Act 2006

has been enacted to provide for facilitating the promotion and development and enhancing the competitiveness of Micro Small and Medium Enterprises and for matter selected therewith or incidental therewith.

7. Chapter 5 of the 2006 Act deals with delayed payment to Micro and Small Enterprises. The liability of the buyer to make payment in the event of delay as well as the mechanism for recovery of the same and Reference of the dispute to the Micro and Small Enterprises Facilitation Council is duly provided in Chapter 5 of 2006 Act. The Hon'ble Supreme Court of India in *M/s Silpi Industries Etc and others* vs. *Kerala State Road Transport Corporation* has been pleased to hold that the provisions of Section 15 to 23 of the 2006 Act, are given overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. From the statement of Objects and Reasons also it is clear that it is a beneficial legislation to the small, medium and micro sector. Hon'ble Supreme Court has further held that Arbitration and Conciliation Act 1996 is a general law whereas the Micro, Small and Medium Enterprises Development Act, 2006 contemplates a statutory arbitration when conciliation fails. A party which is covered by the provisions of 2006 Act allows a party to apply to the Council constituted under the Act to first conciliate and then arbitrate on the dispute between it and other parties. Thus, it is apparently clear that once the subject matter referred to the Council under the provision of the 2006 Act, then it was the mechanism provided therein which was to govern the adjudication of the dispute, *de-horse* the fact that there was an agreement entered into between the parties which envisaged an arbitration clause. In other words as the provision of the 2006 Act have overriding effect upon other laws including the Arbitration and Conciliation Act 1996, therefore, the mechanism of Conciliation and Arbitration provided therein, overrides any other clause entered into between the parties for the settlement of the disputes once the disputes stands referred to the Council.

9. Coming to the facts of this case, the Council which was approached by respondent No.1 was the Haryana Micro Small and Medium Enterprises Facilitation Council which referred the matter for adjudication of the dispute between the parties to the Arbitrator vide order dated 15.11.2019 after the conciliation failed. It is in compliance to the said Reference made by the Haryana Micro Small and Medium Enterprises Facilitation Council that the arbitration proceedings were undertaken by the learned Arbitrator and award dated 20.1.2020 was passed. Incidentally the sole Arbitrator happens to be a Former District & Sessions Judge of the State of Haryana and the seat of Arbitrator was also at Karnal, Haryana.

10. In these peculiar facts, this Court is of the considered view that the award could have been assailed by the present petitioner before a Court, as is envisaged under Section 2(e) of the 1996 Act, as it stands amended from time to time, in the State of Haryana and not this Court as after the Reference of the dispute to the Haryana Micro Small and Medium Enterprises Facilitation Council, no cause of action accrued within the State of Himachal Pradesh as admittedly the arbitration proceedings were also conducted in the State of Haryana. In this view of the matter the preliminary Objections of respondent No.1 are upheld and it is ordered that the present Objections filed under Section 34 of the Arbitration and Conciliation Act, 1996 are not maintainable before this Court.

11. Accordingly, these Objections are ordered to be returned to the Objector in original for their presentation before the appropriate Court of law. Photocopy thereof be retained for the purpose of record and amount be released in the bank account of the Objector details whereof be shall be provided by the learned counsel for the Objector within a period of one week.

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

Between:

SHRI RAMESH KUMAR, SON OF SHRI RAGHUNATH, AGE 52 YEARS, RESIDENT OF VILLAGE SHALYAN, POST OFFICE TIYALI, TEHSIL THEOG, DISTRICT SHIMLA, H.P., PRESENTLY WORKING AS PEON IN THE OFFICE OF DIVISIONAL MANAGER, FOREST WORKING DIVISION SHIMLA.

....PETITIONER.

(BY SHRI P.D. NANDA, ADVOCATE)

AND

1. THE MANAGING DIRECTOR, H.P. FOREST CORPORATION LIMITED SHIMLA, H.P.
2. THE DIVISIONAL MANAGER, HP FOREST CORPORATION LIMITED, SHIMLA, H.P.

....RESPONDENTS.

(BY SHRI VINOD THAKUR, ADVOCATE)

CIVIL REVISION No.10 of 2021
Decided on: 24.09.2021

Civil Revision- **Industrial Disputes Act, 1947**- Execution- Petitioner filed execution for the execution of award passed by the Ld. Labour Court- The execution was dismissed on the ground that prayer of petitioner with regard to grant of benefit of regularization from the date when persons junior to him were regularized was not granted by the High Court- Therefore, it was beyond the competence of the Executing Court to venture upon the said issue- Held-

Executing Court has not exercised the powers vested in it with due diligence in the course of the adjudication of the execution petition- Revision allowed.

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

J U D G M E N T

By way of this Civil Revision, the petitioner herein has challenged order dated 15.10.2020, passed by learned Executing Court, in Execution Petition No.3-11 of 2020, titled as Sh. Ramesh Kumar Versus The Managing Director, HP Forest Corporation Limited & another.

2. Brief facts necessary for the adjudication of the present petition are that on an industrial dispute being raised by the present petitioner, a reference was made by the appropriate government to the learned Industrial Tribunal-cum-Labour Court, Shimla, H.P., i.e. Reference No.41 of 2008, titled Ramesh Kumar Versus The Managing Director, HP Forest Corporation Limited & another, which stood answered by the learned Labour Court vide order dated 11.01.2012, in the following terms:-

> "*In the result, the reference is answered in affirmative. Consequently, petitioner is held entitled to reinstatement in service alongwith seniority and continuity but without back wages. Let a copy of this award be sent to the appropriate government for publication in official gazette. File, after completion be consigned to records.*"

3. Feeling aggrieved by non-grant of back wages, the petitioner approached the High Court by way of *CWP No.5324 of 2012*, titled *Ramesh Kumar* Versus *Managing Director and another*. This writ petition was dismissed by the High Court, vide judgment dated 02.11.2017. Thereafter, an Execution Petition was filed by the present petitioner for the execution of the award

passed by learned Labour Court. This Execution Petition has been dismissed by the learned Execution Court by holding that a perusal of the judgment passed by the High Court in *CWP No.5324 of 2012,* dated *02.11.2017*, demonstrates that the same was dismissed in entirety and in this background as the prayer of the petitioner with regard to grant of benefit of regularization from the date when persons junior to him were regularized was not granted by the High Court therefore, it was beyond the competence of the leaned Executing Court to venture upon the said issue.

4. Feeling aggrieved, the petitioner has filed this Revision Petition.

5. I have heard learned counsel for the parties and have also perused the award passed by the learned Labour Court as well as the judgment passed by the Hon'ble Coordinate Bench of this Court in *CWP No.5324 of 2012*, dated *02.11.2017* and also the impugned order passed by the learned Executing Court.

6. As already mentioned hereinabove, in the Reference Petition, the relief which was granted to the petitioner/workman was that the employer was directed to reinstate the workman in service alongwith seniority, but without back wages.

7. The dismissal of the Writ Petition by this Court was of the grievance raised by the petitioner qua the award of the learned Labour Court for not granting him back wages. May be, there were certain other reliefs with regard to regularization also prayed in the said petition, but this Court is of the considered view that principles of constructive *res judicata* will not be attracted in the peculiar facts of this case, because primarily, what this Court was concerned with in the Writ Petition filed by the present petitioner against the award passed by the learned Labour Court was whether the said award was sustainable in the eyes of law or not.

8. Even otherwise, this Court is of the considered view that issue of regularization is not within the domain of the learned Labour Court. Said

Tribunal is a statutory Tribunal and as it owes its origin to the Industrial Disputes Act, it can only adjudicate on those issues which stand mentioned in the said act with regard to the grievance of the workman.

9. This Court is further of the considered view that in case by way of the Execution Petition, the petitioner was seeking regularization from the date when the persons junior to him were regularized, in the garb of the execution of the award passed by the learned Labour Court, then the only course open for the learned Executing Court to have had dismissed the Execution Petition with the observation that as the regularization was not the domain of the learned Labour Court, nor rightly or wrongly, the award had conferred the right of regularization upon the petitioner, therefore, the petitioner was at liberty to agitate the said cause by way of appropriate proceedings. This not having been done by the learned Executing Court, renders the order so passed by it, as unsustainable in the eyes of law.

10. On this short count, this Civil Revision is allowed and impugned order dated 15.10.2020, passed by the Court of learned Senior Civil Judge, Shimla, District Shimla, H.P., in Execution Petition No.3-11 of 2020, titled as Sh. Ramesh Kumar Versus The Managing Director, HP Forest Corporation Limited & another, is set aside as the Executing Court has not exercised the powers vested in it with due diligence in the course of the adjudication of the Execution Petition. It goes without saying that as far as the claim of regularization of the petitioner is concerned, he shall be at liberty to espouse said cause before the appropriate Court of Law, if so advised.

11. Petition stands disposed of in above terms, so also pending miscellaneous applications, if any.

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

Between:

DARSHAN DASS SON OF GANGU RAM, AGED ABOUT 46 YEARS, RESIDENT OF VILLAGE BASHALA, POST OFFICE ARAHAL, TEHSIL ROHRU, DISTRICT SHIMLA, H.P.

....PETITIONER.

(BY MR. KULBHUSHAN KHAJURIA, ADVOCATE)
AND

GOVERDHAN SINGH CHAUHAN SON OF LATE SH. KARAM CHAND, RESIDENT OF VILLAGE AND POST OFFICE KARASA, TEHSIL ROHRU, DISTT. SHIMLA.

.... RESPONDENT.

CIVIL MISC. PETITION MAIN (ORIGINAL)
No.328 of 2021
Decided on:20.12.2021

Constitution of India, 1950- Article 227- Evidence of the defendant closed by the Court order on 27.12.2010- Defendant did not assail this order but filed an application on 9.3.2021 seeking permission to appear as defence witness- This application has been rejected by the Ld. Court below- Held- Order attained finality as defendant did not assail said order by way of appropriate proceedings what could not be done directly obviously could not have been permitted to be done by the present petition indirectly by permitting him to examine himself as defence witness in lieu of an application filed under Section 151 of the Code of Civil Procedure- Petition dismissed.

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

O R D E R

By way of this petition, filed under Article 227 of the Constitution of India, the petitioner has prayed for the following reliefs:-

> "*It is therefore most respectfully prayed that the record of the case may kindly be called for, this petition may kindly be allowed, and the order dated 9.3.2021 passed by learned Senior Civil Judge, court No.1 Rohru in application No.28-6 of 2021 in Civil Suit No.3/2016 vide which the right to lead evidence on behalf of the defendant/petitioner has been closed may kindly be quashed and set aside and the petitioner may kindly be afforded an opportunity to lead evidence, in the interest of justice and fair play*."

2. I have heard learned counsel for the petitioner and gone through the documents appended with the petition which includes order dated 09.03.2021, passed by the Court of learned Senior Civil Judge, Court No.(1), Rohru, H.P., in application No.28-6 of 2021, in Civil Suit No.3 of 2016.

3. It appears that after the evidence of the plaintiff was closed on 18.12.2018, the case for recording of the evidence of the defendant i.e. the present petitioner, was listed for 19.01.2019. On the said date, no evidence was led by the defendant and on his request the case was adjourned for the said purpose for 09.04.2019. On the said date also, no evidence was led and the matter was again adjourned for 04.06.2019. On this date also, no witness was produced by the defendant and rather an application under Order 6, Rule 17 of the Code of Civil Procedure was filed on behalf of the defendant which was disposed of on 29.08.2019 and thereafter, an additional issues i.e. issue No.2A was framed. The case was listed for 27.12.2019 again for recording evidence of the defendant, but on the said date also no evidence was adduced by the defendant and the right of defendant to lead evidence was closed by the Court on 27.12.2019. This order, i.e. order dated 27.12.2019, vide which the evidence of the defendant has been closed by the learned Trial Court has attained finality as the same has not been challenged by the defendant. Thereafter, when the matter was listed before the learned Court below on 09.03.2021, an application stood filed under Section 151 of the Civil Procedure Code by the defendant, with the

prayer that he may be permitted to appear as defence witness. This application has been rejected by the learned Court below vide impugned order.

4. The reason which has been assigned by the learned Trial Court while dismissed the application primarily is that the evidence of the defendant was closed vide order dated 27.12.2019, which order had attained finality as the same was not challenged by the defendant. On these basis, learned Trial Court held that as the main order vide which the witness of the defendant was closed, was neither set aside nor modified, therefore, no opportunity could be granted to the defendant to lead evidence as the intent of the application indirectly was seeking review of the order earlier passed, which had attained finality.

5. This Court is of the considered view that the reasoning so assigned by the learned Trial Court while dismissing the application filed by the present petitioner to examine himself as the defendant witness suffers from no infirmity. It is a matter of record and not in dispute that evidence of the defendant was closed by the learned Trial Court vide order dated 27.12.2019. In case, the defendant was aggrieved by this order, then he ought to have assailed the same by way of appropriate legal proceedings, which admittedly was not done.

6. That being the case, what could not be done directly, obviously could not have been permitted to be done by the present petitioner indirectly by permitting him to examine himself as defence witness in lieu of an application filed under Section 151 of the Code of Civil Procedure.

7. Therefore, as this Court does not finds any infirmity in the order impugned, i.e., order dated 09.03.2021, passed by the Court of learned Senior Civil Judge, Court No.(1), Rohru, H.P., in application No.28-6 of 2021, in Civil Suit No.3 of 2016, this petition is dismissed, so also pending miscellaneous applications, if any.

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

BETWEEN:-

SHRI SHYAM SUNDER SON OF SHRI JAGANNATH, C/O GANPATI GENERAL STORE, GURDWARA ROAD, PALAMPUR, TEHSIL PALAMPUR, DISTRICT KANGRA, H.P. …PETITIONER

(BY SH. KAPIL DEV SOOD, SENIOR ADVOCATE, WITH SH. MUKUL SOOD, ADVOCATE.)

AND

1. SHRI VIKRAM KANWAR SON OF LATE SHRI LAKSHMAN SINGH, R/O DHAULADHAR COLONY, NEAR ITI DARI, TEHSIL DHARAMSHALA, DISTRICT KANGRA, H.P.

2. SHRI VISHAV JEET SINGH KANWAR, SON OF LATE SHRI LAKSHMAN SINGH, R/O VPO BHIRA, TEHSIL HAMIRPUR, DISTRICT KANGRA, H.P. …RESPONDENTS

(BY SH. NEERAJ GUPTA, SENIOR ADVOCATE, ALONG WITH SH.NEERAJ KANWAR, ADVOCATE.)

CIVIL MISC. PETITION MAIN (ORIGINAL)
No. 499 of 2017
Decided on: 07.01.2022

Code of Civil Procedure, 1908- Order XXXIX Rule 1 & 2- Civil Judge directed the parties to maintain status quo qua nature, possession, construction and alienation on the suit, however, in appeal Ld. Additional District Judge-III, set aside the order and dismissed application having been filed under Order XXXIX Rule 1 & 2 of CPC- Held- Parties are not co-sharers or co-owners of the joint property rather they are independent owners of respective portions owned by them in one and the same building, therefore, order of the Trial Court treating them as co-owners is not sustainable- Reasons assigned by the Ld. ADJ are also not logical- Expert Committee appointed for examining the

claim and counter-claim of the parties with respect to safety of existing and proposed building including structure stability of hybrid construction undertaken on the spot and to suggest appropriate type of stable structure possible on the spot- Matter remanded with the direction to Trial Court to decide afresh taking into consideration the technical report of expert committee.

Cases referred:

Bhartu Vs. Ram Sarup 1981 PLJ 204;

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

O R D E R

Plaintiff-petitioner has approached this Court against impugned order dated 18.9.2017, passed by learned Additional District Judge (III), Kangra at Dharamshala in Civil Miscellaneous Appeal No. 05-D/XIV/2016, titled as Vikram Kanwar and another Vs. Shyam Sunder, whereby order dated 21.3.2016 passed by learned Civil Judge (Junior Division), Palampur, District Kangra, H.P. in CMA No. 317 of 2015, preferred in Civil Suit No. 336 of 2015, titled Shyam Sinder Vs. Vikram Kanwar and another, directing the parties to maintain status quo, qua nature, possession, construction and alienation, on the suit land, has been set aside and application filed by the plaintiff-petitioner herein under Order 39 Rules 1 and 2 CPC has been dismissed.

2. Petitioner and respondents are plaintiff and defendants respectively, in the main suit before the trial Court, therefore, for convenience hereinafter they shall be referred as 'plaintiff' and 'defendants' respectively.

3. Plaintiff has filed a suit for decree of permanent prohibitory injunction, restraining the defendants from forcibly constructing illegal floors, i.e. first and second floors above the shop of plaintiff located at Ground Floor and from blocking the path of the plaintiff existing on the back side of the

shop of plaintiff in any manner or raising structure thereon or encroaching upon qua the share of plaintiff in the land comprised in Khasra No. 1981 measuring 26-52 Sq. meters.

4. As per plaint, case of the plaintiff is that he is owner in possession of 3800/9652 share of land comprised in Khasra No. 1981, with a share of 38 Sq. meters, and defendants are also co-sharers of the suit property and on 2.8.2015, defendant No. 1 started demolishing the old structure existing on the first floor above the shop of plaintiff and on objection raised by plaintiff, it was informed that only old structure was being demolished and new construction would start only after getting proper permission from the concerned Department after strengthening the base and structural strength of old existing building and plaintiff having faith in the words of defendant No. 1 allowed him to demolish the old structure of first floor. Thereafter on 8.9.2015, defendant No. 1 started raising new construction without asking or taking consent of the plaintiff, that too without any permission from the concerned authority or having any approval of the site and such construction was started without strengthening the base of the building or giving any structural strength or support to the building which caused seepage of water from first floor into the shop of plaintiff, resulting into heavy loss to the fittings of the shop and also to the stock of the shop.

5. It is further case of the plaintiff that due to construction work started by defendant No.1, there were cracks in the floor and walls of the shop of plaintiff and such illegal act can cause loss of life and property of plaintiff, other persons of vicinity as well as family of plaintiff, as the suit property has become unfit and unsafe.

6. Suit has been contested by the defendants by filing separate written statements, but on the same line, stating therein that plaintiff is owner of 38 Sq. meters shop located at ground floor of the building in reference and he is not co-owner in the entire property, but he has purchased the property

in a sale conducted by Bank, as reflected in the latest jamabandi, vide mutation No. 1432. Therefore, it has been contended on behalf of defendants that plaintiff had no right, title over the lintel of the shop/building, as he had purchased the shop in his possession, but without any right on the lintel. It is claimed that defendant No.1 has right to repair, construct and re-construct the structure on the lintel of the ground floor as well as first floor, whereas plaintiff has no right, title or interest in those lintels and has no locus standi to interfere and/or stop the construction of the structure being carried out by defendant No.1 upon the lintel being owner thereof.

7. In written statements, it has been stated that permission to repair the first floor was taken from Municipal Council, Palampur on 6.12.2014 and thereafter repair work of the residential house was undertaken in July 2015 and after taking measures for safety, long life and strength of the building, pillars constructed by laying lintel on the first floor, repair work was completed before filing of the suit. It has been denied that plaintiff is co-owner in the property having right as co-sharer on the ground that plaintiff has purchased specific area in entire building as absolute owner of that particular portion.

8. Both written statements were filed on 23.11.2015, taking similar stand therein. It has been stated in the written statements that defendant No.1 has right to repair his residential house in the first floor and plaintiff has no right to interfere and obstruct the repair/construction work of the said defendant for having no right over the lintel of the ground floor as well as first floor, which is in exclusive ownership of the said defendant. Blocking of any path as alleged by plaintiff has also been denied. Jamabandi for the year 2009-2010 of Khasra No. 1981 has also been placed on record along with settlement deed, executed by Smt.Sushila Kanwar, mother of defendants.

9. Taking into consideration all facts, the trial Court had observed that plaintiff was in possession of some portion of joint holding as a co-sharer

and thus was entitled to continue to be in possession of every inch of the land till the joint holding is partitioned and referring entry in the jamabandi for fortifying the claim of the plaintiff as co-owner of Khasra No. 1981, vide order darted 21.3.2016 till final disposal of the main case, parties were directed to maintain status quo, qua nature, possession, construction and alienation on the suit land comprised in Khasra No. 1981.

10. The aforesaid order was assailed by defendants by filing appeal, which was allowed on 18.9.2017 by learned Additional District Judge (III), Kangra at Dharamshala, observing that plaintiff by purchasing a shop in the entire two storied building cannot become co-owner or co-sharer over the entire Khasra No. 1981 as sale certificate clearly depicts that he has no right on the lintel and construction raised upon the lintel and, therefore, plaintiff did not become co-sharer in the suit land, but he got ownership and possession of one shop only and, thus, plaintiff was having right only over the shop measuring 38 Sq. meters having no right as co-owner on the lintel and construction above the shop. Further that when building was already two storied, no permission was required for construction carried on by defendant No.1 and there was no material placed before the Court regarding any construction of third storey being raised by the defendants and the repair work was already over and the plaintiff had failed to produce original documents showing ownership or any document of transfer of ownership to him in auction proceedings including description of shop and, therefore, the appeal preferred by the defendants was allowed and order passed by trial Court was set aside vide judgment dated 18.7.2019.

11. Plaintiff, with application CMP No. 11045 of 2017, has also placed on record Technical Report of Engineer along with photographs of foundation and construction of third storey being raised by defendant No.1. Though placing on record the documents, as proposed in CMP No. 11045 of 2017, has been opposed vehemently by defendants, however, defendants have

also placed on record permission to raise construction received from Municipal Council, Palampur vide communication dated 6.11.2017, Structural Stability Certificate and Soil Investigation from another Engineer and some photographs, alongwith reply to application, for taking on record for consideration.

12. Facts emerging from the material placed on record and submissions made by learned counsel for the parties are that old two storied building was being owned and possessed by one Sushila Devi, mother of defendants. Out of that 38 Sq. meters was given in absolute ownership, but without any right in lintel thereof, to Rajesh Kanwar, by his mother, enabling him to establish his business and the said shop was mortgaged by Rajesh Kanwar with the bank and for non-payment of loan, the shop was auctioned by the Bank and was purchased by plaintiff in the year 2015. There is another shop and Godown on the ground floor, which has been given by Sushila Kanwar to her son defendant No. 2 Vishwajeet Singh Kanwar. First floor has two parts, one is small shop and another is residential house. As per Jamabandi, the shop was sold by Sushila Kanwar to one Smt. Madhu, who further sold it to one Neerja Verma. Residential house in first floor was given by Sushila Kanwar to her son defendant No.1 Vikram Kanwar, whereas lintel of the first floor was given to another son Rajesh Kanwar with right to construct residential house thereon. Lateron the lintel of first floor was sold by Rajesh Kanwar to his brother defendant No.1 Vikram Kanwar. As of now, plaintiff Shyam Sunder, defendant No.1 Vikram Kanwar, defendant No.2 Vishwajeet Singh Kanwar and Neerja Verma are four persons having their independent ownership upon separate and distinct portions of the property. Definitely they are not co-sharers or co-owners of the joint property. They are independent owners of respective portions, owned by them in one and the same building situated on Khasra No.1981. Therefore, the trial Court had committed a mistake by treating them as co-owners with right in and upon

every inch of the property by referring judgment in case of ***Bhartu Vs. Ram Sarup 1981 PLJ 204,*** wherein rights and liabilities of co-owners have been reiterated. Therefore, reasons assigned by the trial Court for passing of order by directing the parties to maintain status quo, qua nature, possession, alienation and construction on the suit land are not sustainable being misconceived.

13. Order passed by the trial Court has been set aside by learned Additional District Judge. Reasons assigned for that are that plaintiff has failed to place on record any document to substantiate his ownership with respect to shop and further being an owner of the shop in the ground floor, he has no right on the lintel and construction raised thereon and two storied building was already existing and, therefore, no permission was required to be obtained by defendants from the Municipal Council for construction and as defendants had already completed the repair work and nothing has been produced by the plaintiff establishing construction/proposed construction of third storey/second floor by the defendants, therefore, it was concluded that no prima facie case has been made out in favour of plaintiff to restrain the defendants from repairing their own premises on the first floor of the shop. Reasons assigned by Additional District Judge for passing the impugned order are also not logical, as case of the plaintiff is that by undertaking construction work on the lintel of ground floor, but without strengthening the base structure of the ground floor, the life and property of not only of the plaintiff, but also his family members and others is in danger. The said issue has not been considered by learned Additional District Judge.

14. The trial Court has wrongly treated the plaintiff as co-owner of the entire property, whereas learned Additional District Judge has returned findings that being owner of 38 Sq. meters shop in the property, plaintiff has no right to object the repair or construction work being carried out by defendants being owners of separate portion of the property, but ignoring plea

of plaintiff that such construction is endangering life and property of plaintiff and others. Reasons assigned by both Courts below are misplaced.

15. In written statements, defendants were completely silent about their plan to construct their second floor i.e. third storey of the building and any sanction in that regard, but it was pleaded that they have permission dated 6.12.2014 from Municipal Council, Palampur to repair the building. At the time of filing present petition in this Court, plaintiff has placed on record photographs Annexure P-10 indicating the plan of defendants to construct second floor on the existing building, causing further load on the old construction of ground floor.

16. In reply to the petition, plan to construct second floor, i.e. third storey has not been denied, rather has been admitted by stating that after having permission to carry out repair work vide letter No.1017, dated 6.12.2014, repair work was completed in May 2015 and lintel was laid in July 2015 after raising column from basement in the area occupied by defendants in addition to load bearing structure already existing so as to add extra strength to the structure and upto this stage work had already been completed when interim order dated 21.3.2016 of status quo was passed by the trial Court. It is further stand of the defendants that vide communication dated 20.10.2015, it was informed by Municipal Council that due to passing of interim order by the Court, map submitted by defendants with respect to first floor and second floor cannot be approved and it was returned. However, after setting aside interim stay by learned additional District Judge vide order dated 18.9.2017, the authorities accorded the sanction in favour of defendants on 6.11.2017 and thereafter on 17.11.2018 in present petition, this Court has passed order to maintain status quo. It has been contended that being absolute owner of portion of the property, defendants are entitled to repair, construct, develop and enjoy the said property, but the plaintiff with malafide intention to harass the defendants by causing unnecessary inconvenience,

monetary loss and jeopardizing their rights, has filed the suit and has obtained Technical Report, which is factually incorrect and further that Technical Report filed by the plaintiff cannot be taken into consideration in present petition, wherein order passed by the trial Court and first appellate Court are to be adjudicated on the basis of material available before those Courts at the time of deciding the application. It has been submitted that for carrying out any repair or construction work, permission of competent authority is required and for that purpose consent of the plaintiff is not necessary, and further that even otherwise also to harass the defendants, petitioner would not consent for years together and, therefore, by rights of parties to manage their respective property and referring the comparative hardship faced by the defendants, prayer for dismissal of the petition and vacation of interim stay has been made.

17. On behalf of plaintiff it has been contended that though plaintiff is not having any right over the lintel of the ground floor, but he has every right to protect his property and to act for safety of his life and property and the manner in which construction work is being undertaken by defendants, is definitely endangering the life and property, not only of the plaintiff, but also of the defendants or inhabitants of under construction floors proposed to be constructed without any support from the ground.

18. True it is that Technical Report of Engineers placed on record in this petition was not before the Courts below, but at the same time it is also an admitted fact that defendants were not having any sanction from the competent authority to construct second floor i.e. third storey and permission dated 6.11.2017 and structural stability certificate placed on record with reply to CMP No.9707 of 2017 was also not available on the record before the Courts below and it was not even in existence. There are number of photographs placed on record by both sides which may or may not be part of the record before the Courts below. The Technical Report also came into

existence after passing of impugned order, like permission of construction granted by Municipal Council, Palampur which has also come into existence after passing of the impugned order. Keeping in view the nature of the pleadings, issue involved in present petition, and prayer of both sides to consider respective documents and photographs filed by them for adjudication of present petition, entire documents filed by parties are taken into consideration for resolving the issue in reference.

19. In Technical Report, filed by plaintiff, Engineer Tarilok Singh Thakur has reported as under:-

> ***"Building Specification:-***
>
> *While the claim of stability of any building we have to check what type of structure it is, whether it is* ***load bearing structure or frame structure.***
>
> *It is a* ***load bearing structure*** *which has* ***completed a period of forty years*** *as said by my client and other specifications under his occupation regarding foundation walls, floor, wood work, finishing roof are as under:-*
>
> ***Foundation:-***
>
> *As it is been visulazied by me that the building is old and foundation are made of, in mud mortar stone masonry which is been judge by digging excavation diagonally down round about two foot from the finished floor….*
>
> ***Walls:-***
>
> *Walls of the occupied accommodation (left & right side) are made of 9" thick brick masonary in cement motor and other wall (partition wall) are also made up to 9" inch thick brick work which is maintained by cement mortar plaster.*
>
> ***Roof:-***
>
> *The ground floor roof is made up of old RCC slab which is supported by two cross heavy girder rested on 9" inch brick work wall in the center of the accommodation of the shop as shown in the photograph No. 4 attached with this report. In which it is clearly visible spots of leakage of water in it.*
>
> ***General of condition:-***

As I have mentioned earlier in my report that the original structure of ground floor is an old load bearing structure. If one person wants to raise another floor on that old load bearing structure, it is, firstly we advise to demolish complete the old structure totally to re-construct RCC frame structure from the ground floor itself with proper laid RCC foundation underground properly upto the required hard strata depth of rock for columns. Then all columns of the building structure will be tied together through tie beams at ground level and then cast the roof level slab from ground floor itself and vice versa for the next floors respectively. But, here in this case there is no concept adopted to erect RCC frame structure from ground level from gurudwara roadside. Which can be understood by photograph No. 5, 6, and 8 from front side and as well inside of the accommodation, which I explain as under how unethically blunder mistake has been taken place in this construction site i.e.

1. Extreme left side of the building at ground level there is no such column is erected from ground level. And it is visible at first floor in the left side of building it is been erected by chiseling common brick wall with adjoining building shown in photograph No. 6,9,10 shows clearly.

2. Then in first row the middle column of the first floor shown in photograph No. 9, 11. It has also not been erected from the ground floor instead of erected it on an old slab of ground floor.

3. Then extreme right side column of first row on first floor of the building erected is not right above on the ground floor column which is out of plumb with the first floor by 0.15m. Beyond further second row of the columns at the first floor extreme left and right side column are also erected by chiseling common wall of first floor of adjoining of building without being raised from the ground floor.

4. Most dangerous thing is that middle column of second row has no connection from the ground level, it is also erected on ground floor slab itself only. Where maximum load of the first floor and

another storey will come on the old slab of ground floor, which may cause sudden collapse of whole structure on it. Till now it is been only supported by ground floor by 9 inch thick brick wall which are also supported by one 12 inches and 9 inch steel girders provided by my client at ground level on 9 inch thick brick partition wall in L-Shape which is clearly visible by photograph No. 4 and in the same second row of adjoining column of first floor are also erected on above the ground floor lenter along with adjoining common wall from first floor itself only. It means that they are also not been erected from the ground floor. In the last I mean to say that only these heavy steel girders and 9 inch brick wall supported the whole load of old RCC slab of ground floor itself, along with ill mannered RCC structure of first floor too. As I mentioned earlier, Palampur area comes under seismic zone-V, which will be dangerous in present as well as in future for old load bearing structure of ground floor as well as ill-mannered constructed first floor on it for that particular areas.

Observation:

From the condition and specification of this building seemed to be about forty years old. Thus the building has out lived its ordinary span of life. The life span of such load bearing building is forty to fifty years, therefore entire building is required to be completely dismantle from ground level and advisable to erect it completely new RCC framed structure from the ground level as one unit in whole instead of erecting it like wise now on the base of ill-mannered construction above the ground floor which may cause havoc to self use of all property owner / tenants within this building as well adjoining building owner along with innocent common customers also."

20. To counter the aforesaid Report of Engineer, defendants have relied upon Structural Stability Certificate, issued by Civil Engineer, which reads as under:-

*"**Subject:- Structural Stability Certificate**.*

I/We hereby certify that the building of Sh/Smt./Ms. Vikram Singh proposed over Khasra No. 1981 Mauja/Ward No. Palampur

Khas Tehsil Palampur District Kangra Himachal Pradesh has been designed by me/us, as per the India Standards Codes for general structural safety against natural hazards including earthquake protections and after soil investigation. The building is structurally safe."

21. There are two divergent views of Engineers. Admittedly, structure of ground floor is a load bearing structure, i.e. lintel on 9" walls, whereas construction of structure of first and second floors is being carried out as a frame structure, i.e. on columns/pillars, therefore, a hybrid structure is coming into existence on the spot on completion of proposed construction, wherein RCC structure is being constructed on first and second floors on columns, but with only one row of columns starting from ground floor, whereas other two rows are starting from lintel of first floor. In these rows, some columns have been erected on 9" load bearing walls, whereas some columns have been erected on lintel itself. This RCC structure of first floor and proposed second floor appears to be a hanging floor structure on one row of columns raised from the ground floor. As per structural stability certificate, this design of structure is as per Indian Standards Codes for General Structural Safety against natural hazards including earthquake protections and after soil investigation and thus it has been claimed that building is structurally safe. Approved and sanctioned map/structure was brought in the Court but has not been placed on record. It was appearing in that map that all columns were proposed from the ground floor. Whereas, in Technical Report, it has been concluded that some pillars have been raised on 9" wall and some from lintel and it would be an ill mannered construction which may cause havoc to self use of all property owner/tenants occupying this building as well as adjoining building owners and innocent common customers also.

22. Every owner is entitled to enjoy, repair, construct or reconstruct the portion of building owned and possessed by him, but not by endangering

life and property not only of others, but also of self and own family. Where there are number of owners of different specific portions in a common building, enjoyment of property to its fullest, carrying repairs and further construction work shall depend upon mutual understanding and cooperation by resorting to a solution beneficial to all stakeholders on the principle of 'Give and Take'. Someone may be more benefitted and someone may be less benefitted. Otherwise reconstruction or further construction in or upon old structure shall never be possible. Where there is dead-lock, there, in absence of any Statute/Rules enacted to deal with such issues, Court has to pass appropriate order based on equity, conscience and keeping in view comparative injury/hardship.

23. In present case, parties are leveling allegations and counter allegations about non-cooperation and causing loss to each other. During pendency of present petition, an endeavour was made for exploring possibility of amicable settlement and parties/representative(s) of parties had also interacted through their respective counsel and at one point, it had appeared that some amicable solution shall be worked out but ultimately there was deadlock with respect to modalities of carrying out construction work on the spot. Defendant No1 was ready to raise all pillars/columns from ground floor subject to providing space and time, by vacating the shop, by plaintiff for a reasonable time but plaintiff, having apprehension of collapse of lintel already laid and also for manner in which beams were constructed and proposed to be constructed for holding lintel above the ground floor, had expressed his reservation to allow raising columns/pillars in the walls of his shop whereupon defendant No.1 had also expressed impossibility of amicable resolution of dispute/problem resulting into deadlock.

24. Ownership of different persons in building in present case is akin to ownership of apartments in a building. The Government of Himachal Pradesh has enacted HP Apartments Ownership Act, 1978 to provide for the

ownership of an individual apartment and to make such apartment heritable and transferable property in Himachal Pradesh. But provisions of the said Act do not deal with situation like present one. Such situations are bound to arise in old buildings having apartments owned and possessed by different persons. Therefore, in public interest, there is need for Legislation or framing of Rules dealing with such eventualities.

25. There may be issues that on what parameters reconstructions shall be allowed; what will be rights and duties of owners; who shall undertake re-construction/ construction and on what terms; who shall decide the terms; what will be the mechanism to deal with claims and counter claims of parties, on what basis necessity of re-construction/construction shall be determined and so on. Therefore, Act/Rules dealing with all such issue are warranted at the earliest.

26. Since long, practice of selling and purchasing parts of a building, flats, lintels or floors has developed, like other parts of the country, in Himachal Pradesh also. Buildings containing such flats/lintels/floors, with few exceptions, are RCC constructions. It is well known that RCC structures, depending upon the strength of cement and iron used for such constructions, have limited life ranging from 40 to 100 years. There may be cases, where different portions of entire building have been sold to different persons and a specific portion/floor of such building, but not the entire building or all floors, may have fast decay for any reason, and for repair or re-construction thereof, there may be requirement of doing construction work or some alteration, modification or repair in other portion owned by another person who, for good condition of his portion, may not be thinking, or in agreement, for undertaking repair/re-construction/construction work in his portion and may be considering it as an additional burden or nuisance to him and it may lead to deadlock between the parties, but definitely causing suffering to the person who really needs repair/re-construction of his portion. There may be a case

where out of total number of flats/floors, only some flats/floors may have been sold and rest flats/floors may be with the owner/ builder/developer and, in the meanwhile, for any reason there may be necessity of repair/re-construction or building may be unsafe for any reason requiring re-construction thereof, in that eventuality, how and in what manner the situation is to be handled, who shall be liable for what amount of consideration for undertaking such repair/re-construction, would be difficult to ascertain in absence of any standard or mechanism/rules to cope with such situation. There may be an instance where one owner of the portion may be considering the building unsafe, whereas another may be considering it safe and both, like in present case, may be able to get certificates, one declaring the building safe and another unsafe. Who will be the final assessing authority to deal with such situation. Such issues also require to be regulated by enacting Rules/Legislation. These are few examples which have emerged during hearing of the case. The Structure Engineers/Architects recognised and working in the field of building construction may be encountering large number of such issues regarding which no law or rules are in existence. Therefore, I am of the considered view that the Government should take initiative in this behalf and should constitute a Committee of well experienced Architects/Structure Engineers and legal luminaries to propose suitable law/rules to deal with aforesaid and like situations, in larger interest of the public and also to avoid unnecessary litigation and decreasing unnecessary load on the courts. The Chief Secretary to the Government of Himachal Pradesh is directed to ensure necessary Legislation or framing of Rules in the aforesaid field within six months from today.

27. In view of conflict in Expert opinion in present case, and also for deciding the modalities for carrying out construction as approved by the Municipal Council (now Municipal Corporation), I am of the view that it would be appropriate to have an expert opinion of Three Members' Committee

consisting of Executive Engineer of HPPWD Division, Palampur and two other expert members/ Engineers, one each nominated by plaintiff and defendants, for examining the claim and counter claim of the parties with respect to safety of existing and proposed building including structure stability of hybrid construction proposed/undertaken on the spot and to suggest appropriate type of stable structure possible and permissible on the spot with safety of all for ensuring enjoyment of property by all and also to suggest mode and manner in which safe and stable structure can be constructed with estimated time and cost to be consumed for such construction work in the area of shop owned and possessed by plaintiff with specific finding as to whether raising of pillar/column would be sufficient or lintel has to be replaced and how and in what manner beam shall bear the load of lintel of first floor above the shop and whether there is requirement of tying the pillar/column with tie-beams at the ground level or not. The Expert Committee is directed to give comprehensive Technical Report for solution to deal with issue in reference with all possible mode of construction as permissible under law and necessary for safe and stable solution. Fee of the two private expert members nominated by the parties shall be paid by them respectively, whereas Executive Engineer of HPPWD shall be paid `30,000/- in total by making payment of `15,000/- each by plaintiff and defendants. The Expert Committee shall submit its report to the trial Court, on or before the date fixed by the Trial Court after 15 days of passing of order, with a copy endorsed to Registrar General of High Court of Himachal Pradesh for placing on record of this file.

28. In view of above discussion, impugned order dated 18.9.2017 passed by learned Additional District Judge, Kangra at Dharamshala is set aside. For reasons assigned therein, order dated 21.3.2016, passed by the Trial Court is also not sustainable and, as such, the same is also set aside. However, till further order passed by the trial court, parties are directed to

maintain status quo qua nature, possession, alienation and construction of suit property comprised in Khasra No.1981.

29. Parties are directed to appear before the Trial Court on 17.2.2022 with name and details of expert members of Committee to be nominated by them. Thereafter, trial Court shall pass an order directing the Committee to submit its report within fifteen days thereafter and after receiving the report, the Trial Court shall proceed further in accordance with law, by taking into consideration the report submitted by the Committee.

30. In case Expert Committee purposes construction of pillars/columns of the building from the ground floor, then plaintiff has to provide space for construction thereof, which shall be completed within reasonable time as considered by the Expert Committee necessary for raising such pillars/ columns/beams/tie-beams and in case new lintel is to be laid on such pillars/columns by dismantling earlier one, plaintiff as well as defendants shall share the cost as proposed by the Expert Committee. Further modalities for completion of proposed construction shall be determined by the trial Court either with consent of the parties or otherwise after hearing the rival contention of the parties on receipt of report of Expert Committee and appropriate order shall be passed with respect to grant or refusing the permission to raise construction during pendency of the suit.

31. Copy of this order be sent to the Executive Engineer, HPPWD Division, Palampur, District Kangra, Himachal Pradesh, for information and compliance.

32. Copy of this order be sent to the Chief Secretary to the Government of Himachal Pradesh, for compliance in terms of Paras 21 to 26.

Petition stand disposed of, so also pending application

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

Between:-

1. SMT. SWEETY @ SAVITA
   D/O LT. SH. SAWAN SHAH,
   W/O SH.ANIL KOHLI,
   R/O SHYAM SUNDER TILAK RAJ CLOTH MARKET, KHANNA, PUNJAB.

   (BY SH.VIRENDER SINGH CHAUHAN, SENIOR ADVOCATE, WITH MR.PRANSHUL SHARMA, ADVOCATE)

....PETITIONER

AND

1. TARUN SAHNI

2. RAJESH SAHNI
   BOTH SONS OF LT. SH. BHAGAT RAM SAHNI.

3. SMT. RAJ KUMARI SAHNI
   WD/O LT. SH. BHAGAT RAM SAHNI,

4. SMT. KIRAN SURI
   D/O LT.SH.BHAGAT RAM SAHNI,
   ALL RESIDENTS OF SOM LODGE NEAR ITI, SOLAN, TEHSIL AND DISTRICT SOLAN.

   (BY SH. SUDHIR THAKUR, SENIOR ADVOCATE, ALONGWITH SH.ANKUSH VERMA, ADVOCATE)

5. MANMOHAN SAHNI

6. SH.BAL KRISHAN SAHNI,
   BOTH SONS OF LT. SH. SAWAN

SHAH SAHNI,
PROPERTIES M/S SAHANI HARDWARE, UPPER BAZAAR SOLAN, TEHSIL AND DISTRICT SOLAN, H.P. ….RESPONDENTS

(BY SH.DALIP SHARMA, ADVOCATE)

7. HARISH ANAND
S/O LT. SMT. USHA, W/O SH.GULSHAN ANNAND,
R/O 102/174,
SECTOR-16, ROHINI,
NEAR DISTRICT PARK DELHI. …PROFORMA RESPONDENT

(BY SH.RAHUL CHAUHAN, ADVOCATE)

CIVIL MISC.PETITION MAIN (ORIGINAL)
NO.331 OF 2021
Reserved on:05.01.2022
Decided on: 07.01.2022

Code of Civil Procedure, 1908- Order I Rule 10 – Section 14 of H.P. Urban Rent Control Act, 1987- Addition of parties- Application dismissed- Inordinate and unexplained delay of 12 years- Petitioner claiming to be co-owners and entitled for arrears of rent of premises- As per revenue record landlords are exclusive owners of premises and entitled to maintain rent petition independently- Held- Application rightly dismissed. (Paras 13, 14, 16)

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

O R D E R

The instant petition has been preferred against the impugned order dated 20.10.2021, passed by the Rent Controller Solan, District Solan, H.P., in Rent Petition No.22/2 of 2007, titled as *Tarun Sahni and others vs. Manhonan Sahni and another*, whereby an application preferred by the petitioner and respondent No.7-Harish Anand, under Order 1 Rule 10 of Code of Civil Procedure (in short 'CPC') for impleading them as petitioners in the Rent Petition, has been dismissed.

2. I have heard learned counsel for the parties and have gone through the material placed before me.

3. Respondents No.1 to 4 (hereinafter referred to as 'landlords/respondents') have filed Rent Petition for vacation of premises, in reference in Rent Petition, for non-payment of arrears of rent and impairment of the premises by tenants Manmohan Sahni and Bal Krishan Sahni (respondents No.5 and 6) sons of late Sh.Sawan Shah Sahni (hereinafter referred to as 'tenants').

4. The Rent Petition is at its advanced stage, wherein after hearing arguments, final order is to be pronounced. Petitioner Sweety is real sister of tenants Manmohan Sahni and Bal Krishan Sahni. Respondent No.7 Harish Anand is son of Usha. Usha was also real sister of the petitioner and tenants respondents No.5 and 6. Petitioner alongwith respondent No.7 Harish Anand is claiming that they are entitled to be impleaded as petitioners for having right in the premises in question. Because, as co-owners, they are also entitled to receive rent as well as arrears of rent of the premises in question. Premises in question is situated in Khasra No.249 situated in upper Bazaar, Mauza Lower Bazaar, Solan.

5. Claim of the petitioner and respondent No.7 is based upon entries in Jamabandi for the year 1992-1993 (Annexure P-4) wherein Sawan Shah Sahni, father of petitioner, as well as tenants respondents No.5 and 6

have been shown as co-owner of Khasra No.249 alongwith his brothers Bhagat Ram (father of landlords-respondents) and Teerath Ram.

6. Reliance has also been placed by the petitioner on mutation No.535 dated 30.11.1998, whereby ownership of 1/3rd share in shop situated on land comprised in Khasra No.249/33, after death of Sawan Shah, on 22.07.1997, was transferred in favour of children of Sawan Shah Sahni namely Girdhari Lal, Manmohan, Rajpal and Bal Kishan (all sons) and Usha, Pammi, Shammi and Sweety (all daughters) and ownership of rest 2/3rd remained as it is i.e. in ownership of Bhagat Ram and Teerath Ram.

7. Landlords-respondents are claiming themselves as exclusive owners of the shop in question on the basis of mutation No.1272 dated 13.06.2005 whereby on the basis of family partition (Khangi Takseem), in the presence of all shareholders, shop comprised in Khasra No.249/33 has been transferred in favour of landlord-respondents namely Tarun, Rajesh both sons and Kiran daughter and Raj Kumari (wife of late Bhagat Ram).

8. Claim of the petitioner and respondent No.7 is that being co-owners they are also entitled for arrears of rent and in case they are not added as petitioners in Rent Petition, then for recovery of arrears of rent, for which they are also entitled they have to file a separate suit and, therefore, their non-impleadment in the Rent Petition, would result into multiplicity of litigation. It has further been stated on behalf of the petitioner that mutation No.1272 has been assailed by the petitioner by filing a Civil Suit against the landlords-respondents in which landlords-respondents have been proceeded *ex parte* and, therefore, right of landlords-respondents, claimed on the basis of mutation No.1272, is under cloud and, therefore, they cannot be stated to be absolute owners of the premises in question, rather they alongwith petitioner and others are co-owners and, therefore, rejection of application filed by the petitioner and respondent No.7 is not tenable and by doing so, the Rent Controller has committed illegality and material irregularity.

9. Learned counsel for the landlord-respondents has submitted that present petition has been preferred under Article 227 of the Constitution of India, which is not maintainable in view of judgment dated 05.07.2012, passed by the Full Bench of this Court in C.R. No.136 of 2010, titled as *Shri Vinod alias Raja vs. Smt. Joginder Kaur,* whereby it has been concluded that any person, aggrieved by an order which is not available under Section 24(1) of the Himachal Pradesh Urban Rent Control Act, 1987 (hereinafter referred to as 'the Act'), has to prefer an appeal as per the Scheme of CPC and, therefore, petitioner was having remedy to file appeal in consonance with the verdict of the Full Bench in C.R. No.136 of 2010 and, therefore, petition is liable to be dismissed.

10. Learned counsel for the landlord-respondents has also produced photocopy of petition filed by respondents NO.5 and 6 (tenants) against the landlords-respondents under Section 21 of the Act for depositing rent stating therein that landlords-respondents are not accepting rent despite due efforts by the petitioner. He has further submitted that in case landlord-respondents are not landlords then there was no occasion for tenants respondents No.5 and 6 to file application under Section 21 of the Act against them and further in case petitioner and respondent No.7 were and are also landlords, then tenants respondents No.5 and 6 would have arrayed them also as respondents in the application filed under Section 21 of the Act and/or would have made payment of the rent to the petitioner and/or respondent No.7, who are none else but real sister and son of real sister of tenants respondents No.5 and 6.

11. It has further been contended on behalf of landlord-respondents that landlords-respondents, either singly or jointly with other persons claiming status of landlord who are entitled to receive rent in respect of the building, are entitled to file and maintain Rent Petition even without joining other co-owners and the claim with respect to rent or arrears of rent, if any, *inter se* landlords-respondents is to be decided and determined in separate

independent proceedings, may be in appropriate Civil Suit, but not in Rent Petition filed by one or more of the co-owners for eviction of tenant.

12. It has further been contended on behalf of the landlord-respondents that petitioner is real sister of tenants Manmohan Sahni, Bal Krishan Sahni and respondent No.7-Harish Anand is her nephew, who is son of another sister of tenants Manmohan Sahni and Bal Krishan Sahni and they have filed application with only intention to linger on the Rent Petition in order to frustrate the claim and right of real owners/landlord-respondents. It has further been stated that Rent Petition is pending since 2007 and after period of 12 years suddenly sister and son of sister of tenants have made an appearance claiming that they are also co-owners of the premises in question and further that even if they are considered to be co-owners of the premises in question, they are not entitled to be impleaded as party at this stage and any claim put forth by them can be decided and determined in the suit already filed by them.

13. A co-owner can file a Rent Petition independently or jointly with others, but in case he prefers an Eviction Petition independently, then also other co-owners being landlords shall also be entitled for the benefits of the order passed by the Rent Controller in case they succeed in establishing their co-ownership and entitlement in the property in reference in Rent Petition. The said issue can be decided independent of Rent Petition, particularly when the persons claiming themselves as co-owners keep sleeping for inordinate unexplained long period of about 12 years. Material on record smacks collusion between tenants (respondents No.5 and 6) and applicants (petitioner and respondent No.7) in order to frustrate the claim of true owners of the property in reference.

14. Perusal of record reveals that Sawan Shah Sahni, Teerath Ram, Bhagat Ram were real brothers and they were joint owners of the shop in reference as per Jamabandi for the year 1992-1993 and after death of Sawan

Shah Sahni, his 1/3rd share in shop was inherited by his sons and daughters namely Girdhari Lal, Manmohan, Rajpal, Bal Kishan, Usha, Pammi, Shammi and Sweety and mutation No.535 dated 30.11.1998 was attested to that effect. Lateron, as per family settlement, this shop was given to landlord-respondents, who are wife, sons and daughter of late Bhagat Ram (brother of Sawan Shah Sahni). On the basis of family settlement, this shop came in their share and mutation No.1272 dated 13.06.2005 was attested in their favour in presence of co-sharers which includes petitioner also. As per latest revenue record, landlord-respondents are exclusive owners of the premises in reference in Rent Petition. Though it has been claimed that the said mutation has been challenged by the petitioner and others, but it is a fact that till date it has not been set aside. On the basis of latest revenue record, landlord-respondents, being exclusive owners of the premises in reference, are entitled to maintain Rent Petition independently.

15. In case Civil Court finds that petitioner and respondent No.7 are also co-owners of the property and entitled for Rent, then appropriate decree for recovery can be passed in the suit preferred by the petitioner. But on the basis of present status of record landlord-respondents are only owners of the property in reference. It is also noticeable that respondents No.5 and 6-tenants are also claiming themselves to be co-owners in the property in reference and they are denying their status of tenant and landlord between them and landlord-respondents and on the basis of such pleadings issues have also been framed and case is at final state of hearing arguments.

16. In the aforesaid facts and circumstances, I am of the considered opinion that at this stage, there is nothing on record to substantiate claim of the petitioner and respondent No.7 that they are co-owners of the property in reference in Rent Petition and the stand of respondents No.5-6 (tenants) is the same as that of petitioner and respondent No.7 which indicates that petitioner and respondent No.7 have jumped into the fray at the instance of tenants

respondents No.5 and 6 in order to delay eviction proceedings. In any case, issue raised by the petitioner and respondent No.7 is already a point in issue in Eviction Petition for the plea taken by tenants respondents No.5 and 6 in their reply to the Rent Petition. Therefore, I find no ground for impleading petitioner and respondent No.7 as petitioners in Rent Petition and accordingly I find no infirmity, illegality, irregularity and perversity in the impugned order passed by the Rent Controller, so as warranting interference by this Court.

17. Though, learned counsel for the landlord-respondents has raised issue of maintainability of present petition in view of decision of Full Bench in C.R. No.136 of 2010, however, present petition has been adjudicated and decided on merit without going into the said question.

18. In view of above, petition is dismissed being devoid of merit.

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

Between:

SH. LACHHMI CHAND @ CHANDU, S/O SH. CHAMARU, R/O VILLAGE CHHAJWAR, P.O. MALOH, TEHSIL SUNDER NAGAR, DISTRICT MANDI, HP.

...PETITIONER

(BY MR. HOSHIYAR SINGH RANGRA, ADVOCATE)

AND

1. THE LAND ACQUISITION COLLECTOR, HPPWD MANDI, DISTRICT MANDI, HP.

2. THE EXECUTIVE ENGINEER HPPWD DIVISION SUNDER NAGAR, DISTRICT MANDI, HP.

...RESPONDENTS

(BY MR. ADARSH SHARMA, MR. SUMESH RAJ AND MR. SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS WITH MR. J.S. GULERIA AND MR. KAMAL KANT CHANDEL, DEPUTY ADVOCATE GENERALS)

CIVIL MISC. PETITION MAIN (ORIGINAL)
No. 154 of 2021.
Decided on: 07.09.2021

Constitution of India, 1950- Article 227- To set aside the award of National Lok Adalat- Held- On the basis of the statements of the parties award was passed in the National Lok Adalat- Petitioner did not aver in the application filed for release of amount that cross-objection which stood filed by him were wrongly withdrawn- Present petition appears to be an afterthought- Petition dismissed.

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

O R D E R

By way of this petition filed under Article 227 of the Constitution of India, a prayer has been made for setting aside the award passed by the National Lok Adalat, on 9.12.2017, on the ground that the award so passed by the National Lok Adalat, is not sustainable in the eyes of law as the petitioner had never acquiescenced to any settlement of the issue by way of conciliation, nor the learned counsel who made a statement before the National Lok Adalat compromising the matter on his behalf was authorized to do so.

2. I have heard the learned counsel for the parties and have also gone through the award passed by the National Lok Adalat as well as the record of the case.

3. The award under challenge is dated 09.12.2017. A perusal of the record demonstrates that Sh. Surinder Verma, learned counsel who appeared on behalf of the petitioner, made a statement before the Lok Adalat that as the State was intending to withdraw the appeal filed by it, the petitioner be also permitted to withdraw the cross-objections filed by him. It was on the basis of said statement made before the Lok Adalat that the award was passed by it.

4. Record further reveals that thereafter on the strength of the award, so passed by the National Lok Adalat dated 9.12.2017, the petitioner Laxmi Chand filed a miscellaneous application for release of the amount. Incidently, in this application, no averments were made by the petitioner that the cross-objections which stood filed by him, were wrongly withdrawn on the basis of a statement of learned counsel, who was not authorized by him to give such statement and the application was being filed by him by reserving his right to assail the award passed by the National Lok Adalat, on the ground on which the present petition has been filed.

5. This demonstrates that filing of the present petition is nothing but an afterthought and in this view of the matter, the Court does not intends to agree with the contention of the petitioner that the award so passed was without his acquiescence.

Accordingly, this petition is dismissed. Pending applications, if any, also stand dismissed.

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

Between:

MUNNU RAM S/O SH. RATTI RAM,
R/O VILLAGE & P.O. DHAR CHANDANA, TEHSIL KUPVI,
DISTRICT SHIMLA-171210, H.P.

....PETITIONER.

(BY. MR. NEEL KAMAL SOOD AND MS. SEEMA AZAD, ADVOCATES)

AND

DR. PANKAJ LALIT, DIRECTOR
ELEMENTARY EDUCATION, H.P.

….RESPONDENT.

(BY. MR. ADARSH SHARMA, MR. SUMESH RAJ AND MR. SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL.

CIVIL ORIGINAL PETITION CONTEMPT (TRIBUNAL)
No.34 of 2021
Decided on: 26.11.2021

Contempt of Courts Act, 1971- Petitioner has sought appropriate action against the respondent for non-compliance of directions passed by erstwhile H.P. Administrative Tribunal- Held- Appropriate Authority has taken a decision in terms of the order passed by the Tribunal, though it is not in favour of the petitioner, nothing survives in these contempt proceedings, as such, ordered to be closed.

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

O O R D E R

By way of these contempt proceedings, the petitioner had approached this Court for taking appropriate action against the respondent for non-compliance of the directions passed by erstwhile learned Himachal Pradesh Administrative Tribunal, in *O.A. No.3105 of 2019*, titled as *Munnu Ram* Versus *State of Himachal Pradesh and others*, decided on *22.07.2019*, which Original Application stood disposed of by the learned Tribunal in the following terms:-

> "*In view of the above, the original application is disposed of in terms of the aforementioned judgment, with a direction to the respondents/ competent authority that subject to the above verification and on finding the applicant to be similarly situate as*

> *above, benefit of the said judgment, if the same has attained finality/implemented, shall be extended to him alongwith consequential benefits, if any, as per law, within three months from the date of production of certified copy of this order before the said authority by the applicant.*"

2. Today, learned Additional Advocate General on the strength of instructions so imparted by Director, Elementary Education, to the Government of Himachal Pradesh, dated 25.11.2021, informs the Court that appropriate orders in terms of the directions passed by the learned Tribunal have now been passed by the competent authority on 25.11.2021.

3. In number of cases, it has been observed by the Court that time bound directions passed by the learned Tribunal are not being complied within the period envisaged and it is only after the aggrieved party approaches this Court by way of either execution proceedings or contempt proceedings that necessary orders are being passed. This Court deprecates this kind of practice and though in this particular case no observation is being made against the authority concerned, but this Court is issuing a caveat that delay in passing of appropriate order in terms of the directions passed by the appropriate Court of Law by the authority concerned shall be viewed with extreme seriousness by the Court and the same shall be construed as contempt/disobedience of the Court orders until and unless the authority concerned is able to satisfy as to why appropriate order could not be passed within the time granted by the Court.

4. As it is not in serious dispute that now in terms of the orders passed by the learned Tribunal, the appropriate authority has taken a decision, though it is not in favour of the petitioner, this Court is of the considered view that nothing survives in these contempt proceedings and accordingly the same are ordered to be closed.

5. The petitioner is at liberty to assail the order which has now been passed by the authority concerned in terms of the directions passed by the appropriate Court of Law. Notice stands discharged.

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

Between:

GURBACHAN SINGH SON OF SHRI RANGA RAM, RESIDENT OF MAIN BAZAR, PANDOH, TEHSIL SADAR, DISTT. MANDI, H.P.

….APPELLANT-CLAIMANT.

(BY. MR. G.R. PALSRA, ADVOCATE)

AND

SMT. KAMLI DEVI WIFE OF SHRI RUP CHAND, R/O VILLAGE SOJHA, P.O. PANDOH, TEHSIL SADAR, DISTT. MANDI, H.P.

…. RESPONDENT/ACCUSED.

(BY MS. MONIKA, LEARNED LEGAL AID COUNSEL)

CRIMINAL APPEAL
No.317 of 2010
Decided on:10.12.2021

Negotiable Instruments Act, 1881- Section 138- Complaint dismissed on the ground that cheque in question stood issued as security, therefore said cheque did not attract the provisions of Section 138 of the Negotiable Instruments Act- Held- Findings returned by the Ld. Trial Court are not sustainable in the eyes of law- Matter remanded back to the Trial Court for adjudication afresh on merit.

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

J U D G M E N T

The issue involved in this appeal is in a very narrow compass.

A complaint filed by the present appellant under Section 138 of the Negotiable Instruments Act stands dismissed by the learned Judicial Magistrate, 1st Class, Court No.3, Mandi, H.P., vide judgment 26.04.2010, passed in Criminal Complaint No.18-III/2006, titled as Gurbachan Singh Versus Kamli Devi, on the ground that as the cheque subject matter of the complaint stood issued as a 'security cheque', therefore, said cheque i.e. the security cheque did not attract the provisions of Section 138 of the Negotiable Instruments Act.

2. Brief facts, necessary for the adjudication of the present appeal are as under:-

As per the appellant/complainant, the respondent/ accused took a loan of Rs.55,000/- from him and in lieu of the same, she handed over a cheque for an amount of Rs.55,000/-, drawn upon Punjab National Bank, Pandoh, Tehsil Sadar, Distti.Mandi, H.P., in his favour on 28.12.2005. The amount of Rs.55,000/- was borrowed in the 3rd week of October, 2005. It is further the case of the complainant that when said cheque was handed over for its collection to the bank concerned, the same was dishonoured on the ground of insufficiency of funds. Thereafter, a statutory notice was issued to the respondent/accused for payment of the said amount, but as the accused did not heed to the said notice, complaint stood filed under Section 138 of the Negotiable Instruments Act. This complaint has been dismissed by the learned Trial Court vide judgment dated 26.04.2010, primarily on the ground that as the cheque was issued by way of security, therefore, such like cheques do not attract the provisions of Section 138 of the Negotiable Instruments Act.

3. Mr. G.R. Palsra, learned counsel for the appellant has argued that the judgment passed by the learned Trial Court is not sustainable in the eyes of law as it has been clearly laid down by Hon'ble Supreme Court of India that even dishonouring of such cheques which are issued by way of security, do attract the provisions of Section 138 of the Negotiable Instruments Act. He has placed reliance on the judgment of Hon'ble Supreme Court in *(2016) 3 Supreme Court Cases*, titled as *Don Ayengia* Versus S*tate of Assam and Another*, in which Hon'ble Supreme Court has been pleased to hold in Para-12 thereof as under:-

> "*12. The difficulty arises only because the promissory note uses the words "security" qua the cheques. This would ordinarily and in the context in which the cheques were given imply that once the amount of rupees ten lakhs was paid, the cheques shall have to be returned. There would be no reason for their retention by the complainant or for their presentation. In case, however, the amount was not paid within the period stipulated, the cheques were liable to be presented for otherwise there was no logic or reason for their having been issued and handed over in the first instance. If non-payment of the agreed debt/liability within the time specified also did not entitle the holder to present the cheques for payment, the issuance and delivery of any such cheques would be meaningless and futile, if not absurd.*"

4. Accordingly, learned counsel for the appellant has submitted that as the judgment passed by learned Trial Court below is in-conflict with the law of land as has been laid down by Hon'ble Supreme Court of India, therefore, the present appeal be allowed.

5. Defending the order passed by the learned Court below, Ms. Monika, learned Legal Aid Counsel appearing for the respondent has argued that as the cheque was issued just as a security and otherwise also as the borrowed amount stood paid back by the accused to the complainant, the filing of the complaint was nothing, but an act of harassment on the part of the

complainant and the complaint accordingly stands rightly rejected by the learned Trial Court below. She has argued that the onus to demonstrate that the cheque was issued in lieu of some loan etc. taken from the complainant by the accused was squarely upon the complainant which he failed to discharge, as no evidence was brought on record to prove the allegations contained in the complaint. She has accordingly prayed that as the judgment passed by the learned Trial Court is a well-reasoned judgment, duly substantiated by the law as stands mentioned therein, therefore, the present appeal being devoid of any merit be dismissed.

6. I have heard learned counsel for the parties and have also gone through the judgment passed by the learned Trial Court as well as record of the case.

7. As I have already mentioned hereinabove, the complaint of the present appellant stood dismissed by the learned Trial Court on the sole ground that as the cheque stood issued by the respondent to the complainant by way of security, therefore, such like cheques do not attract the provisions of Section 138 of the Negotiable Instruments Act. This Court is of the considered view that these findings which have been returned by the learned Trial Court are not sustainable in the eyes of law.

8. Section 138 of the Negotiable Instruments Act deals with penalties in case of dishonour of certain cheques for insufficiency of funds in the account. A perusal of the said statutory provision demonstrates that there is no distinction which is made therein with regard to a cheque which is dishonoured on account of insufficiency of funds etc. in the account, in case it is issued as a security vis-à-vis a cheque which has not been issued as a security. In fact, this issue is no more *res integra* and Hon'ble Supreme Court of India in *Don Ayengia* Versus S*tate of Assam and Another's case (supra)* has been pleased to hold that the cheques which are issued by way of security, cannot be treated to be ornamental only and the person in whose favour such

cheque has been issued, has a right to present the cheque for payment if the agreed debt/liability is not paid within the time specified.

9. Therefore, this Court is of the considered view that as the judgment under challenge is in-conflict with the law as stands laid down by Hon'ble Supreme Court of India, the same is not sustainable in the eyes of law.

10. Accordingly, this appeal is allowed and judgment dated 26.04.2010, passed by the Court of learned Judicial Magistrate, 1st Class, Court No.3, Mandi, H.P., in Criminal Complaint No.18-III/2006, titled as Gurbachan Singh Versus Kamli Devi, is ordered to be set aside and the matter is remanded back to the learned Trial Court for adjudication afresh on merit.

11. It is clarified that as far as the merits of the case are concerned, this Court has not expressed any opinion thereof and the case be decided by the learned Trial Court on the basis of the pleadings of the parties and the respective stand taken by them before the learned Trial Court and the evidence which stands led by them to prove their respective contentions. It is further clarified that the learned Trial Court shall not be influenced by any observation which might have been made by this Court in this judgment as far as the adjudication of the complaint on merit is concerned.

12. The appeal stands disposed of accordingly, so also pending miscellaneous applications, if any.

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

Between:

STATE OF HIMACHAL PRADESH

…APPELLANT

(BY MR. ASHOK SHARMA, ADVOCATE GENERAL, MR. RAJINDER DOGRA, SENIOR ADDITIONAL ADVOCATE GENERAL, MR. VINOD THAKUR,

ADDITIONAL ADVOCATE GENERAL AND MR. RAJAT CHAUHAN, LAW OFFICER)

AND

JIA LAL, SON OF SHRI RAM LAL, RESIDENT OF GASOH, P.O. JHAKRI, TEHSIL RAMPUR BUSHEHAR, DISTRICT SHIMLA, H.P.

…RESPONDENT

(BY MR. P.P. CHAUHAN, ADVOCATE)

CRIMINAL APPEAL
NO. 254 OF 2010
Decided on: 30.12.2021

Indian Penal Code, 1860- Sections 279 and 337- Motor Vehicle Act, 1988- Sections 181 and 185- Trial Court acquitted the accused- Judgment assailed in appeal- Held- Being criminal offence, the ingredients of the offences must be proved beyond reasonable doubt and evidence must clearly indicate the level of alcohol in excess of 30 mg in 100 ml blood- Prosecution has failed to prove that accused was driving the vehicle under the influence of liquor- Appeal dismissed.

Cases referred:

Bachubhai Hassanalli Karyani vs. State of Maharashtra, 1971(3) SCC 930;
Iffco Tokio General Insurance Company Limited vs. Pearl Beverages Limited (2021) 7 SCC 704;

This appeal coming on for order this day, this Court passed the following:

J U D G M E N T

Aggrieved by the judgment dated 16.2.2010, passed by learned Sub Divisional Judicial Magistrate, Rampur, District Shimla in case No. 195-2 of 2007, whereby the accused/respondent stood acquitted, the appellant-State has filed the instant appeal.

2. As per the prosecution case, on 16.7.2007, the respondent/accused was found to be driving vehicle bearing registration No. HP-01A-3573 in a rash and negligent manner. He lost control over the vehicle as a result of which the vehicle rolled down approximately 15 feet, resulting in simple injuries on the person of the respondent. The matter was reported to the Police and on the basis of investigation carried out, it was opined that the respondent/accused was driving the vehicle in a rash and negligent manner, that too without having a valid and effective driving license. Accordingly, notice of accusation under Sections 279 and 337 IPC and Sections 181 and 185 of the Motor Vehicles Act was put to the accused, to which he pleaded not guilty and claimed trial.

3. The prosecution examined six witnesses. Thereafter statement of respondent/accused under Section 313 Cr. P.C. was recorded. After evaluating the evidence, learned trial Magistrate acquitted the respondent/accused constraining the appellant-State to file the instant appeal.

4. It is vehemently argued by Mr. Vinod Thakur, learned Additional Advocate General that findings recorded by the learned Trial Court are perverse inasmuch as it has failed to take into consideration the statements of the prosecution witnesses in the right perspective. Therefore, on this sole ground the judgment deserves to be set aside. In addition, it is averred that there was ample amount of evidence to substantiate and prove the fact that the respondent/accused, at the relevant time, was under the influence of alcohol.

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

6. At the outset, it needs to be observed that a person can be said to be under the influence of alcohol, if his faculties are so disturbed that his driving ability is impaired. To be under influence of alcohol must be

understood as a question going to the facts and a matter to be decided with reference to the impact of consumption of alcohol on the particular driver. If in a case, without there being any blood test, circumstances associated with effects of consumption of alcohol are proved, it may certainly go to show that the person who drove the vehicle had come under the influence of alcohol. The manner in which the vehicle was driven, may again, if it unerringly points to the person having been under the influence of alcohol, be reckoned. Evidence, if forthcoming, of an unsteady gait, smell of alcohol, either before the commencement of the driving or even during the process of driving, along with the manner in which the accident took place, may point to the driver being under the influence of alcohol. It would be a finding based on the effect of the pleadings and the evidence. It is so held by the learned three-judge Bench of the Hon'ble Supreme Court in its recent judgment, titled as, "**Iffco Tokio General Insurance Company Limited versus Pearl Beverages Limited",** reported in (2021) 7 Supreme Court Cases 704.

7. Earlier to this, the learned three-judge Bench of the Hon'ble Supreme Court in "**Bachubhai Hassanalli Karyani versus State of Maharashtra,** reported in 1971(3) Supreme Court Cases 930 had held that drunkenness cannot be said to be conclusively proved unless urine or blood test are carried out. Mere smell of alcohol, unsteady gait, dilation of pupils and incoherence in speech is not enough.

8. Bearing in mind the afore exposition of law, it would be noticed that the prosecution had examined two passengers, PW-2 Kimat Singh and PW-3 Surender to prove that the respondent/accused was under the influence of alcohol at the relevant time. These witnesses have stated that on the date of accident they were in the vehicle being driven by the accused. They further stated that the accused had consumed alcohol. However, both these witnesses have stated that they were taken safely by the

respondent/accused. Therefore, their testimony is of no avail, muchless of no assistance or help for the prosecution.

9. On the other hand, the respondent/accused was examined by the Medical Officer, who opined that the respondent had consumed alcohol, but was not under the influence of alcohol. That apart, Medical Officer Shri Bimal Negi and the Investigating Officer, Shashi Bhushan did not make any reference to obtain the blood or urine samples of the accused, so as to ascertain as to whether the accused was actually under the influence of alcohol or not. In the absence of such tests, learned Trial Magistrate committed no error by concluding that there was no material available on record to establish that the respondent was in fact under the influence of alcohol at the relevant time and that his faculties were so disturbed that his driving ability was impaired, as noticed above.

10. Apart from the accused having been charged for the offences punishable under Sections 279 and 337 of IPC, he had also been charged for the offences punishable under Sections 181 and 185 of the Motor Vehicles Act. Section 185 of the Motor Vehicles Act creates a criminal offence. It purports to deal with driving by a drunken person or by a person under the influence of drugs. Being a criminal offence, the ingredients of the offence must be proved beyond reasonable doubt and evidence must clearly indicate the level of alcohol in excess of 30 mg in 100 ml blood and what is more such presence must be borne out by a test by breath analyser or any other test, including laboratory test. Even in the absence of these tests, the prosecution could have proved the case otherwise by leading cogent and convincing evidence. Once the prosecution has failed to prove that the respondent/accused was driving the vehicle under the influence of liquor, obviously then none of the offences, to which the respondent/accused stood charged, is made out.

11. Since the prosecution has failed to show that at the time of driving the vehicle in question, resulting in accident, the respondent/accused was under the influence of alcohol, therefore no infirmity can be found in the judgment of acquittal recorded by the learned trial Magistrate.

12. Consequently, there is no merit in the appeal and the same is dismissed. Pending application(s), if any, are also disposed of.

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

Between:-

AJMER SINGH
AGE 56 YEARS,
S/O SH. SURMUKH SINGH,
R/O VILLAGE BEHRAL,
TEHSIL PAONTA SAHIB,
DISTRICT SIRMOUR, H.P.,
WHO IS IN JUDICIAL CUSTODY & PRESENTLY LODGED AT CENTRAL MODEL JAIL AT NAHAN, H.P. .....PETITIONER

(BY SH.RAHUL SINGH VERMA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH .....RESPONDENT

(BY SH.RAJU RAM RAHI, DEPUTY ADVOCATE GENERAL)

CRIMINAL MISC. PETITION (MAIN) NO.1550 OF 2021

Between:-

BUDH RAM
SON OF SHRI CHUHAR RAM,

AGED ABOUT 41 YEARS,
RESIDENT OF VILLAGE SATWALA,
POST OFFICE BATA MANDI,
TEHSIL PAONTA SAHIB,
DISTRICT SIRMAUR,
HIMACHAL PRADESH,
PRESENTLY CONFINED IN MODEL JAIL NAHAN, SIRMAUR, DISTRICT SIRMAUR, H.P. (THROUGH HIS FIRST FRIEND.)

.....PETITIONER

(BY SH.KUSH SHARMA, ADVOCATE)

AND
STATE OF HIMACHAL PRADESH

...RESPONDENT

(BY MR.RAJU RAM RAHI, DEPUTY ADVOCATE GENERAL)

CRIMINAL MISC. PETITION (MAIN) NO. 2134 OF 2021

Between:-

SH.AHSAAN
S/O SH. SHAHID, AGED ABOUT 30 YEARS, R/O VILLAGE DHARMAWALA,
TEHSIL VIKASNAGAR,
DISTT.DEHRADUN, UTTARAKHAND,
PRESENTLY AT MODEL CENTRAL JAIL,
NAHAN (H.P).

.....PETITIONER

(BY SH.TOPENDER KUMAR VERMA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH .....RESPONDENT

(BY SH.ANIL JASWAL, ADDITIONAL ADVOCATE GENERAL)

CRIMINAL MISC. PETITION (MAIN) NO. 2100 OF 2021

Between:-

CHAMAN LAL @ TINKU
S/O SH. SURAT RAM,
R/O WARD NO. 4, TARUWALA,
TEHSIL PAONTA SAHIB,
DISTT. SIRMOUR, H.P.
AGED 41 YEARS .....PETITIONER

(BY SH.DEEPAK KAUSHAL, ADVOCATE)

AND

STATE OF H.P. .....RESPONDENT

(BY SH.RAJU RAM RAHI, DEPUTY ADVOCATE GENERAL)

(H.C. TEJINDER SINGH NO.05, I.O. POLICE STATION PAONTA SAHIB, DISTRICT SIRMOUR, PRESENT ALONGWITH RECORD.)

CRIMINAL MISC. PETITION (MAIN)
NO. 1466 OF 2021
Decided on: 29.12.2021

Code of Criminal Procedure, 1973- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 15, 29, 27-A- Recovery of 200.278 Kg. poppy straw from Truck- Held- The general rule bail but not jail cannot be used as a weapon to render the provisions, empowering the Court to

reject the bail, redundant and/or as a guiding factor to enlarge an accused on bail, in every case- Bail petitions dismissed.

Cases referred:

Amit Singh Moni vs. State of Himachal Pradesh, Criminal Appeal No.668 of 2020;

Chaitan Mali vs. State of Odisha, 2021 SCC online Ori 564;

Kaleem vs. Union of India, 2003 Crl.J 2685 (Allahabad High Court);

Mohit Aggarwal vs. Narcotics Control Bureau, Manu/DE/0488/2021 (Delhi High Court);

Roy V.D. vs. State of Kerala, (2000) 8 SCC 590;

Sanjeev Chandra Agarwal & Another vs. Union of India, Criminal Appeal No(s). 1273 of 2021;

Sarija Banu alias Janarthani alias Janani and another vs. State through Inspector of Police, (2004) 12 SCC 266;

Shashikant Prabhu vs. Rahul Saini, 2020 SCCC online Bom 11226;

Shivraj Urs vs. Union of India, Criminal Petition No.6322 of 2020 (Karnataka High Court);

Sujit Tiwari vs. State of Gujarat, Criminal Appeal No.1897 of 2019 (@Special Leave Petition (Criminal) No.3478 of 2019;

Tapan Das vs. Union of India, Petition for Special Leave to Appeal (Crl.) No.5617 of 2021;

Tofan Singh vs. State of Tamil Nadu, 2021 (4) SCC 1;

Yousuf vs. State of Kerala, 2021 SCC online Ker 851;

These petitions coming on for orders this day, the Court passed the following:

O R D E R

Petitioners have approached this Court, under Section 439 Criminal Procedure Code (in short 'Cr.P.C.'), for granting them bail in case FIR No. 21 of 2021 dated 11.02.2021, registered under Sections 15, 29, 27-A of Narcotic Drugs and Psychotropic Substances Act (hereinafter in short 'NDPS Act') in Police Station Paonta Sahib, District Sirmaur (H.P.).

2. Status Report stands filed, wherein it is brought on record that on 11.02.2021, at about 6 a.m., on the basis of reliable information that from Truck No. HP-11-4991 moving towards Banjara Basti huge poppy-straw can be recovered, the said information was transmitted to Sub Divisional Police Officer as provided under Section 42 (2) of NDPS Act and police party had rushed towards Banjara Basti where aforesaid Truck was found coming towards Satiwala Chowk main road. However, on seeing the PCR van of police, person driving the Truck, after parking it came out from driver side and had fled towards Yamuna River by taking benefit of darkness and dense fog, and despite taking help of torch and mobile light, he could not be chased by police officials, and during checking of Truck, 8 plastic bags were found in rear portion of Truck and on opening of one bag, poppy-straw was found therein, which created suspicion that other 7 plastic bags might have been containing poppy-straw, whereupon house owners of houses, adjacent to the spot, were asked to join search and seizure process, but, by citing their difficulties, they refused to come on spot, whereupon Panchayat Pardhan Anjana and Up-Pardhan Satnam Singh were called on spot from their houses through PCR van and were asked to join search and seizure process, but, they also refused to join as independent witnesses by referring their own restrictions. Thereafter, a Constable was sent to Toll Tax Barrier Bahral in search of independent witness wherefrom Toll Tax Barrier employee Arun Sharma agreed to become an independent witness and thus, he was associated in search and seizure process. Thereafter, 8 plastic bags were unloaded from Truck and each bag was opened and checked, wherein poppy-straw was found. On weighing with electronic scale available in police vehicle, in total 200.278 Kg poppy-straw was found in those bags. Thereafter, by sending a ruka, FIR was registered in Police Station and recovered contraband was seized and taken in possession by Investigating Officer. After that, SI Gian Singh along with police officials had gone to Khaira valley of Yamuna river in

search of accused. In that valley also, he found 6 plastic bags of poppy-straw and two spades and one belcha kept in pits of sand under cover of bushes. In these bags, in total 150.500 Kg poppy-straw was found, which was also taken in possession along with belcha and spades.

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

4. It is stated in status report that since 12.02.2021, police kept on searching Mohammad Deen @ Kala, Chaman @ Tinku, Subuash and Parveen in their homes, but, they had absconded to avoid their arrest and thereafter, on 19.2.2021, Mohammad Deen @ Kala and Budh Ram could be traced after great difficulty and were associated in the investigation alongwith Ajmer Singh and during interrogation, Mohammad Deen had disclosed that poppy-straw was brought out of State in another Truck with help of Parveen, Subhash and Chaman @ Tinku and thereafter, Mohammad Deen @ Kala, Ajmer Singh and Budh Ram were arrested on 19.02.2021 and their police remand was obtained on 20.02.2021.

5. As per status report, on 20.02.2021, Mohammad Deen had made a disclosure statement under Section 27 of Indian Evidence Act in the presence of independent witness Gaurav Dhiman, Block Development Officer Paonta Sahib and ASI Ram Lal and in pursuant thereto, 4 bags of poppy-straw were recovered from Satiwala forest/Khudd wherein in total 101.530 Kg. poppy-straw was recovered.

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

7. As per status report, Budh Ram had used his Tractor No. HP-17D-9357 for loading and unloading the poppy-straw under instructions of Parveen Kumar petitioner and car of Ajmer bearing No. HP-17E-9340 was used by Parveen Kumar and Subhash and another car HP-17F-4020 was also used by Mohammad Deen @ Kala and Mushatkeen to procure poppy-straw from Jharkhand and to load in Truck No. HR-55A-4876 along with driver Deepak in the month of January, 2021 in the bags of rice. All these vehicles except Truck No.HR-55L-4876, were taken in possession by police. It is also stated that after taking into possession of aforesaid Truck HR-55L-4876 by Finance Company in Banaras, Mohammad Deen and Mushatkeen had returned home, but, Truck driver Deepak had stayed there.

8. As per status report, for bringing poppy husk/straw, Mohammad Deen @ Kala had contacted Ahsaan resident of village Dharmawala in District Dehradun and had used Truck No.HR-55L-4876 for consideration of `1,50,000/- and out of that, `80,000/- were received by Ahsaan from Mohammad Deen and, therefore, Ahsaan has also been arrested under Section 29 of NDPS Act on 23.02.2021, who after remaining in police custody for three days, has been sent to judicial custody since 26.02.2021.

9. As per prosecution case, co-accused Praveen Kumar had denied acquaintance with arrested persons including Ajmer with submission that he

had not been keeping mobile phone since last one year. Whereas, from CDR of mobile, it was found that Ajmer Singh and Praveen Kumar in active contact with each other and on 10.02.2021 also they talked with each other for fourteen times, wherein six times Ajmer Singh called Praveen Kumar and they were in regular contact with each other through Whatsapp calls.

10. As per status report, Truck No.HR-55L-4876 was not registered in the name of Ahsaan, but in the name of Ashu Malhotra son of Sh.Dharam Pal Malhotra, resident of Ambala. The said Ashu Malhotra had handed over the said Truck to Paramjeet Singh son of Sh.Narender Singh, resident of Nahan, by executing General Power of Attorney (GPA) in favour of Paramjeet Singh. Paramjeet Singh vide agreement dated 28.12.2020 had sold this Truck to Ahsaan for a consideration of `2,25,000/-. Out of which `1,60,000/- had been paid and balance amount of `65,000/- was to be paid within two months thereafter and as per agreement, Truck was with Ahsaan since 28.12.2020. On the basis of GPA and agreement, produced by its driver Deepak (co-accused) this Truck was found in possession and under control of Ahsaan and Deepak as a driver was employed by Ahsaan on the Truck and this Truck was provided by Ahsaan to Mohammad Deen for transportation of poppy straw from Jharkhand. However, this Truck was taken in possession by the Finance Company at Banaras and thereafter poppy straw was transported from Banaras to Selaqui in Truck No.HR-69A-9217.

11. As per status report, when possession of Truck No.HP-55L-4876 was taken by Finance Company, then Mohammad Deen @ Kala had contacted him and had asked him to provide his Truck to bring rice from Varanasi to Ludhiana on urgent basis as Mohammad Deen had expressed apprehension that delay may spoil the rice whereupon Amzad Khan had handed over his Truck to Deepak at Muradabad who brought the rice in his Truck from Banaras to Selaqui. Statement of Amzad has been recorded under Section 161 Cr.P.C.

12. It has further been stated in the status report that from Selaqui to the spot where Truck was intercepted by the police, poppy straw was transported in Truck No.HP-11-4991 owned and possession by Ajmer Singh. This Truck was taken to Selaqui by driver Chaman Lal @ Tinku. When Chaman Lal was going to Selaqui, one Surender Singh had also gone with him in the Truck, but he did not return and during investigation, it has been found that the said Surender Singh was not knowing about purpose for which Chaman Lal was going to Selaqui and, therefore, he has been associated in the investigation as a witness and his statement under Section 164 Cr.P.C. has also been recorded before learned Additional Chief Judicial Magistrate, Paonta Sahib. It is further case of the police that at Selaqui poppy straw from Truck No.HR69-A9217 was shifted to Truck No.HP-11-4991 and brought to near bridge of Banjara Basti, Satiwala and some bags of poppy straw were shifted to Tractor No.HP-17D-9357 belonging to Budh Ram for hiding those bags in the forest adjacent to Yamuna River and during that process, Praveen Kumar had noticed light of some vehicle, therefore, some bags of poppy straw were left in the Truck. Whereas, bags loaded in the Tractor were taken to the forest and thrown in the pits already prepared for hiding contraband that and thereafter accused fled from the spot. As per police, accused Subhash had identified those places wherefrom poppy straw was recovered by the police after incepting the Truck.

13. It has also been contended on behalf of petitioners that there is no direct or indirect evidence to implicate the petitioners, who were having no link with Praveen Kumar and as nothing has been recovered from the petitioners, therefore, presumption of innocence is applicable, but not presumption of guilt like persons from whom contraband is recovered. It has further been stated that there is no bank statements or any other abnormal transaction establishing or indicating involvement of the petitioners in commission of offence.

14. Lastly, it has been stated that user of Truck or Tractor for commission of offence is not sufficient to implicate the petitioners. It has further been stated that petitioner Ajmer Singh has handed over Truck innocently to the wrong persons. On behalf of petitioner Budh Ram, it has been contended that in the entire investigation and the evidence collected by the police, there is no direct or concrete evidence about involvement of petitioner Budh Ram in commission of offence except observation of Investigating Officer that it was appearing to him that Budh Ram was involved in transportation and hiding contraband by using his Tractor.

15. It has been submitted by learned counsel for Ahsaan that Ahsaan has no role in transportation of poppy straw in his Truck from Jharkhand to Banaras or Satiwala as he is neither owner of the Truck nor driver of the Truck and he was not having any knowledge about transportation of poppy straw in the Truck in question by Mohammad Deen. It has further been stated that even if, police story is considered to be true then also, there is nothing on record to depict that Ahsaan was knowing that alongwith rice bags other accused persons have planned to transport poppy straw and further that nothing has been recovered from Ahsaan.

16. Learned counsel for petitioner-Chaman Lal @ Tinku has submitted that Chaman Lal is simply a driver and acting under the instructions of the owner of the Truck to bring some bags from another Truck and he has no role in transportation of the recovered contraband and further that nothing has been recovered from Chaman Lal.

17. Undoubtedly, as pleaded by learned counsel for the petitioner, bail is rule and jail is exception. But, at the same time, this rule does not mean that in every case bail is to be granted in all eventualities. The Supreme Court, in its various pronouncements, as also referred by this Court in State of Sandeep v. State of Himachal Pradesh, reported in 2019(1) Shim.LC 263, has culled out various factors and parameters to be taken into consideration

at the time of deciding the bail applications, which also include denial of bail based on those factors and principles. The general rule 'bail but not jail' cannot be used as a weapon to render the provisions, empowering the Court to reject the bail, redundant and/or as a guiding factor to enlarge an accused on bail, in every case. In cases under the special enactment where provision of reverse onus is there, parameters for deciding the bail application a little bit are different than other cases.

18. It is also canvassed that for the purpose of recovery of huge quantum of contraband, personal liberty of petitioners guaranteed under Article 21 of Constitution of India cannot be infringed.

19. It has been contended on behalf of the petitioners that according to status report, police party had received reliable secret information about transportation of the contraband and it was the time between sunset and sunrise and, therefore, it was mandatory for the police party to comply with provisions of Section 42 of the NDPS Act, and according to the petitioners, police was not authorized to intercept the Truck between sunset and sunrise without recording grounds of belief to intercept without authorization and grounds of belief have not been written by the Investigating Officer in present case and, therefore, for violation of mandatory provisions, entire investigation vitiates entitling the petitioners for bail. To substantiate this plea, reliance has been placed on the pronouncement of Supreme Court in ***Roy V.D. vs. State of Kerala, (2000) 8 SCC 590,*** wherein it has been held that where criminal proceedings are initiated on the basis of illicit material collected on search and arrest, which are *per se* illegal and vitiate trial itself, the proceedings would amount to abuse of process of the Court. Reliance has also been placed on pronouncement of Supreme Court in ***Sarija Banu alias Janarthani alias Janani and another vs. State through Inspector of Police, (2004) 12 SCC 266***, wherein it has been held that Section 42 of the NDPS Act is mandatory

and compliance or non-compliance thereof is a relevant fact which should engage the attention of the Court while considering bail application.

20. Learned counsel for the petitioners have also referred pronouncements of the Supreme Court in ***Tofan Singh vs. State of Tamil Nadu, 2021 (4) SCC 1; Sanjeev Chandra Agarwal & Another vs. Union of India, Criminal Appeal No(s). 1273 of 2021; Sujit Tiwari vs. State of Gujarat, Criminal Appeal No.1897 of 2019 (@Special Leave Petition (Criminal) No.3478 of 2019; Amit Singh Moni vs. State of Himachal Pradesh, Criminal Appeal No.668 of 2020;*** and ***Tapan Das vs. Union of India, Petition for Special Leave to Appeal (Crl.) No.5617 of 2021.***

21. The petitioners have also placed reliance upon pronouncements of judgments of the various High Courts in ***Shivraj Urs vs. Union of India, Criminal Petition No.6322 of 2020 (Karnataka High Court); Shashikant Prabhu vs. Rahul Saini, 2020 SCCC online Bom 11226; Yousuf vs. State of Kerala, 2021 SCC online Ker 851; Mohit Aggarwal vs. Narcotics Control Bureau, Manu/DE/0488/2021 (Delhi High Court);*** and ***Chaitan Mali vs. State of Odisha, 2021 SCC online Ori 564.*** It has further been submitted that in ***Kaleem vs. Union of India, 2003 Crl.J 2685 (Allahabad High Court),*** bail was granted to the petitioner in a case where recovery of 350 kilograms Ganja was involved.

22. Learned counsel for the petitioners have submitted that petitioners have nothing to do with present case and they are being implicated on the basis of suspicion only and on the basis of alleged statements of co-accused, which cannot be taken into consideration against them in view of aforesaid pronouncements of the Supreme Court, particularly in *Tofan Singh's case (supra).* Citing judgments referred supra grant of bail for the petitioners has been advocated.

23. Learned Deputy Advocate General has submitted that petitioners are members of a big racket involved in supplying the narcotic drugs in the

State and involvement of Ajmer Singh is writ large as he has not only handed over the Truck, but had taken Truck to the spot and handed over the key to the co-accused persons. It has further been submitted that involvement of Ajmer Singh is substantiated from the facts that Truck was handed over to co-accused on 10.02.2021 and thereafter, it was taken into possession by the police and Ajmer Singh was associated in the investigation after 12.02.2021, but till then, Ajmer Singh did not inquire about his Truck and did not file any application for release of the Truck as he was knowing well that for what purpose he had handed over the Truck to co-accused. It has further been submitted by learned Deputy Advocate General that it is an un-explained behave on the part of Ajmer Singh that he has handed over the keys of Truck without driver to the persons, without asking for the nature of material to be loaded and unloaded in or of the Truck. It has further been submitted that call details also strengthen the prosecution case with respect to active involvement of Ajmer Singh in commission of offence. It has also been submitted that not only Truck of Ajmer but car was also used by co-accused facilitating transportation of recovered contraband.

24. Learned Deputy Advocate General by referring the material on record has submitted that so far as Ajmer Singh is concerned, his active role in commission of offence stands established for his conduct came into light during investigation and also for his inaction for getting Truck released from the police after its seizure. It has been submitted that had petitioner Ajmer Singh been innocent, then first reaction on his part would have been to take immediate steps to get his Truck released, but in present case he remained silent for about three days and opened his mouth only when he was subjected to interrogation by the police. It has further been contended that it is not a case where only on the basis of suspicion petitioner Ajmer Singh has been implicated, but there is ample evidence, including call detail records about involvement of petitioner Ajmer Singh in commission of offence.

25. Learned Additional Advocate General has submitted that petitioner Ahsaan had agreed to transport the contraband for having heavy amount of consideration i.e. `1,50,000/- and driver Deepak was engaged by him, who was acting under his control and was in his regular contact. Further that when Truck of Ahsaan was taken in possession by the Finance Company, then load of the Truck was shifted to another Truck and at that time also, Deepak remained with the material loaded in the Truck and at the time of shifting also he was actively involved and, therefore, there is more than sufficient evidence on record to connect petitioner Ahsaan with commission of offence. Therefore, recovery or no recovery of contraband from Ahsaan is an immaterial fact.

26. Learned Additional Advocate General has further submitted that petitioner Chaman Lal @ Tinku was also knowing about transportation of contraband and he has actively participated by taking Truck bearing No.HP-11-4991 to Selaqui and not only in his presence but with his help the poppy straw was shifted to the Truck of Ajmer Singh and Truck was brought to Satiwala and near bridge of Banjara Basti some bags of poppy straw were shifted to Tractor of Budh Ram and at that time, police party intercepted the Truck and Chaman fled from the spot. It has been contended that in case Chaman was innocent or not knowing about transportation of contraband, then there was no occasion or reason for him to flee from the spot. Therefore, there is sufficient evidence on record to connect Chaman Lal also with commission of offence as a member of gang involved in commission of offence under the NDPS Act.

27. Learned Deputy Advocate General has further submitted that involvement of Budh Ram, is also established on account of disclosure of his role by co-accused for transporting and hiding contraband by using his Tractor. It has been contended that similarly for role of Ahsaan and Chaman Lal in entire episode, their involvement in commission of offence is also

established and all of them are also active members of gang involved in procuring, transporting and hiding the recovered contraband and, therefore, prayer for rejection of their bail applications has been made.

28. Learned Additional Advocate General has submitted that in present case there is complete compliance of Section 42(2) of the NDPS Act, as immediately after receiving information, same was reduced into writing by Assistant Sub Inspector Gian Singh and was sent to Sub Divisional Police Officer at 6.15 a.m. Referring information reduced into writing by Assistant Sub Inspector, learned Additional Advocate General has pointed out that in the said information, it has been clearly stated that in case of delay in intercepting/raiding the Truck, there is possibility of concealment of evidence or escape of offender from the spot. Therefore, it has been contended that the case law cited by and on behalf of the petitioners, on this count, is not relevant, with respect to compliance of provisions of Section 42 of the NDPS Act, in present case.

29. I have considered judgments referred on behalf of the petitioners, submission made by both sides and have also gone through the record.

30. Considering all facts and circumstances, including quantum of contraband recovered from the petitioners in commission of offence, period of detention, impact on the society but without commenting on merits of the rival contention of parties and taking note of all principles and factors relevant to be considered at the time of deciding bail application with reference to aforesaid facts and circumstances placed before me, and submissions made by learned counsel for the petitioners as well as learned Additional/Deputy Advocate Generals, I am of the considered opinion that petitioners are not entitled for bail at this Stage. Hence, petitions are dismissed and disposed of.

31. Observations made in these petitions hereinbefore, shall not affect the merits of the case in any manner and are strictly confined for the disposal of the bail application.

32. Petitions are disposed of in aforesaid terms.

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

Between:

1. SMT. BABITA, W/O SH. ARSH VARDHAN SINGH, R/O 123/1, KUNDAN KA BAG, NAHAN, DISTRICT SIRMAUR, HP, PRESENTLY RESIDENT OF FLAT NO.12, 2ND FLOOR, NEW GANESH VIHAR, DHAKOLI, TEHSIL DERA BASSI, DISTRICT MOHALI, PUNJAB.

2. BABY MRIGANKA (MINOR), D/O ARSH VARDHAN SINGH, THROUGH HER LEGAL GUARDIAN/MOTHER BABITA, R/O 123/1, KUNDAN KA BAG, NAHAN, DISTRICT SIRMAUR, HP, PRESENTLY RESIDENT OF FLAT NO.12, 2ND FLOOR, NEW GANESH VIHAR, DHAKOLI, TEHSIL DERA BASSI, DISTRICT MOHALI, PUNJAB.

....PETITIONERS.

(BY MR. BALDEV SINGH NEGI, ADVOCATE)

AND

1. SH. ARSH VARDHAN SINGH, S/O SH. VIRENDER SINGH CHAUHAN, R/O 123/1, KUNDAN KA BAG, NAHAN, DISTRICT SIRMAUR, HP.

2. SH. VIRENDER SINGH CHAUHAN, S/O SH. SUKH DARSHAN SINGH, R/O 123/1, KUNDAN KA BAG, NAHAN, DISTRICT SIRMAUR, HP. (FATHER-IN- LAW OF BABITA)

3. SMT. RAJESH CHAUHAN, W/O SH. VIRENDER SINGH CHAUHAN, S/O SH. SUKH DARSHAN SINGH, R/O 123/1, KUNDAN KA BAG, NAHAN, DISTRICT SIRMAUR, HP. (MOTHER-IN-LAW OF PETITIONER BABITA)

....RESPONDENTS.

(BY MR. RUPINDER SINGH, ADVOCATE, FOR RESPONDENT NO.1

MR. ASHOK KUMAR TYAGI, ADVOCATE, FOR RESPONDENTS NO.2 & 3)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No. 266 of 2021
Decided on: 14.09.2021

Code of Criminal Procedure, 1973- Section 482- ***T*he Protection of Women from Domestic Violence Act, 2005**- Sections 12, 23 & 29- Held- Where a statutory remedy is available then the powers so vested with the High Court under Section 482 of Code of Criminal Procedure stood not to be invoked- Hence, proceedings under Section 482 of Code of Criminal

Procedure are not maintainable- Petitioner may approach the Appellate Court.

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

J U D G M E N T

By way of this petition filed under Section 482 of the Code of Criminal Procedure, the petitioners herein have prayed for the quashing of order dated 31.3.2021, passed by the Court of learned Judicial Magistrate, Ist Class, Nahan, District Sirmaur, H.P., in Criminal Case No. 59 of 2020 titled as Smt. Babita and another vs. Arsh Vardhan Singh and others.

Brief facts necessary for the adjudication of the present petition are as under:-

A complaint under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 2005 Act) was filed by the petitioners in the Court of learned Judicial Magistrate Ist Class, Nahan, District Sirmaur, H.P. The same was accompanied by an application under Section 23 of the Protection of Women from Domestic Violence Act 2005. A preliminary objection was taken by the respondents with regard to the maintainability of the said petition, inter-alia, on the ground that the complainants had already instituted a complaint under Section 12 of the Protection of Women from Domestic Violence Act, which was pending adjudication before the Court of learned Judicial Magistrate, Ist Class, Derra Bassi, District Mohali, Punjab. Vide impugned order, the subsequent complaint so filed at Sirmaur was dismissed by the learned Judicial Magistrate, Ist Class, Class, Nahan, District Sirmaur, H.P., on the ground that two cases of similar nature cannot run together in two different Courts.

2. Feeling aggrieved, the petitioners have approached this Court by way of this petition under Section 482 of the Code of Criminal Procedure.

3. Learned Counsel for the respondents has taken a preliminary objection with regard to the maintainability of this petition on the ground that as the order assailed by way of the present petition is that of a Magistrate passed under the provisions of the Protection of Women From Domestic Violence Act, 2005, the same is appealable under Section 29 of the said Act and therefore, this petition under Section 482 of the Code of Criminal Procedure is not maintainable.

4. Learned Senior Counsel appearing for the petitioners has submitted that an appeal as is envisaged under Section 29 of the 2005 Act, can be filed by an aggrieved person in case there is an adjudication on merit by the learned Magistrate on a complaint but in such like situation, where a petition has been dismissed on the ground that there was another case pending on the same cause at Derra Bassi, the only course available with the petitioners was to have had approached this Court under Section 482 of the Code of Criminal Procedure against the impugned order. He has further argued that as the order passed by the learned Judicial Magistrate, Ist Class, Nahan District Sirmaur, H.P**,** is inherently not sustainable in law as while passing the said order, learned Judicial Magistrate, Ist Class, Nahan, District Sirmaur, H.P, has ignored the basic provisions of Section 204 of the Code of Criminal Procedure, therefore, the petitioners have a right to invoke the jurisdiction of this Court under Section 482 of the Code of Criminal Procedure.

5. I have heard learned Counsel for the parties and also gone through the impugned order.

6. Before proceeding further, it is pertinent to mention that in the interregnum, certain developments took place which are necessary to be brought on record. The proceedings which the petitioners had initiated under

the provisions of 2005 Act at Derra Bassi, stood withdrawn by them as is evident from the order appended with these proceedings dated 10.7.2021.

7. Be that as it may, this Court will address the preliminary objection which has been taken by respondents with regard to the maintainability of the present petition. The Protection of Women from Domestic Violence Act, 2005, is a Special Act which has been enacted to provide for more effective protection of the rights of Women granted under the Constitution who are victim of violence of any kind occurring within the family and for matter connected therewith or incident therewith. This stature happens to be a substantial as well as a procedural law.

8. Chapter 4 of the Act deals with the procedure for obtaining orders or relief. Section 12 of the same contemplates, an aggrieved person or a Protection Officer or any other person on behalf of aggrieved person to file an application to the Magistrate seeking one or more relief which can be granted under the Act. The person "aggrieved person" has been defined in Section 2(a) of the Act and the same reads as under:-

> 2(a) "aggrieved person" means any woman 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;

9. Section 23 of the Act further provides that in any proceedings before the Magistrate initiated under the Act, he may pass such interim order as he deems just and proper.

10. Now, coming to the facts of the present case as already mentioned hereinabove, the petitioners herein filed a complaint under Section 12 of Protection of Women from Domestic Violence Act, 2005 at Nahan in which, the following reliefs were prayed for:-

> "It is therefore, most respectfully prayed that this application of applicants/petitioners may kindly be allowed and the respondents may kindly be directed to hand over Jewelry articles i.e. Necklace, Mang Tikka, Ear Rings, one Gold Bangel, to aggrieved person, gift

items and cash in total amounting to Rs. 10,00,000/- withheld by the respondents No.2 & 3 may kindly be ordered to given in the shape of Joint Bank FD. In the name of aggrieved person and respondent No.1, and the respondent No.1 may kindly be directed to pay monthly maintenance of rs. 40,000/- per month including flat rent charges to petitioner No.1 and petitioner No.2 minor daughter and all the respondents may kindly be directed to provide complete floor/set of residence in House Building No.123/1, Kundan Ka Bag, Nahan, District Sirmaur, HP and justice be done. An affidavit is attached herewith."

11. Alongwith this petition an application for interim maintenance as is envisaged under Section 23 of the Act was also filed, vide which the following relief was sought:-

"It is therefore, most respectfully prayed that this application of applicants/petitioners may kindly be allowed and the respondent may kindly be directed to pay interim monthly maintenance of Rs. 30,000/- per month including flat rent charges to petitioner No.1 and petitioner No.2 minor daughter and justice be done. An affidavit is attached herewith."

12. By way of the reply which was filed to the said complaint by the respondents therein, the following preliminary objection was taken amongst others:-

"That the complainant outright dismissal is view of the admitted fact that similar complaint has already been filed by the complainant at Derabasi which is still pending and has not yet been withdraw despite repeated assurances given by the learned counsel of the complainant at bar in this LD Court."

13. By way of the impugned order this petition filed by the petitioners stood dismissed by the learned Magistrate by observations that admittedly the petitioners had already filed a complaint under Section 12 of the Act, alongwith an application under Section 23 of the same before the Court of learned Judicial Magistrate, Ist Class, Derra Bassi, Punjab which was pending adjudication and the counsel for the petitioner had stated at bar that he were

not ready and willing to withdraw the same as the case stood filed claiming different relief and they intended to pursue both the cases at different places. Learned Court thereafter held that it was of the considered view that petitions of similar nature whereby relief claimed was also same should not be filed in two different Courts. It further held that though the petitioner had not suppressed the factum of filing of the complaint before learned Judicial Magistrate, Ist Class, Derra Bassi but merely non suppressing of fact cannot be a ground to permit the petitioners to pursue Domestic Violence cases against the respondents at two places.

14. On these findings, learned Magistrate dismissed the complaint by holding that two cases of similar nature cannot run together in two different Courts.

15. Section 29 of the 2005 Act, provides as under:-

> 29. Appeal.- There shall lie an appeal to the Court of Session within thirty days from the date on which the order made by the Magistrate is served on the aggrieved person or the respondent, as the case may be, whichever is later.

16. The word 'Order' has not been defined under the 2005 Act. In Black's Law Dictionary the word order has defined as under:-

> *"A mandate; precept; command or direction authoritatively given; rule or regulation. Brady v. Inter-state Commerce Commission, D.C.W.Va., 43 F.2d 847, 850. Direction of a court or judge made or entered in writing, and not included in a judgment, which determines some point or directs some steps in the proceedings. an application for an order is a motion."*

17. This Court is of the considered view that the decision vide which a complaint filed under Section 12 of the Protection of Women from Domestic Violence Act, 2005 is dismissed by the Magistrate may by holding that the same is not maintainable, is also an 'order' which is appealable under Section 29 of the Act. Whether or not the reasons assigned therein are sustainable in

law is a separate issue, which obviously can be gone into even by the Court of Sessions in an appeal, which may be preferred by an aggrieved person under Section 29 of the Act. This Court does not concurs with the submissions made by learned Senior Counsel for the petitioners that because there was no adjudication on merit by learned Magistrate and as purportedly the Magistrate had no jurisdiction to dismiss the complaint on the basis of the pendency of another petition before Judicial Magistrate, Ist Class, Derra Bassi, District Mohali, Punjab, therefore, the appeal was not maintainable. According to this Court, any order passed by the Magistrate is assailable at the first instance only by way of appeal under Section 29 of the Act. Therefore, as there is a statutory remedy available with the present petitioners, these proceedings which have been initiated under Section 482 of the Code of Criminal Procedure are not maintainable because law is amply clear that where a statutory remedy is available then the powers so vested under the High Court under 482 of the Code of Criminal Procedure stood not be invoked. In this view of the matter, these proceedings are held to be not maintainable in view of the statutory remedy available to the petitioners.

22. However, in the peculiar facts of the case, it is observed that in case the petitioners herein do approach the learned Appellate Court against the order passed by the learned Magistrate on or before 15th October, 2021, then the said appeal shall be deemed to be within limitation and learned Appellate Court shall make an endeavour to decide the same finally within a period of 2 months as from the date of the receipt of the appeal on merit. Alternatively, petitioners shall be at liberty to institute a fresh petition under the Domestic Violence Act, if so advised. The petition is accordingly disposed of in above terms, so also pending miscellaneous application, if any.

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

Between:

HARISH KUMAR, SON OF SH. SURINDER PAL, RESIDENT OF VILLAGE KATHLAG, POST OFFICE PADHIUN, TEHSIL SADAR, DISTRICT MANDI, HIMACHAL PRADESH, PRESENTLY LODGED IN JAIL.

....PETITIONER.

(BY MR. KULWANT SINGH GILL, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH, THROUGH SECRETARY (HOME)

....RESPONDENT.

(BY MR. ADARSH SHARMA, MR. SUMESH RAJ AND MR. SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL WITH MR. KAMAL KANT CHANDEL, DEPUTY ADVOCATE GENERAL)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No. 340 of 2021
Decided on: 27.09.2021

Code of Criminal Procedure, 1973- Section 482- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Section 21- Revisional Court set aside the order passed by the Ld. Trial Court of bail in favour of the present petitioner under Section 437 of the Code of Criminal Procedure- Held- An order passed on a bail application is an interlocutory order against which no revision maintainable in terms of the provisions of Section 397(2) of the 1973 Act- Petition dismissed.

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

J U D G M E N T

By way of this petition filed under Section 482 of the Code of Criminal Procedure, the petitioner assails the order passed by the Court of learned Special Judge-II, Mandi, in Criminal Revision No. 03 of 2021, titled as State of HP Vs. Harish Kumar vide which while allowing the revision so preferred by the State against order dated 13.5.2021, passed by the Court of learned Judicial Magistrate, 1st Class, Court No.3, Mandi in case FIR No. 113 of 2021, dated 12.5.2021, registered under Section 21 of the NDPS Act, titled as State of HP vs. Harish Kumar, learned Revisional Court set aside the order passed by the learned Trial Court of grant of bail in favour of the present petitioner under Section 437 of the Code of Criminal Procedure.

Brief facts necessary for the adjudication of this petition are that FIR No.113 of 2021, details whereof are already mentioned hereinabove stands registered against the present petitioner. In an application filed under Section 437 of the Cr.P.C., learned Trial Court granted bail to the petitioner in the said FIR. Feeling aggrieved, State preferred a Revision Petition under Section 397 of the Cr.P.C., against the order passed by the learned Trial Court. Vide impugned order, learned Revisional Court while accepting the Revision Petition has set aside the order of bail granted in favour of the petitioner by the learned Trial Court. Feeling aggrieved, the petitioner has filed this petition under Section 482 of the Cr.P.C.

Learned counsel for the petitioner has argued that the order passed by the learned Revisional Court is a nullity in view of the settled law of the land that as an order passed in the course of trial or otherwise in a bail

application is just an interlocutory order passed by the Court concerned, the same is not reviseable under the provision of Section 397 of the Code of Criminal Procedure. To strengthen his argument, he has relied upon the judgments of the Hon'ble Supreme Court in Amar Nath & Ors. Vs. State of Haryana & another, 1977 (4) SCC 137 and Girish Kumar Suneja Vs. CBI, AIR 2017 (14) SCC 809.

Learned Deputy Advocate General while supporting the order passed by the learned Revisional Court has argued that there is no infirmity in the order impugned because as the bail which was granted in favour of the petitioner by the learned Trial Court was not sustainable in the eyes of law State rightly invoked the powers of the learned Revisional Court and the order assailed by way of this petition in fact is a legal and valid order. He has further submitted that even otherwise this petition is not maintainable because the ground now being taken before this Court was never agitated before the Reviosional Court.

I have heard learned counsel for the parties and also gone through the record of the case including the impugned order.

Hon'ble Supreme Court in (1977) 4 SCC 137 has been pleased to hold in Para-6, thereof, that the term "interlocutory order" in Section 397 (2) of the 1973 Code has been used in a restricted sense and not in any broad or artistic sense. It merely denotes orders of purely interim or temporary nature which do not decide or touch the important rights or the liabilities of the parties. Hon'ble Supreme Court further elaborated by stating that for instance, orders summoning witnesses, adjourning cases, passing orders for bail, calling for reports and such other steps in aid of the pending proceedings, may no doubt amount to interlocutory orders against which no revision would lie under Section 397(2) of the 1973 Code.

By relying upon the judgment of Hon'ble Supreme Court quoted hereinabove, the Allahabad High Court in 1988 CRI.L.J. 1434 has been

pleased to hold that revision petition which has been filed against grant of bail being an interlocutory order is not maintainable.

A Coordinate Bench of this Court in State of Himachal Pradesh Vs. Kulwant Singh Katoch in Criminal Revision No. 33 of 2019 decided on 1st August 2019 has also reiterated this view.

Hon'ble Supreme Court of India in Girish Kumar Suneja Vs. CBI, AIR 2017 (14) SCC 809, has again reiterated that an interlocutory order is not assailable under Section 397 of the Criminal Procedure Code.

Accordingly, as it is settled law that an order passed on a bail application is an interlocutory order against which no revision maintainable in terms of the provisions 397 (2) of 1973 Act, this petition is allowed. The contention of the learned Additional Advocate General that this plea was not taken by the present petitioner before the Revisional Court is of no consequence because when the power exercised by the Revisional Court is contrary to the law laid down by the Hon'ble Supreme Court of India, the order so passed cannot be upheld on technical grounds. This petition therefore, succeeds. Order dated 18.6.2021 passed by Special Judge-II, Mandi, in Criminal Revision No.3 of 2021, titled as State of HP vs. Harish Kumar, is quashed and set aside, however, with liberty to the State that if so advised it may have such recourse against the order passed by the learned Trial Court as is available in law.

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

Between:

1. ANBAR BIBI, WIFE OF SH. RAMJAN MOHAMMAD, RESIDENT

OF VILLAGE DHAR GUJJRAN, P.O. CHAKSARI, TEHSIL AMB, DISTRICT UNA, H.P.
2. RAMJAN MOHAMMAD, SON OF REHMAT ALI, RESIDENT OF VILLAGE DHAR GUJJRAN, P.O. CHAKSARI, TEHSIL AMB, DISTRICT UNA, H.P.
3. ASIF MOHAMMAD, SON OF SHRI RAMJAN MOHAMMAD, RESIDENT OF VILLAGE DHAR GUJJRAN, P.O. CHAKSARI, TEHSIL AMB, DISTRICT UNA, H.P.
4. AKHTAR GAFOOR SON OF SHRI RAMJAN MOHAMMAD, RESIDENT OF VILLAGE DHAR GUJJRAN, P.O. CHAKSARI, TEHSIL AMB, DISTRICT UNA, H.P.

....PETITIONERS.

(BY SHRI IMRAN KHAN, ADVOCATE)

AND

SMT RAVEENA BIBI, WIFE OF AKHTAR GAFOOR, RESIDENT OF VILLAGE DHAR GUJJRAN, P.O. CHAKSARI, TEHSIL AMB, DISTRICT UNA, H.P., AT PRESENT LIVING WITH HER FATHER SHRI SHONKI, RESIDENT OF VILLAGE SANGHAI, P.O. & TEHSIL AMB, DISTRICT UNA, H.P.

....RESPONDENTS.

(NONE FOR THE RESPONDENT)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC NO.465 OF 2021
Decided on: 27.09.2021

Code of Criminal Procedure, 1973- Section 482- **The Protection of Women from Domestic Violence Act, 2005**- Section 12- Petitioners have sought the quashing of proceedings under Section 12 of the Protection of Women from Domestic Violence Act, 2005, pending before the Ld. Judicial Magistrate First Class, Amb, District Una- Petitioner have every right to put forth their respective contentions before the Ld. Magistrate and the powers conferred under Section 482 of Code of Criminal Procedure are to be used sparingly and not in routine manner- Petition dismissed being misconceived.

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

J U D G M E N T

By way of this petition, filed under Section 482 of the Criminal Procedure Code, following prayer has been made:-

> "*That the proceedings pending before the Ld. Judicial Magistrate, First Class Amb, District Una, H.P. in Registration No.-1437/2021, Case No.22 of 2021, Case title Raveena Bibi Versus Akhta Gafoor and Others in complaint under Section 12 of Domestic Violence Act-2005, may kindly be quashed and set aside against the petitioners in the interest of justice.*"

2. This Court is of the considered view that the present petition is completely misconceived, as all the grounds which have been taken by the petitioners in this petition for quashing of the proceedings, can be agitated by the petitioners by way of filing their response before the learned Magistrate concerned. Even otherwise, this Court is of the view that the powers, so conferred upon it under Section 482 of the Criminal Procedure Code, are to be used sparingly and the same cannot be used in a routine manner, as the

petitioners want this Court to do so. The contention that the petitioners are not guilty and that the proceedings have been initiated just to harass them are the grounds, which one can take before the Magistrate and all take and it is not for this Court to examine at this stage as to whether the averments as contained in the complaint are genuine or not. That has to be ascertained by the learned Magistrate in terms of the provisions of the Domestic Violence Act. Simply because a complaint has been filed and the process has been issued, this does not *ipso facto* means that the respondents impleaded therein are guilty. Said respondents have each and every right to put forth their respective contentions and the learned Magistrate is duty bound to take a call on the complaint so filed, after taking into consideration the respective stands of the parties. Therefore, respondents impleaded in a complaint have to participate in the proceedings and submit their response before the Magistrate concerned and ordinarily on their asking, this Court will not invoke its inherent powers under Section 482 of the Criminal Procedure Code and quash the complaint without allowing the Magistrate to adjudicate the same on the basis of pleadings and material before it.

3. In these circumstances, this petition is dismissed as this Court does not finds any reason to interfere with the process which has been issued by the learned Magistrate, but with liberty to the petitioner to rake up all these issues which have been taken in this petition, before the learned Magistrate concerned.

4. Pending miscellaneous applications, if any, stand disposed of.

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

Between:

SODHI RAM SON OF SHRI

BACHAN DASS, RESIDENT OF VILLAGE LAKERH, P.O. SMALAH, TEHSIL ANANDPUR SAHIB, DISTT. ROPAR PUNJAB.

....PETITIONER.

(BY MR AMRINDER SINGH RANA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

.... RESPONDENT.

(BY MR. ADARSH SHARMA, MR. SUMESH RAJ, MR. SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, WITH MR. KAMAL KANT CHANDEL, DEPUTY ADVOCATE GENERAL.

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No.486 of 2021
Decided on: 18.11.2021

Code of Criminal Procedure, 1973- Section 482- Petitioner has assailed the orders of Deputy Conservator of Forests, Nalagarh vide which application for release of vehicle in case FIR No. 365/20 dated 25.11.20 under Sections 379, 427 read with Section 34 of Indian Penal Code and Sections 41, 42 of Indian Forest Act, PS Nalagarh, has been dismissed and also of Ld. Additional Sessions Judge, vide which appeal has been rejected- Held- Order passed by the Ld. Additional Sessions Judge, Nalagarh, is perverse order as appeal being maintainable- Ld. Appellate Court was duty bound to have had adjudicated the same on merit- Petition allowed- Vehicle released on supurdari.

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

J U D G M E N T

By way of this petition, filed under Section 482 of the Criminal Procedure Code, the petitioner has assailed order dated 17.03.2021, passed by Deputy Conservator of Forests, Nalagarh Forest Division, Nalagarh, District Solan, H.P., vide which an application filed by the present petitioner for release of vehicle (Pick-up) bearing registration No.PB-65AU-9203 along with its documents, in case FIR No.365/20, dated 25.11.2020, under Sections 379, 427 read with Section 34 of the Indian Penal Code and Sections 41, 42 of the Indian Forest Act, registered at Police Station Nalagarh, District Solan, H.P., has been dismissed and also against order dated 09.08.2021, passed by the Court of learned Additional Sessions Judge, Nalagarh, District Solan, H.P., in Criminal Revision No.1-NL/10 of 2021, titled as Sodhi Ram Versus State of Himachal Pradesh, vide which the appeal preferred by present petitioner against the order passed by Deputy Conservator of Forests, Nalagarh Forest Division, Nalagarh, District Solan, H.P. has been rejected by the learned Appellate Court.

2. Brief facts necessary for the adjudication of the present petition are that FIR No.365 of 2020 has been registered on 25.11.2020, under Sections 379, 427 read with Section 34 of the Indian Penal Code and Sections 41, 42 of the Indian Forest Act, at Police Station Nalagarh, District Solan, H.P. This FIR is with regard to illicit felling of Khair trees & illegal transportation of Khair logs through Pick-up bearing registration No.PB65AU-9203. The vehicle in issue belongs to the present petitioner. In other words, the petitioner is registered owner of the vehicle in issue. He filed an application under Section 53 of the Indian Forest (HP 2nd Amendment) Act, 1991, for release of said vehicle before the Deputy Conservator of Forests, Nalagarh Forest Division, Nalagarh, District Solan, H.P., which was dismissed by the said authority vide order dated 17.03.2021, by holding that as the proceedings under Section 52-

A of the Indian Forest (HP 2nd Amendment) Act, 1991 were still pending and the case was pending before the Authorized Officer-cum-Deputy Conservator of Forests, Nalagarh, District Solan, H.P., therefore, the application deserved rejection.

3. Feeling aggrieved, the petitioner preferred an appeal which was dismissed by the learned Appellate Court, i.e. the Court of learned Additional Sessions Judge, Nalagarh, District Solan, H.P., by relying upon the judgment passed by this Court, in Criminal Revision No.380 of 2015, titled as State of H.P. Versus Parkash Chand, decided on 20.04.2017, by holding that the Court of learned Additional Sessions Judge, Nalagarh, District Solan, H.P. was not having the jurisdiction to entertain the application for interim release of vehicle and there was also an observation by Deputy Conservator of Forests, Nalagarh Forest Division, Nalagarh, District Solan, H.P. that the vehicle was involved in smuggling of Khair trees.

4. I have heard learned counsel for the parties and have gone through the impugned order.

5. This Court is of the considered view that order dated 09.08.2021, passed by the Court of learned Additional Sessions Judge, Nalagarh, District Solan, H.P., vide which the appeal filed by the present petitioner against the order passed by Deputy Conservator of Forests, Nalagarh Forest Division, Nalagarh, District Solan, H.P., rejecting his application under Section 53 of the Indian Forest (HP 2nd Amendment) Act, 1991 has been dismissed, is perverse order. The petitioner had in fact approached the learned Appellate Court feeling aggrieved by the order passed by Deputy Conservator of Forests, Nalagarh Forest Division, Nalagarh, District Solan, H.P., vide which his application filed under Section 53 of the Indian Forest (HP 2nd Amendment) Act, 1991 stood dismissed on merit. In terms of the judgment passed by this Court in Criminal Revision No.380 of 2015, titled as State of H.P. Versus Parkash Chand, decided on 20.04.2017, the course open in such like cases to

the aggrieved party is to file an appeal before the Court of learned Sessions Judge. It was also held by this Court in said case that a party could not have approached the Court of learned Sessions Judge by way of an application for release of the vehicle.

6. In this case, it is not as if, after the dismissal of the application filed under Section 53 of the Indian Forest (HP 2nd Amendment) Act, 1991, the petitioner approached the Court of learned Additional Sessions Judge, Nalagarh, District Solan, H.P. for release of the vehicle. He approached that Court by way of an appeal against the order passed by the Deputy Conservator of Forests, Nalagarh Forest Division, Nalagarh, District Solan, H.P. This appeal was maintainable and the learned Appellate Court was duty bound to have had adjudicated the same on merit. Thus, dismissal of the same by the learned appellate Court by holding that the same was not maintainable is not sustainable in the eyes of law and the order so passed by the learned Appellate Court is thus set aside because the learned Appellate Court has erred in coming to the conclusion that petitioner had approached before it for interim release of the vehicle by way of an application, which was not the case.

7. Be that as it may, now coming to the prayer of the petitioner for release of the vehicle, this Court is of the considered view that said prayer deserves to be allowed. Whether or not, the vehicle was used in the act which has resulted in registration of the FIR is a matter of trial and in case the complainant is able to take its complaint to its logical conclusion, then but natural, the law will take its own course. But, till then this Court is of the considered view that keeping the vehicle stranded will not serve the purpose of anyone. Incidently, the petitioner happens to be the registered owner of the vehicle, therefore, this Court is of the considered view that it will be in the interest of justice in case the vehicle is ordered to be released on Supurdari in his favour.

8. Accordingly, this petition is allowed. Order dated 09.08.2021, passed by the Court of learned Additional Sessions Judge, Nalagarh, District Solan, H.P., in Criminal Revision No.1-NL/10 of 2021, titled as Sodhi Ram Versus State of Himachal Pradesh, is ordered to be set aside, for the reasoning assigned hereinabove. Similarly, order dated 17.03.2021, passed by Deputy Conservator of Forests, Nalagarh Forest Division, Nalagarh, District Solan, H.P., is also ordered to be set aside as this Court is of the considered view that simply because the proceedings were pending, the same was not cogent ground for dismissal of the application filed under Section 53 of the Indian Forest (HP 2nd Amendment) Act, 1991. The authority concerned is further ordered to release the vehicle in question,i.e.Pick-up bearing registration No.PB65AU-9203, in favour of the petitioner on Supurdari in the sum of Rs.5,00,000/- with one surety in the like amount as per Rules. Pending miscellaneous applications, if any, stand disposed of.

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

Between:

SMT. RAJNI, WIFE OF SH. SATISH KUMAR, RESIDENT OF VILLAGE JAWALI, TEHSIL JAWALI, DISTRICT KANGRA, H.P. AGE ABOUT 34 YEARS.

....PETITIONER.

(BY MR. SUNEEL AWASTHI, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH THROUGH ITS SECRETARY

(HOME) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA, H.P.
2. SMT. ANJU BALA WIFE OF SH. JATINDER KUMAR, RESIDENT OF WARD NO.6, VILLAGE JAWALI, TEHSIL JAWALI, POLICE STATION JAWALI, DISTRICT-KANGRA, HIMACHAL PRADESH.

..... RESPONDENTS.

(BY MR. ADARSH SHARMA, MR. SUMESH RAJ, MR. SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, WITH MR. KAMAL KANT CHANDEL, DEPUTY ADVOCATE GENERAL, FOR RESPONDENT NO.1.
NONE FOR RESPONDENT NO.2.

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No.677 of 2021
Decided on: 21.12.2021

Code of Criminal Procedure, 1973- Section 482- Quashing of F.I.R. under Sections 3(1)(r) and 3(1)(s) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities), Act 1989 (Amendment 2015) registered at P.S. Jawali, District Kangra, H.P., on the ground that pursuant to her marriage in to Scheduled Caste family- She also inherits the status of a Scheduled Caste- Held- Very genesis of contention of the petitioner is not sustainable in the eyes of law as by birth she does not belong to scheduled caste, as such petitioner will not get protection by virtue of a marriage to a person who belongs to scheduled caste- Petition dismissed.

Cases referred:
Sunita Singh Versus State of Uttar Pradesh and Others, (2018) 2 SCC 493;

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

O R D E R

By way of this petition, filed under Section 482 of the Criminal Procedure Code, the petitioner has prayed for quashing of FIR No.0146 of

2021, dated 23.09.2021, under Sections 3 (1) (r) and 3 (1) (s) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities), Act 1989 (Amendment 2015), registered at Police Station Jawali, Tehsil Jawali, District Kangra, H.P., *inter alia*, on the ground that as the petitioner is married to a man who is from Scheduled Caste, therefore, in terms of the provisions of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities), Act 1989, no FIR can be registered against her as pursuant to her marriage into a Scheduled Caste family, she also inherits the status of a Scheduled Caste.

2. This Court is of the considered view that the very genesis of contention of the petitioner is not sustainable in the eyes of law. It is not in dispute that the petitioner by birth does not belongs to a Scheduled Caste. Hon'ble Supreme Court of India recently in *(2018) 2 Supreme Court Cases 493*, titled as ***Sunita Singh Versus State of Uttar Pradesh and Others***, has again reiterated that there cannot be any dispute that the caste is determined by birth and the caste cannot be changed by marriage with a person of Scheduled Caste.

3. That being the case, as admittedly the petitioner is not born in a Scheduled Caste family, therefore, it cannot be said that by virtue of a marriage to a person who belongs to Scheduled Caste, the petitioner also gets the protection as envisaged under the provisions of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities), Act 1989.

4. In view of the findings returned hereinabove, present petition is dismissed in limini, so also the pending miscellaneous applications, if any.

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

Between:

INDRA DEVI W/O SH. BALAK RAM, RESIDENT OF VILLAGE MAHIDHAR, P.O. AND TEHSIL

THUNAG, DISTRICT MANDI, H.P.

….PETITIONER.

(BY MS. LEENA GULERIA, ADVOCATE)
AND

1. STATE OF H.P.
2. PROMILA DEVI, W/O BHAVNESHWAR DUTT,, RESIDENT OF VILLAGE JHAMOT, P.O. AND TEHSIL THUNAG, DISTRICT MANDI, H.P.

….. RESPONDENTS.

(BY MR. ADARSH SHARMA, MR. SUMESH RAJ, MR. SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, WITH MR. KAMAL KANT CHANDEL, DEPUTY ADVOCATE GENERAL, FOR RESPONDENT NO.1.
NONE FOR RESPONDENT NO.2.

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No.704 of 2021
Decided on: 21.12.2021

Code of Criminal Procedure, 1973- Section 482- Petition for setting aside order passed by Ld. Special Judge, Manali, vide which application under Section 439(2) Cr.P.C. for cancellation of bail granted to respondent No. 2 has been dismissed- Held- Petitioner has invoked criminal process for settling the personal scores- Petition dismissed.

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

O R D E R

By way of this petition, filed under Section 482 of the Criminal Procedure Code, a prayer has been made for setting aside order dated 08.11.2021, passed by the Court of learned Special Judge, Mandi, District

Mandi, H.P., in Bail Application No.331 of 2021, titled as Indra Devi Versus State of H.P. and another, vide which an application filed under Section 439(2) of the Criminal Procedure Code by the present petitioner for cancellation of bail grant in favour of respondent No.2 has been dismissed.

2. Learned counsel for the petitioner has argued that after the lodging of the FIR against respondent No.2 by the present petitioner, the respondent and her husband also lodged counter FIR naming the witness in the FIR of the present petitioner as an accused therein and now they are threatening said witness not to depose against respondent No.2 and this extremely important aspect of the matter was has been not considered in the correct perspective by the learned Court below. Accordingly, a prayer has been made for setting aside the impugned order.

3. I have heard learned counsel for the petitioner and have carefully gone through the documents appended with the petition as well as the impugned order which has been passed by the Court of learned Special Judge, Mandi, District Mandi, H.P. on 08.11.2021.

4. This Court is of the considered view that the present petition is without merit. Learned Special Judge, Mandi, H.P. has exercised the discretion vested in it by releasing respondent No.2 on bail. But of course, in case the conditions which have been imposed by the learned Court below while releasing respondent No.2 on bail are flouted by the said respondent, the prosecution is always at liberty to approach said Court for recalling the order of grant of bail.

5. In the present case, it is not the case of the prosecution that the conditions which have been imposed upon respondent No.2, stand flouted by her. Incidently, there is nothing placed on record by the present petitioner from which it can be inferred that after the grant of bail, any threat has been issued to the witnesses as alleged by the petitioner. More over, it appears that filing of the application under Section 439(2) of the Criminal Procedure Code was nothing but an attempt to dissuade respondent No.2 and her husband from

pursuing the FIR which has been lodged by them against the person who happens to be the witness in the case of the present petitioner. This demonstrates that the criminal process is being invoked for settling the personal scores by the parties rather than any other purpose.

6. In this view of the discussion made hereinabove, as this Court does not finds any merit in the present petition, the same is dismissed, so also pending miscellaneous applications, if any.

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

Between:-

SHRI MOHAMMAD AADIL
S/O SHRI MOHAMMAD SHAHID,
AGE 22 YEARS, R/O MOHALLA
ISLAM NAGAR, KASBA PATIYAPADA,
THANA CHANDPUR, DISTRICT BIJNOR,
UTTAR PRADESH (INJAIL) THROUGH
MOHD. AAQIB S/O SHRI MOHAMMAD
SHAHID (BROTHER). ....PETITIONER

(BY SH. MOHD. AAMIR &SH. SUMIT BAINS, ADVOCATES).

AND

STATE OF HIMACHAL PRADESH

....RESPONDENT

(BY SH. SUMESH RAJ AND SH. NARINDER GULERIA, ADDITIONAL ADVOCATE GENERALS WITH SH. KUNAL THAKUR, DEPUTY ADVOCATE GENERAL).

S.I. BALJEET SINGH, P.S. BARMANA, DISTRICT BILASPUR, H.P. PRESENT ALONGWITH RECORDS.

CRIMINAL MISC. PETITION(MAIN)
NO. 2346 OF 2021
RESERVED ON : 17.01.2022

DECIDED ON : 18.01.2022

Code of Criminal Procedure, 1973- Section 439- Bail- **Indian Penal Code, 1860**- Sections 302, 201 and 34- Bail on the ground that investigation is complete and there is no legal evidence against the petitioner- Held- Allegation against the bail petitioner and his co-accused are very serious in nature- Bail petition dismissed.

Cases referred:

Hem Singh @ Bhimu vs. State of H.P. 2019 (Suppl.)Him.L.R. (HC) 3006;
Sanjay Chandra vs. Central Bureau of Investigation (2012) 1 SCC 40;

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

O R D E R

Petitioner is an accused in caseregisteredvide FIR No.14 of 2021 dated 04.02.2021 at Police Station, Barmana, District Bilaspur, H.P. under Sections302, 201 and 34 IPC. Petitioner is in custody since 05.02.2021.

2. Petitioner has approached this Court for bail, in above noted case, under Section 439 Cr. P.C., on the grounds that the investigation in the case is already complete and after presentation of challan, the case is pending adjudication before learned Sessions Judge, Bilaspur. It is averred that implication of petitioner is false and there is no legal evidence on record to suggest an inference of his involvement in alleged crime. It has further been contended that petitioner belongs to a respectable family and has roots in the society;he is sole bread earner of the family, is only 22 years old and his further custody will affect his career. He doesn't have any past criminal record. He has undertaken not to make any inducement, threat or promise to the persons acquainted with the facts of the case and also to abide by all the terms and conditions as may be imposed against him.

3. On notice, respondent has submitted status reports, from time to time, the last being dated 16.01.2022. The police file wasalso produced at the time of hearing of the matter. Perusal of status reports as well as records from

the police file, reveal that on investigation, involvement of petitioner along with one Farrah @ Tamanna has been found in the alleged crime and the challan has accordingly been presented in the Court of competent jurisdiction where the same is pending adjudication.

4. As per the case of respondent, on 04.02.2021, a telephonic information was received at Police Station, Barmana, District Bilaspur, that an un-identified dead body was lying between places "Delag and Dali". On such information, a police party reached the spot. Subsequently, the SHO, Police Station, Barmana also reached the spot and conducted preliminary investigation. Statement of Arvind Kumar Sharma was recorded under Section 154 Cr.P.C., who had seen the dead body lying on the spot along with other local residents. On further investigation, one 'Aadhar Card' bearing name of Mohammad Aadil was found in the vicinity where the dead body was lying. The details mentioned in the said 'Aadhar Card' were tracked, which revealed that the person named in the 'Aadhar Card' belonged to a place "Mohalla Islam Nagar, Kasba Patiyapada, Thana Chandpur, District Bijnor, U.P.". It also transpired during investigation that a missing report with respect to a person named Ram Raj was recorded at Police Station, Nayi Mandi, Muzaffarnagar on 01.02.2021 and in the course of inquiry on such report, a person with a female had been tracked on the basis of CDRs. It was further informed by the officials of Police Station, Nayi Mandi, Muzaffarnagar that the person and female rounded off by them along with a few other persons, were being brought to Police Station, Barmana, District Bilaspur for identifying the dead body found on 04.02.2021 within the jurisdiction of said Police Station. The person along with female brought by the police from Police Station, New Mandi, Muzaffarnagar were identified as Mohammad Aadil (petitioner) and Farrah @ Tamanna (the other co-accused in the case). They were accompanied by the other persons, one of whom, was the brother of Ram Raj. All of these persons identified the dead body, found between "Delag and Dali" on

04.02.2021, to be that of Ram Raj. On further investigation, it was found that the petitioner and Farrah @ Tamanna in furtherance of their common intention had caused death of Ram Raj by causing injuries on his person with an iron hammer at place near Namol Barot, P.O. Baroti, Tehsil Sundernagar, District Mandi. The body of Ram Raj was then carried in a vehicle (Alto Car) No. HP-21A-5999 up to the place between "Delag and Dali", where the same was ultimately found on 4.2.2021.

5. As per the further case of respondent, the vehicle (Alto Car) No. HP-21A-5999 was found to be owned by the wife of one Anil Kumar, who disclosed to the police during investigation that on 25.01.2021 he had left the said vehicle in custody of petitioner for denting and painting work at Bari Chowk, Ladrour where the petitioner was having a workshop. The clothes worn by petitioner on the date of alleged offence were also allegedly recovered during investigation. On scientific examination of vehicle (Alto Car) No. HP-21A-5999 blood stains were found. On scientific analysis, i.e. serological examination as well as DNA profiling, the blood sample of deceased picked from the spot where the dead body was found matched with the blood found on the trouser (lower) of petitioner as well as the seat of Alto Car No. HP-21A-5999. The police also found during investigation that in order to suppress the crime and to mislead the police, petitioner had visited Sarkaghat Bus stand on 28.01.2021 and had placed the mobile phone of deceased underneath a seat of a bus en-route from Sarkaghat to Delhi, which later was found by the Conductor of the bus, who during investigation handed over the same to the police. On scanning of CCTV footage of bus stand Sarkaghat for the relevant period of time, it was discovered that petitioner had boarded and de-boarded a bus within a span of 2-3 minutes. The motive ascribed to petitioner is that he suspected illicit relations between deceased and his wife Farrah @ Tamanna.

6. I have heard learned counsel for the petitioner and learned Additional Advocate General for the State and havegone through the records.

7. Though at the stage of consideration of bail application the evidence collected by the Investigating Agency is not to be scanned minutely, yet to assess prima-facie involvement of the bail petitioner in alleged crime, the material collected on record can always be appreciated for such limited purpose. From the perusal of status report as well as material contained in Police file, it cannot be said that the accusations made against petitioner are completely unjustified or uncalled for. The facts that petitioner's Aadhar Card was found in the vicinity of a place where the dead body was dumped, version of witness Anil Kumar that he had handed over vehicle (Alto Car) bearing No. HP-21A-5999 for repairs to petitioner on 25.01.2021 coupled with matched DNA profile of blood stains found in the said vehicle with the blood sample of deceased are sufficient to prima-facie point a finger of accusation against petitioner.

8. The allegations against petitioner and his co-accused Farrah @ Tamanna are very serious in nature. They are alleged to have committed a cold blooded murder and had thereafter intentionally and deliberately caused disappearance of evidence and also conducted themselves in such a way so as to mislead the probable investigation. The offence alleged against petitioner, if proved, attracts even capital punishment. In such circumstances, the grant of bail to the petitioner, in all probabilities, will have adverse effect on the Society.

9. Petitioner is permanent resident of Mohalla Islam Nagar, Kasba Patiyapada, Thana Chandpur, District Bijnor, Uttar Pradesh and his release on bail may cause his subsequent appearance for the purpose of trial difficult if not impossible. This may hamper the course of trial, which needs to be speedily concluded in order to instill confidence of general masses in the legal system. In the given facts of the case, it also cannot be said with certainty that the petitioner with psyche attributed to him will not try to influence the prosecution witnesses.

10. Learned counsel for the petitioner has relied upon the judgment passed by the Hon'ble Supreme Court in ***Sanjay Chandra*** vs**.** ***Central Bureau of Investigation (2012) 1 SCC 40***, judgments passed by Co-ordinate Benches of this Court in ***Hem Singh*** @ ***Bhimu*** vs. ***State of H.P. 2019 (Suppl.)Him.L.R. (HC) 3006*** and ***Cr.MP(M) No. 2182 of 2019*** titled ***Laxman Singh*** vs**.** ***State of Himachal Pradesh***, decided on 24.01.2020, in support of his case. However, none of the judgments cited on behalf of the petitioner, have application in the facts and circumstances of the case.

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

12. 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 AJAY MOHAN GOEL, J.

Between:

SMT. RENU CHAUHAN, W/O SH. PREM CHAUHAN, R/O WARD NO.1, NEAR ADA OFFICE, COURT ROAD, JANOGHAT THEOG, TEHSIL THEOG, DISTRICT SHIMLA, H.P.

….PETITIONER.

(BY MR. AJAY KUMAR SHARMA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH.

2. SH. HARDYAL SINGH, S/O SH.

JETHU RAM, R/O VILLAGE BASA THEOG, TEHSIL THEOG, DISTRICT SHIMLA, H.P., PRESENTLY IN OCCUPATION OF SHOP AT GROUND FLOOR OF THE BUILDING, WARD NO.1, NEAR ADA OFFICE, COURT ROAD, JANOGHAT, THEOG, TEHSIL THEOG, DISTRICT SHIMLA.

....RESPONDENTS.

(MR. MR. ADARSH SHARMA, MR. SUMESH RAJ AND MR. SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, FOR RESPONDENT NO.1

MR. AJAY KASHYAP, ADVOCATE, FOR RESPONDENT NO.2)

CRIMINAL REVISION No. 410 of 2019
Decided on: 22.11.2021

Code of Criminal Procedure, 1973- Sections 397 and 401- Revision petition directed against the order of Sub Divisional Magistrate, Theog vide which complaint filed under Section 133 Cr.P.C. stands dismissed- Held- Competent Authority has not passed a reasoned or speaking order- Neither the contentions of the respective parties have been taken note of nor the statements of the witnesses have been discussed- Petition allowed and impugned order is quashed and set aside.

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

O R D E R

This Revision Petition filed under Section 397 read with Section 401 of the Code of Criminal Procedure is directed against order, dated 02.07.2019, passed by the Sub-Divisional Magistrate, Theog, District Shimla, in Case No. 80-IV/2018, titled as Renu Chauhan vs. Hardyal Singh, vide

which, a complaint filed under Section 133 of the Code of Criminal Procedure by the present petitioner stands dismissed.

2. Brief facts necessary for the adjudication of this petition are as under:-

Petitioner filed a complaint under Section 133 of the Code of Criminal Procedure against the respondent, inter alia, on the ground that the respondent was a tenant of the petitioner and was carrying out welding work in the premises so let out to him and she as a landlady had received complaints from other tenants regarding obnoxious, injurious, annoying and toxic welding fuels being generated by the accused from welding in his shop. As per the complainant, the conduct of the trade/occupation of the respondent was injurious to the health and comfort of the persons residing in the building as well as neighbourhood and accordingly, a prayer was made to initiate appropriate action under Section 133 of the Code of Criminal Procedure.

3. The proceedings were resisted by the respondents, inter alia on the ground that the complaint besides being not maintainable, stood filed just to harass him, for the reason that he had demanded money from the complainant for certain works which he had carried out upon the property of the complainant, for which he was not reimbursed. As per the respondent, contradictory and false pleas stood raised against him and the allegation that the trade being carried by the respondent was causing inconvenience to the residents of the building or neighbourhood, were totally incorrect. This complaint stands dismissed by the Sub-Divisional Magistrate, Theog, by way of impugned order.

4. I have heard learned counsel for the parties and I have also gone through the record of the case as well the impugned order.

5. As the order impugned is a short order, for the sake of convenience, the same is being reproduced as under:-

"2.7.2019
Case called.
Present: Complainant alongwith Advocate Sh. Somendar Chandel.
None for respondent.

From the perusal of the record placed on file and argument put forth by the learned Counsel for complainant it appear for me that there is no nuisance due to welding work this also observed from the record that there is a dispute between the parties for dispossessing the respondent from the shop which was rented out to the respondent by the complainant. Hence the present application does not fall under Section 133 of Cr.P.C. Therefore, there is no need to proceed further in the case. Hence the present application is dismissed. The original case file be consigned to the G.R.R. after due completion. Announced.

Sd/-
SDM."

6. Section 133 of the Code of Criminal Procedure confers upon a District Magistrate or Sub-Divisional Magistrate or any other Executive Magistrate specially empowered in this behalf by the State Government, the power to make a conditional order for removal of nuisance on receiving the report of a police officer or other information and on taking such evidence, as he thinks fit.

7. The power so conferred upon the authority is quasi judicial in nature. Not only this, the same also has penal consequences. In this background, it is but obvious, that whenever authority exercises the powers so conferred upon it under Section 133 of the Code of Criminal Procedure, the procedure prescribed has to be followed along with the principles of natural justice.

8. Record demonstrates that in order to prove her case, the complainant produced as many as seven witnesses, including three expert witnesses, whereas, no witness was produced by the respondent. The order which has been passed on the complaint by the SDM has already been reproduced hereinabove. Perusal thereof demonstrates that the complaint of the petitioner has been decided by the competent authority without passing a reasoned or speaking order. Neither the contentions of the respective parties have been taken note of nor the statements of the witnesses have been discussed. The findings arrived at by the authority are not substantiated by any reasoning. This demonstrates that the impugned order is not a speaking order and has been passed without any due application of judicial mind. It is settled law that an order which has civil consequences has to be a speaking and reasoned order, so that the conclusion arrived at by the authority concerned can be made out from the contents of the order itself. The rationale behind this is that in case there is an aggrieved party and it intends to challenge the order, then it can infer from the said reasoning that on what grounds it may challenge the order and similarly, if after perusal of the reasons, the party is satisfied that the conclusion arrived at, is a just conclusion, it may refrain from indulging in any further litigation. The impugned order falls in the category of non-speaking order from which it cannot be inferred as to on what basis, the conclusion arrived at by the authority has been so arrived at. Simply by saying that record demonstrates that there is a dispute between the parties for dispossessing the respondent from the shop does not gives a licence to the authority to dismiss the complaint filed by the petitioner/complainant by passing a non speaking order. The authority is duty bound to pass a reasoned and speaking order which besides containing the respective stands of the parties, also necessarily has to contain the reasons which lead the authority to the conclusion that may be arrived at by the authority in the matter.

9. Accordingly, in view of the reasons assigned hereinabove, this petition is allowed and the impugned order is quashed and set aside, on the ground that the same is a non speaking and unreasoned order by remanding the matter back to the authority concerned with the direction to decide the same afresh, after hearing the parties by passing reasoned and a speaking order. It is clarified that the order shall be passed by the authority on the basis of the material already on record. It is further clarified that this Court has not made any observation on the merits of the case. What conclusion has to be arrived at by the authority is the prerogative of the authority, but all that this Court observes is that the same be arrived at by passing a reasoned and speaking order. Parties are directed to appear before Sub-Divisional Magistrate, Theog on **20.12.2021**, whereafter appropriate date shall be fixed by the authority for final hearing of the case.

The petition stands disposed of in above terms, so also pending miscellaneous application(s), if any.

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

Between:

1.RAJEEV SOOD, AGED ABOUT 56 YEARS, S/O LATE SH. OM PRAKASH SOOD, R/O 71, MIDDLE BAZAAR, SHIMLA, H.P.

2. VIVEK SOOD, S/O LATE SH. OM PRAKASH SOOD, R/O 71, MIDDLE BAZAAR, SHIMLA, H.P.

....PETITIONERS.

(BY MS. SEEMA K. GULERIA, ADVOCATE)

AND

SOM NATH CHAUDHARY, S/O SH. HARBANS LAL CHAUDHARY, R/O PURSHARTHI BASTI, BAZAR WARD, BARA SHIMLA, H.P.

….RESPONDENT.

(RESPONDENT IS *EX PARTE*)

CIVIL REVISION No.2 of 2020
Reserved on: 28.09.2021
Decided on: 29.11.2021

H.P. Urban Rent Control Act, 1987- Section 24(5)- Petitioner filed rent petition on the ground of rebuilding and reconstruction- Petition allowed, however, Ld. Appellate Authority set aside the order of Ld. Rent Controller- Petitioner assailed said judgment in this revision petition- Held- Reasons assigned by the Ld. Appellate Authority while setting aside the order of Ld. Rent Controller is not sustainable in the eyes of law- Non-framing of issues is not fatal if the parties to the lis know the case of respective sides- Revision petition allowed- Judgment of Ld. Appellate Authority is set aside and order of Ld. Rent Controller upheld.

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

J U D G M E N T

The petitioners herein filed a petition under Section 24 (5) of the H.P. Urban Rent Control Act, 1987, against the respondent/tenant, seeking his eviction on the ground of carrying out reconstruction and rebuilding, which as per the petitioners could not be carried out unless the Demised Premises were vacated by the respondent.

2. The petition was resisted by the respondent, *inter alia*, on the grounds of maintainability as well as the issue that no document qua permission for reconstruction and rebuilding of the Demised Premises was placed on record by the landlords.

3. The Demised Premises comprises of two rooms, kitchen, common bath room and common toilet in second floor of Pursharthi Basti, Bazar Ward, Bara Shimla, H.P.

4. On the basis of the pleadings of the parties, learned Rent Controller framed the following issues:-

> *"1. Whether the demised premises is in dilapidated condition and is not fit for human habitation, as alleged? OPA.*
>
> *2. Whether the respondent is in arrears of rent qua the demised premises, as alleged? OPA.*
>
> *3. Whether the petition is not maintainable? OPR.*
>
> *4. Whether the petitioners are estopped from filing the present petition by way of their acts, deeds, omission, commission and acquiescence? OPR.*
>
> *5. Whether the petitioners have no cause of action to file the present petition? OPR.*
>
> *6. Whether the petition is bad for non-joinder of necessary parties? OPR.*
>
> *7. Relief. "*

5. On the basis of evidence led by the parties in support of their respective contentions, the issues were answered as under:-

"Issue No.1	*:*	*Yes.*
Issue No.2	*:*	*Yes.*
Issue No.3	*:*	*No.*
Issue No.4	*:*	*No.*

Issue No.5	:	*No.*
Issue No.6	:	*No.*
RELIEF	:	*The petition is allowed as per the operative portion of the order*".

6. The Rent Petition (i.e. Rent Petition No.124-2 of 2014, titled as Sh. Rajeev Sood & another Versus Sh. Som Nath Chauchary) was allowed by the learned Rent Controller, vide order dated 31.10.2018 in the following terms:-

> *"38. In view of my findings on the issues No.1,2, 3, 4, 5 and 6, the petition succeeds and the same is as such allowed and the petitioners are held entitled to recover the amount to the tune of Rs.8,47, 963/- as arrears of rent at the rate of Rs.2500/- per month plus statutory interest @ 9% per annum w.e.f. 01.01.2000 to 31.12.2011 and the amended interest @ 12% per annum 2.3.f. 01.01.2012 till today i.e. 31.10.2018 and the respondent is directed to pay the aforesaid entire amount of the rent within the period of 30 days from today i.e. 31.10.2018, the date of passing of this order to the petitioners and failing which, the respondent shall beliable to be evicted from the demised premises. Further, it is held that the demised premises is bonafidely required by the petitioners for the purpose of rebuilding and reconstruction which cannot be carried out without the demised premises being vacated by the respondent and the demised premises has become unfit and unsafe for human habitation. Consequently, the respondent is directed to hand over and deliver vacant possession of the demised premises i.e. two rooms, one kitchen and bath room common toilet in Second Floor at Purcharthi Basti, Bazar Ward, Bara Shimla, H.P. to the petitioners. However, respondent shall have the right of re-entry in the reconstructed and rebuilt building to the extent of the area in his tenancy. However, in view of the peculiar facts and circumstances of the present case, the parties are left to bear their own respective costs. A memo of costs be prepared accordingly. The file after due completion be consigned to the record room."*

7. Feeling aggrieved, the tenant preferred an appeal before the learned Appellate Authority-II, Shimla, H.P., i.e. Rent Appeal No.32-S/113(b) of 2018, titled as Som Nath Chaudhary Versus Sh. Rajeev Sood & another (decided on 16.08.2019), *inter alia*, on the ground that learned Rent Controller had failed to frame material issues arising out of the pleadings and non-framing of material issues had prejudiced the rights of the appellant. According to the appellant, there were no findings returned qua bonafide requirement of the premises for the purpose of rebuilding and reconstruction on account of non-framing of issues in this regard. As per the appellant, there was no intention of the landlords to rebuild the premises because no steps were taken by the landlords for sanction of the map from the competent authority. It was further the contention of the appellant that the learned Rent Controller had erred in returning the findings on the basis of inadmissible evidence.

8. This appeal has been allowed by the learned Appellate Court vide impugned judgment dated 16.08.2019 in the following terms:-

> "*18. As a result of my findings on point no.1 above, the instant appeal is allowed. The impugned order of the learned Rent Controller is set-aside and the case is remanded back to the learned court below with the directions to frame proper issues on the ground of eviction taken by the petitioners and after giving opportunity of leading evidence by both the parties and after hearing the parties to decide it afresh. The record of court below be sent down forthwith along with an authenticated copy of this judgment. The parties through their counsel are directed to appear before the learned court on 17.09.2019. The file after due completion be consigned to the Record Room.*"

9. Feeling aggrieved, the landlords have filed this Revision Petition.

10. As the respondent-tenant did not appear before the Court despite service, he has been proceeded against *ex parte*.

11. I have heard learned counsel for the petitioners and have gone through the order passed by the learned Rent Controller as well as the judgment passed by the learned Appellate Court.

12. While setting aside the order passed by the learned Rent Controller, learned Appellate Court held that the learned Rent Controller erred in mixing two grounds, i.e. whether the building was unfit and unsafe for human habitation and whether it was bonafidely required for rebuilding and reconstruction, which could not be carried out without the premises being vacated by the tenant. It held that the ingredients required to be proved to establish said two grounds were different and therefore, if issue framed was that the Demised Premises were not fit for human habitation then eviction could not have been ordered on the ground of rebuilding and reconstruction. Learned Appellate Court held that neither proper issues were framed on these two counts because as per it, if eviction was ordered on the ground of rebuilding and reconstruction then bonafide of the petitioners was also required to be proved for carrying out construction in the Demised Premises. On the basis of these findings the order passed by the learned Rent Controller has been set aside.

13. This Court is of the considered view that the reasoning which has been assigned by the learned Appellate Court while setting aside the order passed by the learned Rent Controller is not sustainable in the eyes of law.

14. A perusal of the record demonstrates that in the application filed under Section 14(2) of the H.P. Urban Rent Control Act for eviction of the tenant, it was averred that the landlords were the owners of the Demised Premises which had become unfit and unsafe for human habitation and required imminent rebuilding and reconstruction. It was specifically mentioned in the Rent Petition that the Demised Premises were required by

the landlords bonafidely for carrying out reconstruction and rebuilding work which could not be carried out unless the premises were vacated by the occupant of the tenanted premises in the building.

15. The case of the landlords thus was categorical that the Demised Premises were in a dilapidated condition and possession thereof was required by the landlords bonafidely as reconstruction of the premises could not be carried out unless the same stood vacated by its occupant. It was in the backdrop of these pleadings as well as the case put forth by the landlords, which was in the knowledge of the tenant, that issue No.1 was framed to the effect as to whether the Demised Premises was in a dilapidated condition and not fit for human habitation.

16. Learned Appellate Court in fact has erred in not appreciating that the plea of the Demised Premised being unsafe for human habitation and thus were required for rebuilding and reconstruction bonafidely were not distinct pleas which required different ingredients to prove them. The plea so taken by the landlords was inter dependent. Not only this, even the tenant had taken a specific defence that the Demised Premises did not require rebuilding and reconstruction nor was it bonafidely required by the landlords for rebuilding and reconstruction.

17. The reasoning assigned in the order passed by the learned Rent Controller as stand summed up in para-32 onwards, demonstrates that learned Rent Controller has in detail gone into the issue as to whether the Demised Premises were in a dilapidated condition and whether they were bonafidely required by the landlords for the purpose of reconstruction.

18. Even otherwise, it is settled law that non framing of issues is not fatal if the parties to the lis know the case of the respective sides. In this case, it was a specific plea taken in the Eviction Petition by the landlords that the Demised Premises were in a dilapidated condition and eviction of the tenant was bonafidely required for the purpose of reconstruction of the same. The

tenant refuted that the Demised Premises were in dilapidated condition and the same were therefore required bonafidely by the landlords for the purpose of reconstruction. The tenant in fact led evidence to justify his stand. All these aspects of the matter have been ignored by the learned Appellate Court while setting aside the well-reasoned order passed by the learned Rent Controller.

19. Therefore, in these circumstances, as this Court is convinced that the judgment passed by the learned Appellate Court and reasoning assigned there while setting the order passed by the learned Rent Controller are not sustainable in the eyes of law, this petition is allowed by setting aside the judgment passed by the learned Appellate Authority-II, Shimla, H.P., in i.e. Rent Appeal No.32-S/113(b) of 2018, titled as Som Nath Chaudhary Versus Sh. Rajeev Sood & another, decided on 16.08.2019 and by upholding order 31.10.2018, passed by the learned Rent Controller, in Rent Petition No.124-2 of 2014, titled as Sh. Rajeev Sood & another Versus Sh. Som Nath Chauchary.

20. The petition stands disposed of accordingly, so also pending miscellaneous applications, if any.

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

Between:

RAJ RANI WIFE OF SH. SURENDER KUMAR ALIAS SURENDER SINGH, RESIDENT OF 26, BANSI GATE, KAMBOJ NAGAR, MOHALLA GURU NANAKPURA.

....PETITIONER/DEFENDANT.

(BY. T.S. CHAUHAN, ADVOCATE)

AND

SEETA DEVI ALIAS SURJIT KAUR WIFE OF SH. RAM PARKASH, RESIDENT OF VILLAGE BINEWAL, TEHSIL GARSHANK (PUNJAB) AT PRESENT RESIDENT OF VILLAGE LAHGARH, TEHSIL AND DISTRICT FEROZPUR (PUNJAB).

....RESPONDENT/PLAINTIFF.

(BY. MR. N.K. THAKUR, SENIOR ADVOCATE, WITH MR. KARAN VEER SINGH, ADVOCATE)

CIVIL REVISION No.32 of 2021
Decided on: 03.12.2021

Code of Civil Procedure, 1908- Section 115- Petitioner assailed order of Senior Civil Judge, Una, vide which application filed by petitioner under Order IX Rule 13 of Code of Civil Procedure was dismissed and further judgment passed by Ld. Additional District Judge-I, Una, vide which appeal was also dismissed- Held- Petitioner failed to demonstrate that the ex parte judgment and decree passed against her was bad as she was never served in the Civil Suit- Revision dismissed.

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

J U D G M E N T

By way of this petition, filed under Section 115 of Code of Civil Procedure, the petitioner herein assails order dated 10.12.2018, passed by the

Court of learned Senior Civil Judge, Una, District Una, H.P., in Civil Miscellaneous Application No.307-VI-2017, titled as Raj Rani Versus Seeta Devi, vide which an application filed by the petitioner, under Order 9, Rule 13 of the Code of Civil Procedure for setting aside judgment and decree passed against her was dismissed, as well as the judgment dated 07.06.2019, passed by the Court of learned Additional District Judge,-1, Una, District Una, H.P., in Civil Miscellaneous Appeal No.01 of 2019, titled as Raj Rani Versus Seeta Devi alias Surjit Kaur, whereby the Civil Miscellaneous Appeal preferred by the present petitioner against the rejection of the application by the learned Trial Court was also dismissed.

2. Brief facts necessary for the adjudication of the present petition are that the respondent herein filed a suit for declaration to the effect that the parties i.e. the respondent and the petitioner were joint owners-in-possession in equal share of the suit land being daughters of Rattan Chand and that Will dated 22.07.2009 alleged to have been executed by deceased Rattan Chand was illegal, null and void, in-operative and in-effective. Vide order dated 21.08.2012, the petitioner was proceeded against *ex parte* in the Civil Suit. An *ex parte* decree was passed in favour of the petitioner and against the defendant by the learned Trial Court on 10.04.2017.

3. The petitioner preferred an application under Order 9, Rule 13 of the Code of Civil Procedure, praying for setting aside order dated 21.08.2012, vide which she was proceeded against *ex parte* by the learned Trial Court, as well as the judgment and decree passed by the learned Trial Court on 10.04.2017, which was *ex parte*. Alongwith this application, one more application was filed under Section 5 of the Limitation Act, praying for condonation of delay in filing the application under Order 9, Rule 13 of the Code of Civil Procedure. Learned Trial Court after allowing the application filed under Section 5 of the Limitation Act and by condoning the delay in filing the application under Order 9, Rule 13 of the Code of Civil Procedure, dismissed the

application filed under Order 9, Rule 13 of the Code of Civil Procedure vide order dated 10.12.2018. The order in appeal has been upheld by the learned Appellate Court vide judgment dated 07.06.2019.

4. Feeling aggrieved, the petitioner has preferred this Revision Petition.

5. The contention of learned counsel for the petitioner is that the learned Trial Court erred in proceeding against the petitioner, who was the defendant before the learned Trial Court, *ex parte* by ignoring the fact that the defendant was never served during the proceedings in the Civil Suit. He submits that this extremely important aspect of the matter has been completely ignored by the learned Court below while dismissing the application filed for recalling the *ex parte* judgment and decree. As per him, as this has caused great injustice to the petitioner, therefore, this Revision Petition be allowed and the *ex parte* judgment and decree passed by the learned Court below be set aside by also setting aside the orders which stand impugned by way of this Revision Petition. Learned Counsel has also argued that the intent of the respondent/plaintiff to mislead the Court is further borne out from the fact that wrong address and wrong parentage of the defendant, i.e. the present petitioner was mentioned in the memo of parties of the suit filed before the learned Trial Court.

6. On the other hand, learned Senior Counsel appearing for the respondent has argued that the application filed under Order 9, Rule 13 of the Code of Civil Procedure was rightly dismissed by the learned Trial Court by assigning the reasons which stand mentioned therein, as it is clearly borne out from the record that the defendant did put in appearance before the learned Trial Court in person and thereafter when she chose not to appear before the learned Court below, the Court was having no option but to proceed against the defendant *ex parte*. He submits that the plea**,** which has been raised with regard to the alleged non service of the defendant before the learned Trial are nothing but an afterthough. He further submits that the defendant was fully aware of the

pendency of the proceedings, yet after appearing once before the learned Court in person, she chose not to appear or engage anyone on her behalf and in these circumstances, there was no infirmity or illegality with regard to passing of the *ex parte* decree by the learned Trial Court and thus, this petition being devoid of any merit is liable to be dismissed. He further argued that in the memo of parties of the Civil Suit, defendant Raj Rani was rightly reflected as wife of Salinder Kumar and it not as if her address was given by reflecting her parentage therein. He further submits that the address which was mentioned in the cause title of the Civil Suit of the defendant was correct, is further apparent from the fact that the same address has been reflected in the subsequent applications which have been filed by the defendant. On these grounds, he has prayed that the petition be dismissed.

7. I have heard learned counsel for the parties and have gone through the pleadings as well as record of the case.

8. A perusal of the order which has been passed by the learned Trial Court while dismissing the application filed by the present petitioner, under Order 9, Rule 13 of the Code of Civil Procedure, demonstrates that what weighed with the learned Court below was the fact that the petitioner herein had appeared before the learned Trial Court on 07.06.2012, in terms of the proceedings of that date entered in the hand of the learned Presiding Officer herself. In order to ascertain as to whether the findings so returned in order dated 10.12.2018 were correct findings, this Court has perused the original record of the Civil Suit. The Zimini Orders passed in the Civil Suit demonstrate that following order was passed by the learned Presiding Officer on 07.06.2012:-

> "*Defendant be served by RAD on filing the stamp value within 5 days for 21.8.12.*
>
> *At this stage, defendant has put in appearance. Put up for Ws on 21.8.12.*"

9. This order is in the hand of the Judicial Officer. Thus, it is apparent from a perusal of this order that defendant had put in appearance before the learned Presiding Officer. Now, in this background, when one peruses the applications which were filed by the present petitioner under Order 9, Rule 13 of the Code of Civil Procedure as well as Section 5 of the Limitation Act, the same demonstrate that except a bald statement that the petitioner did not appear before the learned Trial Court on 07.06.2012, there is nothing placed on record to substantiate this contention of the petitioner. In this case, on one hand there is a bald statement contained in the application made by the petitioner which is footed against a judicial order. The presumption of truth but natural is attached with the judicial order. In case, defendant actually had not put in appearance before the learned Court below on 07.06.2012, then she could have had spelled out as on that date where was she, so that the contention of her that she actually did not appear before the learned Court below on 07.06.2012, could have been substantiated. In the absence of the same, this Court has no reason to disbelieve the judicial record, in terms whereof the defendant had put in appearance in person before the learned Court below on 07.06.2012.

10. Incidently, the record of the learned Trial Court demonstrates that on the next date, i.e. 21.08.2012, it was again expressly recorded in the order that defendant was not present despite the fact that she was present on the previous date of hearing. There is no allegation in the petition or the application with regard to impersonation etc.

11. That being the case, this Court is of the considered view that there is no infirmity with the order passed by the learned Trial Court as affirmed by the learned Appellate Court, vide which the application filed under Order 9, Rule 13 of the Code of Civil Procedure by the present petitioner stood dismissed, because the petitioner failed to demonstrate that the *ex parte* judgment and decree passed against her was bad as she was never served in the Civil Suit.

12. One more fact that this Court would like to refer at this stage is that in terms of the judgment and decree which has been passed by the learned Trial Court, the suit property which in fact belonged to the predecessor-in-interest of the plaintiff and the defendant, who were real sisters, now dwelled upon them in an equal share.

13. The Will, which stood assailed in the Civil Suit, was the one, in terms whereof the suit property purportedly stood bequeathed by its testator in favour of the present petitioner to the extent of 2/3rd share and to the extent of 1/3rd share in favour of the present respondent. This Will has been disbelieved by the learned Trial Court by holding both the parties, i.e. the sisters to be entitled to equal share of the property of their father. On equity also, this judgment and decree passed by the learned Trial Court seems to be just and reasonable.

14. Accordingly, in view of the observations made hereinabove, as this Court does not finds any merit in this petition, the same is dismissed, so also pending miscellaneous applications, if any. No order as to costs.

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

Between:-

M/S HI TEC POINT TECHNOLOGIES
(P) LTD. HI TECH COMPLEX, VILLAGE
KAMLI, ADJOINING EWS BLOCK,
SECTOR 1, PARWANOO, DISTT. SOLAN,
HIMACHAL PRADESH THROUGH DIRECTOR.

……PETITIONER.

(BY SH. ABHIMANYU JHAMBA, ADVOCATE)

AND

1. UNION OF INDIA REPRESENTED BY
SECRETARY (FINANCE),
MINISTRY OF FINANCE,
DEPARTMENT OF REVENUE,
NORTH BLOCK, NEW DELHI.

2. THE COMMISSIONER, CGST COMMISSIONERATE
SHIMLA, GROUND AND FIRST FLOOR,
PARKING CUM COMMERCIAL COMPLEX,
CHHOTA SHIMLA, DISTT. SHIMLA,
HIMACHAL PRADESH.

3. THE JOINT COMMISSIONER,
CGST COMMISSIONERATE SHIMLA,
GROUND AND FIRST FLOOR,
PARKING CUM COMMERCIAL
COMPLEX, CHHOTA SHIMLA,
DISTT. SHIMLA, HIMACHAL PRADESH.

.....RESPONDENTS.

(SH. RAJINDER THAKUR, CENTRAL GOVERNMENT
STANDING COUNSEL, FOR RESPONDENT-1)

(SH. VIJAY ARORA, ADVOCATE,
FOR RESPONDENTS-2 & 3)

CIVIL WRIT PETITION No.5942 of 2021
Reserved on: 03.01.2022
Decided on: 06.01.2022

Constitution of India, 1950- Articles 226 & 227- Petitioner sought for issuance of writ, order or direction in the nature of mandamus directing the respondents to accept the payment of taxes of Rs.68,19,084/- declared by the Petitioner under the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019- Petitioner was required to pay the amount determined by the Designated Committee within 30 days from the date of issue of the form

SVLDRS-3 which he failed to pay- Held- Court cannot make operational the SVLDRS,2019, especially when the petitioner has approached the court belatedly after 1 year and 3 months from the last date of payment of determined amount of tax under SVLDRS, 2019- Petition dismissed.

This petition coming on for admission after notice this day, ***Hon'ble Mr. Justice Tarlok Singh Chauhan,*** *passed the following:*

O R D E R

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

> "A Issue a Writ, Order or Direction in the nature of Mandamus, or any other appropriate Writ, Order or Direction under Article 226/227 of the Constitution of India directing the Respondents to accept the payment of taxes of Rs. 68,19,084/- declared by the Petitioner and accepted by the respondents under the Sabkas Vishwas (Legacy Dispute Resolution) Scheme, 2019;
>
> B. Direct the Respondents to permit the Petitioner to deposit the determined amount under the Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 along with such rate of interest as may be directed by this Hon'ble Court;
>
> C. Directing the Respondents to consider the representation dated 29.06.2020, 25.09.2020, 29.12.2020, 25.03.2021, 05.06.2021 and 12.08.2021 made by the Petitioner addressed to the Respondents."

2. The Government of India launched a scheme called as "Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019 (for short 'SVLDRS, 2019') as a one time measure for liquidation of legacy disputes of Central Excise and Service Tax.

3. The petitioner opted the scheme and filed a declaration dated 15.01.2020. In the declaration, the petitioner declared an amount of Rs.1,13,65,141/- under the category of 'arrears-appeal not filed or appeal

having attained finality' in respect of order dated 15.01.2020 issued by the Joint Commissioner, CGST Commissionerate, Shimla.

4. The Designated Committee after verification of the aforesaid declaration issued Form SVLDRS-3 to the petitioner on 13.03.2020 whereby the petitioner was required to pay an amount of Rs.68,19,084.60/-. As per the SVLDRS-2019, the amount determined by the Designated Committee was required to be paid within 30 days from the date of issue of the Form, as is evident from Rule-7 which reads as under:-

> "Every declarant shall pay electronically the amount, as indicated in Form SVLDRS-3 issued by the designated committee, within a period of thirty days from the date of its issue."

5. However, the petitioner failed to pay the aforesaid amount within 30 days from the date of issue of notice and further did not pay the same within the extended due date on 30.06.2020.

6. The petitioner thereafter made a number of representations to the Office of the Commissioner for extension of time and payment of dues in installments. However, the petitioner was repeatedly informed that being time bound amnesty scheme, there was no provision under the SVLDRS, 2019 for extension of time after 30.06.2020.

7. Moreover, the petitioner was contacted by the department to ascertain its willingness to pay the tax dues by 30.09.2020, if the date is further extended. The petitioner even after the receipt of the letter dated 14.07.2020 did not show any willingness for the same.

8. The Range Officer accordingly initiated action for recovery of arrears vide letter dated 03.06.2021 and the instant petition was filed after more than 1 year and 3 months from the last date of payment of determined amount of tax under the SVLDRS, 2019.

9. Now, the moot question, in these circumstances, is whether the SVLDRS, 2019 can be made operational by the Court beyond the period for which it was formulated?

10. Learned counsel for the parties have placed reliance upon the various judgments rendered by various High Courts which are enumerated below:-

> "1. Case No: WP(C) 2862/2021, M/s Brahmaputra Tele Productions Pvt. Ltd. versus The Union of India and others.
>
> 2. S.B. Civil Writ Petition No. 10571/2020, Agroha Electronics versus Union of India and another.
>
> 3. D.B. Civil Writ Petition No. 6962/2021, M/s Akshay Dan Charan, A proprietorship Firm, through its Proprietor vs. Union of India and others.
>
> 4. W.P. (MD) No. 19314 of 2020, P. Sikkandar vs. The Government of India and another, Madras High Court.
>
> 5. Writ Tax No.328 of 2021, M/s Shekhar Resorts Limited vs. Union of India and others."

11. Adverting to the facts in ***Brahmaputra Tele's case*** (supra), it would be noticed that the judgment in the said case was not on the point of extension of time under SVLDRS,2019, but was rendered in the peculiar facts and circumstances of the case, as is evident from paras 4 to 9 of the judgment which read as under:-

"4. The admitted position is that the petitioner awes certain amount to the Government of India on account of settlement of certain dispute which was resolved under the "Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019" (in short, SVLDRS)" vide Finance Act No. 2, 2019 under which the petitioner is supposed to pay a sum of Rs. 12,36,844.40/- which the

petitioner had agreed to pay by way of instalments, though it was rejected by the authorities.

5. Be that as it may, the petitioner was to make payment by 1 July, 2020. Unfortunately, according to the petitioner, the Covid pandemic struck because of which not only the petitioner's enterprise but also functioning of the many offices of the Government including of the Respondents had been disrupted and, as such, the petitioner could not make the payment. Subsequently, however, when the opportunity came for the petitioner to make payment, the authorities informed the petitioner that the portal for payment has been closed as the last date of payment had already expired on 1st July, 2020. Accordingly, the petitioner approached the authorities for allowing him to pay the due amounts in instalments, which, however, did not elicit any positive response from the authorities. Being aggrieved, the petitioner has approached this Court by filing this writ petition seeking a direction to the authorities to accept the payment of the amount due in instalments.

6. As regards this, Mr. Keyal, learned Standing Counsel, GST has submitted that if the petitioner is willing to pay the aforesaid amount within 15 days, perhaps, the matter can be sorted out. On the other hand, Ms. Hawelia, learned counsel for the petitioner, has prayed for a longer period as the amount is substantial and sought for at least two months time.

7. In this regard, Mr. Keyal, learned Standing Counsel, GST has drawn attention of this Court also to the amount which according to him, the petitioner-company actually owes to the authorities by referring to the letter dated 22.12.2019 of the petitioner where it has been mentioned that the petitioner-company owes Rs. 3,90,69,385/- under the SVLDRS which could be paid in 48 equal instalments. On the other hand, Ms. Hawelia has submitted that the aforesaid is the aggregate amount which relates to other financial years also and is not the amount for which the petitioner has filed the present writ petition. She submits that as far as the present petition is concerned, the amount due is only Rs. 12,36,844.40/- as

> mentioned in Mandate Form No. 3 under the SVLDRS which the petitioner is seeking to pay.
>
> 8. After hearing learned counsel for the parties, this Court is of the opinion that it may not necessary to dwell on the aggregate amount the petitioner is supposed to pay, except the amount which the petitioner has admitted and willing to pay in this petition. As regards other liabilities, if any, it is a matter to be considered by the authorities on its own merit in accordance with law. However, as far as the amount of Rs. 12,36,844.40/- is concerned which is the subject matter of consideration in this petition, the petitioner shall pay the aforesaid admitted amount of Rs. 12,36,844.40/- within 45 days from today. As regards the dues mentioned by Mr. Keyal, it is for the petitioner to approach the competent authority for payment and in instalments, if the authorities agree.
>
> 9. It is made clear that till payment of the aforesaid amount of Rs. 12,36,844.40/- within the aforesaid 45 days, no coercive action shall be taken against the petitioner as regards the said amount."
>
> 12. Now, adverting to the judgment rendered by the Single Bench of the Rajasthan High Court in ***Agroha Electronics's case*** (supra), wherein time to deposit the amount was extended by the Court.

13. However, a contrary view has been taken by a Division Bench of the same High Court in ***M/s Akshay Dan Charan's case***(supra) where the petitioner therein had challenged the recovery notice dated 14.08.2020 and claimed benefit of the SVLDRS, 2019 Scheme and the learned Division Bench observed as under:-

> "The petitioner is a proprietary concern engaged in the businesses of providing construction services in respect of commercial/Industrial buildings and civil structures etc., for which purpose, the petitioner has made registration under the Services Tax Regime. For the period of financial year 2008-09 to 2011-12, the Service Tax Department was of the opinion that the petitioner was providing taxable services in the form of coal handling and stacking, but on which the petitioner has not paid

service tax. The demand of unpaid service tax amounting to Rs.28,11,443/- with interest was, therefore, raised vide order-in-original passed on 10.11.2016. The petitioner's appeal against the said order-in- original was dismissed on 30.07.2018.

The Government of India introduced an amnesty scheme under the name Sabka Viswas (Legacy Dispute Resolution Scheme, 2019), hereinafter referred to as 'the scheme' by way of enacting Chapter V of the Finance Act, 2019. The Rules for operation of the scheme were notified on 21.08.2019. Broadly stated, as per the scheme, the persons desirous of getting benefit under the said scheme had to deposit a portion of the tax with the Government of India by cut-off date, upon which, the remaining tax would be waived.

It is undisputed that when the petitioner applied for the benefit of the scheme, the department conveyed the petitioner that in order to take advantage thereof, the petitioner must pay a sum of Rs.10,40,177/-. This was communicated to the petitioner on 21.01.2020. Initially the payment had to be made within certain time which was extended from time to time and the last extension was upto 30.06.2020. After that no further extension has been given and the scheme came to an end. Admittedly, the petitioner did not deposit the amount in question till 30.06.2020.

The case of the petitioner is that on account of his personal ill health in the last few days of June 2020, he was totally indisposed and therefore could not make any payment. The petitioner has also set up a case that an attempt was made to make the payment physically, however, the system of the Department would not accept such payment and the petitioner could not make a payment through the portal of the Department.

Be that as it may, the petitioner missed the last date for making the deposit, upon which, the petitioner's application stood automatically dismissed in terms of the provisions of the scheme. The Department thereafter started recovery, upon which, the petitioner has filed this writ petition.

Having heard learned counsel for the parties and perused the documents on record, we find that as per the admitted facts, the payment had to be made latest by 30.06.2020. The petitioner

has not raised any dispute about the computation of the sum payable calculated by the department and conveyed to him. There is no provision in the scheme for extending the time limit for making the payment. In fact, the scheme clearly envisages that upon termination of the said period, the scheme would come to an end. That being the position, on the grounds stated by the petitioner, an order for extension of the scheme cannot be granted."

14. Now, adverting to the judgment in ***P. Sikkandar's case*** (supra). It needs to be noticed that the order dated 08.01.2021 as passed earlier in that case, and strongly relied upon by the learned counsel for the petitioner herein, was subsequently recalled by the said Court (Madras High Court) vide subsequent order dated 30.03.2021 which reads as under:-

"PRAYER: Petition filed under Article 226 of the Constitution of India to issue a Writ of Mandamus, directing the 1st and 2nd respondents to extend the provisions Sections 6 & 7 of the taxation and other laws (Relaxation and Amendment of certain provisions) Act, 2020 to the Finance (No.2) Act, 2019 so far as it relates to Chapter V-SVLDRS, 2019 relating to payment of estimated amount determined by the Designated Committee so that the petitioner company can pay the said amount on or before 30.12.2020 and consequently directing the respondent 1 to apply the provisions of SVLDRS (Removal of difficulties) order 2020 dated 13.03.2020 to the state of Tamilnadu to maintain equality among the states, which faced COVID-19 infection at large scale, enabling the petitioner to pay the estimated amount on or before 31.12.2020 or to file a fresh application in form SVLDRS-1 on or before 31.12.2020 and the amount estimated by the Designated Committee shall be paid on or before 28.02.2021.

For Petitioner : Mr. IIangovan.S

For Respondents : Mr. M. Prabhu,
Junior Panel Standing Counsel.

ORDER

> This writ petition has been listed under the caption "for being mentioned" at the instance of the learned counsel standing counsel for the department.
>
> 2. Vide order dated 08.01.2021, I had allowed the writ petition filed by the petitioner herein. The petitioner herein had applied under Sabka Vishwas (Legacy Dispute Resolution) Scheme (SVLDRS), 2019. The case was considered by the Designated Committee and he was asked to make certain payment on or before 30.06.2020. The petitioner did not comply with the said condition. I had allowed the writ petition by granting extension of time by seven more days. It is now brought to may notice by the learned standing counsel that as per Section 127(5) of the Finance Act, 2019, the payment will have to be made under the said scheme as directed by the designated committee. That apart, Rule 7 of Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019, states that every declarant shall pay electronically the amount as indicated in Form SVLDRS-4 issued by the designated committee on or before 30.06.2020. Inasmuch as, these provisions were not taken note of by me, the order dated 08.01.2021, allowing W.P.(MD) No. 19314 of 2020 is *suo motu* recalled and the writ petition is dismissed. No costs."

15. Thus, the overwhelming view taken by the various High Courts is that time for availing of the benefit of the Scheme cannot be extended as a matter of course, especially beyond the period it was promulgated.

16. We may, at this stage, also take note of the Division Bench judgment rendered by the Allahabad High Court in Writ Tax No. 328 of 2021 wherein the Hon'ble High Court clearly opined that the Scheme cannot be made operational by the Court going beyond the period for which it was formulated only for one person or to relax any of the conditions enumerated in the Scheme. It will be apposite to refer to the relevant portion of the judgment which reads as under:-

> "This writ petition has been filed to seek direction on the respondents for consideration of case of the petitioner under the

scheme "Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019" (for short "Scheme of 2019").

It is submitted by learned counsel for the petitioner that pursuant to the order passed by the NCLT and by operation of law, petitioner was unable to make the payment under S.V.L.D.R.S. on or before 30th June, 2020 to take the benefit of Scheme of 2019. In fact, petitioner was restrained to make the payment by operation of law and when he was in a position to make the payment subsequently, it was not to be accepted for consideration of a case under the Scheme of 2019.

The learned counsel for the respondents has raised objection on the prayer made by the petitioner. It is submitted that the Scheme of 2019 was operational till 30th June, 2020. The Committee is no more exist for consideration of the case and otherwise the payment, as envisaged under the Scheme of 2019, was to be paid in terms of it. Admittedly, petitioner has failed to make the payment as per Scheme of 2019 within the time frame and, accordingly, he is not entitle to the benefit of the scheme.

We have considered the rival submissions of the parties and perused the record.

To take certain benefit of service tax, the respondents came out with a scheme namely Sabka Vishwas (Legacy Dispute Resolution) Scheme, 2019. One was required to make the payment under Scheme of 2019 within the time frame but the petitioner did not comply the mandate aforesaid. It may be on account of the order passed by the N.C.L.T. or operation of law but the question would be as to whether this Court can issue a direction going contrary to the Scheme of 2019. It is also when now the scheme is no more exist so as the committee to consider the case of the petitioner.

The scheme cannot be made operational by this Court going beyond the period for which it was formulated only for one person or to relax any of the conditions enumerated in the scheme. It is also when the committee under the scheme no more exists. The prayer made in the writ petition cannot be

granted for consideration of a case of the petitioner for paying the service tax under the scheme.

We do not find reasons to accept the prayer made in the writ petition and accordingly, the writ petition fails and is dismissed."

17. In view of the aforesaid discussion, we are clearly of the view that the prayers made in this writ petition cannot be granted for consideration of the case of the petitioner for paying the service tax under the Scheme as the Court cannot make operational the SVLDRS, 2019, especially when the petitioner has approached this Court belatedly after 1 year and 3 months from the last date of payment of determined amount of tax under the SVLDRS, 2019.

18. Accordingly, we find no merit in this petition and the same fails and is dismissed, leaving the parties to bear their own costs. Pending application(s), if any, also stand disposed of.

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

Between:-

M/S VIKRANT OIL CARRIER, THROUGH ITS PROPRIETOR CHANDERPHOOL, SON OF SH. BAJE SINGH, RESIDENT OF VILLAGE BHIKEWALA, TEHSIL NARWANA, DISTRICT JIND, HARYANA.

....PETITIONER

(BY SH. KSHITIJ SHARMA AND
SH. PRASHANT SHARMA, ADVOCATES.)

AND

1. HINDUSTAN PETROLEUM CORPORATION LTD. THROUGH ITS CHAIRMAN, 17 JAMSHEDJI TATA ROAD, MUMBAI, MAHARASHTRA.

2. THE DEPUTY GENERAL MANAGER, SHIMLA RETAIL REGION, HINDUSTAN PETROLEUM CORPORATION LTD. 3RD FLOOR, HAMEER HOUSE, LOWER CHAKKER, SHIMLA, HIMACHAL PRADESH.

3. THE CHIEF DEPOT MANAGER, NALAGARH DEPOT, P.O.L. DEPOT, NALAGARH, BADDI-NALAGARH ROAD, VILLAGE DHADI KANIA, P.O. NALAGARH, DISTRICT SOLAN 174101.

(BY SH. BIPIN CHANDER NEGI, SENIOR ADVOCATE WITH MR. NITIN THAKUR AND MR. UDIT SHOURYA KAUSHIK, ADVOCATES.)

CIVIL WRIT PETITION
No. 1080 OF 2020
Decided on: 07.01.2022

Constitution of India, 1950- Article 226- Petitioner challenged impug show cause notice as well as decision of termination of Transport Agreer and forfeiture of security deposit on the ground that action of responde illegal, arbitrary and unjust- Held- Reasons assigned for terminatio contract is factually incorrect- Therefore, impugned termination of cont is not sustainable- Petition allowed.

Cases referred:

Election Commission of India v. Saka Venkata Subba Rao, AIR 1953 SC 210;

K.K. Saksena Vs. International Commission on Irrigation and Drainage and others (2015) 4 SCC 670;

LIC of India and another Vs. Consumer Education and Research Centre and others (1995) 5 SCC 482;

Mahabir Auto Stores and others Vs. Indian Oil Corporation and others,

(1990) 3 SCC 752;

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

J U D G M E N T

Petitioner, a transporter in business of transportation of fuels, has approached this Court challenging impugned show cause notice dated 17.1.2020 (Annexure P-12) as well as decision of termination of Transport Agreement dated 1.1.2019 and forfeiture of security deposit communicated vide letter dated 14.2.2020 (Annexure P-14) issued by respondent No. 2, on the ground that impugned action of respondents taken through respondent No. 2 is illegal, arbitrary, unjust and outcome of vendetta against the petitioner for blowing whistle, against illegalities, irregularities being committed by local officials of respondent-Corporation in P.O.L. Depot Nalagarh, by submitting various applications/complaints, including complaints dated 4.10.2019 and 4.12.2019 (Annexure P-15) to the higher authorities and filing CWP No. 628 of 2019 in this High Court against respondent-Corporation and private persons.

2. Undisputed facts of present case are that Bulk Petroleum Road Transport Agreement (herein after referred to as the 'Transport Agreement') dated 1.1.2019 was entered between petitioner Vikrant Oil Carrier and Hindustan Petroleum Corporation Limited (herein after referred as 'HPCL') for road transport of bulk petroleum products from various storage points of HPCL to its consumers/other storage points. Under aforesaid Transport Agreement, petitioner has offered four tank trucks (TTs) bearing registration No. HR-39D-9470, HR-39D-1004, HR-56B-5852 and HR-56B-8795. These TTs were inducted and started plying w.e.f. 2.1.2019. On 7.2.2019, petitioner had made a written request to replace two TTs bearing No. HR-39D-9470 and HR-39D-1004 with two other TTs bearing registration No. HR-56B-8491 and

HR-56B-4366. Despite the request, these trucks were not replaced, leading to issuance of notice by petitioner through counsel to respondent No. 2, wherein along with issue of replacement, various other illegalities and irregularities being committed at Nalagarh Depot of respondent-Corporation were brought in the notice of respondent-Corporation with request to take appropriate action and to allow the petitioner to replace the TTs. Instead of taking any action, as requested in the legal notice, successive letters were issued to the petitioner to continue the Trucks already inducted, which were sought to be replaced by the petitioner. In response to such letters, petitioner had informed that he had stopped the above referred two Trucks as they had been indulged in illegal activities with further submission that in replacement petitioner has already given documents of two vehicles, sought to be replaced. Correspondences in this regard continued from both sides.

3. It is also pertinent to mention here that petitioner had also filed Civil Writ Petition No. 628 of 2019 on 30.3.2019 against respondent-Corporation and some private respondents, whose trucks were inducted by the officials of Corporation for transportation of petroleum products but without genuine Calibration Certificate, on the basis of a fake Calibration Certificate managed and fabricated in connivance with the officials of the Corporation.

4. It is case of the petitioner that officials at Nalagarh Depot started providing lesser work to the TTs of petitioner to mount pressure upon him to withdraw CWP No. 628 of 2019, but instead of succumbing to the pressure, petitioner had stopped plying its third truck HR-65B-5852 on 30.10.2019 and fourth truck HR-26B-8795 w.e.f. 18.12.2019 with information about reason for doing so.

5. As per respondents, petitioner had stopped plying its truck without any information, whereas claim of the petitioner is that he had given written information to the concerned authority. Further vide communication

dated 31.10.2019 sent to respondent No. 3 in response to communication dated 26.10.2019 and in continuation to communication of the petitioner dated 14.10.2019, petitioner had asked reasons for not replacing his two TTs, documents whereof he had already submitted. Vide communication dated 3.1.2020, petitioner had communicated that reasons for stopping TTs Nos. HR-39D-9470 and HR-39D-1004 has already been given by him in his communication submitted at the time of stopping these vehicles in February, 2019 and again informing that owners of these trucks were having partnership with those persons against whom petitioner had filed a Writ Petition in H.P. High Court, Shimla and, therefore, there was reasonable apprehension to the petitioner that for blacklisting the petitioner those persons may do any illegal activity while plying their trucks under transport Agreement of the petitioner and, thus, petitioner had expressed his inability to continue these trucks. It was further informed by the petitioner that remaining two trucks have been stopped from plying by him for the reason that officials of the Corporation at Nalagarh Depot were taking side of the persons involved in unlawful and illegal activities and were mounting pressure upon the petitioner to withdraw the case filed by him in the Court and had also stopped EMD payment to the petitioner and further that petitioner was being harassed and snubbed by the officials at Nalagarh Depot. Lastly, it was stated that despite having address of petitioner available on the letter head, officials of Nalagarh Depot had been corresponding with petitioner at address of Hisar. Petitioner has also communicated to the respondents that he would not be able to ply the trucks unless and until his grievances are redressed.

6. Ultimately a show cause notice dated 17.1.2020 was issued to the petitioner. In response thereto, communication dated 30.1.2020 was submitted by petitioner, re-iterating his request for replacement of two vehicles with further information that officials at Nalagath Depot, namely, Gopal Dass and Manasri Dixit used to snub the proprietor of petitioner firm

and they were not taking any action despite submission of proof of 22 vehicles which were plying fraudulently for the reasons that either they were conniving with the transporters of these 22 vehicles or they were having their business shares in that and, therefore, it was informed that till matter is listed in the Court, petitioner would not be able to ply the vehicles.

7. Finally, vide impugned communication dated 14.2.2020 Transport Agreement of the petitioner was terminated and security deposit in the form of bank guarantee of `8,00,000/- was forfeited, leading to filing of present Writ Petition.

8. Learned counsel for the petitioner contended that petitioner had stopped plying his vehicles for illegalities and irregularities pointed out by him as a Whistle blower and under protest to the pressure being mounted upon him to withdraw the case and in this regard respondent No. 2 in the impugned communication dated 14.2.2020 has concluded that allegations raised by the petitioner were baseless, incorrect and was a futile attempt to divert from main issue of unauthorized stoppage of TTs despite issuance of various letters by and on behalf of Corporation.

9. Learned counsel for the petitioner has further submitted that CWP No. 628 of 2019 filed by the petitioner has been allowed by a Single Bench of this High Court by holding that private respondents therein were plying their trucks on the basis of fake Calibration Certificates and LPA No. 4 of 2021 preferred by private respondents against it has also been dismissed by the Principal Division Bench of this High court vide judgment dated 15.6.2021, whereas Corporation has accepted the verdict of the Single Bench and has taken action against the guilty transporters and all this substantiates correctness of allegations levelled by the petitioner and, therefore, the very reason assigned for rejecting the representation/reply of the petitioner, terminating Transport Agreement and forfeiting security of the petitioner, is contrary to the true factual matrix and, therefore, petition deserves to be

allowed. He has further submitted that petitioner has full faith in higher authorities of HPCL and thus, in alternative he has prayed for referring the dispute to the Higher authorities of the Corporation for deciding afresh after setting aside the impugned show cause notice and decision of termination of Transport Agreement and forfeiting the security.

10. It has been submitted on behalf of petitioner that petitioner has not been blacklisted or his Transport Agreement has not been terminated for commission of any illegal act or in violation of Oil Industry Transport Discipline Guidelines, but Transport Agreement has been terminated for acting as a whistle blower against the illegal activities in Nalagarh Depot and, therefore, termination of Transport Agreement is malafide, arbitrary and illegal and an act of arm twisting to pressurize the petitioner to keep quite. Whereas petitioner had raised voice on various issues and the version of the petitioner has been affirmed by the verdict of the Courts as another Writ Petition CWP No. 3542 of 2021 filed by the petitioner has also been allowed vide judgment dated 6.9.2021 and Review Petition No. 102 of 2021, preferred therein has also been dismissed vide order dated 23.11.2021 by the Division Bench of this High Court.

11. Petition has been opposed mainly on the ground that issue involved in present case, i.e. termination of Transport Agreement, falls in the domain of private law and impugned decision is a post contract decision taken for breach of terms of the agreement and is governed by law of contract and falls in domain of private law and for adjudication of issues of private law, petition under Article 226 of the Constitution of India, is not maintainable. In support of this plea, reliance has been placed on pronouncement of the Supreme Court in ***K.K. Saksena Vs. International Commission on Irrigation and Drainage and others (2015) 4 SCC 670,*** referring its paras 43 and 44, which read as under:-

> *"43. What follows from a minute and careful reading of the aforesaid judgments of this Court is that if a person or authority is a "State" within the meaning of Article 12 of the Constitution, admittedly a writ petition under Article 226 would lie against such a person or body. However, we may add that even in such cases writ would not lie to enforce private law rights. There are catena of judgments on this aspect and it is not necessary to refer to those judgments as that is the basic principle of judicial review of an action under the administrative law. Reason is obvious. Private law is that part of a legal system which is a part of Common Law that involves relationships between individuals, such as law of contract or torts. Therefore, even if writ petition would be maintainable against an authority, which is "State" under Article 12 of the Constitution, before issuing any writ, particularly writ of mandamus, the Court has to satisfy that action of such an authority, which is challenged, is in the domain of public law as distinguished from private law.*
>
> *44. Within a couple of years of the framing of the Constitution, this Court remarked in* ***Election Commission of India v. Saka Venkata Subba Rao, AIR 1953 SC 210*** *that administrative law in India has been shaped in the English mould. Power to issue writ or any order of direction for "any other purpose" has been held to be included in Article 226 of the Constitution 'with a view apparently to place all the High Courts in this country in somewhat the same position as the Court of the King's Bench in England. It is for this reason ordinary "private law remedies" are not enforceable through extraordinary writ jurisdiction, even though brought against public authorities (See Administrative Law, 8th Edn., H.W.R. Wade & C.F. Forsyth, p. 656). In a number of decisions, this Court has held that contractual and commercial obligations are enforceable only by ordinary action and not by judicial review."*

12. In rebuttal to the aforesaid contention, learned counsel for the petitioner has submitted that respondent-Corporation is a public Corporation and work of transportation of bulk of petroleum products is a Government

largess and process of allotment by way of tender and termination thereof, including post contract termination for alleged breach of contract has to be completely transparent and as per public policy, decision must be reasoned based on true and correct facts and as in present case the reasons assigned for termination and forfeiture are contrary to factual matrix, the rejection of present petition by treating it as a petition belonging to domain of private law would be against public policy resulting into miscarriage of justice.

13. Learned counsel for the petitioner, in support of his contention that present petition is maintainable despite the issue in question is having fragrance of belonging to domain of private law, has referred pronouncements of the Supreme Court in ***Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, (1990) 3 SCC 752, LIC of India and another Vs. Consumer Education and Research Centre and others (1995) 5 SCC 482*** and judgment dated 21.06.2019 passed by a Division Bench of High Court of Gujarat in Special Civil Application No. 7814 of 2019, titled as *Aakash Exploration Services Limited through Director Heman Navinbhai Haria Vs. Oil and Natural Gas Corporation Limited.*

14. After going through aforesaid pronouncements, it cannot be safely concluded that arbitrariness/malafide can shift the matter belonging in private law field to public law field and in all such cases whether public law or private law governs the rights, it depends upon the facts and circumstances of the case and for which, there cannot be any straight jacket formula. Public authorities are expected to act for public good and in public interest. The impact of every action is also on public interest. It imposes public law obligation and impresses with that character upon public authority. Therefore, in case, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligation would not relieve the State or its instrumentality of its obligation to comply with the

basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State or its instrumentality in any of its actions. Even in commercial contracts where there is a public element, it is necessary that relevant considerations are taken into account and the irrelevant consideration discarded. Even in contractual matters public authorities have to act fairly; and if they fail to do so, approach under Article 226 would always be permissible because that would amount to violation of Article 14 of the Constitution. Further the arms of the High Court are not shackled with technical rules or procedure. The action of the State, its instrumentality, any public authority or person whose actions bear insignia of public law element or public character are amenable to judicial review and the validity of such an action would be tested on the anvil of Article 14. While exercising the power under Article 226 the Court would circumspect to adjudicate the disputes arising out of the contract depending on the facts and circumstances in a given case.

15. In an appropriate case, a Writ Petition against the State or an instrumentality of the State, arising out of contractual obligation is maintainable. While entertaining an objection as to the maintainability of a writ petition, the Court should bear in mind the fact that the power to issue prerogative writs vests under Article 226 of the Constitution of India, which is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power, and this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless

such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction.

16. In present case, public element is involved because a decision of an authority of an institution, covered under Article 12 of the Constitution of India, terminating the contract on account of post-contract events is under challenge. Such action under public policy, is expected to be transparent, reasonable, rationale and non-arbitrary. Petitioner has not only raised issue, but has also been able to prove illegalities and irregularities in functioning of officials/officer of the Corporation as evident from pronouncements rendered by this Court in CWP No. 3542 of 2021 and CWP No. 628 of 2019. But the authority has rejected the claim of the petitioner and has terminated the agreement without verifying the true facts.

17. For reference, following portion of verdict in CWP No. 628 of 2019 and CWP No. 3542 of 2021 would be relevant.

> CWP No. 628 of 2019 (SB)
>
> *"37. Accordingly, this petition is allowed to the extent that acceptance of the tenders of the private respondents for the purpose of work allotted to them by respondents No.1 and 2 based upon Notice Inviting Tenders (Annexure P-1), is held to be bad and the same is also ordered to be quashed and set aside having been obtained on the basis of procured calibration certificate."*
>
> *CWP No. 3542 of 2021 (DB)*
>
> *"27....therefore, in the peculiar circumstances of the case, we for the time being deem it expedient in the interest of justice to pass the following directions:*
>
> *The Board of Directors of HPCL is directed to constitute a special team of its officials, holding sufficiently high ranks and unconnected with the affairs of finalization of contract in issue between HPCL and Sai Roadways, to inquire into all the issues involved in the instant case and to take appropriate action*

against the wrong doers, if any, in accordance with law. This entire exercise shall be completed within a period of 6 weeks from the date of this judgment and compliance shall be reported to this Court."

18. Present petition cannot be rejected out rightly only on the ground that termination of agreement is a matter related to breach of terms of the contract after award of the contract. The impugned decision is an administrative decision taken by an officer of the Corporation which must be transparent and reasoned based on true facts. Judicial review of such decision is permissible. Respondent No. 2 in impugned communication dated 14.2.2020 has wrongly stated that petitioner had removed/stopped plying of two trucks without any specific reason and also that he did not inform the stoppage/removal of two trucks and had stopped plying these vehicles without reasons whereas petitioner in each and every communication had been stating the reasons for withdrawal/stopping/discontinuing his trucks from plying under the Transport Agreement and those reasons have been found merit worthy on adjudication by the Court in CWP No. 628 of 2019 as well as CWP No. 3542 of 2021. Therefore, reasons assigned for termination of contract, that allegations raised by the petitioner were baseless, incorrect and was a futile attempt to divert the main issue of stoppage of TTs, is factually incorrect and, therefore, impugned termination of contract for the reasons assigned in the communication dated 14.2.2020 is not sustainable.

19. It has also been contended on behalf of respondent-Corporation that for having arbitration clause in the Transport Agreement, Writ Petition is not maintainable rather petitioner should have taken steps for appointment of arbitrator in terms of clauses of Transport Agreement for redressal of grievances.

20. Petition was filed in the month of March, 2020 and reply thereto was filed on 21.12.2020. No such objection was ever taken either in

reply or otherwise till the stage of addressing arguments and, therefore, in my opinion respondent-Corporation has no right to raise this issue at this juncture, on the ground of waiver. Therefore, plea raised on behalf of respondents with respect to arbitration clause is rejected.

21. Lastly, it is contended on behalf of respondents that for breach of contract petitioner is entitled only for damages and, therefore, remedy available for the petitioner is somewhere else, but not present Writ Petition. In the peculiar facts and circumstances, background of the dispute arisen between the parties and verdict of this High Court in CWP Nos. 628 of 2011 and 3542 of 2021, I find that present matter involved issues which are more than breach of contract simplicitor and, therefore, petition should have been entertained and has rightly been entertained by this Court and is not liable to be dismissed on this count.

22. Corporation has no mechanism to test the validity of order, passed at first level, within institution. Contract contains arbitration clause, but none of the parties is interested to refer the matter for Arbitration. That is why no such objection has been taken in reply of the Corporation. Therefore, issue in reference in petition can be adjudicated in a petition preferred under Article 226 of the Constitution.

23. I am of the considered opinion that Corporation must evolve a mechanism for testing of veracity and validity of order passed by lowest or lower authority/officer by higher authority/officer with adherence of norms of Natural Justice. As on date no such arrangement/provision has been brought in my notice. Therefore, also review of decision of the concerned authority under Article 226 of the Constitution is warranted. However, Corporation is also directed to evolve such mechanism in future.

24. In view of aforesaid discussion, present petition is allowed and impugned communication dated 14.2.2020 is quashed and set-aside and the Director (Marketing), HPCL, Hindustan Bhavan, 8, Shoorji Vallabhdas Marg,

P.B. No. 155 , Mumbai , Maharashtra , Mumbai , 400001, is directed to decide the issue afresh after giving due opportunity of hearing, and if desired, permitting filing of fresh written response to the show cause notice, in the light of observations made hereinabove as well as verdict in CWP No. 628 of 2019 and CWP No.3542 of 2021. Respondent No.4 shall take decision on or before 14.02.2022.

25. It is made clear that setting aside order/letter dated 14.02.2020 shall not entitle the petitioner to consider revival of Transport Agreement. However, in case higher authority fails to take a decision by 14.02.2022 as discussed and directed in present petition, the Transport Contract/Agreement shall be considered to have been revived w.e.f. 15.02.2022.

Petition stands disposed of in aforesaid terms alongwith pending applications, if any.

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

Between:

RITU D/O SH.JAGDISH RAM, R/O VILLAGE DUKHI, P.O. NEHRI, NAURANGA, TEHSIL AMB, DISTT. UNA, HP.

….PETITIONER.

(BY MR. KASHMIR SINGH THAKUR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH ADDITIONAL CHIEF SECRETARY (HOME), TO THE GOVT. OF H.P. SHIMLA.

2. DIRECTOR GENERAL OF POLICE, POLICE HEADQUARTERS HIMACHAL PRADESH SHIMLA, HP.
3. THE SECRETARY, H.P. STAFF SELECTION COMMISSION HAMIRPUR, DISTRICT HAMIRPUR, H.P.
4. THE DEPUTY SECRETARY, HP STAFF SELECTION COMMISSION HAMIRPUR, DISTT. HAMIRPUR, H.P.

5.ROHIT KUMAR S/O KISHORI LAL, R/O WARD NO.9 DHARAMSHALA ROAD KANGRA (T) P.O. AND TEHSIL KANGRA DISTT. KANGRA, H.P.

…. RESPONDENTS.

(BY ASHOK SHARMA, ADVOCATE GENERAL, WITH M/S SUMESH RAJ, ADARSH SHARMA AND SANJEEV SOOD, ADDITIONAL ADVOCATES GENEAL, WITH MR. KAMAL KANT CHANDEL, DEPUTY ADVOCATE GENERAL, FOR RESPONDENTS NO.1 AND 2.
MR. ANGREZ KAPOOR, ADVOCATE, FOR RESPONDENTS NO.3 AND 4.
MR. DIWAKAR DEV SHARMA, ADVOCATE, FOR RESPONDENT NO.5)

CIVIL WRIT PETITION
No.3023 of 2020
Reserved on:26.11.2021
Decided on: 29.11.2021

Constitution of India, 1950- Article 226- Petitioner prayed that writ of *certi* may be issued for quashing the notification dated 4.3.2020 whereby departn has declared the result of successful candidates and petitioner be declared successful candidate for the post of Sub-Inspector Police under OBC (I category- Petitioner offered appointment as a Lady Constable just one month b before the evaluation of the petitioner for the post of Sub Inspector- Held- B certificate issued in favour of the petitioner was still in force and valid, respondent Commission could not have had suo moto taken a decision that petitioner no more could be considered under the BPL category, therefore, rejection of the candidature of the petitioner under OBC(BPL) category is ba

law- Writ petition allowed with the direction respondent Commission to recomm the name of the petitioner for appointment against the post of Sub-Inspector b eligible candidate from OBC/BPL category.

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

O R D E R

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

> "(*i) That a writ of certiorari may kindly be issued for quashing the notification dated 04th march 2020 (Annexure P/6) whereby the department has declared the result of the successful candidates more particularly at sl. no.6 and the petitioner be declared the successful candidate.*
> *(ii) That a writ of mandamus may kindly be issued thereby directing the respondents to declare the petitioner successful for the post of Sub Inspector of police under OBC (BPL) category."*

2. Brief facts necessary for the adjudication of the present petition are as under:-

Respondent No.2 on 18.12.2018 sent a requisition for recruitment to the post of Sub-Inspector of police on regular basis to respondent No.3. In terms of advertisement No.34-2/2018 (Annexure P-1), dated 19.12.2018, issued by respondent No.3-Commission, 33 posts of Sub-Inspector of police on regular basis were advertised which included one post under the category of OBC/BPL. The petitioner being eligible to participate in the process, submitted her application for being considered against the post in issue. She applied under the category of OBC/BPL. In terms of the instructions provided for filling up On-line applications, contained in

advertisement Annexure P-1, the validity of IRDP/BPL Certificate was six months from the date of its issuance and the candidate was required to furnish a valid certificate including the old certificate of the time of filing of application in support of his or claim and the validity of the certificate was required to be seen at the time of evaluation for being entitled to fifteen marks. The petitioner was short listed for evaluation on prescribed parameters for fifteen marks vide Annexure P-3, communication dated 20.01.2020, vide which she was intimated to appear for evaluation on 29.01.2020, at 9.30 a.m. in the office of respondent No.3 alongwith original testimonials/ documents as mentioned in Annexure P-3. In Clause-VII of Annexure P-3, it was mentioned that if the candidate belonged to BPL family, then the candidate should bring necessary certificate on the prescribed format duly countersigned by the competent authority and the BPL Certificate should be valid from six months from the date of its issuance. It was also mentioned that certificate should be valid on the date of submission of application as well as on the date of evaluation.

3. It is the case of the petitioner that she appeared before the Evaluation Committee on 29.01.2020 alongwith all requisite certificates in terms of Annexure P-3, which included the BPL Certificate also, both valid as on the date when she had applied for the post as well as on the date when she appeared before the Evaluation Committee. Alongwith the petition, the petitioner has appended one BPL Certificate, issued on 21.11.2019 and one BPL Certificate dated 30.10.2018. In terms of the advertisement Annexure A-1, the closing date for submission of application was 22.01.2019. The grievance of the petitioner is that when the result of the selection process undertaken to recruit the candidates against the post of Sub-Inspector of Police was declared in the month of March, 2020, her name was not recommended by respondent No.3-Commission against the post reserved under the category of OBC/BPL and in terms of the roll number wise result

for the post declared by the Board concerned (Annexure P-6), her name, which finds mentioned at serial No.88, was reflected under the category of OBC and sub-category unreserved. The marks allotted to her were 43.15. The candidate who was selected under the category of OBC/BPL was a private respondent Shri Rohit Kumar, who had scored 45.46 marks in the recruitment process. The contention of the petitioner is that the act of the respondent No.3 of not considering the petitioner under the category of OBC/BPL and thus allotting her less marks in evaluation is arbitrary and discriminatory and this is more so for the reason that the private respondent had not even applied against the post sanctioned under the category of OBC/BPL. According to the petitioner, at the time when she applied for the post in issue, she applied under the category of OBC/BPL and at the time of evaluation, the category of the petitioner was changed by respondent No.3 without any rhyme or reason. It is in this backdrop that this petition has been filed by the petitioner, praying for the reliefs enumerated hereinabove.

4. One important fact which is relevant to mention at this stage and which finds mention in the Writ Petition is that after the petitioner had applied for the post of Sub-Inspector under the category of OBC/BPL, the petitioner was offered temporary post of Lady Constable in the office of Commandant 5th IBRN, (Mahila) Bassi, District Bilaspur, H.P., on 21.12.2019 (Annexure P-5). In terms of the averments made in the petition, the petitioner had applied for this post on 02.04.2019, for which written test was conducted on 08.09.2019 and interview was held on 09.10.2019. It is also averred in the petition that after she was selected for the post of Constable, she was asked to give her written acceptance for the post on or before 21.12.2019, otherwise the appointment was to be cancelled and in these circumstances, she gave her acceptance for the post in issue, but the same did not preclude her for opting for the job which was better for her upliftment and future.

5. The petition is resisted by respondents No.1and 2, *inter alia*, on the ground that the role of said respondents was only of sending a requisition to respondent No.3 for recommending the name of eligible candidate for appointment against the post of Sub-Inspector, therefore, the petition was not maintainable against respondents No.1 and 2.

6. The reply of respondents No.3 and 4 to the Writ Petition is to the effect that as per her own case, the petitioner was working as a Lady Constable on contract basis in Police Department and as such she could not claim to be a candidate belonging to a BPL family and the BPL Certificate annexed with the petition was of no help to her. It was further mentioned in the reply that at the time of evaluation of fifteen marks, the petitioner failed to produce any BPL Certificate and therefore, she was considered in OBC un-reserved category and after ascertaining her position from the merit of written test of OBC Category, she was giver her correct position by allotting her the marks obtained in the said category. It was also mentioned in the reply that as far as the private respondent was concerned, though he had not applied under OBC/BPL Category, but he was offered the post on his merit under OBC Category as no candidate of OBC/BPL Category was available.

7. Respondent No.5, in the reply filed by him contested the petition on the ground that as the petitioner was already working as a Lady Constable, therefore, she could not be said to be a candidate belonging to IRDP/BPL Category and therefore, her name was rightly not recommended for appointment.

8. By way of rejoinder filed to the reply filed by respondents No.3 and 4, the petitioner has reiterated her stand taken in the writ petition and denied the stand taken by the respondents in the reply.

9. I have heard learned counsel for the parties and have also gone through the record of the case.

10. From what has been mentioned hereinabove, it is evident that the stand of the respondent-Commission is twofold with regard to rejection of candidature of the petitioner under the OBC/BPL Category. The contention of the said Commission is:- (a) That as on the date of interview, the petitioner did not produce a valid OBC Certificate and; (b) As on the date of interview as the petitioner already stood employed as a Lady Constable, therefore, she did not fall under the BPL Category. To ascertain this fact as to whether the petitioner had produced a valid BPL Certificate as on the date when she appeared before the Interview Committee, this Court directed the respondent-Commission to produce original copy of the Application Form submitted by her before the Court. This was duly done by the respondent-Commission. A perusal of the same, i.e. the Biodata Form filled by the petitioner demonstrates that details of the latest BPL Certificate which stood obtained by the petitioner were duly filled in this Biodata Form by the petitioner. The Certificate mentioned by the petitioner in the form is the same, photocopy of which is appended with the Writ Petition as Annexure P/4 (Colly). The averments as are contained in Para-5 of the petition are as under:-

> "*5. That accordingly the petitioner on 29.01.2020 appeared for the evaluation in the office of the Himachal Pradesh Staff Selection Commission, Hamirpur, alongwith all the requisite documents. Copy of requisite documents are annexed herewith as annexure P/4 (Colly), for the kind perusal of this Hon'ble Court.*"

11. The reply which has been filed by the respondent-Commission to Para-5 of the Writ Petition reads as under:-

> " *That the contents of this para are also not disputed and need no reply being matter of record. However, it is incorrect that the petitioner appeared before this Commission alongwith requisite documents which have now been attached with this petition.*"

12. Thus in the reply, on one hand the respondent-Commission admits that the petitioner on 29.01.2020 appeared for evaluation alongwith all requisite documents which stand appended with the petition as Annexure P/4 (Colly), but in the same breath it denies that the petitioner appeared alongwith the documents which have been appended with the petition.

13. Be that as it may, this Court is of the considered view that when the petitioner was already in possession of the latest and valid BPL Certificate which was issued in her favour by the competent authority and details whereof were duly filled in the Biodata Form filled by the petitioner for the purpose of evaluation, then there was no occasion for the petitioner for not producing the said document before the concerned Committee. Therefore, the contention of the respondent-Commission that the petitioner did not produce the OBC/BPL Category Certificate at the time of evaluation, cannot be accepted.

14. Now, coming to the second contention raised by the respondent-Commission that on account of her being appointed as a Lady Constable as on the date of evaluation, the petitioner had lost her status as a person belonging to BPL Category, this Court is of the considered view that there is no merit in this contention of the Commission in the peculiar facts of this case.

15. During the course of hearing of this petition, on 25.11.2021, this Court had directed learned Additional Advocate General to have instructions as to what was the stand of the Government of Himachal Pradesh with regard to the status of a candidate who applies for a post under the OBC/BPL Category, but stands gainfully employed as on the date when he or she appears for interview. In this regard, learned Additional Advocate General handed over a compilation of the instructions issued by the Government of Himachal Pradesh, perusal whereof demonstrates that in terms of these instructions, the life of a BPL Certificate is six months. There are no definite

instructions issued by the government dealing with the factual situation as is there in the present case.

16. Here in, it is not in dispute that as on the date when petitioner applied for the post of Sub-Inspector, she was not gainfully employed anywhere. Vide Annexure P-3, dated 20.01.2020, she was called upon to appear for evaluation for the post of Sub-Inspector alongwith requisite documents on 29.01.2020 in the office of respondent No.3. The appointment of the petitioner against the post of Lady Constable was made vide Appointment Order, Annexure P-5, which is dated 21.12.2019. This communication reads as under:-

> *"APPOINTMENT ORDER*
>
> *Miss Ritu D/O Sh. Jagdish Ram, Village-Duki, Post Office-Nehrian, Police Station/Tehsil-Amb & District Una (HP) is hereby appointed as temporary Lady Constable under Himachal Pradesh Police Act, 2007 against the existing vacancy of 5th Indian Reserve Battalion (Mahila) Bassi, District Bilaspur (H.P.) w.e.f. 21.12.2019 F/N in the Pay Band of Rs.5910-20200+1900/- Grade Pay (initial start Rs.7810/-) and after 08 years of regular service Pay Band will be Rs.10300-34800+Rs.3200/- Grade Pay as per HP Govt. letter No. Home (A) B (2)-59/2017 dated 18.02.2019.*
>
> *Here service can be utilized anywhere in Himachal Pradesh as well as in Union of India or abroad and will be governed under the H.P. Police Act, 2007 and Punjab Police Rules as applicable in the State of Himachal Pradesh. The appointment is purely on temporary basis. She shall have no right of transfer to any Districts or other Units/Sub-Units of Himachal Pradesh Police.*
>
> *She is hereby allotted Constabulary Number 632 of 5th IRBn (Mahila) Bassi, District Bilaspur (H.P.).*"

17. Annexure P/3, as mentioned hereinabove is dated 20.01.2020. The evaluation was to take place on 29.01.2020. Thus, it is only a month before the petitioner was invited for evaluation for the post of Sub-Inspector that she stood appointed against the post of Lady Constable on temporary basis.

18. This Court is of the considered view that this fortuitous situation of the petitioner having been appointed against the post of Lady Constable just a month before her candidature for the post of Sub-Inspector was to be scrutinized by the Selection Board under the OBC/BPL Category, cannot deprive the petitioner of her status as a BPL. The BPL Certificate has a validity period of six months and in this case as on the date when the last BPL Certificate was issued in favour of the petitioner, she was unemployed. In addition, taking into consideration the element of unemployment as it exists in India, by no stretch of imagination, this Court can imagine that a lady belonging to a OBC/BPL Category would have had ventured refusing to accept a job against the post of Lady Constable in anticipation of her being selected against the post of Sub-Inspector.

19. Had it been a case that the petitioner was employed before the issuance of the latest OBC/BPL Category Certificate and she had obtained this certificate by concealing the fact, then the things would have been different. Herein, it is a completely fortuitous situation that before the evaluation of the petitioner for the post of Sub-Inspector, she was offered appointment as a Lady Constable just one month back. Therefore, in the peculiar facts of this case, more so keeping in view the fact that the BPL Certificate issued in favour of the petitioner was still in force and valid, the respondent-Commission could not have had *suo motu* taken a decision that the petitioner no more could be considered under the BPL Category. It is not in dispute that had the petitioner being considered under the OBC/BPL Category, then she would have been recommended for appointment against the post in issue because she was the only candidate belonging to the OBC (BPL) Category. Therefore, the rejection of the candidature of the petitioner under OBC (BPL) Category by respondent No.3 is bad in law.

20. As this Court has found the rejection of candidature of petitioner by respondent-Commission under the OBC/BPL Category to be

bad in law, therefore, this Writ Petition succeeds and respondent-Commission is directed to recommend the name of the petitioner for appointment against the post of Sub-Inspector by treating her as an eligible candidate from the OBC/BPL Category. The respondent-department is further directed to forth with act on the recommendation and offer appointment to the petitioner against the post in issue. This all be done definitely within a period of eight weeks from today. Further, in the peculiar facts of this case, it is further ordered that the appointment which has been offered to the private respondent shall not be disturbed and he shall be adjusted against a post belonging to the OBC Category and if need be, a superannuary post personal to him be created for the said purpose. The petitioner shall be deemed to have been appointed against the post of Sub-Inspector from the date, the private respondent was appointed as such, with all consequential benefits including seniority, save and except that monetary benefits shall be notional till the date of her actual joining.

21. Petition stands disposed of in above terms. Pending miscellaneous applications, if any, also stand disposed of. Interim order, if any, stand vacated.

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

Between:

HHC SANJEEV KUMAR, S/SHRI RAM NARAYAN BHAGAT, RESIDENT OF VPO SANGLA, TEHSIL SANGLA, DISTRICT KINNAUR, HIMACHAL PRADESH.

....PETITIONER.

(BY SHRI RAJIV RAI, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH, THROUGH SECRETARY (HOME) GOVERNMENT OF H.P. SHIMLA 171002.
2. THE DIRECTOR GENERAL OF POLICE, HIMACHAL PRADESH, SHIMLA, DISTRICT SHIMLA, HIMACHAL PRADESH.

....RESPONDENTS.

(BY M/s ADARSH SHARMA, SUMESH RAJ AND SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, FOR THE RESPONDENTS)

CIVIL Writ Petition
No.3527 2021
Reserved On:21.09.2021
Decided on: 27.09.2021

Constitution of India, 1950- Article 226- Petitioner aggrieved by the transfer order vide which he has been transferred from CID Unit to District Kinnaur- Held- It was routine transfer order and not one which has been issued just to harass the petitioner- Transfer is an incidence of service- No infirmity found with transfer order- Petition dismissed.

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

J U D G M E N T

The petitioner herein is aggrieved by the transfer order, dated 22.03.2021 (Annexure P-1), vide which he has been transferred from the CID Unit to district Kinnaur.

2. Brief facts necessary for the adjudication of the present petition are as under:-

The petitioner joined the Police Department as a constable on 14.03.1988. According to the petitioner, after his appointment he has served at various places from time to time. He has an un-blemished service record of more than 32 years. Vide Office Order dated 26.07.2019, he was transferred from District Kinnaur to the CID Unit. According to the petitioner, while discharging his duties in CID Unit there has never been any complaint against him from any quarter. As per the petitioner, he has been transferred vide impugned transfer order dated 22.03.2021 from the CID Unit to district Kinnaur without any cogent reason and without allowing him to complete his normal tenure of three years. According to the petitioner, there are number of constables serving in the CID, who have more than five years service in the Unit, whereas the petitioner has been victimized by adopting pick and choose basis. According to him, the impugned transfer order is in violation of instructions dated 19.11.2020, issued by the Government of Himachal Pradesh, which are applicable to the Police Department of the State also, in terms whereof no transfer or adjustment is to be permitted during the period when there is ban of transfers, without the permission of the Worthy Chief Minister and in the present case no approval was sought from the Worthy Chief Minister. It is on these basis that this Writ Petition has been filed, praying for the following relief:-

> "*a) quash and set aside the impugned transfer order passed vide Annexure P/1 dated 22.03.2021.*"

3. In its response, filed to the petition, the respondents have taken the stand that transfer of the petitioner from the CID Unit to district Kinnaur has

been ordered on the basis of the recommendations made by the State Police Establishment Committee after due deliberation on receipt of reference from the highest administrative authorities vide transfer order dated 22.03.2021. It is further the stand of said respondents that the CID is a sensitive and specialized Organization which provides critical inputs to the government and therefore, it is the prerogative of the employer, as to which official is to be selected/kept in the CID Unit for the stated purpose as per their suitability. It is further mentioned in the reply that as the petitioner is serving against a transferable job, therefore, it is the prerogative of the employer to post its employee at any place where it deems proper and the transfer of the petitioner was made only after due diligence and after affording an opportunity of being heard to him. On these basis, the respondents have prayed for the dismissal of this writ petition.

4. By way of rejoinder, the petitioner while reiterating the grounds taken in the writ petition has also mentioned that his transfer has been made on political grounds on the basis of a D.O. Note, which also renders said transfer bad in law.

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

6. The petitioner is serving as a constable in the Police Department. The post of constable is a district cadre post. The petitioner is serving as such in district Kinnaur. He was transferred vide transfer order dated 26.07.2019 (*Annexure P-3*) from district Kinnaur to the CID Unit. Now, the respondent-department in its wisdom has transferred the petitioner from the CID Unit back to district Kinnaur vide impugned order dated 22.03.2021 (*Annexure P-1*).

7. This Court is of the considered view that as CID indeed is a sensitive organization, the prerogative of the employer as to who is to be posted in the CID Unit, should not be interfered by the Court until and unless on the face of it, it can be demonstrated that the power of transfer has been exercised by the employer in a completely arbitrary manner. In the present case, the

petitioner has failed to demonstrate the same. The contention of the petitioner that his transfer is bad as the same was done during the period of ban on transfers which entails permission of the Worthy Chief Minister which was not obtained in his case, is belied from the record as the same demonstrates that transfer of the petitioner was on the basis of approval, so granted qua the transfers of the officials mentioned in Annexure P-1 by the Worthy Chief Minister, who the Court has been informed, also is the head of the Home Department to the Government of Himachal Pradesh, under which the Police Department falls.

8. Further, a perusal of Annexure P-1, i.e. the impugned transfer order, demonstrates that it is not as if, it is a solitary transfer order vide which the petitioner only has been transferred. In terms of this order, twenty other officials have also been transferred, which demonstrates that it was a routine transfer order and not one which has been issued just to harass the petitioner.

9. Though, in the rejoinder, a plea has been taken by the petitioner that the transfer order is bad as the same is on the basis of a D.O. Note, however, in the main petition, neither there was any such averment, nor in the rejoinder it has been mentioned that on whose D.O. Note, the petitioner has been transferred.

10. Even otherwise, this Court is of the considered view that if the petitioner is to allege malafidies, then the person concerned, against whom malafidies are alleged, has to be implied as a party respondent with specific allegations of malafidies, so that such person gets an opportunity to refute it, which has not been done by the petitioner in this case.

11. Accordingly, as this Court does not finds any infirmity with the impugned transfer order dated 22.03.2021 (*Annexure P-1*) and further taking into consideration the fact that the transfer is an incidence of service and that the petitioner belongs to a disciplined force, this petition being devoid of any merit is dismissed.

12. Pending miscellaneous applications, if any, stand disposed of. Interim order, if any, stands vacated.

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

Between:

SHRI MOHAN LAL, SON OF SHRI GURDAYAL, RESIDENT OF VILLAGE HUGAL, POST OFFICE KARYAS, TEHSIL PANGI, DISTRICT CHAMBA, H.P.

....PETITIONER.

(BY SHRI RAHUL MAHAJAN, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH, THROUGH SECRETARY (PW) TO THE GOVERNMENT OF HIMACHAL PRADESH, H.P., SECRETARIAT, SHIMLA-2.

2. THE EXECUTIVE ENGINEER, HPPWD, DIVISION KILLAR, TEHSIL PANGI, DISTRICT MANDI, H.P.

3. THE LD. PRESIDING JUDGE, H.P. INDUSTRIAL TRIBUNAL-CUM-LABOUR COURT DHARAMSHALA, DISTRICT KANGRA, H.P.

....RESPONDENTS.

(BY SHRI ASHOK SHARMA, ADVOCATE GENERAL, WITH SHRI ADARSH SHARMA, SHRI SUMESH RAJ, SHRI SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL AND SHRI KAMAL KANT CHANDEL, DEPUTY ADVOCATE GENERAL, FOR RESPONDENTS NO.1 & 2.

NONE FOR RESPONDENT NO.3)

CIVIL WRIT PETITION
No.6930 of 2014
Decided on: 23.09.2021

Industrial Disputes Act, 1947- Section 25- Petitioner has challenged the award passed by the Ld. Presiding Judge, Labour Court-cum-Industrial Tribunal, Dharamshala, H.P.- Labour Court set aside the termination and directed the respondent to pay Rs.20,000 to petitioner as compensation- Held- Workman was engaged in a tribal area and in lieu of the number of years put in it will be in the interest of justice in case of compensation awarded by the Ld. Labour Court is enhanced from Rs.20,000/- to Rs.1,50,000/-.

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

J U D G M E N T

By way of this writ petition, the petitioner has challenged the award passed by learned Presiding Judge, Labour Court-cum-Industrial Tribunal, Dharamshala, H.P., in Reference No.50/2013, titled as Shri Mohan Lal Versus The Executive Engineer, on 01.05.2014.

2. Brief facts necessary for the adjudication of the present petition are as under:-

The following reference was received by the learned Labour Court from the appropriate government for adjudication:-

> "*Whether termination of the services of Shri Mohan Lal S/O Shri Gurdayal, R/O Village Hugal, P.O. Karias, Tehsil Pangi, District Chamba, H.P. w.e.f. October 2008 by the Executive Engineer, Killar*

Division, HPPWD, Killar, District Chamba, H.P. without complying with the provisions of the Industrial Disputes Act, 1947, is legal and justified? If not, what amount of back wages, seniority, past service benefits and compensation the above worker is entitled to from the above employer?"

3. On the basis of the pleadings of the parties, learned Labour Court framed the following issues:-

"*1. Whether the termination of the services of the petitioner by the respondent in the month of October, 2008 is illegal and unjustified as alleged? OPP*

2. Whether the claim petition is not maintainable in the present form? OPR

3. Whether the petition is hit by the vice of delay and laches as alleged. If so, its effect? OPR
4. Relief."

4. On the basis of the evidence which was led by the parties in support of their respective contentions, the issues so framed were answered as under:-

"*Issue No.1 : Yes*
Issue No.2 : Not pressed
Issue No.3 : No.
Relief : Claim petition allowed in part vide operative portion of the Award."

5. The reference was thus answered by the learned Labour Court in the following terms:-

"*As a sequel to my findings on the issues No.1 and 3, the instant claim petition succeeds in part and the same is partly allowed. The termination of the services of the petitioner by the respondent in October 2008 is set aside and quashed. The respondent is directed to pay a lump sum of Rs.20,000/- (twenty thousand only) as compensation to the petitioner in lieu of the reinstatement of his*

services as well as other consequential benefits, if any. Such amount will be paid by the respondents to the petitioner or deposited in this Court within a period of 60 days from today failing which he (respondent) will be liable to pay the interest @ 9% per annum on the said amount from the date of the institution of this reference i.e. 13.06.2013 till the date of payment/ deposit. Parties to bear their own costs."

6. Feeling aggrieved, the workman has preferred the present writ petition.

7. Learned counsel for the petitioner has submitted that the award passed by the learned Labour Court is not sustainable in the eyes of law because when it did come to the conclusion that there was violation of the provisions of Industrial Disputes Act by the respondents, then the services of the workman ought to have been ordered to be reinstated and otherwise also, the lump sum amount which has been awarded in favour of the workman as compensation, is to meager. He has drawn the attention of the Court to the judgments of the Hon'ble Supreme Court and by placing reliance upon same he has submitted that the petitioner be at least awarded an amount of 4,00,000/- in case this Court does not concurs with his prayer for reinstatement.

8. Objecting the contentions of learned counsel for the petitioner, learned Additional Advocate General has argued that though the findings returned by the learned Labour Court as to whether the provisions of Industrial Disputes Act were violated or not have attained finality, yet there was a discretion vested with the learned Labour Court as to whether the services of the petitioner were to be reinstated or compensation in lieu thereof was just and learned Labour Court has rightly arrived at the conclusion that the workman could be duly compensated by way of compensation. He has further argued that taking into consideration the tenure which the workman had spent with the department and the daily wages which were being paid to

him, the compensation to the tune of Rs.20,00/- was just and fair. Accordingly, a prayer has been made for dismissal of the writ petition.

9. I have heard learned counsel for the parties and have also gone through the award passed by the learned Labour Court.

10. This Court is of the considered view that the findings returned by the learned Labour Court with regard to not ordering the reinstatement of the petitioner/ workman are well reasoned and this Court does not intends to interfere with the same.

11. Now, the Court will address the issue as to whether an amount of Rs.20,000/- can be said to fair compensation or not in the facts of the case. Hon'ble Supreme Court in *State of Uttarakhand and Others* Versus *Suman Pal (2016) 11 SCC 305*, while holding in the facts of that case that reinstatement with 50% back wages was not just, modified the judgment under challenge to the effect that lump sum amount of Rs.2,00,000/- be paid to the daily wager, as he was not regularly appointed and was relieved before several years.

12. In *Raj Kumar* Versus *Assistant General Manager, State Bank of India (2016) 7 SCC 582*, Hon'ble Supreme Court was dealing with a case preferred by the daily wager who was aggrieved by the interference in the order of reinstatement passed by the High Court and substituting the award with one-time payment of compensation of Rs.75,000/-, Hon'ble Supreme Court was pleased to enhance the compensation by fixing it to Rs.2,00,000/-. While holding such, Hon'ble Supreme Court took note of the fact that the workman therein was working from 1984, though intermittently up to the year 1993.

13. Similarly, in *District Development Officer and Another* Versus *Satish Kantilal Amrelia (2018) 12 SCC 298*, Hon'ble Supreme Court was pleased to order compensation to the tune of 2,50,000/- in favour of the workman in lieu of reinstatement. In this case, the workman had also worked intermittently from 18.12.1989 to 12.02.1992.

14. In case *Ranvir Singh* Versus *Executive Engineer P.W.D.*, *Civil Appeal No.4483 of 2010*, Hon'ble Supreme Court has been pleased to direct payment of compensation to the tune of Rs.3,25,000/- in favour of the workman there in lieu of the reinstatement who he had put in eight years of service.

15. It is thus clear that there is no straight jacket formula as to what compensation a workman would be entitled to in lieu of reinstatement and taking into consideration the peculiar facts of each case, Hon'ble Supreme Court has been pleased to grant the amount of compensation as stands reflected therein.

16. Taking into consideration the fact that herein the workman was engaged in a tribal area and the learned Labour Court held the department to be guilty of violation of the provisions of Section 25 (G) & (H) of the Industrial Disputes Act, this Court is of the considered view that it will be in the interest of justice in case the amount of compensation awarded by the learned Labor Court is reasonably enhanced. Petitioner is stated to have served the respondent-department for a period of six years before his services were terminated. In the considered view of this Court, in lieu of the number of years put in by the petitioner with the respondent-department, it will be in the interest of justice in case the compensation awarded by the learned Labour Court is enhanced from Rs.20,000/- to Rs.1,50,000/-. Ordered accordingly.

17. It is directed that the amount of compensation be paid to the petitioner within a period of three months from today and in the event of non-payment of the same within the said period, the petitioner shall be entitled an interest @ 6% on the said amount from the date of filing of the present petition.

18. This writ petition stands disposed of in above terms, so also pending miscellaneous applications, if any.

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

Between:

PREM DUTT, SON OF LATE SH. DHANI RAM, PRESENTLY POSTED AS CLERK, IN THE O/O DIRECTOR, RURAL DEVELOPMENT DEPARTMENT SDA COMPLEX, KASUMPTI SHIMLA-171009, PERMANENT RESIDENT OF VILLAGE & P.O. SARYANJ, TEHSIL ARKI, DISTRICT SOLAN, HP.

....PETITIONER.

(BY MR. L.N. SHARMA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH, THROUGH SECRETARY (RURAL DEVELOPMENT), TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-171002.

2. DIRECTOR RURAL DEVELOPMENT DEPARTMENT, HIMACHAL PRADESH, SHIMLA-171009.

3. H.P. BOARD OF SCHOOL EDUCATION, DHARAMSHALA, DISTRICT KANGRA, H.P., THROUGH ITS SECRETARY.

….RESPONDENTS.

(BY MR. ASHOK SHARMA, ADVOCATE GENERAL WITH MR. ADARSH SHARMA, MR. SUMESH RAJ, AND MR. SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL, FOR RESPONDENTS NO.1 & 2.

MR. DIWAKAR DUTT SHARMA, ADVOCATE, FOR RESPONDENT NO.3).

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
NO. 3245 OF 2019
Decided on: 30.09.2021

Constitution of India, 1950- Article 226- Writ of mandamus to get the date of birth of the petitioner corrected in the office record- Petitioner has not approached the department at a belated stage, as such, respondent is directed to verify the documents filed by the petitioner showing his correct date of birth and thereafter take appropriate action in this regard. (Para 9)

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

O R D E R

By way of this Writ Petition, the petitioner has prayed for the following relief:-

> *"That writ of mandamus may kindly be issued and the respondents No.1 and 2 may kindly be directed to get the date of birth of the petitioner corrected in the office record and instead of 14.02.1967, the date of birth of the petitioner may be ordered to be recorded as 14.02.1969 and furthermore, the respondent No.3 may also be directed to issue revised detail-marks cards for the 8th and 10th standard."*

2. Brief facts necessary for the adjudication of the present petition are as under:-

3. According to the petitioner, he joined as a Clerk in the office of respondent No.2 on 28.01.2008. At the time of his joining, the respondent-Department had entered his date of birth in the service record as 14.08.1967,

in terms of his date of birth reflected in his matriculation certificate. However, said date of birth of the petitioner as was entered in the service record as also in the matriculation certificate, was incorrect as his actual date of birth was 14.08.1969. Accordingly, the petitioner made a representation to the respondents for the correction of his date of birth. According to the petitioner, he approached the authorities concerned including the Department within the time stipulated in Rule 7(1) of HPFR for the said purpose. The grievance of the petitioner is that the date of birth of the petitioner has not been corrected in his service record as respondents No.1 and 2 have taken a stand that needful cannot be done till the date of birth as entered in the matriculation certificate of the petitioner is corrected by respondent No.3 and respondent No.3 is insisting that needful cannot be done by it until and unless there is a direction issued in this regard by some Competent Court of Law.

4. Learned counsel for the petitioner has argued that the factum of the date of birth of the petitioner being 14.08.1969 is clearly borne out from Annexures P-2, P-3 and P-4 appended with the petition, which include his School Leaving Certificate pertaining to Class-5th, birth certificate issued in his favour by the statutory authority and his date of birth entered in the Pariwar Register. He has also drawn the attention of this Court to an order dated 13.09.2010, passed by this Court in CWP(T) No.6738 of 2008, titled as Miss Puja vs. Secretary, Department of Rural Development & Ors., in which in similar circumstance, this Court had disposed of the petition by directing the respondents therein to verify the documents filed by the petitioner therein showing her correct date of birth and make necessary correction, in case the contention of the petitioner was found to be correct. He submits that the petitioner herein shall be satisfied in case this Writ Petition is also disposed of with similar directions.

5. Learned Advocate General, submits that though there is no dispute that the petitioner had approached the respondent-Department within

the stipulated period, yet the department is not in a position to unilaterally make any changes in the date of birth of the petitioner, entered in the service record, for the reasons that as the department had made the relevant entry on the basis of the documents supplied by the petitioner himself when he entered the job, therefore, until and unless correction was incorporated in the said certificate, the department cannot do anything.

6. Learned counsel for respondent No.3 submits that the date of birth as is reflected in the matriculation certificate of the petitioner is based on the date of birth as it stood entered in the Middle Class Examination Certificate of the petitioner which obviously was based upon information provided to the Board by either the parents or guardians of the petitioner. Therefore, according to him, there was no ambiguity in the date of birth of the petitioner as it stood entered in the matriculation certificate and otherwise also until and unless an appropriate Court order that necessary correction be incorporated unilaterally by respondent No.3.

7. I have heard learned counsel for the parties and have also gone through the pleadings as well as documents on record.

8. In this case, it is not in dispute that the petitioner made a request for correction of his date of birth to the department concerned within few days of his being appointed against the post of a Clerk. The contention of the petitioner is that the date of birth as stands entered in his matriculation certificate is incorrect. Based on the entries which are there in his Primary School Leaving Certificate dated 19.5.2008 (Annexure P-2), certificate of birth issued in his favour by Panchayat Secretary (Annexure P-3) and the Pariwar Register (Annexure P-4), maintained by the Panchayat Secretary where he was born, he claims his date of birth to be 14.08.1969.

9. In these certificates, the date of birth of the petitioner is reflected as 14.08.1969. Therefore, this Court is of the view that as the petitioner has not approached the department at a belated stage, it will be in the interest of

justice, in case, this petition is disposed of with a direction to the respondents to verify the documents filed by the petitioner showing his correct date of birth and thereafter taking appropriate action in this regard.

10. At this stage, learned Advocate General submits that this direction has to be passed to respondent No.3. Ordered accordingly. 11.

This Writ Petition is, therefore, disposed of with the direction to respondent No.3 to verify the documents which shall be provided by the petitioner to the said respondent within a period of four weeks from today with regard to his date of birth and thereafter make necessary correction in the record, in case the contention of the petitioner is found to be corrected. Consequential action thereupon if required shall be taken by respondents No.1 and 2 be taken within three months thereafter.

In view of the above, present petition stands disposed, so also pending miscellaneous applications, if any.

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

Between:-

SMT. SHYAMA RANA, WIFE OF SHRI JAI SINGH RANA,
VILLAGE AND PO KAMRAU, SUB TEHSIL KAMRAU, DISTRICT SIRMAUR (HP)
PRESENTLY WORKING AS LANGUAGE TEACHER AT GSSS TIMBI, TEHSIL SHILLAI, DISTRICT SIRMAUR HP

....PETITIONER

(BY SHRI PRAKASH SHARMA, ADVOCATE)

AND

1. STATE OF H.P. THROUGH
   ADDITIONAL CHIEF SECRETARY
   (EDUCATION) TO THE GOVERNMENT
   OF H.P., SHIMLA

2. THE DIRECTOR OF ELEMENTARY
   EDUCATION, HIMACHAL PRADESH
   SHIMLA.

3. THE DEPUTY DIRECTOR OF
ELEMENTARY EDUCATION,
SIRMAUR H.P.

4. PRINCIPAL,
GOVERNMENT SENIOR SECONDARY
SCHOOL, TIMBI, TEHSIL SHILLAI,
DISTRICT SIRMAUR HIMACHAL
PRADESH .....RESPONDENTS

(BY MR. RAJU RAM RAHI, DEPUTY ADVOCATE GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
NO.7915 OF 2019
Decided on: 05.01.2022

Constitution of India, 1950- Article 226- Policy for conferring contractual status to teachers working through School Management Committee (SMC) under local fund basis in the Government schools and regularization of petitioner in due course of time- Held- Lapse on the part of the state to provide a teacher forced SMC to appoint the petitioner to cater the needs of students, therefore, the action of respondents in not paying grant-in-aid is illegal and arbitrary and not sustainable- Respondent directed to release grant-in-aid as per rules.

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

O R D E R

Petitioner herein has approached this Court seeking (a) directions to respondents to frame a policy for conferring contractual status to teachers working through School Management Committee (in short 'SMC')

under Local Fund/Student Welfare Fund basis in the Government Schools and for her regularization in due course of time; (b) to declare the petitioner entitled to continue in service from due date i.e. 17.5.2013 with all consequential benefits; (c) direction to release the grant-in-aid in favour of petitioner from due date i.e. 17.5.2013 alongwith interest on market rate; and also, (d) in alternative, direction to treat the petitioner in continuous service in view of notification dated 17.7.2012 extended from time to time with all consequential benefits.

2 However, learned counsel for petitioner has restricted the claim of petitioner in present petition, only for seeking direction to respondents to release the grant-in-aid in favour of petitioner from the due date i.e. 17.5.2013 and alternatively, to release the grant-in-aid w.e.f. 16.8.2014, the date of notification extending the applicability of SMC Policy to all schools including the school of petitioner.

3 Therefore, without adjudicating other prayers of petitioner, leaving those issues open to be decided in appropriate petition, if so preferred, in the present petition claim of petitioner for her entitlement to grant-in-aid is being adjudicated.

4 Undisputed facts in present petition are that for shortage of staff petitioner was engaged by School Management Committee, respondent No.4, Principal, Government Senior Secondary School, Timbi as Language Teacher on SMC basis w.e.f. 17.5.2013 and since then she is continuing as such.

5 Claim of petitioner is that she is fully eligible to be appointed as Language Teacher fulfilling essential qualification prescribed under Recruitment and Promotion Rules (R&P Rules) to this post and after appointment, respondents/State has formulated a Policy dated 17.7.2012 with respect to grant-in-aid to teachers appointed on SMC basis for tribal and

difficult areas and said Policy as notified vide communication dated 20th September, 2014 was extended to all schools which were upgraded during academic sessions 2013 and 2014 irrespective of area in which she falls and to all those sanctioned posts of teaching cadre which were vacant since more than two years from the date of issue of notification dated 16.8.2014. Resultantly, the area of GSSS Timbi also came in the area for which Policy to engage teacher(s) through SMC was extended.

6 Respondents have opposed the claim of petitioner by filing reply, stating therein that petitioner was engaged by School Management Committee vide Resolution dated 16.5.2013 against the post of Language Teacher for Academic Session 2013-14 by deciding to pay honorarium at the rate of Rs.20/- per student by collecting the same from parents/guardians and petitioner was allowed to continue her service for Academic Session 2013-14. It has been further stated in reply that when petitioner was not allowed to continue her service in school for next Academic Session then she approached the Erstwhile H.P. State Administrative Tribunal by filing OA No. 4464 of 2015 and in pursuant to order dated 24.11.2015 passed by Erstwhile H.P. State Administrative Tribunal, she was allowed to re-join the school on 29.02.2016 and since then, she is continuing as such and after re-joining she has been paid Rs.2000/- per month w.e.f. 1.3.2016 to 31.12.2019 and Rs.3000/- w.e.f. 1.1.2020 to 31.03.2020 by collecting the funds from parents and guardians of students by the concerned School Management Committee. Lastly, it has been stated that this High Court in CWP No. 277 of 2017 titled Subhash Chand vs. State of HP, has held that State cannot be directed to release wages in favour of petitioners who have not been appointed in terms of 2012 Policy, and thus, it has been contended that petitioner is not entitled for any grant-in-aid from the respondent/State.

7 Learned counsel for petitioner has contended that present case, on the issue being agitated, is squarely covered by judgment passed by Coordinate Bench of this Court in ***CWP No. 2467 of 2015, titled as Villam Singh vs. State of H.P. and others,*** wherein direction was issued to respondents to release grant-in-aid to petitioner therein who was similarly situated to present petitioner and in the said case, not only LPA No. 53 of 2018, preferred by respondents department, was dismissed by the Division Bench of this Court vide judgment dated 26.11.2018, but also SLP (c) No. 19103 of 2019 preferred by respondents' department was dismissed by the Supreme Court vide judgment dated 9.8.2019.

8 In ***Villam Singh's case***, Villam Singh was appointed as Lecturer (Political Science) under SMC policy in the school concerned. He was otherwise eligible for appointment as Lecturer fulfilling the essential qualification prescribed in R&P Rules to such post. The SMC Policy was formulated by State on 17.7.2012 and it was made applicable to all schools including the school wherein Villam Singh was appointed vide notification dated 16.8.2014.

9 Taking into consideration aforesaid facts in ***Villam Singh's case***, a Coordinate Bench of this Court had observed that only reason to deny the petitioner's grant-in-aid was that he had been engaged prior to the notification dated 16.8.2014 read with SMC Policy dated 17.7.2012 and, therefore, he was not entitled to claim the benefit under SMC Policy. It was observed by the Court that it was not the case of respondents department that petitioner's appointment was in any manner illegal or contrary to law or that he was not qualified.

10 As submitted by learned counsel for the petitioner that findings returned and observations made in ***Villam Singh's Case*** have attained finality after dismissal of Special Leave Petition, preferred by

State/respondents, by the Supreme Court, in present case also, it is not a case of respondents' department that appointment of petitioner was illegal in any manner or contrary to law or he was not qualified.

11 The facts of present case are similar. Petitioner was appointed prior to notification dated 16.8.2014 whereas SMC policy dated 17.7.2012 was made applicable to school of petitioners vide notification dated 16.8.2014.

12 In Villam Singh's case, it was concluded by the Coordinate Bench of this Court that action of respondent in not paying the grant-in-aid to petitioner w.e.f. 16.8.2014 was illegal and arbitrary and, therefore, same could not be countenanced or sustained and thus petition was allowed with direction to respondent-State to release grant-in-aid in favour of petitioner in accordance with Rules w.e.f. 20th September, 2014.

13 There is another aspect of the case. It is the duty of respondents' Department, being functionary of the State, to provide sufficient teachers in schools opened by State. In present case, it is not the case of State that there was no necessity of Language Teacher in school. Therefore, there was lapse or failure on the part of respondents/State to provide a teacher. Hence the School Management Committee was constrained to appoint the petitioner to cater the needs of students. Nothing was done by the respondents/State to provide teacher to teach the students, rather School Management Committee was allowed to appoint and when responsibility to pay arises, the State/Department washed its hands by posing that teacher was engaged by School Management Committee, not State/Department. It is strange behaviour on the part of State that for teaching the students, a candidate is considered to be suitable and eligible, but, for making the payment of grant-in-aid or other emoluments equivalent to similarly situated persons, the same candidate is considered ineligible for want of certain formalities to be

performed by School Management Committee as well as Department on behalf of respondents/State and for want of requisite qualification. Such behaviour of State is unwarranted.

14 Following observations of this Court made in judgment dated 26.5.2018 passed in ***CWP No. 384 of 2017 titled Renuka Devi vs. State of HP*** in this regard would also be relevant:-

> "16. Present case is a glaring example of exploitation of unemployed destitute citizens by mighty State. 'We the people of India' have submitted ourselves to a Democratic Welfare State. In India, since ancient era, State is always for welfare of citizens being guardian and protector of their rights. Primary duty of State is welfare of people and exploitive actions of rulers have always been deprecated and history speaks that such rulers were always reprimanded and punished. "Rule of Law" was and is Fundamental Principle of "Raj Dharma". Dream of our forefathers, to establish "Rule of Law" after independence, has emerged in our Constitution. Exploitation by State has never been expected on the part of State as the same can never be termed as 'Rule of Law', but the same is arbitrariness which is antithesis of 'Rule of Law'. To make law, to ameliorate exploitation, is duty of State and in fact State has also framed laws to prevent exploitation. But in present case State is an instrumental in exploitation which is contrary to essence of the Constitution."

15 On comparing the facts of ***Villam Singh's case,*** with present case and verdict of Court therein, I am of the considered view that present case is squarely covered by judgment passed in ***Villam Singh' case,*** referred supra. Therefore, it is concluded that in present case also, action of respondents in not paying grant-in-aid to petitioner w.e.f. 16.8.2014 is illegal and arbitrary and not sustainable

16 In view of above, respondents are directed to release grant-in-aid in favour of petitioner in accordance with relevant Rules w.e.f. 16.8.2014 and except for her appointment prior to issuance and extension of SMC policy in the school, petitioner is otherwise eligible for grant-in-aid. Arrears of grant-in-aid of petitioner shall be paid as expeditiously as possible preferably before 31st March, 2022.

Petition stands disposed of, as aforesaid, including all pending miscellaneous application (s), if any.

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

Between:-

YASHWANT SINGH
AGED ABOUT 54 YEARS
S/O LATE SH. JIA LAL,
R/O VILLAGE & POST OFFICE JUBBER HATTI, TEHSIL & DISTRICT SHIMLA, PRESENTLY WORKING AS SENIOR ASSISTANT IN ARCHITECT PLANNER BRANCH MUNICIPAL CORPORATION SHIMLA, H.P. ....PETITIONER

(BY SH. SANJEEV BHUSHAN, SENIOR ADVOCATE, ALONGWITH SH.RAJESH KUMAR ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
   THROUGH SECRETARY URBAN
   DEVELOPMENT SECRETARIAT
   SHIMLA-2

2. MUNICIPAL CORPORATION, SHIMLA
   THROUGH ITS COMMISSIONER

(BY MS.REETA THAKUR, ADVOCATE)

3. DIRECTOR URBAN DEVELOPMENT,
HIMACHAL PRADESH, SHIMLA-2 ....RESPONDENTS

(BY SH.RAJU RAM RAHI, DEPUTY ADVOCATE GENERAL, FOR RESPONDENTS NO.1 & 3)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
NO.4115 OF 2020
Decided on: 28.12.2021

Constitution of India, 1950- Article 226- Promotion to the post of Superintendent Grade-II- Respondent Corporation is directed to consider the case of the petitioner and other eligible candidates serving in feeder category for the post of Superintendent Grade-II in the light of observations made.

Cases referred:

Dharam Pal vs. State of H.P. and another, 2009 (1) Shim.L.C. 140;

Post Graduate Institute of Medical Education & Rsearch, Chandigarh vs. Faculty Association and others with many other connected matters, (1998) 4 SCC 1;

R.K. Sabharwal and others vs. State of Punjab and others, (1995) 2 SCC 745;

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

J U D G M E N T

Petitioner has approached this Court, seeking direction to consider his case for promotion to the post of Superintendent Grade-II after completion of six years service as a Senior Assistant on 03.09.2017, alongwith all consequential benefits, including seniority, continuity, annual increments, earned leave and all other consequential benefits including arrears accruing thereon on this account.

19. Undisputed facts in present case are that petitioner is serving as a Senior Assistant in the Municipal Corporation, Shimla (hereinafter referred to as "the Corporation'). Next promotional avenue available to him is the post of Superintendent Grade-II. There are six posts of Superintendent Grade-II in the Corporation. Appointment/promotion to the post of Superintendent Grade-II is governed by 13 Point Roster. Before 2015, exercise of power by the Corporation was under cloud, but after 2015, the Corporation has been declared appointing authority for the posts, in reference, in present petition. Therefore, Corporation has started to maintain Roster (13 Point) for the post of Superintendent Grade-II w.e.f. 29.05.2015. Roster being maintained by the Corporation, supplied to the petitioner under Right to Information Act, 2005, has been placed on record as Annexure A-7 with rejoinder and the same is not disputed by the respondents. It is also admitted fact that on 29.05.2015 all six posts were occupied by incumbents posted against those posts. As per 13 Point Roster, first six posts are to be allotted to and filled by Un-Reserved category and thereafter first vacancy shall be against 7th point in Roster and the said vacancy shall go to Scheduled Caste category and, thereafter, again vacancies from 8 to 13 are to be provided for Un-Reserved category, i.e. open for all, i.e. General, Scheduled Caste and Scheduled Tribe. On 29.05.2015, all six posts were occupied and out of them first and sixth posts were occupied by Scheduled Caste candidates on the basis of their seniority and remaining four posts were occupied by General category candidates. But all candidates had consumed first six Roster points available for Un-Reserved.

20. In Annexure A-7 plotting of appointment to the post of Superintendent Grade-II as per 13 Point Roster is as under:-

Table-A

Superintendent Grade-II = 6 Posts

Date of vacancy	Roster Point	Category of Roster Point	Date of promotion	Names of promottees	Further promotion/retirement
29.05.2015	1	UR	29.05.2015	Sh.Bhagi Ram (SC)	31.08.2015 retired
29.05.2015	2	UR	29.05.2015	Sh.Jai Prakash Sharma	31.03.2017 retired
29.05.2015	3	UR	29.05.2015	Sh.Harpal Singh	31.03.2017 retired
29.05.2015	4	UR	29.05.2015	Sh.Diwan Chand	31.01.2016 retired
29.05.2015	5	UR	29.05.2015	Smt.Anita Sharma	31.08.2016 retired
29.05.2015	6	UR	29.05.2015	Smt.Ram Kali (SC)	09.09.2019 promoted as Supdt.Grade-I
	7	SC			
31.08.2015	8	UR	18.06.2016	Raksha Devi (SC)	Retired on 30.06.2019
31.01.2016	9	UR	18.06.2016	Durga Dass	Promoted as Superintendent Grade-I on 09.09.2019
31.08.2016	10	UR	22.09.2017	Godawari Sharma	Retired on 31.01.2020
31.03.2017	11	UR	22.09.2017	Suresh K.Sharma	Promoted as Supdt.Grade-

					I on 23.10.2020
31.03.2017					

21. Person appointed against first post, namely Bhagi Ram belonging to Scheduled Caste category, but posted against Un-Reserved vacancy on the basis of his seniority, retired on 31.08.2015 and person posted against Roster Point 4 namely Diwan Chand retired on 31.01.2016 and, resultantly, two vacancies were available to be filled in against Roster Points 7 and 8. Roster Point 7 was reserved for Scheduled Caste, whereas Roster Point 8 onwards up to Roster Point 13 were available as Un-Reserved Roster Points. Raksha Devi belonging to Scheduled Caste category was seniormost amongst the candidates falling in zone of consideration for promotion to the post of Superintendent Grade-II and next to her as per seniority Durga Dass Thakur belonging to Un-Reserved category was also eligible to be considered to the post of Superintendent Grade-II next to Raksha Devi.

22. The Corporation, instead of considering and posting Raksha Devi, a Scheduled Caste candidate against Roster Point 7, posted her against Roster Point 8 meant for Un-Reserved category and Durga Dass Thakur (General category) was posted against Roster Point 9.

23. Three vacancies were again available in September, 2017, for retirement of Anita Sharma on 31.08.2016, and retirements of Jai Prakash Sharma and Harpal Singh on 31.03.2017. However, Corporation filled in only two vacancies against Un-Reserved Roster Points No.10 and 11. Petitioner, belonging to General category, was next candidate available, but he was not promoted on the ground that vacancy available was to be filled against Roster Point 7 allotted for Scheduled Caste.

24. In reply, filed by the Corporation, it has also been admitted that petitioner had completed six years service as a Senior Assistant on 03.09.2017 and was eligible for promotion to the post of Superintendent Grade-II alongwith Godawari and Suresh Kumar Sharma, and after these two persons, he is seniormost in the feeder category. However, it has been explained that one post of Superintendent Grade-II, which was kept vacant, is to be filled up from Scheduled Caste category as per Reservation Roster maintained by the Corporation and the case of the petitioner was to be considered for promotion against next vacancy available for General category. It has also been submitted in the reply, which is undisputed, that Corporation has adopted Recruitment & Promotion Rules (in short 'R & P Rules') notified by Urban Development Department vide Notification dated 20.08.1997 and promotion to the post of Superintendent Grade-II, from amongst Senior Assistants, is to be made as per seniority.

25. During hearing, learned counsel for the Corporation, under instructions of the concerned official attending the Court, has submitted that as per instructions issued by the State Government dated 20.08.1998 reiterated and clarified vide communication dated 18.11.2004, SC/ST/OBCs appointed on their own merit, but not due to reservation, are not to be counted towards reservation quota and, therefore, Raksha Devi, who was senior most amongst the Senior Assistants was treated to be appointed on her own merit, but not on the basis of reservation and, therefore, Raksha Devi was considered to have been appointed against Roster Point 8 available for Un-Reserved category, and as on that date, no Scheduled Caste candidate was available next to her, falling in the zone of consideration, therefore, post against Roster Point 7 available for Scheduled Caste has been kept vacant.

26. At this juncture, it is also noticeable that on 22.09.2017, alongwith petitioner Hira Nand, a Scheduled Caste candidate next to petitioner in seniority, subject to eligibility was also available to be considered against

Roster Point No.7 allotted to Scheduled Caste category. But neither petitioner nor Hira Nand was promoted. In case Hira Nand was not eligible then Scheduled Caste candidate Hem Chand, subject to eligibility, was also available to be considered for accelerated promotion against the vacancy available to be filled against Roster Point No.7. But Corporation did not opt to do so.

27. Under instructions, learned counsel for the Corporation has submitted that on 22.09.2017 third post could not be filled for interim stay ordered by erstwhile H.P. State Administrative Tribunal vide order passed in M.A. No.1290 of 2018 in O.A. No.1961 of 2016, now pending adjudication in this Court as CWPOA No.7628 of 2019. Perusal of record reveals that post was kept vacant in September, 2017 whereas interim stay was granted by the Court in July/August 2018. Therefore, this plea is contrary to the record which is also evident from the fact that in September, 2017, two other posts were filled by the Corporation. As a matter of fact subsequent vacancies available in 2019 and 2020 have not been filled due to interim stay.

28. In Para-6 of Instructions dated 20.08.1998 (hereinafter referred to as 'the instructions'), which is relevant in present case reads as under:-

> "6. At this Stage of initial operation of a roster, it will be necessary to adjust the existing appointments in the roster. This will also help in identifying the excesses/shortages, if any in the respective categories in the cadre. This may be done starting from the earliest appointment and making an appropriate remark "utilised by SC/ST/OBC/Gen. etc.", as the case may be against each point in the rosters as explained in the explanatory notes appended to the model rosters. In making these adjustments, appointments of candidates belonging to SCs/STs/OBCs which were made on merit (and not due to reservation) are not to be counted towards reservation so far as direct recruitment is concerned. In other words, they are to be treated as general category appointments."

29. Clauses 1 and 2 of Initial Operation contained in Annexure A appended with aforesaid Instructions, after explanatory note are also relevant in present case, which read as under:-

> "1. As the point of initial operation of the roster, it will be necessary to determine the actual representation of the incumbents belonging to different categories in a cadre vis-a-vis the points earmarked for each category viz. SC/ST/OBC and General in the roster. This may be done by plotting the appointments made against each point of roster starting with earliest appointee. Thus, if the earlier appointee in the cadre happens to be a candidate belonging to the Scheduled Castes, against Point NO.1 of the roster, the ramark "utilized by SC" shall be entered. If the next appointee is a general category candidate, the remark "utilized by general category" shall be made against point No.2 and so on and so forth till all appointments are adjusted in the respective rosters. In making these adjustments, SC/ST/OBC candidates on merit, in direct recruitment, shall be treated as general category candidates.
>
> 2. After completing the adjustment as indicated above, a tally should be made to determine the actual percentages of representation of appointees belonging to the different categories in the cadre. If there is an excess representation of any of the reserved categories, or if the total representation of the reserved categories exceeds 50%, it shall be adjusted in the future recruitment. Vacancies arising from retirement etc. of candidates belonging to such categories shall be filled by appointment of candidates belonging to the categories to which the relevant roster points, against which the excesses occur, belong."

30. Para-6 of the Instructions provides that in making adjustments, against Roster point, appointments of the candidates belonging to SCs/STs/OBCs, which were made on merit, and not due to reservation, are

not to be counted towards reservation so far as "direct recruitment" is concerned. Earlier this principle was not applicable to the promotional Roster. However vide communication No.PER(AP)-C-F(II)-3/98 dated 18.11.2004 issued by Department of Personnel AP-III, as circulated, clarifies as under:-

> "… … …that the Scheduled Caste/Scheduled Tribe candidates appointed by promotion on their own merit and not owing to reservation or relaxation of qualifications will not be adjusted against the reserved points of the reservation roster. They will be adjusted against un-reserved points. Further, it has also been clarified that the Scheduled Caste/ Scheduled Tribe candidates appointed on their own merit (by direct recruitment or promotion) and adjusted against un-reserved points will retain their status of Scheduled Caste/Scheduled Tribe and will be eligible to get benefit of reservation in future/further promotions, if any."

31. Instructions also contain guidelines for initial operation of the Roster for determination of actual representation of the incumbents belonging to different categories in a cadre vis-a-vis the points earmarked for each category i.e. SC/ST/OBC and General in the Roster. Appointments made against each point of Roster may be plotted starting with earliest appointee and if the earlier appointee in the cadre happens to be a candidate belonging to Scheduled Caste against Point No.1 of the Roster the remark "utilized by SC" shall be entered and if the next appointee is a General category candidate the remark "utilized by General category" shall be made against Point No.2 and so on and so forth till all appointments are adjusted in the respective Rosters. In making these adjustments, SC/ST/OBC candidates appointed/promoted on merit, shall be treated as General category candidates.

32. After completing the adjustment as indicated above, percentage of representation of appointees belonging to different categories in the cadre should be determined and in case there is excess representation of any of

reserved category or if total representation of reserved category exceeds 50%, it shall be adjusted in future recruitment.

33. It is also settled that in 13 Point Roster, Principle of Replacement/Replacement Theory is not applicable rather Roster is to be continued rotating it forever on the basis of vacancies.

34. On the basis of pronouncements of the Supreme Court in ***R.K. Sabharwal and others vs. State of Punjab and others, (1995) 2 SCC 745; Post Graduate Institute of Medical Education & Rsearch, Chandigarh vs. Faculty Association and others with many other connected matters, (1998) 4 SCC 1;*** and judgment of Division Bench of this High Court in ***Dharam Pal vs. State of H.P. and another, 2009 (1) Shim.L.C. 140,*** and also taking into consideration instructions/guidelines issued by the Government vide communication dated 20.08.1998 and 18.11.2004 following principles for adjudication of present case have emerged:-

A. There is difference between the "post" and the "vacancy":
   (i) "Post" denotes the number of posts in the cadre, whether filled or vacant. "Cadre Strength" is equal to the created/existing posts in the cadre.
   (ii) "Vacancy" means a vacant post available for appointment, through recruitment/promotion, on creation of new post(s) or retirement, death or resignation or for any other reason removal of the incumbent working on the post.

B. There is difference between "Roster Point" and "position" in the seniority list:
   (i) "Roster" denotes division/allotment of posts in the cadre to different categories on the basis of quota of reservation notified for each category. In the Roster Register, "Roster Point" reflects availability of post or vacancy for a particular category in the cadre.
   (ii) "Seniority list" denotes the position of the incumbent in the cadre assigning his seniority *inter se* the incumbents posted/appointed in the cadre.

Seniority list is not to be prepared on the basis of Roster Point, but on the basis of appointment/entry in the cadre subject to other guidelines/instructions related to 'accelerated promotion' and 'principle of catch up'.

C. **Accelerated promotion**

When a person belonging to reserved category, for allotment/availability of post in higher cadre against the Roster Point allotted to such reserved category, is promoted prior to his seniors, in feeder cadre, of Un-Reserved or other category, by giving preferential treatment, then it is accelerated promotion.

D. **Principle of Catch up**

When a person of reserved category for vacancy at a Roster Point reserved to his category gets accelerated promotion prior to his seniors, in feeder cadre, of Un-Reserved/other category and lateron his senior also gets promotion but before further promotion of person promoted by accelerated promotion, then senior, in feeder cadre, shall rank senior to him in promoted cadre also, irrespective of date of his promotion vis-a-vis date of promotion of person promoted by accelerated promotion.

E. **Replacement Theory/Principle of Replacement**

Once all posts are filled as per Roster, then vacancies subsequent thereto are to be filled on the basis of replacement i.e. the post vacated by a person of a particular category i.e. UR/SC/ST/OBC etc., shall be filled from the same category.

F. There are two types of Rosters, one is 100 Point Roster and another is 13 Point Roster.

G. For a cadre of 2-13 posts 13 Point Roster shall be applicable and in such Roster:-

(i) the Roster depicted in the Chart Annexure-D with instructions dated 20.08.1998 is to be read from Entry-1 under the Column "Cadre Strength" till the last post and then horizontally till the last entry in the horizontal row i.e. like 'L';

(ii) All the posts of the cadre are to be earmarked for the categories shown under column "Initial Recruitment";

(iii) While initial filling up will be by the earmarked category, the replacement against any of the post in the cadre shall be by rotation as shown horizontally. After exhausting last Roster Point, Roster shall be rotated again from Point No.1;

(iv) In case of non-availability of candidate of reserved category against the vacancy available for that category in the Roster Point, the said Roster Point shall be carried forward and in case of promotion such post shall be filled by consuming next Roster Point by promoting a person of the category to which next Roster Point is available. As and when eligible candidate of the category shall be available, the Roster Point for that category shall be exhausted by appointing/promoting such candidate on availability of vacancy; and

(v) The relevant rotation by the indicated reserved category could be skipped over if it leads to more than 50% reservation of reserved category.

H. Replacement theory is applicable to 100-Point Roster as percentage of posts available to each category can easily be calculated and maintained in 100-Point Roster. Whereas, in 13 Point Roster, replacement theory is not applicable as for less number of posts in a cadre, where 13 Point Roster is applicable, percentage of reservation cannot be achieved as per entitlement of the particular category and in case percentage of reserved category is maintained then, percentage of Un-Reserved category shall decrease and in case percentage of Un-Reserved category is maintained, then percentage of reserved category shall decrease. Further all reserved categories may not get adequate chance and, therefore, 13-Point Roster has been evolved by the Government to ensure representation of all categories by rotation. Therefore, in

13-Point Roster, instead of replacement theory, the vacancy is to be filled-in on the basis of Roster Point available in 13-Point Roster by applying it in 'L' shape application of Roster as mentioned supra.

I. In case of single cadre post reservation is not permissible.

35. Reservation has been provided in the Government jobs for socially and economically backward classes under Articles 15 and 16 of the Constitution of India for social justice and equality amongst all sections of the society. However, as provided under Article 335 of the Constitution maintenance of efficiency of administration is also to be taken into consideration at the time of dealing with claim of the members of Scheduled Caste and Scheduled Tribe. Therefore, whenever, in case of promotion especially in small cadre/establishments, against Roster Point available for reserved category, eligible person of that category is not available, then the vacancy available for filling up such Roster Point is not to be kept vacant, but is to be filled by utilizing next Roster Point. However, for ensuring compliance of reservation, for social justice, the Roster Point meant for reserved category is to be carried forward for utilization as and when candidate of that category is available, but subject to availability of vacancy/post, because on keeping the post vacant, particularly in small cadres/establishments, efficiency of administration would definitely be hampered and suffered. Therefore, a post cannot be kept vacant for indefinite period or long period in anticipation of availability of a candidate of a particular category, who is not eligible/available on the date of vacancy or date of filling the said vacancy. Promotion is incident of service, which may occur or may not happen in a service career of a person. It is a settled law that right to consider for promotion against available post, is a fundamental right but promotion is not a fundamental right.

36. Petitioner has placed on record final seniority list of Senior Assistants as existing on 25.05.2017, wherein petitioner is at Sl. No.3 and Hira Nand (SC) is at Sl.No.4, as depicted in Table-B as under:-

Table-B

Sr.No.	Name of Employee
1.	Smt.Godavari Sharma
2.	Sh.Suresh Sharma
3.	Sh.Yashwant Singh
4.	Sh.Hira Nand (SC)
5.	Sh.Lal Chand
6.	Smt.Shashi Thakur
7.	Sh.Amar Chand
8.	Sh.Hem Chand (SC)

37. At the time of filing the petition, though petitioner Yashwant Singh was at Sl.No.1, but Roster Point-7 allotted to Scheduled Caste was vacant and, therefore, first post out of the three posts, available in September, 2017 for promotion, was to be given to Scheduled Caste candidate Hira Nand, who, according to Corporation, was eligible on that date as, according to the information supplied by the Corporation, aforesaid persons, referred in the seniority list in Table-B, were eligible for promotion to the post of Superintendent Grade-II on 03.09.2017. At the time of promotion in September, 2017 though Hira Nand was to be considered prior to his seniors for availability of Roster to the Scheduled Caste, being carried forward since 2016, however, in seniority he was to be placed below Godavari Sharma and

Suresh Kumar Sharma. Thereafter, against next post becoming available in July, 2019 petitioner Yashwant Singh was to be considered and on his promotion, he was to be assigned seniority above Hira Nand being senior to him in the feeder cadre for the reason that Hira Nand would not have been promoted to the next cadre of Superintendent Grade-I prior to July, 2019 as persons, seniors to him in cadre of Superintendent Grade-II, were already there available for consideration of promotion to the post of Superintendent Grade-I and moreover the post of Superintendent Grade-I was not available and on promotion of Yashwant Singh against Roster Point-12 before further promotion of Hira Nand to the next cadre, being senior in feeder cadre Yashwant Singh ought to have been placed above Hira Nand in seniority.

38. Other two posts of Superintendent Grade-II became available in September, 2019. These posts would have been filled in after September, 2019 say in October, 2019. At that time, promotion was to be made against Roster Points No.13 and 14. Roster Point-13 is meant for Un-Reserved, whereas Roster Point-14 is for Scheduled Tribe. No Scheduled Tribe candidate was available, therefore, Roster Point 14 should have been kept unutilized and vacancy should have been filled utilizing next Roster Point No.1 rotating the 13 Point Roster again and vacancy should have been filled as unreserved for exhausting the all Roster Points in one round. As such, Lal Chand and Shashi Thakur would have been promoted in October, 2019. Next two vacancies became available in January, 2020 and October, 2020. These posts were to be filled in as per Roster Points-2 and 3 as allotted for Un-Reserved categories and accordingly in February, 2020 and November, 2020 respectively, Amar Chand would have promoted against Roster Point 2 and Hem Chand, though Scheduled Caste candidate but being seniormost, would have been promoted on merit against Roster Point No.3 available for Un-reserved category subject to eligibility. Roster Point 14 meant for Scheduled Tribe should have been carried forward. Subsequent vacancies are to be filled

accordingly and for non-availability of a person belonging the category for which Roster Point is available, the vacancy is to be filled by utilizing next Roster Point.

39. Aforesaid discussion would be more clear from the following hypothetical Tables:-

Table-1
Superintendent Grade-I = 2 Posts

1st Post		
	Date of appointment/Further promotion	Retirement/Further promotion
Smt.Ram Kali	09.09.2019	27.08.2020 as Secretary M.C. Shimla
Suresh K.Sharma	23.10.2020	31.08.2021
Vacant	**31.08.2021**	**----**
2nd Post		
	Date of appointment/Further promotion	Retirement/Further promotion
Durga Dass	09.09.2019	Till date
Filled		

Table-2
Roster Register for the post of Superintendent Grade-II = 6 Posts

Date of vacancy	Roster Point	Category of Roster	Vacancy	Date of promotion	Names of promottees	Further promotion/retirement
31.08.2015	1	SC	1	29.05.2015	Sh.Bhagi Ram	31.08.2015
31.03.201	2	UR	1	29.05.20	Sh.Jai	31.03.2017

7				15	Prakash Sharma	
31.03.2017	3	UR	1	29.05.2015	Sh.Harpal Singh	31.03.2017
31.01.2016	4	UR	1	29.05.2015	Sh.Diwan Chand	31.01.2016
31.08.2016	5	UR	1	29.05.2015	Smt.Anita Sharma	31.08.2016
30.09.2017	6	UR	1	09.09.2019	Smt.Ram Kali	30.09.2017
	7	SC	Carried forward for non-availability of SC candidate. To be utilized by promotion of Hira Nand w.e.f. 22.09.2017.			
31.08.2015	8 Note:- Roster point 7 of ST carried forward	UR	1	18.06.2016	Raksha Devi	Retired on 30.06.2019
31.01.2016	9 Note:- Roster point 7 of ST carried forward	UR	1		Durga Dass	Promoted as Superintendent Grade-I on 09.09.2019
31.08.2016	10 Note:- Roster point 7 of ST carried forward	UR	1	22.09.2017	Godawari Sharma	Retired on 31.01.2020

31.03.2017	7	SC	1	22.09.2017	Hira Nand (may have been promoted here against the Roster Point No.7)	
31.03.2017	11	UR	1	22.09.2017	Suresh K.Sharma	Promoted as Supdt.Grade-I on 23.10.2020
30.06.2019	12	UR	1	7/2019	Yashwant Singh (may have been promoted against the Roster Point)	
09.09.2019	13	UR	1	10/2019	Lal Chand (may have been promoted against the Roster Point)	
	14	ST	Carried forward for non-availability of ST candidate. To be utilized later on availability of candidate and post/ vacancy.			
09.09.2019	1 Note:- Roster point	UR	1	10/2019	Shashi Thakur (may have	

	14 of ST carried forward				been promoted against the Roster Point for UR)	
31.01.2020	2 Note:- Roster point 14 of ST carried forward	UR	1	02/2020	Amar Chand (may have been promoted against the Roster Point for UR on own merit)	
23.10.2020	3 Note:- Roster point 14 of ST carried forward	UR	1	11/2020	Hem Chand (SC) (may have been promoted against the Roster Point for UR)	

Table-3A

Superintendent Grade-II

Seniority as on 22.09.2017

Seniority no.	Name of employee	Roster Point	Date of retirement/ promotion
1	Ram Kali	6	

2	Raksha Devi	8	30.06.2019 retired
3	Durga Dass	9	
4	Godawari Sharma	10	
5	Suresh K.Sharma	11	
6.	Hira Nand	7	

Table-3B

Superintendent Grade-II

Seniority as on 31.07.2019

Seniority no.	Name of employee	Roster Point	Date of retirement/ promotion
1	Ram Kali	6	09.09.2019 promoted as Supdt. Grade-I
2	Durga Dass	9	09.09.2019 promoted as Supdt. Grade-I
3	Godawari Sharma	10	
4	Suresh K.Sharma	11	
5.	Yashwant Singh	12	
6.	Hira Nand	7	

Table-3C

Superintendent Grade-II

Seniority as on 30.10.2019

Seniority no.	Name of employee	Roster Point	Date of retirement/ promotion
1.	Godawari Sharma	10	31.01.2020 retired
2.	Suresh	11	

	K.Sharma		
3.	Yashwant Singh	12	
4.	Hira Nand	7	
5.	Lal Chand	13	
6.	Shashi Thakur	1 (Note:- Roster point 14 of ST carried forward)	

Table-3D

Superintendent Grade-II

Seniority as on 31.03.2020

Seniority no.	Name of employee	Roster Point	Date of retirement/ promotion
1.	Suresh K.Sharma	11	23.10.2020 promoted as Supdt. Grade-I 31.08.2021 retired as Supdt. Grade-I
2.	Yashwant Singh	12	
3.	Hira Nand	7	
4.	Lal Chand	13	
5.	Shashi Thakur	1 (Note:- Roster point 14 of ST carried forward)	

6.	Amar Chand	2 (Note:- Roster point 14 of ST carried forward)	

Table-3E

Superintendent Grade-II

Seniority as on 31.12.2020

Seniority no.	Name of employee	Roster Point	Date of retirement/ promotion
1.	Yashwant Singh	12	Yet to be promoted w.e.f. 7/2019
2.	Hira Nand	7	Yet to be promoted w.e.f. 9/2017
3.	Lal Chand	13	Yet to be promoted w.e.f. 10/2019
4.	Shashi Thakur	1 (Note:- Roster point 14 of ST carried forward)	Yet to be promoted w.e.f. 10/2019
5.	Amar Chand	2 (Note:- Roster point 14 of ST carried forward)	Yet to be promoted w.e.f. 2/2020
6.	Hem	3	Yet to be promoted

	Chand	(Note:- Roster point 14 of ST carried forward)	w.e.f. 11/2020

40. In view of aforesaid discussion, respondent No.2-Corporation is directed to consider the case of petitioner and others eligible candidates serving in feeder category for the post of Superintendent Grade-II in the light of aforesaid observations of this Court and to promote Hira Nand from 22.09.2017, Yashwant Singh from September, 2019, Lal Chand and Shashi Thakur from October, 2019, Amar Chand from February, 2020 and Hem Chand from November, 2020 to the post of Superintendent Grade-II, but subject to eiligibility, with all consequential benefits, including seniority, continuity, annual increments, earned leave and counting of service towards pensionary benefits, accruing thereon w.e.f. their promotion from the aforesaid deemed dates, but on notional basis, till date of actual promotion. One post of Superintendent Grade-I has become available on 31.08.2021 which has to be filled by promotion from feeder cadre of Superintendent Grade-II w.e.f. September, 2021. Therefore, in case any candidate/person is entitled for further promotion to the post of Superintendent Grade-I, his case shall be considered, simultaneously or immediately after completing exercise of promotion to the post of Superintendent Grade-II, but not later than 31.01.2022 as there is already sufficient delay in promotion of the petitioner despite his entitlement since September, 2019. Corporation is directed to take all necessary steps for promoting and granting all consequential benefits to all

promotees to the posts of Superintendent Grade-II and Superintendent Grade-I as directed supra on or before 31.01.2022.

41. It is made clear that aforesaid illustration from/in Table-1 to Table 3-E is based on presumption on the basis of information supplied by Corporation that all persons in Table-B were and are eligible for promotion on due date. In case someone is not eligible on due date, then Corporation has to act accordingly but applying principles and observations made hereinabove.

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

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

Between:

AKASHDEEP SINGH, S/O SH. GURBACHAN SINGH, R/O HOUSE NO.148/12, RAM NAGAR, MANDI TOWN, DISTRICT MANDI, H.P.

....APPELLANT.

(BY MR. HOSHIAR SINGH KAUSHAL, ADVOCATE, FOR THE PETITIONER)

AND

1. ADMINISTRATOR, THE MANDI URBAN CO-OPERATIVE BANK LTD., MANDI, H.P. THROUGH ITS MANAGER.

2. MANJEET SINGH, S/O LATE SH. LAL SINGH, R/O HOUSE NO.110/12, RAM NAGAR, MANDI

TOWN, DISTRICT MANDI, HP.

3. KARAN DEEP SINGH, S/O SH. MANJEET SINGH, R/O HOUSE NO.110/12, RAM NAGAR, MANDI TOWN, DISTRICT MANDI, HP.

4. DISTRICT COLLECTOR MANDI, DISTRICT MANDI, HP.

….RESPONDENTS.

(BY MR. R.S. GAUTAM, ADVOCATE, FOR RESPONDENT NO.1.

MR. H.S. RANGRA, ADVOCATE, FOR RESPONDENTS NO.2 & 3.

MR. ASHOK SHARMA, ADVOCATE GENERAL, ADARSH SHARMA, MR. SUMESH RAJ AND MR. SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL WITH MR. KAMAL KANT CHANDEL, DEPUTY ADVOCATE GENERAL, FOR RESPONDENT NO.4).

RSA No. 72 of 2021
Between:

AKASHDEEP SINGH, S/O SH. GURBACHAN SINGH, R/O HOUSE NO.148/12, RAM NAGAR, MANDI TOWN, DISTRICT MANDI, H.P.

….APPELLANT.

(BY MR. HOSHIAR SINGH KAUSHAL, ADVOCATE, FOR THE PETITIONER)

AND

1. THE MANDI URBAN CO-OPERATIVE BANK LTD., MANDI, H.P. THROUGH ITS MANAGER.

2. MANJEET SINGH, S/O LATE SH. LAL SINGH, R/O HOUSE NO.110/12, RAM NAGAR, MANDI TOWN, DISTRICT MANDI, HP.

3. KARAN DEEP SINGH, S/O SH. MANJEET SINGH, R/O HOUSE NO.110/12, RAM NAGAR, MANDI TOWN, DISTRICT MANDI, HP.

4. DISTRICT COLLECTOR MANDI, DISTRICT MANDI, HP.

....RESPONDENTS.

(BY MR. R.S. GAUTAM, ADVOCATE, FOR RESPONDENT NO.1.

MR. H.S. RANGRA, ADVOCATE, FOR RESPONDENTS NO.2 & 3.

MR. ASHOK SHARMA, ADVOCATE GENERAL, ADARSH SHARMA, MR. SUMESH RAJ AND MR. SANJEEV SOOD, ADDITIONAL ADVOCATES GENERAL WITH MR. KAMAL KANT CHANDEL, DEPUTY ADVOCATE GENERAL, FOR RESPONDENT NO.4).

REGULAR SECOND APPEAL
Nos. 166 OF 2019 & 72 OF 2021
Decided on: 18.11.2021

Code of Civil Procedure, 1908- Section 100- **H.P. Co-operative Societies Act,**

1968- Section 76- Appeal- Suit of the plaintiff for declaration and mandatory injunction was dismissed and subsequently appeal was also dismissed- Held- Plaintiff did not serve notice upon defendant No. 3 before instituting the suit, as per the mandate of Section 76 of H.P. Co-operative Societies Act, 1968, as such the suit is not maintainable being filed without complying with provisions of Section 76 of the H.P. Co-operative Societies Act- Appeals dismissed.

This appeal coming on for admission this day, the Court delivered the following:

O R D E R

As, these appeals arise out of a common judgment passed by the Court of learned District Judge, Mandi, in Civil Appeal Nos. 11 of 2016, titled as Akashdeep Singh vs. Administrator, The Mandi Urban Cooperative Bank Ltd., Mandi, H.P., & Ors., the same are being disposed of by common judgment.

Brief facts necessary for the adjudication of these appeals are as under:-

Appellant/plaintiff filed a suit for declaration and permanent prohibit injunction against the defendants inter alia on the ground that defendant No. 2, who was elected as a Director of the defendant/respondent No. 1-bank, allured the plaintiff for raising loan by alleging that he had already sanctioned a Cash Credit Limit of Rs. 20,00,000/- in favour of his son i.e. (defendant
No.3). Being allured, plaintiff intended to raise a loan of Rs. 50,000/- but defendant No.2, allured the plaintiff for sanctioning loan of Rs. 2,00,000/-and out of this amount of Rs. 2,00,000/-, defendant No.2 transferred Rs. 1,50,000/- in the C.C. Limit account of his son (defendant No.3). Thus, loan amount of Rs. 1,50,000/- was transferred in the account of defendant No.3, by defendant No.2. Defendant No.3, stood surety for the aforesaid loan.

Defendants No. 2 & 3 paid few regular installments to the bank against the aforesaid loan amount but thereafter they stopped paying the installments. The loan account was declared as Non Performing Assets. The case was sent for Arbitration, wherein learned Arbitrator passed an award in favour of defendant No. 2. Plaintiff agitated the matter by stating that as defendant No.2 had taken away an amount of Rs. 1,50,000/- from the account of the plaintiff, hence the plaintiff was only liable to pay Rs.50,000/-. As per the plaintiff, even the defendant-bank had not opened any account of his at the time of raising loan and defendant No. 2 had obtained his signatures from a shop as the plaintiff had never visited the defendant-bank. According to the plaintiff, he had requested defendant No.2, on numerous occasion to realize the entire loan amount but defendant No. 2, did not do so which led to issuance of the orders of the auction of the suit land belonging to the plaintiff. He appealed to the revenue authorities against these orders but finally lost leading to the passing of the orders of the auction of his land. It is in this background, that the suit was filed with the prayer that the defendants No. 2 & 3 be directed to pay Rs. 1,50,000/- towards the loan amount.

2. The suit was resisted by the defendants inter alia on the ground that the same was bad for misjoinder and nonjoinder of parties and that there no cause of action had accrued in favour of the plaintiff, to file the suit. The same was also resisted on maintainability as well as being hit by the principle of resjudicata by defendant No.1. Defendants No.2 & 3 also denied the allegations leveled in the plaint and as per them, they had nothing to do with the loan which stood taken by the plaintiff from defendant No.1-bank.

3. On the basis of the pleadings of the parties learned Trial Court framed the following issues:-

1. Whether the plaintiff is entitled to declaration to the effect that defendant No.2 and 3 be declared as loanee of Rs. 1,50,000/- as prayed for? OPP.

2. If the issue No.1 is decided in affirmative, whether the plaintiff is entitled for relief of mandatory injunction directing defendant No.2 to repay the entire loan amount to the bank, as prayed for? OPP.

3. Whether the plaintiff is entitled to a decree for permanent prohibitory injunction, as prayed for? OPP.

4. Whether the present suit is not maintainable for want of notice under Section 76 of the HP Co-operative Societies Act, as alleged? OPD-1.

5. Whether this court has no jurisdiction to entertain the present suit in view of Section 75 and 92 of the HP Co-operative Societies Act, as alleged? OPD-1 & 4.

6. Whether the suit of the plaintiff is not maintainable, as alleged? OPD-1.

7. Whether the plaintiff is stopped by his own act and conduct from filing the present suit, as alleged? OPDs.

8. Whether the suit of the plaintiff is barred by principal of resjudicata, as alleged? OPD 1 & 4.

9. Whether the suit of the plaintiff is bad for misjoinder and non joinder of necessary parties, as alleged? OPD 1 & 4.

10. Whether the plaintiff has no locus standi to file the present suit, as alleged? OPD-1.

11. Whether the plaintiff has not come to the court with clean hands, as alleged? OPD 1 & 4.

12. Whether the suit of the plaintiff is not maintainable for want of notice under Section 80 of CPC, as alleged? OPD-4.

13. Relief.

4. On the strength of the evidence which was led by the parties concerned as well as the pleadings, the issues were decided as under:-

Issue No.1	:	No
Issue No.2	:	No
Issue No.3	:	No
Issue No.4	:	No
Issue No.5	:	No
Issue No.6	:	No
Issue No.7	:	No
Issue No.8	:	No
Issue No.9	:	No
Issue No.10	:	No
Issue No.11	:	No
Issue No.12	:	No
Relief	:	The suit of the plaintiff is dismissed as per operative part of the judgment.

5. Vide judgment and decree dated 29.02.2016, the suit was dismissed. The judgment and decree passed by learned Trial Court stood assailed by the plaintiff by way of Civil Appeal No. 11 of 2016 before the learned Appellate Court. Feeling aggrieved, by the adjudication on the issues, which were framed at the behest of the defendant-bank, said bank also preferred Cross Objection i.e. Cross Objection No.1 of 2016.

6. Vide judgment dated 02.01.2019, the appeal filed by the appellant/plaintiff stood dismissed, whereas, the Cross Objections were allowed by the learned Appellate Court. Feeling aggrieved, the plaintiff has filed these Regular Second Appeals.

7. I have heard learned counsel for the parties and I have also gone through the judgments and decrees passed by the learned Courts below.

8. While allowing the Cross Objections, filed by the defendant-bank, learned 1st Appellate Court has returned the findings that the suit instituted by the plaintiff was not maintainable, being hit by the provision of Sections 75, 76, 92 of the H.P. State Co-operative Societies Act.

9. A perusal of the record demonstrates that indeed no notice in terms of Section 76 of the 1968 Act was served upon by the plaintiff upon the defendant-bank before filing of the suit. Ext. PW-4/A, which according to the learned counsel for the appellant/plaintiff was the Notice, so served in compliance of the provision of Section 76 (supra), by no stretch of imagination can be said to be a Notice as is envisaged under Section 76 of the Act. This notice is not addressed to the Cooperative Society i.e. defendant No.1 but is addressed to defendant No.3, and contents thereof clearly demonstrates that it was a Notice in personam issued by the plaintiff to defendant No.3, highlighting the acts of defendant No.3 and his father defendant No.2, which purportedly led to the filing of the suit.

10. Be that as it may, fact of the matter remains that no Notice was served upon defendant No.3 by the plaintiff before instituting the suit and therefore the findings returned by the learned Appellate Court that the suit was hit by the provision of Section 76 of the Himachal Pradesh Cooperative Societies Act are correct findings.

11. Now, incidently with regard to issues No. 1 to 3 framed by the learned Trial Court, onus to prove which issues was upon the plaintiff, there are concurrent findings returned by both the learned Courts below against the plaintiff. In other words, both the learned Courts have concurrently held that the plaintiff was not entitled to a decree of declaration that defendants No. 2 & 3 be declared as loanee of Rs.1,50,000/-. A perusal of the findings returned by the learned Trial Court on these issues, as affirmed by learned Appellate

Court, demonstrates that these findings are duly supported by the pleadings on record as well as the evidence which was led by the parties to these issues. In other words, these findings returned by the leaned Courts below are clearly borne out from the record of the case. Besides this, the findings so returned *per say* are findings of fact and no question of law, leave aside any substantial question of law, indeed is attracted in these two appeals. Record further demonstrates that as a result of the plaintiff failing to repay the loan obtained from the bank, the matter was referred to the learned Arbitrator and the award of the learned Arbitrator was against the plaintiff. This award was never challenged by the plaintiff as is evident from the findings returned by learned Courts below and plaintiff in fact sought time to deposit money in terms of the award. That being the case, it is apparent that subsequently filing of the suit by the plaintiff was nothing but an afterthought. Therefore, in view of the findings returned hereinabove, this Court is satisfied that no substantial questions of law is involved in these two appeals.

12. During the course of arguments, learned counsel for the appellant stated that as an application filed under Order 41 Rule 27 of the Code of Civil Procedure praying for permission to lead additional evidence was not decided by the learned Appellate Court, therefore, these appeals deserve admission on this substantial questions of law.

13. I have carefully perused the record the record of the learned Appellate Court. In terms thereof, an application under Order 41 Rule 27 of the Code of Civil Procedure was filed by the present appellant praying to lead additional evidence. The additional evidence which was sought to be led was by way of examination of one witness Smt. Charanjeet Kaur, W/o Sh. Gurcharan Singh, who as per appellant was allegedly shown as one of the guarantor of the loan application by forging the application form, though this witness had neither visited the bank premises nor appended her signatures upon the application. It stood averred in the application that this witness was

material, and this fact had come to the notice of learned counsel for the appellant while preparing the file for arguments. As despite due diligence this witness could not be produced and examined before the learned Trial Court, therefore, prayer was made for the examination of this witness with liberty to lead additional evidence. Reply to this application is also on record. Though the judgment and decree passed by the learned Appellate Court does not deals with this application but to do justice to the parties, this Court called upon the learned counsel for the appellant to demonstrate as to why the application should have been allowed by the learned Appellate Court for the reason that it is well settled that in the garb of an application under Order 41 Rule 27 of the Code of Civil Procedure, party cannot be permitted to fill up lacuna in its case. Now, a perusal of the application demonstrates as already mentioned hereinabove that the intent of the appellant was to examine one witness which as per the appellant inadvertently could not be examined when the appellant led his evidence before the learned Trial Court. This is in the considered view of this Court, does not passes the test of the due diligence. Under Order 41 Rule 27 of the Code of Civil Procedure, a party can be permitted to lead additional evidence if it satisfies the Court that the evidence which it intends to place on record despite due diligence was not in its knowledge earlier or the said evidence has come into existence subsequently. Both these tests are not satisfied even in terms of the averments made in the application. Therefore, this Court is of the considered view that on this hyper technical ground, the judgments and decrees passed by the learned Courts below cannot be set aside especially when the suit of the plaintiff is held to be not maintainable having been filed by not complying with provision of Section 76 of the 1968 Act. Hypothetically even if the application is/was allowed and the plaintiff is permitted to examine the witness, then also the lacuna of the suit being hit by the provision of Section 76 of the Act cannot be filled up, therefore, also, this

Court is of the considered view that no substantial questions of law is involved in these appeals.

14. Accordingly, these appeals being devoid of any merit are dismissed. Pending miscellaneous applications, if any, stand disposed of. Interim orders, if any, stand vacated.

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

Between:

1. SH, TABE RAM, SON OF SH. RAM SAHAYE, VILLAGE TIHNI, P.O. SUSH VIA DALASH, TEHSIL ANI, DISTRICT KULLU, HP.

2. SMT. BLASSO DEVI, WIFE OF SH. RAM SAHAY (SINCE DECEASED).

....PETITIONER.

(BY MR. BHUPENDER GUPTA SENIOR ADVOCATE WITH MS. RINKI KASHMIRI, ADVOCATE)

AND

1. SH. PRITTAM SINGH, SON OF SH. RAM SAHAYE, VILLAGE TIHNI, P.O. SUSH VIA DALASH, TEHSIL ANI, DISTRICT KULLU, HP.

....RESPONDENT.

2. SMT. SOMA DEVI, ALIAS SIBHA DEVI, WIFE OF SH. PRATAP SINGH, VILLAGE PHIRNU, P.O. TEBBAN,

TEHSIL KARSOG, DISTRICT MANDI, HP.

3. SMT. PARVATI DEVI ALIAS BATI DEVI, WIFE OF SH. SHYAMA NAND, VILLAGE BARGAR, P.O. BARAGAON, TEHSIL KUMARSAIN, DISTRICT SHIMLA, HP.

4. SMT. HIRA MANI, WIFE OF SH. OM PRAKASH, VILLAGE PHIRNU, P.O. TEBBAN, TEHSIL KARSOG, DISTRICT MANDI, HP.

5. SMT. MEERA DEVI, WIFE OF SH. MADAN LAL, VILLAGE KOTI, P.O. SUSH, TEHSIL ANI, DISTRICT KULLU, HP.

PROFORMA RESPONDENTS

(BY MR. AJAY KUMAR SOOD, SENIOR ADVOCATE, WITH MR. ROHIT KUMAR, ADVOCATE, FOR RESPSONDENT NO.1)

REGULAR SECOND APPEAL
NO. 203 OF 2014
Decided on: 28.09.2021

Code of Civil Procedure, 1908- Section 100- Appeal- Will- Suit of the plaintiff for declaration with consequential relief of injunction was decreed and subsequent appeal was also dismissed- Held- Propounder of the will has to discharge the initial onus to prove the will- There is neither any misreading nor any misappreciation of documentary or oral evidence on record in this regard by the Ld. Courts below- Appeal dismissed.

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

O R D E R

By way of this second appeal filed under Section 100 of the Code of Civil Procedure, the appellants had challenged the judgment and decree dated 11.3.2011, passed by the Court of learned Civil Judge (Junior Division) Anni, District Kullu (HP) in Civil Suit No. 40-1 of 2003, titled as Prittam Singh Vs. Tabe Ram & Ors., vide which, suit for declaration with consequential relief of injunction filed by the plaintiff, was decreed by the learned Trial Court, as also the judgment and decree dated 25.02.2014, passed by the Court of learned District Judge, Kinnaur, Civil & Sessions Division, Rampur, in Civil Appeal No. 0100008/2011, titled as Tabe Ram & Another Vs. Prittam Singh & Ors., vide which, learned Appellate Court while upholding the judgment and decree passed by the learned Trial Court, dismissed the appeal filed by the present appellants.

2. Brief facts necessary for the adjudication of the present appeal are that Sh. Prittam Singh (hereinafter referred to as the plaintiff) filed a suit for declaration with consequential relief of injunction against the appellants (name of appellant No.2 Smt. Blasso Devi has been ordered to be deleted on account of her death), on the pleadings that Sh. Ram Sahay was owner of the property in Sub Tehsil Anni, District Kullu, HP. He had two wives namely Smt. Blasso Devi and Smt. Aalmu Devi. Plaintiff and defendant No.1 i.e present appellant No.1 Sh. Tabe Ram were his two sons and proforma defendants No.4 to 7 were his daughters. In the year 1991, defendant No.1, manipulated Sh. Ram Sahay and got one Will executed in his favour from Sh. Ram Sahay, in terms whereof, he got some land bequeathed in his favour, which was the prime land. Realizing the fraud played by defendant No.1, Sh. Ram Sahay got his entire holding partitioned between the plaintiff and Sh. Ram Sahay in the presence of respectable persons of the area on 30.05.1993. In terms of the said partition, Sh. Ram Sahay executed a Will on 31.5.1993, which was duly registered and vide this Will, he revoked his earlier Will. In

terms of the said Will, plaintiff and defendant No.1, who were earlier living jointly, were separated by their father. The plaintiff and his father lived jointly, whereas defendant No.2 and mother of plaintiff and defendant No.1, lived with the plaintiff till the year 2000. The plaintiff, who was in service, maintained his father as well as his mother and step mother to the best of his ability. After the partition, plaintiff and defendant No.1 cultivated upon their own shares separately. Sh. Ram Sahay for the reasons best known to him, executed another Will on 17.12.1996, vide which he made certain modifications bequeathing land comprised in Khata Khatauni No. 30/91, Khasra No.229 measuring 0.14 Bighas situated in Patwar Circle Gopalpur, Tehsil Karsog, District Mandi, H.P., in favour of defendant No.1 and land comprised in Khata Khatauni No.18/67, Khasra No.230, measuring 7.6 Biswas and Khasra No.227, 231, one half share measuring 1-11-12 Bighas total 1-19 Bighas situated in Patwar Circle Gopalpur, Tehsil Karsog, District Mandi, H.P., in favour of the plaintiff. As per this Will, remaining landed property including the house was bequeathed in favour of the plaintiff as well as defendant No.1 and further Sh. Ram Sahay revoked earlier Will dated 31.5.1993. According to the plaintiff Sh. Ram Sahay was an old man, yet he was maintaining good health till the year 2000, upto when he stayed with the plaintiff. Thereafter, defendant No.1, instigated Sh. Ram Sahay as well as both his wives to live with him. Owing to such instigation, Sh. Ram Sahay stayed with defendant No.1, till his death. According to the plaintiff, Sh. Ram Sahay's health was fading on account of advance age and he was also getting mentally weak. His memory was feeble and he also lost his eye sight. He was not in a position to distinguish between good and bad. In the month of April 2003, Sh. Ram Sahay got bed ridden and he continued to be so till his death i.e. 25.9.2003. The plaintiff was informed about his illness only in the month of September, 2003. He immediately rushed from his place of posting to attend Sh. Ram Sahay. However, unfortunately Sh. Ram Sahay died on 25.9.2003.

His last rites were jointly performed by plaintiff and defendant No.1. According to the plaintiff, defendant No.1 started asserting that late Sh. Ram Sahay had gifted land comprised in Khasra No. 2427/1, measuring one biswa which factually is Abadi Deh situated in Village Tihni, Phati Dingidhar, Kothi Sirigarh, Sub-Tehsil Anni, District H.P., in favour of the minor sons of defendant No.1. According to the plaintiff, the physical possession of this land was with the plaintiff and it came to his knowledge that defendants No.1 and 2 had manipulated the execution of a Will by Sh. Ram Sahay allegedly on 17.04.2003, qua land comprised in Khasra No.5305/2235 measuring 6 bighas 13 biswas and Khasra No.2284, one half share measuring 18 biswas situated in Phati Dingidhar, as also the land situated in Patwar Circle Gopalpur, Tehsil Karsog, District Mandi, H.P., comprised in Khasra No.230, 229, 227, 231 in favour of defendant No.1. According to the plaintiff, this Will dated 17.04.2003, was a result of fraud, misrepresentation and it was a false Will besides being unnatural and, thus, was not a genuine Will, as it was shrouded with suspicious circumstances. As per the plaintiff, Sh. Ram Sahay on the alleged date of the execution of this Will was in his advanced age, had feeble memory and weak eye sight and was not in a position to execute any Will. Accordingly, a declaration was sought that the Will be declared as void and further Will dated 17.12.1996, executed by Sh. Ram Sahay be held to be the last Will of Sh. Ram Sahay.

3. The suit was contested by defendant No.1, who in his written statement took the stand that though Sh. Ram Sahay had executed Wills in the year 1991, 1993 and 1996 also, but the same stood revoked vide Will dated 17.04.2003. According to the defendant, Sh. Ram Sahay was maltreated by the wife of plaintiff and the Will was executed in the year 1996, on account of undue influence and coercion methods, which were used against Sh. Ram Sahay by the plaintiff. Further, as per defendant No.1, he came to the rescue of Sh. Ram Sahay and gave him moral and financial

support. Sh. Ram Sahay lived with defendant No.1, since 1999 up to his death and it was in lieu of the service so rendered by him to his father that he executed Will dated 17.4.2003, out of love and affection in favour of the defendant No.1. According to the said defendant, the Will was duly executed and the same was binding upon all the parties as the same was executed by the testator in his full sense and was also duly registered in the presence of the attesting witnesses before the Competent Officer.

4. On the basis of the pleadings of the parties learned Trial Court framed the following issues:-

Issue No.1: Whether the Will dated 17.12.1996 is valid Will having been executed by Ram Sahay and binding on parties, as alleged? OPP.

Issue No.2: Whether the plaintiff is entitled for the consequential relief of permanent prohibitory injunction, as prayed for? OPP.

Issue No.3: Whether the Testator has executed valid Will dated 17.04.2003, as alleged? OPD.

Issue No.4: Whether the plaintiff is stopped by his own act, conduct and deeds from filing the present suit? OPD.

Issue No.5: Relief.

5. On the basis of the evidence which was led in support of their respective contention by the contesting parties, the issues were answered as under:-

Issue No.1 : Yes.

Issue No.2 : Yes.

Issue No.3 : No.

Issue No.4 : No.

Issue No.5 : Suit of the plaintiff is decreed, vide operative part of the judgment.

6. The suit was thus decreed by the learned Trial Court by holding that Will dated 17.12.1996, was the last valid Will of late Sh. Ram Sahay and the same was binding upon the parties, whereas Will dated 17.04.2003, was not a valid document. Learned Trial Court also passed a decree restraining the defendants from getting mutation entered and sanctioned in their favour qua the suit land. In appeal, the findings so returned by the learned Trial Court were upheld by the learned Appellate Court.

7. Feeling aggrieved, appellant/defendant No.1 has filed this appeal which was admitted by this Court on 07.07.2014, on the following substantial question of law:-

> *"Whether on account of misappreciation of the pleadings and misreading of the oral as well as documentary evidence available on record, the findings recorded by both Courts below are erroneous and, as such, the judgment and decree impugned in this appeal being perverse and vitiated is not legally sustainable?"*

8. I have heard learned counsel for the parties and have also gone through the judgments and decrees passed by both the Courts below as well as the record of the case.

9. Learned Trial Court while decreeing the suit filed by the plaintiff held that Will dated 17.12.1996, was duly proved by the plaintiff by examining PW-3 Anoop Ram, who was scribe of the Will and PW-2 Sh. Prem Nath, who was the Sub Registrar, Anni at the time when the Will dated

17.12.1996, was registered in his office. The Court held that PW-3 Sh. Anoop Ram, who was the scribe of Will dated 17.12.1996, mentioned in his affidavit that he knew Sh. Ram Sahay as well the parties and that Will dated 17.12.1996 was scribed by him as per the instructions of Sh. Ram Sahay. The Will after being scribed, was read over and contents thereof were admitted by Sh. Ram Sahay to be correct and thereafter he appended his signatures thereon in Urdu script in the presence of witnesses. This witness also deposed that two witnesses i.e. Sh. Pari Ram (Numberdar) and Sh. Joginder also appended their signatures on the Will in the presence of Sh. Ram Sahay. Sh. Pari Ram appended his signatures in Urdu script whereas Sh. Joginder appended his signatures in Hindi script, which were duly identified. Learned Trial Court also held that whereas attesting witness of Will dated 17.12.1996 i.e. Sh. Joginder was dead and another attesting witness of the Will Sh. Pari Ram had lost his memory, as such, they could not be examined. However, the plaintiff had filed an application under Section 69 of the Indian Evidence Act read with Section 151 of the Code of Civil Procedure for permission to prove Will dated 17.12.1996, in terms of the provisions of Section 69 of the Indian Evidence Act, which was allowed by the Court vide order dated 10.12.2009. Plaintiff examined PW-4 Sh. Sanget Ram, who tendered his examination-in-chief affidavit in which he stated that he knew Sh. Pari Ram Negi, who was the Numberdar of Village Tharog and he identified the signatures of Sh. Pari Ram, as Pari Ram had appended his signatures many times before this witness, who was a Deed Writer. This witness also stated that he recognized the signatures of Sh. Pari Ram on Will Ext. PW-3/A in Urdu script. Learned Trial Court held that in his cross-examination, his credibility could not be impeached by the defendants and said witness also deposed that he knew Urdu script. On these basis, learned Trial Court held that the execution of Will dated 17.12.1996, stood duly proved by the plaintiff.

10. While deciding issue No.3, learned Trial Court held that execution of Will dated 17.04.2003 could not be proved by the defendants. It held that in order to prove this issue, defendants examined four witnesses. Defendant No.1, entered into the witness box as DW-1 and he made same depositions in the Court which were made in the written statement. Learned Court, held that defendant No.1 Sh. Tabe Ram was neither the testator nor the scribe of the Will nor its attesting witness, therefore, his deposition would not in any manner go to prove the execution of the Will in question. It further held that DW-2 Sh. Lagan Dass, who had appended his signatures on the Will in question i.e. Ext. DW-4/A as the identifier of the testator, deposed in the witness box that he knew late Sh. Ram Sahay and that Will dated 17.04.2003, was bearing his signatures. He further deposed that he was not aware as to who had scribed the Will. He stated that he had appended his signatures upon the Will in the Tehsil office, when he went to the Clerk, who had affixed a stamp on the Will, whereafter he had appended his signatures on the same. Learned Trial Court on the strength of the statement of this witness, held that it was evident from the deposition of this witness that he had not appended his signatures upon the same, either in front of the scribe or the testator of the Will. Learned Trial Court also held that PW-3 Sh. Parma Nand deposed in the Court that he had scribed Will dated 17.04.2003, as per the directions of Sh. Tabe Ram. Learned Court held that it appeared from the statement of this witness that he had appended his signatures before a Clerk in Tehsil office, as he had nowhere stated that he appended his signatures in the presence of the testator of Will Sh. Ram Sahay or that Sh. Ram Sahay also appended his signatures on the Will in the presence of this witness or acknowledged his signatures on the Will as a witness. Learned Court further held that if the statement of this witness was read with that of PW-3 Ram Sahay, the same raised doubts as to whether Sh. Ram Sahay was actually aware of the contents of the Will or not and the only inference which could be drawn was

that the contents of the Will were not known to the testator. Active role was played by Tabe Ram, in getting the Will scribed from PW-3 Sh. Anoop Ram which shrouded the Will with suspicion. Learned Court also observed that the attesting witness to the Will namely Sh. Parma Nand was stated to be dead and the only other witness namely Sh. Lagan Dass was not able to prove the proper execution of the Will in question. All this raised suspicion with regard to the genuineness of the Will in question as to whether the same was rightly prepared or not. Learned Trial Court also held that in his statement, DW-4 Sh. Surender Thakur, Naib Tehsildar, stated that as per record Sh. Ram Sahay came to him for registration of Will and identified Sh. Lagan Dass and attesting witness Sh. Parma Nand accompanied Sh. Ram Sahay. Before registering the Will, he read over the contents thereof to Sh. Ram Sahay, who was in good mental condition and said that Will be registered. This also, according to the learned Trial Court could not in any manner fill the gaps in proving the attestation of the Will in issue in terms of the provisions of the Succession Act. On these basis, learned Trial Court decreed the suit.

11. In appeal learned Appellate Court up held these findings. Learned Appellate Court held that Will dated 17.04.2003, should have been proved by defendants to have been executed by the testator in sound state of mind after fully knowing and understanding the contents of the documents. It held that Will dated 17.04.2003 Ext. DW-4/A was said to have been executed by late Sh. Ram Sahay in favour of contesting defendants and perusal of the same demonstrated that Will was scribed by Sh. Anoop Ram PW-3 and attested by only one witness Sh. Parma Nand. DW-2 Sh. Lagan Dass signed the Will only as an identifier of the executant and not as an attesting witness. Learned Appellate Court thus held that the Will in issue was not attested by at least two witnesses, which demonstrated that the Will had not been attested in accordance with law and in the absence of due attestation thereof, it could not be said the execution of the Will stood proved on record. It

further held that material on record suggested that this Will was shrouded by suspicious circumstances. While referring to the statement of PW-3 Sh. Anoop Ram, the scribe of the document, it observed that this witness had stated that Sh. Tabe Ram DW-1 came to him on 17.04.2003, and got the Will scribed by stating that Sh. Ram Sahay, the actual executant would come later on. This witness further stated that he scribed the Will and Sh. Ram Sahay came thereafter. He also stated that he did not read over the Will to the executant. On these basis, learned Appellate Court concluded that the Will was not scribed on the instructions of late Sh. Ram Sahay but was written on the instructions of Sh. Tabe Ram and the Will in issue was never read over to the executant. Learned Appellate Court also held that the statement of DW-2 Sh. Lagan Dass corroborated the version of Sh. Anoop Ram to some extent. Learned Appellate Court took note of the fact that DW-2 had deposed that he signed the Will as an identifier and was not aware as to where the same was written and by whom and when he went to sign the Will, Sh. Ram Sahay was not present, which proved that the Will in issue was not got scribed at the instance of Sh. Ram Sahay nor the same was attested to by at least two witnesses, which was an essential requirement of law. On these basis, it held that the findings returned by learned Trial Court that due execution of Will dated 17.04.2003, was not proved on record, did not call for any interference. Learned Appellate Court also held that it was only when the execution of a Will was proved by the propounder that the onus shifts to the persons to prove that its execution was shrouded by suspicious circumstances, but in the present case, the propounder of the Will had failed to discharge the initial onus. With regard to Will dated 17.12.1996, learned Appellate Court affirmed the findings returned by learned Trial Court that the same stood proved to be the last duly executed Will by late Sh. Ram Sahay, as its execution stood proved by scribe Sh. Anoop Ram and the attesting witnesses of the said Will.

12. A perusal of the record demonstrates that the prayer of the plaintiff in the suit was for declaration that Will, allegedly executed on 17.04.2003 by late Sh. Ram Sahay be declared to be void and Will executed by late Sh. Ram Sahay, dated 17.12.1996 be held to be a validly executed Will by him qua the property mentioned therein.

13. Now incidently, a perusal of the written statement demonstrates that execution of Will dated 17.12.1996 by Sh. Ram Sahay was not disputed by the contesting defendants, who in the written statement took the defence that Will dated 17.12.1996 was later on revoked on account of the reasons mentioned therein and Sh. Ram Sahay executed another Will dated 17.04.2003 out of love and affection for the defendant No.1 and also to defeat the wrong deeds of the plaintiffs. Now, it is well settled principle of law that admitted facts need not be proved. Yet, in this case, on the basis of the pleadings of the parties, learned Trial Court did frame an issue with regard to the legality of Will dated 17.12.1996 as to whether the same was a validly executed Will. There are concurrent findings to the effect that the same is a validly executed Will. Its execution has been proved on record by the statement of its scribe Sh. Anoop Ram PW-3 as well as the statement of Sh. Sangat Ram PW-4, who was examined by the plaintiffs after securing permission to prove the Will by filing an application under Section 69 of the Indian Evidence Act, as one of the attesting witness of Will dated 17.12.1996 Sh. Joginder Singh was stated to be dead and the other attesting witness Sh. Pari Ram was stated to have lost his memory. Now, Sh. Sangat Ram deposed in the Court that he knew Pari Ram, who was the Nambardar of Village Tharog and he recognized his signatures, as Pari Ram had appended his signature before this witness on several occasions. Incidently, Sh. Sangat Ram was a deed writer in Tehsil Anni, who deposed that Sh. Pari Ram used to visit the Tehsil office with regard to land revenue matters and in the course of preparation of documents, he had signed many of times in front of him. Thus,

neither the execution of Will dated 17.12.1996 has been much disputed by the contesting defendants nor it can be said that its execution was not duly proved by the plaintiffs before the learned Courts below. Therefore, it can be safely concluded that there is neither any misreading nor any misappreciation of documentary evidence or oral evidence on record in this regard by the learned Courts below.

14. Now, coming to Will dated 17.04.2003 Ext DW-4/A, a perusal of the evidence on record demonstrates that both the learned Courts below have rightly held that its execution was not duly proved by the contesting defendants. It is clearly borne out from the statement of the scribe of the Will PW-3 Sh. Anoop Ram that on 17.04.2003 Sh. Tabe Ram had come to him and stated that his father intended to execute a Will and he scribed a Will, as instructed by Sh. Tabe Ram. He also deposed in the Court that thereafter Sh. Ram Sahay appended his signatures on the Will and name of Sh. Parma Nand as a witness was also suggested by Sh. Tabe Ram. This witness also deposed that at the time of execution of Will dated 17.04.2003, Sh. Ram Sahay was of considerable old age and his health condition was not good and he was also looking extremely weak. The statement of this witness clearly demonstrates, as has also been held by both the learned Courts below, that Will Ext DW-4/A was not scribed at the instance of Sh. Ram Sahay, but the same was scribed at the instance of Sh. Tabe Ram that is the beneficiary of the Will. Not only this, it has not been spelt out in the statement of the scribe of the said Will that Sh. Ram Sahay appended his signatures on this Will after the same was read over and explained to him and he understood the contents thereof. This also clearly demonstrates that this Will indeed was shrouded with suspicious circumstances, because the propounder of the Will played an active role in the execution of the same.

15. Besides this, it is also an admitted fact that the witnesses to the Will were not examined by the propounder of the Will and in the event of the

witnesses not being available on account of death etc., no steps were taken by the propounder of the Will to prove this Will by way of any secondary evidence. The statement of the other witness DW-2 Sh. Lagan Dass also clearly demonstrates that he deposed that when he appended his signatures on Will dated 17.04.2003, it was already scribed and he was not knowing as to who had scribed the Will. He further stated that he appended his signatures on the Will in the Tehsil office in front of a Clerk. He also deposed that the Will was not read over in front of him and the witness to the Will were not present at the time when he scribed the Will.

16. Now, incidently, the signatures of this witness on the Will are not in his capacity as an attesting witness, but only in his capacity as an identifier of the executant. This witness also deposed in the Court that when he appended his signatures on the Will the executor of the Will, was not present. All this clearly demonstrates that the execution of Will Ext. DW4/A was not duly proved by the propounder of the Will before the learned Courts below. The findings to this effect returned by both the learned Courts below are clearly borne out from the record of the case and it cannot be said that these findings are perverse or are a result of misreading or misappreciation of the evidence on record.

17. At this stage, it is pertinent to take note of one contention of learned Senior Counsel appearing for respondents, who argued that otherwise also as there was concurrent findings to the effect that Will dated 17.12.1996 was the last validly executed Will of Sh. Ram Sahay and further Will dated 17.04.2003 was shrouded with suspicion, these being pure questions of fact answered by learned Courts below did not warrant any interference in the second appeal, as the same did not involve any substantial question of law. This Court is not making any observation on the said contentions for the simple reasons that after appreciation of the evidence on record vis a vis the findings returned by both the learned Courts below, this Court has otherwise

held that there is no misreading or misappreciation of either the pleadings or the evidence on record. Substantial question of law is answered accordingly. This appeal being devoid of any merit is dismissed. Pending miscellaneous applications, if any, stand disposed of. Interim order, if any, stands vacated.

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

Between:

SMT SATYA DEVI, WIFE OF LATE DAULAT RAM, SON OF GANGA RAM, RESIDENT OF VILLAGE DEOLI, TEHSIL GHANARI DISTRICT UNA, HP.

...APPELLANT

(BY MR. SUNNY MODGIL, ADVOCATE)

AND

SHAM LAL, SON OF SH. KUKANDA, RESIDENT OF VILLAGE DEOLI, TEHSIL GHANARI, DISTRICT UNA. HP.

...RESPONDENT

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

REGULAR SECOND APPEAL
No. 473 of 2019.
Decided on:02.09.2021

Code of Civil Procedure, 1908- Section 100- Plaintiff's suit for declaration was dismissed and subsequently appeal was also dismissed- Plaintiff has challenged the Gift Deed procured by the defendant on the ground of fraud and mirepresentation- Held- Execution of gift deed has been duly proved and findings of courts below are not perverse- Appeal dismissed.

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

O R D E R

By way of this appeal filed under Section 100 of the code of Civil Procedure, the appellant has prayed for setting aside of the judgment and decree passed by the Court of learned Civil Judge (Junior Division), Court No.III, Amb, District Una, HP in Civil suit No. 794 of 2014, titled as Satya Devi versus Sham Lal, dated 30.4.2016, whereby the suit for declaration filed by the present appellant stood dismissed by the Learned Trial Court, as also for setting aside the judgment passed by the Court of Learned Additional District Judge (I), Una, Circuit Court at Amb, in Civil Appeal No. 98 of 2017, titled as Satya Devi versus Shyam Lal, dated 16.7.2019, vide which the appeal filed by the present appellant against the judgment passed by the Learned Trial Court stood dismissed.

2. I have heard learned counsel for the parties for the purpose of admission and also gone through the judgments and decrees passed by the learned Courts below.

3. Appellant herein filed a suit for declaration that she had inherited the suit land from her husband Shri Daulat Ram. She was issue-less and defendant who was her nephew had approached her in the month of July, 2004 and advised her to take benefit of an old age pension scheme. He took her to Tehsil Amb, on the pretext of signing documents so that she could be granted old age pension by the Welfare Department. Defendant got signed a document from the plaintiff which in fact was a gift deed qua the suit land purported to be executed by the plaintiff in favour of the defendant. She never executed any gift deed on 19.7.2002, in favour of the defendant and the deed was procured by the defendant by exercising undue influence upon her and was a result of fraud, misrepresentation in connivance with the marginal witnesses and the deed writer. It was further the case of the plaintiff that mutations which were attested by the defendant on the strength of the gift

deed were also null and void. According to the plaintiff, about two month before the filing of the suit, illegal threats were extended to her by the defendant of her being ousted from her abadi and defendant also threatened to alienate the suit land on the basis of the said gift deed and this is how the plaintiff came to know about the execution of the gift deed. It was on these facts that the suit for declaration stood filed by the plaintiff that the gift deed are bad in the eyes of law.

4. The suit was contested by the defendant inter-alia on the ground that the gift deed was duly executed by the plaintiff in his favour in lieu of service rendered by him to the plaintiff. At the time of the execution of the gift deed, the plaintiff was in sound and disposing mind and the gift deed was executed by her out of her own free will and not under any coercion or undue influence.

5. The suit was dismissed by the learned Trial Court by holding that the plaintiff miserably failed to prove that any fraud was committed upon her by the defendant. Learned Trial Court held that the gift deed was duly proved by DW-1, Malkiyat Chand, DW-2, Santosh Kumar, retired Sub Registrar Amb and DW-4, Vijay Kumar as well as PW-5 Hari Singh, who were the attesting witnesses of the gift deed. It held that what animosity DW-1, DW-4 and DW-5, were having with the plaintiff, could not be explained or established by the plaintiff. Learned Trial Court took note of the fact that in her cross-examination, the plaintiff had admitted that the witnesses had no enmity with her. Learned Trial Court also held that the conduct of the plaintiff created suspicion that she had not approached the Court with clean hands as was evident from the fact that she even refused to identify her photo on the gift deed which in fact was her own photograph as observed by the Court at the time of her cross examination. Learned Court also held that the credibility of the witnesses produced by the plaintiff was doubtful as it had come in evidence that people from the village had filed complaint against witness PW-

2 Ashok Kumar with regard to misappropriation of the government funds. Learned Trial Court also held that nothing stood adduced by way of the evidence by the plaintiff on record from which it could be inferred that the execution of the gift deed was a result of fraud and misrepresentation. On these basis learned Trial Court dismissed the suit.

6. In appeal, these findings were up held by the learned Appellate Court. It held that evidence proved that plaintiff was present before the Sub Registrar on 19.7.2004, when the gift deed was registered. Learned Appellate Court also held that though the plaintiff had cleverly feigned ignorance qua her presence before Sub Registrar and feigned ignorance with regard to her signatures on Ext.DW-1/A but the photograph affixed on the gift deed clearly demonstrated that the plaintiff was indeed present on the day of registration of the gift deed before the Sub Registrar.

7. Learned Appellate Court also held that the factum of the gift deed being genuine was duly proved by the defendant through the testimonies of DW-1, DW-2, DW-4 and DW-5. DW1, the scribe of the deed testified that the deed was scribed by him at the instance and instructions of the plaintiff and the same was also read over to the plaintiff. He stated that plaintiff understood and accepted the contents thereof to be correct and thereafter appended her signature on the gift deed in the presence of DW4 and DW-5. Learned Appellate Court also held that DW-4 and DW-5 had categorically stated that plaintiff got scribed gift deed from DW1 and executed the same in their presence. They testified that the gift deed was voluntarily executed by the plaintiff in favour of Shyam Lal. Learned Appellate Court took note of the fact that these witnesses had testified that the documents were presented before the Sub Registrar where the plaintiff made a statement regarding execution of the deed by her. In addition, DW-2 the Sub Registrar also testified that when deed Ext. DW1/A (gift deed) was presented before him by the plaintiff for registration, he read over the contents of the same to the plaintiff and the

plaintiff admitted the contents thereof to be correct in the presence of the witnesses Vijay and Hari Singh. On the basis of these findings, Learned Appellate Court while dismissing the appeal, up held the findings returned by the Learned Trial Court by holding that from the material on record it could not be held that defendant had failed to discharge the burden which laid fastened upon him to prove that the gift deed was got voluntarily executed by the plaintiff in his favour.

8. Feeling aggrieved the plaintiff has filed this appeal. The suit filed by the plaintiff was for declaration that the gift deed in issue was got executed by the defendant by exercising undue influence upon the plaintiff. There are concurrent findings returned by both the Learned Courts below to the effect that the gift deed was indeed voluntarily executed by the plaintiff which has been so testified by the deed writer, the marginal witnesses and also the Sub Registrar who registered the deed.

9. During the course of arguments, learned counsel for appellant on the basis of record could not demonstrate that the concurrent finding so returned by both the Courts below were perverse and not borne out from the record. Learned Trial Court has appreciated the pleadings and the evidence on record and after elaborate discussions thereof, dismissed the suit. Similarly, the Learned Appellate Court also has taken into consideration the entire evidence on record while affirming the findings returned by the Learned Trial Court.

10. The execution of the gift deed has been duly proved by the defendant through the statements of the scribe of the gift deed as well as marginal witnesses and the Sub Registrar who registered the same. All these witnesses have deposed in unison that the gift deed was prepared at the instance of the plaintiff and the same after being scribed was read over and

explained to her and she appended her signatures thereafter upon the same in front of the marginal witnesses. Even, the Sub Registrar has deposed that it was the plaintiff who presented the gift deed for registration and the same was read over and explained to the plaintiff by him and she stated to have understood the contents of the gift deed. On the other hand, there is no cogent evidence worth reliance placed on record by the plaintiff to establish that the gift deed was got executed by defendant by exercising undue influence or fraud upon the plaintiff. That being so, as it is a question of fact whether the execution of the gift deed in issue was a result of misrepresentation and fraud which stands decided against the plaintiff and in favour of the defendant by two Courts below, this Court does not finds any substantial question of law involved in this appeal and the same is accordingly dismissed. No order as to costs. Pending applications, if any, also stand disposed of. Interim order, if any, stands vacated.

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

BETWEEN:-

1. GAURAV KAKKAR SON OF SH.JITENDER KUMAR KAKKAR, AGE ABOUT 54 YEARS
2. JITENDER KUMAR KAKKAR SON OF SH. C.D. KAKKAR BOTH RESIDENT OF HOUSE NO.880, SECTOR-7 PANCHKULA (HARYANA).

(BY SH. SUDHIR THAKUR, SENIOR ADVOCATE WITH MR. KARUN NEGI AND MR. ANKUSH VERMA, ADVOCATES) ....PETITIONERS

AND

1. ARUN BANSAL SON OF SH. A.L. BANSAL, RESIDENT OF HOUSE NO. 568, SECTOR16 D, CHANDIGARH (U.T.)
2. CHIEF EXECUTIVE OFFICER-CUM-SECRETARY HIMUDA NIGAM VIHAR SHMLA H.P.

(BY SH. K.D SOOD, SENIOR ADVOCATE WITH MR. MUKUL SOOD, ADVOCATE FOR R-1
(BY MR. JIVESH SHARMA, ADVOCATE,FOR R-2

.....RESPONDENTS

CIVIL REVISION No. 29 of 2020
Decided on: 21.02.2022

Code of Civil Procedure, 1908- Order 6 Rule 17- **Specific Relief Act, 1963**-

Sections 21 and 40- Plaintiff's application for amendment of plaint qua alternative relief of recovery was allowed- Held- Section 21 of Specific Relief Act entitles the plaintiff to amend the plaint to claim compensation whereas Section 40 entitles the plaintiff to amend the plaint to claim the damages with mandate that court shall allow such amendment at any stage of proceedings in terms of these Sections- Claim of the plaintiff is also covered by Section 21 of the Specific Relief Act- Code of Civil Procedure is a general law prescribing general procedure whereas Specific Relief Act is a special law with reference to CPC wherein Section 21 and 40 provides allowing for amendment of the plaint to include the claim for compensation or damages, as the case may be, at any stage of proceedings- order of the Trial Court is not perverse- Petition dismissed.

Cases referred:

B.N.Narayana Pillai vs. Parameshwaran Pillai (2000) 1 SCC 712;
Chander Kanta Bansal vs. Rajinder Singh Anand AIR 2008 S.C 2234;
Gopal Chandra Chaudhury vs. The Life Insurance Corporation of India, AIR 1985 Orissa 120;
Jagdish and others vs. Har Sarup, AIR 1978 Delhi 233;
Jagdish Singh v. Natthu Singh, (1992) 1 SCC 647;
Jagdish Singh vs. Natthu Singh AIR 1992 SC 1604;
M.R.K. Rau vs. Corporation, City of Bangalore AIR 1992 Karnataka 411;
M/s Hi Sheet Industries vs. Litelon Limited & others, AIR 2007 Mad 78 (Full Bench);
Pandit Malhari Mahale vs. Monika Pandit Mahale (2020) 11, SCC 549;
Prithi Pal Singh and another vs. Amrik Singh and others, (2013) 9 SCC 576;
Shamsu Suhara Beevi v. G. Alex and another, (2004) 8 SCC 569;
Shiv Gopal Sah @ Shiv Gopal Sahu vs. Sita Ram Saraugi and others (2007) 14, SCC 120;
Sukhbir v. Ajit Singh, (2021) 6 SCC 54;
Universal Petro Chemicals Ltd. v. B.P PLC and others, 2022 SCC Online SC 199;
Urmila Devi and others v. Deity, Mandir Shree Chamunda Devi, Through Temple Commissioner and Others, (2018) 2 SCC 284;
V.R. Nathan vs Mac Laboratories (P) Limited AIR 1975 Madras 189;
Vidya Bai and others vs. Padmalatha and another (2009) 2 SCC 409;

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

ORDER

Petitioners-defendants, by way of present petition, have assailed impugned order dated 11.12.2019 passed by learned Senior Civil Judge Kasauli, whereby application filed by respondent No.1-plaintiff, under Order 6 Rule 17 C.P.C, seeking amendment of the plaint for adding alternative prayer in the head note and prayer clause of the plaint, has been allowed.

2. Parties herein, for convenience, shall be referred here-in-after as plaintiff and defendants, according to their status in the Civil Suit. Respondent No.1 is plaintiff, whereas petitioners are contesting defendants No. 1 and 2 and respondent No.2 is proforma defendant.

3. Plaintiff, being purchaser in a sale agreement executed between him and defendants No. 1 and 2, has filed a Civil Suit for Specific Performance of the contract and for Mandatory Injunction and Possession.

4. As per agreement to sell dated 1.7.2011, executed between the contesting parties, as recorded in clause 8 of this agreement, in case seller backs out from the bargain and fails to complete all terms and conditions of the agreement, then seller shall be liable for prosecution and shall also be liable to refund to the said purchaser three times of the amount received by him from the purchaser against the plot, if any, without any hesitation, demand and delay, and further that in case, the purchaser does not accept such liquidated damages then the purchaser shall have right to get the sale effected through the court of law under Specific Relief Acts, at the risk and cost of the seller.

5. As per plaint, sellers/defendants were defaulting in execution of the sale deed and transfer of possession of suit property, whereas as per written statement plaintiff was never interested for transfer of the property in

his name and despite making efforts by the defendants No. 1 and 2 to transfer the property, plaintiff delayed the matter on one pretext or another.

6. During trial, at the stage of recording evidence of defendants witnesses, plaintiff filed an application under Order 6 Rule 17 C.P.C stating therein that at the time of conducting cross- examination of the defendants, it was revealed that though the plaintiff had duly mentioned the alternative plea of payment of three times of the sale amount so received by the defendants, in para 9 of the plaint, but had omitted to mention such alternative relief of such recovery, despite due diligence, in the head note and prayer clause of the plaint in spite of the fact that plaintiff had also sought any other relief as deemed fit by the Court.

7. The aforesaid application was contested by defendants No.1 and 2 on the grounds that application was hopelessly time barred, in absence of any specific prayer in plaint regarding alternative prayer of recovery, at this belated stage, plaintiff could not be allowed to introduce new relief in the suit, by introducing the alternative prayer of recovery, at this belated stage, nature of suit would be changed and lastly that plaintiff had failed to explain due diligence exercised by him in pursuing the case.

8. After taking into consideration, pleadings of the parties and submissions made on their behalf including case law referred, learned Senior Civil Judge, Kasauli has allowed the amendment sought by the plaintiff. Hence the present petition.

9. In present case, plaintiff has filed a suit for 'Specific Performance of Contract' and also for 'Mandatory Injunction' and possession.

10. Being relevant for adjudication of present petition, it would be apt to reproduce Sections 21 and 40 of Specific Relief Act and Order 6 Rule 17 C.P.C for ready reference:

21. Power to award compensation in certain cases.

1. In a suit for specific performance of a contract, the plaintiff may also claim compensation for its breach (in addition to) such performance.

2. If, in any such suit, the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant, and that the plaintiff is entitled to compensation for that breach, it shall award him such compensation accordingly.

3. If, in any such suit, the court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

4. In determining the amount of any compensation awarded under this section, the court shall be guided by the principles specified in section 73 of the Indian Contract Act, 1872 (9 of 1872).

5. No compensation shall be awarded under this section unless the plaintiff has claimed such compensation in his plaint:

Provided that where the plaintiff has not claimed any such compensation in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as may be just, for including a claim for such compensation.

Explanation- The circumstance that the contract has become incapable of specific performance does not preclude the court from exercising the jurisdiction conferred by this section.

40. Damages in lieu of, or in addition to,injunction.-

(1) The plaintiff in a suit for perpetual injunction under section 38, or mandatory injunction under section 39,may claim damages either in addition to, or in substitution for, such injunction and the court may, if it thinks fit, award such damages.

(2) No relief for damages shall be granted under this section unless the plaintiff has claimed such relief in his plaint:

Provided that where no such damages have been claimed in the plaint, the court shall, at any stage of the proceedings, allow the plaintiff to amend the plaint on such terms as may be just for including such claim.

(3) The dismissal of a suit to prevent the breach of an obligation existing in favour of the plaintiff shall bar his right to sue for damages for such breach.

Order 6 Rule 17 C.P.C:
Amendment of pleadings-

The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of

> determining the real questions in controversy between the parties:
>
> Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

11. Section 21 of Specific Relief Act provides that in a suit for specific performance of contract, plaintiff may also claim compensation for its breach in addition to such performance and thus this section mandates the Court to award such compensation where breach of contract is there but specific performance ought not to be granted, with further provision that no compensation shall be awarded by the Court unless plaintiff has claimed such compensation in his plaint. It also provides that the Court 'shall' at 'any stage of proceedings' allow the plaintiff to amend the plaint to claim such compensation on such terms as may be just, for including a claim for such compensation.

12. Similarly, Section 40 of the Specific Performance Act provides award of damages in a suit filed for mandatory injunction either in addition to or in substitution for such injunction. In this section also no relief of damages shall be granted unless plaintiff has claimed for such relief in his plaint. However, like Section 21 , where no such damage has been claimed in the plaint, the Court shall, at 'any stage of proceedings' allow the plaintiff to amend the plaint on such terms as may be just for including such claim.

13. Section 21 entitles the plaintiff to amend the plaint to claim compensation, whereas Section 40 entitles the plaintiff to amend the plaint to claim the damages with mandate that court 'shall ' allow such amendment at any stage of proceedings in terms of these Sections.

14. Order 6 Rule 17 of C.P.C. deals with amendment of pleadings by providing that Court 'may' at any stage of the proceedings allow the parties to alter or amend pleadings in such manner and on such terms as may be just and all such amendment shall be made as may be necessary for purpose of determining the real question in controversy between the parties, with proviso that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not raise the matter before the commencement of trial.

15. Mr. Sudhir Thakur, learned Senior Advocate under instructions of Mr. Karun Negi, Advocate has laid challenge to the impugned order on the basis of grounds already taken before the trial Court. To substantiate his plea, he has referred pronouncements of Supreme Court in cases **Shiv Gopal Sah @ Shiv Gopal Sahu versus Sita Ram Saraugi and others** reported in **(2007) 14, SCC 120, Chander Kanta Bansal vs. Rajinder Singh Anand** reported in **AIR 2008 S.C 2234, Vidya Bai and others vs. Padmalatha and another** reported in **(2009) 2 SCC 409 and Pandit Malhari Mahale versus Monika Pandit Mahale** reported in **(2020) 11, SCC 549 and judgment dated 2.5.2019 of this Court passed in OMP Nos. 316 of 2016 and 139 of 2017 in Civil Suit No. 4084 of 2013, titled Mrs.Bahar Murtaza Fazal Ali & others versus Rohini Wahi alias Roohani and also judgment dated 26.04.2019 of Rajasthan High Court in Civil Revision Petition No.24 of 2018 titled M/s Nahar Industrial Enterprises Limited vs M/s Swasti Trading Company .**

16. **In Shiv Gopal Sahu's case** relied upon by the defendants, amendment in the plaint was disallowed by the Court for no reasonable explanation for delay and also for claim being time barred as the amendment was sought after delay of 15 years. In this case prayer of the plaintiff was rejected in view of proviso of Order 6 Rule 17 C.P.C. In **Chander Kanta**

Bansal's case, in view of provisions of Order 6 Rule 17 C.P.C, for failure to establish due diligence, amendment sought in plaint to retract the pleadings in the written statement was disallowed.

17. In **Vidya Bai's case referred on behalf of defendants, (2009) 2 Supreme Court Cases 409**, amendment sought by the defendants was rejected by the trial Court as well as the first Appellate Court alongwith an application for production of documents, proposed to be placed on record after allowing amendment but the High Court had allowed the production of documents and, therefore, case was remanded by the Supreme Court to the High Court to decide whether documents could be allowed to be produced after commencement of trial when the amendment of written statement was not allowed observing that proviso appended to Order 6 Rule 17 C.P.C restricts the power of the court by putting an embargo on exercise of its jurisdiction. This pronouncement is also not relevant in present case. In Pandit Mahale's case also the Court was not satisfied that in spite of due diligence, as provided under Order 6 Rule 17 C.P.C, party could not introduce amendment before commencement of trial and, therefore, prayer for amendment of the plaint was rejected. In **Bahar Murtaza Fazal Ali's** case amendment to challenge the will was rejected being time barred. Similarly in **Nahar Industrial Enterprises case,** in a suit for recovery, amendment to increase the amount to be recovered was not allowed being time barred.

18. Mr. Kapil Dev Sood, Sr. Advocate, under instructions of Mr. Mukul Sood, Advocate, has contended that as averments with respect to entitlement of recovery of three times amount of consideration are already there in para 9 of the plaint made on the basis of clause 8 of the agreement to sell and therefore,by way of amendment sought by the plaintiff nature of the suit is not going to be changed and addition of alternative prayer in the head note and in the prayer clause of the plaint would amount to only elaborating and amplifying the plea already taken in the plaint more particularly for

prayer made in plaint to grant any other relief as deemed fit by the Court. He has convassed that alternative relief sought to be introduced in the plaint is in terms of the pleadings as well as according to terms and conditions of the agreement to sell. Referring Section 40 of Specific Relief Act 1963, it has been argued that in view of proviso to Section 40(2) of the Specific Relief Act, plaintiff is entitled to amend the plaint to include the claim for damages 'at any stage' of proceedings without inhibited by the Limitation Act and / or Order 6 Rule 17 CPC. He has further submitted that plaintiff has exercised due diligence and, therefore, the averments with respect to damages are already there in para 9 of the plaint and so far as mention of the said claim, in head note and prayer clause of the plaint, is concerned the same was to be added by the concerned Advocate at the time of drafting the plaint. Plaintiff has discharged his duty to exercise due diligence by briefing the Advocate with respect to the clause of the agreement and right arising thereto and also for setting up claim for that and for that reason only pleading with respect to such relief is in existence in the plaint.

19. On behalf of the plaintiff pronouncements of the various High Courts in cases **Jagdish and others versus Har Sarup,** reported in **AIR 1978 Delhi 233; Gopal Chandra Chaudhury versus The Life Insurance Corporation of India,** reported in **AIR 1985 Orissa 120; M/s Hi Sheet Industries vs. Litelon Limited & others,** reported in **AIR 2007 Mad 78 (Full Bench); and also pronouncements of the Supreme Court in cases B.N.Narayana Pillai vs. Parameshwaran Pillai** reported in **(2000) 1 SCC 712; Prithi Pal Singh and another versus Amrik Singh and others,** reported in **(2013) 9 Supreme Court cases 576; and Universal Petro Chemicals Ltd. v. B.P PLC and others, reported in 2022 SCC Online SC 199,** have been referred.

20. In **Jagdish 's case,** referred on behalf of plaintiff, learned Single Judge of Delhi High Court, has observed as under:

> **9**……Whereas under O.6,R.17 of the Civil Procedure Code the court has a discretion, the proviso to sub-sec.(2) makes it imperative for the court to allow the amendment. It is for that reason that the word "shall" has been used in contradiction to the word 'may' used under O.6 R.17. The proviso further shows that howsoever belated the request for amendment may be and even if the claim put forward by way of amendment is hopelessly barred by limitation it is the bounden duty of the court to allow the amendment.
>
> **10.** The word 'proceeding' is not a term of art. It has to be construed with reference to the context in which it has been used. There is nothing to show that " at any stage of the proceedings" does not relate to the appeals which may arise out of the suit. It is now well settled that an appeal is a continuation of the suit. Wherever an appeal lies against any decree and an appeal is filed according to law, the finality of the decree of the trial court comes to an end. Thereafter it is the decree and judgment of the appellate court which will replace the decree and judgment of the trial court.

21. In aforesaid pronouncements,pronouncement of Division Bench of **Madras High Court in V.R. Nathan vs Mac Laboratories (P) Limited** reported in **AIR 1975 Madras 189** has also been referred as under:

> 13. I find that a Division Bench of the Madras High Court in V.R Nathan versus Mac Laboratories (P.) Limited, AIR 1975 Mad 189, allowed the amendment which was asked for the first time during the pendency of the appeal before the High Court against the decree of the trial court dismissing the suit. The court held: "in

> view of the imperative language of the proviso which requires that the Court shall grant the amendment……..the plaintiff is entitled, as a matter of right, to have the amendments made and the only discretion left for the Court is about the terms, if any, on which he may be permitted to amend." All the pleas opposing the amendment on the ground that it was very much belated and was lacking in bona fides etc. were held to be futile in view of the proviso to sub- section (2) of S. 40 of the Specific Relief Act.

22. Reliance on behalf of plaintiff has also been placed on judgment in **Gopal Chandra Chaudhury's case** wherein it has been observed as under:

> 8……..It is clear from sub-section (1) that in a suit for perpetual injunction or mandatory injunction damages may be claimed either in addition to, or in substitution of such injunction. If no such relief for damages has been claimed, according to the proviso to sub section (2), the court shall, at any stage of the suit, allow the plaintiff to amend the plaint including such relief. In this connection reference may be made to the Division Bench decision reported in AIR 1975 Mad. 189, V. R. Nathan vs. Mac Laboratories (P) Ltd., in which it was held that in a suit for permanent injunction,according to the proviso to sub section (2) of S.40 of the Specific Relief Act, 1963 it is imperative and the Court has no option but to allow amendment for adding a prayer for damages. This being the provision of law, the contention that in a suit for permanent injunction damages cannot be claimed is wholly untenable.

23. In pronouncement of Full Bench of Madras High Court in **M/s Hi Sheet Industries vs. Litelon Limited & others,** it has been held as under:

> **7.02 Specific Relief:**
>
> I) A plain reading of Section 40, sub section (2) proviso clarifies that the Court shall at any stage of the proceedings allow the plaintiff to amend the plaint on such terms as may be just, provided that no such damages have been claimed.
>
> ii) A combined reading of sub-sections (1) and (2) with proviso clarifies that plaintiff may claim damages in suit for injunction but no relief for damages shall be granted unless the plaintiff has claimed such relief: provided where no such damages have been claimed, the Court shall at any stage of the Proceedings allow to amend the plaint to claim damages.
>
> iii) Thus, it is clear that when the plaintiff has claimed damages in his plaint, he is entitled to do so. When he intends to amend his plaint to claim such damages, where no such damages have been claimed, the Court shall have to permit the plaintiff to amend the plaint at any stage of the proceedings. The word " such damages" means, the specific damages viz the amount of damages sought to be claimed through the amendment.
>
> iv) The language of Section 40 makes it clear that it is for the plaintiff to claim damages in lieu of injunction, Section 40 makes it clear that it is for the plaintiff does not claim damages, the question of awarding damages

> does not arise. But when the plaintiff claimed damages and is praying for amendment to specify such damages, the plaintiff is entitled for amendment of plaint for specifying such damages, as he did not claim such damages by specifying the amount.
>
> v) Therefore, it is clear that in a suit for permanent injunction according to proviso to sub-section (2) of Section 40, it is imperative and the Court has no option but to allow the amendment by adding the prayer for such damages, this being the provision of law.
>
> vi) Since the proviso to Section 40 sub-section (2) of the Specific Relief Act reads as an imperative and the Court has no option except to allow the amendment of the plaint and the fact that the application is belated is immaterial. The only discretion left to the Court is as regards the terms on which the plaintiff may be permitted to amend. Thus, any proposed amendment is to be allowed in view of the mandatory nature of the language employed under the proviso to Section 40(2) of Specific Relief Act.

24. Referring pronouncement of the Supreme Court in **Prithvi Pal Singh's case**, it has been contended on behalf of the plaintiff that in view of provisions of Section 40 of Specific Relief Act, the amendment sought by the plaintiff has to be allowed in any case and after allowing such amendment the said amendment has to be related back to date of filing of the suit and, therefore, claim of the plaintiff based on the clause of the agreement and also in view of the provisions of Section 40 of the Specific Relief Act cannot be said to be time barred.

25. Similar view has been taken by the Division Bench of High Court of Karnataka in case titled as **M.R.K. Rau versus Corporation, City of Bangalore reported in AIR 1992 Karnataka 411,** wherein it has been held that in view of provisions of Section 40(2) of the Specific Relief Act, the Court cannot refuse permission to the plaintiff to amend the plaint to include the claim for damages in a suit for perpetual injunction or mandatory injunction as the claim for damages is inherent in a suit for perpetual injunction or mandatory injunction and where no such relief is specifically claimed , if sought for at any stage of the proceedings, it has to be allowed to be added and therefore, contention of the defendant, in that case, that the claim for damages was barred by limitation on the date the application seeking amendment to add the claim for damages, was rejected.

26. Similar view has also been taken by learned Single Judge of this Court in case **Civil Revision No.31 of 2005, decided on 23.06.2006, titled as Sunil Kuthiala versus Ajwesh Sood and others** reported in **(2007) 1 CCC 536**.

27. In present case claim of the plaintiff is also covered by Section 21 of Specific Relief Act. The Supreme Court in **Jagdish Singh vs. Natthu Singh's case reported in AIR 1992 Supreme court 1604:(1992) 1 SCC 647** after taking into consideration the provisions of Section 21 of the Specific Relief Act has held as under:

> "16. So far as the proviso to sub-section (5) is concerned,two positions must be kept clearly distinguished. If the amendment relates to the relief of compensation in lieu of or in addition to specific performance where the plaintiff has not abandoned his relief of specific-performance the court will allow the amendment at any stage of the proceeding. That is a claim for compensation failing under Section 21 of the Specific Relief Act, 1963 and the amendment is one under the proviso to sub-section

(5).But different and less liberal standards apply if what is sought by the amendment is the Conversion of a suit for specific performance into one for damages for breach of contract in which case Section 73 of the Contract Act is invoked. This amendment is under the discipline of Rule 17 Order 6, C.P.C. The fact that sub-section (4), in turn, invokes Section 73 of the Indian Contract Act for the principles of quantification and assessment of compensation does not obliterate this distinction.

17. The provisions of Section 21 seem to resolve certain divergencies of judicial opinion in the High Courts on some aspects of the jurisdiction to award of compensation. Sub-section (5) seeks to set at rest the divergence of judicial opinion between High Courts whether a specific claim in the plaint is necessary to grant the compensation. In England Lord Cairn's (Chancery Amendment) Act, 1858 sought to confer jurisdiction upon the Equity Courts to award damages in substitution or in addition to specific performance. This became necessary in view of the earlier dichotomy in the jurisdiction between common law and Equity Courts in the matter of choice of the nature of remedies for breach. In common law the remedy for breach of a contract was damages. The Equity Court innovated the remedy of specific performance because the remedy of damages was found to be an inadequate remedy. Lord Cairn's Act, 1858 conferred jurisdiction upon the Equity Courts to award damages also so that both the reliefs could be administered by one court. Section 2 of the Act provided:

> "2...In all cases in which the Court of Chancery has jurisdiction to entertain an

> application for specific performance of any covenant, contract or agreement it shall be lawful for the same Court if it shall think fit to award damages to the party injured either in addition to or in substitution for such specific performance and such damages may be assessed as the Court shall direct."
>
> 18. This is the historical background to the provisions of Section 21 of the Specific Relief Act, 1963 and its predecessor in Section 19 of the 1877 Act."

28. Supreme Court in its pronouncement in **Universal Petro Chemicals'** case, considering **Jagdish Singh v. Natthu Singh, (1992) 1 SCC 647; Shamsu Suhara Beevi v. G. Alex and another, (2004) 8 SCC 569; Urmila Devi and others v. Deity, Mandir Shree Chamunda Devi, Through Temple Commissioner and Others, (2018) 2 SCC 284;** and **Sukhbir v. Ajit Singh, (2021) 6 SCC 54,** has observed that in view of express provision in proviso to Section 21(5) of the Specific Relief Act on failure on the part of the plaintiff to plead relief of damages/compensation either in the trial Court, in Appellate Court or even before the Supreme Court, by raising plea for damages/ compensation or seeking to amend the relief for that specifically, during the pendency of proceedings including appeal, no relief in the nature of damages and/or compensation can be granted. Observation of the Supreme Court in this Judgment impliedly held that in terms of provision of Section 21(5) of the Specific Relief Act, prayer for relief of damages or compensation, in alternative to the decree for specific performance in the suit, can be added at any stage during pendency of the suit or the appeal.

29. Code of Civil Procedure is a general law prescribing general procedure whereas Specific Relief Act is a special law with reference to C.P.C, wherein Section 21 and 40 provides allowing for amendment of the plaint to

include the claim for compensation or damages, as the case may be, at any stage of proceedings. In proviso to Section 21(5) and Section 40(2), the word 'shall' has been used by the Legislature by saying that the Court 'shall', at any stage of proceedings, allow the plaintiff to amend the plaint, on such terms as may be just, for including a claim for compensation/damages. Special law have precedent over General law. In Specific Relief Act word 'shall' has been used in contrast to word 'may' used in Order 6 Rule 17 C.P.C. Provision of Section 21 (5) and 40(2) of Specific Relief Act are imparative in nature and court cannot refuse permission to the plaintiff to amend the plaint to include the claim for compensation/damages if sought in suits covered under Section 21 and 40 of the Specific Relief Act. In such cases,proviso to Order 6 Rule 17 shall have no relevance. Therefore, pronouncements of the Courts rendered with reference to case governed by provisions of Order 6 Rule 17 CPC shall have no bearing on the issue involved in present case.

30. In none of the aforesaid cases referred on behalf of defendants, Section 21 or Section 40 of the Specific Relief Act was attracted. Therefore, these judgments are not relevant as unlike the provisions of Order 6 Rule 17 C.P.C, proviso to Section 21(5) and Section 40(2) of Specific Relief Act entitles the plaintiff to seek amendment for claiming compensation or damages, as the case may be, 'at any stage of the proceedings' and in some cases the Court have also allowed such amendment at appellate stage.

31. Referring **B.K. Narayana Pallai' case,** it has been contended on behalf of the plaintiff that amendment sought by the plaintiff would result in solution of real controversy between the parties but without altering original cause of action and without any need of leading further evidence on his behalf, and, therefore, the trial Court has rightly allowed the prayer of the plaintiff to amend the plaint for adding alternative relief in the head note and prayer clause of the plaint. I find force of this contention of learned counsel for the plaintiff as condition for damages/compensation proposed to be claimed

alternatively already exist in clause 8 of the agreement to sell and also in pleadings in para 9 of the plaint.

32. In view of above discussion, I am of the considered view that the trial Court has not committed any illegality, irregularity or perversity in the impugned order by allowing the amendment sought by the plaintiff. Hence no interference is warranted.

Accordingly petition is dismissed being devoid of merits, so also pending application(s), if any.

BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Between:-

SHAHJAD ALI AGED 42 YEARS, SON OF SH. ABDUL GAFFAR R/O VILLAGE AMARKOT, P.O NIHALGARH, TEHSIL PAONTA SAHIB DISTRICT SIRMOUR, H.P. (NOW CONFINED IN JAIL AT NAHAN) THROUGH HIS WIFE SMT. SEEMA W/OF SH. SHAJAD ALI R/O VILLAGE AMARKOT, PO NIHALGARH TEHSIL PANOTA SAHIB, DISTRICT SIRMAUR, H.P.

……PETITIONER

(BY MR. SERVEDAMAN RATHORE, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

……RESPONDENT

(BY MR. Shiv Pal Manhans, Addl.A.G with Mr. Vikrant Chandel and Mr. Raju Ram Rahi, Dy.A.Gs and Mr. Shriyek Sharda, Sr. Assistant A.G for the respondent.)

CRIMINAL MISC. PETITION (MAIN)
No. 233 of 2022
Decided on:04.02.2022

Code of Criminal Procedure, 1973- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Held- Recovered quantity is less than commercial quantity, so rigorous of Section 37 of the ND&PS Act are not applicable in the present case- Accused first offender and challan has already been presented in the Court- Bail granted subject to conditions.

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

O R D E R

The present bail application has been maintained by the petitioner under Section 439 of the Code of Criminal Procedure seeking his release in case FIR No. 12/22, dated 6.1.2022, under Sections 22-61-85 of the ND&PS Act, registered at Police Station Paonta Sahib, District Sirmaur, H.P.

2. As per the averments made in the petition, the petitioner is innocent and has been falsely implicated in the present case. He is neither in a position to tamper with the prosecution evidence nor in a position to flee from justice. No fruitful purpose will be served by keeping him behind the bars for an unlimited period, so he be released on bail.

3. Police report stands filed. As per the prosecution story, on 16.1.2022 at about 11.02 A.M, a police team was on routine patrol duty and then at about 11.40 a.m. near Primary School, Amarkot, Paonta Sahib, they

received a secret information that the accused is indulged in the business of selling Drugs (narcotic capsules). On finding the information genuine, the police party proceeded to Amarkot. At about 12.05 p.m. they have reached to the house of accused and search of the house of the accused was conducted. During search, they found a knotted polythene bag from a steel almirah. On opening the polythene bag, they recovered 18 packets of restricted/narcotic tablets in which total 180 capsules were found. In each packet of restricted/narcotic tables, " Parvion Spas Composition: Each Hard Geletin Capsule contains: Diclomine Hydrochloride I.P 10 mg. Tramadol Hydrochloride I.P 50 Mg, Acelaminophen, I.P 325 mg." was written. When the police asked about theses tablets, the accused could not produce any permit for keeping these tablets. On weighing the 180 tablets so recovered from the accused, it was found to be 132.73 grams. Police completed all the codal formalities and the petitioner was arrested. A case under the apt Section of ND&PS was registered and the investigation ensued. Police recorded the statements of the witnesses and prepared the spot map. It is prayed that at this stage, the bail application of the petitioner be dismissed.

4. I have heard the learned Counsel for the petitioner, learned Additional Advocate General for the State and gone through the records, including the police report, carefully.

5. The learned Counsel for the petitioner has argued that the petitioner has been falsely implicated in the present case. He has further argued that the petitioner is neither in a position to tamper with the prosecution evidence nor in a position to flee from justice. No fruitful purpose will be served by keeping the petitioner behind the bars for an unlimited period, as investigation is complete; nothing remains to be recovered at the instance of the petitioner and *challan* stands presented in the learned Trial Court. The custody of the petitioner is not at all required by the police for investigation, so the petitioner is required to be enlarged on bail by allowing

the instant bail application. Conversely, the learned Additional Advocate General has argued that the petitioner was found involved in a serious offence and considerable quantity of narcotic substance was recovered from his possession, so in case the petitioner is enlarged on bail, at this stage, he may tamper with the prosecution evidence and may also flee from justice. It is prayed that the bail application of the petitioner be dismissed.

6. In rebuttal the learned Counsel for the petitioner has argued that the petitioner is neither in a position to flee from justice nor in a position to tamper with the prosecution evidence. His custody is not at all required by the police, as the investigation is complete, nothing remains to be recovered at the instance of the petitioner, even *challan* stands presented in the learned Trial Court. Moreover, the petitioner is behind the bars for about one month and cannot be kept behind the bars for an unlimited period, so the petitioner may be enlarged on bail by allowing the instant bail petition.

7. At this stage, considering the fact that the alleged recovered quantity of contraband is less than commercial quantity, so rigors of Section 37 of the ND&PS Act are not applicable to the instant case, the fact that the petitioner is first time offender, considering age of the petitioner, who is 42 years old, the fact that now the investigation is complete, even *challan* stands presented in the learned Trial Court, the custody of the petitioner is not at all required by the police, as nothing remains to be recovered at the instance of the petitioner, the petitioner is neither in a position to tamper with the prosecution evidence nor in a position to flee from justice and also considering all the facets of the case and without discussing them elaborately at this stage, this Court finds that the present is a fit case where the judicial discretion to admit the petitioner on bail, is required to be exercised in his favour. Accordingly, the petition is allowed and it is ordered that the petitioner, in case FIR No. 12 of 2022, dated 6.1.2022, under Sections 22-61-85 of the ND&PS Act, registered at Police Station Paonta Sahib, District Sirmaur, H.P.,

shall be released on bail forthwith in this case, subject to his furnishing personal bond in the sum of Rs.50,000/- (rupees fifty thousand) with one surety in the like amount to the satisfaction of the learned Trial Court. The bail is granted subject to the following conditions:

(i) That the petitioner will appear before the learned Trial Court/ Police/ authorities as and when required.

(ii) That the petitioner will not leave India without prior permission of the Court.

(iii) That the petitioner will 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 the Investigating Officer or Court.

8. In view of the above, the petition is disposed of.

9. Needless to say that the observations made hereinabove are only confined for adjudication of the present case and the same shall have no bearing on the merits of the main case, which shall be adjudicated on its own.

Copy *dasti*.

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

Between:-

SAYA CHAUHAN, D/O SH. BHAGAT
SINGH CHAUHAN, R/O SUBHAM
NIWAS, NEAR BUS STAND, SECTOR-3,
NEW SHIMLA, SHIMLA-171202

....PETITIONER

(BY SHRI RAHUL GAUTAM & SHRI JEEVESH SHARMA ADVOCATES)

AND

SHRI ANKUSH ARORA, PROPRIETOR OF
M/S FASHION POINT BOUTIQUE, AT
SAIBU BUILDING, KRANTI CHOWK,
SECTOR-2, NEW SHIMLA-171009

...RESPONDENT

(SHRI G.C. GUPTA, SR. ADVOCATE WITH MS. MEERA DEVI, ADVOCATE)

CRIMINAL MISC.PETITION (MAIN)
U/S 482 CRPC NO. 796 OF 2019
Decided on:22.02.2022

Code of Criminal Procedure, 1973- Sections 482, 291 and 220- Petitioner assailed the order of Ld. Judicial Magistrate First Class, vide which his application under Section 219 and 220 of Code of Criminal Procedure was dismissed- Held- The payee may combine the cause of action by covering all instances of dishonour of cheque in a single notice and prefer a single complaint against the accused- Complainant has already combined three cheques in one case and two cheques in another case and has filed only two complaints with respect to five cheques and liability of accused in both cases is different- Order not perverse- Petition dismissed.

Cases referred:

Chhutanni vs. State of Uttar Pradesh AIR 1956 SC 407;

Mohinder Singh vs. State of Punjab AIR 1999 SC 211;

Ranchhod Lal vs State of Madhya Pradesh AIR 1965 SC 1248;

The State of Andhra Pradesh vs. Cheemalapati Ganeswara Rao and another AIR 1963 SC 1850;

Willie (William) Slaney vs. State of Madhya Pradesh, AIR 1956 SC 116;

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

O R D E R

Instant petition has been filed assailing impugned order dated 15.10.2019 passed by learned Judicial Magistrate First Class, Court No. IV, Shimla whereby an application preferred by petitioner/accused under Sections 219 and 220 of Code of Criminal Procedure (in short 'Cr.PC') has been dismissed in Complaint No. 250 of 2017 titled as Ankush Arora vs. Saya

Chauhan, rejecting the prayer of petitioner/accused to charge with and try the petitioner/accused together in two cases i.e. complaint No. 250 of 2017 titled Ankush Arora vs. Saya Chauhan and complaint No. 251 of 2017 titled M/s Fashion Point Boutique vs. Saya Chauhan.

2 For convenience, complainant and accused are being referred in this judgment as per their status in complaint.

3 Facts emerging from record in present case, in brief, are that both complaints have been filed by Ankush Arora i.e. complaint No. 250 of 2017 in individual capacity as Ankush Arora and second on behalf of M/s Fashion Point Boutique through its proprietor Ankush Arora i.e. complaint No. 251 of 2017 wherein Ankush Arora is also party as individual as Complainant No.2. According to Complaint No. 250 of 2017, accused Saya Chauhan had issued two cheques for Rs.1,50,000/- dated 10.5.2017 and Rs.1,98,000/- dated 10.5.2017 in order to liquidate her liability of financial assistance extended by complainant Ankush Arora by giving loan to her. As per Complaint No.251 of 2017 she had also issued three cheques amounting to Rs. 1,50,000/- dated 25.4.2017, Rs. 1,50,000/- dated 29.4.2017 and Rs.1,50,000/- dated 4.5.2017 for discharging her liability towards amount due on account of payment of goods purchased by her from shop of complainant i.e. M/s Fashion Point Boutique. On presentation, all these cheques have been dishonoured.

4 Two even dated separate legal notices, dated 14.7.2017, were sent by and on behalf of complainant to accused in terms of Section 138 of Negotiable Instrument Act (in short 'NI Act') which were received back unclaimed on 26.7.2017. One notice was with respect to two cheques issued by accused to liquidate her liability of financial assistance, whereas, another

notice was with respect to three cheques issued by accused for discharging her liability for payment of goods purchased by her from shop of complainant.

5 Complainant preferred two separate complaints under Sections 138 and 142 of NI Act referred supra.

6 Accused preferred an application to charge with and try the accused at one trial in terms of Sections 219 and 220 of Cr.P.C. The said application was opposed by complainant by filing reply. After taking into consideration the averments made in application and reply and also submissions of learned counsel for parties, trial Court has rejected the application. It has also come on record, which has not been controverted, that similar application bearing Cr.MA No. 643/4 of 2018, filed earlier, was also dismissed by learned Chief Judicial Magistrate, Shimla on 19.5.2018 and the said order was never assailed by accused.

7 It has been contended on behalf of accused that offences alleged to have been committed by accused are arising out of one and same transaction i.e. to discharge her liability to pay some amount to complainant and alleged offences are of same kind alleged to have been committed within a space of 12 months and therefore, keeping in view the provisions of Sections 219 and 220 Cr.PC, accused is entitled to be charged with and tried at one trial. It has been contended on behalf of complainant that transactions involved in two complaints are entirely different and thus, cases arising thereto cannot be clubbed and tried together and more particularly, prayer for the same relief, for which application filed by accused, was dismissed, is not maintainable.

8 Chapter XVII of Cr.PC deals with 'The Charge". Part-B thereof provides for "Joinder of Charges". Section 218 Cr.PC is the Rule, whereas

Sections 219 and 220 Cr.PC are exceptions to the General Rule, which read as under:-

> **"218. Separate charges for distinct offences.-** (1) For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately: Provided that where the accused person, by an application in writing, so desires and the Magistrate is of opinion that such person is not likely to be prejudiced thereby, the Magistrate may try together all or any number of the charges framed against such person.
>
> (2) Nothing in sub-section (1) shall affect the operation of the provisions of sections 219, 220, 221 and 223.
>
> **219. Three offences of same kind within year may be charged together-**(1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with, and tried at one trial for, any number of them not exceeding three.
>
> (2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code (45 of 1860) or of any special or local law:
>
> Provided that, for the purposes of this section, an offence punishable under section 379 of the Indian Penal Code (45 of 1860) shall be deemed to be an offence of the same kind as an offence punishable under section 380 of the said Code, and that an offence punishable under any section of the said Code, or of any special or local law, shall be deemed to be an offence of the same kind as an attempt to commit such offence, when such an attempt is an offence.
>
> **220. Trial for more than one offence-**(1) If, in one series of acts so connected together as to form the same transaction, more

offences than one are committed by the same person, he may be charged with, and tried at one trial for, every such offence.

(2) When a person charged with one or more offences of criminal breach of trust or dishonest misappropriation of property as provided in sub- section (2) of section 212 or in sub- section (1) of section 219, is accused of committing, for the purpose of facilitating or concealing the commission of that offence or those offences, one or more offences of falsification of accounts, he may be charged with, and tried at one trial for, every such offence.

(3) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences.

(4) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for the offence constituted by such acts when combined, and for any offence constituted by any one, or more, of such acts.

(5) Nothing contained in this section shall affect section 71 of the Indian Penal Code (45 of 1860)."

9 In Section 218 of Cr.PC word 'shall" has been used by providing that for every distinct offence of which any person is accused, there, "shall" be a separate charge and every such charge shall be tried separately. Whereas in Sections 219 and 220 Cr.PC, word "may" has been used by providing that accused may be charged with and tried at one trial as provided in these Sections. The intention of Legislature is very clear that normal Rule is separate charges and separate trial for distinct offences, but subject to

exception provided under sections 219, 220, 221 and 223 CrPC. But provisions of exceptions are not mandatory in nature wherein the Court has been granted liberty to charge with and try together or separately.

10 Provisions of Part B dealing with joinder of charges are to be read together harmoniously and not in isolation as they all deal with same subject matter and set out different aspects of it. (***See Willie (William) Slaney vs. Sate of Madhya Pradesh,*** reported in ***AIR 1956 SC 116***, Para 39).

11 It is a rule of construction that all the provisions of a Statute are to be read together and given effect to, it is, therefore, the duty of the Court to construe a statute harmoniously. (See ***The State of Andhra Pradesh vs. Cheemalapati Ganeswara Rao and another*** reported in ***AIR 1963 SC 1850*** para 28).

12 It has also been observed in ***Cheemalapati Ganeswara Rao's case*** that separate trial is normal rule and joint trial is an exception.

13 In ***Chhutanni vs. State of Uttar Pradesh*** reported in ***AIR 1956 SC 407,*** it was possible for trial Court to prosecute and try the accused persons for two murders in the same trial as the offences were committed during same transaction but the Supreme Court has upheld the separation of trial by Sessions Court by observing that even though joint trial is permissible under Cr.PC, but, still there is no illegality or irregularity in holding the separate trials.

14 In ***Ranchhod Lal vs State of Madhya Pradesh*** reported in ***AIR 1965 SC 1248,*** it has been held by the Supreme Court that where, under Cr.PC, an accused may be charged with and tried at one trial for commission of the same kind of offences committed within a period of 12 months for any number of such offences not exceeding three, but has been tried separately,

there is nothing illegal about it as provision for charging with and trying together is only an enabling provision and same view has been expressed with respect to offences committed in due course of the same transaction which may be triable at one trial but tried separately, by observing that Section dealing with such provision is also an enabling Section.

15 ***In Mohinder Singh vs. State of Punjab*** reported in ***AIR 1999 SC 211*** also, the Supreme Court has held that provision of Section 220 Cr.PC for joint trial of different offences is only enabling provision and Court may or may not try all the offences together in one trial and it cannot be said that by trying separately the Court commits any illegality.

16 In view of aforesaid pronouncements and for language of Sections 219 and 220 Cr.PC, it is apparent that these Sections, as exceptions to general principle propounded in Section 218 of Cr.PC, are enabling provisions whereby two or more different offences may be tried together subject to confirming the ingredients required for that as provided in these Sections, but charging with and trying together by Court in these Sections is not mandatory and these previsions do not prohibit separate trial for different offences committed by an accused. The Court is at liberty to charge with and try the accused under Sections 219 and 220 Cr.P.C in a single trial or in different trials, as normal Rule is separate trial for different and distinct offences committed by accused.

17 In a case under NI Act, cause of action to file a complaint arises when the accused fails to make the payment of amount of money to payee/holder in due course of cheque within 15 days of receipt of notice issued within 30 days of dishonour of cheque. Prior to aforesaid period, there is no cause of action to complainant to prefer a complaint under Section 138 of NI Act. Different cheques, may be issued for discharging the liability, arising

out of one and same transaction, are separate entities and dishonour of each and every cheque gives a right to complainant to issue notice to drawer in terms of Section 138 of NI Act and on failure to make payment within period prescribed in Section 138 of NI Act entitles the complainant to file a complaint with respect to such dishonour of cheque. Dishonour of different cheques and non-payment of that amount after receipt of notice constitutes a different offence. Therefore, complainant has right to file and maintain separate complaint for dishonour of each and every cheuqe on failure to make payment by payer after receipt of notice under Section 138 of NI Act.

18 The payee may combine the cause of action by covering all instances of dishonour of cheque in a single notice and prefer a single complaint against the accused. In a complaint under Section 138 of NI Act, transaction for commission of offence is date of issuance of cheque, presentation thereof and issuance of notice of dishonouring of cheque, and therefore, issuance of cheques on different dates, and dishonour of such cheques on presentation on different dates, leading to issuance of separate notices on such dishonour, at no stretch of imagination, can be termed to be a single transaction attracting the provision of Section 220 of Cr.PC.

19 In present case, Notice of Accusation has already been put to accused in both complaints and complainant has already combined three cheques in one case and two cheques in another case and has filed only two complaints with respect to five cheques and liability of accused in both cases is different in nature as in one case cheques are stated to have been issued to discharge the debt of financial assistance provided by an individual, whereas, in another case cheques are stated to have been issued for discharing the liability towards the purchase of goods from sole proprietorship concern.

In view of facts and circumstances of case and aforesaid discussion, I find no merits in petition and no illegality, irregularity or perversity in the impugned order and therefore, petition is dismissed being devoid of any merit.

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

Between:-

1. CRMP(M) NO. 336 OF 2022

SH. VARINDER SINGH, S/O SH. JAGDEV SINGH,
AGED 30 YEARS, R/O HOUSE NO. 180,
GURUSAR, HAMIRGARH, BATHINDA,
RAMPURA PHUL, PUNJAB 151206
PRESENTLY LODGED IN SUB JAIL, KULLU.

.....PETITIONER

(BY SH. GAUTAM SOOD, ADVOCATE AND SH. ISHAN KASHYAP, ADVOCATE, VICE SH. KARAN SHARMA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

.....RESPONDENT

(BY SH. NARENDER GULERIA, ADDITIONAL ADVOCATE GENERAL WITH SH. RAM LAL THAKUR, ASSISTANT ADVOCATE GENERAL,
ASI KAPIL KUMAR, POLICE STATION, MANALI, DISTRICT KULLU,IN PERSON)

2. CRMP(M) NO. 337 OF 2022

SH. SUKHWINDER SINGH,
S/O SH. RANJEET SINGH,
AGED 33 YEARS, R/O NEAR PETROL PUMP,
PIND MALLAN, SHRI MUKATSR SAHIB
PUNJAB 152031,
PRESENTLY LODGED IN SUB JAIL, KULLU.

.....PETITIONER

(BY SH. GAUTAM SOOD, ADVOCATE AND SH. ISHAN KASHYAP, ADVOCATE, VICE SH. KARAN SHARMA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

.....RESPONDENT

(BY SH. NARENDER GULERIA, ADDITIONAL ADVOCATE GENERAL WITH SH. RAM LAL THAKUR, ASSISTANT ADVOCATE GENERAL,
ASI KAPIL KUMAR, POLICE STATION, MANALI, DISTRICT KULLU, IN PERSON)

CRIMINAL MISC. PETITION (MAIN)
Nos. 336 & 337 of 2022
Decided on: 25.02.2022

Code of Criminal Procedure, 1973- Section 439- **Indian Penal Code, 1860**- Sections 489-A, 489-B, 489-C, 420 and 34- Held- Investigation is complete- Challan is ready- Petitioners are serving as Constables in Punjab police, therefore, possibility of their evading the trial can be ruled out- Bail petitions are allowed subject to conditions.

Cases referred:

Dipakbhai Jagdishchandra Patel vs State of Gujarat and Another, (2019) 16 SCC 547;

Umashanker v. State of Chhattisgarh (2001) 9 SCC 642;

These petitions coming on for orders this day, the Court passed the following:

O R D E R

Both these bail petitions arise out of common FIR, hence are taken up together for disposal.

2. The petitioners are in judicial custody in connection with FIR No. 06/22, dated 04.01.2022, registered under Sections 489-A, 489-B, 489-C, 420 and 34 of Indian Penal Code, at Police Station, Manali, District Kullu. They were arrested on 04.01.2022 and by means of present petitions seek their release on regular bail.

3. As per status report:-

3(i) The FIR was registered on the basis of statement of one Smt. Neena Thakur recorded on 04.01.2022. She stated that she was running a shop near Vashisht Chowk, Tehsil Manali, District Kullu. On 04.01.2022, at around 10:30 A.M. a Tempo Traveller bearing No. HP-01-K5008 stopped near her shop. Some persons alighted from this Tempo Traveller and purchased/collected winter clothing from her shop on hire basis against cash payment of Rs. 2200/- . This amount was paid to her by one of the occupants wearing a white coloured jacket. During evening, while counting the money and tallying her account, it dawned upon her that some currency notes handed over by the afore described person could be fake as their serial numbers appeared suspicious.

3(ii) On the basis of the above complaint, investigation was carried out. While the investigation was in progress at the spot, one Shri Roshan Lal, who operates a Zipline in the nearby area of Kulang complained that he was also paid three counterfeit currency notes of Rs. 100/- denomination by a person wearing a white coloured jacket and travelling in the above described Tempo Traveller. The amount was statedly paid to him for the use of his Zipline. Further as per status report, Roshan Lal's wife namely Smt. Phula

Devi also came to the spot with the similar complaint of having been handed over one counterfeit currency note of Rs. 100/- by a person wearing white coloured jacket travelling in the Tempo Traveller. The note was statedly handed over to her in lieu of tea taken by the above described person in her Tea stall.

3(iii) The Tempo Traveller in question arrived at the spot in the evening. A person sitting therein, wearing white coloured jacket, was identified by all the three complainants. He was identified as Varinder Singh working as a Constable in Punjab Police [petitioner in Cr.MP(M) No. 336 of 2022]. He was searched in accordance with law. Counterfeit notes of Rs.300/- were recovered from his person by the police officials. Another person travelling in the afore described vehicle was identified as Sukhwinder Singh working as a Constable in Punjab Police [petitioner in Cr.MP(M) No. 337 of 2022]. From his possession, three counterfeit notes of Rs. 100/- denomination were recovered. Assuming that the currency notes produced by the complainant Neena Thakur, Roshan Lal and his wife Smt. Phula Devi as well as the notes recovered from the possession of the petitioners Varinder Singh & Sukhwinder Singh were counterfeit currency, both the accused persons were arrested by the police officials on 04.01.2022. They are in custody ever since and by means of present petitions seek their enlargement on bail.

4. Learned counsel for the petitioners stated that the petitioners have been falsely and erroneously implicated for the commission of offences in FIR in question. That bail petitioners alongwith their wives had come to visit Manali on a tour sponsored by a Company called *MI Life Style Company*. Wives of the bail petitioners were employed in the said company. The tour was sponsored by the company. The tour group consisted of more than 100 members including the bail petitioners. All the members collected the money. There is no evidence on record that the bail petitioners were in conscious possession of counterfeit currency. Even assuming that currency notes

allegedly recovered from the bail petitioners were fake, then also no case is made out against them. The bail petitioners never knowingly intended to use the counterfeit notes as genuine currency.

Per contra, learned Additional Advocate General submitted that the bail petitioners are facing allegations for using counterfeit currency notes. The offences committed by the petitioners pose challenge to the economy of country. In the facts and circumstances of the case, the petitioners do not deserve to be enlarged on bail.

5. I have heard learned counsel for the parties and gone through the police record. The petitioners are facing accusations of possessing and using counterfeit currency. Their defence at this stage is that they were not travelling independently in the vehicle in question. They were travelling alongwith other co-passengers of the tour. The status report is silent about the investigation being carried out from the other passengers of the Tempo Traveller. Even if it is assumed that the counterfeit currency was recovered from the petitioners, then also the possibility of their being in unwary possession of the same cannot be ruled out at this stage.

Hon'ble Apex Court in ***(2001) 9 SCC 642***, titled ***Umashanker*** v. ***State of Chhattisgarh*** held that:

> "7. Sections 489-A to 489-E deal with various economic offences in respect of forged or counterfeit currency-notes or bank-notes. The object of Legislature in enacting these provisions is not only to protect the economy of the country but also to provide adequate protection to currency-notes and bank-notes. The currency-notes are, inspite of growing accustomedness to the credit cards system, still the backbone of the commercial transactions by multitudes in our country. But these provisions are not meant to punish unwary possessors or users.
>
> 8. A perusal of the provisions, extracted above, shows that mens rea of offences under Sections 480-B and 489-C

> is, "knowing or having reason to believe the currency-notes or bank notes to be forged or counterfeit". Without the afore-mentioned mens rea selling, buying or receiving from another person or otherwise tranfficking in or using as genuine forged or counterfeit currency-notes or bank-notes, is not enough to constitute offence under Section 489-B of I.P.C. So also possessing or even intending to use any forged or counterfeit currency-notes or bank-notes is not sufficient to make out a case under Section 489-C in the absence of the mens rea, noted above. No material is brought on record by the prosecution to show that the appellant had the requisite mens rea."

In ***(2019) 16 SCC 547,*** titled ***Dipakbhai Jagdishchandra Patel*** vs ***State of Gujarat and Another,*** it was reiterated that mens rea of offences under Sections 489-B and 489-C is "knowing or having reason to believe the currency notes or banknotes are forged or counterfeit". Without the aforementioned mens rea selling, buying or receiving from another person or otherwise trafficking in or using as genuine forged or counterfeit currency notes or banknotes, is not enough to constitute offence under Section 489-B IPC.

Whether the petitioners had the intention of knowingly using the counterfeit notes as genuine currency is an aspect to be proved during trial by leading cogent evidence. At this stage in the facts and circumstances of the case for the purpose of deciding the bail petitions the defence put forward by the petitioners cannot be brushed aside. The conduct of the petitioners also assumes significance. The petitioners statedly returned to the shop of the complainant in the evening. They participated and co-operated with the investigating agency. As per status report, investigation qua the petitioners is complete. Challan is stated to be almost ready for presentation before the Court of competent jurisdiction. The petitioners are serving as Constables in Punjab police, therefore, possibility of their evading the trial can be ruled out.

No criminal record of the petitioners has been indicated in the status report.

In view of above, the present bail petitions are allowed. Petitioners are ordered to be released on bail on their furnishing personal bond of Rs. 75,000/- each with one local surety each in the like amount to the satisfaction of learned trial Court having jurisdiction over the concerned Police Station, subject to the following conditions:

(i) The petitioners shall join the investigation of the case as and when called for by the Investigating Officer in accordance with law and shall cooperate with the Investigating Agency.

(ii) The petitioners shall not tamper with the evidence or hamper the investigation in any manner whatsoever:

(iii) The petitioners shall not contact the complainant, threaten or browbeat her or to use any pressure tactics in any manner whatsoever.

(iv) The petitioners shall not leave India without prior permission of the Court.

(v) The petitioners shall not make any inducement, threat or promise, directly or indirectly, to the Investigating Officer or any person acquainted with the facts of the case to dissuade him from disclosing such facts to the Court or any Police Officer;

(vi) The petitioners shall attend the trial on every hearing, unless exempted in accordance with law.

(vii) The petitioners shall inform the Station House Officer of the concerned Police Station about their place of residence during bail and trial. Any change in the same shall also be communicated within two weeks thereafter. Petitioners shall furnish furnish details of their Aadhar Card, Telephone Number, E-mail, PAN Card, Bank Account Number, if any.

In case of violation of any of the terms & conditions of the bail, respondent-State shall be at liberty to move appropriate application for cancellation of the bail. It is made clear that observations made above are only for the purpose of adjudication of instant bail petitions and shall not be construed as an opinion on the merits of the matter. Learned trial Court shall decide the matter without being influenced by above observations.

With the aforesaid observations, these present petitions stand disposed of, so also the pending miscellaneous applications, if any.

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BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Between:-

BALDEV SINGH AGED 37 YEARS SON OF LATE SH. JAI KARAN R/O VILLAGE AND POST OFFICE TIKKARI, TEHSIL CHIRGAON, DISTRICT SHIMLA.H.P.

……PETITIONER

(BY MR. VIRENDER SINGH RATHORE, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

…RESPONDENT

(BY Mr. Shiv Pal Manhans, Addl.A.G with Mr. Vikrant Chandel and Mr. Raju Ram Rahi, Dy.A.Gs and Mr. Shriyek Sharda, Sr. Assistant A.G for

the respondent.)

CRIMINAL MISC. PETITION (MAIN)
No. 264 of 2022
Decided on:04.02.2022

Code of Criminal Procedure, 1973- Section 439- Bail- **Narcotic Drugs and Psychotropic Substances Act, 1985**- Sections 21 and 29- Recovery of 17.57 gms of Heroin- Held- Recovered quantity of contraband is less than commercial quantity, so rigors of Section 37 of ND&PS Act are not attracted- Investigation is complete and challan stand presented in the Court- Bail granted subject to conditions.

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

O R D E R

The present bail application has been maintained by the petitioner under Section 439 of the Code of Criminal Procedure seeking his release in case FIR No. 7/22, dated 20.1.2022, under Sections 21 and 29 of the ND&PS Act, registered at Police Station Chirgaon, District Shimla.H.P.

2. As per the averments made in the petition, the petitioner is innocent and has been falsely implicated in the present case. He is neither in a position to tamper with the prosecution evidence nor in a position to flee from justice. No fruitful purpose will be served by keeping him behind the bars for an unlimited period, so he be released on bail.

3. Police report stands filed. As per the prosecution story, on 20.1.2022, a police team was on routine patrol duty, and during patrolling and traffic checking at about a distance of 50-60 meter from Chirgao Bridge towards Sandasu Road Bridge, a white Honda Amaze, bearing registration No. HP-10B-6465, came from Chirgao side. On inquiring about the papers, the driver of the vehicle got perplexed and the person sitting besides him also got perplexed. On suspicion, the vehicle of the accused was checked and during

checking a plastic packet was recovered. On checking the plastic packet, grey substance was found. On weighing the substance, it was found 17.57 grams of Heroin. Police completed all the codal formalities and the petitioner was arrested. A case under the apt Sections of ND&PS was registered and the investigation ensued. Police recorded the statements of the witnesses and prepared the spot map. It is prayed that at this stage, the bail application of the petitioner be dismissed.

4. I have heard the learned Counsel for the petitioner, learned Additional Advocate General for the State and gone through the records, including the police report, carefully.

5. The learned Counsel for the petitioner has argued that the petitioner has been falsely implicated in the present case. He has further argued that the petitioner is neither in a position to tamper with the prosecution evidence nor in a position to flee from justice. No fruitful purpose will be served by keeping the petitioner behind the bars for an unlimited period, as investigation is complete; nothing remains to be recovered at the instance of the petitioner and *challan* stands presented in the learned Trial Court. The custody of the petitioner is not at all required by the police for investigation, so the petitioner is required to be enlarged on bail by allowing the instant bail application. Conversely, the learned Additional Advocate General has argued that the petitioner was found involved in a serious offence and considerable quantity of narcotic substance was recovered from his possession, so in case the petitioner is enlarged on bail, at this stage, he may tamper with the prosecution evidence and may also flee from justice. It is prayed that the bail application of the petitioner be dismissed.

6. In rebuttal the learned Counsel for the petitioner has argued that the petitioner is neither in a position to flee from justice nor in a position to tamper with the prosecution evidence. His custody is not at all required by the police, as the investigation is complete, nothing remains to be recovered at

the instance of the petitioner, even *challan* stands presented in the learned Trial Court. Moreover, the petitioner is behind the bars for near about one month and cannot be kept behind the bars for an unlimited period, so the petitioner may be enlarged on bail by allowing the instant bail petition.

7. At this stage, considering the fact that the alleged recovered quantity of contraband is less than commercial quantity, so rigors of Section 37 of the ND&PS Act are not applicable to the instant case, the fact that the petitioner is first time offender, considering age of the petitioner, who is 37 years old, the fact that now the investigation is complete, even *challan* stands presented in the learned Trial Court, the custody of the petitioner is not at all required by the police, as nothing remains to be recovered at the instance of the petitioner, the petitioner is neither in a position to tamper with the prosecution evidence nor in a position to flee from justice and also considering all the facets of the case and without discussing them elaborately at this stage, this Court finds that the present is a fit case where the judicial discretion to admit the petitioner on bail, is required to be exercised in his favour. Accordingly, the petition is allowed and it is ordered that the petitioner, in case FIR No. 7 of 2022, dated 20.1.2022, under Sections 21 and 29 of the ND&PS Act, registered at Police Station Chirgaon, District Shimla, H.P., shall be released on bail forthwith in this case, subject to his furnishing personal bond in the sum of Rs.50,000/- (rupees fifty thousand) with one surety in the like amount to the satisfaction of the learned Trial Court. The bail is granted subject to the following conditions:

(i) That the petitioner will appear before the learned Trial Court/ Police/ authorities as and when required.

(ii) That the petitioner will not leave India without prior permission of the Court.

(iii) That the petitioner will 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 the Investigating Officer or Court.

8. In view of the above, the petition is disposed of.

9. Needless to say that the observations made hereinabove are only confined for adjudication of the present case and the same shall have no bearing on the merits of the main case, which shall be adjudicated on its own.

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

Between:

DHARAM PAL,
S/O KARTAR SINGH,
R/O VPO TIKRI,
TEHSIL SARKAGHAT,
DISTRICT MANDI,
AGED 29 YEARS.

....PETITIONER

(BY MR. PRASHANT SHARMA AND
MR. AJIT SHARMA, ADVOCATES)

AND

STATE OF HIMACHAL PRADESH.

....RESPONDENT

(MR. SUDHIR BHATNAGAR,
AND MR. DESH RAJ THAKUR,
ADDITIONAL ADVOCATES GEENRAL
WITH AND MR. GAURAV SHARMA,

DEPUTY ADVOCATE GENERAL)

CRIMINAL MISC. PETITION (MAIN)
No. 297 of 2022
Decided on:22.02.2023

Code of Criminal Procedure, 1973- Section 439- Bail- **Indian Penal Code, 1860**- Sections 363 and 376 and Section 4 of Protection of Children from Sexual Offences Act, 2012- Prosecutrix in contact with petitioner for the last three years and even after arrest prosecutrix has been meeting petitioner in the jail and in her statement under Section 164 Cr.P.C. before the Magistrate she has categorically stated that she loves the bail petitioner and wants to solemnize marriage with him- Held- Normal rule is of bail and not jail- Bail is not to be withheld as a punishment- Bail granted subject to conditions.

Cases referred:

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

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

O R D E R

Bail petitioner namely Dharampal, who is behind bars since 13.12.2021, has approached this Court in the instant proceedings filed under Section 439 of Cr.PC, for grant of regular bail in case FIR No. 115 of 2021 dated 5.11.2021, under Sections 363 & 376 of IPC and Section 4 of POCSO Act, registered at PS Hatli, District Mandi, H.P. Respondent State has filed the status report in terms of order dated 4.2.2022. ASI Brij Lal, I/o P.S. Hatli, District Mandi, H.P has also come present with records. Records perused and returned.

2. Perusal of status report/record reveals that on 5.11.2021, complainant Rakesh Kumar, who happens to be father of the victim-prosecutrix (name withheld), lodged aforesaid FIR, alleging therein that his minor daughter aged 16 ½ years i.e. victim-prosecutrix has gone missing and as such, efforts be made to locate her. On the basis of aforesaid information, police started investigation and found that bail petitioner had been calling on the mobile number of mother of the victim-prosecutrix. During investigation, police found that bail petitioner had given a telephonic call to a taxi driver namely Satish Kumar alias Kalu Ram, who thereafter took bail petitioner and victim-prosecutrix to Baddi in his vehicle, from where present bail petitioner took the victim-prosecutrix to Rohtak in some private vehicle. After ascertaining the location, police recovered the victim-prosecutrix from Rohtak and got her medically examined at CHC Baldwara. Medical Officer opined that *there is nothing to suggest that sexual intercourse has not been conducted with the patient, however final opinion shall be given after the receipt of the report of RFSL.* On 9.12.2021, police arrested the bail petitioner and since then, he is behind the bars.

3. Since Challan stands filed in the competent court of law and nothing remains to be recovered from the bail petitioner, he has approached this Court in the instant proceedings for grant of regular bail.

4. Mr. Sudhir Bhatnagar, learned Additional Advocate General while fairly admitting factum with regard to filing of the Challan in the competent court of law contends that though nothing remains to be recovered from the bail petitioner, but keeping in the gravity of offence alleged to have been committed by the bail petitioner, it may not be in the interest of justice to enlarge him on bail. While making this Court to peruse the status report/record, learned Additional Advocate General, submits that though there is overwhelming evidence suggestive of the fact that the bail petitioner taking undue advantage of the innocence and minority of the victim-

prosecutrix not only made her to elope with him, but also sexually assaulted her against her wishes, but even otherwise consent, if any, of victim-prosecutrix being minor is immaterial and as such, bail petition having been filed by the bail petitioner deserves outright rejection.

5. This Court having heard learned counsel for the parties and perused material available on record, especially, statement made by the victim-prosecutrix under Section 164 Cr.PC, finds that victim-prosecutrix and present bail petitioner had prior acquaintance and they had been meeting and talking to each other for the last three years prior to the alleged incident. Victim-prosecutrix in her statement recorded under Section 164 Cr.PC before the Magistrate has categorically stated that she loves the bail petitioner and wants to solemnize marriage with him and she was forcibly taken by her parents for medical examination. Most importantly, victim-prosecutrix in her aforesaid statement has stated that she had asked the bail petitioner to take her to Rohtak from Barnal and nothing happened against her wishes and she shall have no objection in case bail petitioner is acquitted of charges leveled against him. No doubt, consent, if any, of the victim-prosecutrix is immaterial in view of her age, but having taken note of the conduct of the victim-prosecutrix, which is quite apparent from her statement made under Section 164 Cr.PC, it is difficult to conclude that the bail petitioner taking undue advantage of innocence and minority of the victim-prosecutrix made her to elope with him, rather she of her own volition and choice, with a view to solemnize with the bail petitioner, left her house and joined the company of the bail petitioner. During proceedings of the case, learned counsel for the petitioner made available information received by him under RTI that after lodging of case at hand against the petitioner, victim-prosecutrix has been regularly visiting the jail to meet the bail petitioner. In view of the totality of facts and circumstances narrated herein above, this Court finds it difficult to agree with learned Additional Advocate General that victim-prosecutrix

is/was not capable of understanding the consequences of her being in the company of the bail petitioner. Subsequent actions of the victim-prosecutrix, whereby she has been regularly visiting the jail, clearly suggest that despite there being FIR registered against the bail petitioner, victim-prosecutrix is in constant touch with the bail petitioner. Tough case at hand is to be heard and decided by the court below in totality of evidence collected on record by the investigating agency, but having taken note of the aforesaid aspect of the matter, this Court sees no reason to curtail the freedom of the bail petitioner during trial, especially when nothing remains to be recovered from him. Though learned Additional Advocate General claimed that it may not be in the interest of victim-prosecutrix to enlarge bail petitioner at this stage, but since victim-prosecutrix herself has been regularly meeting the bail petitioner in jail, this Court sees no reason to curtail the freedom of the bail petitioner for an indefinite period during trial. Apprehension expressed by the learned Additional Advocate General that in the event of petitioner's being enlarged on bail, he may flee from justice, can be best met by putting the bail petitioner to stringent conditions as has been fairly stated by the learned counsel for the petitioner.

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

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

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

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

" This Court in Sanjay Chandra v. CBI, also involving an economic offence of formidable magnitude, while dealing with the issue of grant of bail, had observed that deprivation of liberty must be considered a punishment unless it is required to ensure that an accused person

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

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

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

(vii) reasonable apprehension of the witnesses being influenced; and
(viii) danger, of course, of justice being thwarted by grant of bail.

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

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

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

need to consider in an appropriate case. The relevant paras of the aforesaid judgment are reproduced as under:

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

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

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

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

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

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

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

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

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

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

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

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

Between:

YASH THAKUR, SON OF SHRI VIJAY SINGH AGED 26 YEARS THROUGH HIS NEXT FRIEND ANJANA DAUGHTER OF SHRI VIJAY SINGH, RESIDENT OF VILLAGE BALI AND POST OFFICE BALI KOTI, TEHSIL SHILLAI, DISTRICT SIRMOUR, H.P.

……..PETITIONER

(BY SHRI NITIN THAKUR, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

…….RESPONDENT

(BY MR. BHARAT BHUSHAN, ADDITIONAL ADVOCATE GENERAL AND MR. GAURAV SHARMA, DEPUTY ADVOCATE GENERAL, FOR THE RESPONDENT.

ASI INDER SINGH, P.S. PAONTA SAHIB, DISTT, SIRMOUR IS PRESENT IN PERSON WITH RECORD.

CRIMINAL MISCELLANEOUS PETITION (MAIN)
NO. 103 OF 2022
RESERVED ON:-25.02.2022
Decided on: 28.02.2022

Code of Criminal Procedure, 1973- Section 439- Bail- **Indian Penal Code, 1860**- Sections 341, 354, 323, 376 and 506- Section 7 of Protection of Children from Sexual Offences Act, 2012- Section 3(1)(w)(i) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989- Held- Pre-trial incarceration cannot be ordered as a matter of rule- Bail granted subject to conditions.

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

O R D E R

Petitioner is an accused in case FIR No. 50/2021, dated 07.10.2022, registered at Police Station Shillai, District Sirmour, H.P., under Sections 341,354,323,376, 506 of IPC, Section 7 of POCSO Act & Section 3(1)(w)(i) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities Act).

2. Petitioner has approached this Court for the grant of bail under Section 439 of the Code of Criminal Procedure in the above noted case, on the ground that petitioner belongs to a respectable family. He use to work

for gain at Solan, however, on account of Covid conditions and consequent lockdown petitioner had returned to his native village. As per the petitioner, the allegations levelled by the prosecutrix are false. It is further contended on behalf of the petitioner that there is no past criminal history attributable to him. Petitioner belongs to a respectable family and is a permanent resident of village Bali and Post Office Bali Koti, Tehsil Shillai, District Sirmour, H.P. There is no likelihood of his fleeing from the course of justice and he will abide by all the conditions as may be imposed against him.

3. In response, status report was filed by the respondent on 28.01.2022. A fresh status report has been filed by the respondent on 25.02.2022, detailing therein the subsequent completion of investigation and submission of supplementary challan. As per status report, on 07.10.2021, the victim lodged a complaint with the police that she was beaten up by the petitioner and her modesty was also outraged. It was further alleged that the petitioner on earlier occasion also used to blackmail the victim. On 07.10.2021, petitioner again had asked the victim to visit his room and on her refusal she was ill-treated and harassed as above. On 09.10.2021, statement of victim under Section 164 of Cr.P.C. was recorded and on such basis Section 3(1) (w)(i) of Schedule Caste and Scheduled Tribe (Prevention of Atrocities Act) was added. The investigation was handed over to Dy. S.P. Paonta Sahib. On 11.10.2021, the victim was again associated in investigation and her statement was recorded, wherein she alleged having been sexually exploited by the petitioner since June 2020. During investigation, the date of birth of the victim was ascertained as 21.08.2002. On scientific analysis of evidence, nothing substantial was found incriminating against the petitioner. The data collected from the mobile phone of the petitioner did not contain any obscene picture or video relating to the victim. Challan is stated to have been presented in the Court.

4. I have heard learned counsel for the petitioner and also learned Additional Advocate General for the respondent/State and have also gone through the contents of the status report as well as the record of the investigation.

5. The date of birth of the victim is stated to be 21.08.2002 and as such she attained majority on 21.08.2020. The allegations of sexual assault on victim by the petitioner is alleged to have taken in June, 2020 for the first time with various repetitions thereafter. This fact is coming forth only from the statement of the victim, which is yet to be proved in accordance with the law. The victim had not disclosed the factum of sexual assault on her by the petitioner, in her initial version to the police. The successive statements of the victim have not remained consistent in material particulars. The fact that victim had not disclosed the factum of sexual assault on her by the petitioner before 11.10.2021 is a factor to be taken into consideration at this stage.

6. The petitioner was arrested on 17.10.2021. On 18.10.2021, he was remanded to police custody till 21.10.2021 and thereafter is in judicial custody till date. The allegations against the petitioner are yet to be proved. Petitioner, in the given facts of the case, can not be allowed to remain in custody for indefinite period as the trial of the case is likely to take sometime before conclusion. Pre-trial incarceration can not be ordered as a matter of rule. The balance has to be kept between the rights of the victim and those of the bail petitioner.

7. Petitioner is permanent resident of Village Bali and Post Office Bali Koti, Tehsil Shillai, District Sirmour, H.P. There is no likelihood of his absconding from the course of justice. It is apprehended by the respondent that in case of grant of bail to the petitioner he may overawe the witnesses. This apprehension, however, is not substantiated by any tangible material. There is no past criminal history attributed to the petitioner. Even otherwise,

such apprehension of respondent can not be made the sole basis to deny bail to the petitioner and appropriate conditions can be imposed in this regard. It is not the case of the respondent that in case of release of petitioner on bail, the trial may be affected adversely.

8. In the peculiar facts and circumstances of the case, the petition is allowed and the petitioner is ordered to be released on bail in case FIR No. 50/2021, dated 07.10.2022, registered at Police Station Shillai, District Sirmour, H.P., under Sections 341,354,323,376, 506 of IPC, Section 7 of POCSO Act & Section 3(1) (w)(i) of Scheduled Castes and Scheduled Tribes (Prevention of Atrocities Act), on his furnishing personal bond in the sum of Rs. 50,000/- with one surety in the like amount to the satisfaction of the learned Trial Court. This order is subject to following conditions :-

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

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

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

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

9. 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 CHANDER BHUSAN BAROWALIA, J.

Between:-

ANU KUMARI WIFE OF RAKESH KUMAR AGED ABOUT 39 YEARS R/O VILLAGE KHAROUTH, POST OFFICE BALLAH, TEHSIL PALAMPUR, DISTRICT KANGRA, H.P. WORKING AS TGT (NON-MEDICAL) IN GSSS LYLH DISTT. CHAMBA HP.

……PETITIONER

(BY MR. KULBHUSHAN KHAJURIA, ADVOCATE)

AND

1.STATE OF HIMACHAL PRADESH THROUGH SECRETARY (EDUCATION) TO THE GOVT. OF HIMACHAL PRADESH.

2. DIRECTOR, DEPARTMENT OF ELEMENTARY EDUCATION, GOVT. OF H.P SHIMLA.

……RESPONDENTS

(BY MR. SHIV PAL MANHANS, ADDL.A.G WITH MR. VIKRANT CHANDEL AND MR. RAJU RAM RAHI, DY.A.GS AND MR. SHRIYEK SHARDA, SR. ASSISTANT A.G FOR THE RESPONDENTS-STATE)

CIVIL WRIT PETITION NO. 558 OF 2022
Decided on:04.02.2022

Constitution of India, 1950- Article 226- Writ petitioner firstly stated that she would be satisfied if representation of writ petitioner shall be decided in time bound manner as the same is still pending before the respondent concerned- Held- Respondent concerned ordered to decide representation of the writ petitioner within three weeks and pass a reasoned order in accordance with law.

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

O R D E R

When the instant matter was taken up today, learned counsel for the writ petitioner fairly states that his client would be satisfied if representation of the writ petitioner Annexure P-1, dated 18.11.2021, shall be decided in a time bound manner, as the same is still pending before the respondents concerned.

2. Learned Additional Advocate General states that the representation, so made by writ petitioner shall be decided sympathetically in a time bound manner.

3. In view of above, the instant petition is disposed of by ordering that the respondents concerned shall decide representation of the writ petitioner, Annexure P-1 dated 18.11.2021, within a period of three weeks from today and pass a reasoned order, in accordance with law.

However, it is made clear that if the writ petitioner is still aggrieved, she has every right to approach this Court. Pending application(s), if any, also stands disposed of.

BEFORE HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Between:-

ANIL KUMAR SON OF SH. NARAIN SINGH, R/O VILLAGE AND POST OFFICE KHADDHA, TEHSIL LADBHAROL, DISTRICT MANDI, H.P.

……PETITIONER

(BY MR. IMRAN KHAN, ADVOCATE VICE MS. ARCHNA DUTT, ADVOCATE)

AND

1.STATE OF HIMACHAL PRADESH THROUGH SECRETARY (EDUCATION) TO THE GOVT. OF HIMACHAL PRADESH SHIMLA 171002.

2. DIRECTOR OF ELEMENTARY EDUCATION, HIMACHAL PRADESH, SHIMLA-1.

3.
DEPUTY DIRECTOR ELEMENTARY EDUCATION MANDI, DISTRICT MANDI, H.P.

4.
PRINCIPAL GOVT. SR. SEC. SCHOOL SIMAS, DISTRICT MANDI, H.P.

5.
NEELAM KUMARI PARENTAGE AND ADDRESS NOT KNOWN TO THE PETITIONER PRESENTLY WORKING

AS TGT (ARTS) IN GHS SIMAS, DISTRICT MANDI, H.P.

……RESPONDENTS

(BY MR. SHIV PAL MANHANS, ADDL.A.G WITH MR. VIKRANT CHANDEL AND MR. RAJU RAM RAHI, DY.A.GS AND MR. SHRIYEK SHARDA, SR. ASSISTANT A.G FOR THE RESPONDENTS-STATE)

CIVIL WRIT PETITION
NO. 443 of 2022
Decided on: 04.02.2022

Constitution of India, 1950- Article 226- Writ petitioner firstly stated that he would be satisfied if representation of writ petitioner shall be decided in time bound manner as the same is still pending before the respondent concerned- Held- Respondent concerned ordered to decide representation of the writ petitioner within three weeks and pass a reasoned order in accordance with law.

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

O R D E R

When the instant matter was taken up today, learned counsel for the writ petitioner fairly states that his client would be satisfied if he is permitted to file a representation before the authorities concerned. The prayer being innocuous is allowed. The petitioner is permitted to file representation within a period of one week from today.

2. Learned Additional Advocate General states that the representation, so made by writ petitioner shall be decided sympathetically in a time bound manner.

3. In view of above, the instant petition is disposed of by ordering that the respondents concerned shall decide representation of the writ petitioner within three weeks from today and pass a reasoned order, in accordance with law. It is also made clear that in the meanwhile respondents will not take any coercive action against the petitioner. It is also ordered that respondents shall also consider the posting of the petitioner, if possible, at Govt. Middle School Basai, Under Complex GSSS Makeri, District Mandi.

However, it is made clear that if the writ petitioner is still aggrieved, he has every right to approach this Court. Pending application(s), if any, also stands disposed of.

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

1. CWP No.2711 of 2017

Between:-

BALDEV
S/O SHRI LEHNU RAM,
R/O VILLAGE & POST OFFICE DHARGLA,
TEHSIL SALOONI, DISTRICT CHAMBA (H.P.)
RETIRED AS MALI IN THE OFFICE OF
DIVISIONAL FOREST OFFICER, CHURAH,
TEHSIL CHURAH, DISTRICT CHAMBA (H.P.)

……PETITIONER

(BY MR. ADARSH K. VASHISTA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH ITS PRINCIPAL SECRETARY (FORESTS)
TO THE GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA-171002 (H.P.)

2. THE PRINCIPAL CHIEF CONSERVATOR
OF FORESTS, TALLAND, SHIMLA-171001 (H.P.)

3. THE DIVISIONAL FOREST OFFICER,
CHURAH FOREST DIVISION, SALOONI,
DISTRICT CHAMBA (H.P.)

……RESPONDENTS

(BY MR. ASHOK SHARMA, ADVOCATE GENERAL
WITH MR. NAND LAL THAKUR, ADDITIONAL
ADVOCATE GENERAL)

2. CWPOA No.2208 of 2020

Between:-

NARDEV SINGH
S/O SHRI GEETA RAM,
R/O VILLAGE SAKOL, PO BAGTHAN,
TEHSIL PACHHAD, DISTRICT SIRMOUR,
HIMACHAL PRADESH,
PRESENTLY SERVING AS PEON ON
REGULAR BASIS, RAJGARH FOREST DIVISION

……PETITIONER

(BY MR. A.K. GUPTA, MR. ABHYENDRA GUPTA
AND MR. MANIK SETHI, ADVOCATES)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH ITS PRINCIPAL SECRETARY (FORESTS)
TO THE GOVERNMENT OF HIMACHAL PRADESH

2. PRINCIPAL CHIEF CONSERVATOR
OF FOREST, SHIMLA, H.P.

3. THE DIVISIONAL FOREST OFFICER,
RAJGARH, DISTRICT SIRMOUR,
HIMACHAL PRADESH

4. SECRETARY (PERSONNEL) TO THE
GOVERNMENT OF HIMACHAL PRADESH

……RESPONDENTS

(BY MR. ASHOK SHARMA, ADVOCATE GENERAL
WITH MR. NAND LAL THAKUR, ADDITIONAL
ADVOCATE GENERAL)

CIVIL WRIT PETITION No.2711 of 2017
ALONGWITH
CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No.2208 of 2020
RESERVED ON:31.12.2021
PRONOUNCED ON: 22.02.2022

Constitution of India, 1950- Fundamental Rules- Rule 56- Due to "Apparent Conflict" decisions rendered by different Benches of Hon'ble High Court regarding interpretation of Rule 56 of Fundamental Rules, the matter has been referred to the larger Bench for authoritative pronouncement on the subject- Held- it is the date of engagement, which is the decisive factor- If the date of engagement/appointment is prior to 10.05.2001, the Class-IV employee will continue to serve till 60 years of age- In case, it is later than 10.05.2001, then restriction in age upto 58 years will apply- Reference is accordingly answered.

These petitions coming on for orders this day, ***Hon'ble Mr. Justice Mohammad Rafiq****, passed the following:*

O R D E R

A Division Bench of this Court observed 'apparent conflict' in the decisions rendered by different Benches of this Court regarding interpretation of Rule 56 of Fundamental Rules (in short 'F.R.') vis-à-vis notification dated 10.05.2001 amending this Fundamental Rule in the State of Himachal Pradesh as well as circular dated 22.02.2010 clarifying the amendment and its

applicability. For authoritative pronouncement on the subject, the matter has been referred to the Larger Bench vide following order dated 28.12.2019:-

> *"Apparently there appears to be a conflict in the decisions rendered by different Benches of this Court with regard to the interpretation of FR 56.*
>
> *2. In LPA No. 196 of 2010, titled Bar Chand vs. State of H.P. & others, decided on 21.10.2010, it was observed that all those who had been appointed even if on daily waged service prior to 10.05.2001, would be entitled to continue upto the age of 60 years.*
>
> *3. However, the aforesaid judgment has later on been distinguished, as one rendered per incuriam, since the position under the Rules was not considered in that case and this was so stated clearly by a Division Bench (Coram: The Hon'ble Mr. Justice Kurian Joseph, Chief Justice {as his Lordship then was} and The Hon'ble Mr. Justice Sanjay Karol, Judge, {as his Lordship then was}) in LPA No. 298 of 2011, titled State of H.P. & others vs. Chuni Lal Beldar, decided on 22.11.2011, relevant paras whereof reads as under:*
>
> > *"The State has come up in appeal against the judgment dated 24th February, 2011. The issue pertains to continuance of Class IV employee upto the age of 60 years. There is no dispute on the question of law that all those who have been appointed in regular service as Class IV employee prior to 10.5.2011, they are entitled to continue upto the age of 60 years. In LPA No. 196 of 2010 titled as Bar Chand vs. State of H.P. and others decided on 21st October, 2010, this Court had observed that all those, who have been appointed even if on daily waged service prior to 10.5.2001 would be entitled to continue upto the age of 60 years. That judgment has been later distinguished as one rendered per incurium since the position under the Rules was not considered in that case. What was considered in that case was the Notification issued by the Government. As per the amendment in FR 56, only those who have been regularly appointed/regularized in service prior to*

10.5.2001, they alone will be entitled to continue upto 60 years.

2. Learned Single Judge in the judgment under appeal has followed LPA No. 196 of 2010, which is no more a good law in view of the position under law that being a judgment rendered per incurium it has no precedential value and it is no more binding. As far as the facts of the case of the petitioner are concerned, it is an admitted fact that he had entered regular service only in the year 2007, though he was on daily waged service prior to 2001. Only in case the writ petitioner entered regular service before 10.5.2001, he would be entitled to continue upto the age of 60 years."

4. Similar issue came up before one of us (Justice Tarlok Singh Chauhan, J.) in CWP No. 7140 of 2012, titled Gian Singh vs. State of H.P. and others, decided on 24.09.2014, wherein after placing reliance upon a decision rendered by a Coordinate Bench of this Court (Coram: The Hon'ble Mr. Justice Sanjay Karol, Judge, as his Lordship then was) in CWP No. 1837 of 2012, titled Tara Chand vs. State of H.P. & others, decided on 21.08.2014, the age of retirement was held to be 60 years.

5. The Judgment rendered in Gian Singh's case (supra) has been affirmed by learned Division Bench of this Court in LPA No. 194 of 2015, titled State of H.P. & others vs. Gian Singh, decided on 03.12.2015 and it has been held that daily wagers appointed prior to the amendments carried out in the FR 56, have right to continue till the age of 60 years and they would not retire at the age of 58 years.

6. This judgment apparently is in direct conflict with the judgment rendered by another Division Bench of this Court in Chuni Lal Beldar's case (supra).

7. The issue in question is likely to come up repeatedly before this Court, therefore, it would be desirable that an authoritative pronouncement qua the issue in question be made by a Larger Bench of the Court.

8. Accordingly, the Registry is directed to place the matter before Hon'ble the Chief Justice for constitution of the Larger Bench to resolve the issue."

2. The matter revolves around F.R. 56 and its amendments carried out by the respondent-State.

2(i). F.R. 56 pertains to 'retirement'. F.R. 56(a), (b) and (e) as they existed in the year 1997, read as under:-

"F.R. 56. (a) Except as otherwise provided in this rule, every Government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty-eight years.

(b) A workman who is governed by these rules shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years.

Note.- In this Clause, a workman means a highly skilled, skilled, semi-skilled, or unskilled artisan employed on a monthly rate of pay in an industrial or work-charged establishment.

(e) A Government servant in Class IV service or post shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years:

Provided that a Class IV employee of the Secretariat Security Force who initially enters service on or after the 15th day of September, 1969, shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty-eight years.

Provided further that a Group 'D' employee recruited as Pioneer in the General Reserve Engineer Force (GREF) on or after the 25th day of September, 1993, shall retire from service on the afternoon of the last day of the month in which he attains the age of 50 years:

Provided also that a Group 'D' employee recruited or redesignated as Pioneer in the General Reserve Engineer Force (GREF) prior to the 25th day of September, 1993 and having

attained the age of 50 years shall retire from service on the afternoon of the last day of the month in which he is declared by the appropriate authority as medically unfit and/or physically incapacitated to satisfactorily discharge the duties assigned to him."

F.R. 56(e) was deleted by the Central Government vide notification dated 13.05.1998, whereby certain other amendments were also carried out in various clauses of F.R. 56.

2(ii). State of Himachal Pradesh however carried out its own amendment in F.R. 56 vide notification dated 30.07.1998. F.R. 56(a), (c), (d) and (e) were amended as under:-

"(a) Except as otherwise provided in this rule, every Government servant shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty-eight years.

(c) A workman referred to in Clause (b) may be granted extension of service, under very special circumstances to be recorded in writing, after he attains the age of sixty years with the sanction of the appropriate authority.

(d) A Government servant to whom Clause (a) applies, other than a workman referred to Clause (b), may be granted extension of service after he attains the age of fifty-eight years with the sanction of the appropriate authority if such extension is in the public interest and the grounds therefor are recorded in writing:

Provided that no extension under this clause shall be granted beyond the age of sixty years except in very special circumstances:

Provided further that the appropriate authority shall have the right to terminate the extension of service before the expiry of such extension by giving a notice in writing of not less than three months in the case of a permanent or a quasi-permanent Government servant, or, one month in the case of a temporary Government servant, or, pay and allowances in lieu of such notice.

(e) A Government servant in Class IV service or post shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years:

Provided that a Class IV employee of the Secretariat Security Force who initially enters service on or after the 15th day of September, 1969, shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty-eight years."

2(iii). In exercise of powers conferred by proviso to Article 309 of the Constitution of India, F.R. 56(b) and (e) were further amended by the State of Himachal Pradesh on 10.05.2001 as under:-

"In exercise of the powers conferred by proviso to Article 309 of the Constitution of India, the Governor, Himachal Pradesh is pleased to make following rules further to amend the Fundamental rules, in their application to the State of Himachal Pradesh, namely:-

1. Short title and commencement:-	*1. (1) These Rules may be called Fundamental (in their application to the State of Himachal Pradesh) Amendment Rules, 2001.* *(2) These shall come into force from the date of publication in the Rajpatra Himachal Pradesh.*

Amendment of rule-56-

2. In Rule-56 of the Fundamental Rules-

(a) After clause (b) the following proviso shall be inserted, namely:-

"Provided that a workman appointed on or after the date of publication of this notification in the Rajpatra Himachal Pradesh shall retire from service on the afternoon of the last day of the month in which he attains the age of 58 years."

(b) After proviso to clause (e) the following second proviso shall be inserted, namely:-

"Provided further that a Class-IV Government servant appointed on or after the date of publication of this notification in Rajpatra Himachal Pradesh shall retire from service on the afternoon of the last day of the month in which he attains the age of 58 years."

By order
Sd/-
F.C.-cum-Secretary (Finance) to the Government of Himachal Pradesh"

The notification came into force from 11.05.2001, when it was published in the Gazette. As per the above amendment, a workman appointed after 10.05.2001 shall retire from service in the afternoon of the last day of the month in which he attains the age of 58 years. Also as per the amendment, a Class-IV government servant appointed on or after 10.05.2001 shall retire from service in the afternoon of the last day of the month in which he attains the age of 58 years.

2(iv). The effect of 2001 amendment was that all those workmen and Class-IV employees, who were appointed on and after 10.05.2001, were to retire on attaining the age of 58 years. Prior to this amendment, their age of

superannuation in terms of notification dated 30.07.1998 was 60 years. A question arose as to what would be the age of superannuation of those, who were appointed/engaged on daily wage basis prior to 10.05.2001. A clarification was issued in this regard by the Department of Personnel on 22.02.2010 as under:-

"No.PER (AP)-C-B(2)-1/2006-Vol.-VIII
Government of Himachal Pradesh,
Department of Personnel (AP-III)
Dated Shimla-171002 22nd February, 2010.

From

The Secretary (Personnel) to the
Government of Himachal Pradesh.

To

1. All the F.C./Principal Secretaries/Secretaries to the Government of Himachal Pradesh, Shimla-171002.
2. All Divisional Commissioners in Himachal Pradesh.
3. All Heads of Departments in Himachal Pradesh.
4. All Deputy Commissioners in Himachal Pradesh.

Subject:- Age limit for disengagement of a daily wager.

Sir,

I am directed to say that consequent upon amendment in Rule-56 of the Fundamental Rules vide Government of Himachal Pradesh, Finance (Regulations) Department Notification No.Fin(C) A(3)-3/98 dated 10th May, 2001, the issue of fixing the age of disengagement of a daily wager in all the departments had also been engaging the attention of the Government for sometime past. After careful consideration, the Government has now decided that the people who are engaged on daily wages they will also be governed by the same set of age restriction of disengagement as is applicable to regular Government employees. As such, the Class-IV daily wager engaged prior to 2001 i.e. when said notification of limiting the age of Class-IV Employees was reduced from 60 to 58 years will cease to be in the employment at the age of 60 years and no daily wager deployed after the reduction of the age limit in 2001 will be

retained after attaining the age of 58 years. Similarly, all Class-III and above employees if working on daily wage will cease to be employed at the age of 58 years. There should be no ambiguity in this matter and all departments are to follow this age restriction.

2. The policy regarding regularization of daily waged persons remain as circulated vide this office letter No.PER (AP)-C-B(2)-1/2006-Vol.-VII (Loose-2), dated 28.8.2009.

3. The above instructions may kindly be brought to the notice of all concerned for strict compliance.

Yours faithfully,
Sd/-
Deputy Secretary (Personnel) to the
Government of Himachal Pradesh"

(emphasis supplied)

The Government clarified that a Class-IV daily wager engaged prior to 2001 amendment will continue to serve till the age of 60 years, whereas a daily wager engaged after 2001, will cease to be in service on attaining the age of 58 years.

3. Certain decisions of this Court involving 2001 amendment and circular dated 22.02.2010 as indicated in the reference order dated 28.12.2019 are being noticed hereinafter:-

3(i). Bar Chand Versus State of H.P. & Ors.

(LPA No.196 of 2010, decided on 21.10.2010)

The issue before the Division Bench was whether the appellant engaged as a Daily Waged Beldar on 05.09.1994, i.e. prior to coming into force of 2001 amendment, was entitled to continue in service till the age of 60 years or not. The Court considered the circular dated 22.02.2010 and held that those daily waged Class-IV employees, who were engaged as such prior to

2001 amendment, can continue in service till they attain the age of 60 years. It was further held that the restriction of continuing in service upto the reduced age of 58 years will apply only to those who were engaged after 2001 amendment. Relevant para of the judgment reads as under:-

> *"3. The learned Single Judge took the view that since the petitioner has been regularized in service after 2001, he is entitled to continue only up to 58 years. But, as clearly stated in the circular, no distinction whatsoever is made as to regular service. In fact the expression used is daily wager engaged prior to 2001. Admittedly, the petitioner was engaged as Beldar in 1994. The restriction up to the age of 58 years would apply only in the case of those engaged on daily wages after 2001 when the retirement age was reduced to 58 years. In view of the above circumstances, we set aside the judgment of the learned Single Judge, allow the writ petition with the direction that the petitioner shall be permitted to continue up to the age of 60 years. He shall be engaged forthwith with continuity of service at any rate within a period of one week from the date of production of copy of this judgment. It is made clear that the period during which the petitioner was kept out of service shall be treated as duty for all purposes except the actual wages. In other words, there shall be continuity of service for all purposes except the actual wages since the petitioner has not actually worked during the period."*

3(ii). State of H.P. & others Versus Chuni Lal

(LPA No.298 of 2011, decided on 22.11.2011)

The Division Bench in this case was considering the age upto which Class-IV employees could serve. The Bench held that:-

(a). All those who were appointed in regular service as Class-IV employees prior to 10.05.2001 can continue to serve till they attain the age of 60 years.

(b). Bar Chand Versus State of H.P. & others (LPA No.196 of 2010), decided on 21.10.2010, holding that daily wagers appointed prior to 10.05.2001 can continue till the age of 60 years, is per incurium as rule position was not considered in Bar Chand's case, supra. As per 10.05.2001 amendment, only regularly appointed/ regularized in service prior to 10.05.2001 can continue in service upto the age of 60 years.

(c). Writ petitioner therein engaged on daily wage basis prior to 10.05.2001 was made regular in the year 2007. Since he was regularized after 10.05.2001, therefore, his age of superannuation will be 58 years and not 60 years. The appeal filed by the State was accordingly allowed.

The judgment reads as under:-

"The State has come up in appeal against the judgment dated 24th February, 2011. The issue pertains to continuance of Class IV employee upto the age of 60 years. There is no dispute on the question of law that all those who have been appointed in regular service as Class IV employee prior to 10.5.2011, they are entitled to continue upto the age of 60 years. In LPA No.196 of 2010 titled as Bar Chand vs. State of H.P. and others decided on 21st October, 2010, this Court had observed that all those, who have been appointed even if on daily waged service prior to 10.5.2001 would be entitled to continue upto the age of 60 years. That judgment has been later distinguished as one rendered per incurium since the position under the Rules was not considered in that case. What was considered in that case was the Notification issued by the Government. As per the amendment in FR 56, only those who have been regularly appointed/regularized in service prior to 10.5.2001, they alone will be entitled to continue upto 60 years.

2. Learned Single Judge in the judgment under appeal has followed LPA No. 196 of 2010, which is no more a good law in view of the position under law that being a judgment rendered

per incurium it has no precedential value and it is no more binding. As far as the facts of the case of the petitioner are concerned, it is an admitted fact that he had entered regular service only in the year 2007, though he was on daily waged service prior to 2001. Only in case the writ petitioner entered regular service before 10.5.2001, he would be entitled to continue upto the age of 60 years.

3. In that view of the matter, the appeal is allowed, the judgment under appeal is set aside and the writ petition is dismissed."

3(iii). Tara Chand Versus State of H.P. & others

(CWP No.1837 of 2012, decided on21.08.2014):-

The writ petitioner therein was engaged as a Class-IV daily wager in the year 1991 and regularized w.e.f. 01.09.2006. On 26.09.2011, the respondents granted him work charge status retrospectively w.e.f. 01.01.2001. Learned Single Judge noticed the 2001 amendment to F.R. 56, the clarification dated 22.02.2010, the judgment passed in Bar Chand's case supra and observed that the petitioner was regularized prior to 10.05.2001, therefore, was entitled to continue in service till he attained the age of 60 years. Since the petitioner had crossed the age of superannuation, i.e. 60 years, at the time of decision of his writ petition, the respondents were directed to give him all monetary benefits for the period in question. Relevant paras from the judgment are as under:-

"2. Petitioner was engaged as a daily wage worker in the year 1991. His services were regularized w.e.f. 01.09.2006, by the Divisional Forest Officer, Wildlife Division Kullu, District Kullu, H.P., vide office order dated 11.09.2006. Respondents did not consider the petitioner's case for regularization in the light of decision rendered by the apex Court in Mool Raj Upadhyaya Versus State of H.P., 1994, Supp. (2) SCC 316 as also this Court in Gauri Dutt and others Versus State of H.P.,

Latest HLJ 2008 (HP) 366 as such vide judgment dated 03.05.2011 rendered in CWP No. 2360 of 2011, titled as Tara Chand Versus State of H.P. and others, State was directed to consider the petitioner's case, in accordance with law. Pursuant thereto, vide order dated 26.09.2011 (Annexure P-1) now petitioner's case stands considered and respondents have granted him work charge status with effect from 01.01.2001.

3. In the light of such development, petitioner is legally entitled to continue to serve the State up to the age of 60 years. Policy so communicated vide order dated 22.02.2010 (Annexure P-7), which reads as under is evidently clear and squarely applicable……

4. The question of applicability of Fundamental Rules, 2001, so amended on 10.05.2001 (Annexure P-3) would not arise. It applies only to those employees who stand appointed on or after the date of amendment of Rules, which was so done in the year 2001. In the instant case, work charge status stands accorded to the petitioner with effect from 01.01.2001, date prior to the amendment of Rules. In fact, the issue is no longer res integra and squarely covered by the decision rendered by this Court in LPA No.196 of 2010, titled as Bar Chand Versus State of H.P. & Others……

5. As such, present petition as prayed is allowed. Petition was filed in the year 2012. Petitioner who has now crossed the age of superannuation i.e. 60 years hence shall be deemed to be in service. Consequently respondents are directed to take all consequential actions, including disbursement of monetary benefits, in accordance with law, within a period of three months from the date of production of copy of this order, failing which, thereafter, petitioner shall be entitled to interest thereupon @ 9% per annum. Needless to add, petitioner shall be entitled to all consequential benefits of pension etc., if otherwise permissible, in accordance with law."

Though the above judgment did not notice the judgment in Chuni Lal's case, supra, however, the fact remains that the petitioner in Tara Chand's case was regularized prior to 10.05.2001. Therefore, even going by the ratio in Chuni Lal's case, supra, the petitioner in Tara Chand's case

having been engaged and regularized as Class-IV employee prior to 2001 amendment would have continued to serve till the age of 60 years.

3(iv). Gian Singh Versus State of H.P. and others

(CWP No.7140 of 2012, decided on 24.9.2014):-

The petitioner therein was appointed as a Daily Wager on 01.09.1992. Learned Single Judge held him entitled to be regularized w.e.f. 01.01.2000, i.e. on completion of eight years of continuous service. On that basis, the petitioner was not only engaged prior to 10.05.2001, but he was also deemed to have been regularized prior to 10.05.2001, therefore, following the judgment rendered in Tara Chand's case supra, he was held entitled to continue in service till the age of 60 years. The petitioner therein had also crossed the age of 60 years at the time of decision of his writ petition, therefore, the respondents were directed to disburse monetary benefits to him for the period in question. This judgment was affirmed in LPA No.194 of 2015, decided on 03.12.2015.

4. We have heard learned counsel for the parties at length. According to the learned counsel for the writ petitioners, the law laid down in Bar Chand's case is the correct interpretation of applicable rules/notifications and circulars, whereas, according to the learned Advocate General, it is the judgment rendered in Chuni Lal's case, which properly interprets the applicable rules/ amendments/circulars.

We hereinafter notice the sum and substance of the above decisions mentioned in the reference order dated 28.12.2019:-

4(a). Bar Chand's case:-

The Division Bench held that the circular dated 22.02.2010 did not differentiate between daily waged and regular Class-IV service. Those daily wagers, who were engaged prior to 10.05.2001, were held entitled to serve till the age of 60 years and those daily wagers, who were engaged after

10.05.2001, were held entitled to work till the age of 58 years. The writ petitioner (therein) engaged prior to 10.05.2001 and regularized after 10.05.2001 was held entitled to serve till the age of 60 years.

4(b). Chuni Lal's case:-

The judgment in Bar Chand's case, supra, was held per incurium since it did not consider the rule position. It was held that in accordance with the amendment carried out by the respondents-State on 10.05.2001 in F.R. 56, only those Class-IV employees, who were regularly appointed/regularized in service prior to 10.05.2001, could continue to serve till the age of 60 years. While allowing State's appeal, it was held that the writ petitioner though was engaged on daily wage basis prior to 10.05.2001, but was regularized after this date, could only continue to serve upto the age of 58 years.

4(c). Tara Chand/Gian Singh's case:-

The judgment in Tara Chand's case followed the decision in Bar Chand's case and did not take into consideration the judgment rendered in Chuni Lal's case. However, even if the judgment in Chuni Lal's case had been considered in Tara Chand's case, then also the outcome would not have been different since in Tara Chand's case, the petitioner was engaged and regularized prior to 10.05.2001. Similar was the position in Gian Singh's case, wherein the petitioner was held entitled to be regularized w.e.f. 01.01.2000, i.e. prior to 10.05.2001. The judgment passed by ld. Single judge in Gian Singh's case was upheld by the Ld. Division Bench in LPA no. 194/2015. While affirming the judgment, ld. Division Bench held that the writ petitioner was entitled to be regularised prior to 10.5.2001 therefore fetters of age restriction placed under 2001 amendment were not applicable to him.

5. Notifications/Clarification with respect to F.R. 56(e) and their effect:-

5(i). Vide notification dated 30.07.1998, State of Himachal Pradesh amended F.R. 56(e) as under:-

> *"(e) A Government servant in Class IV service or post shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years:*
>
> *Provided that a Class IV employee of the Secretariat security force who initially enters service on or after 15th day of September, 1969 shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty-eight years."*

As per F.R. 56(e) as amended by the State on 30.07.1998, a government servant in Class-IV 'service or post' was to retire from service on attaining the age of 60 years. The word used in F.R. 56(e) was 'service or post'.

5(ii). On 10.05.2001, further amendment was carried out in F.R. 56(e) by adding second proviso as under:-

> *"Provided further that a Class-IV Government servant appointed on or after the date of publication of this notification in Rajpatra Himachal Pradesh shall retire from service on the afternoon of the last day of the month in which he attains the age of 58 years."*

The 2001 amendment came into force from the date of publication in the Gazette, i.e. on 11.05.2001. The amendment was to the effect that all those Class-IV government servants appointed on or after 10.05.2001 could continue to serve only upto 58 years of age. The amendment used the word 'appointed' and not 'engaged'. The amendment though leads to a definite conclusion that those who were appointed/engaged on daily wage basis in Class-IV services and regularized prior to 10.05.2001 could continue to serve upto the age of 60 years, however, the position was not clear in the amendment qua those employees, who were engaged on daily wage basis in Class-IV services prior to 10.05.2001 and were continuing as such on 10.05.2001 and regularized after 10.05.2001.

5(iii). In order to clarify the situation, the Government issued a circular on 22.02.2010 (extracted earlier). In terms of this circular, the amendment

notification dated 10.05.2001 was made applicable to the Class-IV daily wagers as well. Those daily wagers, who were engaged prior to 10.05.2001, were to continue till the age of 60 years. However, such of the daily wagers, who were engaged after 10.05.2001, could serve till the age of 58 years.

5(iv). A vacuum still remained in the notification/clarification about the superannuation age of daily wager engaged prior to 10.05.2001, but regularized after 10.05.2001. To meet this situation, another notification was issued on 21.02.2018, amending F.R. 56(e) yet again. This notification has not been noticed in the reference order dated 28.12.2019. Relevant portion of the notification reads as under:-

"Short title and commencement:-	*1. (1) These rules may be called Fundamental (in their application to the State of Himachal Pradesh) First Amendment, Rules, 2018.* *(2) These rules shall come into force from the date of publication in the Rajpatra (e-Gazette), Himachal Pradesh.*
Amendment of rule-56.	*2. In rule-56 of the Fundamental Rules, after the second proviso to clause (e), the following third proviso shall be inserted, namely:-* *"Provided further that a Class-IV Government servant appointed on part-time/daily wages basis prior to 10-05-2001 and regularized on or after 10-05-2001 shall retire from service on the afternoon of the last day of the month in which he attains the age of 60 years."*

The above amendment inserting third proviso in F.R. 56(e) came into force from the date of publication in the Gazette, i.e. on 22.02.2018. The

gist of the amendment was that with effect from 21.02.2018, Class-IV government servants appointed on part-time/daily wage basis prior to 10.05.2001 and regularized on or after 10.05.2001, were to retire on attaining the age of 60 years. It was the date of first appointment/engagement, which was made the basis for their continuation in service till the age of 60 years and not the date of regularization. A corrigendum has also been issued by the State on 10.06.2019 to the effect that for the word 'appointed' used in the notification dated 21.02.2018, the word 'engaged' shall be substituted.

F.R. 56(e) as it stood on 22.02.2018 (with corrigendum) now reads as under:-

> *"(e) A Government servant in Class IV service or post shall retire from service on the afternoon of the last day of the month in which he attains the age of sixty years:*
>
> *Provided that a Class IV employee of the Secretariat Security Force who initially enters service on or after the 15th day of September, 1969, shall retire from service on the afternoon of the last day of the month in which he attains the age of fifty-eight years.*
>
> *Provided further that a Class-IV Government servant appointed on or after 10.05.2001 shall retire from service on the afternoon of the last day of the month in which he attains the age of 58 years.(2001 amendment)*
>
> *Provided further that with effect from 21.02.2018 a Class-IV Government servant engaged on part-time/daily wages basis prior to 10-05-2001 and regularized on or after 10-05-2001 shall retire from service on the afternoon of the last day of the month in which he attains the age of 60 years.(2018 amendment)"*

Answering the Reference:-

6(i). Conflict in the Judgments;- There appears to be a very thin difference in the line of approach taken in the judgments referred to in the reference order dated 28.12.2019. The view taken in Bar Chand's case was

held to be per incurium in the judgment delivered in Chuni Lal's case. A different approach was adopted by the Division Bench in Chuni Lal's case, which held that both engagement and regularization of a Class-IV employee had to be prior to 10.05.2001 to enable him to continue to serve till the age of 60 years, whereas, in Bar Chand's case, relying on the circular dated 22.02.2010, supra, it was held that if engagement on daily wage basis was prior to 10.05.2001, then, such an employee could continue to serve till he attained the age of 60 years, irrespective of date of his regularization. The judgment in Chuni Lal's case was, however, not brought to the notice of the learned Single Judge in Tara Chand's case. In Tara Chand's case, learned Single Judge followed the judgment in Bar Chand's case. Similarly, in Gian Singh's case, learned Single Judge followed the judgment delivered in Tara Chand's case. The judgment in Chuni Lal's case was not noticed by the learned Single Judges either in Tara Chand's case or in Gian Singh's case.

6(ii). Age of Continuance in Service:-

6(ii)(a). In terms of 2001 amendment of F.R. 56(e), such of the Class-IV employees, who were engaged on daily wage basis prior to 10.05.2001 and regularized also prior to 10.05.2001, are entitled to continue to serve till the age of 60 years. This position is acknowledged in the judgments rendered in Bar Chand as well as Chuni Lal's cases, supra.

6(ii)(b). Such of the Class-IV employees, who were engaged on daily wage basis prior to 10.05.2001 and regularized after 10.05.2001 were not given the benefit of continuation till the age of 60 years in Chuni Lal's case. The judgment in Chuni Lal's case was based upon the interpretation of F.R. 56(e), as amended by the respondents-State vide notification dated 10.05.2001.

6(ii)(c). In terms of the State notification dated 21.02.2018 carrying out further amendment in F.R. 56(e), with effect from 21.02.2018, all daily wagers appointed prior to 10.05.2001 and regularized on or after 10.05.2001 are to continue to serve till the age of 60 years. This amendment is post the

decisions rendered in Bar Chand and Chuni Lal's cases, supra and has not been noticed in the reference order dated 28.12.2019. While affirming the judgment of ld. Single Judge in Gian Singh's case, ld. Division Bench though did not notice Chuni Lal's judgment but held that writ petitioner's date of regularisation was prior to 10.5.2001 therefore reduced age of 58 years introduced in 2001 amendment would not be applicable to him.

7. There is now no confusion regarding employees falling in para 6(ii)(a) above. These employees can continue to serve till they attain the age of 60 years. However, an anomalous situation has developed amongst the employees falling in para 6(ii)(b) & 6(ii)(c). The employees falling in above para 6(ii)(b) and 6(ii)(c) for all practical purposes belong to the same category and are similarly situated. Both sets of employees were engaged on daily wage basis prior to 10.05.2001 and regularized after 10.05.2001. Such of the employees engaged on daily wage basis prior to 10.05.2001 and regularized after 10.05.2001, if were in service on 21.02.2018, will continue to serve till they attain the age of 60 years. On the other hand, such of the employees, who were engaged on daily wage basis prior to 10.05.2001 and regularized after 10.05.2001, but have retired before the issuance of notification dated 21.02.2018, will not get the benefit of notification dated 21.02.2018. This to our mind is wholly discriminatory. Similarly situated employees are being treated differently. The employees, who were engaged on daily wage basis prior to 10.05.2001 and regularized after 10.05.2001, constitute one homogenous class. Differential treatment to the employees falling in same homogenous class is impermissible. In fact, amendment carried out in F.R. 56(e) on 21.02.2018 suggests that the date of regularization will have no impact upon the superannuation age. Date of engagement is the determinative factor. If a daily wager is engaged prior to 10.05.2021, then he is entitled to serve till 60 years of age irrespective of date of his regularization. This was held so in Bar Chand's case, decided on 21.10.2010. However, at the time of decision in Bar

Chand's case, the amendment dated 21.02.2018 had not been carried out in F.R. 56(e). Therefore, though later judgment in Chuni Lal's case dated 22.11.2011, holding the decision in Bar Chand's case as per incuriam cannot be faulted as it was based upon strict interpretation of F.R. 56(e) as amended by the State at that time. However, in view of subsequent amendment of F.R. 56(e) on 21.02.2018 in the interregnum, situation has undergone further change. Reference made to the larger Bench is not only to decide about the inconsistency in the decisions referred therein, but also to put at rest related issues coming or likely to arise before different benches. Therefore, we hold that:-

(i). There is an apparent inconsistency or conflict between the decisions referred to in the reference order dated 28.12.2019, which lies in a very narrow compass, as noticed in para 6(i) above. In Chuni Lal's case, the decision rendered in Bar Chand's case was held to be per incuriam. The decision in Chuni Lal's case was based upon interpretation of F.R. 56(e) as it existed in the State at that time. But the judgment delivered in Tara Chand's case did not notice the decision in Chuni Lal's case. The judgment in Gian Singh's case in respect of continuation in service was based upon the verdict in Tara Chand's case. In both these judgments, learned Single Judges did not notice the judgment delivered in Chuni Lal's case. In Letters patent appeal, the Division Bench while affirming the judgment passed by the ld. Single Judge in Gian Singh's case though did not notice the judgment rendered in Chuni Lal's case however the amendment dated 10.5.2001 reducing the superannuation age from 60 to 58 years was held to be not applicable to the writ petitioner, who was held entitled for regularisation prior to 10.5.2001.

(ii). Inconsistency between Bar Chand and Chuni Lal now stands, not just resolved, but rather dissolved, in view of notification dated 21.02.2018 amending F.R. 56(e), issued by the State, which has now reinforced and reiterated what was held in Bar Chand's case, i.e. date of regularization of a

class IV daily wager whether prior or after 10.05.2001, will make no difference to the age of his continuing in service. It is the date of engagement, which is the decisive factor. If date of engagement/appointment is prior to 10.05.2001, the Class-IV employee will continue to serve till 60 years of age. In case, it is later than 10.05.2001, then restriction in age upto 58 years will apply.

(iii). There cannot be any discrimination amongst similarly situated Class-IV employees belonging to one homogenous class. Therefore the retirement date, of such of those employees, who had been engaged on daily wage basis prior to 10.05.2001, but regularized after 10.05.2001 and have actually been retired prior to the issuance of notification dated 21.02.2018 at the age of 58 years, shall be deemed to be the date when they otherwise attained the age of 60 years. Since these employees have not actually worked beyond the age of 58 years, therefore, they will not be entitled to the actual monetary benefits of wages/salary etc. for the period of service from the date of their actual retirement till deemed dates of their retirement. However, they will be entitled to notional fixation of their pay for the period in question for working out their payable pension and payment of consequential arrears of pension accordingly.

Reference is accordingly answered. The writ petitions be now placed appropriately before the respective Benches.

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

Between: -

SHRI JAGDISH RAI GUPTA,
ASSISTANT ENGINEER (RETIRED)
SON OF SHRI KOORA RAM AGGARWAL,
R/O AGGARWAL NIWAS,
CHAKKAR, SHIMLA-171005.

……PETITIONER

(BY SH. H.K. PAUL, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH,
   THROUGH;
   (i) THE CHIEF SECRETARY TO
   THE GOVERNMENT OF HIMACHAL PRADESH,
   SHIMLA -171 002.
   (ii) THE PRINCIPAL SECTETARY
   (IRRIGATION AND PUBLIC HEALTH DEPARTMENT),
   TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-2.

2. THE SENIOR DEPUTY ACCOUNTANT
   GENERAL, (A&E), HIMACHAL PRADESH,
   SHIMLA, OFFICE OF THE ACCOUNTANT
   GENERAL, HIMACHAL PRADESH, SHIMLA-3.

...RESPONDENTS

(BY SH. ASHWANI SHARMA,
ADDITIONAL ADVOCATE GENERAL,
FOR THE RESPONDENTS/STATE).

(BY SH. LOKINDER PAUL THAKUR, ADVOCATE,
FOR RESPONDENT NO.2)

CIVIL WRIT PETITION ORIGINAL APPLICATION
No. 2762 OF 2020
Decided on: 24.02.2022

Constitution of India, 1950- Article 226- Petitioner has sought revised pay scales in accordance with the revised pay rules and senior pay scale of Rs.14300-18150 after completion of 14 years of service as Assistant Engineer and further revised pension- Representation of petitioner rejected by the Competent Authority- Held- Petitioner cannot be held entitled for financial benefits allowed to its employees by the Government of Himachal Pradesh after the date on which petitioner retired unless retrospectivity was attached-

There is nothing on record to show that any such retrospectivity was allowed by respondent No. 1 – Petitioner can be said to have a claim only to revised pension- Petitioner cannot claim negative parity, which is impermissible under the Article 14 of the Constitution of India- Petition dismissed. (Paras 9, 10, 11 & 12)

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

ORDER

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

"(i) The respondents may kindly be directed to place the applicant in the revised pay scales in accordance with the Revised Pay Rules (Annexure A-1) and in the senior pay scale of Rs.14300-18150/- after completion of 14 years of service as Assistant Engineer and revise his pension with effect from 01.01.1996 with all consequential benefits, arrears of pension etc.

(ii) Respondents may kindly be directed to pay the arrears of pension and retirement benefits with interest @ 18% per annum.

(iii) The action of the respondents and their order dated 17.7.2017 (Annexure A-6) denying the relief prayed for by the applicant may kindly be quashed and set-aside."

2. Petitioner has filed the petition on the premise that though he retired from the post of Assistant Engineer in the department of Irrigation & Public Health, Government of Himachal Pradesh, on 30.04.1994 after rendering more than 16 years 7 months service, he was entitled to post retiral financial benefits viz., the fixation of pay in revised pay scale of Rs.14300 – 18150 w.e.f. 01.01.1996 and revised pension on the basis of such revised scale. Petitioner also claimed the benefits of Assured Career Progression

Scheme (ACPS) introduced by the Government of Himachal Pradesh after the date of his retirement.

3. As per the averments made in the petition, petitioner was appointed as Junior Engineer on 15.10.1958 in the then composite department of Himachal Pradesh Public Works Department (for short 'HPPWD') and Irrigation and Public Health Department (for short 'I&PH Department'). Petitioner retired as Assistant Engineer on 30.04.1994 from the I&PH Department as there was bifurcation of departments into HPPWD and I&PH w.e.f. 01.01.1994. Petitioner at the time of retirement was drawing pre-revised pay scale of Rs.3000 – 4500. According to petitioner, as per pay scales revised w.e.f. 01.01.1996, petitioner was entitled for pay scale of Rs.14300 – 18150, as was admissible to the Assistant Engineers having rendered 14 years of service.

4. Petitioner also claimed that he became entitled to the benefits of ACPS introduced by the Government of Himachal Pradesh w.e.f. 23.06.2000 and subsequently on 27.08.2009. Petitioner also staked claim to the benefit of step-up in the pension on the basis of office memorandum dated 21.5.2013, Annexure A-4, issued by the Government of Himachal Pradesh.

5. Petitioner filed Original Application No.4185 of 2016 before the erstwhile Tribunal on the identical pleas as raised herein, which was disposed of on 19.04.2017 in the following terms:

> *"3. There will be a direction to the respondent through the Principal Secretary (IPH) to the Government of Himachal Pradesh to consider and take a decision on the representation dated 25.09.2015, Annexure A-12, of the applicant in accordance with law within four weeks from today. The applicant shall produce a certified copy of this order as well as a copy of representation before the respondent within a week."*

6. The representation dated 25.09.2015 submitted by the petitioner was decided by the competent authority, in pursuance to order dated

19.04.2017 passed in O.A. No. 4185 of 2016, on 17.07.2017 and the claim of the petitioner was rejected. Thereafter, the petitioner has preferred the present petition.

7. Respondent No.1 has contested the claim of the petitioner broadly on the grounds that since the petitioner had retired on 30.04.1994, he was not entitled to any benefit allowed, to the employees of Government of Himachal Pradesh holding similar post, after the date of retirement of the petitioner. The pension of the petitioner w.e.f. 01.01.1996 was fixed on the basis of pay scale of Rs.10025 -15100 which was corresponding to pre-revised pay scale of Rs.3000 – 4500 held by the petitioner on the date of the retirement. The allegation of the petitioner that certain other Assistant Engineers, who had retired before 01.01.1996 were allowed the pay scale of Rs.14300 -18150 and were being paid pension on such basis has been stated by respondent No.1 to have been wrongly granted. As per the specific case of respondent No.1, the benefits so granted to certain ineligible persons were in the process of being withdrawn.

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

9. The core question that arises for determination is whether the petitioner can be held entitled for financial benefits allowed to its employees by the Government of Himachal Pradesh after the date on which petitioner retired? In our considered view the answer is in negative. Unless the retrospectivity was attached to the financial benefits allowed to the Assistant Engineers working with the Government of Himachal Pradesh after the date of retirement of petitioner, the benefits so allowed could not be claimed by the petitioner. There is nothing on record to show that any such retrospectivity was allowed by respondent No.1. On a pointed query to the learned counsel representing the petitioner regarding any legal basis for the claim of petitioner,

he has not been able to rely upon any legal principle or precedent to support the claim of the petitioner.

10. Further, the petitioner can be said to have a claim only to the revised pension w.e.f. 01.01.1996 based on revised pay scale of Rs.10025 – 15100 (pre-revised pay scale of Rs.3000 – 4500) which is said to have been granted to the petitioner. Respondent No.1 has specifically maintained that petitioner was drawing basic pay of Rs.3800/- in the pay scale of Rs.3000 – 4500 (pre-revised) on completion of 8 years of service and his pension was fixed at Rs.1970/- which was revised from time to time with corresponding pay scales revised in 1996 (Rs.10025 -15100) and 2006 (Rs.15600-29100+6600) and accordingly, the pension of petitioner has rightly been fixed at Rs.12625/- w.e.f. 01.01.2006. This factual aspect has not been denied by petitioner. That being so, petitioner cannot be allowed to claim more than permissible pensionary benefits.

11. As regards the allegation of the petitioner that some similarly situated persons, who had retired prior to 01.01.1996 from the service of Government of Himachal Pradesh, were granted the benefit of pension on the basis of revised pay scale of Rs.14300-18150 w.e.f. 01.01.1996, respondent No.1 has taken specific stand that such benefit was wrongly allowed to some persons and steps were already initiated to withdraw the benefits so granted. On this score, no legal right can be claimed by petitioner firstly for the reasons that respondent No.1 after realizing the mistake has taken steps to withdraw the benefits wrongly allowed to certain persons and secondly, the petitioner cannot claim negative parity, which is impermissible under Article 14 of the Constitution of India.

12. In the light of above discussion, we find no merit in the instant petition and the same is accordingly dismissed, so also the pending applications, if any.

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

FAO (WCA)NO. 313 OF 2011

Between:

SH. SHAM MAHANAN SON OF SHRI CHUNI LAL MAHAJAN SOLE PROPRIETOR OF M/S NATIONAL CONSTRUCTION CO. HOUSE NO.688, SECTOR 16, PANCHKULA

APPELLANT

(BY MR. J.S BHOGAL, SR. ADVOCATE WITH MR. TARUNJEET SINGH BHOGAL, ADVOCATE).

AND

1.SHRI GIRI RAJ SON OF SHRI GEETA RAM RESIDENT OF VILLAGE SUNIL RUG, P.O LAGDAGHAT TEHSIL NALAGARH, DISTRICT SOLAN,HP.

...RESPONDENT

2.THE EXECUTIVE ENGINEER NALAGARH DIVISION, HPPWD NALAGARH, DISTRICT SOLAN.

MR. JIA LAL BHARDWAJ, ADVOCATE FOR R-1

....PROFORMA RESPONDENT

MS. RAMEETA RAHI, ADDITIONAL ADVOCATE GENERAL WITH MR.RAJU RAM RAHI, DEPUTY ADVOCATE GENERAL FOR R-2

2. FAO (WCA) NO. 442 OF 2011

SHRI GIRI RAJ SON OF SHRI GEETA RAM
RESIDENT OF VILLAGE SUNIL RUG, P.O
LAGDAGHAT TEHSIL NALAGARH, DISTRICT
SOLAN,HP.

APPELLANT

(BY MR.JIA LAL BHARDWAJ, ADVOCATE)

AND

1.SHAM MAHANAN SON OF SHRI CHUNI LAL
MAHAJAN SOLE PROPRIETOR OF M/S NATIONAL
CONSTRUCTION CO. HOUSE NO.688, SECTOR 16,
PANCHKULA,HARYANA

2.THE EXECUTIVE ENGINEER, HIMACHAL
PRADESH PUBLIC WORKS DEPARTMENT
ARKI,TEHSIL ARKI, DISTRICT SOLAN ,HP.

(MR. J.S BHOGAL, SR. ADVOCATE WITH
MR. TARUNJEET SINGH BHOGAL,
ADVOCATE, FOR R-1

RESPONDENTS

MS. RAMEETA RAHI, ADDITIONAL
ADVOCATE GENERALS WITH
MR.RAJU RAM RAHI, DEPUTY
ADVOCATE GENERAL FOR
R-2.

FIRST APPEAL FROM ORDER NO.313 of 2011
WITH FIRST APPEAL FROM ORDER No. 442 of 2011
Decided on: 21.2.2022

Employees Compensation Act, 1923- Section 30- Appeal- While working as Drillman with H.P. Public Works Department employee suffered 30% disability on account of injury in an accident on the workplace resulting loss of 100% earning capacity and compensation determined @ 30% loss of earning by Commissioner is erroneous- Held- It cannot be said that the employee has

become completely unfit for any kind of job- No merit in appeals and accordingly appeals are dismissed.

Cases referred:

Beli Ram Vs. Rajinder Kumar (2010) ACJ 1653;

Divisional Forest Officer, Karsog vs. Budhi Singh 2006 ACJ 1851;

Jaya Biswa & others vs Branch Manager, Iffco Tokio General Insurance Company Limited and another (2016) 11 SCC 201;

Krishna Devi & others vs Harjit Singh and another 2018(3)Him.L.R (HC)1618;

New India Assurance Company Limited vs Jagdish Ram and another (2007) ACJ 806;

Raju vs Sardar Jasbir Singh, Latest HLJ 2008 (HP) 1478;

Saberabibi Yakubbhai Shaikh and others vs National Insurance Company Limited and others in (2014) 2 S.C.C 298;

Sunita Devi vs. Shanti Devi and others Latest HLJ 2009 (HP)596;

This appeal coming on for orders this day, the Court delivered the following:

JUDGMENT

These appeals, arising out of common order dated 09.06.2011 passed by the Commissioner Employee's Compensation, Court No.2, Nalagarh, District Solan, H.P. (hereinafter shall be referred as ' Commissioner' for convenience) in Claim Petition No. 8/2/2011/2003 titled as Giri Raj Vs. Sham Mahajan and another, are being decided by this common judgment, as common questions of facts and law are to be appreciated on the basis of common evidence on record for determining the substantial questions of law framed at the time of admission of these appeals.

2. FAO No. 313 of 2011 has been preferred by the employer-respondent (hereinafter shall be referred as 'employer' for convenience). In this appeal, following substantial questions of law have been framed at the time of admission on 6.09.2011:

> 1. "Whether learned Commissioner could have awarded compensation assuming a loss of earning capacity of 30% even

in absence of any evidence to that effect and in the face of the medical evidence to
suggest that the disability to the whole body was only 15% ?
2. Whether learned Commissioner could have imposed any penalty without conducting any separate proceedings to determine the liability of the appellant to pay such penalty and without affording the appellant opportunity to show cause against the same?"

3. FAO No. 442 of 2011 has been preferred by the claimant-employee(hereinafter shall be referred as 'employee' for convenience). In this appeal following substantial question of law has been framed at the time of admission on 03.04.2012:

1. Whether learned Commissioner is right in assessing the compensation taking 30% disablement of the appellant, especially when 30% disability of the appellant who was a workman doing the avocation of a Drill man/Labourer was 100% qua his earning capacity ?
2. Whether learned Commissioner is right in holding that there is no evidence of loss of earning capacity more than disablement in view of the evidence led by the appellant that after the accident he is unable to do any hard work which evidence has not been rebutted by the respondents?"

4. Claim of the employee is that while he was working as Drillman with employer for construction of road at a work being executed by the employer for H.P. Public Works Department, he received injury on 19.08.2008 in an accident occurred on the work place causing 30% disability to him resulting loss of 100% earning capacity and therefore, compensation determined @ 30% loss of earning by the Commissioner is erroneous and instead it deserves to be increased by calculating on the basis of 100% loss of earning capacity.

5. Claim of employer is that there is no evidence of loss of 30% earning capacity, much less 100%, and, therefore, compensation awarded to

the employee is on higher side as it has come in evidence of PW-1 Dr. Anil Bansal that overall disability of body shall be counted as 15% in total, and also the penalty imposed on the employer is also liable to be set aside as it has been imposed without granting any opportunity to the employer to show cause.

6. So far as employee and employer relationship is concerned, that stands determined by this Court in judgment dated 22.09.2010 passed in FAO No. 423 of 2005 titled as Giri Raj versus Sham Mahajan and another in earlier round of litigation between parties in this Court. Thereafter, vide aforesaid judgment the claim petition, which was earlier dismissed by the Commissioner by holding that there was no employee and employer relationship, was remanded back to the Commissioner for deciding afresh.

7. Learned counsel for the employee has submitted that disability of the employee stands proved in the statement of PW-1 Dr. Anil Bansal, who, in his cross-examination, has stated that the employee can walk but he would face difficulty in movement. Further, deposition of claimant PW-3 Giri Raj, in his examination-in-chief, that he is unable to do any hard work, has also not been disputed in the cross-examination and, therefore, the same stands admitted and therefore, there is sufficient evidence on record to establish that there is loss of 100% earning capacity.

8. Learned counsel for the employee has placed reliance upon the judgment dated 15.03.2019 passed by a Coordinate Bench of this Court in FAO No. 336 of 2018 titled as **Prakash Chand Vs. Babu Ram and others**, wherein for 30% disability of the claimant, 100% disability qua his earning capacity was taken into consideration for determining the compensation. Learned counsel for the employee has also placed on record a photocopy of order passed by the Apex Court on 29.07.2019 in **Prakash Chand's** case, whereby SLP preferred. by the Insurance Company against the said judgment was dismissed.

9. Learned counsel for the employee has also referred pronouncements of various Courts in **New India Assurance Company Limited versus Jagdish Ram and another** reported in **(2007) ACJ 806,Raju versus Sardar Jasbir Singh reported in latest HLJ 2008 (HP) 1478, Divisional Forest Officer, Karsog versus Budhi Singh** reported in **2006 ACJ 1851,Sunita Devi vs. Shanti Devi and others** reported in **Latest HLJ 2009 (HP)596, Beli Ram Vs.Rajinder Kumar** reported in **(2010) ACJ 1653**, **Saberabibi Yakubbhai Shaikh and others versus National Insurance Company Limited and others in (2014) 2 S.C.C 298, Jaya Biswal & others versus Branch Manager, Iffco Tokio General Insurance Company Limited and another** reported in **(2016) 11 SCC 201** and **Krishna Devi & others versus Harjit Singh and another** reported in **2018(3)Him.L.R (HC)1618.**

10. Learned counsel for the employer has referred to the statement of PW-1 Dr. Anil Bansal, wherein in cross-examination he has stated that the disability of entire body is to be counted about 15% and pointing out further that the doctor is silent about the percentage of loss of earning capacity and further that PW-3 Giri Raj in his statement has no-where claimed that he had suffered loss of 100% earning capacity.

11. Learned counsel for the employer has also submitted that as the employer had not admitted employee and employer relationship, there was no question of making payment of any amount to the employee immediately after the alleged accident or within one month thereafter and it is for the judgment passed by this High Court that relationship of employee and employer has been considered to have been established in the year 2010 and, therefore, imposition of penalty by the Commissioner, where relationship of employee and employer was in dispute, is not only erroneous, but against the law.

12. Claims and counter-claims raised in these appeals, by the parties herein, are to be determined on the basis of evidence on record,

particularly statement PW-1 Dr. Anil Bansal and PW-3 Giri Raj, and considering the disability certificate Ext.P-1.

13. Quantum of compensation under Employee's Compensation Act is to be determined on the basis of loss of earning capacity. It is settled law that loss of earning capacity can be greater than or lower than the disability, permanent or temporary, suffered by an employee in accident, depends on the avocation of the victim/injured and effect of disability thereon. Therefore, normally, percentage of disability of the body or any limb cannot be a basis for determining the loss of earning capacity in all cases. It may or may not be relevant for deciding the quantum of loss of earning capacity in given facts and circumstances.

14. In present case, in Medical Certificate Ext.P-1, Medical Board has determined permanent locomotor impaired disability of 30% lower leg. But, percentage of loss earning capacity has not been determined in this certificate. PW-1 Dr. Anil Bansal was Member of Board which has issued the certificate, but in his examination-in-chief, he has only stated that during check-up of the employee, he was found to have suffered 30% disability. In his cross-examination he has stated that total disability of the body would be counted about 15%. He has further stated that the patient can move but he would suffer difficulty in that. In the statement of doctor, no specific averment with respect to loss of earning capacity has come on record. PW-3 Giri Raj in his examination-in-chief, has stated that he remained admitted, for his medical treatment, in Government Hospital, Bilaspur and thereafter he remained under treatment from I.G.M.C. Shimla, and further, that accident was reported to the police. A copy of report recorded by the police is Ext.PW-2/A. Thereafter, he has also stated that he has studied up to 5th class only and he is not able to do hard work. In his cross-examination, he has stated that he is not having any certificate or Diploma of Drillman,and neither before 19th July, 2010 nor thereafter he had worked as a Drillman, but he has also

stated that he was having experience of working as a Drillman. However, no document or any other evidence has been brought on record to establish that he was having any experience of working as a Drillman. In normal course, it would have been considered that he had been working as Drillman with employer since long or was having experience of working as such. However, for his own admission that he had not worked as a Drillman prior or after 19.07.2010 creates a doubt about his claim of having experience as a Drillman, more particularly keeping in view his age of less than 17 years

15. Judgment in **Prakash Chand's case,** referred on behalf of employee, wherein 30% disability of body was considered sufficient for loss of 100% earning capacity, is not strictly applicable in the present case as in that case it had come in evidence that the petitioner therein was a Driver by profession and 30% disability of right lower limb had rendered him incapable of driving the vehicle, as in driving, there is active role of right lower limb also and thus, keeping in view the avocation of the petitioner therein, and the injury suffered by him, it was concluded that he was not fit for driving after accident, after suffering 30% disability of lower limb. Therefore, compensation was determined on the basis of 100% loss of earning. In present case, avocation of the petitioner, at the most, is Drillman and there is no positive evidence on record to establish that he has become unfit to work as a Drillman or even as a Labourer. However, for the nature of work of a Labourer and Drillman, it can be presumed that a person with 30% permanent disability of left lower limb would definitely be in difficultly for performing his work as a Labourer or Drillman with full efficiency. But at the same time, it is also a matter of record that the employee has not stated in so many words that he is unfit for doing any kind of work or labour work.

16. Similarly in case **New India Assurance Company Limited versus Jagdish Ram and another** reported in **(2007) ACJ 806,** there was evidence on record that the driver of the truck, having sustained 30 per cent

permanent disablement in his leg, was no longer able to drive any vehicle and, therefore, he was held entitled to compensation for total loss of earning capacity. In case of **Raju versus Sardar Jasbir Singh,** reported in **Latest HLJ 2008 (HP) 1478,** also there was disability to the extent of 45% on both the lower-limbs and it was proved by the doctors that claimant was not able to perform the work of conductor, driver or labourer any more and he was not able to perform any job and thus loss of earning, for 45% disability on both lower limbs, was considered as 100%. But the evidence in present case is not like that.

17. From the evidence on record, it cannot be said that the employee has become completely unfit for any kind of job. Undoubtedly, working as a Drillman he would have got remuneration much more than a normal labourer. But at the same time, it is also fact that he was not having any certificate or Diploma of handling the drill machine at relevant point of time. However, it can also not be ignored that at the time of accident, employee was of less than 17 years and thus there was always a probability of gaining experience or obtaining Diploma/certificate by him, with passage of time, to handle the drill machine. It is also a fact that at the time of accident though he was working as a skilled man, but he was an unskilled labour. For want of any contrary evidence on record, it can be presumed that he is able to work as a labourer. It is also claim of the employee that he is unable to do hard work which has not been questioned in cross-examination, but at the same time, no where he has stated that he cannot do any work at all.

18. In Chapter 22 of the Himachal Pradesh Development Report published by Planning Commission, Government of India, in Chapter 22.3, it has been published that average daily rate of unskilled labourer in 2000-01 was Rs.89.83/- say Rs.90.00/- and average daily rate of skilled workman was 153.04 say Rs.153/-. It is claim of the employee that he was getting wages @150/-, which is nearer to the average daily wage rate of a skilled workman

published by the Finance Commission, Government of India at relevant time. Even if it is considered that the employee is not able to work as a Drillman, then also, on the basis of the evidence on record, it cannot be construed that he is totally unfit for doing any kind of labour work. He can definitely perform the job of simple labourer. In such an eventuality, loss which would be suffered by him would be 150-90=60/- which is 40% of 150/-.

19. Undoubtedly, for the permanent disability suffered by the employer, he has suffered loss of earning capacity but percentage of loss of earning has not been referred or questioned either in certificate or in statement of PW-1 Dr. Anil Bansal, rather in cross-examination PW-1 has stated that over all disability to body would be 15%. At the same time, he has also stated that employee shall face difficulty in movement. For such kind of evidence i.e disability certificate as well as deposition of PW 1 Dr. Anil Bansal, the Commissioner has rightly determined the loss of earning capacity @30%. I do not find any material on record to interfere in the findings returned by the Commissioner in this regard.

20. So far as the imposition of penalty is concerned, relationship of employee and employer stands determined by the High Court in FAO No. 423 of 2005 filed earlier by the employee. The said findings have not been assailed by the employer and, therefore, for such established relationship, the employer was duty bound to pay the compensation or atleast some amount of compensation which, according to him, was payable to the injured employee at the time of accident or at the most within one month thereafter in consonance with and in compliance of provisions of the Act. But the employer even after passing of judgment by the High Court in FAO No. 423 of 2005, whereby relationship of employer and employee was decided to be in existence, the employer has failed to pay any amount within reasonable period which delayed the payment of compensation of the employee.

21. **In case Divisional Forest Officer versus Budhi Singh** reported in **2006 ACJ 1851** employer-State, despite having knowledge of death of work-woman and her wages, had failed to deposit the compensation as soon as it was payable. Therefore, penalty imposed by the Commissioner on the employer-State was upheld by learned Single Judge of this High Court.

22. In case **Sunita Devi vs. Shanti Devi** reported in **Latest HLJ 2009 (HP) 596,** learned Single Judge of this High Court has held that as employer was fully aware about the case of the claimants including prayer for imposition of penalty, therefore, no separate show cause notice was required to be issued for imposition of penalty at the time of determination of the amount of compensation and penalty by the Commissioner. Therefore, I find no ambiguity, illegality or irregularity in imposition of penalty also.

23. In case **Saberabibi Yakubbhai Shaikh and others versus National Insurance Company Limited and others in (2014) 2 S.C.C 298,** referred on behalf of employee, it was held that claimants were entitled for 12% interest from the date of accident. In present case though no substantial question of law, with respect to rate of interest and date from which it is payable, has been framed, however, the Commissioner has already awarded interest at the rate of 12% from the date of accident. Therefore, this judgment has no relevance.

24 Pronouncements in cases **Beli Ram Vs. Rajinder Kumar** reported in **(2010) ACJ 1653** and **Krishna Devi & others versus Harjit Singh and another** reported in **2018(3)Him.L.R (HC)1618** have been referred for taking into consideration the wages of the employee as claimed on his behalf before the Commissioner, by contending that neither employer nor employee has produced any documentary evidence in this regard, whereas, as also observed by the Supreme Court in case titled as **Jaya Biswa & others versus Branch Manager, Iffco Tokio General Insurance Company Limited and another** reported in **(2016) 11 SCC 201,** it was duty of the employer to

maintain the Register and records of wages as provided under Section 13-A of the Payment of Wages Act 1936. No substantial question of law has been framed in this regard also. However, it is also apt to record that in present case the employee has claimed his wages at the rate of Rs. 150 per day and for calculation of amount of compensation, his wages have been taken as claimed by him at the rate of Rs.150/-per day.

25. Substantial questions of law framed in both these appeals are answered in aforesaid terms.

26. In view of above discussion, I find no merit in both these appeals and accordingly same are dismissed, so also the pending application(s), if any.

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

Between:-

1. STATE BANK OF INDIA
HAVING ITS CENTRAL OFFICE
IN NEW ADMINISTRATIVE BUILDING
MADAM CAMA ROAD, BACK-WAY
RECLAMATION, PO BOX NO. 12,
MUMBAI-400021, AND ONE OF
THE BRANCHES AT NEW SHIMLA
H.P. THROUGH SHRI JAGDISH CHAND
CHIEF MANAGER.

2. ASSISTANT GENERAL MANAGER,
STATE BANK OF INDIA,
REGION-II, ZONAL OFFICE,
SHIMLA, H.P.

….APPELLANTS

(SH. K. D. SOOD, SR. ADVOCATE WITH SH. RAHUL PATHANIA, ADVOCATE)

AND

1. PUJA WIFE OF SHRI MAKHAN SINGH,
RESIDENT OF BLOCK NO. A-17,
SECTOR 23, SDA COLONY,
VIKAS NAGAR, SHIMLA-9.

2. (DELETED VIDE ORDER DATED 12.6.2012)

....RESPONDENTS

(SH. SHASHI BHUSHAN, ADVOCATE, FOR R-1).

LETTERS PATENT APPEAL No. 258 OF 2012
Reserved on:22.2.2022
Date of decision: 26.2.2.2022

Industrial Disputes Act, 1947- Sections 10 and 25F- Challenge has been laid to the judgment passed by the Single Judge whereby award passed by Ld. Presiding Officer, Central Government-cum-Industrial Tribunal-1, Chandigarh, holding the retrenchment of respondent herein to be bad in law and directing the appellants herein to reinstate the workman with all consequential benefits, has been affirmed- The workman worked continuously on daily wages for more than 5 years- The service rendered by the workman to the Bank initially for 5 years and after passing of the award by Ld. Tribunal again for continuous period of more than 11 years, is definitely a circumstance to uphold the order of reinstatement in favour of the workman- No merits in appeal- Appeal dismissed.

Cases referred:

BSNL vs. Bhuru Mal, 2014 (7) SCC 177;
District Development Officer & another vs. Satish Kantilal Amrelia, (2018) 12 SCC 298;
District Development Officer & another vs. Satish Kantilal Amrelia, (2018) 12 SCC 298;
G.M., B.S.N.L and ors vs. Mahesh Chand, 2008 (3) SLR, 105;
Senior Superintendent Telegraph (Traffic), Bhopal vs. Santosh Kumar Seal and others, 2010 (6) SCC 773;
Uttrakhand & another vs. Raj Kumar 2019 (14) SCC 353;

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

J U D G M E N T

Heard.

By way of instant Letters Patent Appeal, challenge has been laid to the judgment dated 29.3.2012 passed by the learned Single Judge in CWP No. 663 of 2011, whereby the Award dated 7.9.2010 passed by learned Presiding Officer, Central Government-cum-Industrial Tribunal-I Chandigarh in Case No. ID-3/2007(for short, "Tribunal") holding the retrenchment of respondent herein to be bad in law and directing the appellants herein to reinstate the workman with all consequential benefits, has been affirmed.

2. Appellants and Respondent herein shall be referred to as the Bank and workman respectively for the sake of convenience.

3. A glance at the factual background of the case reveals that the workman raised an Industrial Dispute under the Industrial Disputes Act 1947 (for short 'the Act') against the Bank. It was alleged that workman remained in continuous employment with New Shimla Branch of the Bank w.e.f 9.6.2000 till 29.7.2005, on payment of Rs. 50/- as daily wage. She was not allowed to work w.e.f. 29.7.2005 and her services were terminated without any prior notice or salary in lieu thereof, therefore, the workman alleged her retrenchment to be in violation of Section 25-F of the Act.

4. On 22.1.2007, appropriate Government referred the dispute, under Section 10 of the Act, to the Tribunal for adjudication in following terms:-

> "Whether the action of the management of State Bank of India, Shimla in terminating the services of Smt. Pooja, Part Time Sweeper w.e.f. 29.7.2005 is illegal and unjustified? If so, to what

relief the concerned workman is entitled to and from which date?"

5. The Bank did not specifically deny the averment with respect to engagement of workman in the Bank since 9.6.2000. However, the relationship of employer and employee with the workman was denied. It was stated that the workman was, in fact, employed by a contractor, who was awarded a contract to install, operate and maintain a generator set in the concerned branch of the bank. The said contract was stated to have commenced in August, 2002. It was further maintained by the management that the contractor was to be paid Rs. 8200/- per month by the bank and on the asking of the said contractor, a sum of Rs. 700/- per month was being paid to the workman, who was employed to operate the generator set by the contractor. On one hand, the management had taken a specific stand, as noticed above, on the other, the management simultaneously pleaded that the services of the workman were availed by the branch of the bank as casual labour to perform the work of sweeping and cleaning the branch on few occasions only before commencement of the business hours and she was paid for the same on daily basis as and when, she was engaged as such.

6. Learned Tribunal on the basis of material on record including the evidence led by the parties found the defence raised by the management as fallacious. The workman was held to be in continuous employment of the bank from 9.6.2000 to 29.7.2005. The termination of workman was held to be in violation of Section 25-F of the Act. The management was directed to reinstate the workman with all consequential benefits.

7. Learned Single Judge of this Court, while deciding the challenge raised by the bank to the award passed by the Tribunal, held findings and conclusions recorded by the learned Tribunal to be in accordance with the

material on record and thus, affirmed the award impugned by way of CWP No. 663 of 2011.

8. Perusal of the grounds raised by the appellants in the instant Appeal reveal that the judgment passed by the learned Single Judge as well as Award passed by the learned Tribunal have been assailed being not inconformity with the material on record. The impugned judgment passed by the learned Single Judge has been challenged broadly on the ground that the relationship of employer and employee has wrongly been held to exist between the bank and the workman, whereas the workman was proved to be the employee of the contractor. However, at the time of hearing, an argument has been raised in alternative that in any case, the relief of reinstatement in favour of the workman was not warranted. Sh. K. D. Sood, learned Senior Advocate representing the bank has placed reliance on judgments passed in ***G.M., B.S.N.L and ors vs. Mahesh Chand, 2008 (3) Services Law Reporter, 105, Senior Superintendent Telegraph (Traffic), Bhopal vs. Santosh Kumar Seal and others, 2010 (6) SCC 773, District Development Officer & another vs. Satish Kantilal Amrelia, (2018) 12 SCC 298 and Ranbir Singh vs. Executive Engineer, PWD, Civil Appeal No. 4483 of 2010, decided on 2.9.2021***.

9. The specific case of workman, as pleaded, that she was employed w.e.f. 9.6.2000 in the New Shimla Branch of the bank was neither denied nor otherwise rebutted by the bank hence, such fact was impliedly admitted. On the contrary, the bank raised the plea that the workman was employee of the contractor with whom the contract for installation of generator set had come into being in August, 2002. The bank, however, admitted that workman was occasionally assigned the sweeping and cleaning work on need basis and was paid Rs. 50/- per day for such job, which was being paid to her in addition to Rs. 700/- per month as Generator set attendant by deducting the same from payable amount to the contractor as per contract. Thus, there was a clear

admission of the bank to the effect that the workman was being paid Rs. 50/- as daily wage for sweeping and other office works assigned to her from petty cash. It was not the case of the bank that its concerned branch had some other incumbent for the job of sweeping and cleaning. It is hard to believe that a branch of State Bank of India that too in a thickly populated area of town would remain without sweeping and cleaning for days together. Viewed in aforesaid perspective adverse inference is liable to be drawn against the bank for not having produced best evidence to prove from its records actual payments made to the workman. Even otherwise, the stand of the bank regarding casual deployment of workman to sweep and clean the branch has been belied by the cross-examination of bank's witness before the learned Tribunal. That being so, we do not find any reason to take a view different from the one taken by the learned Tribunal and by the learned Single Judge, as regards the nature and period of employment of the workman with the bank.

10. The argument raised on behalf of the appellants to the effect that the order of reinstatement with all consequential benefits was not warranted in the facts of the present case, in our considered view, is also liable to be rejected for the reasons detailed hereinafter.

11. In **G.M., B.S.N.L and ors vs. Mahesh Chand, 2008 (3) Services Law Reporter, 105,** the question considered was whether the workman had worked continuously for 240 days in a calendar year and on whom the onus rested to prove such fact? In addition, their Lordships had rejected the claim of the workman by taking into consideration specific facts of the case by observing as under:-

> *"Additionally, the specific stand of the appellants in the proceedings before the Tribunal and the High Court was that there is no sanctioned post of Safaiwala. There is no finding recorded by the Tribunal or the High Court that this stand is incorrect. Further, the respondent is also not consistent as to the period for*

which he worked. At one place he said he was working for five hours each day and other places he had stated that he was working for 8 hours. On the contrary, the appellant with reference to the nature of work done categorically stated that on a part time basis depending on the need and requirement the respondent was engaged for 2 to 3 hours periodically. Interestingly, the work that was being done by the respondent was also being done by his wife and his mother. Sometimes, no order of appointment was admittedly issued to the respondent. This fact is mis-conceived. In view of the aforesaid factual scenario, the award made by the Tribunal as affirmed by learned Single Judge and the Division bench cannot be sustained and is set aside. The appeal is allowed with no order as to costs."

The facts and propositions discussed in the above noted judgment are thus clearly distinguishable from the facts of the instant case.

12. In **Senior Superintendent Telegraph (Traffic), Bhopal vs. Santosh Kumar Seal and others, 2010 (6) SCC 773**, Hon'ble Supreme Court declined the relief of reinstatement to the workman in the peculiar facts of the case by observing that the workmen were engaged as daily wagers about 25 years back and had worked hardly for 2 or 3 years. Noticing various past precedents, it was observed that the relief by way of reinstatement with back wages was not automatic even if termination of an employee was found to be illegal or in contravention of the prescribed procedure and that monetary compensation in lieu of reinstatement and back wages in case of such nature may be appropriate.

13. In **District Development Officer & another vs. Satish Kantilal Amrelia, (2018) 12 SCC 298**, the Hon'ble Supreme Court placed reliance on paragraphs 33, 34 and 35 of judgment passed in **BSNL vs. Bhuru Mal, 2014 (7) SCC 177**, which read as under:-

"33. It is clear from the reading of the aforesaid judgments that the ordinary principle of grant of reinstatement with full back wages, when the termination is found to be illegal is not applied

mechanically in all cases. While that may be position where services of a regular/permanent workman are terminated illegally and/or mala fide and/or by way of victimization, unfair labour practice, etc. However, when it comes to the case of termination of a daily-wage worker and where the termination is found illegal because of a procedural defect, namely, in violation of Section 25-F of the Industrial Disputes Act, this Court is consistent in taking the view that in such cases reinstatement with back wages is not automatic and instead the workman should be given monetary compensation which will meet the ends of justice. Rationable for shifting in this direction is obvious.

34. The reasons for denying the relief of reinstatement in such cases are obvious. It is trite law that when the termination is found to be illegal because of non-payment of retrenchment compensation and notice may as mandatorily required under Section 25-F of the Industrial Disputes Act, even after reinstatement, it is always open to the management to terminate the services of that employee by paying him the retrenchment compensation. Since such a workman was working on daily-wage basis and even after he is reinstated, he has no right to seek regularization [see State of Karnataka v. Umadevi (3). Thus when he cannot claim regularization and he has no right to continue even as a daily-wage worker, no useful purpose is going to be served in reinstating such a workman and he can be given monetary compensation by the Court itself inasmuch as if he is terminated again after reinstatement, he would receive monetary compensation only in the form of retrenchment compensation and notice pay. In such a situation, giving the relief of reinstatement, that too after a long gap, would not serve any purpose.

35. We would, however, like to add a caveat here. There may be cases where termination of a daily-wage worker is found to be illegal on the ground that it was resorted to as unfair labour practice or in violation of the principle of last come, fist go viz. while retrenching such a worker daily-wage juniors to him were retained. There may also be a situation that persons junior to him were regularized under some policy but the workman concerned terminated. In such circumstances, the terminated worker should

> *not be denied reinstatement unless there are some other weightly reasons for adopting the course of grant of compensation instead of reinstatement. In such cases, reinstatement should be the rule and only in exceptional cases for the reasons stated to be in writing, such a relief can be denied."*

The relief of compensation instead of reinstatement was allowed by their Lordships again having considered the specific facts of the case as under:-

> *"12. Having gone through the entire record of the case and further keeping in view the nature of factual controversy, the findings of the Labour Court, the manner in which the respondent fought this litigation on two fronts simultaneously, namely, one in the civil court and the other in the Labour Court in challenging his termination order and seeking regularization in service, which resulted in passing the two conflicting orders- one in the respondent's favour (Labour Court) and the other against him (civil court) and lastly, it being an admitted fact that the respondent was a daily wager during his short tenure, which lasted hardly two-and-half years approximately and coupled with the fact that 25 years have since passed from the date of his alleged termination, we are of the considered opinion that the law laid down by this Court in BSNL v. Bhurumal would aptly apply to the facts of this case and we prefer to apply the same for disposal of these appeals."*

14. Lastly, in **Ranbir Singh vs. Executive Engineer, PWD, Civil Appeal No. 4483 of 2010**, decided on 2.9.2021, the judgment passed by the Hon'ble Supreme Court in State of **Uttrakhand & another vs. Raj Kumar 2019 (14) SCC 353**, was relied, which itself had relied on paragraphs 33 to 35 of the judgment in *Bhurumal (supra).* Accordingly, their Lordships have been pleased to hold as under:-

> *"6. In the light of the state of the law, which we take note of, we notice certain facts which are not in dispute. This is a case where it is found that, though the appellant had worked for 240*

days, appellant's service was terminated, violating the mandatory provisions of Section 25F of the Act. The authority involved in this case, apparently, is a public authority. At the same time, it is common case that the appellant was a daily wager and the appellant was not a permanent employee. It is relevant to note that, in the award answering Issue No.1, which was, whether the termination of the appellant's service was justified and in order, and if not, what was the amount of back wages he was entitled to, it was found, inter alia, that the appellant would not adduce convincing evidence to establish retention of junior workers. There is no finding of unfair trade practice, as such. In such circumstances, we think that the principle, which is enunciated by this Court, in the decision, which is referred to in Raj Kumar (supra), which we have referred to, would be more appropriate to follow. In other words, we find that reinstatement cannot be automatic, and the transgression of Section 25F being established, suitable compensation would be the appropriate remedy.

7. In such circumstances, noticing that, though the appellant was reinstated after the award of the Labour Court in 2006, the appellant has not been working since 2009 following the impugned order, and also taking note of the fact that the appellant was, in all likelihood, employed otherwise, also the interest of justice would be best subserved with modifying the impugned order and directing that in place of Rs. 25,000/- (Rupees Twenty Five Thousand), as lumpsum compensation, appellant be paid Rs. 3.25 lakhs (Rupees Three Lakhs and Twenty Five Thousand), as compensation, taking into consideration also the fact that the appellant had already been paid Rs. 25,000/- (Rupees Twenty Five Thousand) as compensation."

15. Analysing the facts of instant case, in light of the exposition of law discussed hereinabove, it can safely be held to be falling in the zone of exception. The bank being a public sector undertaking, was expected to place on record true and correct facts. The stand of the bank that workman was not its employee and also having been deployed causally, as noticed above, is belied by record and proved otherwise. Considering the incorrect stand having

been taken by the bank, there is no hesitation to infer unfair labour practice having been applied by the bank. The workman was proved to have worked continuously on daily wage basis for more than five years. It is not the case of the bank that its concerned branch had a regular sweeper to sweep and clean the branch. It cannot be visualized that the branch of a bank, that too none else than State Bank of India, would not require service of a sweeper to clean and sweep the business place regularly. It is also unimaginable that the said branch of the bank would require the service of workman for the purposes of sweeping and cleaning occasionally. Thus, the conduct of the bank/management clearly proves its intent to ostensibly employ the workman on casual or temporary basis and to continue her as such for years with the object of depriving her of the status and privilege of permanent workman, which as per Clause-10 of the 5th Schedule of the Act amounts to unfair labour practice.

16. Further, the workman in the instant case was initially employed on 9.6.2000 and worked continuously till 29.7.2005 i.e. for more than five years. We have been informed at the time of hearing that the workman is still working in the bank, after passing of the award by the learned Tribunal. A perusal of order dated 23.2.2011, passed by a Division Bench of this Court in CWP No. 663 of 2011 reveals that operation of the impugned award was stayed on the condition that the bank would continue to engage the workman for the works for which, she was earlier engaged. While admitting the writ petition on 3.6.2011, the interim order dated 23.2.2011 was ordered to continue. Thus, the service rendered by the workman to the bank initially for five years and after passing of the award by the learned Tribunal again for continuous period of more than eleven years, is definitely a circumstance to uphold the order of reinstatement in favour of the workman or otherwise, it will really be harsh upon her to be left on road without any job after a period of 21 years of her initial employment with the bank, especially when she may

be at such a stage of life where she may not be able to secure another job and livelihood for her. The relief in terms of monetary compensation may not be appropriate in the given facts of the case.

17. In light of the above discussion, we find no merit in the instant appeal and the same is accordingly dismissed. Pending applications, if any, also stand disposed of.

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

Between

RAM LAL,
SON OF SHRI DHANI RAM,
R/O VILLAGE SHARAN, POST OFFICE DEORI,
TEHSIL ANNI, DISTRICT KULLU,
H.P.

.....PETITIONER

(BY SH. JIA LAL BHARDWAJ, ADVOCATE)

AND

KUMARI PRIYANKA (MINOR),
D/O SHRI RAM LAL WRONGLY STATED SO IN THE APPEAL,
R/O VILLAGE SHARAN, POST OFFICE DEORI,
TEHSIL ANNI, DISTRICT KULLU,
H.P.
THROUGH HER MATERNAL UNCLE SH. SUNIL THAKUR,
SON OF SH. PREM CHAND,
RESIDENT OF VILLAGE JAHROHAN,
POST OFFICE DEORI, TEHSIL ANNI,
DISTRICT KULLU,
H.P.

....RESPONDENT

(BY SH. TEJASVI VERMA, ADVOCATE)

CIVIL MISC. PETITION MAIN (ORIGINAL)
NO. 915 OF 2019
Decided on: 02.03.2022

Indian Evidence Act, 1872 – Section 112 – Legitimacy of child - DNA test - Plaintiff has not born out of legal wedlock of defendant with mother of the plaintiff rather he took birth on account of rape by defendant with the mother of the plaintiff for which defendant has been convicted but he is denying paternity of the plaintiff -- No other evidence much less better evidence, to determine the issue in suit, with certainty, would be available except DNA profiling test, as even presumption under section 112 of Indian Evidence Act is also not applicable in a case like present one - As the plaintiff was not born out of wedlock, therefore she is carrying stigma of an unwanted child born on account of rape committed by the defendant with her mother and in such circumstances determination of paternity by DNA profiling shall not cause any adverse impact on her stains rather it would be in her interest to know truth about her biological father as to entitle her to civil consequences - Petition dismissed. (Para 22, 28 & 29)

Cases referred

A. Andisamy Chettiar v. A. Subburaj Chettiar, (2015) 17 SCC 713;
Ashok Kumar v. Raj Gupta and others (2022) 1 SCC 20;
Banarsi Dass v. Teeku Dutta (Mrs.) and another, (2005) 4 SCC 449;
Bhawani Prasad Jena v. Convener Secretary Orissa State Commission for Women and another, (2010) 8 SCC 633;
Dipanwita Roy v. Ronobroto Roy, (2015) 1 SCC 365;
Goutam Kundu v. State of W.B., (1993) 3 SCC 418;
Gurdev Singh and another v. Mehnga Ram and another, (1997) 6 SCC 507;
Kamti Devi v. Poshi Ram, (2001) 5 SCC 311;
Maya v. Naresh Kumar, 2017(1) ShimLC 244;
Narayan Dutt Tiwari v. Rohit Shekhar and another, (2012) 12 SCC 554;
Shaik Fakruddin v. Shaik Mohammed Hasan and another, AIR 2006 Andhra Pradesh 48;
Sharda v. Dharmpal, (2003) 4 SCC 493;
Sunil Eknath Trambake v. Leelavati Sunil Trambake, AIR 2006 Bombay 140;

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

O R D E R

Respondent herein is plaintiff in a Civil Suit No.41-1 of 2013, filed by her in the Trial Court, seeking declaration that petitioner herein (defendant in the Civil Suit) is her biological father. For convenience, hereinafter the parties shall be referred to as 'plaintiff' and 'defendant', according to their status in the Civil Suit.

2. Plaintiff is not a child conceived and delivered out of a wedlock, but she was conceived on account of rape committed by defendant with her mother in June 2003, which was disclosed on 15.10.2003 during medical check-up of mother of plaintiff, who was minor at that time, and, resultantly, an FIR No.82 of 2003 was registered under Section 376 of Indian Penal Code (IPC) against defendant and after conclusion of trial therein, defendant was convicted under Section 376 IPC and the conviction was upheld by the High Court by dismissing the appeal preferred by the defendant.

3. Plaintiff was born on 1.3.2004. She had also filed an application under Section 125 of the Code of Criminal Procedure (for short 'Cr.P.C.'), through her maternal grandfather Prem Chand, against the defendant, for grant of monthly maintenance, wherein, on 27.10.2010, an application Cr.MA No.18-4 of 2011 was filed by defendant for obtaining blood samples of plaintiff as well as defendant for conducting DNA Test to ascertain paternity of the plaintiff. By referring to the pronouncements of the Supreme Court in **Goutan Kundu v. State of W.B., (1993) 3 SCC 418;** and **Sharda v. Dharmpal, (2003) 4 SCC 493,** the Judicial Magistrate First Class, Ani, had dismissed the said application on 12.5.2011. The said application was opposed on behalf of plaintiff by relying upon the aforesaid pronouncements of the Supreme Court. The Magistrate had observed that direction to the parties to undergo DNA Test for determining paternity of plaintiff would amount to nothing but would have

effect of branding the mother of plaintiff as an unchaste woman, which is not permissible to any Court.

4. Civil Suit filed by plaintiff has been dismissed by Civil Judge (Junior Division), Ani, on 1.11.2017, on the ground that there was no sufficient evidence to prove the case of plaintiff even to satisfy preponderance of probabilities. Against dismissal of the suit, plaintiff had preferred Appeal No.10 of 2018, which is pending adjudication before learned District Judge, Kinnaur at Rampur Bushehr.

5. During pendency of the appeal, plaintiff filed an Application CMA No.114-R/6 of 2018, under Sections 45 and 114 of the Indian Evidence Act, for issuing direction to the parties to undergo DNA Test. Learned Additional District Judge has allowed the application vide impugned order dated 15.10.2019, observing that the plaintiff has been able to make out a strong prima facie case to construe that DNA Test is of eminent need and plaintiff has been directed to deposit the requisite fee of analysis so that further direction in the matter may be issued.

6. Aggrieved and dissatisfied with the impugned order, defendant has preferred present petition under Article 227 of the Constitution of India,

7. It has been argued on behalf of the defendant that the plaintiff has filed to lead evidence during trial in the Civil Suit and the application has been filed by the plaintiff for filling up lacuna which is not permissible under law. It has further been contended that Courts have always desisted from directing the parties to undergo DNA Test and such direction can be issued only when there is eminent need to do so and, in present case, plaintiff was having sufficient opportunity to lead evidence to prove her case during trial, but she has failed to do so and case of the plaintiff is a case of no evidence and, therefore, there is no eminent need to subject the parties to DNA Testing. Further that the Court cannot make roving enquiry to know the paternity of the child simply at the asking of a party that too at appellate stage.

8. It has been canvassed on behalf of defendant that earlier, during adjudication of proceedings initiated under Section 125 Cr.P.C., plaintiff had opposed similar request of the defendant, seeking direction to conduct DNA Test of the parties to ascertain the paternity of plaintiff and now plaintiff cannot be allowed to take U-turn by allowing the application filed by her for the same purpose. According to the defendant, plaintiff, because of her tender age, is not able to understand pros and cons of conducting DNA Test, which may have adverse effect on the plaintiff and her mother and, therefore, prayer for setting aside the impugned order has been made, terming it illegal and irregular.

9. It has been contended on behalf of the defendant that the learned Additional District Judge has exceeded the jurisdiction by allowing the application, in exercise of the jurisdiction, which was not vested in him, causing grave injustice and prejudice to the defendant.

10. It has further been submitted on behalf of the defendant that parties cannot be ordered to undergo DNA Test in mechanical manner and DNA Test is not to be directed as a matter of routine but only in deserving cases, and in the instant facts, present case is not a deserving case for directing DNA Test, but the impugned order has been passed in mechanical manner.

11. It has also been contended on behalf of the defendant that FIR was lodged on 15.10.2003, whereas child was bron on 1.3.2004 and, thus, it is apparent on the face of record itself that defendant is not father of the plaintiff as no child can born within four months.

12. To substantiate the arguments advanced on behalf of the defendant, reliance has been placed on **Maya v. Naresh Kumar, 2017(1) ShimLC 244; Shaik Fakruddin v. Shaik Mohammed Hasan and another, AIR 2006 Andhra Pradesh 48; Sunil Eknath Trambake v. Leelavati Sunil Trambake, AIR 2006 Bombay 140; Goutam Kundu v. State of W.B., (1993)**

3 SCC 418; Sharda v. Dharmpal, (2003) 4 SCC 493; Banarsi Dass v. Teeku Dutta (Mrs.) and another, (2005) 4 SCC 449; Bhawani Prasad Jena v. Convener Secretary Orissa State Commission for Women and another, (2010) 8 SCC 633; and **Ashok Kumar v. Raj Gupta and others (2022) 1 SCC 20.**

13. Learned counsel for the plaintiff has submitted that impugned order, passed by learned Additional District Judge, is non-appealable order and to assail the same specific provision exists in the Code of Civil Procedure, under Order 43 Rule 1A, which provides right to challenge non-appealable orders in appeal against decrees. Therefore, it has been contended that present petition under Article 227 of the Constitution of India is not maintainable for efficacious statutory remedy available to the defendant. It has been further contended that Order 41 Rule 27 CPC shall come into play lateron after receiving report of the Forensic Science Laboratory with respect to DNA Test, as, at this stage, there is no additional evidence available with the plaintiff and DNA Test cannot be conducted without orders of the Court and, therefore, application for expert evidence under Sections 45 and 114 of the Evidence Act has been rightly filed on behalf of the plaintiff. It has been further contended that for the nature of present case, it would not be possible to the Court to adjudicate the matter in absence of report of DNA Profiling Test of the parties and, therefore, learned Additional District Judge has rightly exercised the jurisdiction vested in him, by passing a very reasoned order which requires no interference.

14. To substantiate the plea raised on behalf of plaintiff, reliance has been placed on **Gurdev Singh and another v. Mehnga Ram and another, (1997) 6 SCC 507; A. Andisamy Chettiar v. A. Subburaj Chettiar, (2015) 17 SCC 713;** and **Narayan Dutt Tiwari v. Rohit Shekhar and another, (2012) 12 SCC 554.**

15. Taking into consideration the submissions made by learned counsel for the parties, case law cited by them, and perusal of record, I am of the considered view that petition deserves to be dismissed for foregoing reasons.

16. Without going into the question of maintainability, as to whether, in view of provision of Order 43 Rule 1A CPC, petition under Article 227 of the Constitution of India is maintainable or not, petition is being decided on merit.

17. In pronouncements of the Courts, cited by learned counsel for defendant, issue as to whether parties shall be subjected to medical examination, including DNA Profiling Test so as to ascertain paternity of child, was considered and decided in the light of Section 112 of Indian Evidence Act, as in those cases father was resisting parenthood at the cost of bastardizing the child, and in the interest of the child and also for the reason that Rule of Law, based on dictates of justice, has always made the Courts incline towards upholding the legitimacy of a child unless the facts are so compulsive and clinching as to necessarily warrant a finding that the child could not at all have been begotten to the father and as such a legitimation of the child would result in rank injustice to the father, and for the reason that courts have always desisted from lightly or hastily rendering a verdict and that too, on the basis of slender materials, which will have the effect of branding a child as a bastard and its mother an unchaste woman.

18. In **Ashok Kumar v. Raj Gupta and others (2022) 1 SCC 20**, after taking into consideration **Goutam Kundu v. State of W.B., (1993) 3 SCC 418; Kamti Devi v. Poshi Ram, (2001) 5 SCC 311; Sharda v. Dharmpal, (2003) 4 SCC 493; Banarsi Dass v. Teeku Dutta, (2005) 4 SCC 449; Bhawani Prasad Jena v. Convener Secretary Orissa State Commission for Women and another, (2010) 8 SCC 633;** and **Dipanwita Roy v. Ronobroto Roy, (2015) 1 SCC 365,** the Supreme Court has reiterated the essence of these pronouncements, including judgments referred on behalf

of defendant, observing that in circumstances where other evidence is available to prove or dispute the relationship, the Court should ordinarily refrain from ordering blood tests because such tests impinge upon the right of privacy of an individual and could also have major societal repercussions, and Indian law leans towards legitimacy and frowns upon bastardy and the presumption in law of legitimacy of a child cannot be lightly repelled. It has also been observed in these judgments that DNA test is not to be directed as a matter of routine but only in deserving cases and discretion of the Court must be exercised, after balancing interest of the parties, where a DNA test is needed for just decision in the matter and such a direction satisfies the test of eminent need.

19. In none of the aforesaid cases, request for DNA test was made by the child, muchless a child born on account of rape committed with his mother. Therefore, ratio of aforesaid decisions does not apply where a child moves the Court to determine his parentage as in such eventuality question of 'protective jurisdiction' of the Court of applicability of Section 112 of Indian Evidence Act does not arise.

20. Plaintiff is not a child born out of wedlock of defendant and mother of the plaintiff, but on account of rape by defendant with mother of plaintiff, for which defendant has been convicted, but he is denying paternity of plaintiff. No other evidence, muchless better evidence, to determine the issue in suit, with certainty, would be available except DNA Profiling Test, as even presumption under Section 112 of Indian Evidence Act is also not applicable in a case like present one. Therefore, case law referred by the defendant is not relevant in the facts and circumstances of present case.

21. Facts in present case are nearer to the facts involved in **Narayan Dutt Tiwari v. Rohit Shekhar and another, (2012) 12 SCC 554,** wherein, Supreme Court has upheld the directions passed by a Division Bench of Delhi High Court, whereby parties were directed to undergo DNA Profiling Test. The

Court had also directed that in case there is defiance of the order, the Court shall be entitled to take police assistance and use of reasonable force for compliance of the order to conduct DNA Profiling Test. Certain points relevant to refer here, observed by the Court, are reiterated hereinafter:

(a) A distinction has to be drawn between "legitimacy" and "paternity" of child.

(b) Section 112 of the Indian Evidence Act, 1872 is intended to safeguard the interest of child by securing his/her legitimacy and not to paternity.

(c) A child has a right to know the truth of his/her origin.

(d) The right of a child to know his biological roots can be enforced through reliable scientific tests and if interest of the child is best sub-served by establishing paternity of someone who is not the husband of his mother, the Court should not shut that consideration altogether; Indian law casts an obligation upon a biological father to maintain his child and does not disregard rights of an illegitimate child to maintenance.

(e) Pronouncements of Supreme Court in **Goutam Kundu v. State of W.B., (1993) 3 SCC 418; Sharda v. Dharmpal, (2003) 4 SCC 493;** and **Bhawani Prasad Jena v. Convenor Secretary, Orissa State Commission for Women and another, (2010) 8 SCC 633,** are not applicable in such situation.

(f) In case for denial of DNA Testing, the applicant suffers irreparable injury, then balance of convenience is also in favour of the applicant.

(g) Justice is best served by truth, and Justice is not served by impeding the establishment of truth. No injustice is done by conclusively establishing paternity.

(h) A putative father may seek to avoid his paternity which science could prove; alternatively, to cling on to a status that science could disprove. In both cases selfish motives or emotional anxieties and needs may drive the refusal to co-operate in the scientific tests which the court has directed.

(i) When the conclusive scientific evidence is to the advantage of the child, then his legal status should not be determined on the basis of evidence proving perhaps but should be displaced by firm evidence on scientific analysis.

(j) the injunction directing DNA testing falls in the category of an order in aid of disposal of the suit and deciding the rights of the parties to the suit.

(k) Once the Court finds that there is eminent need for such a test, the police force or any other coercive action against the person defying the order is justified, as legal fiction under Section 114 of the Evidence Act with regard to it is not a reality but a fact which the said provision requires the Court to accept as reality and the Court is not bound to or obliged to draw such adverse inference.

(l) It is the rule of law in evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue and the Court ought to take an active role in the proceedings in finding the truth and administering justice. Therefore, adverse inference from non-compliance cannot be a substitute to the enforceability of a direction for DNA testing, as valuable right of the applicant under the said direction, to prove his paternity through such DNA testing, cannot be taken away by asking the applicant to be satisfied with the comparatively weak "adverse inference".

(m) It is permissible to the Court to compel a person to undergo a medical test or to give a bodily sample for such test, once the Court has arrived at the conclusion that such test is necessary for complete and final adjudication of the issue involved in the case.

22. No doubt, in earlier round of litigation, in proceedings initiated under Section 125 Cr.P.C., application filed by defendant for conducting DNA Profiling Test was opposed on behalf of plaintiff and was dismissed by the Magistrate on 12.5.2011. Perusal of order passed by the Magistrate,

dismissing the application, clearly depicts that the said application was dismissed by the Magistrate observing that DNA Profiling Test in those proceedings would be against the interest of child (plaintiff) and her mother, as it may have the effect of branding the mother of plaintiff as unchaste woman. It is noticeable that proceedings under Section 125 Cr.P.C. are summary in nature.

23. For the facts and circumstances of the present case, I find that the reason assigned by the Magistrate, for rejecting the application, was that FIR on record was sufficient to connect paternity of the plaintiff with defendant as, in Para-13 of the said order, he has observed that FIR was lodged on 15.10.2003, stating therein that the mother of the plaintiff was violated in June 2003 and fact of conceiving the child came to the knowledge on 15.10.2003 and child was born on 1.3.2004, and on the basis of these dates it was concluded by the Magistrate that birth of the child in March 2004 was corroborating the fact that plaintiff was conceived on account of rape by defendant with mother of the plaintiff and, therefore, it was not considered appropriate by the Magistrate to subject the parties to DNA Profiling Test to verify the parentage of plaintiff. Therefore, rejection of application of the defendant by the Magistrate in those summary proceedings, under Section 125 Cr.P.C., has no bearing in the Civil Suit filed by the plaintiff, wherein child herself is asking for determination of parentage on the basis of DNA Profiling Test.

24. No doubt, the application filed by the defendant, in proceedings under Section 125 Cr.P.C, for DNA Profiling Test, was opposed on behalf of plaintiff, but hard ground realities cannot be ignored. Though it is presumed that an Advocate acts on the basis of instructions imparted by the client, however, it is ground reality that parties, particularly rustic villagers depend upon and act according to legal advice rendered by the Advocate. Record placed before me indicates that application of the defendant was opposed on

the basis of case law referred by the defendant in present petition, but at that time defendant was applicant, whereas in present petition child (plaintiff) is seeking direction for DNA Profiling with right to know her paternity and at that time it was considered by the learned counsel for the plaintiff as well by the Court to exercise 'protective jurisdiction' in the interest of child (plaintiff), as material available on record was otherwise considered sufficient by the Magistrate to determine the paternity.

25. So far as plea of the defendant that plaintiff has taken U-turn on this issue and should not be permitted to reopen the same, the same principle is also applicable to the defendant, who himself was asking for DNA Profiling in proceedings under Section 125 Cr.P.C., but now opposing the application. In view of pronouncements of Supreme Court, I find that this ground is not tenable for accepting the plea of defendant.

26. Plea of the defendant that possibility of the defendant to be biological father of the plaintiff is ruled out for the fact on record that FIR was lodged on 15.10.2003 and plaintiff was born four months thereafter on 1.3.2004, is also factually incorrect as the complete facts are available in the order passed by the Magistrate in Cr.MA No.18-4 of 2011, placed on record with the petition as Annexure P-4, wherein it is stated that rape was committed in June 2003, FIR was lodged on 15.10.2003 on revealing of conception of child and child (plaintiff) was born on 1.3.2004.

27. Plea that application should have been filed under Order 41 Rule 27 CPC and the same should have been decided at the time of final adjudication of the case is also not sustainable for the reason that question of production of additional evidence by the plaintiff in appeal shall arise only after piece of evidence is available and for that purpose an application has been filed by the plaintiff which has been allowed by learned Additional District Judge. Even otherwise, Appellate Court may call for or allow to produce additional evidence, if it requires any document to be produced to

enable it to pronounce judgment and for any other substantial cause and imparting justice, after complete and final adjudication of the case, which is a substantial cause for which Courts have been established. Therefore, I am of the considered opinion that present case is a fit case for exercising such jurisdiction in its facts and circumstances.

28. As the plaintiff was not born out of wedlock, therefore, she is carrying stigma of an unwanted child born on account of rape committed by the defendant with her mother. Therefore, determination of paternity by DNA Profiling shall not cause any adverse impact upon her status, rather it would be in her interest to know truth about her biological father so as to entitle her to civil consequences arising thereto, in the interest of complete justice.

29. I do not find any irregularity, illegality or perversity in the impugned order passed by learned Additional District Judge, warranting interference by this Court.

30. In view of afore-discussion, petition is dismissed. Defendant shall also pay costs of this petition, quantified at Rs.11,000/-, to the plaintiff.

Pending application, if any, also stands disposed of.

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

Between:-

1. SMT. RAMA ALIAS RITA DEVI
   AGE 75 YEARS,
   W/O SH. RANJEET SINGH,
   R/O NAYA BAZAAR,
   OPPOSITE MAIN GATE OF
   NAHAN FOUNDARY, DISTRICT SIRMAUR, HP

2. BHANU,
   AGE 44 YEARS,
   S/O SH. RANJEET SINGH,
   R/O NAYA BAZAAR,
   OPPOSITE MAIN GATE OF

NAHAN FOUNDARY, DISTRICT SIRMAUR, HP

……PETITIONERS

(BY SH. KARAN SINGH KANWAR, ADVOCATE)

AND

1. ASHWANI KUMAR,
   S/O LATE SH. SARWAN SINGH,
   AGED 66 YEARS,
   R/O NEAR DELHI GATE, NAHAN,
   DISTRICT SIRMAUR, H.P.

2. SMT. KAMLESH THAKUR,
   W/O LATE SH. ANIL KUMAR,
   AGED 56 YEARS,
   R/O NEAR DELHI GATE, NAHAN,
   DISTRICT SIRMAUR, H.P.

3. KITTY THAKUR,
   D/O LATE SH. ANIL KUMAR,
   AGED 29 YEARS,
   R/O NEAR DELHI GATE, NAHAN,
   DISTRICT SIRMAUR, H.P.

4. RAVISH KUMAR,
   S/O LATE SH. ANIL KUMAR,
   AGED 26 YEARS,
   R/O NEAR DELHI GATE, NAHAN,
   DISTRICT SIRMAUR, H.P.

5. ARUSHI BANSAL,
   AGED 24 YEARS,
   D/O LATE SH. ANIL KUMAR,
   R/O CHOTTA CHOWK, NAHAN,
   DISTRICT SIRMAUR, H.P.
   (W/O SH. AMAN BANSAL,
   S/O SH. PARVEEN KUMAR

……RESPONDENTS/PLAINTIFFS

6. SMT. ARUNA
W/O LATE SH. KISHAN SINGH,
S/O SH. RATTAN SINGH,
R/O NAYA BAZAAR,
OPPOSITE MAIN GATE OF NAHAN
FOUNDARY, DISTRICT SIRMAUR, H.P.

7. SANJAY THAKUR ALIAS SANJU,
S/O SH. KISHAN SINGH,
S/O SH. RATTAN SINGH,
R/O NAYA BAZAAR,
OPPOSITE MAIN GATE OF NAHAN
FOUNDARY, DISTRICT SIRMAUR, H.P.

8. AMIT THAKUR ALIAS PINTU,
S/O SH. KISHAN SINGH,
S/O SH. RATTAN SINGH,
R/O NAYA BAZAAR,
OPPOSITE MAIN GATE OF NAHAN
FOUNDARY, DISTRICT SIRMAUR, H.P.

9. SMT. KRISHNA THAKUR,
W/O SH. SHER SINGH,
S/O SH. RATTAN SINGH,
R/O NAYA BAZAAR,
OPPOSITE MAIN GATE OF NAHAN
FOUNDARY, DISTRICT SIRMAUR, H.P.

……PROFORMA RESPONDENTS/
DEFENDANTS 3 TO 6

(SH. ASHOK K. TYAGI, ADVOCATE,
FOR R-1 TO R-5)

CIVIL MISC. PETITION MAIN (ORIGINAL)
No.33 of 2022
Decided on:05.03.2022

Code of Civil Procedure, 1908 – Order 7 rule 11 - Rejection of plaint -- Written statement not filed for two years after institution of the suit -- Application for rejection of plaint filed after two years -- Held -- The application under order 7 rule 11 CPC filed after two years cannot be taken as an excuse for not filing the written statement -- Provisions of order 8 Rule 1 CPC cannot be simply ignored or else under the guise of moving application under order 7 rule 11 CPC the defendants can protract the trials thereby defeating not only the object of the provision, but also the cause of justice -- Last opportunity granted to the defendant to file the written statement - Petition disposed of accordingly. [Para 4 (iv)]

Cases referred:

ATCOM Technologies Limited Versus Y.A. Chunawala and Company and others, (2018) 6 SCC 639;

R.K. Roja Versus U.S. Rayudu and another (2016) 14 SCC 275;

Saleem Bhai and others Vs State of Maharashtra & others (2003) 1 SCC 557;

SCG Contracts (India) Private Limited Vs K.S. Chamankar Infrastructure Private Limited and others 2019) 12 SCC 210;

Shakti Bhog Food Industries Ltd. VS The Central Bank of India & Anr. 2020 (8) SCALE 219;

This petition coming on for admission this day, the Courtpassed the following:

O R D E R

Whether notwithstanding the pendency of an application under Order 7 Rule 11 of the Code of Civil Procedure (in short 'CPC') moved by the defendant about two years after the institution of the suit, can he be directed to file written statement as last opportunity, is the point involved in the present petition.

2. Facts:-

2(i). A civil suit was filed by respondents No.1 to 5 for possession and mandatory injunction on the basis of title against six defendants. The suit was filed in December, 2019. The case status document produced by learned counsel for respondents No.1 to 5 during hearing of the case gives the impression that the defendants were served in the suit by April, 2020. This

has not been disputed by learned counsel for the petitioners. First date given for filing the written statement as per the case status document was 09.04.2020. The matter was thereafter listed before the learned Trial Court on 19.06.2020, 22.09.2020, 10.11.2020, 06.01.2021 and 22.03.2021 for filing of written statement. The case was thereafter fixed for proper orders on 06.05.2021 and 12.07.2021. Perhaps on account of COVID-19 pandemic, the matter could not be taken up and was fixed on 21.08.2021 for the purpose of service. It was again posted for filing of written statement on 01.11.2021.

2(ii). On 01.11.2021, instead of filing the written statement, defendants No.1 and 2 (petitioners herein) moved an application under Order 7 Rule 11 read with Section 151 CPC for rejection of plaint. The rejection was sought on the ground that the suit filed by the plaintiffs was undervalued for the purposes of court fees and jurisdiction. That the plaintiff had deliberately not paid the requisite court fees in terms of Section 7(5)(e) of the Himachal Pradesh Court Fees Act, 1968. It was pleaded that the learned Trial Court lacked pecuniary jurisdiction to entertain and try the suit.

2(iii). Vide order dated 01.11.2021, learned Trial Court took cognizance of the Order 7 Rule 11 CPC application and directed the plaintiffs to file reply to the application. Learned Trial Court also noticed that the written statement had not been filed. The defendants prayed for time to file the written statement. One last opportunity was granted by the learned Trial court to file written statement, failing which the opportunity for filing the written statement was to be closed. The matter was ordered to be next listed for 22.02.2022.

The order dated 01.11.2021, to the extent it grants last opportunity to the defendants to file written statement, failing which they were not to be granted any further opportunity to file the same, has been assailed by defendants No.1 and 2 (petitioners) in the instant petition.

3. Contentions:-

3(i). Sh. Karan Singh Kanwar, learned counsel for the petitioners (defendants No.1 and 2), relying upon ***(2003) 1 SCC 557***, titled ***Saleem Bhai and others Versus State of Maharashtra & others*** and ***(2016) 14 SCC 275***, titled ***R.K. Roja Versus U.S. Rayudu and another***, argued that the learned Trial Court erred in law in directing defendants No.1 and 2 to file written statement before the decision of their application moved under Order 7 Rule 11 CPC. Learned counsel submitted that the question of filing the written statement would come only after the adjudication of application moved under Order 7 Rule 11 CPC. By granting last opportunity to defendants No.1 and 2, they cannot be compelled to file the written statement during pendency of their Order 7 Rule 11 CPC application. The approach of the learned Trial Court is wholly erroneous and illegal.

3(ii). According to Sh. Ashok K. Tyagi, learned counsel for respondents No.1 to 5 (plaintiffs), defendants No.1 and 2 had been unnecessarily dragging the litigation. They had not opted to file the written statement even after grant of umpteenth number of opportunities during the last about two years. Under the pretext of filing the application under Order 7 Rule 11 CPC, the time limit for filing the written statement stipulated under Order 8 Rule 1 CPC cannot be extended.***(2019) 12 SCC 210***, titled ***SCG Contracts (India) Private Limited Versus K.S. Chamankar Infrastructure Private Limited and others***, was cited in support of the plea.

4. I have heard learned counsel for the parties and gone through the case file.

4(i). Order 7 Rule 11 CPC pertains to rejection of plaint and reads as under:-

> *"O7 R11. Rejection of plaint*
>
> *The plaint shall be rejected in the following cases:-*
>
> *(a) where it does not disclose a cause of action;*

(b) where the relief claimed is undervalued, and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so;

(c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

(d) where the suit appears from the statement in the plaint to be barred by any law;

(e) where it is not filed in duplicate;

(f) where the plaintiff fails to comply with the provisions of rule9:

Provided that the time fixed by the court for the correction of the valuation or supplying of the requisite stamp-papers shall not be extended unless the court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp papers, as the case may be, within the time fixed by the court and that refusal to extend such time would cause grave injustice to the plaintiff."

It is settled principle of law that an application under Order 7 Rule 11 CPC can be filed at any stage. Once such an application is instituted, the Court is bound to dispose of the same before proceeding with the trial.

4(ii). ***(2003) 1 SCC 557***, titled ***Saleem Bhai and others Versus State of Maharashtra and others***, was a case before the Apex Court, where the appellant had filed an application under Order 7 Rule 11 CPC, praying for dismissal of the suit on the stated grounds. The respondents had also filed an application under Order 8 Rule 10 CPC with a prayer to the Court for pronouncing the judgment in the suit as the appellant had not filed the written statement. The appellant also moved an application under Section 151 CPC praying the Court to first decide the application under Order 7 Rule 11 CPC. Learned Trial Court dismissed the application filed under Order 8 Rule 10 CPC as well as the application filed under Section 151 CPC. The appellant

was directed to file his written statement. The High Court affirmed the order passed by the learned Trial Court that appellant should file his written statement and observed that the Trial Court shall frame issues and record its finding on preliminary issues before proceeding to try the suit on facts. The order passed by the High Court was agitated in the Hon'ble Supreme Court. The question that arose before the Hon'ble Apex Court was as to whether an application under Order 7 Rule 11 CPC was to be decided on the basis of allegations in the plaint and filing of written statement by the contesting defendant was irrelevant and unnecessary. The Hon'ble Apex Court held that for the purpose of deciding the application under Order 7 Rule 11 CPC, it is only the averments in the plaint that are germane. The pleas taken up by the defendants in the written statement will be wholly irrelevant at that stage. The Apex Court also held that a direction to file the written statement without deciding the application under Order 7 Rule 11 CPC isa procedural irregularity touching the exercise of jurisdiction by the learned Trial Court. Relevant para of the judgment reads as under:-

> *"9. A perusal of Order 7 Rule 11 CPC makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power under Order 7 Rule 11 CPC at any stage of the suit-before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order 7 CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order 7 Rule 11 CPC cannot but be procedural irregularity touching the exercise of jurisdiction by the trial court. The order, therefore, suffers from non-exercising of the jurisdiction vested in the court as well as procedural irregularity. The High Court however, did not advert to these aspects."*

The judgment in Saleem Bhai's case, supra, came up for consideration in ***(2016) 14 SCC 275***, titled ***R.K. Roja Versus U.S. Rayudu and another***. Reiterating the law laid down in Saleem Bhai's case, supra, it was held that once the application is filed under Order 7 Rule 11 CPC, the Court has to dispose of the same before proceeding with the trial. At this stage, it will be appropriate to extract relevant portion of the judgment:-

> *"5. Once an application is filed under Order 7 Rule 11 CPC, the court has to dispose of the same before proceeding with the trial. There is no point or sense in proceeding with the trial of the case, in case the plaint (election petition in the present case) is only to be rejected at the threshold. Therefore, the defendant is entitled to file the application for rejection before filing his written statement. In case the application is rejected, the defendant is entitled to file his written statement thereafter (see Saleem Bhai v. State of Maharashtra, (2003) 1 SCC 557). But once an application for rejection is filed, the court has to dispose of the same before proceeding with the trial court. To quote the relevant portion from para 20 of the Sopan Sukhdeo Sable case [(2004) 3 SCC 137]: (SCC pp. 148-49)*
>
> > *"20.… Rule 11 of Order 7 lays down an independent remedy made available to the defendant to challenge the maintainability of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the objections can be raised, and also does not say in express terms about the filing of a written statement. Instead, the word "shall" is used, clearly implying thereby that it casts a duty on the court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the defendant."*
>
> *6. In Saleem Bhai case [(2003) 1 SCC 557], this Court has also held that: (SCC p. 560, para 9)*

> *"9. … a direction to file the written statement without deciding the application under Order 7 Rule 11 cannot but be a procedural irregularity touching the exercise of jurisdiction by the trial court."*

The principles laid down in the above two judgments have been reiterated in ***2020 (8) SCALE 219***, titled ***Shakti Bhog Food Industries Ltd. VS The Central Bank of India & Anr.***

4(iii). Interwoven with the question involved in the case is the time schedule for filing the written statement. Order 8 Rule 1 CPC sets down following timeline for filing the written statement:-

> *"O8 R1. Written statement.- The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:*
> *Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons."*

Nature of above provision has been held to be procedural and not substantive law. Settled legal position is that the provisions of Order 8 Rule 1 CPC are directory and not mandatory. The time limit prescribed for filing the written statement therein has to be respected ordinarily. The provision provides for extension of time for filing the written statement. However, the extension should not be granted in routine, but only in exceptionally hard cases. It would be apt to refer here following paras from ***(2018) 6 SCC 639***, titled ***ATCOM Technologies Limited Versus Y.A. Chunawala and Company and others***:-

> *"19. It has to be borne in mind that as per the provisions of Order VIII Rule 1 of the Code of Civil Procedure, 1908, the defendant is obligated to present a written statement of his defence within thirty days from the date of service of summons. Proviso*

thereto enables the Court to extend the period upto ninety days from the date of service of summons for sufficient reasons. Order VIII Rule 1 of the Code of Civil Procedure, 1908 reads as under:

> *"1. Written statement.- The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:*
>
> *Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the same on such other day, as may be specified by the Court, for reasons to be recorded in writing, but which shall not be later than ninety days from the date of service of summons."*

20. *This provision has come up for interpretation before this Court in number of cases. No doubt, the words "shall not be later than ninety days" do not take away the power of the court to accept written statement beyond that time and it is also held that the nature of the provision is procedural and it is not a part of substantive law. At the same time, this Court has also mandated that time can be extended only in exceptionally hard cases. We would like to reproduce the following discussion from Salem Advocate Bar Assn. v. Union of India[(2005) 6 SCC 344]: (SCC p.354, para 21)*

> *"21. ...There is no restriction in Order 8 Rule 10 that after expiry of ninety days, further time cannot be granted. The court has wide power to "make such order in relation to the suit as it thinks fit". Clearly, therefore, the provision of Order 8 Rule 1 providing for the upper limit of 90 days to file written statement is directory. Having said so, we wish to make it clear that the order extending time to file written statement cannot be made in routine. The time can be extended only in exceptionally hard cases. While extending time, it has to be borne in mind that the legislature has fixed the upper time-limit of 90 days. The discretion of the court to extend the time shall not be so frequently and routinely exercised so as to nullify the period fixed by Order 8 Rule 1."*

> *21. In such a situation, onus upon the defendant is of a higher degree to plead and satisfactorily demonstrate a valid reason for not filing the written statement within thirty days. When that is a requirement, could it be a ground to condone delay of more than 5 years even when it is calculated from the year 2009, only because of the reason that Writ of Summons were not served till 2009?*
>
> *22. We fail to persuade ourselves with this kind of reasoning given by the High Court in condoning the delay, thereby disregarding the provisions of Order 8 Rule 1 of the Code of Civil Procedure, 1908 and the spirit behind it. This reason of the High Court that delay was condoned "by balancing the rights and equities" is far-fetched and, in the process, abnormal delay in filing the written statement is condoned without addressing the relevant factor viz. whether the respondents had furnished proper and satisfactory explanation for such a delay. The approach of the High Court is clearly erroneous in law and cannot be countenanced. No doubt, the provisions of Order 8 Rule 1 of the Code of Civil Procedure, 1908 are procedural in nature and, therefore, handmaid of justice. However, that would not mean that the defendant has right to take as much time as he wants in filing the written statement, without giving convincing and cogent reasons for delay and the High Court has to condone it mechanically."*

In the case in hand, the defendants were admittedly served in the civil suit by April, 2020. The civil suit thereafter had been repeatedly fixed for filing of written statement by them. As observed earlier, according to the case status document supplied by learned counsel for the respondents, the matter was fixed before the learned Trial Court for filing of written statement by the defendants on 09.04.2020, 19.06.2020, 22.09.2020, 10.11.2020, 06.01.2021 and 22.03.2021. On three subsequent dates, i.e. 06.05.2021, 12.07.2021 and 21.08.2021, the matter was fixed for proper orders/service. Lastly, the matter was fixed on 01.11.2021 for filing of written statement. The written statement

was not filed by the defendants. Instead of filing the written statement, an application was moved under Order 7 Rule 11 CPC for rejection of plaint on the ground of undervaluation of the suit for the purposes of court fees &jurisdiction and that the learned Trial Court lacked pecuniary jurisdiction to try the suit. No explanation was offered by the defendants for not filing the written statement during the last about two years.

Admittedly, no application has been filed by the defendants for extension of time to file the written statement beyond the period prescribed under Order 8 Rule 1 CPC. Instead of filing the written statement on 01.11.2021, the defendants came up with an application under Order 7 Rule 11 CPC. A copy of this application appended at Annexure P-3, prima-facie, shows that it was signed on 22.03.2021 and attested on 12.07.2021.

Despite having entered appearance in the civil suit about two years ago, the defendants have neither filed their written statement nor moved any application seeking extension of time to file it. In ***R.K. Roja's*** case, supra, the Hon'ble Apex Court had also cautioned that liberty to file an application under Order 7 Rule 11 CPC cannot be made as a ruse for retrieving the lost opportunity to file the written statement. These observations relevant in context of present controversy are extracted hereinafter:-

> *"However, we may hasten to add that the liberty to file an application for rejection under Order 7 Rule 11 CPC cannot be made as a ruse for retrieving the lost opportunity to file the written statement."*

The above observations were again noticed and explained by the Hon'ble Apex Court in ***(2019) 12 SCC 210***, titled ***SCG Contracts (India) Private Limited Versus K.S. Chamankar Infrastructure Private Limited and others***. It was a case involving provisions of Order 8 Rule 1 CPC as amended by the Commercial Courts Act, 2015. The amended provisions of Order 8 Rule 1 CPC read as under:-

"O8 R1. Written statement

The defendant shall, within thirty days from the date of service of summons on him, present a written statement of his defence:

Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the written statement on such other day, as may be specified by the Court, for reasons to be recorded in writing and on payment of such costs as the Court deems fit, but which shall not be later than one hundred twenty days from the date of service of summons and on expiry of one hundred twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record."

Defendant No.1 in the above case had not filed written statement within 120 days from the date of service of summons in the suit. Instead, he moved an application under Order 7 Rule 11 CPC. The application was taken up and rejected. After dismissal of Order 7 Rule 11 CPC application, the defendant prayed for seven days' time to file written statement. The Court allowed the defendant to file written statement within the specified time subject to payment of costs of Rs.25,000/- to the plaintiff. The order was complied with and written statement was filed within the time limit mentioned in the order. The plaintiff agitated that changes made in the CPC were not adhered to. That the written statement could not be taken on record in view of the fact that 120 days had elapsed from the date of service of summons of the suit. Amended provisions of Order 8 Rule 1 CPC were pressed in service by the plaintiff. One of the arguments raised by the respondents before the Hon'ble Apex Court was that as an application under Order 7 Rule 11 CPC had been filed and that had to be answered before the trial of the suit could commence. That a written statement could not be filed prior to the adjudication of the application under Order 7 Rule 11 CPC. The argument was based upon the

judgment in ***R.K. Roja's*** case, supra. While answering this contention, the Apex Court held that the judgment in R.K. Roja's case cannot be read in the manner sought for by the respondents. That Order 7 Rule 11 proceedings are independent of filing of the written statement once a suit has been filed. The written statement was ordered to be taken off the record. It would be appropriate at this stage to extract the observations of the Apex Court in this regard:-

> *"11. We are of the view that the view taken by the Delhi High Court in these judgments is correct in view of the fact that the consequence of forfeiting a right to file the written statement; non-extension of any further time; and the fact that the Court shall not allow the written statement to be taken on record all points to the fact that the earlier law on Order 8 Rule 1 on the filing of written statement under Order 8 Rule 1 has now been set at naught.*
>
> *13. We are of the view that since both these judgments dealt with the pre-amendment position, they would not be of any direct reliance insofar as the facts of the present case are concerned.*
>
> *14. The learned counsel appearing for the respondents also relied upon R.K. Roja v. U.S. Rayudu for the proposition that the defendant is entitled to file an application for rejection of plaint under Order 7 Rule 11 before filing his written statement. We are of the view that this judgment cannot be read in the manner sought for by the learned counsel appearing on behalf of the respondents. Order 7 Rule 11 proceedings are independent of the filing of a written statement once a suit has been filed. In fact, para 6 of that judgment records: (SCC p. 277)*
>
> > *"6. … However, we may hasten to add that the liberty to file an application for rejection under Order 7 Rule 11 CPC cannot be made as a ruse for retrieving the lost opportunity to file the written statement."*

Civil Appeal No.1318 of 2022, titled ***Prakash Corporates Versus Dee Vee Projects Limited***, decided on 14.02.2022, was a case under the Commercial Courts Act, 2015, where the learned Trial Court declined the

prayer of defendant for granting further time to file the written statement after expiry of 120 days from the date of service of summons in view of amended provisions of Order 8 Rule 1 CPC. The order was upheld by the High Court. Hon'ble Apex Court though allowed the appeal and permitted the written statement to be taken on record on certain grounds and also taking note of the orders passed in Suo Moto Writ Petition (Civil) No.3 of 2020, but held as under with respect to the time limit for filing the written statement and consequences of default:-

> *"17. If the aforesaid provisions and explained principles are literally and plainly applied to the facts of the present case, the 120th day from the date of service of summons came to an end with 06.05.2021 and the defendant, who had earlier been granted time for filing its written statement on payment of costs, forfeited such right with the end of 120th day, i.e., 06.05.2021. However, it is required to be kept in view that the provisions aforesaid and their interpretation in SCG Contracts (supra) operate in normal and non-extraordinary circumstances with the usual functioning of Courts. It is also noteworthy that the above referred provisions of CPC are not the only provisions of law which lay down mandatory timelines for particular proceedings. The relevant principles, in their normal and ordinary operation, are that such statutory timelines are of mandatory character with little, or rather no, discretion with the Adjudicating Authority for enlargement. The question in the present case is, as to whether the said provisions and principles are required to be applied irrespective of the operation and effect of other orders passed/issued by the Courts under the force of aberrant, abnormal and extraordinary circumstances? In our view, the answer to this question cannot be in the affirmative for a variety of reasons, as indicated infra."*

4(iv). Reverting back to the facts of the present case, the defendants even after entering appearance in the matter two years ago, havestill not filed

their written statement. No doubt, application under Order 7 Rule 11 CPC can be filed at any stage and this application has to be adjudicated first before proceeding with the trial. Nonetheless Order 7 Rule 11 CPC proceedings have been held to be independent of filing of written statement. There is no embargo upon the defendants to file written statement before adjudication of Order 7 Rule 11 CPC application. Pendency of Order 7 Rule 11 CPC application filed two years later to the date of appearance of defendants in the civil suit cannot be taken as a ruse for not filing the written statement. Provisions of Order 8 Rule 1 CPC cannot be simply ignored or else under the guise of moving frivolous Order 7 Rule 11 CPC applications, the defendants can always protract the trials, thereby defeating not only the object of the provisions, but also the cause of justice. Also as per the impugned order, it was the defendants, who prayed for more time to file written statement. Learned Trial Court accordingly granted them one last opportunity. There is nothing wrong in the approach of the learned Trial Court.

For all the above reasons, this petition lacks merit and is accordingly dismissed. Parties, through their learned counsel, are directed to appear before the learned Trial Court on **21.03.2022**. It shall be open to the petitioners to file the written statement in the learned Trial Court by 21.03.2022 in terms of the impugned order, failing which, learned Trial Court shall proceed further in the matter in accordance with law.

Before parting, it is clarified that this Court has not expressed any opinion on merits of application under Order 7 Rule 11 CPC moved by defendants No.1 and 2. The observations made above are confined only to adjudication of present petition.

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

Between:

M/S JYOTHY LABORATORIES LIMITED, KATHA, P.O. BADDI, TEHSIL NALAGARH, DISTRICT SOLAN, H.P. 173205 THROUGH SH. ASHOK KUMAR, S/O SH. PARKASH CHAND PRESENTLY WORKING AS ASSISTANT MANAGER ACCOUNTS AND AUTHORIZED SIGNATORY OF M/S JYOTHY LABORATORY R/O VILLAGE KHATA P.O. BADDI, TEHSIL NALAGARH, DISTRICT SOLAN, H.P.173205.

……..PETITIONER

(BY SHRI V. LAKSHMI KUMARAN AND MR. GOVERDHAN LAL SHARMA, ADVOCATES)

AND

EXCISE AND TAXATION INSPECTOR, MP BARRIER DHEROWAL, H.P.

…….RESPONDENT

(BY SHRI. AJAY VAIDYA, SENIOR ADDITIONAL ADVOCATE GENERAL)

CIVIL REVISION PETITION No. 191 of 2015

Between:

M/S JYOTHY LABORATORIES LIMITED, KATHA, P.O. BADDI, TEHSIL NALAGARH, DISTRICT SOLAN, H.P. 173205 THROUGH SH. ASHOK KUMAR, S/O SH. PARKASH CHAND PRESENTLY WORKING AS ASSISTANT MANAGER ACCOUNTS AND AUTHORIZED SIGNATORY OF M/S JYOTHY LABORATORY R/O VILLAGE KHATA P.O. BADDI, TEHSIL NALAGARH, DISTRICT SOLAN, H.P.173205.

……..PETITIONER

(BY SHRI V. LAKSHMI KUMARAN AND MR.
GOVERDHAN LAL SHARMA, ADVOCATES)

AND

EXCISE AND TAXATION INSPECTOR, MP BARRIER DHEROWAL, H.P.

…….RESPONDENT

(BY SHRI. AJAY VAIDYA, SENIOR ADDITIONAL
ADVOCATE GENERAL)

CIVIL REVISION PETITION No. 192 of 2015

Between:

M/S JYOTHY LABORATORIES LIMITED, KATHA, P.O. BADDI, TEHSIL NALAGARH, DISTRICT SOLAN, H.P. 173205 THROUGH SH. ASHOK KUMAR, S/O SH. PARKASH CHAND PRESENTLY WORKING AS ASSISTANT MANAGER ACCOUNTS AND AUTHORIZED SIGNATORY OF M/S JYOTHY LABORATORY R/O VILLAGE KHATA P.O. BADDI, TEHSIL NALAGARH, DISTRICT SOLAN, H.P.173205.

……..PETITIONER

(BY SHRI V. LAKSHMI KUMARAN AND MR.
GOVERDHAN LAL SHARMA, ADVOCATES)

AND

EXCISE AND TAXATION INSPECTOR, MP BARRIER DHEROWAL, H.P.

…….RESPONDENT

(BY SHRI. AJAY VAIDYA, SENIOR ADDITIONAL
ADVOCATE GENERAL)

CIVIL REVISION PETITION
Nos. 190, 191 and 192 of 2015
Reserved on:07.03.2022
Decided on:14.03.2022

Himachal Pradesh Value Added Tax Act, 2005 - Entry 54(113) of Part-II of Schedule A- Industrial input and taking material - HSN code adopted by Customs Traffic Act can be used for the purpose of H. P. Vat Act - Held, TET and TV serial number 113 of notification seafood by the respondent detailing industrial input and packing material specified in entry 54 of Part-II of Schedule A of H. P. Vat Act, cannot be said to be used without purpose - The only corollary that can be drawn from the use of HSN code is to have reference of product vis-a-vis Customs Traffic Act, 1975 for the purposes of identification - Since the AVP is referable to item denoted by HSN code 3204 as adopted by Customs Traffic Act, 1975, so cannot be ignored for the purpose of H.P. Vat Act and the product remains AVP, having coverage under Entry 54 (113) of Part-II of schedule A of H. P. Vat Act. (Para 17)

Cases referred:

M.P. Agencies Vs. State of Kerala (2015) 7 SCC 102;

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

O R D E R

All these three revision petitions are being decided by a common judgment as common questions of law and facts arise.

2. Revision petitioner is a registered dealer under Himachal Pradesh Value Added Tax Act, 2005 (in short 'H.P. VAT Act') and is manufacturer of product fabric whitening “Ujala Supreme” (for short ‘product’). The Assessing Officer under H.P. VAT Act applied the rate of tax @ 13.5% on the premise that the product did not fall in any of the categories specified in Schedule-A to H.P. VAT Act and hence was liable for incedence of tax in accordance with Part-III of Schedule-A (supra) in residuary category.

3. On two occasions i.e. on 29.12.2012 and 01.02.2013, the Assessing Officer raised demands of Rs. 1,06,250/- and Rs.11,090/- respectively, from the petitioner, on account of less payment of VAT after checking the consignment of the product at Barrier. Another demand of Rs. 15,29,300/- was raised by the Assessing Officer on 31.01.2013 from the petitioner on account of less tax paid for the year 2007-2008.

4. Petitioner assailed the aforesaid assessment by way of separate appeals under Section 45 of H.P. VAT Act, before Additional Excise and Taxation Commissioner-cum-Appellate Authority (South Zone), Himachal Pradesh, Shimla-09 (for short 'Appellate Authority'). The details of the appeals before the Appellate Authority are as under:-

Sr. No.	**Date of demand**	**Tax liability**	**Appeal Number**
1.	29.12.2012	1,06,250/-	194/2012-2013
2.	31.01.2013	15,29,300/-	222/2012-2013
3.	01.02.2013	11,090/-	1/2013-2014

All these appeals were decided by the Appellate Authority by a common order dated 24.07.2013 against the petitioner. The assessment made by the Assessing Officer was upheld. However, the Appellate Authority absolved the petitioner from payment of penalty as assessed by the Assessing Officer.

5. Aggrieved against the aforesaid order passed by the Appellate Authority, the petitioner challenged the same by filing three separate appeals No. 73/2013, 74/2013 and 75/2013 before the Himachal Pradesh Tax Tribunal, Dharamshala, camp at Shimla (for short "Tribunal") under Section 45(C) of the H.P. VAT, Act). The Tribunal dismissed the appeals of the petitioner vide common order dated 17.09.2014, and therefore, the petitioner is in Revision before this Court.

6. The matter in issue between the petitioner and respondent is with respect to the rate of VAT payable on the product. Whereas, according to the petitioner, the product is covered under Entry 54 (113) of Schedule-A, Part-II-A of H.P. VAT Act, 2005, and thus, is liable to pay tax @ 5%, the respondent denies the factum of coverage of product under aforesaid Entry and maintains it to be falling in Schedule-A, Part-III of H.P. VAT Act, under residuary category.

7. On the basis of the material on record, the following question of law has arisen in common in all the three revision petitions, for consideration of this Court in exercise of its revisional power under Section 48 of the H.P. VAT, Act:-

> *" Whether 'Ujala Supreme' is classifiable under Entry No. No.54 (113) of Schedule-A, Part II-A of H.P. VAT Act, 2005 as 'synthetic organic colouring matter' ".*

8. We have heard Mr. V. Lakshmi Kumaran,learned counsel for the petitioner and also Mr. Ajay Vaidya, learned Senior Additional Advocate General for the respondent.

9. It is not in dispute between the parties that the product "Ujala Supreme" is taxable under Section 6 (1)(a) of H.P. VAT Act. The dispute is with respect to the rate of tax payable by the petitioner on the product. Respondent claims VAT @13.5%, whereas the petitioner admits VAT to be payable at the rate of 5%. As per petitioner, the product is covered as "Synthetic organic colouring matter" specified at serial No.113 of notification issued by respondent detailing "Industrial input and packing material" as per Entry 54 of Part-II of Schedule-A of H.P. VAT Act.

10. In order to appreciate the rival contentions of the parties, it is relevant to reproduce the extract of Entry 54 as contained in Part-II of Schedule-A of H.P. VAT Act as also Entry contained at serial No. 113 to the

list of industrial input and packing material notified by respondent to categorize Entry 54 (supra).

54	Industrial Input and Packing Material as may be notified

Sr. No.	**Heading Number**	**Description**
113	3204.00.00	Synthetic organic coloring matter, whether or not chemically defined; preparations based on synthetic organic coloring matter synthetic organic products of a kind used as fluorescent brightening agents or as luminophores, whether or not chemically defined.

11. The case of petitioner in short is that the petitioner is engaged in processing of "Acid Violet Paste" (for short 'AVP') by diluting it with water and selling the same in the market. The product is thus nothing but diluted AVP and is used for whitening the fabric in households. Petitioner categorically maintains that since AVP is covered under Entry 54(113) of Part II of Schedule-A of H.P. VAT Act and there being no further process being employed for manufacture of product, save and except its dilution with water, the product also is covered under the said Entry and hence chargeable to VAT @ 5%.

12. Per contra, the specific stand of the respondent is that Entry-54 (113) (supra) pertains to items covering Industrial Input. The diluted AVP, as claimed by the petitioner, is not Industrial Input, rather is a product sold in retail in different size of packing for direct use of consumer, as such, the product is covered under residuary category specified in Part-III of Schedule-A of H.P. VAT Act. This contention of the respondent has been

upheld by the Appellate Authority as well as the Tribunal. The matter in issue in the instant petitions, has remained in contention on earlier occasions also before different High Courts. The Appellate Authority noticed the judgments passed by the Kerala and Guwahati High Courts as under:-

> *"12. The Hon'ble Kerala High Court in its judgment in OT Rev. No. 13 of 2009 titled as State of Kerala Vs. M/s Jyothy Laboratories dated 12-4-2011 had held that "Ujala Supreme" which is admittedly used as laundry whitener for clothes, cannot be treated as AVP falling under Entry 155(8)(d) under list of Third Schedule covering industrial inputs and packing materials because "Ujala Supreme". the product made can no longer be identified with AVP in any manner and in the conversion process it has lost its property as an industrial input used for dying silk and woolen material. Moreover in the process of conversion, there is 99% erosion in the concentration of AVP leaving only an insignificant percentage of the item in water with different properties and different use. IN other words, what is done is that an industrial raw material which is used as a dyeing agent for silk and woolen clothes at high temperature is converted into a laundry whitener. Obviously an acid base industrial raw material cannot be used as a laundry whitener which is exactly what is done by "Jyothy Laboratories". The supplier of the items to the appellant. since in the process, the original item lost its identity and a new commodity with distinct composition, identity and use emerged, the appellant's contention that the item should be treated as the original commodity for classification cannot be accepted.*
>
> *13. However, the Hon'ble Gauhati High Court in its judgment in case No. WP(C) 5428/2010 titled as M/s Jyothy Laboratories Ltd. V/s State of Assam and Ors. dated 24.03.2011 held that the product 'Ujala Supreme" though is a highly diluted form of AVP, as has been rightly held by leanred Single Judge, it retains the essential characteristics of AVP. therefore, it cannot be said to be commercially distinct and different from the user product product AVP, which is covered by Entry 114 of Schedule II-C to the Act. Therefore, we find no justifiable reason to accept the submission of the Appellant sale that the product emerges out of a manufacturing process and to the place the product in the residuary category in the firth schedule to the Act."*

It becomes evident from the aforesaid extractions of the order passed by the Appellate Authority that while the Kerela High Court held the issue against the petitioner, Division Bench of Guwahati High Court upheld the judgment passed by learned Single Judge of said Court upholding the issue in favour of the petitioner i.e. Jyoti Laboratories ltd.. The Appellate Authority, however, placed reliance upon the judgment of this Court in ***CWP No. 1506/2009 titled PEPSICO India holdings Pvt. Ltd.*** *Vs*. ***The Assessing Authority-I and Ors***, decided on 24.09.2010, for the purposes of drawing distinction between the authorities of the H.P. VAT Act and the Assam VAT Act, and thus, held that the product Ujala Supreme, which was universally used as fabric/laundry whitener for clothes, could not be treated as AVP or Synthetic organic colouring material specified at Entry 54 (113) of Part-II of Schedule-A of H.P. VAT Act.

13. The Tribunal in its order impugned in the present petitions, verbatim quoted the aforesaid extraction from the order passed by the Appellate Authority and upheld the same.

14. The judgment passed by Kerala High Court, as noticed by the Appellate Authority and the Tribunal has been set-aside by Hon'ble Supreme Court in ***M.P. Agencies*** *Vs*. ***State of Kerala (2015) 7 SCC 102***. On the strength of the judgment passed by Hon'ble Supreme Court, the petitioner contends that the matter in issue has been answered in its favour and is accordingly covered by the aforesaid judgment. This contention has, however, been disputed by the respondent.

15. The facts, as noticed by the Hon'ble Supreme Court in aforesaid judgment, are as under:-

> *"1. The appellant, M/s M.P Agencies, is a registered dealer under the Kerala Value Added Tax Act, 2003 (for brevity "the 2003 Act") and is a wholesale distributor for "Ujala Supreme" and "Ujala Stiff and Shine", which are manufactured by M/s Jyothy Laboratories Ltd. "Ujala Supreme" is a fabric whitener and "Ujala Stiff and Shine" is a liquid*

fabric stiffener. The product "Ujala Supreme" is described as fabric whitener for supreme whiteness of clothes, and "Ujala Stiff and Shine" is given the description, liquid fabric whitener for crisp and shining clothes.

2. As there was an issue relating to rate of tax applicable to the two products, the appellant filed an application for clarification before the Commissioner of Commercial Taxes, Thiruvananthapuram. The Commissioner vide Order No. C7.34151/06.CT dated 25-10-2006 clarified the position which is in the nature of advance ruling by opining that the items "Ujala Supreme" and "Ujala Stiff and Shine" are commercially known as instant whiteners and the consumers are purchasing the manufactured goods which are subjected to certain processes and are marketed as a commercially different commodity, "instant whitener", in the brand name "Ujala", which is used as a "laundry whitener" at the end point. After so observing, the Commissioner referred to SRO No. 82 of 2006 wherein the Government has notified list of commodities coming under 12.5% category and laundry whiteners have been brought under this category vide Entry 27. On that basis, the Commissioner held that as there is a specific entry for the commodities, it would fall under the said entry and the taxable rate would be 12.5%.

3. Being aggrieved by the aforesaid clarificatory order, the appellant filed an appeal being OTA No. 13 of 2006 which was disposed of on 7-6-20071. The High Court remitted the matter by holding, inter alia:

> *"In the instant case, the Commissioner without even adverting to any one of the evidence produced by the assessee, by merely relying upon how the commodity is understood in the commercial circles, has proceeded to observe that the sale of the products by the assessee requires to be taxed at 12.5%. This view of the Commissioner is contrary to* ***sub-section (2) of Section 94*** *of the Act.*
>
> *The orders passed by the Commissioner under Section 94 of the Act is not only binding on the assessee, but also binding on the assessees who are similarly placed. Further, it is binding on the assessing authority. In cases of this nature, it is expected of the Commissioner to deal with the subject which is before him for clarification in detail and then offer his opinion by way of an*

order. In the instant case, the Commissioner has not done that exercise. This action of the Commissioner, in our opinion, is arbitrary, illegal and improper. Therefore, the order passed by the Commissioner requires to be set aside and the matter requires to be remitted back to the Commissioner for a fresh decision, keeping in view the observations made by us in the course of the order."

4. After the matter was remitted, the Commissioner considered all the materials furnished by the appellant and heard the matter at length. It was contended by the appellant that the scheme of VAT is materially different from that of KGST principally with respect to classification of goods for the purpose of levy of sales tax based on Harmonised System of Nomenclature (HSN), rate of tax applicable to different goods, etc. and resort to common parlance/commercial parlance test could be made only in respect of those goods, which have no reference to HSN. It was further urged that once a commodity is listed in the Third Schedule along with its HSN under List A, it has to be included in that entry only.

5. The crucial question, as the Commissioner perceived, was that the determination of classification of a particular commodity would be whether the same is listed in the Third Schedule with reference to HSN or not and if so listed there would be no scope to interpret the commodity differently relying on common parlance or commercial parlance. The Commissioner took note of the fact that the appellant had purchased the product in question from Jyothy Laboratories that was charging tax @ 4%on the products. Thereafter the Commissioner took note of all the contentions of the appellant and referred to the HSN codes allotted to the commodities, clause 43 of the rules of interpretation, referred to the test reports filed by the appellant and addressed to the commodity, namely, acid violet paste (AVP), and at one point observed thus:

"Admittedly the products in question are manufactured and supplied by M/s Jyothy Laboratories, an industrial unit. There is no dispute on the status of the unit as a 'manufacturing unit'. The unit for the production of the products in question purchases AVP and PVA. There is no dispute on the fact that 'the unit is not merely repacking' the materials purchased by them and marketing it under their brand name. Admittedly some process, as per the SSI certificate of the unit 'a manufacturing process', is

carried out before marketing their product, which brings an obvious change in the content and character and use of the products. AVP is basically an organic dye used in textile industry. By virtue of the process undertaken in the unit on the material it undergoes a basic change both in its content and character as well as in its application and use. In the new product evolved out of the process, admittedly there is only about 0.98%of AVP. According to the opinion furnished by Institute of Chemical Technology, University of Mumbai, the new product cannot any longer be used for any purpose for which AVP could have been used. These positions make it clear that the emergence of a new character for AVP is obviously due to change in content. Thus, the content, character and use of the commodity has been changed and as far as the market is concerned this is a commodity holding distinct identity as a 'fabric whitener'.

It may be true that on account of the term 'manufacture' as defined in the CET Act for the purpose of levying 'excise duty' the activities leading to the emergence of the product may not amount to manufacture on microanalysis of the term for the purpose of levying 'excise duty'. But the basic fact remains that the product marketed by the unit is not AVP in its original form as classified in the CET Act. AVP with the changed character has not been assigned any separate HSN for the purpose of the CET Act. Under no stretch of interpretation can it be said that for the mere reason that a product has not been assigned any separate HSN it should be treated as a commodity holding HSN by virtue of its mere presence. In this case Ujala Whitener admittedly contains only a negligible portion (about 0.98%) of AVP. As stated above, definitions and classifications in the CET Act are exclusively for the purpose of levying excise duty. If a commodity comes outside the ambit of a classification made under the CET Act, then the interpretation that could be given under the KVAT Act would be based on the preamble and definitions under the statute."

Thereafter, the Commissioner proceeded to state thus:

"The commodity covered under HSN 3204.12.94 is specifically for acid violets. In view of the above findings, 'Ujala Whitener' can no longer be treated as an AVP in the original form for which the HSN

has been assigned and so the specific Entry 155(8) for acid violets holding HSN 3204.12.94 will not encompass the product 'Ujala Whitener'. In the result the test to be applied is the 'common parlance' or 'commercial parlance' theory. If a consumer asks for AVP no dealer would give 'Ujala Whitener', so also when 'Ujala Whitener' is asked for no dealer would give the commodity 'AVP'. Instead, when a laundry brightener is asked for obviously the dealer would give 'Ujala Whitener' as a similar product. So in common parlance and commercial parlance 'Ujala Whitener' is known and treated as a 'laundry brightener'. In the Third Schedule there is no other entry for such products and so it cannot be classifiable under the Third Schedule.

In the case of 'Ujala Stiff & Shine' the raw material used is Poly Vinyl Acetate (PVA) coming under the specific HSN 3905.12.90 and admittedly the product marketed as 'Ujala Stiff and Shine' fabric stiffener is in other form and the formulation arrived at in the previous paragraphs in the case of 'Ujala Whitener' is squarely applicable in this case also.

It is a settled position that so long as the trade recognises it as different commodity and its uses are different, the item has to be recognised as different goods. Here the products in question produced are by itself a commercial commodity capable of being sold or supplied with distinct identities when compared to the raw materials used. In the instant case these requirements are satisfied and so the products in question can no longer be treated as the same product as 'imputed' by virtue of its mere presence in a negligible proportion.

As per ***Section 6(1)(d)*** *goods not covered under clauses (a) or (c) are taxable @ 12.5%and the Government is empowered to notify list of such goods. Accordingly, the Government had notified the list of such goods as per SRO No. 82 of 2006. Vide Entry 27 inter alia 'laundry brighteners' have been specifically picked out and placed in 12.5%category making the intention clear."*

And again

"The next question to be considered is in what sub-entry the product in question is to be placed. The applicant had pointed out that in Entry 27 of SRO No. 82 of 2006, the product 'laundry

whitener' is mentioned only in the heading and not mentioned in the sub-entries. By picking out the product 'laundry whitener' and including it specifically in the heading of the said entry, the intention is made specially clear. But since no specific HSN has been assigned to the products in question and the products are not specifically mentioned elsewhere, it has necessarily to go under Entry 103 i.e the residual entry of SRO No. 82 of 2007 taxable @ 12.5%."

6. In view of the aforesaid analysis, the Commissioner opined that the products "Ujala Supreme" and "Ujala Stiff and Shine" are classifiable under Entry 103 of SRO No. 82 of 2006 and would attract tax @ 12.5%.

16. The fact situation before the Hon'ble Supreme Court was *pari-materia* identical to that in the petitions before this Court. Even the purpose and product was the same. The only distinction that can be drawn was in respect of certain provision of the H.P. VAT Act and the Kerala VAT Act. However, the distinctive features of both the Acts, in our considered view, will not be material as far as drawing of precedence in instant petitions is concerned. The fact of the matter remains that under the Kerala Act, the schedule specified certain products/articles to be taxable at lesser rate and the products/articles outside schedule at higher rate under residuary category, as is in the case under H.P. VAT Act. The rules of interpretation provided in Kerala Act are not available in H.P. VAT Act, but that can not be used to the disadvantage of the petitioner for the reason that such rules have been used by the Hon'ble Supreme Court to interpret the real import of the relevant Entry of the Schedule.

17. The Entry in Column-II of notification issued by the respondent detailing Industrial input and packing material entry against Entry 55 (113) of Schedule-A, Part II-A of H.P. VAT Act, denotes the HSN number, i.e Harmonized System of Nomenclature developed by International Customs Organization and adopted in the Customs Tariff Act, 1975. Noticeably, the

Entry against serial No. 113 of the notification issued by respondent detailing Industrial input and packing material specified in Entry 54 of Part-2 of Schedule-A of the H.P. VAT Act, can not be said to be used without purpose. The only corollary that can be drawn from the use of HSN code is to have reference of the product viz-a-viz Customs Tariff Act, 1975 for the purposes of identification. Since the AVP is referable to item denoted by HSN code 3204 as adopted by Customs Tariff Act, 1975, the same can not be ignored for the purposes of H.P. VAT Act. The fact that Hon'ble Supreme Court, after relying upon the report of the experts, has concluded that mere dilution of AVP does not change its character, is sufficient to reject the contention raised by the respondent. The product, therefore, remains AVP, having coverage under Entry 54 (113) of Part-II of Schedule-A of H.P. VAT Act.

18. By discussing the relevant Entry of Kerala Act corresponding to Entry 54 (113) of Part-II of Schedule-A of H.P. VAT Act with the help of rules of interpretation, Hon'ble Supreme Court has held as under:-

> *"40. From the aforesaid discussion, it is clear as crystal that the two goods/products have been held to be covered under HSN Code 3905 and HSN Code 3204.12.94 and hence, there can be no shadow of doubt that the said entries fall under Schedule III List A* ***Entries 155(8)(d) and 118(5) to the 2003 Act*** *covering industrial inputs and packaging materials, but that would not be material and relevant regard being had to the Rules of Interpretation which are applicable. The subject-matter of the list will not fall under residuary Entry 103 in SRO No. 82 of 2006 dated 21-1-2006, if the goods in question fall in any entry of any of the Schedules. That is what is conveyed by the language employed in Entry 103. The said entry, as we find, does not stipulate or carve out any exception in respect of List A of the Third Schedule. That being the position, once goods fall under any of the HSN classification, that is, the goods/commodities that are included in List A of Third Schedule, Entry 103, which is residuary in nature, would not get attracted.*

41. The submissions of the learned counsel for the State that the decisions under the Excise Act would have no play, for they deal with the issue of manufacture, does not commend acceptance. The High Court has elaborately dwelled upon the issue of manufacture. We have noticed the judgments rendered by Cestat where there is no manufacturing. It is pertinent to state here that the question of manufacture is not relevant for the purposes of the 2003 Act. What is really relevant is the classification based upon the HSN number. The decisions rendered by Cestat have decided on the classification which is founded upon the HSN number. It has been laid down that after dilution with water the goods continue to remain classified under the same HSN number. This means that the goods remain in List A of the Third Schedule. It may be noted that the position would have been totally different had the goods in question been separately and specifically itemised in SRO No. 82 of 2006 dated 21-1-2006. The goods which are specifically mentioned in any of the entries of the said SRO, would be chargeable to tax @ 12.5%. But that is not the lis here, for the Revenue has included the goods in the residuary Entry 103 and the said entry, by no stretch of reasoning, can be made applicable.

42. The High Court, we are disposed to think, has missed the issue in entirety and, therefore, we are obliged to dislodge the impugned judgment and orders. However, if any appellant assessee has paid the amount of VAT to the State Government, they will not be entitled to get any refund of the said amount.

43. Consequently, the appeals are allowed and the judgment and orders are set aside with the stipulation that none of the appellant assessees would be entitled to refund. However, in the facts and circumstances of the case, there shall be no order as to costs."

19. Thus, we are of the considered view, that the question of law framed by us in these petitions finds its answer on all fronts from the aforesaid judgment passed by Hon'ble Supreme Court. The product 'Ujala Supreme' is thus held to be classifiable under Entry 55 (113) of Schedule-A, Part II-A of H.P. VAT Act, 2005 as "Synthetic organic colouring

matter" and assessable to the rate of VAT applicable to such Entry of Schedule-A.

20. In light of above discussion, we find merits in these petitions and the same are allowed. Order dated 17.09.2014 passed by Tribunal as also the order passed by the Appellate Authority and Assessing Officer are set-aside. The product 'Ujala Supreme' is held liable for VAT under H.P. VAT Act at the rate which is applicable for items against Entry 54(113) of the Part-II of Schedule-A of H.P. VAT Act and the petitions are accordingly disposed of, so also the pending application(s), if any.

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

Between:

M/S POOJA COTSPIN LIMITED, SALLEWAL-NALAGARH, DISTRICT SOLAN (H.P). THROUGH ITS DIRECTOR SHRI MEGH RAJ GOYAL.

……..PETITIONER

(BY SHRI R.N. SHARMA, ADVOCATE)

AND

1.STATE OF HIMACHAL PRADESH THROUGH ADDITIONAL CHIEF SECRETARY (EXCISE & TAXATION) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-2.

2.CHAIRMAN, HIMACHAL PRADESH TAX TRIBUNAL, DHARAMSHALA CAMP AT SHIMLA, BLOCK NO. 30, SDA COMPLEX, KASUMPTI, SHIMLA-171009.

3.EXCISE & TAXATION COMMISSIONER, HIMACHAL PRADESH, BLOCK NO. 30, SDA COMPLEX, KASUMPTI, SHIMLA-171009.

4.THE ASSISTANT EXCISE & TAXATION COMMISSIONER, BADDI- BAROTIWALA-NALAGARH, DISTRICT SOLAN.

5.THE EXCISE & TAXATION OFFICER-CUM-ASSESSING AUTHORITY-1, BADDI, DISTRICT SOLAN.

…….RESPONDENTS

(BY SHRI. AJAY VAIDYA, SENIOR ADDITIONAL ADVOCATE GENERAL)

CIVIL REVISION PETITION
No. 226 of 2015
Reserved on :15.03.2022
Decided on: 22.03.2022

Himachal Pradesh Value Added Tax Act, 2005 – Sections 7 & 30 – Levy of presumptive tax – Tax invoices / retail invoices – The conjoint reading of Sections 7 and 16(2) of the Act and Rule 45 of the rules, have made it clear that a registered dealer under the Act has option to pay presumptive tax under Section 7 or by way of composition under Section 16(2) in the manner as prescribed in chapter 6 of the rules -- In case the dealer under rule 45 (6) opt to pay the lump sum, he, is not liable to issue tax invoices under section 30 -- The order passed by Ld. Tribunal dated 29.05.2015 is held to be wrong illegal and against the provisions of VAT Act and the rules framed -- Revision petition allowed. (Paras 16, 24 & 25)

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

O R D E R

By way of instant revision petition, petitioner has assailed order dated 29.08.2015 passed by Himachal Pradesh Tax Tribunal (for short

'Tribunal') Dharamshala, camp at Shimla, in Appeal No. 19/2012, whereby order dated 28.05.2012, passed by the Excise & Taxation Commissioner, Himachal Pradesh(for short 'Commissioner') was affirmed.

2. Brief facts of the case are that the petitioner is a registered dealer under the Himachal Pradesh Value Added Tax Act, 2005, (in short 'VAT Act'). The Assessing Authority, Baddi, District Solan, H.P. assessed the petitioner for the year 2010-11 under the VAT Act and also the Central Sales Tax Act, 1956. The assessment order was issued on 29.09.2011. A total sum of Rs. 1,31,43,515/- was assessed as excess Input Tax Credit (for short 'ITC'), out of which a sum of Rs. 49,27,694/- was applied towards the payment of due Central Sales Tax and balance of Rs. 82,15,821/- was assessed as excess Input Tax Credit, which was ordered to be carried forward to the next year under Section 12(4) of the VAT Act. Petitioner made a request for refund of ITC, however, he was directed to file separate application for refund by the Assessing Officer.

3. Petitioner submitted requisite application for refund of excess ITC of Rs. 82,15,821/-. Refund, as applied by the petitioner, was recommended byAssistant Excise and Taxation Commissioner, Baddi, Barotiwala and Nalagarh (AETC-BBN) on 02.11.2011. While considering the refund application of the petitioner, Commissioner called for additional reports from AETC-BBN and Excise and Taxation Officer (ETO) Nalagarh to verify the facts relating to actual tax deposition in Government Treasury and purchases made by the petitioner from M/s Samana Industrial Limited. In response, AETC-BBN submitted his report dated 17.01.2012. The relevant extract of said report was as under:-

> *"2. The refund of the dealer has been assessed and the amount of refund determined after verification of required documentary evidences and after verification of the ITC amount which is clearly stated in the assessment order. The dealer is a manufacturing unit dealing in yarns etc. and most of the same*

are interstate sales attracting CST @1%. Out of the GTO of Rs. 49,59,40,525/- an amount of Rs. 49,55,20,087/- is on account of ISS and Rs. 48,16,53,992/- is taxable @1%. The dealer has made local purchases and an amount of Rs. 1,31,43,515/- is eligible as ITC therefore, the amount has become refundable to the dealer."

The Excise & Taxation Officer, Nalagarh, also submitted his report dated 06.01.2012 and the relevant extract of said report was as under:-

"1. Sales and purchases made by the company in the year 2010-11 were checked from the account books and were found in order.

2. Input tax credit claimed to the tune of Rs. 1,38,03,914.00 was test checked from the accounts of its four major suppliers i.e. M/s Samana Industries, Salewal, VMT Spinning Co. Ltd. Kalyanpur, M/s Winsome Textile Industries ltd. Baddi and M/s Vardhman Textiles ltd. Baddi and was found as per claimed at the time of assessment. The company has claimed a refund of Rs. 82,15,821-00 out of the total ITC."

4. Learned Commissionerpassed order dated 28.05.2012 on the refund application of the petitioner. The Commissioner disallowed a sum of Rs. 17,06,715/- from ITC refund of the petitioner after holding the same to be unverifiable claim. Thus, refund of Rs. 65, 09,106/- only was held payable to the petitioner. The relevant extract of learned Commissioner's order necessary for the purpose of adjudication of this petition is as under:-

"M/s Pooja Cotspin Limited has purchased raw material from M/s Samana Industries, Sallewal-Nalagarh for Rs.14,17,05,652/- during 2010-11 and has paid tax of Rs. 70,85,283/- on such purchase as per report of ETO Nalagarh dated 21.05.2012. Since, M/s Samana Industries Limited is enjoying incentive of deferred payment of tax scheme while exercising option under notification No. EXN-F(1)-2/2004 dated 26.07.2005 for which the Assessing

Authority Nalagarh has issued a necessary certificate (Deferment Certificate No. 005) for the period 14.08.2009 to 13.08.2014 covering the period of commencement of commercial production w.e.f. 14.08.2009. As per report of ETO Nalagarh dated 21.05.2012, M/s Samana Industries Limited has claimed deferment to the tune of Rs. 17,06,715/- on VAT payable for Rs. 70,85,283/- i.e the amount of Rs. 17,06,715 has not been deposited into government treasury due to option exercised for upfront payment of tax as per aforesaid notification.

The amount of tax which has not gone into Government treasury does not become refundable to the dealer as the amount cannot be refunded out of air. For granting refund, the first and foremost requirement is to allow refund only against specific payment or deposit of tax/ demand and where no amount has been deposited, there exists no provision under law to refund such amount. The application for refund cannot be entertained to the extent of the amount of claim not deposited in Government Treasury and as such the same remains unverifiable. Hence the amount of tax to the tune of Rs. 17,06,715/- is disallowed as being unverifiable claim and the same having not been paid or deposited in Government Treasury at all."

5. Aggrieved against the aforesaid order passed by the Commissioner, petitioner preferred an appeal before the Tribunal, which was dismissed on 29.08.2015, hence the present revision.

6. The instant revision petition was admitted on 27.07.2017 on the following questions of law:-

(i) Whether the Ld. Tribunal has failed to appreciate that the provisions of (a) sections 11(1), 30(1) and (2) of the HP VAT Act, 2005 which allow Input Tax Credit and (b) section 11(7)(c) (iii) and 11(8) read with Rule 20 (also read with the Schedule appended thereto) which do not disallow Input Tax Credit in respect of purchases from dealers covered by the Deferment Scheme, 2005 notified under section 62 of the Act ?

(ii) Whether the Ld. Tribunal has failed to appreciate that the entire field occupied by the provisions of payment of (i)

presumptive tax and (ii) lump sum by way of composition is expressly and statutory confined, restricted and stood thereby completely exhausted by provisions of sections 7 and 16(2) of the HP VAT Act, 2005 read with Rules 45, 46, 47, 48, 49 and 50 of the HP VAT Rules, 2005, and could not be expanded to include Deferment of tax notified under section 62 of the said Act by quasi-judicial adjudicatory process ?

(ix) Whether denial of Input Tax Credit to the Petitioner amounting to Rs.17,06,715/- in respect of purchases from M/s Samana Industries under section 11(7)(c)(iii) which has no application at all to the purchases from dealers enjoying deferment and making upfront payment is valid and legal even through there is no other provision in the Act or the Rules sustaining such denial?

7. We have heard Mr. R.N.Sharma, learned counsel for the petitioner as well as Mr. Ajay Vaidya, learned Senior Additional Advocate General and perused the record.

8. Learned Commissioner had disallowed the refund of Rs. 17.06,715/- to the petitioner on the ground that the petitioner purchased raw material from selling dealer M/s Samana Industries Ltd. for Rs. 14,17,05,652/- during 2010-11 and said selling dealer had paid tax of Rs. 70,85,283/- on such purchase. M/s Samana Industries Ltd. had claimed deferment to the tune of Rs. 17,06,715/- on VAT payable for Rs. 70,85,283/- and thus, a sum of Rs. 17,06,715/- had not been deposited into the Government Treasury as M/s Samana Industries Ltd. had opted for upfront payment of tax in accordance with notification No. EXN-F(1)-2/04, dated 26.07.2005. Since the amount of Rs. 17,06,715/- had not gone into the Government Treasury, hence, according to the learned Commissioner, the same was not refundable to the dealer.

9. In appeal, learned Tribunal upheld the dis-allowance of Rs. 17,06,715/-, ordered by the learned Commissioner, on the grounds that the

petitioner was not entitled to avail the refund against the amount which was not deposited by the selling dealer i.e. M/s Samana Industries Ltd. by availing the benefit of deferment scheme, and also that refund to the extent of Rs.17,06,715/- was unverifiable under Section 11(7) (c)(iii) of the Act.

10. Since the learned Tribunal has upheld learned Commissioner's order by placing reliance on Section11(7)(c)(iii) of the Act, we deem it proper to answer question of law at serial No. (ii) above, in the first instance.

11. Section 11(7)(c)(iii) of the Act reads as under:

> *(7) No input tax credit shall be claimed by a purchasing dealer and shall not be allowed to him for, ---*
> *(a) ……*
> *(b) ……*
> *(c) purchase of goods made in the State from,--*
> *(i) ……or*
> *(ii) ……or*
> *(iii) a registered dealer who has opted to pay lump-sum amount, in lieu of tax, by way of composition under sub-section (2) of section 16 or presumptive tax under section 7;*

12. Sub section 7(c)(iii) of section 11 of the Act specifically bars the claim of ITC by a purchasing dealer who has purchased goods in the State from a registered dealer who either opted to pay lump-sum amount in lieu of tax by way of composition under section 16(2) or presumptive tax under section 7, therefore, glance at provisions of section 7 and section 16(2) of the Act becomes necessary to assess the applicability of said provisions in the facts of the case. Section 7 of the Act reads as under:-

> *"7. Notwithstanding anything contained in this Act, every registered dealer, whose gross turnover in any year does not exceed such amount as may be prescribed, shall, in lieu of the tax payable under this Act, pay presumptive tax on the entire taxable*

turnover of sales or purchases, as the case may be, at such rates, not exceeding the rates specified in section 6, as the State Government may, by notification, direct, and subject to such conditions and restrictions and in such manner as may be prescribed:

Provided that no input tax credit shall be available to such dealer:

"Provided further that a registered dealer who imports goods for sale shall pay tax on the sale of such goods imported from outside the State on actual basis i.e. as per tax applicable on the sale of such goods within the State."

Section 16(2) of the Act reads as under:-

"16(2) The State Government may, in public interest and subject to such conditions as it may deem fit, accept from any class of dealers in lieu of the amount of tax payable under this Act for any period, by way of composition, a lumpsum to be determined and to be paid at such intervals and in such manner as may be prescribed, or the lumpsum amount may be calculated at a fixed rate on the taxable turnover, as may be prescribed in respect of such class of dealers and for this purpose a simplified system of registration, maintenance of accounts, filing of returns may also be prescribed which shall remain in force during the period of such composition".

13. Section 7 of the Act provides an option to a registered dealer under the Act to pay fixed presumptive tax on the entire taxable turnover of the sales and purchase atthe rates to be prescribed by the Government. A dealer having opted to pay presumptive tax under aforesaid provisions of Act

is precluded to avail ITC. To bar a dealer from claiming ITC under Section 7 of the Act,it is necessary to be proved that such dealer firstlywas entitled to opt and secondlyhad opted to pay presumptive tax. In the facts of the case in hand, there is nothing to suggest that the selling dealer i.e. M/S Samana Industries had opted to pay presumptive tax or had ever paid it.

14. As regards the applicability ofsection 16(2) of the Act to attract disqualification under section 11(7)(c)(iii), we find the conclusion drawn by learned Tribunal in that behalf to be clearly misplaced. The aforesaid provision of the Act clearly provides that the State Government haspower toaccept from any class of dealers, a composite orlump sum amount in lieu of tax payable under this Act for any period and at such intervals as may be '*prescribed'*. The calculation of payable lump-sum amount has also been left to be '*prescribed'*. The term prescribed is defined in Section 2(r) of the Act as under:-

*"2(r) '**prescribe**d' means prescribed by rules made under this Act"*

15. The Himachal Pradesh Value Added Tax Rules, 2005 (for short 'Rules') have been framed under Section 64 of the Act. In order to understand the clear import of Section 16(2) of the Act, relevant rules fulfilling the prescriptions as contained in Section 16(2) of the Act needs to be looked at.

Rule 45 is the general rule that reads as under:-

> "**45. Lump-sum by way of Composition.*(1)*** *A registered dealer (other than a dealer running a restaurant holding bar license for retail sale of liquor under the Himachal Pradesh Liquor License Rules, 1986 and a dealer dealing in medicines) shall have the option to pay presumptive lump sum tax by way of composition under section 7 or under sub-section(2) of section 16, and shall pay tax in the manner prescribed in this chapter.*
>
> *(2) Such payment (hereinafter called —the lump-sum) shall be deemed to be tax for the purpose of application of*

provisions relating to assessment, use of declaration forms, maintenance of record relating to such forms, levy of interest, imposition of penalties for contraventions and offences against provisions of the Act, and recovery of outstanding dues.

(3) The application, in the prescribed form, offering to pay the lump-sum shall be made to the Appropriate Assessing Authority and signed by a person eligible to make an application for registration under the Act. The Appropriate Assessing Authority shall scrutinize the application filed by the dealer and the option shall become operative w.e.f. 1st day of the month following the day on which such option is filed if it is correct and complete. On receipt of the application, such authority shall ascertain that it is complete and its contents are correct, and thereafter allow the applicant to make payment of the lumpsum

(4) The dealer exercising such option under sub-rule (2) shall be deemed to have been allowed to make payment of the lump-sum w.e.f. the beginning of the month following the date of application. In case, the appropriate Assessing Authority finds the option incomplete it shall allow the dealer to complete the same by affording an opportunity of being heard.

(5) A dealer paying lump-sum shall pay the lump-sum in equal quarterly installments payable within thirty days of the expiry of each quarter and shall, in proof of the payment so made, furnish to the appropriate Assessing Authority, a treasury receipt.

(6) The dealer opting to pay the lump-sum shall not issue a tax invoice under section 30 and the input tax credit in respect of goods purchased from such dealer shall be nil, and such dealer shall also not be entitled to claim any input tax credit on the purchase of goods made by him.

(7) The dealer opting to pay lump-sum shall be entitled to charge tax as may be prescribed.

> *(8) Notwithstanding anything contained in this Chapter, the State Government may at any time withdraw the facility of making payment of the lump-sum from any or all class(s) of dealers."*

Rules 46 to 49 deal with specific classes of dealers i.e. brick kiln owners, laboratory dealers, work contractors and village industries etc. Rule 50 deals with dealers other than those covered under Rules 46 to 49. As per above provisions, one is at liberty to opt to pay either under Section 7 or Section 16(2),the fixed lump-sum payable amount in accordance with its annual turnover subject, however, to the provisions of Rule 45(*supra*).

16. From the conjoint reading of Section 7 and Section 16(2) of the Act and Rule 45 of the rules, it is clear that a registered dealer under the Act has option to pay presumptive lump-sum tax under Section 7 or by way of composition under Section 16(2) in the manner as prescribed in Chapter VI of the Rules. Importantly, by virtue of Rule 45(6), the dealer opting to pay the lump-sum is not liable to issue tax invoices under Section 30.

17. It is not understandable as to under what assumption, learned Tribunal has upheld the order of the Commissioner by placing reliance upon Section 16(2) of the Act. Again, there is nothing on record to suggest even remotely that the sellingdealer M/s Samana Industries Ltd. had opted to pay lump-sum tax for the year 2010-11. The findings recorded by learned Tribunal in this behalf can easily be termed to be non- speaking being bereft of any reasoning. Simply quoting a provision of law without adjudging its application to the specific facts of the case cannot be held to be tenable on the touch stoneof well settled canons of law.

18. Presumably, the benefit of deferred payment availed by M/s Samana Industries ltd. under notification No. EXN-F(1)-2/04, dated 26.07.2005 has been misunderstoodand overlapped with the lump-sum

payment payable under Section 16(2) of the Act. The relevant extract of aforesaid notification dated 26.07.2005 reads as under:-

> *"No. EXN-F(1)-2/2004- In exercise of the powers conferred by sub section (1) of Section 62 of Himachal Pradesh Value Added Tax Act, 2005 (Act No. 12 of 2005) as amended by the Himachal Pradesh Value Added Tax (Amendment) Ordinance, 2005 (Ordinance No.8 of 2005), the Governor of Himachal Pradesh is pleased to make the following amendments in the Himachal Pradesh General Sales Tax (Deferred Payment of Tax) Scheme, 2005 (hereinafter called the 'said Scheme') with immediate effect:-*
>
> *1.* ***Short title and commencement-(i)*** *This Scheme may be called the Himachal Pradesh General Sales Tax (Deferred Payment of Tax) (First Amendment) Scheme, 2005.*
>
> *(ii) It shall come into force at once.*
>
> ***2. Insertion of Para 5-A****- After the existing para 5 of the said Scheme, the following para-5-A shall be inserted, namely:-*
>
> ***"5A. Option by industrial units-(I)*** *Notwithstanding anything contained in para 5 of the said Scheme, the new and existing eligible industrial units other than those specified in the negative list, which have come into commercial production before 07.01.2003 and which, after the approval of the Director of Industries or other officers so authorized by him, undertake substantial expansion only after 07.01.2003 may either continue to avail such facility or by making an application in Form S.T. (DP)-VII opt to pay 65% of the tax liability, for any tax period of a financial year, according to the return and upon making such payment, he shall be deemed to have paid the tax due from him according to such return. The option once exercised shall be final.*
>
> *(2) The registered dealer (industrial unit) making payments of tax under sub-para(I) of this para shall be entitled to input tax credit under Section 11 of the Himachal Pradesh Value Added*

Tax Act, 2005 in respect of intra-State sales, inter-State sales or transfer of goods on consignment basis or branch transfer basis."

The genesis of notification dated 26.07.2005 can be traced from Himachal Pradesh General Sales Tax (deferred payment of tax) Scheme 2005 (for short, "deferment scheme')issued under the Himachal Pradesh General Sales Tax Act, 1968, notified by the State Government on 30.03.2005. The H.P. General Sales Tax Act, 1968 was repealed by VAT Act w.e.f. 01.04.2005. Thus, the deferment scheme under H.P. General Sales Tax Act was amended vide aforesaid notification dated 26.07.2005. The deferment scheme was applied to VAT Act under the first proviso to Section 62(5) of the Act vide notification dated 19.01.2006. At this stage, it is relevant to notice the provisions of Section 62(5) of the Act as under:-

"62(5) Any dealer who manufactures and sells goods and who, immediately before the commencement of this Act, was enjoying the benefit of any incentive of sales tax leviable on the sale of manufactured goods under the said Act and who would have continued to be eligible for such incentive on the date of commencement of this Act, had this Act not come into force, may be allowed by the State Government, by notification, --

(a) to continue to avail of the benefit of exemption from payment of tax on the sale of manufactured goods made by such dealer himself for the unexpired period, subject to the condition that no input tax credit shall be allowed to the subsequent dealer purchasing goods manufactured and sold by such dealer (industrial unit), or

(b) to opt, in the prescribed manner, to avail of the facility of making deferred payment of tax for the unexpired period of incentive instead of availing the exemption specified in clause (a), or

(c) to continue to avail of the facility of making deferred payment of tax on the sale of manufactured goods made by such dealer himself for the unexpired period and such dealer (industrial unit) shall be eligible to issue tax invoice and to claim input tax credit subject to the provisions of section 11 of this Act.

[Provided that the State Government may, by notification, allow any dealer, whether registered before or after the commencement of this Act to avail of any incentive of tax leviable on the sale of manufactured goods under the Act, if such incentive has been declared by the State Government before the commencement of this Act:

Provided further that the State Government may by notification, in lieu of the incentive of exemption from tax under the preceding proviso, allow only the facility of making deferred payment of tax, subject to such conditions as it may specify therein.]

19. The first proviso to Section 62(5) of the Act enables the State to issue notification and allow any dealer to avail of any incentive on tax, if such incentive has been declared by the State before the commencement of the VAT Act. In exercise of such powers, the State Government issued notification dated 19.01.2006 and allowed the incentive of deferment to new and existing Industrial Units by applying all terms and conditions specified in deferment scheme.

20. The lump-sum payment of composite tax under Section 16(2) of the Act in no way can be equated with the powers of State under Section 62(5) of the Act as bothhave separate and distinct fields of operation. There cannot be any overlapping between the two provisions, therefore, disallowance of Rs. 17,06,715/- payable from ITC to the petitioner by invoking the provisions either of Section 7 or Section 16(2) of the Act is wholly illegal and against the mandate of law.

21. The question of law underconsideration is thus answered accordingly. It is held that the payment of presumptive tax under Section 7 or lump-sum tax by way of composition under Section 16(2) of the Act read with Rules 45 to 50 of the rules have their application in the specific field expressly contemplated in the Act and cannot be expanded to include deferment of tax notified under Section 62(5) of the Act.

22. This takes us now to the point of consideration on other question of law framed at serial No. (i) and (iii) as noticed above. The entitlement of a dealer to claim ITC is provided under sub-Section 1 of Section 11 of the Act which reads as under:-

> *"11.[(1) Subject to the provisions of this Act, the input tax credit which a purchasing registered dealer (hereinafter in this section called the purchasing dealer') may claim, in respect of taxable sales made by him during the tax period, shall be –*
>
> > *(i) the amount of input tax paid or payable by such purchasing dealer to the selling registered dealer, on the turnover of purchases of such goods as have been sold by him during the tax period; and*
> >
> > *(ii) calculated and allowed as provided in this section, and subject to such other conditions as may be prescribed.]"*

However, sub-Section 7 of Section 11 places an embargo on claim to ITC by a purchasing dealer in certain specific exigencies. A part of the claim of refund has been disallowed to the petitioner by wrong application of Section 11(7)(c)(iii) of the Act, as already held above. The entitlement of the petitioner to claim refund of ITC was never the issue. It was the quantum of

refund which hadbeen bone of contentionbetween the parties. Under Rule 45(6), the dealer opting to pay lump-sum is not required to issue tax invoices under Section 30, whereas sub Section 1 of Section 30 mandates the issuance of tax invoices by one registered dealer to another which forms the basis to make purchasing registered dealer entitle for claim of ITC. Under sub Section 3 of Section 30, the issuance of tax invoices is barred in certain cases which includes the payment of presumptive tax under Section 7 or lump-sum tax under sub-Section 2 of Section 16 of the Act. It is not the case of respondent No.1 that selling dealer had not issued tax invoices in the case. These provisions clearly define and distinguish the fields where ITC can be claimed under the Act and where it is prohibited. As noticed above, it has not been the case of thedepartment that the claim of the petitioner for ITC refund was not tenable. In such circumstances, to deny a part of claim of refund by applying Section 7 or Section 16(2) of the Act is clearly arbitrary. Even the principle of proportionality cannot be applied in cases where provisions of law are not juxtaposed,rather have their application in different situations.

23. There is no dispute on facts that the selling dealer i.e. M/s Samana Industries Limited had initially availed the benefit of deferred payment subsequently converted to upfrontpayment of 65% of the payable amount by virtue of provisions of notification dated 26.07.2005. It was provided in said notification that the upfront payment of 65% of the tax liability for any tax period offinancial year shall be deemed to be payment of the tax due according to the return of the assessee. Therefore, deficit, if any, of 35% in receipt of tax suffered by the State was its voluntary Act under a scheme formulated by it. Such deficit to the State coffers cannot be made basis forpenalizing the petitioner who was not at fault.

24. The questions of law at serial No. (i) and (iii) are accordingly answered. The petitioner was entitled to refund of entire amount of ITC to the tune of Rs.82,15,821/-. Dis-allowance of Rs.17,06,715/- from payable amount of ITC to the petitioner as ordered by learned Commissioner vide order dated 28.05.2012 and upheld by learned Tribunal vide order dated 29.08.2015 is held to be wrong, illegal and against the provisions of VAT Act and rules framed thereunder.

25. In light of above discussion, the instant revision petition is allowed. Order dated 29.08.2015 passed by the Himachal Pradesh Tax Tribunal in Appeal No.19 of 2012 upholding order dated 28.05.2012 passed by the Excise & Taxation Commissioner, Himachal Pradesh is set-aside. Petitioner is held entitled to refund of balance Input Tax Credit to the tune of Rs.17,06,715/-. Since the petitioner remained divested from substantial amount of his business money without his fault, he is held entitled to payment of interest from Respondent No.1 @ 6% per annum on the amount of Rs.17,06,715/- from the date it fell due till the date of actual payment.

Accordingly, the present revision petition is disposed of, so also the pending application(s), if any.

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

Between: -

NOOP RAM SON OF SHRI DUGLU RAM,
RESIDENT OF VILLAGE BANOGI, POST OFFICE
BHEKHALI, TEHSIL, POLICE STATION AND
DISTRICT KULLU, H.P. AGED 28 YEARS.

...APPELLANT

(BY SH. VINAY THAKUR AND SH. MAAN SINGH, ADVOCATES)

AND

STATE OF HIMACHAL PRADESH

.... RESPONDENT.

(BY SH. KAMAL KANT, DEPUTY ADVOCATE GENERAL)

CRIMINAL APPEAL
NO.32 OF 2018
Decided on: 10.03.2022

Narcotic Drugs and Psychotropic Substances Act 1985, Section 20 – Recovery of 1kg and 600 grams of charas and conviction passed against the appellant - Defence of false implication taken - The testimonies of police officers/spot witnesses are reliable and trustworthy - No explanation by a appellant why he was on the spot of recovery and what was the probable cause of his false implication– Held – In the case under NDPS Act reverse burden applies and once the prosecution discharges its initial burden, it is for the accused to explain, though the standard of proof for both is different -- Accused has to probabalize his defence -- On the analysis of the material on record, the false implication of appellant by the police has not been proved - Material prosecution witnesses found reliable and trust worthy -- Appeal dismissed. (Paras 12 & 13)

Cases referred:

Hanif Khan alias Annu Khan vs. Central Bureau of Narcotics (2020) 16 SCC 709;

Raveen Kumar vs. State of Himachal Pradesh (2020) 12 Scale, 138;

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

J U D G M E N T

By way of instant appeal, appellant has assailed judgement and sentence dated 28.11.2017 passed by learned Special Judge-II (Additional Sessions Judge), Kullu, H.P. in Sessions Trial No.23 of 2016, whereby appellant has been convicted for commission of offence under Section 20 of the Narcotic Drugs and Psychotropic Substances Act,1985, (for short 'NDPS Act') and has been sentenced to undergo rigorous imprisonment for ten years

and to pay a fine of Rs.1,00,000/- (One lac) and in default of payment of fine, to further undergo simple imprisonment for one year.

2. The facts on which the case of prosecution rested are that on 28.12.2015, a police party headed by HC Jamal Deen (PW-8) left Police Station, Kullu at about9.57 P.M. for routine patrol duty in official vehicle No.HP-33A-9986. (PW-8),HC Jamal Deen was accompanied by HHC Shyam Dass (PW-6)C. Mahesh Kumar (PW-7) and C. Sunil Mahant, driver of the official vehicle. At about 10.45 PM, near place 'Bhutnath Bridge' the police party noticed a person coming from footpath side carrying a bag in his hand. On noticing the presence of police party, the said person turned back and tried to run away from the spot after throwing the bag carried by him on the ground. The police party apprehended the said person, i.e. the appellant. On inquiry, appellant disclosed his name as Noop Ram. He, however, could not satisfactorily explain his conduct regarding getting rid of bag carried by him. Thus, the police party entertained suspicion against him. (PW-7)C. Mahesh Kumar sent to bring some independent witness, but he failed to procure any such witness. (PW-8) HC Jamal Deen then associated (PW-6) HHC Shyam Dass and (PW-7) C. Mahesh Kumar as witnesses and the bag of the appellant was searched in which another green coloured carry bag was found tied with a knot. On opening of said bag, stick shaped black coloured substance was found wrapped in wrapper, which was discovered to be the contraband i.e. Charas. On weighing, the recovered Charas was found to be 1 Kg. 600 Grams. The recovered Charas was again placed in green carry bag along with polythene wrapper and were put inside the carry bag, which further was placed in a cloth parcel and such parcel was sealed by nine seals carrying impression 'A'. Facsimile of seal impression was preserved on a separate piece of cloth Ext.PW-6/A. NCB form was filled by (PW-8) HC Jamal Deen. Recovery memo Ext.PW-6/B was prepared. "Rukka" Ext.PW-7/A after preparation was sent to Police Station by (PW-8) HC Jamal Deen through (PW-7) C. Mahesh

Kumar for registration of FIR. Accordingly, FIR Ext.PW-7/B was registered. Appellant was formally arrested. (PW-8) HC Jamal Deen on his return to Police Station handed over the recovered contraband in sealed packet to SHO/Inspector Anil Kumar (PW-9) who re-sealed the packet with six seals carrying impression 'D'. Facsimile of seal impression was separately preserved on a piece of cloth. NCB form was completed. The sealed contraband with necessary documents were handed over to MHC for safe deposit in "Malkhana". On 30.12.2015, special report under Section 57 was sent to the Additional Superintendent of Police, Kullu, who after receipt of such report, directed the same to be placed in official records. On 06.01.2016 contraband was sent to SFSL, Junga for chemical analysis, which was opined to be Charas. The challan was prepared and the appellant was tried.

3. The prosecution examined total nine witnesses. PW-6HHC Shyam Dass, PW-7 C. Mahesh Kumar and PW-8 HC Jamal Deen were examined as spot witnesses. PW-9 Inspector Anil Kumar was examined to prove the registration of FIR on receipt of "Rukka" Ext PW-7/A at Police Station and also to prove re-sealing process undertaken by the said witness before handing over the contraband for safe custody to MHC. HC Nirat Singh (PW-1) was examined to prove the receipt of special report in the office of Additional Superintendent of Police, Kullu on 30.12.2015 at 11.00 A.M. (PW-2) HC Gajender Pal was examined to prove the receipt, safe custody and transit etc. of the contraband during investigation and trial. (PW-3) C. Karamzor Negi was examined to prove the transit of contraband along with FSL opinion from SFSL, Junga to Police Station. (PW-4) C. Yash Pal was examined to prove the transit of contraband from Police Station to SFSL, Junga on 06.01.2016 and its safe custody during the period it remained with him. (PW-5) C. Tek Chand was examined to prove the DDR No. 35 dated 28.12.2015 Ext. PW-5/A and DDR No. 2 dated 29.12.2015 Ext. PW-5/B.

4. The appellant was examined under Section 313 Cr.P.C. He did not choose to lead defence evidence.

5. We have heard learned counsel for the parties and have gone through the records of the case carefully.

6. The impugned judgment has been challenged mainly on the ground that despite availability of independent witnesses, none was examined casting serious doubt on the prosecution story. In addition, it has been stated on behalf of the appellant that there are material contradictions and serious infirmities in the statements of the prosecution witnesses which renders the alleged recovery and seizure of contraband highly suspicious. The conviction of appellant is stated to be without any legal evidence on record.

7. Mr. Kamal Kant, learned Deputy Advocate General for the State, on the other hand, has supported the impugned judgment of conviction recorded against the appellant. It has been stated that the testimonies of police witnesses inspire confidence and hence conviction was justifiable even in absence of independent witnesses. It is also submitted that though the Investigating Officer had made attempt to secure presence of independent witnesses, but could not succeed due to late hours of night.

8. In the first instance, we may deal with appellant's argument regarding non-association of independent witnesses despite availability and its effect on the outcome of the case.

9. (PW-6) HHC Shyam Dass in his cross-examination admitted that Bus-stand was at a walking distance of one minute from the spot. He also admitted that there were few houses existing in the vicinity of the place where the recovery was effected. He also admitted that the proceedings were conducted on the main road. PW-7 HC Mahesh Kumar in his cross-examination stated that they were on the main Highway and the spot of occurrence was at a distance of 4-5 meters from the Highway. According to him, the place of occurrence was at a walking distance of 10 minutes from the

bus stand. Bhutnath temple was adjacent to the spot. He, however, denied the existence of houses of residents in the vicinity. It was, however, clarified that the houses were situated at a distance of 10-20 meters. It was also stated by this witness that he did not visit any house in search of independent witnesses, he rather went towards Akhara Bazar in search of the witnesses. (PW-8) HC Jamal Deen also admitted existence of Bhutnath temple and sewerage treatment plant near the spot and existence of bus stand near the place of recovery was also not denied.

10. In light of above material on record, it cannot be said that the place from where the recovery was alleged to have been effected was totally secluded. The said place, atleast was not far away from the town. No serious attempt appears to have been made to procure the presence of independent witnesses. (PW-7) HC Mahesh Kumar has made a vague statement that he went towards Akhara Bazar in search of witnesses. He has not been categoric as to which place he visited and under what circumstances he failed to procure the presence of independent witnesses.

11. It is settled that where the stringent procedure in cases attracting severe punishments is involved, the prosecution evidence has to be scanned minutely in order to check and test its genuineness and veracity. In ***Hanif Khan alias Annu Khan vs. Central Bureau of Narcotics (2020) 16 SCC 709,*** the Hon'ble Supreme Court held as under:

"8. We have considered the submissions on behalf of the parties. The prosecution under the N.D.P.S. Act carries a reverse burden of proof with a culpable mental state of the accused. He is presumed to be guilty consequent to recovery of contraband from him, and it is for the Accused to establish his innocence unlike the normal Rule of criminal jurisprudence that an Accused is presumed to be innocent unless proved guilty. ***But that does not absolve the prosecution from establishing a prima facie case only whereafter the***

burden shifts to the accused. *In Noor Aga v. State of Punjab, (2008) 16 SCC 417, it was observed as follows:*

"58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the Accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the Accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the Accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the Accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the Accused cannot be said to have been established."

9. ***Because there is a reverse burden of proof, the prosecution shall be put to a stricter test for compliance with statutory provisions. If at any stage, the Accused is able to create a reasonable doubt, as a part of his defence, to rebut the presumption of his guilt, the benefit will naturally have to go to him."***

12. Simultaneously it is also settled that mere absence of non-association of independent witnesses will not be fatal to the prosecution case. However, in such circumstance it is called upon the Courts to assess the version of available prosecution witnesses on record more minutely in order to negate the possibility of any foul play or mischief.

13. In ***Raveen Kumar vs. State of Himachal Pradesh (2020) 12 Scale, 138,*** it has been held as under:

"19. It would be gainsaid that lack of independent witnesses are not fatal to the prosecution case. However, such omissions cast an added duty on Courts to adopt a greater-degree of care while scrutinising the testimonies of the police officers, which if found reliable can form the basis of a successful conviction."

14. Keeping in view the above legal position, we now proceed to scan the prosecution evidence. The powers of this Court in exercise of appellate jurisdiction under Section 386 Cr.P.C. includes power to look into the evidence for the purpose of re-appreciation.

15. PW-6 HHC Shyam Dass, PW-7 HC Mahesh Kumar and PW-8 HC Jamal Deen are the persons, who were the spot witnesses. PW-6 HHC Shyam Dass and PW-7 HC Mahesh Kumar, as a matter of fact, have been associated as witnesses of recovery in absence of independent witnesses. PW-6 HHC Shyam Dass in his deposition before the Court has stated that on 28.12.2015, he along with PW-7 HC Mahesh Kumar, PW-8 HC Jamal Deen and driver Sunil Mahant were on patrol duty at "Bhutnath bridge" on the left bank of Kullu town. At about 10.45 P.M., they noticed a person coming from footpath side approaching the road. As soon as the appellant noticed the police party, he tried to run away from the spot and threw a carry bag carried by him in his hand. The bag thrown by the appellant had marking "21" on it. The police party overpowered the appellant. Suspicion was entertained against him as the appellant failed to give any satisfactory answer about his conduct in trying to flee away from the spot. C. Mahesh Kumar was deputed to bring independent witnesses, but on account of non-availability, he came back after some time. PW-6 and PW-7 were associated as witnesses and in their presence the bag thrown by the appellant was searched. A green coloured carry bag was found inside the bag which contained Charas. The recovered Charas was weighed and was found 1 kg. 600 grams. The contraband was again placed in the green coloured carry bag which was kept in the bag carried by the

appellant in his hand. This bag was finally placed in a cloth parcel which was sealed with nine seals with impression 'A'. Sample seal was taken on a separate piece of cloth Ext.PW-6/A which was signed by this witness besides PW-7 Mahesh Kumar and appellant Noop Ram. Sample seal was handed over to him. NCB form, in triplicate, was filled by PW-8 HC Jamal Deen. The recovered contraband along with NCB form, in triplicate, and sample seal were taken into possession vide memo Ext. PW-6/B which was signed by him besides PW-7 Mahesh Kumar and appellant Noop Ram. Spot map was prepared by PW-8 HC Jamal Deen. Memo Ext. PW-6/C regarding identification of contraband was prepared. Arrest memo Ext. PW-6/D was also prepared by the Investigating Officer and signed by him.

16. In cross-examination of PW-6, nothing substantial benefitting the appellant has been elicited, save and except that the place of recovery was not secluded so as to prevent the possibility of availability of any independent witnesses. Learned counsel for the appellant by referring to certain portions of cross-examination of witness PW-6 has advanced an argument that those were in contradiction with the statements of other spot witnesses PW-7 and PW-8. These contradictions, however, are only with respect to the exact positioning of the spot of recovery, which in our considered view is not so material to have effect on the final outcome of the case. The fact of the matter remains that all the spot witnesses i.e. PW-6, PW-7 and PW-8 werein unison regarding the spot of recovery to be near the Bhutnath bridge. Perusal of spot map Ext. PW-8/A reveals that the Bhutnath bridge, over river Beas, links road leading from bus stand Kullu to the road on the left bank of river Beas connecting Manali and Bhunter. Keeping in view the spot position as shown in the spot map which has remained unrebutted, the minor discrepancies as to the place of exact recovery can be ignored. The spot position as shown in spot map Ext. PW-8/A has not been disputed on behalf of the appellant by cross-examining PW-8 HC Jamal Deen in respect thereof. None of other witnesses

PW-6 and PW-7 have been confronted with this document, therefore, the argument raised by learned counsel for the appellant deserves to be rejected.

17. PW-7 and PW-8 have materially corroborated each other. We have not been able to find any material contradictions in their statements nor have the same been pointed to us on behalf of the appellant.

18. The departure of police party including PW-6, PW-7 and PW-8 from Police Station, Kullu on the night of 28.12.2015 was duly proved as Ext. PW-5/A, DDR No. 35, recorded at Police Station, Kullu at 9.57 P.M. wasduly proved. The recovery of contraband weighing 1 kg. 600 grams. was also proved by the statements of PW-6, PW-7 and PW-8. No explanation has come forward from appellant as to why he was on the spot of recovery at relevant time and what was the probable cause of his false implication if any. As noticed above, in **Hanif Khan** (supra), it has been held that in a case under the NDPS Act, reverse burden applies.Once the prosecution discharges its initial burden, it is for the accused to explain, though the standard of proof for both is different. The prosecution has to prove its case beyond all reasonable doubts, whereas the accused has only to probabilize his defence. However, we find that no specific defence except general denial has been taken by the appellant.

19. The necessary procedure as required under the NDPS Act has also been found to be adopted. The recovery memo Ext.PW-6/B was prepared after the recovery. NCB form was partially filled on the spot by the Investigating Officer PW-8 HC Jamal Deen. FIR was registered. The recovered contraband in sealed packet was produced before the SHO, Police Station, Kullu, who after satisfying himself re-sealed the same. Nothing has been brought on record to show that the contraband was tampered with at any stage. The seized contraband was opined to be Charas vide opinion rendered by the SFSL, Junga Ext. PW-2/D. Section 57 of the Act is proved to have been complied with. Ext. PW-1/A was the special report sent by PW-8 to Additional Superintendent of Police, Kullu on 30.12.2015. This document was also

proved to have been received by the Additional Superintendent of Police, Kullu vide endorsement Ext. PW1/C and extract of relevant register Ext. PW-1/B.

20. On the analysis of the material on record, we don't find sufficient material to infer that the police has falsely implicated the appellant. The depositions made by the police witnesses especially PW-6, PW-7 and PW-8 are reliable and trustworthy as they corroborate each other on material aspect of the matter.

21. In view of the above discussion, we find no merit in the instant appeal and the same is accordingly dismissed. Pending application(s), if any, also stands disposed of.

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

Between:-

STATE OF HIMACHAL PRADESH

…APPELLANT

(BY SH. KAMAL KANT, DEPUTY ADVOCATE GENERAL,)

AND

LAKHVINDER SINGH SON OF SHRI DAULAT RAM, R/O VILLAGE NAKOI, P.O. THAHLI, TEHSIL CHURAH, DISTT. CHAMBA, H.P.

…. RESPONDENT.

(BY SH. N.K. THAKUR, SENIOR ADVOCATE WITH SH. DIVYA RAJ SINGH, SH. KARANVEER SINGH AND MS. RITU SINGH, ADVCATES,)

CRIMINAL APPEAL
NO.442 OF 2019
Reserved On:08.03.2022
Decided on: 14.03.2022

Code of Criminal Procedure, 1973 - Section 378 -- Appeal against acquittal --Credibility of testimony of police officials -- Availability of independent witnesses – Held -- From the perusal of impugned judgment, it is clear that Ld. Special Judge has not scrutinized testimonies of police officials in the light of the fact that there was possibility of associating independent witnesses, so, such approach of Ld. Special Judge with respect to appreciation of evidence cannot be countenanced --The matter remitted back to Ld. Special Judge, Chamba to decide the case afresh -- The petition stands disposed of. (Paras 10, 11 &12)

Cases referred:

Mohan Lal vs. State of Punjab, 2018 (8) JT 53;

Mukesh Singh vs. State (Narcotics Branch of Delhi), 2020 (10) SCC 120;

Raveen Kumar vs. State of Himachal Pradesh (2020) 12 Scale, 138;

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

J U D G M E N T

By way of instant appeal, exception has been taken to the judgment of acquittal dated 20.09.2018 passed by learned Special Judge-II, Chamba, District Chamba, H.P. in case No. Rg. N/NDPS/18/2017.

2. The case of the Appellant-State, on the basis of which prosecution was launched,isas under: -

2.(i) On 25.12.2016, police party led by SI Satpal (PW-14) of Police Post Banikhet, District Chamba, was on routine patrol duty.While coming from Khairibridge towards Padar at about 9.30 P.M., they noticed a person coming towards them with a carry bag in his hand near Mahajan Karyana Store. SI Sat Pal (PW-14), asked the person, the reason for his roaming on the road in late hours. He got perplexed and tried to run away from the spot. The police party apprehended the person. Despite efforts to associate independent witnesses, none could be procured.

2.(ii) The person apprehended by the police disclosed his name as Lakhvinder (accused). The bag carried by the accused was checked in presence of HC Inder (PW-13) and Parbhat (PW-1), who were associated as witnesses. Another bag having green colour was found inside the outer pink bag and inside the green colouredbag, black coloured hard substance was recovered, which on initial analysis was found to be Charas. The recovered Charas was weighed and found 1 kg. 240 grams. Spot photographs were taken. The recovered Charas was placed in the same bag from which it was recovered and the entire bag containing Charas was sealed in a cloth parcel with six seal impressions of seal "DK". NCB form were filled by SI Sat Pal (PW-13) in triplicate. Facsimile of seal was preserved. The sealed packet containing Charas, NCB form, in triplicate, and sample seal were taken into possession.

2.(iii) Rukka was prepared and sent to Police Station, Dalhousie for recording the FIR. Constable Pawan Kumar was assigned duty to take rukka to the Police Station. Spot map was prepared by the Investigation Officer. The accused was interrogated and arrest memo was prepared. The information of his arrest was given to his mother. Thereafter, personal search of the accused was conducted, nothing incriminating was found. The case file was received through Constable Pawan Kumar on the spot. SI Sat Pal (PW-14) recorded the statement of C. Pawan Kumar.

2.(iv) The police team alongwith accused and case property reached the Police Station, Dalhousie. The recovered contraband was handed over by SI Sat Pal (PW-14) to SHO Sunny Guleria(PW-9), who conducted the re-sealing proceedings and handed over the recovered contraband with MHC, Dalhousie for safe deposit in Malkhana.

2.(v) On 26.12.2016, the accused alongwith case property was produced before learned Judicial Magistrate 1st Class (for short 'JMIC'), Dalhousie. Proceedings under Section 52A of the Narcotic Drugs and

Psychotropic Substances Act, (for short 'NDPS Act') were drawn. Necessary certificate was issued by learned JMIC, Dalhousie.

2. (vi) On 27.12.2016, SI Sat Pal (PW-14) prepared the special report under Section 57 of the Act and sent the same to SDPO, Dalhousie. The contraband was sent for chemical analysis to FSL, Junga, which were found to be sample of Charas with resin found therein 23.95%w/w.

2.(vii) After completion of investigation, challan was prepared and put in the Court.

3. In support of its case, the prosecution examined total 14 witnesses. The statement of accused was recorded under Section 313 Cr.P.C.

4. PW-1, HHC Prabhat Chand, PW-2, HHC Pawan Kumar, PW-13 HC Inder Singh and PW-14 SI Sat Pal were examined as spot witnesses. PW-3 C. Rajesh Kumar and PW-9 SI Sunny Guleria were examined to prove the receipt of recovered contraband alongwith necessary documentation in Police Station, Dalhousie and the re-sealing process conducted there. PW-9 SI Sunny Guleria, additionally stated the facts to prove the handing over of the contraband after re-sealing to MHC for safe custody, preparation of special report and preparation of challan etc. PW-4 C. Naresh Kumar proved the transit of contraband from Police Station to FSL, Junga for scientific analysis and its safe custody during the period. PW-5 C. Anil Kumar No. 405, proved the transit of contraband and scientific opinion thereon from FSL, Junga to Police Station and its safe custody during the period. PW-6 C. Dalip Kumar was examined to prove the receipt of rukka as well as special report in the office of SDPO, Dalhousie. PW-7 HC Hem Raj, was examined to prove the safe custody etc. of the contraband in Malkhana of Police Station, Dalhousie. PW-8 HC Bhagwan Chand proved the deposit of contraband in Malkhana after its receipt from FSL, Junga. PW-10 HC Arun Kumar also proved the transit etc. of the case property from Malkhana

for the purpose of proceedings under Section 52A of the Act. PW-12 HHC Chaman Singh, proved the entry of rapat No.12, Ex. PW-12/A dated 25.12.2016.

5. Learned Special Judge, Chamba has acquitted the respondent on two counts. Firstly, the non-association of independent witnesses has weighed with learned Special Judge to disbelieve the case of the prosecution and secondly, the benefit of the judgment passed by Hon'ble Supreme Court in **Mohan Lal vs. State of Punjab, 2018 (8) JT 53**, was given to the accused by holding that since SI Sat Pal (PW-14) was the complainant and the investigator himself, therefore, in view of **Mohan Lal** (supra), the trial stood vitiated because of the infraction of the constitutional guarantee of a fair investigation.

6. We have heard learned counsel for the parties and have gone through the records of the case carefully.

7. Mr. Kamal Kant, learned Deputy Advocate General for the appellant/State has, at the outset, laid challenge to the impugned judgment of acquittal on the ground that the view taken by the two Judges Bench in **Mohan Lal** (supra) has been held to be not good law by a Full Bench judgment of the Hon'ble Supreme Court in **Mukesh Singh vs. State (Narcotics Branch of Delhi), 2020 (10) SCC 120**,therefore, the respondent could not be given the benefit of the fact that SI Sat Pal (PW-14) himself was the complainant and investigator also.In addition, it has been contended that without admitting the failure on part of the Investigating Officer to associate independent witnesses, the mere fact of non-association of independent witnesses cannot be a ground of acquittal.

8. We are in agreement with the contentions raised on behalf of the appellant-State. The law laid down in **Mohan Lal** case (supra) has been held to be not good law in **Mukesh Singh** (supra), therefore, the mere fact that

complainant and investigator was the same person will not vitiate the trial and cannot be a ground for acquittal alone.

9. The other ground on which learned Special Judge has acquitted the respondent is non-association of independent witnesses despite availability. Learned Special Judge has clearly erred in acquitting the respondent on this ground also. It is trite law that mere non-association of independent witnesses is not fatal to the prosecution under the Act. The association of independent witnesses may lend credence to the prosecution version, but its absence is not always fatal. The evaluation and appreciation of the statements of police witnesses as well as other material brought on record is necessary to arrive at a conclusion as the genuineness and authenticity thereof.

10. In ***Raveen Kumar vs. State of Himachal Pradesh (2020) 12 Scale, 138,*** it has been held as under:

> *"19. It would be gainsaid that lack of independent witnesses are not fatal to the prosecution case. However, such omissions cast an added duty on Courts to adopt a greater-degree of care while scrutinising the testimonies of the police officers, which if found reliable can form the basis of a successful conviction."*

11. From the perusal of impugned judgment it is revealed that no such exercise, as observed above, was undertaken by learned Special Judge save and except to scrutinize the evidence with respect to the possibility of availability of witnesses and their non-association. The approach adopted by learned Special Judge cannot be countenanced.

12. In light of the above discussion, the judgment dated 20.09.2018 passed by learned Special Judge-II, Chamba, District Chamba, H.P. in case Re.N/NDPS/18/2017 is set-aside. The matter is remitted back to learned Special Judge, Chamba to decide it afresh in light of the observations made

hereinabove. Since the case was registered in the year 2016, it will be expedient in the interest of justice in case learned Special Judge, Chamba disposes of the matter expeditiously.

13. The instant appeal stands disposed of in the aforesaid terms, so also the pending application(s), if any.

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

Between:-

SURINDER SINGH,
SON OF SHRI AMAR SINGH,
AGED ABOUT 26 YEARS,
RESIDENT OF KALROO,
POST OFFICE THAKURDWARA,
POLICE STATION HARIPUR,
TEHSIL DEHRA, DISTRICT
KANGRA, H.P.

....APPELLANT

(BY SH. MALAY KAUSHAL, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH.

....RESPONDENTS

(SH. ANIL JASWAL, ADDITIONAL ADVOCATE GENERAL)

CRIMINAL APPEAL
No. 477 OF 2019
Decided on: 21.03.2022

Protection of Children from Sexual Offence Act, 2012 - Section 3 - Penetrative Sexual Assault - Interpretation of - Held - Victim was below 12 years of age at the time of commission of offence - She used the terms "galat kam" and "sexual intercourse" against the appellant and these terms have

to be understood in the context of her understanding, which definitely cannot be equated to be that of an adult or at least a person having reached the age of discretion and the injuries suffered by her have also to be understood in the same context - Penetrative sexual assault defined in Section 3 of Protection of Children from Sexual Offences Act is very wide term and can include various forms of sexual attacks - Victim was below 12 years of age, so sexual assault suffered by her became aggravated form of penetrative sexual assault as per section 5K of POCSO Act -- Evidence reveals that offence under section 6 of POCSO Act, 2012 has been committed by the appellant - Appeal dismissed. (Paras16, 19 & 20)

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

J U D G M E N T

By way of instant appeal, appellant has assailed the judgment and sentence dated 29.5.2019/6.7.2019, passed by learned Special Judge, Kangra at Dharmshala, in Sessions Case No. S.C. No. 47-G/VII/16, RBT No. 61-G/VII/17/16, whereby appellant has been convicted for commission of offence under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short the "POCSO Act") and sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs. 50,000/- and to further undergo rigorous imprisonment for one year in default of payment of fine. In addition, the victim has also been awarded lump sum compensation of Rs. 6,00,000/- to be paid by the appellant.

2. The case as set up by prosecution was that on 26.7.2016, Anjana Devi (PW-1) (hereafter referred to as complainant) reported a crime at Police Post, Ranital *vide* daily dairy No. 11 (Ext. PW-12/A), alleging *inter-alia* that the victim was her daughter. On 25.7.2016, the mother of complainant had paid a visit to the house of complainant. At about 2.00 PM, she in the company of the victim and Nishant (son of complainant) went towards the bus-stop. Both the children (victim and her brother) reached back home at

about 4.15 P.M. The victim was weeping and on inquiry by complainant, she disclosed that the appellant had also accompanied them till the bus-stop. On their way-back appellant had caught hold of her and dragged her towards water source downwards from the road and had further gagged her mouth at place near "Dhuri-ka-Nalla". Appellant had then undressed her and had thereafter indulged in *"Galat Kaam"* with her. Nishant had pelted stones at the appellant. Despite her resistance; appellant had not budged. On this disclosure, the complainant had gone in search of appellant but he did not respond and absconded from his house. Appellant had raped her minor daughter. She could not lodge the report the previous day, as firstly she remained searching for the appellant and thereafter remained busy in a function of her nephew and also kept searching for the President of the Gram Panchayat.

3. On the basis of aforesaid report, FIR Ext. PW-18/A was registered at Police Station, Haripur and investigation was initiated. Statement of victim under Section 161 Cr.P.C. was recorded in the first instance. Later, on 29.7.2016 her statement under Section 164 Cr.P.C. (Ext. PW-2/A) was also recorded by learned Judicial Magistrate at Dehra. The victim was medically examined on 26.7.2016 at CHC Jwalamukhi. PW-7 Dr. Kanika examined the victim and issued MLC Ext. PW-7/B. Relevant extract of MLC read as under:-

> "<u>on external examination:</u> multiple bruises (reddish blue) in colour present on both the breast."
>
> <u>Internal examination:</u> no injuries present on the perineal region. On separation of thighs no abrasion present at time of examination. No bleeding P/V present."
>
> <u>Per speculum:</u> hymen torn, the redness present at vaginal opening."

Final opinion was rendered by PW-7 on 19.10.2016 as under:-

"However, the possibility of sexual assault cannot be ruled out"

4. During investigation, the date of birth of victim was found as 10.4.2005. The appellant, who had absconded, was arrested on 4.8.2016. The report from Regional Forensic Laboratory, Dharmshala, Ext. PY was received. On completion of investigation report under Section 173 Cr.P.C. was submitted.

5. Learned Special Judge, Kangra at Dharmshala framed charge against the accused under Section 6 of POCSO Act, 2012, to which appellant pleaded not guilty and claimed trial.

6. Prosecution examined total 20 witnesses to prove its case. Appellant was examined under Section 313 Cr.P.C. He raised the defence of false implication on account of enmity with the complainant. Appellant did not lead any defence evidence.

7. We have heard learned counsel for the parties at length and also examined the record carefully.

8. The fact that the victim was less than 12 years of age was duly proved on record. Birth certificate of victim, Ext. PW-8/B, was proved on record by PW-8, Panchayat Secretary, Gram Panchayat, Dhar. As per birth certificate Ext. PW-8/B, date of birth of victim was 10.4.2005. This fact remained un-rebutted.

9. The victim was examined as a witness (PW-2) before learned Special Judge. She categorically deposed that on 25.7.2016 at about 3.00 PM., she accompanied by her brother Nishant (PW-3) and appellant had gone to see-off her *'Nani'* till bus stand at place known as *"Behri"*. On their way back, near *'Tundia Nallah'*, appellant had caught her hold. She sat down but the appellant slapped her and carried her to the *"Nallah"*. PW-3 Nishant was instructed to keep standing there. PW-3 Nishant pelted stones

at the appellant but the appellant slapped him. Appellant undressed the victim and committed sexual intercourse with her and thereafter left towards the water source. As per this witness, victim along with her brother (PW-3) came back to their house. She disclosed this occurrence to her sister Aarti and the complainant. Thereafter the complainant had left for the house of aunt of victim, where birthday celebrations were going on. Appellant was found there and was given beatings by the complainant. Report was lodged at Police Post, Ranital. Victim was medically examined and her statement was also got recorded before Judicial Magistrate at Dehra. Police had also made inquiries from her and had also recorded her statement. Police had taken her to the spot, where the incident had taken place. The spot was photographed. Further she identified the appellant present in the Court to be the same person, who had committed sexual intercourse with her. In cross-examination, she admitted that the appellant and his family members were not on talking terms with the complainant and other family members. She also admitted that there was a quarrel between the complainant and Rakesh Kumar, brother of the appellant. She, however, denied that her mother had vowed to teach the appellant a lesson. Injuries found on the person of victim were suggested to be the result of fall, which was specifically denied by PW-2.

10. Statement of PW-2 was corroborated, on material particulars, by her brother, Nishant, (PW-3). He categorically stated that after seeing off his *'Nani'*, he along with victim and appellant were returning back. Near *"Dhuri-ka-Nallah"*, appellant lifted the victim and took her towards water source. He had thrown stones at the appellant. Appellant slapped him and pressed his neck. The appellant had undressed the victim. On their return, victim disclosed the matter to the complainant. He also identified the appellant present in the Court to be the same person, who had lifted his sister. In cross-examination, this witness maintained his version, as given

in the examination-in-chief. He denied that he had made the statement as per the version of his mother.

11. Further, the version of victim found corroboration from statement of complainant as PW-2. This witness also narrated the same story that the victim along with her brother Nishant (PW-3) had left the house to see off their *'Nani'* till bus stop. Appellant had also accompanied them. On return, at about 4.00 PM, victim started weeping and disclosed the misdeed of the appellant. Complainant found appellant present in the house of her sister-in-law, where celebrations of birthday were going on. On being confronted, appellant denied the allegations. Since the complainant was in anger, as such, she gave beatings to appellant with a *'Danda'* (Stick) which she was holding in her hands. Younger sister of complainant named Salochna was married to the brother of appellant. She was also informed about the wrong act committed by the appellant with the victim. Thereafter she informed the mother of appellant telephonically and complained to her about the conduct of appellant. As per this witness, her sister subsequently had disclosed that the appellant had come home and had left after changing the clothes. The appellant remained underground from 25.7.2016 to 4.8.2016 on which date, he was arrested. The matter was reported to *'Pradhan'* and *'Up-Pradhan'* of the Panchayat and they were requested to accompany her to Police Station, Ranital and in such circumstances, the report Ext. PW-18/B was lodged, culminating in FIR Ext. PW-18/A. The victim was medically examined. The police had visited the spot of occurrence. The statement of victim was recorded before Judicial Magistrate, Dehra. In cross-examination, she admitted that she had not seen appellant accompanying her mother. She also admitted that there was some case between her and the brother of the appellant in the Panchayat. Though, PW-1 tried to explain that the case was subsequent in time to the lodging of the report Ext. PW-18/B, however, she subsequently clarified

that it was a separate case. It was suggested to this witness that victim had suffered injuries due to fall, which was denied by her. She specifically denied that she had falsely implicated the appellant due to enmity.

12. PW-2 was unequivocal in her version while narrating the entire incident before the Court. Similarly, PW-3, who was only about 8 years of age, had remained unshaken in his testimony while corroborating the version of PW-2. The victim had disclosed the entire misdeed of appellant to her elder sister and the complainant at the earliest. It was also not unnatural for the mother to confront the appellant immediately. Her conduct of having tried to contact the *'Pradhan'* and *'Up-Pradhan'* also cannot be said to be unnatural. The victim had reached back home at about 4.00 P.M. and it was thereafter that she had disclosed to her mother the entire incident. Naturally, it might have taken some time for the complainant to reconcile. The fact that the husband of complainant was working for gain at some other place and was not at home cannot be lost site. Police Post, Ranital is stated to be at a distance of about 15 KMs from the village of complainant as stated by PW-12 HHC Kuldeep Chand. In these circumstances, the fact that matter was not reported to the police on the same day will not be of much significance. The distressed complainant could not be expected to walk a distance of approximately 15 KMs alone to lodge the report. The report Ext. PW-18/B was lodged at 11.45 AM, the next morning when the complainant visited Police Post, Ranital in the company of 'Up-Pradhan' of the Panchayat and the victim.

13. The appellant raised the defence of his false implication due to enmity. However, he failed to probabilise such defence. PW-2 as well as PW-1 made admissions of some dispute, before the 'Panchayat', between complainant and the brother of appellant. However, the nature, gravity and magnitude of dispute was not brought on record. It cannot be believed that for some trivial dispute that too between the complainant and the brother of

appellant, the honour and dignity of victim and entire family would be put at stake.

14. The allegation against the appellant has also been corroborated by the medical evidence. PW-7 had occasion to examine the victim on 26.7.2016. Bruises were found on the breast of victim. The hymen was found torn and redness was found present at the vaginal opening. PW-7 did not rule out the possibility of sexual assault. Her final opinion Ext. PW-7/C has already been noticed in earlier part of this judgment. This witness specifically denied that her findings about sexual assault on the victim were on the basis of application moved by the police. She volunteered that her opinion was based on clinical findings.

15. As noticed earlier, it was suggested to PW-2 and also to PW-1, in their respective cross-examinations that the injuries found on the person of victim were caused by fall. PW-7 in her cross-examination has specifically denied that redness found in vagina of the victim could be due to itching. She, however, admitted that bruises on the breast could be caused due to fall on hard surface. The appellant cannot take benefit from this admission of PW-7 for the simple reason that the injuries suffered by the victim on her breast could be caused by more than one reason and it was nowhere suggested to PW-7 that such injuries could not be caused as a result of sexual assault of the victim.

16. The victim was less than 12 years of age at the time of commission of offence. The terms *'Galat Kaam'* and *'sexual intercourse'* used by her against appellant have to be understood in the context of her understanding, which definitely cannot be equated to be that of an adult or atleast a person having reached the age of discretion. The injuries suffered by her have also to be understood in the same context. Section 3 of POCSO Act, 2012 defines penetrative sexual assault in very wide terms and can include various forms of sexual attacks. Since victim was less than 12 years

of age, the sexual assault suffered by her became aggravated form of penetrative sexual assault as per Section 5(k) of POCSO Act.

17. PW-4, Nitin Thakur, *'Up-Pradhan'* of *'Gram Panchayat'* and PW-5 Kishori Lal, *'Pradhan'* of the *'Gram Panchayat'* also corroborated the version of the complainant to the extent that they were informed about the incident by her and then the matter was reported to the police.

18. Though, nothing incriminating has been found from the report of Forensic Science Laboratory, Ext. PY, but that does not absolve the appellant for the reasons that the appellant was arrested on 4.8.2017 and therefore, no incriminating scientific evidence could be collected.

19. Thus, on the analysis of the entire evidence on record, specifically the evidence as discussed above, the offence under section 6 of POCSO Act, 2012 has been proved against appellant beyond all reasonable doubts. The learned Special Judge has rightly appreciated the evidence and we are not able to find any infirmity or illegality in the findings and conclusions recorded by the learned Special Judge.

20. In light of the above discussion, there is no merit in the instant appeal and the same is accordingly dismissed. The judgment and also the sentence passed by the learned Special Judge, Kangra at Dharmshala in Sessions Case No. S.C. No. 47-G/VII/16, RBT No. 61-G/VII/17/16 are affirmed. Records of learned trial court be sent back forthwith.

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

Between:

1. PRAKASH CHAND,
   S/O SH. BHAGAT RAM, CASTE JAT.

2. SAVITRI DEVI,
   W/O PRAKASH CHAND,
   CASTE JAT,

BOTH RESIDENTS OF VILLAGE JAISIAIR,
TEHSIL AND POLICE STATION JAWALI,
DISTRICT KANGRA, H.P.

....PETITIONERS

(BY MR. N.K. THAKUR,
SENIOR ADVOCATE
WITH MR. DIVYA RAJ SINGH
AND MS. RITU SINGH,
ADVOCATES)

AND

1. STATE OF HIMACHAL PRADESH,

2. MS. REKHA,
W/O RAVAN SINGH,
R/O VILLAGE JAISOR,
TEHSIL JAWALI,
DISTRICT KANGRA, H.P.

....RESPONDENTS

(BY MR. SUDHIR BHATNAGAR AND
MR. DESH RAJ THAKUR, ADDITIONAL
ADVOCATES GENERAL, WITH
MR. NARENDER THAKUR AND
MR. KAMAL KISHORE SHARMA,
DEPUTY ADVOCATES GENERAL,
FOR R-1)

CRIMINAL REVISION
No.45 of 2012 a/w
Cr. MP No. 2167 of 2021
Decided on: 16.03.2022

Code of Criminal Procedure, 1973 - Section 320(6) -- Compounding of offence and the power of the Court to allow compromise – Held -- Provisions contained under section 320 enables the High Court or Court of Sessions in exercise of its powers of revision under section 401 to allow any person to

compound any offence which such person is competent to compound under the section – The schedule attached to Section 320 CrPC reveals that this Court has power to compound the offence punishable under section 325 but not under section 452 and in order to compound the offence punishable under section 452, this Court can always exercise power under section 482 CrPC which clearly provides that nothing in this code shall be deemed to limit or affect the inherent powers of High Court to make such orders as may be necessary to give effect to any order under this code to prevent abuse of process of any Court or otherwise to secure the ends of Justice -- In view of the peculiar facts and circumstances of this case, parties have compromised the matter at hand, this Court deems it fit to exercise its power under section 482 CrPC, so, FIR is order to be quashed along with consequent proceedings - Petition disposed of. (Paras 11 & 16)

Cases referred:

Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013(11 SCC 497;

*Gian Singh v. State of Punjab and anr. (2012) 10 SCC 3*03;

Narinder Singh and Ors. V. State of Punjab and Anr. (20140 6 SCC 466;

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

O R D E R

Instant criminal revision petition filed under Section 397 read with Section 401 of Cr.PC, lays challenge to judgment dated 31.12.2011, passed by the learned Additional Sessions Judge-I, Kangra at Dharamshala, Himachal Pradesh, in Criminal Appeal No. 07-J/2006, affirming judgment of conviction and order of sentence dated 12.1.2006, passed by the learned Additional Judicial Magistrate, Jawali, District Kangra, H.P., in Criminal Case No.21-II/2002, whereby the learned trial Court while holding the petitioners-accused guilty of having committed offences punishable under Sections 452 of the IPC read with Section 34 of IPC, convicted and sentenced them to undergo imprisonment as per description given herein below:

Sr. No.	*Sections*	*Imprisonment*	*Fine*
1.	*Section 452 read with Section 34 of IPC*	*Rigorous imprisonment for a period of two years.*	*Rs.2,000/- In default of aforesaid payment of fine, to further undergo simple imprisonment for two months*
2.	*Section 325 IPC*	*Rigorous Imprisonment for a period of two years.*	*Rs.2,000/- In default, to undergo simple imprisonment for two months*
3.	*Section 323 IPC*	*Simple imprisonment for a period of six months*	*Rs. 1,000/- In default of payment, to undergo simple imprisonment for a period of one month*

2. Precisely, the facts of the case, as emerge from the record are that police presented challan against the accused for their having committed offence punishable under Sections 451, 452, 323, 324, 325 of IPC read with Section 34 of the IPC, in the court of learned Additional Judicial Magistrate, Jawali, District Kangra, H.P., alleging therein that deceased Nikko Devi (since deceased) i.e. mother of the accused Prakash Chand, was having four daughters and one son. Her husband had

bequeathed four kanals of land in her favour and remaining land was bequeathed in favour of the accused Prakash Chand, son of the complainant. Prakash Chand was residing in the house belonging to the husband of the complainant and complainant was residing in the house of one Ravan Singh, son of her daughter. A suit for partition was filed by the complainant, which was pending disposal before the revenue authorities. Demarcation was conducted and one kanal land was found to be belonging to the complainant, which was given to her by means of a will. Allegedly, accused Prakash Chand entered in the said land on 29.4.2001 at about 11:00 AM and started abusing the complainant. He was accompanied by petitioner No.2-Savitri Devi, wife of the accused Prakash Chand. When the complainant requested the accused not to abuse her, the accused entered in her courtyard and inflicted a blow of *"Daraat"* on her head and on her left leg, as a consequence of which, she suffered injuries.

3. Learned trial Court on the basis of material adduced on record by the respective parties, vide judgment/order dated 12.1.2006, held the petitioners-accused guilty of having committed offences punishable under Sections 451, 452, 323, 324 and 325 of IPC read with Section 34 of the IPC and accordingly, sentenced them as per the description given herein above.

4. Being aggrieved and dissatisfied with the aforesaid judgment of conviction recorded by the court below, accused preferred an appeal in the court of learned Additional Sessions Judge-I, Kangra at Dharamshala, H.P., which also came to be dismissed vide judgment dated 31.12.2011, as a consequence of which, judgment of conviction recorded by the learned trial Court came to be upheld. In the aforesaid background, present petitioners-accused have approached this Court by way of instant proceedings, seeking therein their acquittal after setting aside the judgments of conviction recorded by the courts below.

5. Vide order dated 7.3.2012, this Court, while suspending the substantive sentence imposed by the court below, admitted the case for hearing. During the pendency of the case at hand, accused filed an application under Section 320 (6) read with Section 482 Cr.PC, seeking therein permission of this court to compound the offence under Sections 452, 323 and 325 of IPC read with Section 34 of the IPC on account of compromise arrived *inter-se* parties.

6. Vide order dated 9.11.2021, this court with a view to ascertain factum with regard to correctness and genuineness of the compromise, deemed it necessary to cause presence of parties to the Court. Since Complainant on account of her illness was unable to come present, this Court vide order dated 17.11.2021 directed the learned JMFC Jawali, to record her statement.

7. Pursuant to aforesaid direction issued by this Court, learned trial court after having recorded the statement of the complainant has transmitted the same to this Court, perusal whereof reveals that accused and complainant namely Rekha, who are closely related to each other, have resolved to settle their dispute amicably inter-se them. Complainant Rekha Devi has categorically stated in her statement recorded before the court below that she of her own volition and without there being any external pressure has entered into compromise with the accused, who are otherwise in her relations, whereby both the parties have settled their dispute amicably. She stated that since accused have already apologized for their misbehavior and have undertaken not to repeat such act in future, she shall have no objection in case prayer made by the accused for compounding the offence is accepted.

8. Mr. Sudhir Bhatnagar, learned Additional Advocate General, while fairly admitting factum with regard to the statement made by the complainant Rekha Devi before the court below contends that since

accused already stands convicted by the competent court of law, this Court in the instant proceedings, may not compound the offence, as has been prayed in the instant petition. He further submits that otherwise also, while exercising power under Section 320 (6), this court has no power to compound the offence punishable under Section 452 Cr.PC.

9. Having heard learned counsel for the parties and perused material available on record, especially statement of the complainant recorded by the JMFC Jawali, pursuant to orders passed by this Court, this Court finds substantial force in the prayer made by the petitioners-accused for compounding the offence. It is not in dispute that accused and respondent-complainant are closely related to each other. Accused No.1 and accused No.2 are real maternal uncle and aunt of the complainant and dispute *inter-se* them arose on account of some land. Since they have resolved to settle their dispute amicably *inter-se* them, prayer made in the instant petition for compounding of offence deserves to be considered.

10. Question, which falls for adjudication by this Court is whether this Court has power under Section 320(6) read with Section 482 Cr.PC, to compound the offence, if any, punishable under Sections 325 and 452 of Cr.PC that too after recording of the conviction by the competent court of law. This Court has already dealt with the similar situation in Case titled ***Ajay Kumar v. State of Himachal Pradesh passed in Cr.R. NO. 361 of 2017 dated 10.9.2018***.

11. Provision contained under Section 320 (6) enables the High Court or Court of Session acting in the exercise of its powers of revision under section 401 to allow any person to compound any offence which such person is competent to compound under this section. If the schedule attached to section 320 Cr.PC is read in its entirety, it reveals that though this Court has power to compound the offence punishable under Section 325, but not under section 452, however, to compound the offence

punishable under Section 452, this Court can always exercise power under Section 482 Cr.PC, which clearly provides that nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. Since in the case at hand, complainant and the accused are closely related to each other and they with a view to have cordial relationship with each other in future, have mutually decided to resolve their dispute amicably, prayer made in the instant petition, if allowed, would definitely bring peace and harmony and secure the ends of justice

12. Reliance is placed upon judgment passed by the Hon'ble Apex Court in case titled **Narinder Singh and Ors. V. State of Punjab and Anr. (20140 6 SCC 466**, whereby Hon'ble Apex Court has formulated guidelines for accepting the settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings. Perusal of judgment referred above clearly depicts that in para 29.1, Hon'ble Apex Court has returned the findings that power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under section 320 of the Code. No doubt, under section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with great caution. Para Nos. 29 to 29.7 of the judgment are reproduced as under:-

> "29. In view of the aforesaid discussion, we sum up and lay down the following principles by which the High Court would be guided in giving adequate treatment to the settlement between the parties and exercising its power under Section 482 of the Code while accepting the

settlement and quashing the proceedings or refusing to accept the settlement with direction to continue with the criminal proceedings:

29.1Power conferred under Section 482 of the Code is to be distinguished from the power which lies in the Court to compound the offences under Section 320 of the Code. No doubt, under Section 482 of the Code, the High Court has inherent power to quash the criminal proceedings even in those cases which are not compoundable, where the parties have settled the matter between themselves. However, this power is to be exercised sparingly and with caution.

29.2. When the parties have reached the settlement and on that basis petition for quashing the criminal proceedings is filed, the guiding factor in such cases would be to secure:

(i) ends of justice, or

(ii) to prevent abuse of the process of any Court.

While exercising the power the High Court is to form an opinion on either of the aforesaid two objectives.

29.3. Such a power is not be exercised in those prosecutions which involve heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. Such offences are not private in nature and have a serious impact on society. Similarly, for offences alleged to have been committed under special statute like the Prevention of Corruption Act or the offences committed by Public Servants while working in that capacity are not to be quashed merely on the basis of compromise between the victim and the offender.

29.4. On the other, those criminal cases having overwhelmingly and pre-dominantly civil character, particularly those arising out of commercial transactions or arising out of matrimonial relationship or family disputes should be quashed when the parties have resolved their entire disputes among themselves.

29.5. While exercising its powers, the High Court is to examine as to whether the possibility of conviction is remote and bleak and continuation of criminal cases would put the accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal cases.

29.6. Offences under Section 307 IPC would fall in the category of heinous and serious offences and therefore is to be generally treated as crime against the society and not against the individual alone. However, the High Court would not rest its decision merely because there is a mention of Section 307 IPC in the FIR or the charge is framed under this provision. It would be open to the High Court to examine as to whether incorporation of Section 307 IPC is there for the sake of it or the prosecution has collected sufficient evidence, which if proved, would lead to proving the charge under Section 307 IPC. For this purpose, it would be open to the High Court to go by the nature of injury sustained, whether such injury is inflicted on the vital/delegate parts of the body, nature of weapons used etc. Medical report in respect of injuries suffered by the victim can generally be the guiding factor. On the basis of this prima facie analysis, the High Court can examine as to whether there is a strong possibility of conviction or the chances of conviction are remote and bleak. In the former case it can refuse to accept the settlement and quash the criminal proceedings whereas in the later case it would be permissible for the High Court to accept the plea compounding the offence based on complete settlement between the parties. At this stage,

the Court can also be swayed by the fact that the settlement between the parties is going to result in harmony between them which may improve their future relationship.

29.7. While deciding whether to exercise its power under Section 482 of the Code or not, timings of settlement play a crucial role. Those cases where the settlement is arrived at immediately after the alleged commission of offence and the matter is still under investigation, the High Court may be liberal in accepting the settlement to quash the criminal proceedings/investigation. It is because of the reason that at this stage the investigation is still on and even the charge sheet has not been filed. Likewise, those cases where the charge is framed but the evidence is yet to start or the evidence is still at infancy stage, the High Court can show benevolence in exercising its powers favourably, but after prima facie assessment of the circumstances/material mentioned above. On the other hand, where the prosecution evidence is almost complete or after the conclusion of the evidence the matter is at the stage of argument, normally the High Court should refrain from exercising its power under Section 482 of the Code, as in such cases the trial court would be in a position to decide the case finally on merits and to come a conclusion as to whether the offence under Section 307 IPC is committed or not. Similarly, in those cases where the conviction is already recorded by the trial court and the matter is at the appellate stage before the High Court, mere compromise between the parties would not be a ground to accept the same resulting in acquittal of the offender who has already been convicted by the trial court. Here charge is proved under Section 307 IPC and conviction is already recorded of a heinous crime and, therefore, there is no question of sparing a convict found guilty of such a crime".

13. The Hon'ble Apex Court in case ***Gian Singh v. State of Punjab and anr. (2012) 10 SCC 303*** has held that power of the High Court in quashing of the criminal proceedings or FIR or complaint in exercise of its inherent power is distinct and different from the power of a Criminal Court for compounding offences under Section 320 Cr.PC. Even in the judgment passed in **Narinder Singh's** case, the Hon'ble Apex Court has held that while exercising inherent power of quashment under Section 482 Cr.PC., the Court must have due regard to the nature and gravity of the crime and its social impact and it cautioned the Courts not to exercise the power for quashing proceedings in heinous and serious offences of mental depravity, murder, rape, dacoity etc. However subsequently, the Hon'ble Apex Court in **Dimpey Gujral and Ors. vs. Union Territory through Administrator, UT, Chandigarh and Ors. (2013(11 SCC 497** has also held as under:-

> "7. In certain decisions of this Court in view of the settlement arrived at by the parties, this Court quashed the FIRs though some of the offences were non-compoundable. A two Judges' Bench of this court doubted the correctness of those decisions. Learned Judges felt that in those decisions, this court had permitted compounding of non-compoundable offences. The said issue was, therefore, referred to a larger bench.
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> The larger Bench in Gian Singh v. State of Punjab (2012) 10 SCC 303 considered the relevant provisions of the Code and the judgments of this court and concluded as under: (SCC pp. 342-43, para 61)
>
> > 61. The position that emerges from the above discussion can be summarised thus: the power of the High Court in quashing a criminal proceeding

or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 of the Code. Inherent power is of wide plenitude with no statutory limitation but it has to be exercised in accord with the guideline engrafted in such power viz; (i) to secure the ends of justice or (ii) to prevent abuse of the process of any Court. In what cases power to quash the criminal proceeding or complaint or F.I.R may be exercised where the offender and victim have settled their dispute would depend on the facts and circumstances of each case and no category can be prescribed. However, before exercise of such power, the High Court must have due regard to the nature and gravity of the crime. Heinous and serious offences of mental depravity or offences like murder, rape, dacoity, etc. cannot be fittingly quashed even though the victim or victim's family and the offender have settled the dispute. Such offences are not private in nature and have serious impact on society. Similarly, any compromise between the victim and offender in relation to the offences under special statutes like Prevention of Corruption Act or the offences committed by public servants while working in that capacity etc; cannot provide for any basis for quashing criminal proceedings involving such offences. But the criminal cases having overwhelmingly and pre-dominatingly civil flavour stand on different footing for the purposes of quashing, particularly the offences arising from commercial, financial, mercantile, civil, partnership or such like transactions or the offences arising out of matrimony relating to dowry, etc. or the family disputes where the wrong is basically private or personal in nature and the

> parties have resolved their entire dispute. In this category of cases, High Court may quash criminal proceedings if in its view, because of the compromise between the offender and victim, the possibility of conviction is remote and bleak and continuation of criminal case would put accused to great oppression and prejudice and extreme injustice would be caused to him by not quashing the criminal case despite full and complete settlement and compromise with the victim. In other words, the High Court must consider whether it would be unfair or contrary to the interest of justice to continue with the criminal proceeding or continuation of the criminal proceeding would tantamount to abuse of process of law despite settlement and compromise between the victim and wrongdoer and whether to secure the ends of justice, it is appropriate that criminal case is put to an end and if the answer to the above question(s) is in affirmative, the High Court shall be well within its jurisdiction to quash the criminal proceeding." (emphasis supplied)

8. In the light of the above observations of this court in Gian Singh, we feel that this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides. In the circumstances of the case, FIR No. 163 dated 26.10.2006 registered under Section 147, 148, 149, 323, 307, 452 and 506 of the IPC at Police Station Sector 3, Chandigarh and all consequential proceedings arising there from

including the final report presented under Section 173 of the Code and charges framed by the trial Court are hereby quashed."

14. In the aforesaid case, Hon'ble Apex Court specifically observed that "*this is a case where the continuation of criminal proceedings would tantamount to abuse of process of law because the alleged offences are not heinous offences showing extreme depravity nor are they against the society. They are offences of a personal nature and burying them would bring about peace and amity between the two sides***."** In the instant case, offences allegedly having been committed by the petitioner-accused are neither serious nor heinous offences of mental depravity or offences like murder, rape, dacoity, etc., rather offences allegedly committed by the petitioner-accused are private in nature and do not have any serious impact on society. Apart from above, it clearly emerges from the statement of complainant that as of today parties have amicably settled the matter inter-se them. Complainant has categorically stated before this Court that she has entered into a compromise with the petitioner-accused of her own free will and accord, without any pressure or influence of any kind whatsoever and as such, she does not wish to prosecute the case any further. Hence this Court after hearing the complainant as well as submissions made in the application filed under Section 482 is of the view that instant matter can be ordered to be compounded while exercising power under Section 482 of the Cr.P.C.

15. Recently, Hon'ble Apex Court in judgment dated ***29.2.2021*** passed in ***Cr.A. No.1488 of 2012, Ram Gopal v. State of MP,*** has held that the touchstone for exercising the extraordinary power under Section 482 Cr.P.C. would be to secure the ends of justice. There can be no hard and fast line constricting the power of the High Court to do substantial

justice. A restrictive construction of inherent powers under Section 482 Cr.P.C. may lead to rigid or specious justice. Most importantly, the Honb'le Apex Court in the aforesaid judgment has categorically held that the High Court having regard to the nature of the offence and the fact that parties have amicably settled their dispute and the victim has willingly consented to the nullification of criminal proceedings, can quash such proceedings in exercise of its inherent powers under Section 482 Cr.P.C., even if the offences are non compoundable. Relevant extract of the afore judgment reads as under:

> "12. The High Court, therefore, having regard to the nature of the offence and the fact that parties have amicably settled their dispute and the victim has willingly consented to the nullification of criminal proceedings, can quash such proceedings in exercise of its inherent powers under Section 482 Cr.P.C., even if the offences are non compoundable. The High Court can indubitably evaluate the consequential effects of the offence beyond the body of an individual and thereafter adopt a pragmatic approach, to ensure that the felony, even if goes unpunished, does not tinker with or paralyze the very object of the administration of criminal justice system.
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> 13. It appears to us that criminal proceedings involving nonheinous offences or where the offences are predominantly of a private nature, can be annulled irrespective of the fact that trial has already been concluded or appeal stands dismissed against conviction. Handing out punishment is not the sole form of delivering justice. Societal method of applying laws evenly is always subject to lawful exceptions. It goes without saying, that the cases where compromise is struck post conviction, the High Court ought to exercise such discretion with rectitude, keeping in view the circumstances surrounding the incident, the fashion in which the compromise has been arrived at, and with due regard to the nature

> and seriousness of the offence, besides the conduct of the accused, before and after the incidence. The touchstone for exercising the extraordinary power under Section 482 Cr.P.C. would be to secure the ends of justice. There can be no hard and fast line constricting the power of the High Court to do substantial justice. A restrictive construction of inherent powers under Section 482 Cr.P.C. may lead to rigid or specious justice, which in the given facts and circumstances of a case, may rather lead to grave injustice. On the other hand, in cases where heinous offences have been proved against perpetrators, no such benefit ought to be extended, as cautiously observed by this Court in Narinder Singh & Ors. vs. State of Punjab & Ors.3 and Laxmi Narayan (Supra).
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> 14. In other words, grave or serious offences or offences which involve moral turpitude or have a harmful effect on the social and moral fabric of the society or involve matters concerning public policy, cannot be construed betwixt two individuals or groups only, for such offences have the potential to impact the society at large. Effacing abominable offences through quashing process would not only send a wrong signal to the community but may also accord an undue benefit (2014) 6 SCC 466, to unscrupulous habitual or professional offenders, who can secure a 'settlement' through duress, threats, social boycotts, bribes or other dubious means. It is well said that "let no guilty man escape, if it can be avoided."

In the aforesaid judgment, the Hon'ble Apex Court has categorically held that criminal proceedings involving non-heinous offences or where the offences are predominantly of private nature can be annulled irrespective of the fact that trial has already been concluded or appeal stands dismissed against the conviction.

16. Consequently, in view of the peculiar facts and circumstances of the case, wherein parties have compromised the matter at hand, this Court deems it fit to exercise its power under Section 482 Cr.PC and accordingly,

the FIR No. 71 of 2001 dated 29.4.2001, registered at Police Station Jawali, District Kangra, H.P., under Sections 451, 452, 323, 324, 325 of IPC read with Section 34 of the IPC, is ordered to be quashed. Since FIR has been quashed, consequent proceedings i.e. the judgments passed by learned courts below, are also quashed and set-aside, as a consequence of which, petitioners-accused are acquitted of the offences in terms of settlement arrived inter-se parties. In view of the above, present petition is disposed of alongwith pending applications if any.

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

Between: -

1. LIAQ RAM SON OF SHRI RAI SINGH
RESIDENT OF VILLAGE PULWAHAL,
POLICE STATION, CHOPAL, TEHSIL
CHOPAL, DISTRICT SHIMLA (H.P.)

2. LACHHAMI DEVI WIFE OF LIAQ RAM
RESIDENT OF VILLAGE PULWAHAL,
POLICE STATION, CHOPAL, TEHSIL
CHOPAL, DISTRICT SHIMLA (H.P.)

….APPELLANTS

(BY MR. N.S. CHANDEL, SENIOR ADVOCATE
WITH MR. KSHITIZ THAKUR, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

..RESPONDENT

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

CRIMINAL APPEAL
No. 366 OF 2015
Reserved on: 02.03.2022
Decided on: 09.03.2022

A. **Narcotics and Psychotropic Substances Act, 1985** -Section 20 - Commercial quantity – Accused took defence of false implication -Held- Evidence on the record does not suggest even remotely implication of accused in case for some specific motive. (Para 11)

B. **Narcotic Drugs and Psychotropic Substance Act, 1985** - Section 20- Non association of independent witness challenged on the ground of non examination of independent witnesses-Commercial quantity-Conviction - The fact remains that at 2.30 in night independent witnesses could not associated readily and easily- Held- Non association of independent witnesses is not fatal to case under NDPS Act- Conviction upheld-Appeal dismissed. (Paras 12 &13)

Cases referred:

Surinder Kumar vs. State of Punjab (2020) 2 SCC 563;

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

J U D G M E N T

By way of instant appeal, the appellants have assailed their conviction and sentence ordered by learned Special Judge, Solan in Sessions Trial No. 3-S/7 of 2013 vide judgment dated 01.05.2015, whereby the appellants have been convicted for the commission of offence under Section 20 of the Narcotics Drugs and Psychotropic Substances Act,1985 (for short, "NDPS Act") and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- each and in default of payment of fine amount, to undergo simple imprisonment for one year.

2. Brief facts of the case, on which the prosecution was launched against the appellants, are as under:

2.1 On the intervening night of 3/4.12.2012 the police party headed by Inspector/SHO Chaman Lal (PW-8) along-with HC Bhagat Singh No. 135 (PW-6) C. Kuldeep Kumar No. 239, HHG Rakesh Tanwar, HHG Manohar Lal and HHG Tek Chand left police station, Solan at about 11.00 p.m. in Government vehicle No HP-14A-6205 for place named as 'Jatoli' to lay "*Nakka*". While on '*Nakka*", at about 2.15 a.m. a vehicle (Tata 407) bearing registration No. HP-63-3975 approached from the side of "Oachghat" and was stopped. Besides the Driver, another male and a female were found occupying the front cabin. On being asked, the Driver was found juvenile (name withheld), whereas the person sitting beside him disclosed his name as Liaq Ram (A-1) and the female disclosed her name as Lachhami Devi (A-2). They all belong to village Pulwahal of Chopal Tehsil in District Shimla and were members of a family. Liaq Ram and Lachhami Devi were husband and wife and the juvenile was their son.

2.2 The vehicle was checked. Six bags containing "garlic produce" were found in the back of the vehicle and one polythene bag was found concealed under the seat on the conductor side of front cabin of the vehicle. On opening of polythene bag, another carry bag coloured 'Khaki' was found therein containing charas in the shape of balls and wicks. The charas was identified from smell and with the experience. The charas was weighed and was found 2kgs 300 grams.

2.3 The recovered charas was placed in the same carry bag and polythene and was sealed in a cloth parcel with six seals having impression 'T'. Facsimile of seal impression was separately preserved on a piece of cloth. Seal was handed over to HC Bhagat Singh No. 135 (PW-6). NCB forms were filled in triplicate.

2.4 Liaq Ram produced the registration certificate and insurance of the vehicle which was found registered in the name of Lachhami Devi.

The parcel of recovered charas with vehicle, key, documents and six bags of garlic were taken into possession vide memo Ext.PW-6/B. The copy of memo was handed over to Liaq Ram. Due to late hours in the night and absence of any habitation near the place of seizure, no witnesses were available.

2.5 Rukka Ext.PW-8/B was prepared by the Inspector Chaman Lal and was sent to police station through Constable Kuldeep Kumar No. 239 for registration of FIR. Rukka was entertained at police station by officiating SHO/SI Nishant Kumar (PW-9) and FIR Ext.PW-9/A was accordingly registered. The case file was sent back to the spot through Constable Kuldeep Kumar.

2.6 The appellants were formally arrested on the spot at 6.15 a.m. and arrest memos Ext. PW-6/C and Ext.PW-8/D were prepared. The information of the arrest of the appellants was telephonically provided to the person of their choice. The case property along-with appellants were brought to police station. The case property was handed over by the Inspector/SHO Chaman Lal (PW-8) to MHC HHC Narender Prakash No. 378 (PW-7), who kept the same in safe custody of Malkhana. The seized contraband was sent for chemical analysis to SFSL Junga on 04.12.2012 and was opined to be charas.

2.7 Juvenile was separately proceeded against in accordance with the provisions of Juvenile Justice Act.

3. Prosecution examined nine witnesses. PW-6 HC Bhagat Singh and PW-8 Inspector/SHO Chaman Lal were examined to prove the recovery of contraband on spot and consequent investigation conducted thereupon. PW-9 SI Nishant Kumar was examined to prove the receipt of Rukka Ext.PW-8/B in the police station, Solan on 04.12.2012 at about 4.00 a.m. through Constable Kuldeep Kumar No. 239 and recording of FIR Ext.PW-9/A on its basis. PW-7 HHC Narender Prakash No. 378 was examined to

prove the deposit of contraband in safe custody of Malkhana as also its transition to SFSL Junga for chemical analysis. PW-3 proved the safe transition of seized contraband from police station to SFSL. PW-1, PW-2 and PW-5 were examined to prove the dispatch and receipt of special report under Section 57 of the Act. PW-4 Constable Fayyaz Khan No. 483 was examined to prove the recording of DDR No. 49 dated 3.12.2012 Ext.PW-4/A regarding departure of police party from police station, Solan.

4. Appellants were examined under Section 313 Cr.P.C. Appellants examined three witnesses in defence besides relying upon the document Ext. D-B, a medical prescription slip dated 03.12.2012 in the name of Lachhami Devi, Ext. DW-3/A copy of statement made by Constable Kuldeep Kumar No. 239, prosecution witness in the trial involving juvenile.

5. We have heard Mr. N.S. Chandel, learned Senior Advocate on behalf of the appellants and Mr. Ashwani K. Sharma, learned Additional Advocate General on behalf of the respondent-State and also gone through the record carefully.

6. The challenge to the impugned judgment has mainly been laid on the ground of non-examination of all witnesses forming part of raiding party viz. Constable Kuldeep Kumar No. 239, HHG Rakesh Tanwar, HHG Manohar Lal and HHG Tek Chand as prosecution witnesses. Such conduct of prosecution has been alleged to be an intentional ploy to suppress the genesis of the case. It has been contended that in contrast to HC Bhagat Singh and Constable Kuldeep Kumar, the Home Guards accompanying the police party would have been more independent witnesses being not the employees of police Department. Further, the case of appellants is that Constable Kuldeep Kumar had already made a statement on oath in trial involving juvenile, therefore, he was given up on false pretext of being repetitive. Reliance has been placed on the document Ext.DW-3/A i.e. a

copy of statement made by Constable Kuldeep Kumar in trial involving juvenile.

7. To say that Home Guards would have been independent witnesses is nothing but a fallacy. When the Home Guards were deputed to assist the police in discharge of its functions, they were directly under the control of PW-8 Inspector/SHO Chaman Lal, therefore, the distinction tried to be drawn between the Home Guards and other police officials associated in *'Nakka'* has no basis. It has also been stressed that Home Guards were not authorized officers under Section 42 of the Act and as such could be said to be independent persons, also deserves to be rejected for the reason that even Constable Kuldeep Kumar did not fulfill the criteria to be called as authorized officer under Section 42 of the Act. A person having no interest in success of prosecution case can be termed to be an independent witness.

8. The contention that Constable Kuldeep Kumar was intentionally given up in order to avoid confrontation with his previous statement is also not substantiated. Reliance on document Ext.DW-3/A is misplaced. Such document is not relevant and admissible in absence of fulfillment of specific requirement of Section 33 of the Evidence Act. The appellants were free to examine the said witness in their defence, in case they intended.

9. As per appellants, the story put-forth by the prosecution was highly improbable. Constable Kuldeep Kumar was stated to have left the spot along-with *'Rukka'* to the police station at about 3.00 a.m. and was stated to have returned to the spot at about 4.30 a.m after registration of FIR which was not believable as the police station was at a distance of about six kilometers from the spot and Constable Kuldeep Kumar was stated to have left the spot on foot. It was not humanly possible to walk 12 kilometers in the given span of time that too after deducting time taken for recording of FIR at police station.

10. The discrepancy, as pointed out above, in our considered view is not fatal to the prosecution case. It has been stated by PW-6 and PW-8 that *'Rukka'* was sent to police station from the spot through Constable Kuldeep Kumar. PW-9 SI Nishant Kumar has also categorically stated to have received the "Rukka" at police station through Constable Kuldeep Kumar. Perusal of statements of these witnesses reveal that defence has failed to falsify their version. There is not even a suggestion to these witnesses that "Rukka" was not sent through Constable Kuldeep Kumar. FIR Ext.PW-9/A also records that the "Rukka"was received through Constable Kuldeep Kumar No. 239. That being so, the mode of travel of Constable Kuldeep Kumar loses significance. The fact of the matter that stood proved is that the "Rukka" Ext.PW-8/B was prepared and sent to police station where FIR Ext.PW-9/A was registered on its basis.

11. The statements of PW-6 and PW-8 are in unison as regards the proceedings undertaken by the police party right from the moment they left the police station, Solan on 03.12.20212 at 11.00 p.m. till they returned in the morning on 04.12.2012 at about 7.00 a.m. Both these witnesses have stated that at 11.00 p.m. on 03.12.2012, the police party left the police station, Solan in Government Vehicle No. HP-14A-6205 and laid *'Nakka'* at place known as 'Jatoli' on Solan-Oachghat road at a spot from where road bifurcates to Jatoli temple. At about 2.15 a.m. vehicle bearing No. HP-63-3975 was stopped. Appellants with their juvenile son were the occupants of vehicle. On checking the vehicle, charas weighing 2kgs 300 grams was found concealed under the seat of conductor side in front cabin of the vehicle. The contraband was seized and concealed in cloth parcel with affixation of six seals of mark **'T'**. Facsimile of seal impression was preserved. Recovery memo of contraband along-with vehicle, its documents and six bags of garlic found loaded in the vehicle was prepared. Rukka was sent whereupon FIR was registered and on further investigation, the

appellants were arrested. Site plan was prepared. Even after lengthy cross-examination of these witnesses, the defence has not been able to extract any material which may cast doubt on their version. The only discrepancy in statement of these witnesses, as pointed out on behalf of the appellant, is that as per HHC Bhagat Singh, PW-6, the place from where the contraband was recovered, under the seat, was open, whereas according to PW-8, the said place was covered and concealed. This discrepancy, in the given facts of the case, cannot be termed to be material as PW-6 has categorically stated that it was PW-8 who had entered the vehicle No. HP-63-3975 and he had found the contraband therein and all other persons in the '*Nakka*' party including PW-6 were standing outside. Further, there is nothing on record to suggest even remotely that implication of appellants in the case is for some specific motive. Such a huge quantity of contraband cannot be said to have been planted by the police, in absence of any specific defence being raised on behalf of the appellants.

12. It has further been argued that police had failed to associate independent witnesses despite availability. Reliance has been placed on the statement of DW-1, who was stated to be a local resident of the area where *'Nakka'* was laid. Perusal of statement of this witness does not reveal that he was aware about the exact location of the spot where the *'Nakka'* was laid by the police party during intervening night of 3/4.12.2012. He has made a general statement that he was resident of Jatoli and his house was adjacent to Solan-Rajgarh road at Jatoli below the road where the road goes up-to Jatoli temple. He has not been specific in showing the location of his house in site plan Ext.PW-8/C. He has also deposed that there are 8-10 houses on the road besides 3-4 shops and 'Dhabas' there. According to this witness, Shivalik Poly Steel was also adjacent to the place from where the road bifurcates to the temple, where work goes on round the clock. He also stated that Jatoli temple was at a distance of 40 to 50 feet through short-

cut and throughout night '*Bhandara*' was arranged in that temple. According to this witness, people were usually available on the road head due to the fact that shops remained open and vehicles usually stopped there for taking food and tea etc. In cross-examination, he admitted that Shivalik Poly factory was at a sufficient distance from road which bifurcates to temple and was in a *'Nallah'*. He further admitted that people visit the Jatoli temple during day time and leave back in the evening and also that 'Jagran' was organized in the temple generally during 'Shivratri' or other Hindu festivals. He further admitted that 'Khokas' (*kiosks)* remained closed during evening hours. The statement of DW-1 cannot be read in isolation to defeat the entire prosecution case. PW-8 has specifically stated that it was night and hence there was no availability of independent witnesses. To the similar effect is the statement of PW-6. The fact remains that at 2.30 in the night the independent witnesses could not be associated readily and easily. In so far as the availability of 'Dhabas' and houses on the road side are concerned, the same has also not been established convincingly. Not only DW-1 had not stated even a single word about the authenticity and genuineness of the site plan Ext.PW-8/C, none of other witnesses were confronted in this regard by the defence. Perusal of site plan Ext. PW-8/C reveals that the descriptions made therein do not match the site description provided by DW-3.

13. Even otherwise, it is trite law that non association of independent witnesses is not fatal in a case under the Act. In ***Surinder Kumar*** vs. ***State of Punjab (2020) 2 SCC 563***, three Judge Bench of Hon'ble Apex Court has observed as under: -

> "14. Further, it is contended by learned senior counsel appearing for the appellant that no independent witness was examined, despite the fact they were available. In this regard, it is to be noticed from the depositions of Devi Lal, Head Constable (PW-1),

during the course of cross- examination, has stated that efforts were made to join independent witnesses, but none were available. The mere fact that the case of the prosecution is based on the evidence of official witnesses, does not mean that same should not be believed.

15. The judgment in the case of *Jarnail Singh v. State of Punjab*, relied on by the counsel for the respondent-State also supports the case of the prosecution. In the aforesaid judgment, this Court has held that merely because prosecution did not examine any independent witness, would not necessarily lead to conclusion that accused was falsely implicated. The evidence of official witnesses cannot be distrusted and disbelieved, merely on account of their official status.

16. In the case of *State* (*NCT of Delhi*) v. *Sunil* it was held as under:

> "It is an archaic notion that actions of the Police Officer, should be approached with initial distrust. It is time now to start placing at least initial trust on the actions and the documents made by the Police. At any rate, the Courts cannot start with the presumption that the police records are untrustworthy. AS a presumption of law, the presumption would be the other way 6 (2001)1 SCC 652 round. The official acts of the Police have been regularly performed is a wise principle of presumption and recognized even by the Legislature".

17. Learned counsel also placed reliance on the judgment of this Court in the case of Mohan Lal to support his argument that informant and investigator cannot be the same person. But in the subsequent judgment, in the case of Varinder Kumar this Court

held that all pending criminal prosecutions, trials and appeals prior to law laid down in Mohan Lal, shall continue to be governed by individual facts of the case.

14. Another contention has been raised on behalf of the appellants that as per case of prosecution, the sealed packet containing seized contraband was sent to SFSL on 04.12.2012 itself and thereafter none had occasion to deal with such packet. This argument has been raised by pointing out that evidence disclosed writing of date 12.12.2012 on the packet with signature of some person. According to appellants, this fact proved that sealed packet was interfered with and hence the interference with the case property could not be ruled-out. This fact again cannot help the cause of the appellants. Mere writing of date and signatures on the packet containing contraband can be attributed to many reasons. The packet was lying in SFSL, Junga till it was sent along-with opinion. Thereafter, the packet containing contraband had been brought to Court more than once in relation with the proceedings of trial. Even mischief cannot be ruled-out.

15. The defence has also tried to take benefit from the fact that PW-4 in cross-examination stated that police party had taken a camera along-with them, when they had left the police station on 03.12.2012, whereas PW-8 had denied this fact. Keeping in view role of PW-4, much reliance cannot be placed on his statement to above effect. PW-4 was examined to prove the recording of DDR Ext.PW-4/A regarding departure of police party from police station on 03.12.2012. Even such departure report does not mention the carrying of camera by the police party.

16. No other point has been raised on behalf of the appellants.

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

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

Between:-

1. VIJENDER ALIAS BABLU
S/O SHRI CHAND R/O VPO GAGANA,
TEHSIL GOHANA, P.S. BARODA,
DISTRICT SONIPAT, HARYANA.

2. AMIT SINGH ALIAS MITTA
S/O SH. SHAMSHER SINGH
R/O VPO GAGANA TEHSIL GOHANA
P.S. BARODA, DISTRICT SONIPAT
HARYANA.

....APPELLANTS

(BY MR. N.S. CHANDEL, SENIOR ADVOCATE
WITH MR. VINOD K. GUPTA, ADVOCATE)

AND
STATE OF HIMACHAL PRADESH

..RESPONDENT

(MR. HEMANT VAID, ADDITIONAL ADVOCATE GENERAL)

CRIMINAL APPEAL
No. 462 OF 2017
Reserved on:24.02.2022
Decided on: 04.03.2022

Narcotics Drug and Psychotropic Substances Act, 1985 - Section 50 – Appellants aggrieved by the conviction passed vide judgment dated 17.7.2017 for commission of offence punishable under section 20 of NDPS Act has preferred appeal - Requirement of personal search in presence of witnesses - Held - Recovery was affected from bag belonging to appellant and not from their personal search - It is more than settled law that compliance of section 50 of NDPS Act is not required while searching the bag carried by any person-

No benefit can be allowed to appellant merely for the reason that the police took almost 3 hours to complete the preliminary investigation - Record does not suggest foisting of false case against the appellant and it cannot be believed that the quantity recovered in this case was planted by the police specifically in a bus packed with passengers – Appeal dismissed.(Paras 14&19)

Cases referred:

Arif Khan Vs State of Uttrakhand (2018) 18 SCC 380;
Mahesh Janardhan Gonnade vs State of Maharashtra (2008) 13 SCC 271;
Paulmeli & Anr vs State of Tamil Nadu, (2014) 13 SCC 90;
Raja and Others V/S State of Karnataka (2016) 10 SCC 506;
Rizwan Khan vs State of Chhattisgarh(2020) 9 SCC 627;
State of Punjab Vs Baljinder Singh, (2019) 10 SCC 473;
State of Rajasthan Vs Parmanand (2014) 5 SCC 345;

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

J U D G M E N T

Appellants have been convicted *vide* judgment dated 17.7.2017 for offence under Section 20 of the Narcotics Drugs and Psychotropic Substances Act,1985 (for short, "NDPS Act") by learned Special Judge III, Solan in Sessions Trial No. 20ASJ-II/7 of 2015 and have been sentences to undergo rigorous imprisonment for 10 years with payment of fine of Rs. 1,00,000/- each.

2. The appellants were charged for having been found in conscious possession of 1.954 Kgs. of cannabis/charas while travelling in a Himachal Roadways bus No. HP-03B-6176 on 29.01.2015 (for short, "Bus").

3. As per prosecution, SI Rupesh Kant (for short 'IO') Police Station, Parwanoo, District Solan, H.P.(PW-13), on 29.1.2015 at about 8.10 AM received a secret telephonic information to the effect that two persons sitting on seat Nos. 25 and 26 of the bus en-route from Shimla to Delhi were carrying charas in a bag which they had kept between their seats. The IO recorded the

information *vide* Ext.PW-2/A and sent the same through PW-3 HHC Ram Lok to Sub Divisional Police Officer, Parwanoo. The I.O along-with HC Praveen, HC Achhar Singh and C. Balwant Singh proceeded towards the Timber Trail Resort (TTR) in Government vehicle driven by HHC Raj Pal and reached there at about 8.45 AM. Bus reached the spot at about 8.55 AM and was stopped at the instance of police party. Two persons,conforming to the identity provided in secret information, were found occupying seat Nos. 25 and 26 of the bus. Police party associated the conductor and driver of the bus namely Ami Chand and Braham Dass respectively (PW-1 and PW-7)as independent witnesses. Police personnel offered their personal search and memo Ext. PW-5/A was prepared. Thereafter the appellants were made aware about their right to be searched in presence of a Magistrate or a Gazetted Officer *vide* memos Ext. PW-1/B and PW-1/C. Appellants opted to be searched by the I.O. On personal search of the appellants nothing incriminating was found, however, a bag was found placed and shared on the laps of the appellants. On search of such bag, charas in the shape of sticks weighing 1.954 Kgs. was recovered and recovery memo Ext. PW-1/H was prepared. The recovered contraband was seized and sealed with seal impression "A" and the memo Ext. PW-1/G was prepared. Facsimile of seal impression "A" was separately preserved on a piece of cloth. NCB form Ext PW-11/C was prepared and filled in triplicate. "Rukka" Ext. PW-13/B was prepared and sent to Police Station, Parwanoo through C. Balwant Singh (PW-5). FIR No. 14/15 Ext. PW-4/A was registered. SHO Police Station, Parwanoo, Inspector Meenakshi (PW-11) resealed the contraband with seal 'R'. Facsimile of seal impression was preserved. Resealing certificate Ext. PW-11/B was prepared. Contraband was deposited in safe custody of "*Malkhana*". The case file after registration of FIR was sent back to the spot through Constable Balwant. Appellants were formally arrested at about 3.30 PM *vide* arrest memos Ext. PW-13/F and PW-13/G and the information about their arrest was telephonically given to their friend on

their asking. Photographs Ext. PW-13/A-1 to A-6 were clicked at the time of recovery of contraband. On 30.01.2015, the I.O prepared special report Ext. PW-2/C under Section 57 of the Act and sent the same to SDPO, Parwanoo. On 31.01.2015, the seized contraband along-with relevant documents was sent to SFSL, Junga for chemical analysis. The contraband was opined to be cannabis/charas *vide* SFSL report Ext. PX. The appellants were accordingly charged for offence under Section 20 of the Act and were tried and convicted as above.

4. Prosecution examined total 13 witnesses. PW-1 Ami Chand, PW-5 C Balwant Singh, PW-7 Braham Dass, PW-12 HC Achhar Singh and PW-13 I.O. SI Rupesh Kant were examined as spot witnesses. PW-7, Meenakshi, SHO, PS, Parwanoo was examined to prove the re-sealing proceedings conducted by her and also the preparation of "*Challan*" etc. PW-2 HC Rakesh Kumar, PW-3 HHC Ram Lok and PW-10 Dy. S.P. Pramod Chauhan were examined to prove compliance of Section 42(2) and 57 of the Act. PW-4 HC Hem Raj posted as MHC, PS, Parwanoo during relevant period was examined to prove the safe custody, dispatch and receipt of contraband in and from the Malkhana. PW-6 HHC Raj Pal was driver of the Government vehicle which commuted I.O along-with other police personnel to the spot on 29.01.2015. PW-5 Devinder Verma, Nodal Officer, Bharti Airtel was examined to prove the CDR details and billing address in respect of Mobile No. 98050-59807. Statements of appellants under Section 313 Cr.P.C were recorded. No evidence in defence was preferred by the appellants.

5. We have heard Mr. Nareshwar Chandel, learned Senior Advocate assisted by Mr. Vinod Gupta Advocate for the appellants and Mr. Hemant Vaid, learned Additional Advocate General for respondent State.

6. Mr. N.S. Chandel, learned Senior Advocate, at the outset, has challenged the impugned judgment on the ground that learned Special Judge had failed to consider the effect of statements of independent witnesses PW-1

and PW-7, who had not supported the case of prosecution. According to him, statements of PW-1 and PW-7 had belied the prosecution story and were sufficient to disbelieve the same. The conviction of the appellants, on the strength of above argument, has been stated to be without any legal evidence.It has been stressed on behalf of the appellants that according to the prosecution version the bag containing contraband was found on the laps of appellants sitting adjacent to each other on seat Nos. 25 and 26 of the bus, whereas PW-1 had categorically stated that the aforesaid bag was found from underneath the said seats. PW-7, other independent witness, had completely denied the factum of recovery of contraband from the appellants.

7. Perusal of statement of PW-1 reveals that this witness specifically stated that the bag was found under seat Nos. 25 and 26. Bag was opened by the police and contraband weighing 1.954 Kgs was recovered there from. It was sealed in a white coloured packet with seals carrying impression 'A' .Facsimile of seal impression was taken on a white piece of cloth. He signed the white packet as well as white cloth carrying facsimile of seal. Seal was handed over to him. Photographs were taken on spot. Case property was taken into possession vide memo Ext.PW-1/H which was having his signature as well as signature of Braham Dass (PW-7). He identified the appellants to be the persons sitting on seat No. 25 and 26 of the bus on 29.01.2015. This witness also identified the case property. PW-1 was cross-examined by learned Prosecutor by declaring him hostile. He, however, denied that the appellants were holding the bag on their lap and that he was deposing falsely in connivance with police. Confronted with his previous statement recorded under Section 161 Cr.P.C, he denied having made statement mark 'A' to 'A' therein. In cross-examination on behalf of the appellants, PW-1 denied the factum of recovery from the bag in his presence. According to this witness, the bus was packed with passengers and some of them were even standing. Lastly, he admitted that false case was instituted by the police against the

appellants. On re-examination by learned Prosecutor, PW-1 firstly admitted that police had made case on true facts but subsequently qualified his statement by stating that the bag was lying on the floor of the bus and that a false case was instituted.

8. PW-7 Braham Dass in his examination-in-chief denied all the facts supporting prosecution story save and except that bus driven by him was stopped by the police and search was conducted. He stated that he kept sitting on his seat and was not aware as to from where the recovery was effected. In cross-examination by learned Prosecutor, PW-7 though denied the fact that contraband was inside the bag, but stated that some substance was in the "Shape of slides". He admitted the fact that bag containing substance was sealed in a packet and also admitted preparation of memo Ext.PW-1/H on spot and his signature thereon in red circle 'B'. He also admitted his signature on memos Ext.PW-1/C, PW-1/D, PW-1/E, PW-1/A, PW-1/J, PW-1/G and PW-5/A. While being cross-examined on behalf of the appellants, PW-7 stated as under:-

> *"It is incorrect that cannabis was not recovered from the possession of the accused persons and it was recovered from the floor of the bus."*

9. Analyzing the material excerpts, as noticed above, from the statements of PW-1 and PW-7 it becomes evident that these witnesses have tried to hide the truth. Both the witnesses were public servants and have admitted to have signed the recovery as well as seizure memo of contraband coupled with other documents evidencing the investigation conducted on spot. Importantly, none of these witnesses have rendered any explanation as to why they signed all such documents without any objection or resistance. It is case of none of these witnesses that they were under some pressure or threat to sign the documents. The fact of recovery of contraband from bus has been admitted by both theses witnesses. The statement of PW-1 that bag was found

underneath seat No. 25 and 26 is belied by the contents of documentExt.PW-1/H which has been signed by him. Similarly, PW-7 has negated the suggestion of defence that cannabis was not recovered from the possession of appellants. Meaning thereby that according to him, the contraband was recovered from the appellants. This witness has also signed the recovery memo and thus his statement to the contrary without any reasonable explanation for deviation cannot be countenanced.

10. It is trite law that statements of hostile witnesses are not liable to be discarded completely. The statements of hostile witnesses to the extent are relevant and admissible can always be looked into. In the instant case, witnesses PW-1 and PW-7 appears to have twisted their statements for reasons best known to them. Such practices are not uncommon in our legal system. In **Paulmeli & Anr vs State of Tamil Nadu**, **(2014) 13 SCC 90,** the legal position has been explained as under

> "22. In State of U.P. v. Ramesh Prasad Misra & Anr., 1996 AIR(SC) 2766, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Sarvesh Narain Shukla v. Daroga Singh &Ors., 2008 AIR(SC) 320; Subbu Singh v. State by Public Prosecutor, 2009 6 SCC 462; C. Muniappan & Ors. v. State of Tamil Nadu, 2010 AIR(SC) 3718; and Himanshu @ Chintu v. State (NCT of Delhi), 2011 2 SCC 36).Thus, the law can be summarised to the effect that the evidence of a hostile witness cannot be discarded as a whole, and relevant parts thereof which are admissible in law, can be used by the prosecution or the defence."

Similarly in **Raja and Others V/S State of Karnataka (2016) 10 SCC 506,** it has been observed by Supreme Court as under:

> "32. That the evidence of a hostile witness in all eventualities ought not stand effaced altogether and that the same can be accepted to the extent found dependable on a careful scrutiny was reiterated by this Court in

Himanshu @ Chintu by drawing sustenance of the proposition amongst others from Khujii vs. State of M. P., 1991 3 SCC 627 and KoliLakhman Bhai Chanabhai vs. State of Gujarat, 1999 8 SCC 624. It was announced that the evidence of a hostile witness remains admissible and is open for a Court to rely on the dependable part thereof as found acceptable and duly corroborated by other reliable evidence available on record."

11. Viewing the matter from another angle also, statements of PW-1 and PW-7 can also not be discarded as a whole, as the Investigating Officer PW-13 had categorically deposed that statement of these witnesses under section 161 Cr.P.C Ex.PW-13/D and Ex.PW-13/E were recorded by him according to their respective versions. Record reveals that this part of deposition of I.O, PW-13, has neither been challenged nor shaken. In **Mahesh Janardhan Gonnade vs State of Maharashtra (2008) 13 SCC 271,** Hon'ble Supreme Court has observed as under:

(Para 49) It is the evidence of PW-PSI Dhimole that portion mark 'A' appearing in the statement of PW-1 was recorded by him correctly. The defence has not brought on record any evidence to show why the Investigating Officer had recorded mark 'A' portion of the statement of PW-1 incorrectly. If PW-1 the maker of the complaint has chosen not to corroborate his earlier statement made in the complaint and recorded during investigation, the conduct of such a witness for no plausible and tenable reasons pointed out on record, will give rise to doubt the testimony of the Investigating Officer who had sincerely and honestly conducted the entire investigation of the case. In these circumstances, we are of the view that PW-1 has tried to conceal the material truth from the Court with a sole purpose of shielding and protecting the appellant for reasons best known to the witness and therefore, no benefit could be given to the appellant for unfavorable conduct of this witness to the prosecution.

12. Thus, the argument raised by learned Senior Advocate representing the appellants, as noticed above, is liable to be rejected. The appellants cannot derive any benefit from mere fact that learned Special Judge had failed to consider and elaborate on this legal aspect of the matter. Even otherwise, the statement of PW-5 Constable Balwant Singh, PW-12 HC Achhar Singh and PW-13 SI Rupesh Kant are consistent and trustworthy in so far as the recovery of contraband from the appellants is concerned. All these witnesses have made depositions making the prosecution story credible. These witnesses have unanimously stated that they had firstly offered their personal search to the appellants and thereafter had conducted searches on their persons, after having afforded them option to be searched either before a Magistrate or a Gazetted Officer in compliance to the provisions of Section 50 of the Act. The memos were prepared in this behalf which were also signed by PW-1 and PW-7. They have also been in unison so far as the placement of bag containing contraband is concerned. They have stated that bag was lying in between laps of appellants sitting on seat Nos. 25 and 26 of the bus. On search, charas weighing 1.954 Kgs was recovered. There is nothing to discredit the statement of these witnesses to above effect.Despite their lengthy cross-examination, nothing could be elicited to discredit them.The conviction can be maintained on the statement of police witnesses, provided they inspire confidence. Not only that the statement of PW-5, PW-12 and PW-13 are trustworthy, they get corroboration from the deposition of PW-1 and PW-7 on material aspects of the matter. In **Rizwan Khan vs State of Chhattisgarh(2020) 9 SCC 627,** the Supreme Court has observed as under:

> "12. It is settled law that the testimony of the official witnesses cannot be rejected on the ground of non-corroboration by independent witness. As observed and held by this Court in catena of decisions, examination of independent witnesses is not an indispensable requirement and such non-examination is not necessarily fatal to the prosecution case."

13. In addition to above, an argument has also been raised that since personal search on the persons of appellants were conducted at the first instance, provisions of Section 50 of the Act were required to be complied with in letter and spirit. According to learned counsel for the appellants, such compliance is discrepant. It has been submitted that police officials had failed to prove having offered their personal search before conducting search on the persons of appellants. It has also been stressed that option given to the appellants was not complying with the provisions of law. This argument also deserves to be rejected for the reason that I.O. PW-13 was an officer authorized under Section 42 of the Act to conduct the search. He had given option to the appellants to be searched either before the Gazetted Officer or a Magistrate. Memos Ext.PW-1/B and Ext.PW-1/C were prepared in this behalf which clearly mentioned that the appellants were made aware of their right that they could get themselves searched before a Magistrate or a Gazetted Officer also. These memos were witnessed and signed by PW-1 and PW-7 who have not denied the execution of these documents, rather they have admitted their signatures thereon. In view of the material on record, the appellants have failed to show non-compliance of Section 50 of the Act.

14. The aforesaid contention of the appellants otherwise also needs to be rejected in view of the fact that recovery, in fact, was effected from a bag belonging to appellants and not from their personal search. It is more than settled now that the compliance of Section 50 of the Act is not required while searching the bag carried by any person and such search does not amount to a personal search of a person. Reliance can be placed on **State of Punjab Vs Baljinder Singh, (2019) 10 SCC 473,**

15. As regards applicability of the requirements under Section 50 of the Act is concerned, it is well settled that the mandate of Section 50 of the Act

is confined to "personal search" and not to search of a vehicle or a container or premises.

16. The conclusion (3) as recorded by the Constitution Bench in para 57 of its judgment in *Baldev Singh* [*State of Punjab* v. *Baldev Singh*, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080] clearly states that the conviction may not be based "only" on the basis of possession of an illicit article recovered from personal search in violation of the requirements under Section 50 of the Act, but if there be other evidence on record, such material can certainly be looked into.

17. In the instant case, the personal search of the accused did not result in recovery of any contraband. Even if there was any such recovery, the same could not be relied upon for want of compliance of the requirements of Section 50 of the Act. But the search of the vehicle and recovery of contraband pursuant thereto having stood proved, merely because there was non-compliance of Section 50 of the Act as far as "personal search" was concerned, no benefit can be extended so as to invalidate the effect of recovery from the search of the vehicle. Any such idea would be directly in the teeth of conclusion (3) as aforesaid.

18. The decision of this Court in *Dilip case* [*Dilip* v. *State of M.P.*, (2007) 1 SCC 450 : (2007) 1 SCC (Cri) 377] , however, has not adverted to the distinction as discussed hereinabove and proceeded to confer advantage upon the accused even in respect of recovery from the vehicle, on the ground that the requirements of Section 50 relating to personal search were not complied with. In our view, the decision of this Court in the said judgment in *Dilip case* [*Dilip* v. *State of M.P.*, (2007) 1 SCC 450: (2007) 1 SCC (Cri) 377] is not correct and is opposed to the law laid down by this Court in *Baldev Singh* [*State of Punjab* v. *Baldev Singh*, (1999) 6 SCC 172 : 1999 SCC (Cri) 1080] and other judgments.

15. In light of above-considered exposition of law, the reliance placed by learned Senior Advocate representing appellants on **(2014) 5 SCC 345 State of Rajasthan Vs Parmanand and (2018) 18 SCC 380 Arif Khan Vs State of Uttrakhand** can be said to be misplaced. In Arif Khan *supra* reliance was placed on Dilip Vs State of M.P (2007) 1 SCC 450, which has now been held to be incorrect view by Baljinder Singh (*supra*).

16. Another fact that has been highlighted on behalf of the appellants is that the recovery memo of contraband Ext. PW-1/H described the contraband to be in the shape of sticks, whereas the report furnished by the SFSL mentioned the contraband to be in the shape of sticks and balls. Mr. Hemant Vaid, learned Additional Advocate General representing the respondent-State has drawn out attention to the photograph Ext PW-13/A-6 in which seized contraband is visible. These are in the shape of small oval sticks. The description by the Scientific Officer of the contraband to be sticks and balls cannot be faulted, keeping in view the shape of the contraband. There can be another possibility of breaking of certain small sticks of contraband in transit. Further, the appellants cannot be allowed to take any benefit therefrom for the reason that it was for them to have sought clarification on this aspect when the packet containing contraband was opened and exhibited before the Court during trial.

17. It has further been contended on behalf of the appellants that documents Ext.PW-11/C, NCB form is shown to have been filled at 12.10 PM. According to the appellants, this fact creates a doubt on the prosecution story. The bus was apprehended at 8.55 AM and it could not have taken three hours for the police to reach such stage of investigation when NCB form was filled. In our considered view, there is no substance in this argument of the appellants. As already held by us that there was nothing to discredit statements of police witnesses as far as the recovery of contraband is concerned. In this view of the matter, no benefit can be allowed to the

appellants merely for the reason that the police took almost three hours to complete preliminary investigation.

18. Learned counsel for the appellant has also drawn our attention to the fact that process of resealing conducted by PW-11 was in fact a fresh sealing and not resealing. It has been argued that resealing means the affixation of seals on the packet already sealed and not that the sealed packet is placed in another packet and then sealed. We do not find any substance in such argument also. It has duly been proved that SHO having received the contraband from spot through PW-5 C Balwant Singh, had placed the same in another fresh packet and was sealed with seal 'R'. Such sealed packet was deposited in Malkhana in the same state and was also received at SFSL in the same condition. No constrictive interpretation can be allowed to the procedure of resealing required during investigation of case under the Act.

19. There is nothing on record to infer foisting of false case against the appellants. The defence has failed to prove any ulterior motive of the police in false implication of appellants, that too, for such a huge quantity of contraband. Such quantity cannot be presumed to have been planted by the police especially in a bus packed with passengers. It cannot be presumed that not only the appellants but none of other passengers had guts to object to the conduct of the police.

20. No other point has been raised on behalf of the appellants.

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

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

Between:

CHANDER PRAKASH, S/O SH. PRITAM SINGH, RESIDENT OF VILLAGE NOG KENCHI, P.O. AND TEHSIL KUMARSAIN, DISTRICT SHIMLA (H.P.)

.....APPELLANT

(BY SHRI MANOJ PATHAK, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

.....RESPONDENT

(BY SHRI ASHWANI K. SHARMA, ADDITIONAL ADVOCATE GENERAL)

CRIMINAL APPEAL No. 312 of 2017
Decided on: 24.03.2022

Narcotic Drugs and Psychotropic Substance Act, 1985 - Section 20 - Non association of independent witnesses – Conviction in commercial quantity challenged on the ground of non-examination of independent witness despite availability – Held - In the chance recovery non association of independent witnesses cannot be said to be sole circumstance to display the prosecution case and there is lack of convincing evidence to suggest that independent witness was available near to the spot at the time when the appellant was queried by the police party - Once the appellant was with the police with the bag in his hand and was not witnessed at that stage by any independent witnesses subsequent inclusion of independent witnesses becomes meaningless-- More non-association of independent witnesses will not be considered as fatal to the prosecution case and the only Caveat is that in case of such omission testimony of police witnesses is to be scrutinized with caution and care and if found reliable can form basis of a successful prosecution. [Para 9 and 10]

Cases referred:

Raveen Kumar Vs. State of Himachal Pradesh 2020 (12) Scale 138;
Rizwan Khan Vs. State of Chattisgarh (2020) 9 SCC 627;

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

J U D G M E N T

By way of instant appeal, appellant has assailed his conviction and sentence recorded by the learned Special Judge-II, Kinnaur at Rampur Bushahr, H.P., vide judgment dated 06.06.2016 in Sessions Trial No. 28-R/3 of 2016, whereby the appellant has been convicted for commission of offence punishable under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985(for short 'ND& PS' Act) and has been sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 1,00,000/- and in default of payment of fine to undergo further simple imprisonment of six months.

2. The case as set up by the prosecution was that a police party of Police Station Kumarsain, District Shimla,H.P. including SI/SHO Virochan Negi, HC Rakesh Kumar, ASI Krishan Lal and Constable Mool Chand, while on patrol had laid a "*Nakka"*on the "Kirti road".At about 10:15 P.M. appellant approached the spot of "*Nakka"* from Kirti side. PW-10, SI/SHO Virochan Negi stopped the appellant, who was carrying a red colour bag in his left hand. On suspicion, the bag carried by the appellant was checked. The red colour bag contained another bag of dark brown colour and inside such bag black coloured substance in the shape of balls was found. The black colour substance was discovered to be the "*Cannabis"*.The place where the accused was apprehended was secluded and no independent witness was immediately available. PW-1, H.C. Rakesh Kumar, PW-2, ASI Krishan Lal were associated as witnesses. The "*Cannabis"* was weighed and found 1 Kg 500 grams. The contraband was placed firstly in the dark brown bag which in turn was placed inside the red colour bag. This bag was further placed in a cloth parcel Ext. PA, which was sealed with six seals having impression "N".Sample seal was drawn on a separate piece of cloth Ext.PW1/A.NCB form Ext.PW6/B was filled up by PW-10,SI/SHO Virochan Negi. Seal after use was handed over to PW-

1,HC Rakesh Kumar. Seizure memo Ext. PW1/B was prepared. The spot proceedings were photographed by PW-2, ASI Krishan Lal. Photographs PW2/A-1 to Ex. PW2/A-6 were later developed. *Rukka* Ext. PW3/A was prepared and handed over to PW-3, C. Mool Chand for being taken to police station for the purposes of registration of FIR. PW-3, C. Mool Chand took the *Rukka* to the police station, on the basis of which FIR Ext. PW3/B was recorded. PW-10, SI/SHO Virochan Negi prepared special report Ext. PW4/A, under Section 57 of the Act and sent the same to S.D.P.O. Rampur, where it was received by the concerned police officer and handed over to PW-4, HC Tara Chand to be kept in record. The accused was formally arrested on spot. The case property alongwith accused were brought to police station. The case property was handed over to PW-6, MHC Sita Devi alongwith relevant documents for safe custody in "*Malkhana*".On 08.02.2016, the recovered contraband was sent for chemical analysis to S.F.S.L. Junga through PW-5, HHC Roshan Lal No. 413. On chemical analysis, such substance was confirmed to be cannabis, vide report Ext. PX. The contraband and report Ext. PX were brought from S.F.S.L. Junga to Police Station Kumarsain on 29.02.2016 by PW-8, HHC Roshan Lal No. 372. After investigation, challan was prepared and presented in the Court. Appellant was charged for commission of offence punishable under Section 20 of the ND&PS, Act to which he pleaded not guilty and claimed trial.

3. Prosecution examined total ten witnesses. PW-1, HC Rakesh Kumar, PW-2, ASI Krishan Lal, PW-3, C. Mool Chand and PW-10, SI/SHO Virochan Negi were examined as spot witnesses. PW-9, LC Chetna proved the transit of special report Ext. PW-4/A from police station to the office of S.D.P.O. Rampur on 08.02.2016. PW-4, HC Tara Chand proved the receipt of special report. PW-5, HHC Roshan Lal No. 413 proved the transit of contraband from police station Kumarsain to S.F.S.L. Junga on 08.02.2016 and PW-8, HHC Roshal Lal No. 372 proved the transit of contraband from

S.F.S.L. Junga to Police Station Kumarsain on 29.02.2016. Both these witnesses also proved the safe custody of contraband till it remained with them. PW-6, MHC Sita Devi and PW-7, HC Liaq Ram proved the safe custody of contraband and other related documents in "*Malkhana*". Appellant was examined under Section 313 of Cr.P.C. Appellant did not lead any defence evidence.

4. Learned Special Judge-II Kinnaur at Rampur Bushahr after holding the trial convicted and sentenced the appellant as noticed above.

5. We have heard Mr. Manoj Pathak, learned counsel for the appellant as well as Mr. Ashwani K. Sharma, learned Additional Advocate General and perused the record.

6. At the outset, Mr. Manoj Pathak, learned counsel for the appellant has argued that the trial was vitiated on account of non compliance of provisions of Section 42 of the Act. According to him, it was a case of prior information and hence failure to comply with the aforesaid provisions of law was fatal to the prosecution case. In support of this argument, reliance has been placed on the cross- examination of PW-1, HC Rakesh Kumar. It will be gainful to reproduce the relevant extract of the cross-examination of PW-1, on which reliance has been placed on behalf of the appellant as under:-

> *" We had not checked any vehicle. We had also not checked any person. We had not laid any barricade on the road. The head light of the official vehicle was also switched off. We had gone to that place as SHO was saying that he has some information, so, we had laid nakka there. I do not exactly know what was the information to SHO."*

7. The argument raised by the appellant deserves to be rejected for the reasons that from the above noted statement of PW-1, the inference can

not be drawn that PW-10, SI/SHO Virochan Negi had prior information as required under Section 42 of the Act. Even according to PW-1, SHO had mentioned about some information and hence "*Nakka*" was to be laid. He has further clarified that he did not know what was the exact information. Thus, the statement of this witness to the above effect cannot be held sufficient to invoke Section 42 of the Act. More so because none of the other witnesses have stated even a single word regarding any prior information available with either of them. PW-10, SI/SHO Virochan Negi has specifically denied about the receipt of any information with him as required under Section 42 of the Act.

8. Section 42 comes into play only when the officer authorized therein entertains reason to believe from personal knowledge or information given by any person regarding the commission or likely commission of offence under the Act. The expression "reason to believe" in the context of ND&PS Act requires objective satisfaction on the part of the officer concerned and not merely his subjective satisfaction. In the case in hand, there is no material on record to hold that PW-10 had any information regarding likelihood of commission of offence under the Act on the objective analysis of which he could entertain the requisite reason to believe.

9. It has further been contended on behalf of the appellant that the entire recovery and seizure was shrouded in suspicion as the investigating officer had intentionally omitted to associate independent witnesses despite availability. No doubt, the spot witnesses have admitted that no effort was made to associate independent witnesses, but such version on their part is to be evaluated in the backdrop of the circumstances in which the contraband was recovered. As we have already held that it was not a case of prior information. Thus, in a chance recovery, non association of independent witnesses cannot be said to be the sole circumstance to disbelieve the prosecution case. There is no convincing evidence on record to

suggest that some person(s) other than the police party were readily available on or near the spot at the time when the appellant was queried by the police party. Once the appellant was with the police with a bag in his hand and was not witnessed at that stage by any independent witnesses, subsequent inclusion of independent witnesses becomes meaningless.

10. It is trite law that mere non association of independent witnesses will not be considered as fatal to the prosecution case. The only caveat is that in case of such omission, the testimony of police witnesses is to be scrutinized with caution and care and if found reliable can form basis of a successful prosecution. In ***Raveen Kumar*** *Vs*. ***State of Himachal Pradesh 2020 (12) Scale 138***, it has been held as under:-

> *"19. It would be gainsaid that lack of independent witnesses are not fatal to the prosecution case. 6 However, such omissions cast an added duty on Courts to adopt a greater degree of care while scrutinizing the testimonies of the police officers, which if found reliable can form the basis of a successful conviction."*

Similarly, in ***Rizwan Khan*** *Vs*. ***State of Chattisgarh (2020) 9 SCC 627,*** the Hon'ble Supreme Court has observed as under:-

> *"12. It is settled law that the testimony of the official witnesses cannot be rejected on the ground of non-corroboration by independent witness. As observed and held by this Court in catena of decisions, examination of independent witnesses is not an indispensable requirement and such non-examination is not necessarily fatal to the prosecution case."*

11. We have carefully scrutinized the statements of police witnesses. As far as, the sequence of events that had taken place on the spot have been unanimously narrated by PW-1, PW-2, PW-3 and PW-10 in one voice. All these spot witnesses have stated in unison that they had laid a "*Nakka*" on Kirti road and at about 10:15 P.M. appellant appeared on the spot with a bag in his hand. On suspicion, the bag was searched and charas weighing 1.5 Kgs was recovered. All these witnesses have been subjected to detailed cross-examination but no material could be elicited benefiting defence. In fact, no material contradiction in the statements of all the spot witnesses could be pointed out on behalf of the appellant. The only test to check the veracity of a witness is his cross examination. We have no hesitation to say that all the above spot witnesses have successfully undergone the test of cross-examination. Thus, we do not find any material on record to disbelieve the version given by these witnesses.

12. The contraband after recovery was duly sealed and seized vide seizure memo Ext. PW-1/B. There is nothing on record to suggest that the recovery and seized contraband were ever tampered with. The placement of the case property in a"*Malkhana*" for safe custody without undue delay has been proved. The transit of case property from "*Malkhana*" to SFSL Junga has also been proved to have been conducted in safe manner. Perusal of the contents of "*Rukka*" Ext. PW-3/A, FIR Ext. PW-3/B and special report Ext. PW-4/A strengthens the case of prosecution as the required procedure were followed with promptitude and further there was nothing on record to entertain any suspicion regarding the executionor contents etc. of these documents. The laboratory report Ext. PX confirms the recovered substance to be "*Cannabis*" besides its weight and shape etc. as described in seizure memo Ext. PW-1/B.

13. Another unsuccessful attempt has been made by learned counsel for the appellant to discredit the prosecution case by inviting our

attention towards photograph Ext. PW2/A-2. As per him, the kind of weighing scale visible in the photograph is not usually available with the police and this proves that the police have brought this weighing scale from nearby shop and thus the independent witnesses could also be easily associated. We do not find any substance in this argument also as there is no rule that provides that the police station cannot have traditional type of weighing scale as shown in photograph i.e PW-2/A-2. However, the defence could have discharged this burden by leading cogent evidence. No inference can be drawn from assumptions in a criminal trial.

14. In light of above discussion, we find no merit in this appeal and the same is dismissed.

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

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

Between:-

RAJESH KUMAR
AGE 38 YEARS,
SON OF LATE SHRI MAST RAM,
RESIDENT OF VILLAGE AND POST OFFICE, ANDRETTA, TEHSIL PALAMPUR, DISTRICT KANGRA, H.P.

.....APPELLANT

(BY MS.KIRAN KANWAR, ADVOCATE AS LEGAL AID COUNSEL)

AND

STATE OF HIMACHAL PRADESH

…RESPONDENT

(BY SH.HEMANT VAID, ADDITIONAL ADVOCATE GENERAL)

CRIMINAL APPEAL NO.349 OF 2019
Reserved on:26.02.2022
Decided on: 29.03.2022

Protection of Children from Sexual Offence Act, 2016 - Section 10 - Appellant being convicted by the Judgment Order dated 26.06.2019 / 29.06.2019 passed by Ld. Special Judge Kangra at Dharamshala, HP, in Sessions Trial titled State of Himachal Pradesh versus Rajesh Kumar, has preferred appeal - Punishment for aggravated sexual assault – Held - Section 10 of POCSO Act provides that sentence under this section may be of either description for a term which shall not be less than 5 years but which may extend to 7 years with fine, so, there is no provision in the Act for awarding lesser sentence than minimum prescribed sentence for offence punishment under section 10 of POCSO Act - Language of this section indicates legislature intent unambiguously that for punishment under section 10 of minimum sentence shall not be less than 5 years - Sentence cannot be reduced – Appeal dismissed. (Paras 16 & 17)

Cases referred:

Mohinder vs. State of Haryana, (2014) 15 SCC 641;
Parveen vs. State of Haryana, (2016) 3 SCC 129;
State of Madhya Pradesh vs. Vikram Das, (2019) 4 SCC 125;

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

J U D G M E N T

Instant appeal has been preferred by convict Rajesh Kumar (hereinafter referred to as the appellant) against judgment/order dated 26.06.2019/29.06.2019, passed by learned Special Judge, Kangra at

Dharamshala, H.P., in Sessions Case R.B.T. No.20-P/VII/19/14, titled as *State of Himachal Pradesh vs. Rajesh Kumar,* in case FIR No. 248 of 2013, dated 13.12.2013, registered in Police Station Palampur, District Kangra, H.P., under Sections 354-A, 506, 509 of the Indian Penal Code (in short 'IPC') and Sections 9(m), punishable under Section 10 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act'), whereby appellant has been convicted under Section 10 of POCSO Act as well as Sections 354-A, 506, 509 IPC and sentenced to undergo rigorous imprisonment for five years with fine of ₹25,000/-; six months with fine of ₹5000/-; one month with fine of ₹1000/-; and three months with fine of ₹2000/- respectively and in case of default of payment of respective fine, to further undergo simple imprisonment for one month, three months, fifteen days and/or one month respectively. The substantive sentences have been ordered to run concurrently.

2. Prosecution case is that on 12.12.2013, 12 years old victim went to Andretta bazaar alongwith other children namely Shivani, Ayush and PW.3-Piyush. Ayush and Piyush were rolling a scooter tyre which on the way rolled inside the house of appellant and Ayush and Piyush went inside the house of appellant to bring that. Thereafter, Ayush came back but Piyush did not. Whereupon, victim went inside the house of appellant to bring Piyush. At that time, appellant, who was lying on the bed caught victim from her arm and opened zip of his pants and showed his private part to the victim. Victim managed to release her from clutches of appellant by giving teeth bite on the hand of the appellant and ran out of the room. At that time appellant had also shown currency note of `100/- to the victim. This incident was narrated by the victim to her Aunt (Bua) PW.2-Sandhla Devi, who reprimanded the accused, who was following the victim. On next day, Sushma Devi, elder sister of Sandhla Devi came home after attending marriage and entire episode was narrated by the victim to her also. Whereupon, Panchayat Pradhan Rajni

Devi was informed about the incident and thereafter, matter was reported to the police and FIR was registered.

3. After completion of investigation, challan was presented in the Court and on conclusion of trial, appellant has been convicted and sentenced as stated supra.

4. Prosecution has examined twelve witnesses, whereas, no defence witness has been examined by the appellant.

5. I have heard learned counsel for the appellant as well as learned Additional Advocate General and also gone through the entire record.

6. Learned counsel for the appellant has submitted that statement of PW.1-victim, that accused had shown his private part to her by opening zip, has not been corroborated by another alleged spot witness PW.3 Piyush; and as other witnesses of the spot Ayush and Shivani have not been examined by the prosecution, thus, adverse inference deserves to be drawn against the prosecution. It has been canvassed that as a matter of fact Ayush and Piyush had gone inside the house of appellant with a view to commit theft, but they were caught red-handed by wife of accused and to counter the said allegation false case has been registered against the appellant. It has further been contended that incident is alleged to have occurred on 12.12.2013 at 5.00 p.m. whereas complaint to the police was submitted on 13.12.2013 at 10.00 p.m. as is evident from Rukka (Ex.PW.1/A) and during this period of delay in lodging the FIR, a concocted story has been cooked by the complainant party, and further that child witnesses were tutored not only to make statement before police, but also to depose before the Magistrate and trial Court. It has been contended that appellant is 42 years old married person having his family with him and he was residing in a rented accommodation and there was neither occasion nor possibility of commission of offence by the appellant as alleged by the complainant party and being only family of different caste in the village, residing in a rented accommodation, he has been implicated in

order to pressurize to leave the locality in order to get rented accommodation vacated from him.

7. It has come in evidence that victim, after death of her mother, had been residing at Andretta with her Aunt (Bua) Sushma Devi since last one year and was studying in 7th class. Whereas, her two brothers were living with father. On 12.12.2013, victim alongwith Shivani, Ayush and Piyush who are children of her Aunt, at about 5.00 p.m., was going to purchase Note Book. Ayush and Piyush were rolling scooter tyre, which accidently rolled inside the house of appellant and both of them went inside the house of appellant, but thereafter, only Ayush came back, but Piyush did not. Victim went inside to bring Piyush. At that time, appellant was alone at his home and was lying on the bed. Piyush also came out and Shivani was already standing outside the house. In the meantime, appellant-Rajesh stood up, came towards victim and after catching her hand pulled her towards him and started vulgar activities with her by opening his zip and showing his penis. Victim rescued her by giving bite and ran alongwith her sister Shivani towards home. It has further been stated by victim that appellant was showing her note of `100/- when he was lying on the bed and when they were running towards Aunt's home, appellant also followed them and came to house of Aunt of victim. Victim narrated the entire incident to her Aunt Sandhla Devi as her Aunt Sushma Devi was out of station to attend a marriage. Sandhla Devi reprimanded the accused. Whereupon, he ran from the spot and next day victim's Aunt Sushma Devi came back from marriage and entire episode was narrated to her, who approached the Pradhan, who attempted to resolve the issue by visiting house of appellant, but appellant was not home, however his wife and mother were there, who instead of resolving the issue started blaming the children. Resultantly, matter was reported to the police and statement of victim was recorded under Section 154 of the Code of Criminal Procedure (in

short 'Cr.P.C.') at 10.00 p.m. and Rukka was sent to the Police Station, on the basis of which FIR was registered.

8. Arguments canvassed, on behalf of the appellant, that Ayush and Shivani have not been examined and Piyush has not supported version of the victim, are not tenable for the reason that it is not the quantity but quality of evidence which determines the fate of a trial. Otherwise also, Ayush and Shivani did not see that accused was holding hand of the victim as Ayush had come out and Shivani was already outside the house. Therefore, they are not witness to the act of appellant. Whereas, Piyush who was inside the house, had seen that victim was caught by appellant and thereafter he came out and, therefore, he was witness only to the fact that victim was caught by appellant but he did not see anything thereafter, therefore, he was not supposed to depose the fact which he did not notice.

9. It is contended on behalf of the appellant that child witnesses were tutored, but I find that this argument is also not tenable. Had it been so, then Piyush would have also been tutored to corroborate entire episode, but he has deposed to the extent to which he had noticed the occurrence, not less than that not more than that. Therefore, he has deposed as a natural witness.

10. PW.1-victim and PW.3-Piyush have categorically denied the suggestion that they were deposing in the Court in a particular manner as asked by their Aunt/mother.

11. PW.1-victim and PW.2-Sandhla Devi have also denied the suggestion that children had gone to the house of accused with intention to commit theft and they were caught red-handed by wife of the accused and as a counterblast, a case has been registered. Not only PW.1-victim, but PW.2-Sandhla Devi and PW.3-Piyush, who are related to each other, have corroborated the occurrence in the same manner as was reported to the police and also deposed by PW.1-victim in her statement recorded under Section 164 Cr.P.C. before the Magistrate. PW.3-Piyush has corroborated all the facts,

which were reported to the police, without any major discrepancy or improvement or contradiction therein. Statements of PW.1-victim, PW.2-Sandhla Devi and PW-3-Piysh have also been corroborated in the statement of Panchayat Pradhan PW.4-Rajni Devi and reporting of incident to her has also been corroborated by PW.4 herself. At that time, no suggestion has been put to her as put to PW.1 to PW.4 that a false case has been made out by the residents of Village in order to oust the appellant from the Village to get the rented accommodation vacated. This plea has been taken for the first time in statement recorded under Section 313 Cr.P.C. There is no suggestion to these witnesses with regard to any enmity of these witnesses i.e. PW.1 to PW.4 with accused. False implication of the accused for catching children red-handed while they were making an attempt to commit theft has also not been put to PW.3 Piyush.

12. Learned counsel for the appellant has also referred statement of PW.12-Dr.Sandeep Kashyap, who had examined the accused, wherein he has stated that on examination there was no external injury, abrasion or teeth marks as alleged in the application submitted by the police at the time of issuance of MLC (Ex.PW.12/A).

13. Victim at the time of incident was about 12 years old it is not necessary that every bite, that too of a child of 12 years old who is trying to rescue herself from the clutches of 37 years old person, would cause injury, abrasion or teeth marks on the body of the accused. Therefore, I am of the considered opinion that absence of external injury, abrasion of teeth marks on the body of the accused is of no consequence, particularly keeping in view the cogent, reliable and convincing evidence of the prosecution in statements of PW.1 to PW.4. Other witnesses are formal in nature, who have substantiated the prosecution case with respect to their role in the investigation.

14. In alternative, appellant has also submitted that keeping in view family life of the appellant and also that victim has not been violated or

injured by the appellant and as claimed by the victim, after the incident appellant had come to the house of victim, is also indicating that appellant was having repentance about his conduct, a lenient view be taken and sentence imposed upon him be reduced.

15. Appellant has been convicted for offences under Sections 354A, 506, 509 IPC and Section 10 of POCSO Act. Quantum of five years sentence awarded under Section 10 of POCSO Act is highest amongst all. Appellant has already served the sentence awarded under Sections 354A, 506 and 509 IPC.

16. Section 10 of POCSO Act provides that sentence under this Section may of either description for a term which shall not be less than five years but which may extend to seven years with fine. There is no provision for awarding lesser sentence than the minimum prescribed sentence for offence under Section 10 of POCSO Act. Language of this Section indicates legislature's intent unambiguously that for offence punishable under Section 10 of POCSO Act minimum sentence shall not be less than five years in any case. There is no scope of interference in the awarded sentence which is prescribed sentence. Therefore, I, for the provision of the Section, in the light of pronouncements of the Supreme Court in ***Mohinder vs. State of Haryana, (2014) 15 SCC 641; Parveen vs. State of Haryana, (2016) 3 SCC 129;*** and ***State of Madhya Pradesh vs. Vikram Das, (2019) 4 SCC 125,*** afraid to consider case of the appellant for reduction of sentence.

17. Taking into consideration entire facts and circumstances and evidence on record, prayer for reducing the sentence is rejected.

18. As discussed supra, after considering arguments of respective learned counsel for the parties and examining testimonies of witnesses minutely, I am of the considered view that no case for interference in the impugned judgment is made out. Hence, the appeal, being devoid of merit, is dismissed

and disposed of accordingly. Pending application(s), if any, also stand disposed of. Record be sent back forthwith.

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

Between:

NARINDER SINGH,
S/O SH. KULDIP SINGH,
TEHSIL MUKERIAN,
VISHAVKARMA CHOWK,
HAJIPUR, HOSHIARPUR,
PUNJAB-144221

....PETITIONER

(BY MR. SUNEEL AWASTHI,
ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH ITS SECRETARY (HOME)
TO THE GOVERNMENT OF HIMACHAL
PRADESH, SHIMLA.

2. RAGUBIR SINGH,
S/O LATE SH. DHANI RAM,
RESIDENT OF VILLAGE KHATIYAD,
TEHSIL FATEHPUR,
DISTRICT KANGRA, H.P.

....RESPONDENTS

(BY MR. SUDHIR BHATNAGAR AND
MR. ARVIND SHARMA, ADDITIONAL
ADVOCATES GENERAL, WITH
MR. NARENDER THAKUR,
DEPUTY ADVOCATE GENERAL, FOR R-1)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No. 97 of 2021
Decided on: 16.03.2022

Code of Criminal Procedure, 1973 - Section 320 (6), section 482 - Inherent jurisdiction and the power of Court to allow compromise - Scope of - Complaint while getting his statement recorded under section 154 CrPC had nowhere stated about occupants of vehicle in question, ran over their vehicle over his father with an intention to kill him, rather it was very categorically stated that occupants of vehicle made an attempt to flee from the spot after having seen people gathered at the shop but when they were stopped by his father, driver of the vehicle namely Narinder Singh wrongly and negligently turned the vehicle, as a consequence of which father fell down and sustained injuries – Held - Court after having perused material available on record has no hesitation to conclude that the evidentiary material on record would not reasonably connect the petitioner with the crime and further there is also lack of evidence to conclude that on the date of alleged accident petitioner had any intention to kill the deceased father of the complainant - Petitioners would suffer irreparable loss, harassment and mental agony if criminal proceedings in this case which are result of misconstruction & mis-understanding of statement of complaint recorded after lodging of FIR proceed further, so, are required to be quashed - The FIR number 159 of 2016 registered police station Fatehpur, District Kangra is order to be quashed and subsequent proceedings are also quashed and set aside -- Petition disposed of. (Paras 15, 16 & 17)

Cases referred:

Anand Kumar Mohatta and Anr. v. State (Government of NCT of Delhi) Departmetn of Home and Anr, AIR 2019 SC 210;

Pramod Suryabhan Pawar v. The State of Maharashtra and Anr, (2019) 9 SCC 608;

Prashant Bharti v. State (NCT of Delhi), (2013) 9 SCC 293;

Rajiv Thapar and Ors v. Madan Lal Kapoor, (2013) 3 SCC 330;

State of Haryana and others vs. Bhajan Lal and others, 1992 Supp (1) SCC 335;

State of Karnataka vs. L. Muniswamy and others, 1977 (2) SCC 699;

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

O R D E R

Petitioner herein has approached this Court in the instant proceedings filed under Section 482 Cr.PC., praying therein to quash and set-aside the FIR No. 159 of 2019 dated 30.12.2019, registered at PS Fatehpur, District Kangra, under Sections 302 and 304 IPC read with Section 34 of IPC as well as consequent proceedings, if any, pending before the competent court of law.

2. Precisely, facts of the case, as emerge from the record, are that on 30.12.2019, respondent-complainant No.2 Raghubir Singh (herein after referred to as the complainant) lodged FIR as detailed herein above, alleging therein that on 29.12.2019, while he alongwith his brother and father was present at his fish shop at Khatiyad, Tehsil Fatehpur, District Kangra, HP, 5-6 young persons namely Harmanpreet Singh, Sukhjeet Singh, Harjot Singh and Harvinder Singh along with Narender Singh i.e. driver of the vehicle bearing No. PB07BH8139, stopped at their eatery for having fried fish. Complainant alleged that though aforesaid occupants of the vehicle ate fish amounting to Rs. 2,000/-, but they only paid sum of Rs. 1500/- and as such, altercation took place *inter-se* them and his father. Complainant alleged that all the occupants including the driver after having seen people gathering at the shop made an attempt to run away and in that process, driver of the vehicle rashly and negligently turned his vehicle, as a consequence of which, his father Dhanni Ram, suffered injuries and was declared brought dead when taken to the hospital. In the aforesaid background, FIR sought to be quashed in the instant proceedings, came to be lodged against the present petitioner as well as other occupants of the vehicle under Section 304 read with Section 34 IPC. On 30.12.2019, police recorded supplementary statement of the complainant under Section 161 Cr.PC, wherein he allegedly disclosed to the police that on 29.12.2019, at around 7 PM, six young boys from Punjab came

to their Dhaba for having fish and they consumed 1½ kg fish and ½ kg curry with rice. He alleged that since persons named hereinabove were ready to pay Rs.1500/- only against the bill of Rs. 2000/-, altercation took place between her father and them. Complainant alleged that persons named herein above started arguing and pushing him as well as his father and they headed towards their vehicle. He stated that when his father came in front of the vehicle demanding payment, vehicle was driven by the present petitioner, as a consequence of which, his father was dragged alongwith vehicle for about 25-30 feet. He alleged that all the occupants of the vehicle in question had an intention to kill his father Dhani Ram. On the basis of aforesaid supplementary statement made by the complainant, case under Section 302 IPC read with Section 34 IPC came to be initiated against all the occupants as well as person namely Narender Singh instead of 304 IPC. After completion of investigation, police presented challan in the competent court of law, wherein police claimed that occupants of the vehicle in question ran over their vehicle over the deceased Dhani Ram with an intention to kill him. All the occupants save and except present petitioner Narender, who at that relevant time, was driving the vehicle, approached this Court by way of Cr.MMO No. 287 of 2020, filed under Section 482 Cr.PC, praying therein to quash the FIR as well as consequent proceedings pending in the competent court of law, on the ground that no case much less under Section 302 IPC read with Section 34 of IPC is made out against them, and they have been falsely implicated in the case. This Court after having perused reply as well as record of investigation passed detailed judgment on 4.1.2022, setting aside the FIR sought to be quashed in the instant proceedings qua them. Now by way of present petition, petitioner Narender Singh, who at that relevant time was the driver of the vehicle in question has approached this Court in the instant proceedings, praying therein to quash and set-aside the FIR on the ground that no case much less under Section 302 IPC read with Section 34 of IPC is made out against him

and he has been falsely implicated. Pursuant to notice issued in the instant proceedings, respondents have filed their reply. Respondent No.1 has stated that there is ample evidence available on record that petitioner herein as well as other occupants of the car intentionally ran over their vehicle over the deceased Dhani Ram with an intention to kill him and as such, petitioner herein has been rightly booked under Section 302 IPC. Respondent No.2 complainant in his reply/affidavit submitted that initial version given by him at the time of lodging of FIR is correct and supplementary statement given by him to the police on 30.12.2019 was misconstrued by the police. He stated in the affidavit that he being complainant/informant had no such intention to cause greater injury to the accused than the act which is mentioned in the FIR. He stated that he and his family members were in grave and sudden shock on account of demise of his father and as such, murmured in the local dialect " *Budda maarita ghassiti ke, kuchli dita gadia thaale*". Para-3 of the reply, reads as under:-

> "3. That it is humbly submitted that the deponent and his family were in grave and sudden shock and wailing heavily on the sudden demise of his father and were in no position to understand because of sudden death and murmuring in the local dialects that " Budda maarita ghassiti ke, kuchli dita gadia thaale" The supplementary statement recorded by the I.O. was misconstrued and mis-communicated and caused the mis-understanding with the I.O. in the investigation which resulted in a graver effect. The complainant/informant has no such intention to cause great injury to the accused then the act which is mentioned in the FIR.

> This short affidavit/ reply have been explained to me vernacular as well as in a local dialect which I understood completely and no fraud, coercion, undue influence and threat is given to me to file the same affidavit in this Hon'ble Court. The cutting and mistake if any has been verified by me.

3. This Court with a view to ascertain the correctness and genuineness of the aforesaid stand taken by the respondent-complainant in his reply deemed it necessary to cause presence of respondent No.2 in the court and as such, pursuant to order dated 24.9.2021, respondent-complainant came present before this court. Respondent-complainant while acknowledging factum with regard to filing of short reply/affidavit on his behalf deposed on oath before this Court that on 29.12.2019, some altercation took place *inter-se* his father and occupants of the vehicle on account of less payment. He deposed that since occupants of the vehicle after having made payment of Rs. 1500/- made an attempt to flee from the shop, they were stopped by his father, but driver of the vehicle namely Narender Singh rashly and negligently turned the vehicle, as a consequence of which, his father fell down and ultimately succumbed to his injuries. He stated before this Court that he had narrated the aforesaid facts to the police on 29.12.2019, as a result of which, case under Section 304 read with Section 34 of the IPC was registered, but subsequently on 30.12.2019, police recorded his supplementary statement, wherein he had given the same version as was given at the time of lodging of FIR, but police misconstrued his statement and wrongly registered case under Section 302 IPC against occupants as well as driver of the vehicle. He deposed that it was wrongly recorded in his supplementary statement that occupants of the vehicle in question ran over the vehicle over his father with an intention to kill him, whereas his father

sustained injuries after being hit by vehicle being driven by Narender Singh. He stated before this Court that at no point of time, occupants of the vehicle caused any harm to his deceased father. Complainant deposed before this Court that he has specifically stated in his short reply/affidavit that complainant/informant had no such intention to cause greater injury to the accused than what is mentioned in the FIR. Lastly, respondent-complainant on oath stated before this Court that since occupants of the vehicle being driven by the person namely Narender Singh had no intention to cause harm to his father, he shall have no objection in case prayer made on his behalf for quashing of FIR is accepted.

4. I have heard the learned counsel for the parties and perused the records of the case.

5. Close scrutiny of the FIR sought to be quashed in the instant proceedings as well as reply filed by the respondent complainant reveals that initially on 29.12.2019, complainant while getting his statement recorded under Section 154 Cr.PC., had nowhere stated that the occupants of the vehicle in question ran over their vehicle over his father with an intention to kill him, rather he very categorically stated that occupants of vehicle made an attempt to flee from the spot after having seen people gathering at the shop, but when they were stopped by his father, driver of the vehicle namely Narender Singh wrongly, rashly and negligent turned the vehicle, as a consequence of which, his father fell down and sustained serious injuries. Complainant specifically alleged that after having paid Rs. 1500/-, all the occupants of the vehicle, made an attempt to flee from the spot, but his father while attempting to stop the occupants of the vehicle suffered injuries and died. Though supplementary statement of the complainant under Section 161 Cr.PC, suggests that complainant had got recorded to the police that occupants of the vehicle in question ran over their vehicle over his father with an intention to kill him, but such statement of him, if examined/

analyzed in light of short reply/affidavit as well as statement made before this Court on oath, this Court finds reason to presume/believe that supplementary statement of the complainant recorded by the police on 30.12.2019 has been misconstrued. Otherwise also, it is not understood that what prevented the respondent-complainant to state such facts at the time of getting his statement recorded under Section 154 Cr.PC, on the basis of which, FIR on 29.12.2019 came to be lodged. Having taken note of the peculiar facts and circumstances of the case, this Court has already allowed the petition filed by all the occupants of the vehicle save and except driver of the vehicle for quashing of FIR vide judgment date 4.1.2021 passed in Cr.MMO No. 287 of 2020.

6. If the aforesaid judgment passed by this Court is read in its entirety, it clearly reveals that this court after having examined the entire record, arrived at a conclusion that no case much less under Section 302 read with Section 34 of IPC is made out against the occupants of the vehicle including the present petitioner. Aforesaid judgment passed by this Court has attained finality, as none of the party to the lis has laid challenge to the same before the superior court of law. In the aforesaid background, prayer made in the instant petition for quashing of FIR made by the petitioner-driver needs to be considered. However, before considering such prayer, this Court deems it necessary to discuss /elaborate the scope and competence of this Court to quash the FIR as well as criminal proceedings while exercising power under Section 482 Cr.PC.

7. A three-Judge Bench of the Hon'ble Apex Court in case titled **State of Karnataka vs. L. Muniswamy and others, 1977 (2) SCC 699**, held that High Court while exercising power under Section 482 Cr.PC is entitled to quash the proceedings, if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court or that the ends of justice require that the proceeding ought to be quashed.

8. Subsequently, in case titled **State of Haryana and others vs. Bhajan Lal and others, 1992 Supp (1) SCC 335**, the Hon'ble Apex Court while elaborately discussing the scope and competence of High Court to quash criminal proceedings under Section 482 Cr.PC laid down certain principles governing the jurisdiction of High Court to exercise its power. After passing of aforesaid judgment, issue with regard to exercise of power under Section 482 Cr.PC, again came to be considered by the Hon'ble Apex Court in case bearing Criminal Appeal No.577 of 2017 (arising out of SLP (CrL.) No. 287 of 2017) titled ***Vineet Kumar and Ors. v. State of U.P. and Anr.,*** wherein it has been held that saving of the High Court's inherent powers, both in civil and criminal matters, is designed to achieve a salutary public purpose i.e. court proceedings ought not to be permitted to degenerate into a weapon of harassment or persecution.

9. The Hon'ble Apex Court in ***Prashant Bharti v. State (NCT of Delhi), (2013) 9 SCC 293***, relying upon its earlier judgment titled as ***Rajiv Thapar and Ors v. Madan Lal Kapoor, (2013) 3 SCC 330***, reiterated that High Court has inherent powers under Section 482 Cr.PC., to quash the proceedings against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charge, but such power must always be used with caution, care and circumspection. In the aforesaid judgment, the Hon'ble Apex Court concluded that while exercising its inherent jurisdiction under Section 482 of the Cr.PC, Court exercising such power must be fully satisfied that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts and the material adduced on record itself overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. Besides above, the Hon'ble Apex Court further held that material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the

accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 of the Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice. In the aforesaid judgment titled as ***Prashant Bharti v. State (NCT of Delhi)***, (2013) 9 SCC 293, the Hon'ble Apex Court has held as under:-

> "22. The proposition of law, pertaining to quashing of criminal proceedings, initiated against an accused by a High Court under Section 482 of the Code of Criminal Procedure (hereinafter referred to as "the Cr.P.C.") has been dealt with by this Court in Rajiv Thapar & Ors. vs. Madan Lal Kapoor wherein this Court inter alia held as under: (2013) 3 SCC 330, paras 29-30)
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> > 29. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 of the Cr.P.C., if it chooses to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 of the Cr.P.C., at the stages referred to hereinabove, would have far reaching consequences, inasmuch as, it would negate the prosecution's/complainant's case without allowing the

prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section 482 of the Cr.P.C. the High Court has to be fully satisfied, that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such, as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such, as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it

to exercise its power under Section 482 of the Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.

30. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashing, raised by an accused by invoking the power vested in the High Court under Section 482 of the Cr.P.C.:-

> 30.1 Step one, whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?
>
> 30.2 Step two, whether the material relied upon by the accused, would rule out the assertions contained in the charges levelled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e., the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false.

> 30.3 Step three, whether the material relied upon by the accused, has not been refuted by the prosecution/complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/complainant?
>
> 30.4 Step four, whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?
>
> 30.5 If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal - proceedings, in exercise of power vested in it under Section 482 of the Cr.P.C. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as, proceedings arising therefrom) specially when, it is clear that the same would not conclude in the conviction of the accused."

10. It is quite apparent from the bare perusal of aforesaid judgments passed by the Hon'ble Apex Court from time to time that where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding

is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him/her due to private and personal grudge, High Court while exercising power under Section 482 Cr.PC can proceed to quash the proceedings.

11. Sh. Sudhir Bhatnagar, learned Additional Advocate General, contended that since investigating agency after having completed investigation has already filed challan under Section 173 Cr.PC., in the competent court of law, prayer made on behalf of the petitioners for quashing FIR cannot be accepted at this stage. However, this Court is not inclined to accept the aforesaid submission made by the learned Additional Advocate General for the reason that High Court while exercising jurisdiction under Section 482 Cr.PC can even proceed to quash charge, if it is satisfied that evidentiary material adduced on record would not reasonably connect the accused with the crime and if trial in such situations is allowed to continue, person arraigned as an accused would be unnecessarily put to ordeals of protracted trial on the basis of flippant and vague evidence.

12. Recently, the Hon'ble Apex Court in case tilted ***Anand Kumar Mohatta and Anr. v. State (Government of NCT of Delhi) Departmetn of Home and Anr, AIR 2019 SC 210***, has held that abuse of process caused by FIR stands aggravated if the FIR has taken the form of a charge sheet after investigation and as such, the abuse of law or miscarriage of justice can be rectified by the court while exercising power under Section 482 Cr.PC. The relevant paras of the judgment are as under:

> ***16. Even otherwise it must be remembered that the*** provision invoked by the accused before the High Court is Section 482 Cr. P.C and that this Court is hearing an appeal from an order under Section 482 of Cr.P.C. Section 482 of Cr.P.C reads as follows: -

> "482. Saving of inherent power of the High Court.- Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

17. There is nothing in the words of this Section which restricts the exercise of the power of the Court to prevent the abuse of process of court or miscarriage of justice only to the stage of the FIR. It is settled principle of law that the High court can exercise jurisdiction under Section 482 of Cr.P.C even when the discharge application is pending with the trial court (G. Sagar Suri and Anr. V. State of U.P. and Others, (2000) 2 SCC 636 (para 7), Umesh Kumar v. State of Andhra Pradesh and Anr. (2013) 10 SCC 591 (para 20). Indeed, it would be a travesty to hold that proceedings initiated against a person can be interfered with at the stage of FIR but not if it has advanced, and the allegations have materialized into a charge sheet. On the contrary it could be said that the abuse of process caused by FIR stands aggravated if the FIR has taken the form of a charge sheet after investigation. The power is undoubtedly conferred to prevent abuse of process of power of any court."

13. Recently, the Hon'ble Apex Court in case titled ***Pramod Suryabhan Pawar v. The State of Maharashtra and Anr, (2019) 9 SCC***

608, has elaborated the scope of exercise of power under Section 482 Cr.PC, the relevant para whereof reads as under:-

> "7. Section 482 is an overriding section which saves the inherent powers of the court to advance the cause of justice. Under Section 482 the inherent jurisdiction of the court can be exercised (i) to give effect to an order under the CrPC; (ii) to prevent the abuse of the process of the court; and (iii) to otherwise secure the ends of justice. The powers of the court under Section 482 are wide and the court is vested with a significant amount of discretion to decide whether or not to exercise them. The court should be guarded in the use of its extraordinary jurisdiction to quash an FIR or criminal proceeding as it denies the prosecution the opportunity to establish its case through investigation and evidence. These principles have been consistently followed and re-iterated by this Court. In Inder Mohan Goswami v State of Uttaranchal5, this Court observed.
>
> > "23. This Court in a number of cases has laid down the scope and ambit of courts' powers under Section 482 CrPC. Every High Court has inherent powers to act ex debito justitiae to do real and substantial justice, for the administration of which alone it exists, or to prevent abuse of the process of the court. Inherent power under Section 482 CrPC can be exercised:
> >
> > (i) to give effect to an order under the Code;
> > (ii) to prevent abuse of the process of the court, and

(iii) to otherwise secure the ends of justice.

24. Inherent powers under Section 482 CrPC though wide have to be exercised sparingly, carefully and with great caution and only when exercise is justified by the tests specifically laid down in this section itself. Authority of the court exists for the advancement of justice. If any abuse of the process leading to injustice is brought to the notice of the court, then the court would be justified in preventing injustice by invoking inherent powers in absence of specific provisions in the statute."

8. Given the varied nature of cases that come before the High Courts, any strict test as to when the court's extraordinary powers can be exercised is likely to tie the court's hands in the face of future injustices. This Court in State of Haryana v Bhajan Lal6 conducted a detailed study of the situations where the court may exercise its extraordinary jurisdiction and laid down a list of illustrative examples of where quashing may be appropriate. It is not necessary to discuss all the examples, but a few bear relevance to the present case. The court in Bhajan Lal noted that quashing may be appropriate where, (2007) 12 SCC 1 1992 Supp (1) SCC 335

"102. (1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a

> cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2).
>
> .....
>
> (7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

In deciding whether to exercise its jurisdiction under Section 482, the Court does not adjudicate upon the veracity of the facts alleged or enter into an appreciation of competing evidence presented. The limited question is whether on the face of the FIR, the allegations constitute a cognizable offence. As this Court noted in Dhruvaram Murlidhar Sonar v State of Maharashtra, 2018 SCCOnLine SC3100 ("Dhruvaram Sonar") :

> "13. It is clear that for quashing proceedings, meticulous analysis of factum of taking cognizance of an offence by the Magistrate is not called for. Appreciation of evidence is also not permissible in exercise of inherent powers. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken, it is open to the High Court to quash the same in exercise of its inherent powers."

14. Now being guided by the aforesaid proposition of law laid down by the Hon'ble Apex Court, this Court would make an endeavor to examine and consider the prayer made in the instant petition vis-à-vis factual matrix of

the case. Careful perusal of FIR sought to be quashed as well as challan filed in the competent court of law under Section 173 Cr.PC, if read in its entirety, reveals that initially respondent-complainant while getting his statement recorded under Section 154 Cr.PC, categorically disclosed to the police that some altercation took place *inter-se* his father and occupants of the vehicle having registration No. PB07BH8139 over less payment. As per complainant, occupants of the vehicle after having paid Rs. 1500/- made an attempt to flee from the spot, but when they were prevented by his father, driver of the vehicle rashly and negligently, turned his vehicle, as a consequence of which, his father sustained injuries and ultimately died. No specific allegation, if any, ever came to be levelled against the occupants of the vehicle as well as driver i.e. petitioner, that at any point of time, they while fleeing from the spot inflicted injury of any kind on the father of the complainant or they with an intention to kill his father ran over their vehicle over his father and as such, police at the first instance rightly registered case under Sections 304 and 34 of IPC against the occupants of the vehicle in question. It is only after recording of the supplementary statement under Section 161 Cr.PC made by the respondent-complainant to the police, wherein he alleged that occupants of the vehicle in question had an intention to kill his father, case under Section 302 IPC came to be registered against the present petitioner i.e. driver of the vehicle namely Narender Singh as well as other occupants. As has been taken note herein above, respondent-complainant in his reply as well as statement made on oath before this Court has categorically stated that contents of FIR lodged at his behest at the first instance on 29.12.2019, are correct and his supplementary statement recorded on 30.12.2019 has been misconstrued by the police. Respondent-complainant in his affidavit as well as statement given to this court on oath has submitted that since he and his family were in grave and sudden shock after the sudden demise of his father, they murmured in local dialect " ***Budda Maarita Ghassiti ke, kuchli dita***

gadia thaale". He stated that he had no such intention to cause greater injury to the accused than that mentioned in the FIR. Most importantly, respondent-complainant categorically stated that at no point of time, occupants of the vehicle including present bail petitioner, caused harm of any kind to his father, rather his father suffered injuries after being hit by the vehicle being driven by the driver namely Narender Singh rashly and negligently.

15. Having carefully perused reply affidavit filed by the respondent-complainant and statement made by him on oath this court is convinced and satisfied that at no point of time, complainant gave statement to the police that occupants of the vehicle had an intention to kill his father and they dragged him with an intention to kill him, rather he in very clear terms stated that his father came forward and stood in front of the vehicle demanding the payment, but driver namely Narender Singh hit him while turning the vehicle rashly and negligently. Having taken note of the aforesaid categorical statement made by the respondent-complainant, this Court in earlier proceedings i.e. Cr.MMO No. 287 of 2020, has already quashed the FIR lodged against all the occupants of the vehicle except driver under Section 304 read with Section 34 IPC. Since bail petitioner had not approached this Court in those proceedings, this court purposely restrained itself from making any observation or pass order with regard to complicity/culpability, if any, of the petitioner namely Narender Singh. Otherwise, bare perusal of judgment rendered in the earlier case clearly reveals that this Court categorically recorded finding that no case much less under Section 302 read with Section 34 IPC is made out against the occupants, also including the driver i.e. petitioner. FIR sought to be quashed neither reveals that petitioner herein while refusing to pay sum of Rs. 2000/- hurled abuses or caused injury to his father, rather categorical stand of respondent No.2 from day one, has been that his father with a view to stop the occupants of the vehicle came in front of

the vehicle and was hit while driver of the vehicle wrongly turned his vehicle. There are material contradictions and inconsistencies in the statements of the respondent-complainant recorded under Section 154 Cr.PC and 161 Cr.PC. Needless to say, statement recorded under Section 161 Cr.PC otherwise has no evidentiary value save and except for the purpose of corroboration. Contents of FIR, which is lodged at the first instance, have relevance, provided same are proved in accordance with law by leading cogent and convincing evidence. Respondent-complainant, at whose behest FIR sought to be quashed came to be lodged, has not alleged anything against the petitioner herein and has no objection in case prayer made on behalf of the petitioner for quashing of FIR registered against him under Section 302 IPC is accepted. This Court having carefully perused material available on record, sees no justification or plausible ground to register case under Section 302 IPC against the petitioner, who at that relevant time was driving the vehicle. Neither it is the case set up in the FIR sought to be quashed nor it has come in the statement of respondent-complainant recorded on oath before this Court that petitioner herein with an intention to kill his father ran over his vehicle over him, rather, in his statement recorded under Section 161 Cr.PC, he himself stated that all the occupants of the vehicle were frequent visitors to their shop and they used to come quite often to eat fish and as such, it cannot be presumed that they can have an intention to kill the father of the complainant. Otherwise also, it is highly improbable and unbelievable that for sum of Rs. 500/-, occupants of the vehicle including the driver would think of killing the deceased father of the complainant.

16. Leaving everything aside, this court after having perused material available on record has no hesitation to conclude that evidentiary material on record, if accepted would not reasonably connect the petitioner with the crime. Neither there is sufficient evidence to conclude that on the date of the alleged incident, petitioner had any intention to kill the deceased

father of the complainant or they with the help and aid of each other committed alleged crime in furtherance of common intention. Otherwise also, statement as has been given by the complainant before this court, if tested/analyzed vis-à-vis material available on record by the Investigating Agency, case of the prosecution is bound to fail against the present petitioner, hence, no fruitful purpose would be served by allowing such proceedings to continue. To the contrary, petitioners would suffer irreparable loss, harassment and mental agony, if criminal proceedings in the present case, which manifestly appear to have been initiated on account of misconstruction and misunderstanding of supplementary statement of complainant recorded after lodging of FIR sought to be quashed, are allowed to continue. Moreover, chances of conviction of the petitioner are very remote and bleak on account of statement given by the complainant before this court and in case, FIR sought to be quashed in the instant proceedings as well as consequent proceedings pending in the competent court of law are allowed to sustain, petitioner would unnecessarily be put to ordeals of protracted trial, which ultimately may lead to acquittal of the accused.

17. Consequently, in view of the detailed discussion made herein above as well as law laid down by the Hon'ble Apex Court, present petition is allowed and FIR No. 159 of 2019 dated 30.12.2019, registered at PS Fatehpur, District Kangra, under Sections 302 IPC read with Section 34 of IPC as well as consequent proceedings, if any, pending before the competent court of law are quashed and set-aside. Accordingly, present petition is disposed of, so also pending applications, if any.

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

Between:

SH. HIRA NAND SHASTRI,
S/O LATE SH. DAULAT RAM,

R/O VILLAGE PAHL., P.O. BAKHOL,
TEHSIL KOTKHAI, DISTRICT SHIMLA.

....PETITIONER

(BY MR. NARESH SHARMA,
ADVOCATE)

AND

1. SH. RAM RATTAN THAKUR,
S/O SH. ROOP RAM,
R/O VILLAGE BHAWANA,
PO KIAR KOTI,
TEHSIL AND DISTRICT SHIMLA, H.P.

2. STATE OF HP.

....RESPONDENTS

(BY MR. AJAY SHARMA, ADVOCATE,
FOR R-1)

(BY MR. SUDHIR BHATNAGAR AND
MR. DESH RAJ THAKUR,
ADDITIONAL ADVOCATES GENERAL,
WITH MR. NARENDER THAKUR AND
MR. GAURAV SHARMA,DEPUTY
ADVOCATES GENERAL, FOR R-2)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No. 107 of 2022
Decided on: 02.03.2022

Criminal Procedure Code, 1973 - Section 482 - Negotiable Instrument Act, 1881 - Section 138 – Inherent jurisdiction Compounding in cases relating to dishonor of cheque - Held - Effect of a General Act can be curtailed by the Special Act even if a General Act contains a non-obstante clause and as such provisions contained under section 320 Cr. P. C. would not come in the way in recording the compromise or in compounding the offence punishable under section 138 of the Act - To the contrary provision of section 147 of the

Negotiable Instrument Act though start with non obstante clause, but has overwriting effect on the provisions contained under section 320 CrPC - In view of compromise arrived inter-se parties the judgment of conviction and order of sentence passed by JMFC – 3, Shimla is annulled – Accused acquitted - Petition disposed of. (Paras 12 &13)

Cases referred:

Damodar S. Prabhu V. Sayed Babalal H. (2010) 5 SCC 663;

Gulab Singh v. Vidya Sagar Sharma, Latest HLJ 2017(HP) Suppl. 753;

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

O R D E R

Instant petition filed under Section 482 Cr.PC, has been filed with a prayer to compound the offence committed by the petitioner under Section138 of the Act in case No. 58-3 of 2012/11 titled as *Ram Rattan v. Hira Nand* decided by the learned JMFC-III, Shimla, vide judgment/order dated 24.6.2013/16.7.2013 and further to quash the sentence of six months awarded to the petitioner.

17. Precisely, the facts of the case, as emerge from the record are that respondent-complainant instituted a complaint under Section 138 of the Act, in the court of learned Judicial Magistrate First Class-III, Shimla, alleging therein that the accused borrowed sum of Rs. 1,90,000/- from him and with a view to discharge his liability, issued cheque for a sum of Rs. 1,90,000/- (Ext.PW1/A), but fact remains that aforesaid cheque on its presentation, was dishonoured. Since petitioner-accused failed to make the payment good within the time stipulated in the legal notice, respondent/complainant was compelled to initiate proceedings before the competent Court of law under Section 138 of the Act.

18. Learned trial Court on the basis of material adduced on record by the respective parties held the petitioner-accused guilty of having

committed offence under Section 138 of the Act and accordingly, vide judgment/order dated 24.6.2013/16.7.2013, convicted and sentenced him to undergo six months' simple imprisonment and pay compensation to the tune of Rs. 2,25,000/- to the complainant.

19. Being aggrieved and dissatisfied with the aforesaid judgment of conviction recorded by the court below, accused preferred an appeal in the court of learned Additional Sessions Judge-II Shimla, District Shimla, H.P., which also came to be dismissed vide judgment dated 27.2.2015. Though aforesaid judgment was laid challenge in this court by way of Cr.R. No. 148 of 2015, but same was also dismissed vide judgment dated 1.7.2016. Since after recording of the aforesaid judgment passed by this Court, petitioner has entered into compromise with the respondent-complainant, whereby he has paid the entire sum of compensation awarded by the court below to the respondent-complainant, he has approached this Court in the instant proceedings for setting aside judgment of conviction dated 24.6.2013, passed by the learned JMFC-III Shimla, further upheld by this Court in Cr.R. No. 148 of 2015.

20. While inviting attention of this Court to the compromise (Annexure P-2), Mr. Naresh Sharma, learned counsel representing the petitioner, argued that since entire payment of compensation awarded by the learned trial court stands paid to the respondent-complainant, this Court while exercising power under Section 482 Cr.PC can quash the judgment of conviction and order of sentence recorded by the learned trial court. While placing reliance on the judgment dated 21.12.2021, passed by this Court in ***CrMP No. 2499 of 2021 in Cr.R. No. 79 of 2019, Geeta Devi v. Surinder Singh and Anr***, Mr. Naresh Sharma, learned counsel submitted that this Court has ample powers under Section 147 of the Act to compound the offence in those cases where accused already stands convicted. Apart from above, Mr. Sharma, also placed reliance upon judgment dated ***13.8.2021***,

passed by the ***High Court of Judicature at Allahabad, Lucknow Bench, in "Rishi Mohan Srivastava v. State of UP and Anr"*** , wherein court while exercising power under Section 482 Cr.PC annulled the judgment of conviction and order of sentence recorded by learned trial court, further affirmed by High Court on the basis of compromise arrived *inter-se* parties.

21. Mr. Ajay Sharma, learned counsel appearing for respondent No.1-complainant, while fairly admitting factum with regard to compromise arrived *inter-se* parties, submitted that since entire amount of compensation awarded by the court below stands received by the respondent-complainant, he shall have no objection in case judgment of conviction and order of sentence recorded by the learned trial court is quashed and set-aside and offence alleged to have been committed by the petitioner under Section 138 of the Act, is ordered to be compounded while exercising power under Section 147 of the Act. Mr. Ajay Sharma, also invited attention of this Court to judgment dated 1.12.2017, passed by this court in Case titled ***Gulab Singh v. Vidya Sagar Sharma, Latest HLJ 2017(HP) Suppl. 753***, wherein this Court recalled its judgment passed in criminal revision in light of provisions contained under Section 147 of the Act, which permits compounding of the offence under Section 138 of the Act.

22. Having heard the learned counsel for the parties and perused the judgments pressed into service by the learned counsel, this Court finds that issue raised in the instant petition stands duly adjudicated by this Court in ***Geeta Devi's*** *Case (Supra).* It would be apt to take note of paras 11 to 15 passed in case titled ***Geeta Devi'*** s case supra:

> *" 11. Having heard learned counsel for the parties and perused the judgment dated 1.12.2017 passed by this Court in Gulab Singh case (supra), this Court finds that issue which arises in the case at hand stands duly adjudicated by this Court. It would be profitable to*

reproduce para Nos. 9 to 15 of the aforesaid judgment herein:-

"9. Mr. Manohar Lal Sharma, learned counsel representing the petitioner, has invited attention of this Court to the judgment passed by Hon'ble High Court of Rajasthan in Naresh Kumar Sharma versus State of Rajasthan & another, Criminal Misc. Application No.371 of 2016 in Criminal Revision Petition No.1267 of 2016, to suggests that in view of amicable settlement arrived inter se the parties, this Court has power to recall its judgment in the light of the provisions contained in Section 147 of the Act, which permits compounding of the offence under Section 138 of the Act. At this stage, it would be profitable to reproduce the judgment passed by Hon'ble High Court of Rajasthan hereinbelow:-

> *"The accused-petitioner has field this criminal misc. application under section 482 Cr.P.C read with section 147 of Negotiable Instruments Act(for short the 'Act') with a prayer to review/recall the order dated 6.10.2016 passed by this Court in SB Criminal Revision Petition No.1267/2016 in the light of compromise dated 4.11.2016 subsequently entered between the parties and as a consequences thereof to acquit the accusedpetitioner for the offence under Section 138 of N.I. Act.*
>
> *Vide order dated 6.10.2016, the aforesaid revision petition filed by the petitioner was dismissed by this Court while upholding and affirming the judgment and order of conviction and sentence passed by the trial Court as well as by the Appellate Court.*

It was jointly submitted by the learned counsel for the parties that after the order dated 6.10.2016 the parties have amicably settled their dispute and entered into compromise and the amount in the dispute has been paid by the petitioner to the respondent-complainant. It was further submitted that although the revision petition has been dismissed by this Court on merits vide order dated 6.10.2016, but even then that order can be recalled in the light of provisions of Section 147 of N.I.Act which permits compound of the offence under Section 138 of the Act at any stage and the accused can be acquitted.

In support of their submissions, they relied upon the case of K. Subramanian Vs. R.Rajathi reported in (2010) 15 SCC 352 and order dated 7.7.2015 passed by a Single Bench of Hon'ble Gujarat High Court in S.B. Criminal Misc. Application (Recall) No.10232/2015 filed in Special Criminal Application No.3026/2014.

On consideration of submissions jointly made on behalf of the respective parties and the material including the compromise entered into between the parties and the fact that the amount in dispute has been paid by the accused-petitioner to the respondent- complainant and the principles of law laid down in the aforesaid decisions, I find it a fit case in the criminal misc. application is to

be allowed and the order dated 6.10.2016 is to be recalled.

Consequently, the criminal misc. application is allowed and the order dated 6.10.2016 is recalled and all the orders whereby the accused-petitioner was convicted and sentenced for the offence under Section 138 of N.I. Act are set aside and as a consequence thereof he is acquitted therefrom."

10. Reliance is also placed upon the judgment passed by Hon'ble Gujarat High Court, wherein similar application came to be filed for recalling the judgment passed by the Hon'ble High Court of Gujarat. In the aforesaid judgment, Hon'ble Gujarat High Court, has reiterated that judgment passed by the High Court 8 affirming the judgment of conviction recorded under Section 138 of the Act, can be recalled in view of the specific provisions contained in Section 147 of the Act, which provides for compounding of offence allegedly committed under Section 138 of the Act.

11. The Hon'ble Apex Court in K. Subramanian Vs. R.Rajathi; (2010)15 Supreme Court Cases 352, also in similar situation ordered for compounding of offence after recording of conviction by the courts below, wherein it has been held as under:-

"6. Thereafter a compromise was entered into and the petitioner claims that he has paid Rs. 4,52,289 to the respondent. In support of this claim, the petitioner has produced an

affidavit sworn by him on 1.12.2008. The petitioner has also produced an affidavit sworn by P. Kaliappan, Power of attorney holder of R. Rajathi on 1.12.2008 mentioning that he has received a sum of Rs. 4,52,289 due under the dishonoured cheques in full discharge of the value of cheques and he is not willing to prosecute the petitioner.

7. The learned counsel for the petitioner states at the Bar that the petitioner was arrested on 30.7.2008 and has undergone the sentence imposed on him by the trial Court and confirmed by the Sessions Court, the High Court as well as by this Court. The two affidavits sought to be produced by the petitioner as additional documents would indicate that indeed a compromise has taken place between the petitioner and the respondent and the respondent has accepted the compromise offered by the petitioner pursuant to which he has received a sum of Rs.4,52,289. In the affidavit filed by the respondent a prayer is made to permit the petitioner to compound the offence and close the proceedings.

8. Having regard to the salutary provisions of Section 147 of the Negotiable Instruments Act read with Section 320 of the Code of Criminal Procedure, this Court is of the opinion that in view of the compromise arrived at between the parties, the petitioner

should be permitted to compound the offence committed by him under Section 138 of the Code."

12. The Hon'ble Apex Court in the aforesaid judgment has categorically held that in view of the provisions contained under Section 147 of the Act, read with Section 320 of Cr.P.C, compromise arrived inter se the parties, can be accepted and offence committed under Section 138 of the Act, can be ordered to be compounded.

13. Another question which arise for determination/ adjudication of this Court is with regard to maintainability of present review petition. Admittedly, instant review petition has been filed after withdrawal of Special Leave Petition, preferred by the applicant/ petitioner against the judgment passed by this Court in Criminal Revision No.394 of 2015, wherein conviction/ sentence awarded by the Court below came to be upheld. In the case at hand, Special Leave to Appeal (Crl.) filed by the applicant/petitioner was dismissed as withdrawn vide order dated 18.08.2017. Subsequent to passing of aforesaid order by Hon'ble Apex Court, petitioner/applicant has approached this Court, praying therein for modification/recalling of its judgment dated 10.3.2017, passed in Criminal Revision No.394 of 2015 on the ground that parties have amicably settled the matter and entire amount stands paid to the respondent/complainant in terms of judgment passed by the learned trial Court. Learned counsel representing the petitioner/applicant, contended that once

the Supreme Court permits withdrawal of a Special Leave Petition without recording reasons, it is as if no appeal was ever filed or entertained, since in the absence of grant of special leave, there is no appeal in existence. Learned counsel further contended that where a Special Leave Petition is permitted to be withdrawn and equally when it is dismissed in limine without recording reasons, the High Court judgment neither merges into any proceedings before the Supreme Court nor is it in any manner affected by the filing and subsequent withdrawal or dismissal of the Special Leave Petition. In support of aforesaid contentions, learned counsel representing the applicant/ petitioner also invited attention of this Court to the judgment passed by the three Judges Bench of the Supreme Court in Kunhayammed Vs. State of Keral (2000) 6 SCC 359, wherein it has been held that after dismissal of SLP in limine, review petition can be filed because at the stage of dismissal of SLP, there exists no appeal in the eyes of law.

14. Before ascertaining the correctness of aforesaid submissions having been made by learned counsel representing the applicant/petitioner, it would be profitable to take note of judgment passed by Hon'ble Delhi High Court in Kanoria Industries Limited & ors. Versus Union of India & Ors on 27th February, 2017, wherein it has been held as under:-

"8. We are in the factual situation of the present case concerned not with a case of

dismissal in limine by a nonspeaking order of an SLP preferred against the judgment of which review is sought but with dismissal as withdrawn of the SLP. Though the review petitioners, while seeking to withdraw the SLP also sought liberty to move this Court in review petition but the Supreme Court merely dismissed the SLP as withdrawn and has not stated that the liberty sought had been granted.

9. The question which arises is, whether the dismissal as withdrawn of the SLP, even in the absence of the words "with liberty sought" is to be read as grant of liberty.

10. The review petitioners obviously were of the opinion that without the aforesaid words, they did not have liberty to approach this Court by way of review and claim to have made an application to the Supreme Court in this regard but which application is stated to have been refused to be listed.

11. In our opinion, it is not for us to venture into, whether the order, notwithstanding having not provided that the review petitioners had been granted liberty, grants liberty or not. It cannot be lost sight of that it is not as if the counsel for the review petitioners, when the SLP came up before the Court, stated that the filing of SLP was misconceived and withdrew the same. The order records that it was "after some arguments" that the counsel for the review petitioners sought permission to withdraw the SLP. It is also not as if the Supreme Court is not known to, while dismissing the SLP as withdrawn, grant such liberty. The

order thus has to be read as it is i.e., of dismissal of SLP as withdrawn.

12. Rule 9 of Order XV titled "Petitions Generally" of the Supreme Court Rules, 2013 provides for withdrawal of the petition. Once a proceeding / petition is permitted to be withdrawn, the effect of such withdrawal is as if, it had not been preferred. It is a different matter that the Rules may prohibit the petitioner who so withdraws his petition from refiling the same or even in the absence of such Rules, such refiling may be treated as an abuse of the process or by way of re-litigation. But in law a dismissal of the petition as withdrawn cannot be at par with the dismissal of the petition.

13. Neither counsel has however addressed us on this aspect and has proceeded on the premise as if dismissal as withdrawn is the same as dismissal of the petition.

14. As far as the effects, if any, of dismissal in limine of a SLP on a subsequent review petition before the High Court is concerned, which arise for consideration are firstly whether, Abbai Maligai Partnership Firm and Kunhayammed (supra), both of three Judges Bench hold differently and secondly whether the two deal with different factual situations i.e. of a review having been preferred before the dismissal of SLP or after the dismissal of SLP. We have studied the two judgments in this light.

15. We find that in Kunhayammed (supra) the review petition was filed after the dismissal of SLP. The Supreme Court was approached aggrieved from the order of the

High Court overruling the preliminary objection as to the maintainability of the review petition on the ground of the SLP having been dismissed. Supreme Court held that where the judgment of the High Court has come up to the Supreme Court by SLP and the SLP is dismissed, the judgment of the High Court does not merge in the order of dismissal of SLP and the aggrieved party is not deprived of any statutory right of review, if it was available and he can pursue it; it may be that the review Court may interfere or it may not interfere depending upon the law and principles applicable to interference in review; but the High Court, if it exercises a power of review or deals with the review application on merits, cannot be said to be wrong in exercising statutory jurisdiction or power vested in it. It was expressly held that review can be filed even after SLP is dismissed and as also before special leave is granted but not after it is granted. It was held that once special leave is granted, the jurisdiction to consider the validity of the High Court's order vested in the Supreme Court and the High Court cannot entertain a review thereafter unless such a review application was preferred in the High Court before the SLP was granted. With respect to Abbai Maligai Partnership Firm (supra) it was observed that the facts and circumstances of the case persuaded the Supreme Court to form an opinion that the tenants were abusing the process of the Court by approaching the High Court and the very entertainment of review petition

and then reversing the earlier order was an affront of the order of the Supreme Court. It was explained that the three Judges Bench in Abbai Maligai Partnership Firm (supra) nowhere in the course of judgment relied on the doctrine of merger for taking the view they had taken and rather a careful reading of Abbai Maligai Partnership Firm (supra) also fortified the view taken in Kunhayammed (supra).

16. It would thus be seen that Kunhayammed (supra), though of a Bench of the same strength as Abbai Maligai Partnership Firm (supra), did not read Abbai Maligai Partnership Firm (supra) as laying down anything to the contrary than what was held in Kunhayammed (supra). The Supreme Court having expressly held so, it is not open today to the respondent UOI to contend or for us to hold that there is a conflict in the two.

17. We now proceed to analyze whether Sunil Kumar (supra) carves out any different factual scenario in which Abbai Maligai Partnership Firm and Kunhayammed (supra) operate.

18. Supreme Court in Sunil Kumar (supra) was concerned with a petitioner who was held to be a black-marketer exploiting helplessness of the poor people of the society and capable of engaging lawyers and found to be abusing the process of the Court and wanting to use the Courts as a safe haven. The subject matter of Sunil Kumar (supra) was a transaction under Section 7 of the Essential Commodities Act, 1955. The petitioner therein was found to

have approached the High Court for modifying the order of his conviction after the SLP against the order of conviction had been dismissed and had again preferred the SLP to the Supreme Court against the order of the High Court refusing to modify the order of conviction. It was held that Section 362 of the Code of Criminal Procedure, 1973 puts a complete embargo on the Criminal Court to reconsider after the delivery of judgment as the Court becomes functus officio. In this background when the petitioner relied on Kunhayammed (supra), it was observed that Kunhayammed (supra) has been explained in various subsequent judgments as holding that review petition filed before the High Court after approaching the Supreme Court amounts to abuse of the process of the Court. Reference in this regard was made to Meghmala (supra). However, after holding so, it was further held that the ratio of Kunhayammed (supra) has no application to Sunil Kumar (supra) as Kunhayammed (supra) was dealing with civil cases.

19. We have already noticed above that in Kunhayammed (supra) the review petition was filed after the order of dismissal of the SLP.

20. What we find is that the observations, of preferring review petition after the dismissal of SLP amounting to abuse of the process of the Court, in Abbai Maligai Partnership Firm (supra) as well as in Sunil Kumar (supra) are on a factual finding of the petitioners therein abusing the process

of the Court and not on the maintainability of the review petition. Certainly, if we are to find the review petitioners herein also to be abusing the process of the Court by preferring this review petition after withdrawal of the SLP preferred against the judgment of which review is sought, the review petition of the review petitioners would also suffer the same fate. However it would not make the review not maintainable."

15. Reliance is also placed upon the judgment passed by Hon'ble Apex Court in Kunha Yammed and others versus State of Kerala and others; (2000) 6 Supreme Court Cases 359, wherein it has been held as under:-

"22. We may refer to a recent decision, by Two-Judges Bench, of this Court in V.M. Salgaocar & Bros. Pvt. Ltd. Vs. Commissioner of Income Tax 2000 (3) Scale 240, holding that when a special leave petition is dismissed, this Court does not comment on the correctness or otherwise of the order from which leave to appeal is sought. What the Court means is that it does not consider it to be a fit case for exercising its jurisdiction under Article 136 of the Constitution. That certainly could not be so when appeal is dismissed though by a non- speaking order. Here the doctrine of merger applies. In that case the Supreme Court upholds the decision of the High Court or of the Tribunal. This doctrine of merger does not apply in the case of dismissal of special leave petition under Article 136. When appeal is dismissed, order of the High Court is merged with that

of the Supreme Court. We find ourselves in entire agreement with the law so stated. We are clear in our mind that an order dismissing a special leave petition, more so when it is by a non-speaking order, does not result in merger of the order impugned into the order of the Supreme Court.

27.A petition for leave to appeal to this Court may be dismissed by a non-speaking order or by a speaking order. Whatever be the phraseology employed in the order of dismissal, if it is a non-speaking order, i.e. it does not assign reasons for dismissing the special leave petition, it would neither attract the doctrine of merger so as to stand substituted in place of the order put in issue before it nor would it be a declaration of law by the Supreme Court under Article 141 of the Constitution for there is no law which has been declared. If the order of dismissal be supported by reasons then also the doctrine of merger would not be attracted because the jurisdiction exercised was not an appellate jurisdiction but merely a discretionary jurisdiction refusing to grant leave to appeal. We have already dealt with this aspect earlier. Still the reasons stated by the Court would attract applicability of Article 141 of the Constitution if there is a law declared by the Supreme Court which obviously would be binding on all the courts and tribunals in India and certainly the parties thereto. The statement contained in the order other than on points of law would be binding on the parties and the court or tribunal, whose order was under challenge

on the principle of judicial discipline, this Court being the Apex court of the country. No court or tribunal or parties would have the liberty of taking or canvassing any view contrary to the one expressed by this Court. The order of Supreme Court would mean that it has declared the law and in that light the case was considered not fit for grant of leave. The declaration of law will be governed by Article 141 but still, the case not being one where leave was granted, the doctrine of merger does not apply. The Court sometimes leaves the question of law open. Or it sometimes briefly lays down the principle, may be, contrary to the one laid down by the High Court and yet would dismiss the special leave petition. The reasons given are intended for purposes of Article 141. This is so done because in the event of merely dismissing the special leave petition, it is likely that an argument could be advanced in the High Court that the Supreme Court has to be understood as not to have differed in law with the High Court".

12. Bare perusal of aforesaid judgment rendered by this Court, which is squarely based upon the judgment passed by Hon'ble Apex Court, reveals that doctrine of merger does not apply in the case of dismissal of SLP. In the case at hand, SLP having been filed by the petitioner/applicant herein came to be dismissed in limini by nonspeaking order and as such, does not result in the merger of impugned order with the order passed by the Hon'ble Supreme Court. Now, next question which needs determination is whether this court after affirming the judgment of conviction and order of sentence recorded by court below can accept

the prayer made on behalf of the accused to compound the offence while exercising power under Section 147 of the Act or not.

13. Bare perusal of Section 147 of the Act, reveals that notwithstanding anything contained in the Code of Criminal Procedure, 1973(2 of 1974), every offence punishable under this Act, shall be compoundable. Section 147 of the Act is in the nature of an enabling provision which provides for the compounding of offence prescribed under the same Act, thereby serving as an exception to the general rule incorporated in sub section (a) of Section 320 of the Code of Criminal Procedure, which otherwise state that " no offence shall be compounded except as provided by this section", since section 147 was inserted by way of an amendment to a special law, the same will override the effect of sub section (a) of section 320 of the Code of Criminal procedure. In this regard reliance is placed upon the judgment rendered by Hon'ble Apex Court in Damodar S. Prabhu versus Sayed Babalal H., (2010) 5 Supreme Court Cases 663, which otherwise lays down the law that court can proceed to compound the offence, if any, under section 138 of the Act in the case where accused already stands convicted. Section 362 Cr.P.C, provides that save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error. As per aforesaid provisions of law judgment/order once singed cannot be altered or reviewed except to correct the clerical or arithmetical error, but expression used in the aforesaid provision of law i.e. "save as otherwise provided by this code or by any other law for the time being in force", enables this Court to consider the prayer made on behalf of the accused for compounding the offence while exercising power under

> *Section 147 of the Act. As has been observed hereinabove, section 147 empowers court to compound every offence punishable under this Act notwithstanding anything contained in the code of criminal procedure.*
> *14. At the cost of repetition, Hon'ble Apex Court in Damodar S case(supra) has categorically held that offence punishable under Section 138 of the Act can be compounded even in those cases where accused stands already convicted.*
> *15. Hon'ble Apex Court in K. Subramanian vs. R. Rajath, (2010)15 Supreme Court Cases 352, as has been taken note by this Court in its earlier judgment passed in Cr.MP No.1198 of 2017 has clarified that having regard to the salutary provisions of Section 147 of the Negotiable Instruments Act read with Section 320 of the Code of Criminal Procedure, compromise arrived inter"-se parties, can be ordered to be compounded."*

23. Careful perusal of the afore judgment reveals that petitioner in that case approached this Court with prayer to compound the offence while exercising power under Section 147 of the Act after dismissal of his SLP filed against the judgment passed by this Court upholding the judgment of conviction and order of sentence passed by the court below. One of the issue decided in the aforesaid judgment was with regard to merger of judgment of conviction and order of sentence passed by the court below with that of order passed by the Hon'ble Apex Court dismissing the SLP of the accused in *limine*. Though in the aforesaid case, this Court having taken note of the various judgments passed by the Hon'ble Apex Court held that doctrine of merger does not apply in the case of dismissal of the SLP in *limine* by non speaking order, but also decided the question " *whether this court after affirming the judgment of conviction and order of sentence recorded by the court can accept the prayer*

made by the accused to compound the offence while exercising power under Section1 47 of the Act or not."

24. This court while placing reliance upon judgment rendered by the Hon'ble Apex Court in case titled ***Damodar S. Prabhu V. Sayed Babalal H. (2010) 5 SCC 663,*** has held that though Section 362 Cr.P.C provides that *save as otherwise provided by this Code or by any other law for the time being in force*, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error, but aforesaid expression used in the aforesaid provision of law i.e. "*save as otherwise provided by this code or by any other law for the time being in force*", enables this Court to consider the prayer made on behalf of the accused for compounding the offence while exercising power under Section 147 of the Act. Otherwise also, Section 147 of the Act empowers this court to compound every offence punishable under the Act notwithstanding anything contained in the Code of Criminal Procedure.

25. High Court of Judicature of Allahabad, Lucknow Bench, in ***Rishi Mohan Srivastava's case (supra***), has dealt with similar issue as is evident from bare reading of para 12 of the judgment, which reads as under:

> *12. Considering the facts as narrated above, the following two questions arise for consideration -*
> *Whether an order passed by the High Court in the criminal revision petition confirming the conviction can be nullified by the High Court in a petition filed under section 482 Cr.P.C. noticing subsequent compromise of the case by the contesting parties ?*

26. After having taken note of the provisions contained under Section 320 Cr.PC and Section 147 of the Negotiable Instruments Act, the High Court of Allahabad held that inherent powers under Section 482 Cr.P.C. can be exercised only when no other remedy is available to the

litigant and not where a specific remedy is provided by the statute. It has been further held by the Allahabad High Court that court can always take note of any miscarriage of justice and prevent the same by exercising its powers under Section 482 of Cr.P.C. Relevant paras of ***Rishi Mohan Srivastava's*** case read as under:

> *"15. It is well settled that inherent powers under section 482 Cr.P.C. can be exercised only when no other remedy is available to the litigant and not where a specific remedy is provided by the statute. It is also well settled that if an effective alternative remedy is available, the High Court will not exercise its inherent power under this section, specially when the applicant may not have availed of that remedy.*
>
> *16. Inherent powers under Section 482 of Cr.P.C. include powers to quash FIR, investigation or any criminal proceedings pending before the High Court or any Courts subordinate to it and are of wide magnitude and ramification. Such powers can be exercised to secure ends of justice, prevent abuse of the process of any court and to make such orders as may be necessary to give effect to any order under this Code, depending upon the facts of a given case. The court can always take note of any miscarriage of justice and prevent the same by exercising its powers u/s 482 of Cr.P.C. These powers are neither limited nor curtailed by any other provisions of the Code. However, such inherent powers are to be exercised sparingly and with caution.*
>
> *17. The High Courts in deciding matters under Section 482 should be guided by following twin objectives, as laid down in the case of Narinder Singh vs. State of Punjab (2014) 6 SCC 466:*
>
> *i. Prevent abuse of the process of the court.*
>
> *ii. Secure the ends of justice.*
>
> *iii. To give effect to an order under the Code.*

18. In the instant case, it is true that this Court had dismissed the criminal revision and upheld the conviction and sentence passed by the court below but it cannot be lost sight of the fact that this Court has the power to intervene in exercise of the powers vested under section 482 Cr.P.C. only with a view to do the substantial justice or to avoid miscarriage and the spirit of the compromise arrived at between the parties. This is perfectly justified and legal too.

19. I have considered the judgments cited by the learned counsel for the petitioner as well as by the learned Counsel for the State and other decisions of the Hon'ble Apex Court and I do not think it necessary to enlist those decisions which are taken into consideration for the purpose of the present proceedings.

20. In the instant case, the petitioner is invoking the inherent power as vested under section 482 Cr.P.C. after the dismissal of the revision petition under section 397 Cr.P.C. read with section 401 Cr.P.C. In this circumstances, I have to examine the maintainability of the present petition under section 482 Cr.P.C. and also to examine as to whether for entertaining the aforesaid petition, any special circumstances are made out or not. The gist of the ratio is reflected in the decision of the Hon'ble Apex Court in the case of Rajinder Prasad vs. Bashir and Others; AIR 2001 SC 3524. In that case, it was contended before the Apex Court that as per the earlier revision filed by the accused persons under section 397 of the Code has been rejected by the High Court vide order dated 13.05.1990, they had no right to file the petition under section 482 Cr.P.C. with the prayer for quashing the same order. While dealing with the above contention, the Apex Court observed that -

"We are of the opinion that no special circumstances were spelt out in the subsequent application for invoking the jurisdiction of the High Court under section 482 of the Code and the impugned order is liable to be set aside on this ground alone."

So it can be legitimately argued and inferred and held that in all cases where the petitioners are able to satisfy this court that there are special circumstances which can be clearly spelt out, subsequent application invoking inherent powers under section 482 Cr.P.C. can be moved and cannot be thrown away on the technical argument as to its sustainability.

21. In the case of Krishan Vs. Krishnaveni, reported in (1997) 4 SCC 241, Hon'ble the Apex Court has held that though the inherent power of the High Court is very wide, yet the same must be exercised sparingly and cautiously particularly in a case where the petitioner is shown to have already invoked the revisional jurisdiction under section 397 of the Code. Only in cases where the High Court finds that there has been failure of justice or misuse of judicial mechanism or procedure, sentence or order was not correct, the High Court may in its discretion prevent the abuse of process or miscarriage of justice by exercising jurisdiction under section 482 of the Code.

22. For adjudicating the instant petition, the facts as stated hereinabove are very relevant. Here, the petitioner has attempted to invoke the jurisdiction of this court vested under section 482 Cr.P.C. The embargo of sub section 6 of section 320 Cr.P.C. as pointed out by learned AGA would not come in the way so far as the relief prayed in this petition.

23. I am not in agreement that when the adjudication of a criminal offence has reached to the state of revisional level, there cannot be any compromise without permission of the court in all case including the offence punishable under 'N.I. Act' or the offence mentioned in Table-1 (one) can be compounded only if High Court or Court of Sessions grants permission for such purpose. The Court presently, concerned with an offence punishable under 'N.I. Act'.

24. It is evident that the permissibility of the compounding of an offence is linked to the perceived seriousness of the offence and the nature of the remedy provided. On this point I can refer to the following extracts from an academic

commentary [Cited from : K.N.C. Pillai, R.V. Kelkar's Criminal Procedure, 5th Edition :

> *"17.2 - compounding of offences - A crime is essentially a wrong against the society and the State. Therefore, any compromise between the accused person and the individual victim of the crime should not absolve the accused from criminal responsibility. However, where the offences are essentially of a private nature and relatively not quite serious, the Code considers it expedient to recognize some of them as compoundable offences and some others as compoundable only with the permission of the court..."*

25. Section 147 of NI Act begins with a non obstante clause and such clause is being used in a provision to communicate that the provision shall prevail despite anything to the contrary in any other or different legal provisions. So, in light of the compass provided, a dispute in the nature of complaint under section 138 of N.I. Act, can be settled by way of compromise irrespective of any other legislation including Cr.P.C. in general and section 320 (1)(2) or (6) of the Cr.P.C. in particular. The scheme of section 320 Cr.P.C. deals mainly with procedural aspects; but it simultaneously crystallizes certain enforceable rights and obligation. Hence, this provision has an element of substantive legislation and therefore, it can be said that the scheme of section 320 does not lay down only procedure; but still, the status of the scheme remains under a general law of procedure and as per the accepted proposition of law, the special law would prevail over general law. For the sake of convenience, I would like to quote the observations of Hon'ble the Apex Court in the case of Municipal Corporation, Indore vs. Ratnaprabha reported in (AIR 1977 SC 308) which reads as under :

> *"As has been stated, clause (b) of section 138 of the Act provides that the annual value of any building shall "notwithstanding anything contained in any other law for the time being in force" be deemed to be the gross annual rent for which the building might "reasonably at the time of the assessment be expected to be let from year to year" While therefore, the*

requirement of the law is that the reasonable letting value should determine the annual value of the building, it has also been specifically provided that this would be so "notwithstanding anything contained in any other law for the time being in force". It appears to us that it would be a proper interpretation of the provisions of clause (b) of Section 138 of the Act to hold that in a case where the standard rent of a building has been fixed under Section 7 of the Madhya Pradesh Accommodation Control Act, and there is nothing to show that there has been fraud or collusion, that would be its reasonable letting value, but, where this is not so, and the building has never been let out and is being used in a manner where the question of fixing its standard rent does not arise, it would be permissible to fix its reasonable rent without regard to the provisions of the Madhya Pradesh Accommodation Control Act, 1961. This view will, in our opinion, give proper effect to the non-obstante clause in clause (b) with due regard to its other provision that the letting value should be "reasonable"

26. The expression 'special law' means a provision of law, which is not applicable generally but which applies to a particular or specific subject or class of subjects. Section 41 of Indian Penal Code stands on the same footing and defines the phrase special law. In this connection I would like to quote the well accepted proposition of law emerging from various observations made by the Hon'ble Apex Court in different decisions as a gist of the principle and it can be summarised as under:

"When a special law or a statute is applicable to a particular subject, then the same would prevail over a general law with regard to the very subject, is the accepted principle in the field of interpretation of statute."

27. In reference to offence under section 138 of N.I. Act read with section 147 of the said Act, the parties are at liberty to compound the matter at any stage even after the dismissal of the revision application. Even a convict undergoing imprisonment with the liability to pay the amount of fine imposed by the court and/or

under an obligation to pay the amount of compensation if awarded, as per the scheme of N.I. Act, can compound the matter. The complainant i.e. person or persons affected can pray to the court that the accused, on compounding of the offence may be released by invoking jurisdiction of this court under section 482 Cr.P.C. If the parties are asked to approach the Apex Court then, what will be situation, is a question which is required to be considered in the background of another accepted progressive and pragmatic principle accepted by our courts that if possible, the parties should be provided justice at the door step. The phrase "justice at the door step" has taken the court to think and reach to a conclusion that it can be considered and looked into as one of such special circumstances for the purpose of compounding the offence under section 147 of the N. I. Act."

28. Needless to say, the operation or effect of a general Act can be curtailed by special Act even if a general Act contains a non obstante clause and as such, provisions contained under Section 320 Cr.P.C. would not come in the way in recording the compromise or in compounding the offence punishable under section 138 of the Act. To the contrary, provisions of section 147 of the Act though start with a non obstante clause but have overriding effect on the provisions contained under section 320 Cr.P.C.

29. Consequently, in view of the detailed discussion made herein above as well as law taken note herein above, this Court finds no impediment in accepting the prayer made in the instant petition and accordingly, same is allowed, as a consequence of which, judgment of conviction and order of sentence dated 24.6.2013/16.7.2013 in case No. 58-3 of 2012/11 passed by the learned JMFC-III, Shimla, is annulled in terms of compromise arrived inter-se parties and petitioner accused is acquitted of the notice of accusation. In the aforesaid terms, present petition is disposed of alongwith pending applications if any.

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

Between:-

HIMANSHU SAHOTRA SON OF LATE SH. SURENDER KUMAR, RESIDENT OF BAKTORA COLONY, HOSPITAL ROAD,
SOLAN, TEHSIL AND DISTRICT SOLAN, H.P.
AGED ABOUT 24 YEARS.

....PETITIONER

(BY SH. V.S. CHAUHAN, SENIOR ADVOCATE,
WTH SH. RAJUL CHAUHAN, ADVOCATE).

AND

STATE OF HIMACHAL PRADESH.

....RESPONDENT

(BY SH. P.K. BHATTI AND SH. BHARAT BHUSHAN,
ADDL. A.G. FOR THE RESPONDENT).

CRIMINAL MISC. PETITION (MAIN)
NO. 146 OF 2022
Reserved on:04.03.2022
Decided on:08.03.2022

Code of Criminal Procedure, 1973 - Section 439 read with Sections 22 and 29 of Narcotic Drugs and Psychotropic Substances Act ,1985 – Bail -- Petitioner was occupant of a car along with four other persons and has taken the plea in the petition that he had no knowledge about the conduct of other occupants of the vehicle since he had taken lift in the vehicle -- Contraband recovered in this case is intermediate quantity and hence, rigors of section 37 of NDPS Act will not be applicable - From the status report filed by the respondent it cannot be inferred that petitioner had knowledge of conduct of co occupant of the car who was carrying the contraband on her person – Pre-trial incarceration is not warranted as the same will not serve any fruitful purpose - Bail granted – Petition allowed. (Paras 5, 6 & 8)

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

O R D E R

Petitioner is an accused in case registered vide FIR No. 137 of 2021, dated 29.12.2021, at Police Station, Dharampur, District Solan, H.P.under Sections 22 and 29 of the Narcotic Drugs and Psychotropic Substances, Act 1985 (for short 'NDPS Act').

2. Petitioner has approached this Court for grant of bail under Section 439 Cr.P.C., in above noted case, on the grounds that he is innocent and has nothing to do with the case. It is stated that no contraband was recovered from the conscious possession of the petitioner. Petitioner is stated to be an occupant of a car alongwith four other persons namely Lalit Kumar, Savita Thakur, Ajay Kumar and AvneetAulokh. As per petitioner, he had taken lift in the vehicle and had no knowledge about the conduct of other occupants. The police is stated to have recovered contraband from AvneetAulokh. Petitioner has disclosed his age as 24 years and has stated that he is permanent resident of Baktora Colony, Hospital Road, Solan, H.P. and there is no likelihood of his fleeing from the course of justice. Petitioner has undertaken not to tamper with prosecution evidence and also to abide by all the conditions as may be imposed against him. It is stated that petitioner has no criminal history except the registration of a case under Sections 379, 34 IPC at Police Station, Solan in the year 2013. Petitioner was juvenile at that time and was directed by the Principal Magistrate, Juvenile Justice Board, Solan to render service in hospital for 40 hours in Regional Hospital, Solan.

3. In response, the status report has been filed. It is stated that on 28.12.2021 at about 7.18 P.M. an information was received at Police Station, Dharampur, through helpline No.112 to the effect that a vehicle No.HP-63A-5755 was approaching Dharampur from the side of Parwanoo and some girl had been abducted. On this information, the vehicle No. HP-63A-5755 was

stopped by the police party. The vehicle was being driven by Ajay Kumar, who was accompanied his wife AvneetAulokh on the adjoining front seat. On the rear seat one Savita Thakur, Lalit Kumar and petitioner were found sitting. In the meantime the complainant Gurinder Singh and his wife Mona Singh R/o Chandigarh reached the Police Station. On inquiry, Savita Thakur disclosed that she was forcibly brought by Lalit Kumar. She also raised suspicion that Lalit Kumar could be in possession of some intoxicants.After compliance of Sections 42 (2) and 50 of the NDPS Act, search of occupants of the car was conducted. Number of capsules and tablets branded as 'Whisper Ulra', 'Spas-Trancan Plus', 'Tramadol', 'Acetaminophen', 'Nitrazepam' etc. were recovered from the person of AvneetAulokh. As per SFSL report, recovered Capsules weighed 166.244 grams and recovered Tablets weighed 24.166 grams. As per scientific opinion, the Capsules and Tablets were found to be sample of Tramadol and Nitrazepam. The quantity of contraband was found to be intermediate quantity of the NDPS. It is further stated that the petitioner was arrested on 29.12.2021 at 3.30 A.M. Petitioner was diagnosed to be drug user and was prescribed medicine by the doctor. The investigation is stated to be complete.

4. I have heard learned counsel for the petitioner and learned Additional Advocate General for the State and have also gone through the status report.

5. The contraband recovered in the case is intermediate quantity and hence, rigors of Section 37 of the NDPS Act will not be applicable. From the status report filed by the respondent, it cannot be inferred that petitioner had knowledge of the conduct of the co-occupant of the car namely AvneetAulokh, who was carrying the contraband on her person. Petitioner is stated to have availed lift in the car of Ajay Kumar and AvneetAulokh, who were known to him.

6. The allegations against the petitioner are yet to be proved. Pre-trial incarceration is not warranted in the facts of the case as the same will serve no fruitful purpose. Petitioner is permanent resident of Baktora Colony, Hospital Road, Solan, District Solan, H.P. and is a student. There is no likelihood of his fleeing from the course of justice. Petitioner appears to be a victim of drug abuse and thus requires medical and social help instead of judicial custody. There is no previous criminal history against petitioner save and except the case under Sections 379, 34 IPC registered against him alongwith others when he was juvenile. This solitary instance cannot be an impediment in grant of bail to the petitioner.

7. It is not the case of the respondent that in case of grant of bail to the petitioner, the trial of the case shall be affected adversely. There is no material on record to infer that the petitioner may tamper with prosecution evidence.

8. In light of above discussion, the application is allowed and the petitioner is ordered to be released on bail in case registered vide FIR No. 137 of 2021, dated 29.12.2021, at Police Station, Dharampur, District Solan, H.P. under Sections 22 and 29 of the NDPS Act, on his furnishing personal bond in the sum of Rs. 50,000/- with one surety in the like amount to the satisfaction of learned Chief Judicial Magistrate, Solan, District Solan, H.P. or in his absence, any other Judicial Magistrate First Class, on duty. This order is, however, subject to following conditions:

i) That the petitioner shall regularly attend the trial of the case before the 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 and shall not tamper with the prosecution evidence.

iii) 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.

iv) That the petitioner shall not leave the territory of India without express leave of the Trial Court during the Trial.

9. 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.

Between:-

LALIT KUMAR, AGE 33 YEARS, S/O SH. LACHHI RAM,
R/O RATAL NIWAS, CHAKKAR, SUMMERHILL,
TEHSIL AND DISTRICT SHIMLA, HIMACHAL PRADESH.

....PETITIONER

(BY SH. ANUBHAV CHOPRA ADVOCATE).

AND

STATE OF HIMACHAL PRADESH.

....RESPONDENT

(BY SH. P.K. BHATTI AND SH. BHARAT BHUSHAN,
ADDL. A.Gs. FOR THE RESPONDENT).

CRIMINAL MISC. PETITION (MAIN)
NO. 422 OF 2022
Reserved on:04.03.2022
Decided on: 08.03.2022

Code of Criminal Procedure, 1973 - Section 439 read with Sections 22 and 29 of Narcotic Drugs and Psychotropic Substances Act ,1985 – Bail -- Petitioner was occupant of a car along with four other persons and has taken the plea of innocence in the petition alleging that he had no knowledge about the conduct of other occupant of the vehicle -- Contraband recovered in this case is intermediate quantity and hence, rigors of section 37 of NDPS Act will not be applicable - From the status report filed by the respondent it cannot be inferred that petitioner had knowledge of conduct of co-occupant of the car namely Avneet Aulokh who was carrying the contraband on her person -- Pre trial incarceration is not warranted as the same will not serve any fruitful purpose - Bail granted – Petition allowed. (Paras 5, 6 & 8)

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

O R D E R

Petitioner is an accused in case registered vide FIR No. 137 of 2021, dated 29.12.2021, at Police Station, Dharampur, District Solan, H.P.under Sections 22 and 29 of the Narcotic Drugs and Psychotropic Substances, Act 1985 (for short 'NDPS Act').

2. Petitioner has approached this Court for grant of bail under Section 439 Cr.P.C., in above noted case, on the grounds that he is innocent and has nothing to do with the case. It is stated that no contraband was recovered from the conscious possession of the petitioner. As per petitioner, Ajay Kumar was driving the vehicle, his wife AvneetAulokh was sitting with him and on rear seats, Savita Thakur, HimanshuSahotra and the petitioner were sitting. The occupants of the vehicle were produced before the Incharge, Police Station, Dharampur. The informant, Gurinder Singh also came there and disclosed that the girl (Savita Thakur) was being taken forcibly by the petitioner. Savita Thakur also raised suspicion that the petitioner might have some intoxicants with him. During personal search of the accused persons namely Ajay, Himanshu and the petitioner, nothing was recovered. The police

is stated to have recovered contraband from AvneetAulokh. Petitioner has disclosed his age as 33 years and has stated that he is permanent resident of Chakkar, Tehsil and District Shimla, H.P. and there is no likelihood of his fleeing from the course of justice. Petitioner has undertaken not to tamper with prosecution evidence and also to abide by all the conditions as may be imposed against him. It is stated that petitioner is involved in six cases vide FIR Nos. 39 of 2009, dated 18.4.2009 under Sections 379, 34 IPC registered at Police Station, Kumarsain, District Shimla, 59/2009, dated 13.4.2009, under Sections 379, 34 IPC registered at Police Station, Sadar, Shimla, 138/2011, dated 5.7.2011, under Section 20 of the NDPS Act, Sections 341, 323, 324, 34 IPC and Sections 25, 54, 59 of the Arms Act, registered at Police Station, Boileauganj, Shimla, 03/2011, dated 02.01.2011 under Sections 341, 323, 34 IPC, registered at Police Station, Boileauganj, Shimla, 277 of 2011 dated 4.12.2011, under Sections 147, 148, 149, 323, 427 IPC, registered at Police Station, Boileauganj, Shimla and FIR No. 136 of 2021 dated 28.12.2021, under Sections 365, 342, 323, 34 IPC registered at Police Station, Dharampur, District Solan, H.P. Out of these cases, in three cases the petitioner has been acquitted and three cases are still pending in the Courts.

3. In response, the status report has been filed. It is stated that on 28.12.2021 at about 7.18 P.M. an information was received at Police Station, Dharampur, through helpline No.112 to the effect that a vehicle No.HP-63A-5755 was approaching Dharampur from the side of Parwanoo and some girl had been abducted. On this information, the vehicle No. HP-63A-5755 was stopped by the police party. The vehicle was being driven by Ajay Kumar, who was accompanied by his wife AvneetAulokh on the adjoining front seat. On the rear seat one Savita Thakur, HimanshuSahotra and the petitioner were found sitting. In the meantime, the complainant Gurinder Singh and his wife Mona Singh R/o Chandigarh reached the Police Station. On inquiry, Savita Thakur disclosed that she was forcibly brought by the petitioner. She also raised

suspicion that the petitioner could be in possession of some intoxicants.After compliance of Sections 42 (2) and 50 of the NDPS Act, search of occupants of the car was conducted. Number of capsules and tablets branded as 'Whisper Ulra', 'Spas-TrancanPlus','Tramadol', 'Acetaminophen', 'Nitrazepam' etc. were recovered from the person of AvneetAulokh. As per SFSL report, recovered Capsules weighed 166.244 grams and recovered Tablets weighed 24.166 grams. As per scientific opinion, the Capsules and Tablets were found to be sample of Tramadol and Nitrazepam. The quantity of contraband was found to be intermediate quantity of the NDPS. It is further stated that the petitioner was arrested on 29.12.2021 at 3.30 A.M. The investigation is stated to be complete.

4. I have heard learned counsel for the petitioner and learned Additional Advocate General for the State and have also gone through the status report.

5. The contraband recovered in the case is intermediate quantity and hence, rigors of Section 37 of the NDPS Act will not be applicable. From the status report filed by the respondent, it cannot be inferred that petitioner had knowledge of the conduct of the co-occupant of the car namely AvneetAulokh, who was carrying the contraband on her person.

6. The allegations against the petitioner are yet to be proved. Pre-trial incarceration is not warranted in the facts of the case as the same will serve no fruitful purpose. Petitioner is permanent resident of Chakkar, Tehsil and District Shimla, H.P. There is no likelihood of his fleeing from the course of justice. The registration of cases against the petitioner in the past cannot be a ground to deny bail to the petitioner as there is no conviction recorded against his name. Further there is no link between the past cases with case in hand.

7. It is not the case of the respondent that in case of grant of bail to the petitioner, the trial of the case shall be affected adversely. There is no

material on record to infer that the petitioner may tamper with prosecution evidence.

8. In light of above discussion, the application is allowed and the petitioner is ordered to be released on bail in case registered vide FIR No. 137 of 2021, dated 29.12.2021, at Police Station, Dharampur, District Solan, H.P. under Sections 22 and 29 of the NDPS Act, on his furnishing personal bond in the sum of Rs. 50,000/- with one surety in the like amount to the satisfaction of learned Chief Judicial Magistrate, Solan, District Solan, H.P. or in his absence, any other Judicial Magistrate First Class, on duty. This order is, however, subject to following conditions:

i) That the petitioner shall regularly attend the trial of the case before the 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 and shall not tamper with the prosecution evidence.

iii) 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.

iv) That the petitioner shall not leave the territory of India without express leave of the Trial Court during the Trial.

9. 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 VIVEK SINGH THAKUR, J.

Between

BHIM SINGH,

SON OF SH. HIMRU RAM AND SMT. NAGAM DEVI,
R/O 76, NIHUON, PO KUFRI,
TEHSIL SADAR, DISTRICT MANDI,
HIMACHAL PRADESH

.....PETITIONER

(BY MS ANU TULI AZTA & MS ANITA KUMARI, ADVOCATES)

AND

SMT. TIKMI DEVI,
W/O SH. K.R. THAKUR,
R/O SET NO.1,
LEHNU BHAWAN,
SHIMLA.

....RESPONDENT

(BY SH. JIYA LAL BHARDWAJ, ADVOCATE)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC NO.176 OF 2021
Reserved on: 7.3.2022
Decided on: 11.03.2022

Code of Criminal Procedure, 1973 - Section 482-- Exercising power - Consideration – Petitioner challenged summons issued against him by learned Magistrate under Section 138 of Negotiable Instrument Act, 1881 - There is difference between an ordinary criminal case and a complaint under section 138 of N.I Act since, in ordinary criminal case presumption of Innocence is in favour of accused whereas in a case in complaint under N.I Act, presumption is in favour of complainant with reverse onus upon the accused - In case ingredients for filing complaint under section 138 of N.I Act are in existence then presumption is there, as provided under law and to rebut the same, definitely, evidence would be required, which would be possible only in trial court but in case essential ingredients are lacking, then the trial court at the time of framing of charge/ putting notice of accusation, can quash the criminal proceedings - Petition found without merits – Petition dismissed. (Paras 29, 30 & 32)

Cases referred:
Ajeet Seeds Limited v. K. Gopala Krishnaiah, (2014) 12 SCC 685;
Bir Singh v. Mukesh Kumar, 2019(1) CCC 580 (SC);
C.C. Alavi Haji v. Palapetty Muhammed and another, (2007) 6 SCC 555;
Harnam Electronics Private Limited and another v. National Panasonic India Private Limited, (2009) 1 SCC 720;
HMT Watches Limited v. M.A. Abida and another, (2015) 11 SCC 776;
Jagdish Singh Vs. Natthu Singh, (1992) 1 SCC 647;
Kamlesh Kumar v. State of Bihar and another, (2014) 2 SCC 424;
M.S. Narayana Menon Alias Mani v. State of Kerala and another, (2006) 6 SCC 39;
MSR Leathers v. S. Palaniappan and another, (2013) 1 SCC 177;
Rajeshbhai Muljibhai Patel and another v. State of Gujarat and another, (2020) 3 SCC 794;
Rajiv Thapar and others Vs. Madan Lal Kapoor, (2013) 3 SCC 330;
Rangappa v. Sri Mohan, (2010) 11 SCC 441;
Shivakumar v. Natarajan, (2009) 13 SCC 623;
Sonu Gupta v. Deepak Gupta and others, (2015) 3 SCC 424;
State of M.P. Vs. Hiralal & Ors., (1996) 7 SCC 523;
Subodh S. Salaskar v. Jayprakash M. Shah and another, (2008) 13 SCC 689;
V.Raja Kumari Vs. P.Subbarama Naidu & Anr., (2004) 8 SCC 774;

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

O R D E R

Petitioner, in present petition filed under Section 482 of the Code of Criminal Procedure (for short 'Cr.P.C.'), has assailed order dated 5.9.2020, passed by Judicial Magistrate First Class, Court No.5, Shimla, in case No.57-3/2020, titled as **Tikmi Devi v. Bhim Singh,** whereby learned Magistrate has proceeded against him for commission of offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (for short 'NI Act') and issued summons for his service.

2. It is case of the complainant-respondent that she, on request of accused-petitioner to enable him purchase land at Ner- Chowk Mandi, had paid amounts to him on different dates and for discharge of his liability to return the same, petitioner had issued two cheques dated 25.3.2020 and 20.3.2020, for `3,30,000/- and `4,50,000/- respectively. The said cheques, on presentation by the respondent-complainant for collection, on 25.6.2020, were dishonoured for insufficiency of funds. Thereafter, on 18.7.2020, Legal Demand Notice was issued to the accused-petitioner by the complainant-respondent, through her counsel, requesting him to pay `7,80,000/- within 15 days of receipt of the notice. On failing to pay the amount of cheques, within 15 days of receipt of the Demand Notice, complaint was preferred in the Court.

3. Case of the accused-petitioner is that he was not having any social or any other relation with the complainant-respondent or her family members, but he was an authorized Marketing Agent of Financial Institutions/Banks, on commission basis, for promoting Mutual Funds and Bonds of the Institutions/Banks and in such course he came in contact of respondent and she had invested in Mutual Funds of ICICI Prudential, State Bank of India and SAMRUDDHA Jeevan Foods India Ltd., and from Mutual Funds of ICICI Prudential and State Bank of India, respondent is getting returns ranging from 15% to 18% per annum, however, with respect to amount of `4,00,000/-, invested in the Bonds of SAMRUDDHA Jeevan Foods India Ltd., some problem has arisen as the Company has been restricted from Investment Trading and criminal actions, under law, have also been initiated against the said Company for aforesaid irregularity which are pending in the Courts. In this regard, petitioner has placed on record Newspaper cutting as Annexure P-6.

4. It is further case of the petitioner that during aforesaid business interaction, respondent had taken blank cheques from petitioner, bearing only signatures of the petitioner, as security to ensure that the amount is actually

invested, with understanding that the cheques would be torn after issuance of Certificates/Bonds of investment to the respondent. As such, petitioner has claimed that there is no enforceable debt for which cheques, in reference, would have been issued. According to petitioner, he was assured that the cheques had been torn, but he was shocked and astonished on receiving notice/warrant from the Court in the complaint, preferred by the respondent against him, under Section 138 of NI Act. As per petitioner, after service in the said complaint, he had asked the husband of respondent, who is an Advocate, reasons for filing the complaint, whereupon it was informed that as amount invested in SAMRUDDHA Jeevan Foods India Ltd. was under dispute, the respondent had no other option to recover the said amount, except by filing the complaint.

5. Defence of the petitioner is that story in complaint is fabricated and concocted, and in order to frame the petitioner in false case, notice, which was issued by Mr. K.R. Thakur, Advocate, who is husband of respondent, was posted at the wrong address of the petitioner, giving incorrect description of the Post Office, by avoiding to send the same on the present address of the petitioner, who is residing in Shimla, despite having knowledge of the said address. Further that, petitioner as well as respondent and her husband are residing in Shimla, but the notice, as per postal receipt placed on record, has been posted from a Post Office at Karsog, which is neither Post Office of the respondent and her family members nor the Post Office of the petitioner and, according to petitioner, notice was sent on wrong address, i.e. village address of the petitioner where he does not reside, to avoid delivery thereof.

6. Petitioner has also placed on record E-mail, dated 2.3.2021, whereby he had sought information from Indian Postal Department for verifying status of service of notice stated to be sent through Registered Post, in response whereto, Indian Postal Department has informed that the said Registered Letter was not delivered to the addressee and was returned to the

sender on 24.7.2021. Communication received from Indian Postal Department, through E-mail, has been placed on record as Annexure P-10.

7. It has been contended that not even a single line has been mentioned in the complaint to disclose return of the notice to the sender, which fact has now surfaced after receiving information from the Indian Postal Department by the petitioner.

8. It is contended on behalf of the petitioner that notice, in present case, has not been sent on proper address, has not been served upon the petitioner and the same stands returned to the sender, and the sender/respondent has failed to place on record the said envelope, which is a relevant piece of evidence to adjudicate claim of the parties and, as a matter of fact, notice was never delivered to the petitioner and, therefore, no cause of action arises for the respondent to file complaint under Section 138 of NI Act and as all three essential ingredients, entitling to file a complaint under Section 138 of NI Act are not in existence, therefore, petition deserves to be allowed by quashing the criminal complaint.

9. Relying upon judgment of Delhi High Court in **Amit Kumar Mishra v. The State (Govt. of NCT of Delhi & Anr), Crl. M.C. 1189/2018 and Crl.M.A. 4326/2918, decided on 30.1.2020**, wherein pronouncement of the Supreme Court in **Kamlesh Kumar v. State of Bihar and another, (2014) 2 SCC 424; Shivakumar v. Natarajan, (2009) 13 SCC 623**; and **Harnam Electronics Private Limited and another v. National Panasonic India Private Limited, (2009) 1 SCC 720**, have been referred, it has been contended on behalf of the petitioner that an offence under Section 138 of NI Act would constitute only if ingredients thereof are proved by the complainant and one such ingredient, i.e. receipt of notice by the accused-petitioner, is missing and, therefore, no cause of action is available to file complaint under Section 138 of NI Act.

10. Referring pronouncement of Supreme Court in **M.S. Narayana Menon Alias Mani v. State of Kerala and another, (2006) 6 SCC 39,** learned counsel for the petitioner has submitted that standard of proof in a case under Section 138 of NI Act has to satisfy preponderance of probability and onus, upon the accused-petitioner, to rebut the same is lesser than the complainant and as the petitioner has proved that notice was never delivered upon him, he has discharged the onus to establish that chain of ingredients, mandatory for filing complaint under Section 138 NI Act, is missing.

11. Relying upon pronouncement of Supreme Court in **MSR Leathers v. S. Palaniappan and another, (2013) 1 SCC 177,** it has been contended that all three conditions, including receipt of notice by accused, are mandatory for cause of action to file complaint, and for non-compliance, of mandatory condition of receipt of notice by accused, is fatal to the complaint and, therefore, complaint deserves to be quashed.

12. Reliance has also been placed on **Rangappa v. Sri Mohan, (2010) 11 SCC 441,** wherein it is stated that though there is presumption, as mandated by Section 139 of NI Act, but regarding existence of legally enforceable debt or liability, such presumption is rebuttable presumption by granting liberty to the accused to raise defence, wherein existence of legally enforceable liability can be contested, and, in case, accused is able to raise a probable defence which creates doubt about claim of complainant, the prosecution can fail. It has been contended that the respondent has not said anything with respect to service of notice or return thereof to the sender and there being no evidence of service of notice upon/receipt of notice by the accused-petitioner, the petitioner is not required to adduce evidence, as for absence of any pleading in this regard, there is no question of rebutting the same.

13. Pronouncement of Supreme Court in **Subodh S. Salaskar v. Jayprakash M. Shah and another, (2008) 13 SCC 689,** has also been

referred by the petitioner to demonstrate the ingredients, which must exist for commission of offence under Section 138 of NI Act, which include service of notice on the accused, in terms of Section 138 of NI Act, and non-payment of amount by the accused, despite service of notice. It has been contended that in present case notice was not served and, therefore, there was no question of payment after service of notice and, as such, mandatory ingredients are missing disabling the respondent from filing the complaint.

14. Learned counsel for the respondent has contended that none of the judgments referred on behalf of the accused-petitioner deals with the issue regarding issuance of notice by the Magistrate, but are judgments based on conclusion of trial, whereas for issuance of process, the Magistrate has to see whether prima facie case is made out for issuance of notice or not and all issues raised in this petition are required to be adjudicated by the trial Court on the basis of evidence to be led by the parties. It has been argued that whether notice has been served or not, whether there is liability or not, are the issues which are to be decided by the trial Court on the basis of evidence but not by this Court in a petition under Section 482 Cr.P.C.

15. Learned counsel for the respondent has submitted that in view of Section 114 of the Indian Evidence Act and Section 27 of the General Clauses Act, there is presumption with respect to delivery of notice to the accused-petitioner. To substantiate his plea, he has relied upon pronouncement of Supreme Court in **C.C. Alavi Haji v. Palapetty Muhammed and another, (2007) 6 SCC 555,** by referring to the following paragraphs:

> "13. According to Section 114 of the Act, read with illustration (f) thereunder, when it appears to the Court that the common course of business renders it probable that a thing would happen, the Court may draw presumption that the thing would have happened, unless there are circumstances in a particular case to show that the common course of business was not

followed. Thus, Section 114 enables the Court to presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business in their relation to the facts of the particular case. Consequently, the court can presume that the common course of business has been followed in particular cases. When applied to communications sent by post, Section 114 enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee. But the presumption that is raised under Section 27 of the G.C. Act is a far stronger presumption. Further, while Section 114 of Evidence Act refers to a general presumption, Section 27 refers to a specific presumption. For the sake of ready reference, Section 27 of G.C. Act is extracted below:

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

14. Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of

the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. This Court has already held that when a notice is sent by registered post and is returned with a postal endorsement 'refused' or 'not available in the house or house locked or shop closed or addressee not in station, due service has to be presumed. {*Vide Jagdish Singh Vs. Natthu Singh [(1992) 1 SCC 647] ; State of M.P. Vs. Hiralal & Ors. [(1996) 7 SCC 523]* and *V.Raja Kumari Vs. P.Subbarama Naidu & Anr. [(2004) 8 SCC 774]*}. It is, therefore, manifest that in view of the presumption available under Section 27 of the Act, it is not necessary to aver in the complaint under Section 138 of the Act that service of notice was evaded by the accused or that the accused had a role to play in the return of the notice unserved.

15. Insofar as the question of disclosure of necessary particulars with regard to the issue of notice in terms of proviso (b) of Section 138 of the Act, in order to enable the Court to draw presumption or inference either under Section 27 of the G.C. Act or Section 114 of the Evidence Act, is concerned, there is no material difference between the two provisions. In our opinion, therefore, when the notice is sent by registered post by correctly addressing the drawer of the cheque, the mandatory requirement of issue of notice in terms of Clause (b) of proviso to Section 138 of the Act stands complied with. It is needless to emphasise that the complaint must contain basic facts regarding the mode and manner of the issuance of notice to the drawer of the cheque. It is well settled that at the time of taking cognizance of the complaint under Section 138 of the Act, the Court is required to be prima facie satisfied that a case under the said Section is made out and the aforenoted mandatory statutory procedural requirements have been complied with. It is then for the drawer to rebut the presumption about the service of notice and show

that he had no knowledge that the notice was brought to his address or that the address mentioned on the cover was incorrect or that the letter was never tendered or that the report of the postman was incorrect. In our opinion, this interpretation of the provision would effectuate the object and purpose for which proviso to Section 138 was enacted, namely, to avoid unnecessary hardship to an honest drawer of a cheque and to provide him an opportunity to make amends.

16. As noticed above, the entire purpose of requiring a notice is to give an opportunity to the drawer to pay the cheque amount within 15 days of service of notice and thereby free himself from the penal consequences of Section 138. In *D. Vinod Shivappa v. Nanda Belliappa* {(2006) 6 SCC 456}, this Court observed: One can also conceive of cases where a well intentioned drawer may have inadvertently missed to make necessary arrangements for reasons beyond his control, even though he genuinely intended to honour the cheque drawn by him. The law treats such lapses induced by inadvertence or negligence to be pardonable, provided the drawer after notice makes amends and pays the amount within the prescribed period. It is for this reason that Clause (c) of proviso to Section 138 provides that the section shall not apply unless the drawer of the cheque fails to make the payment within 15 days of the receipt of the said notice. To repeat, the proviso is meant to protect honest drawers whose cheques may have been dishonoured for the fault of others, or who may have genuinely wanted to fulfil their promise but on account of inadvertence or negligence failed to make necessary arrangements for the payment of the cheque. The proviso is not meant to protect unscrupulous drawers who never intended to honour the cheques issued by them, it being a part of their modus operandi to cheat unsuspecting persons.

17. It is also to be borne in mind that the requirement of giving of notice is a clear departure from the rule of Criminal Law, where there is no stipulation of giving of a notice before filing a complaint. Any drawer who claims that he did not receive

> the notice sent by post, can, within 15 days of receipt of summons from the court in respect of the complaint under Section 138 of the Act, make payment of the cheque amount and submit to the Court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected. A person who does not pay within 15 days of receipt of the summons from the Court along with the copy of the complaint under Section 138 of the Act, cannot obviously contend that there was no proper service of notice as required under Section 138, by ignoring statutory presumption to the contrary under Section 27 of the G.C. Act and Section 114 of the Evidence Act. In our view, any other interpretation of the proviso would defeat the very object of the legislation. As observed in Bhaskaran's case (supra), if the giving of notice in the context of Clause (b) of the proviso was the same as the 'receipt of notice' a trickster cheque drawer would get the premium to avoid receiving the notice by adopting different strategies and escape from legal consequences of Section 138 of the Act."

16. Referring pronouncement of the Supreme Court in **Ajeet Seeds Limited v. K. Gopala Krishnaiah, (2014) 12 SCC 685,** it has been canvassed on behalf of the respondent that it is not necessary to aver in the complaint that notice was served upon the accused, as presumption, under Section 114 of the Evidence Act and Section 27 of the General Clauses Act, enables the Court to presume that in the common course of natural events, the communication would have been delivered at the address of the addressee when it is sent to the correct address by Registered Post and unless or until contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business.

17. Referring observations of the Supreme Court in its pronouncement in **HMT Watches Limited v. M.A. Abida and another,**

(2015) 11 SCC 776, it has been contended that the High Court should not express its view on the disputed question of fact in a petition under Section 482 Cr.P.C. to come to a conclusion that offence is not made out. On this count, judgment of the Supreme Court, passed in **Criminal Appeal No.1325 of 2019,** titled as **Kishore Sharma v. Sachin Dubey,** decided on **3.9.2019** has also been relied upon.

18. Pronouncement of the Supreme Court in **Sonu Gupta v. Deepak Gupta and others, (2015) 3 SCC 424,** has been relied upon on behalf of the respondent to substantiate that at the stage of cognizance and summoning, the Magistrate is required to apply his judicial mind only with a view to take cognizance of the offence or, in other words, to find out whether prima facie case has been made out for summoning the accused person or not and the Magistrate is not required to consider the defence version or material or arguments nor is he required to evaluate the merits of the material or evidence of the complainant, because the Magistrate must not undertake the exercise to find out at this stage whether the material will lead to conviction or not, as the cognizance is taken of the offence and not the offender, and an accused may seek discharge at the stage of framing of charge if he or she can show that materials are absolutely insufficient for framing of charge against the said accused, but such exercise will be required only at a later stage not at the state of taking cognizance for summoning the accused on the basis of prima facie case.

19. Judgment of the Supreme Court in **Rajeshbhai Muljibhai Patel and another v. State of Gujarat and another, (2020) 3 SCC 794,** has been relied upon to refer that once the issuance of cheque is established, presumption would arise under Section 139 of NI Act in favour of holder of cheque and the presumptions under Section 139 of NI Act and Section 118(a) of the Evidence Act are rebuttable and burden lies on the accused to rebut the presumption by leading evidence and until the accused discharges the

burden, presumption under Section 139 of NI Act will continue to remain. Therefore, apart from raising defence that there is no legally enforceable debt and other disputed questions of fact, accused has to adduce evidence to rebut the statutory presumption and prove the disputed questions of fact and, therefore, complaint under Section 138 of NI Act ought not to have been quashed by the High Court by taking recourse to Section 482 Cr.P.C., though the Court has the power to quash such Criminal Complaint on the legal issues like limitation, etc.

20. Reliance has also been placed on pronouncement of the Supreme Court on **Bir Singh v. Mukesh Kumar, 2019(1) CCC 580 (SC),** wherein it has been held that a meaningful reading of the provisions of the Negotiable Instruments Act including, in particular, Sections 20, 87 and 139, makes it amply clear that a person who signs a cheque and makes it over to the payee remains liable unless he adduces evidence to rebut the presumption that the cheque had been issued for payment of a debt or in discharge of a liability, and it is immaterial that the cheque may have been filled in by any person other than the drawer, if the cheque is duly signed by the drawer, and that if the cheque is otherwise valid, the penal provisions of Section 138 would be attracted.

21. Issues raised on behalf of accused-petitioner that notice was not given on proper address, it was not served properly, it has never been delivered to the petitioner, it has been returned to the sender leading to adverse inference, it was sent on the wrong address, there was no legally enforceable debt for discharge of which cheques in question were issued and the cheques were issued as a security, which was valid till issuance of certificates/ bonds by the concerned companies/financial institutions, are the disputed facts which, as also held by the Apex Court in pronouncements referred supra, are to be adjudicated and decided by the trial Court after adducing of evidence by the parties.

22. In view of pronouncement in **Ajeet Seeds Limited v. K. Gopala Krishnaiah, (2014) 12 SCC 685,** it is not necessary for the complainant to aver in the complaint that notice was served upon the accused, however, this issue is to be determined by the trial Court on the basis of presumption under Section 114 of the Evidence Act and Section 27 of the General Clauses Act, but subject to rebuttal thereof by the petitioner by leading evidence and this issue cannot be decided in present petition. Though petitioner has placed on record information received from Postal Authorities that notice was never served upon the addressee but was returned to the sender and delivered to sender on 24.7.2020, however, the said information is incomplete as it does not disclose the reasons for returning the notice to the sender.

23. The Supreme Court in **Jagdish Singh Vs. Natthu Singh, (1992) 1 SCC 647; State of M.P. Vs. Hiralal & Ors., (1996) 7 SCC 523; and V.Raja Kumari Vs. P.Subbarama Naidu & Anr., (2004) 8 SCC 774,** has held that when notice is sent by Registered Post and is returned with a postal endorsement 'refused' or 'not available in the house' or 'house locked' or 'shop closed' or 'addressee not in station', due service has to be presumed.

24. In present case, it is not clear on what count registered letter was returned. It is an issue to be decided on the basis of evidence led by the parties. Definitely, when notice has been returned to the sender, it would be duty of the sender, i.e. complainant, to place it on record to establish the reason for returning the notice, amounting to deemed service of the notice. Petitioner would also be entitled to rebut the presumption of service by leading appropriate evidence to establish that notice was not returned on those counts which may lead to presumption of deemed service. In case returned envelope is not placed on record and it is duly proved that it was returned to the sender, an adverse inference may also be drawn against the respondent-complainant. But, all these issues are to be considered and decided by the trial Court on conclusion of trial. Therefore, this ground is not available for

the petitioner for quashing the proceedings at this stage, i.e. stage of issuance of process by the Magistrate.

25. So far as question raised about Post Office from where notice was sent, in my considered opinion, it is an irrelevant issue, as there is no bar or impediment to post a registered notice from the Post Office not having jurisdiction of the area where the party or Advocate is residing. Notice can be posted from anywhere for more than one reason. There is possibility that after preparing the notice and putting it in envelope, the sender may have to travel somewhere else before posting the same from the same station and in such eventuality, notice can be posted from a place other than the place of Advocate or sender.

26. As to whether address of the petitioner was correct or not is also again a matter of disputed fact required to be adjudicated by the trial Court.

27. Before parting, in view of ratio laid down in **Rajiv Thapar and others Vs. Madan Lal Kapoor, (2013) 3 SCC 330,** it is clarified that in pronouncements of the Supreme Court and this High Court, it is not the ratio that in complaints filed under Section 138 of NI Act, the High Court is precluded or inhibited from quashing the complaint, exercising jurisdiction under Section 482 Cr.P.C. In appropriate cases, absence of necessary ingredients, enabling the Magistrate to take cognizance and issue process, under Section 138 of NI Act or for production of sound, reasonable and indubitable material of sterling and impeccable quality on record which is sufficient to reject and overrule the factual assertions contained in the complaint, leading to persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false and the said material is of such nature that it cannot be justifiably refuted by the complainant and, thus, clearly depicting that proceedings with the trial would result in an abuse of process of Court, running contrary to purpose of serving the ends of justice, exercising power under Section 482 Cr.P.C, the High Court can proceed to

quash the criminal proceedings against the accused, as such exercise of power, besides doing justice to the accused, would save precious court time, whichwould otherwise be wasted in holding such a trial as well as proceedings arising therefrom, especially when it is clear that the same would not conclude in conviction of the accused.

28. The parameters, considering which the High Court is supposed to exercise the power under Section 482 Cr.P.C. to quash the criminal proceedings, would definitely be available to the trial Court for taking a decision as to whether initiation or continuation of criminal proceedings is justifiable or not. There cannot be a case that on considering certain factors it is permissible to the High Court to quash the proceedings, but impermissible to the trial Court to do so on the basis of the same material at the time of taking cognizance or at the stage of framing of charges. It would not be prudent and justifiable to hold that those, who can afford to approach High Court, would enjoy privilege of quashing of criminal proceedings but not those who cannot afford to reach High court for any reason. Therefore, the parameters culled out in Rajiv Thapar's case, are equally applicable to the criminal proceedings before the trial Court.

29. There is a difference between an 'ordinary criminal case' and a 'complaint under Section 138 of NI Act'. In ordinary criminal case, presumption of innocence is in favour of accused, whereas in a case in complaint under NI Act, presumption is in favour of complainant with reverse onus upon the accused.

30. In case ingredients for filing complaint under Section 138 of NI Act are in existence, then presumption is there, as provided under law, and to rebut the same, definitely, evidence would be required, which would be possible only in the trial Court, but in case essential ingredients are lacking, then the trial Court, at the time of framing of charge/putting notice of accusation, can quash the criminal proceedings as also explained by this

Court in **CRMMO No.165 of 2018, titled as Siemens Enterprise Communications Ptv. Ltd. Now known as Progility Technologies Pvt. Ltd. v. Central Bureau of Investigation,** decided on 30.8.2019, reported in **2019(4) Him L.R.(HC) 2491**.

31. Stay stands vacated and the parties are directed to appear before the trial Court on **21.3.2022**.

32. In view of aforesaid discussion, and in the light of ratio laid down by the aforesaid judgments, I find no merit in the present petition. Accordingly, the petition is dismissed.

Pending application, if any, also stands disposed of.

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

Between

PAWAN KUMAR
S/O SHRI LEKH RAM
R/O VILLAGE BARMANA, PO BARMANA
TEHSIL SADAR, DISTRIC BILASPUR
HIMACHAL PRADESH.

.....PETITIONER

(BY MR. RAJIV RAI & MR. GURDEV NEGI, ADVOCATES)

AND

STATE OF HIMACHAL PRADESH
THROUGH SECRETARY (HOME) TO THE
GOVERNMENT OF HIMACHAL PRADESH

....RESPONDENT

(BY MR. HEMANT VAID, ADDITIONAL ADVOCATE
GENERAL & MS DIVYA SOOD, DEPUTY ADVOCATE
GENERAL)

1. CRMP(M) NO.555/2022

Between

SANJEEV KUMAR
S/O SHRI DHIAN SINGH
R/O VILLAGE SUDHWAN, PO SUDHIAL
TEHSIL NADAUN, DISTRIC HAMIRPUR
HIMACHAL PRADESH.

.....PETITIONER

(BY MR. NIMISH GUPTA, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

....RESPONDENT

(BY MR. HEMANT VAID, ADDITIONAL ADVOCATE
GENERAL & MS DIVYA SOOD, DEPUTY ADVOCATE
GENERAL)

(INSPECTOR/SHO KAMLESH KUMAR, PSI RAJAT RANA AND
HC ROOP LAL, POLICE STATION BALH, DISTRICT MANDI,
HIMACHAL PRADESH, ALONGWITH RECORD)

CRIMINAL MISC. PETITIONS (MAIN)
No.484 & 555 OF 2022
Decided on: 30.03.2022

(A) Code of Criminal Procedure, 1973 - Section 438 – Anticipatory bail - Factors to be considered at the time of grant of anticipatory bail – Nature and gravity of offence, exchange of involvement of petitioners manner of commission of offence, antecedents of petitioner possibility of fleeing from justice and impact of granting or rejecting the bail on society as well as petitioner, are amongst relevant factors which may compel Court to reject or accept bail application under section 438 Cr.P.C. [Para 15(30)]

(B) Code of Criminal Procedure, 1973 – Sections 438 read with Sections 420, 120 B of Indian Penal Code, 1860 and Sections 5 and 6 of Price and

Money Circulation Scheme (Banking) Act 1978 - Scope of anticipatory bail in economic offences – The petitioners found involved in duping large number of people for crores of rupees - Petitioners created 650 IDs whereby people invested Rupees 5 crores –Petitioners pleaded they were only up liners and no control on money and are not accused – Held - Balancing the Personal interest vis –a vis public interest - No case for anticipatory bail is made out - Bail Rejected (Para 19)

Cases referred:

Bhadresh Bipinbhai Sheth v. State of Gujarat and another, (2016) 1 SCC 152;
Dataram Singh v. State of Uttar Pradesh and another, (2018) 3 SCC 22;
Fekan Yadav v. Satendr Yadav alias Boss Yadav alias Satendra Kumar and others, (2017) 16 SCC 775;
Freed and other connected matters v. State, reported in 2020(4) Shim. LC 1614;
Gurbaksh Singh Sibbia & others v. State of Punjab, (1980) 2 SCC 565;
Gurbaksh Singh Sibbia, (1980) 2 SCC 565;
Mangal Singh Negi v. Central Bureau of Investigation, 2021(2) Shim. LC 860 : 2021(2) Him L.R. (HC) 917;
P. Chidambaram v. Directorate of Enforcement, (2019) 9 SCC 24;
Pokar Ram v. State of Rajasthan and others, (1985) 2 SCC 597;
Prem Giri v. State of Rajasthan, (2018) 12 SCC 20;
Prem Giri v. State of Rajasthan, (2018) 6 SCC 571;
Savitri Agarwal and others v. State of Maharashtra and another, (2009) 8 SCC 325;
Siddharam Satlingappa Mhetre v. State of Maharashtra and others, (2011) 1 SCC 694;
State of M.P. & another v. Ram Kishna Balothia & another, (1995) 3 SCC 221;
Sushila Aggarwal & Others v. State (NCT of Delhi) & another, (2018) 7 SCC 731;
Sushila Aggarwal & Others v. State (NCT of Delhi) & another, 2020 SCC Online SC 98;

Theses petitions coming on for orders this day, the Court passed the following:

O R D E R

Both these Petitions are being disposed of by this common order, as they arise out of the same FIR and involve similar questions of fact and law.

2. Petitioners Pawan Kumar (Cr.MP(M) No.484 of 2022) and Sanjeev Kumar (Cr.MP(M) No.555 of 2022) have filed the present Petitions, under Section 438 of the Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C.'), for grant of bail, in case FIR No.73 of 2022, dated 27.2.2022, registered under Sections 420, 120B of the Indian Penal Code (hereinafter referred to as 'IPC') and 5,6 of the Prize and Money Circulation Schemes (Banking) Act, 1978, in Police Station Balh, District Mandi, Himachal Pradesh.

3. Status Report stands filed and placed on the file of Cr.MP(M) No.484/2022. Record has also been produced.

4. Prosecution case is that on 27.2.2022, complainant Manoj Kumar submitted a complaint in Police Station Balh, stating therein that in August 2020 his friend Pawan Sankhyan had introduced him with a person Sushil Jaryal, and Sushil Jaryal had stated that with a Plan in Crypto Currency an US Company ONYX Trading was there which had its browser registered as OFS Trading.com. Thereafter, he had demonstrated in his Mobile Phone by logging in his ID-ONYXHP04. He had told that there was a 105-days Plan through which on investments there will be 1½ times return within 4½ months and for that he had told about four types of investment Plans, i.e. 100 US Dollar (`8,000), 500 US Dollar (`41,000), 1000 US Dollar (`82,000/- and 5000 US Dollar (`4,10,000). Apart from it, Sushil Jaryal had also told that this amount was invested in Share Market, wherein there was hundred percent risk but the Company was extending guarantee to return the principal amount. Sushil Jaryal had also told that investment in Plan was to be made in cash and return thereof would be in Crypto Currency Exchange as BTC Dollar (Bitcoin). After telling that, Sushil Jaryal had shown receipt of BTC in Block Chain. Complainant was impressed by Sushil Jaryal to create 500 US Dollar ID-Manoj121, below Pawan Sankhyan, for confirmation whereof

complainant received a Mail from Info@ofstrading.com. After confirmation, complainant started working in the Company and arranged meetings in Balh and Sundernagar area for convincing people for investment and in those meetings, head of the Company Birender Preet Singh alongwith his associates Sushil Jaryal and Pawan Sankhyan started to attend these meetings and in every meeting he had duped the people by assuring that their money shall be safe and in case of closure of Company he shall inform them six months in advance so as to enable them to withdraw their money and not to invest further. Complainant started working on the aforesaid investment Plan and created 650 IDs whereby people invested about `5 crore. Most of the people gave cash for creating IDs and some amount was deposited in accounts. Cash was taken by Birender Preet Singh himself mostly and sometimes complainant had visited to hand over the cash to him. As per complainant, about `2 crore was received by people in the shape of BTC or cash and complainant had also received `15 Lakhs, which was invested by him in the same Company and thereafter Birender Preet Singh started direct communication with the complainant, who, in March 2021, told that there was some problem in the Company, resulting into closure of BTC, which will be started during next month. Upon this, complainant continued to arrange meetings and investment from people in the Company, but people started to make telephonic calls continuously with complaint that amount was not returning but as complainant was assured by Birender Preet Singh, he continued to respond by saying that they will get money during next month and by saying so he continued to assure persons on every date. Thereafter, in August 2021, Birender Preet Singh conducted a meeting in Nangal and told that there was no return of the amount and advised to generate a ticket through the ID of the persons for withdrawal of principal amount, whereupon within two months principal amount will be received in Crypto Exchange Wallet. After one month of generating the ticket, 30% people received 5% principal amount in Crypto

Exchange Wallet as BTC, but thereafter people started to complain telephonically to the complainant that they were not getting principal amount. On asking Birender Preet Singh, he conducted a meeting in the month of November at Ropar and told that in the Plan of previous Company, there was some shortcoming and told that he was coming with different Plan of one Company namely RFX Trading wherein 50% shall be invested by the people and 50% by the Company and investment shall be doubled within 9 months. Thereafter, persons who had invested in new Company received 5% of previous investment and two additional installments from new Company. It has been stated in the complaint that persons, who had invested in RFX Trading, had received a confirmation Mail from info@rfstraders.com and thereafter their ID was started. After 18.1.2022, nobody received any installment upon which complainant started calling Birender Preet Singh, on telephone, who for sometime attended his calls but thereafter stopped to receive his calls and switched off his phone. Lastly, prayer was made to take action against Birender Preet Singh. Upon this, FIR under Section 420 IPC has been registered.

5. Learned counsel for the petitioners have submitted that petitioners are not accused but victims in present case and they are on the same footing as the complainant is, as they were introduced with the Plan of the Company by main accused Birender Preet Singh and they were investing their amount like complainant Manoj Kumar, who, admittedly, has received amount of `15 Lakh in return from the Company and petitioners have also received return of some amount and not of the entire amount invested by them, and, therefore, they are not accused in present case but for their names in the complaint, submitted by complainant, they are apprehending their arrest in the present case. Further that, after grant of anticipatory bail they have joined the investigation and are cooperating with the Investigating Agency, rather have explained their position as victims and they are not having any role in

commission of offence but they have also invested money in the Plan introduced by Birender Preet Singh, like other investors innocently. Therefore, prayer for enlarging the petitioners on bail has been made by referring the principle "bail is rule and jail is exception". According to them, keeping in view right to personal liberty guaranteed under Article 21 of the Constitution of India, petitioners are entitled to be enlarged on bail.

6. Referring Status Report, learned counsel for the petitioners have submitted that the petitioners were only Up-liners, like the complainant, having no control on the money, and entire business was being controlled by Birender Preet Sngh and petitioners were not having any role in creation of Software.

7. In the Status Report, it has been stated that petitioner Sanjeev Kumar (in Cr.MP(M) No.555/2022) and Pawan Kumar (Cr.MP(M) No.484/2022) are main accused with Birender Preet Singh and Sanjeev Kumar was top Up-liner of MLM Plan, who, in connivance with Birender Preet Singh, had allured persons to invest in www.ofstrading.com and had given guarantee of return of principal amount. When there were losses to the people from investment in OFS Tading, they had allured people to invest in RFX Trading by telling the people that it was an US Company, whereas Sanjeev Kumar alongwith Birender Preet Singh had developed MLM Software at Panchkula in the Office of Wave Info Tech and as a result thereof people were made to invest `1.24 Crore. Petitioner Sanjeev Kumar had collected money in cash from Rajeev Verma, which was collected by Rajeev Verma from the people for trading. He had been assuring the people about return of double money within 9 months whereas that amount was being used for trading in RFX Trading wherein people have been duped for `56 Lakh and during this period `90 Lakh have been found to be deposited in the account of petitioner Sanjeev Kumar, but, as of now, there is no amount in the account of petitioner Sanjeev Kumar. Lastly, it has been stated in the Status Reprot that petitioner Sanjeev Kumar

has invested his amount in some Trading Platform but he is neither disclosing his Password nor registered Mail ID and 1/4th of `56 Lakh is to be recovered from petitioner Sanjeev Kumar.

8. According to Status Report, petitioner Pawan Sankhyan (in Cr.MP(M) No.484/2022) is Up-liner of complainant, in whose account `31 Lakh have been found, which were collected by him by duping Down-liners and out of that `8 Lakh have been withdrawn and `23 Lakh are yet to be recovered from him, which is money of poor people and there are `7 Lakh available in WazirX Trading Platform of the petitioner. It has been further stated that as per complaint, petitioner was active partner of main accused Birender Preet Singh to dupe the public at large and for that purpose he had introduced the complainant with Sushil Jaryal.

9. Learned Additional Advocate General has submitted that keeping in view the fact that petitioners are involved in duping large number of people for Crores of rupees and that the investigation is at initial stage, petitioners are not entitled for anticipatory bail and the bail petitions deserve to be rejected.

10. Learned Additional Advocate General has further submitted that petitioner Pawan Kumar claims himself to be a victim but till date he has not filed any complaint against the person who is real culprit according to him.

11. There was no specific provision in Code of Criminal Procedure, 1898 empowering the Court to grant bail to the person apprehending arrest. This provision was introduced, for the first time, in Cr.P.C. in 1973 on the basis of recommendations of Law Commission, urging necessity of such provision.

12. This Court in ***Freed and other connected matters v. State,*** reported in **2020(4) Shim. LC 1614,** has observed as under:

> "8. Section 438 of the Cr.P.C. is a right provided for a person to approach the trial Court or the Court of Session, seeking direction to enlarge him on bail, in the event of his arrest, in a case wherein he apprehends his arrest on accusation of having committed a non-bailable offence.

9. Commenting upon the right provided under Section 438 of the Cr.P.C., the Supreme Court in ***State of M.P. & another v. Ram Kishna Balothia & another,*** **(1995) 3 SCC 221**, has observed that it is essentially a statutory right conferred long after the coming into force of the Constitution, but with clarification that it cannot be considered as an essential ingredient of Article 21 of the Constitution.

10. Dealing with a case under unamended Section 438, a five-Judges Constitution Bench of the Apex Court in ***Gurbaksh Singh Sibbia & others v. State of Punjab,*** **(1980) 2 SCC 565,** has clarified few points as under:

> "35. Section 438 (1) of the Code lays down a condition which has to be satisfied before anticipatory bail can be granted. The applicant must show that he has "reason to believe' that he may be arrested for a non-bailable offence. The use of the expression "reason to believe" shows that the belief that the applicant may be so arrested must be founded on reasonable grounds. Mere 'fear' is not 'belief', for which reason it is not enough for the applicant to show that he has somesort of a vague apprehension that 'some one is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the court objectively, because it is then alone that the court can determine whether the applicant has reason to believe that he may be so arrested S. 438 (1), therefore, cannot be invoked on the basis of vague and general allegations, as if to arm oneself in perpetuity against a possible arrest. Otherwise the number of applications for anticipatory bail will be as large as, at any rate, the adult populace. Anticipatory bail is a device to secure the individual's liberty; it is neither a passport to the commission of crimes nor a shield against any and all kinds of accusations, likely or unlikely.

> 36. Secondly, if an application for anticipatory bail is made to the High Court or the Court of Session it must apply its own mind to the question and decide whether a case has been made out for grant-in such relief. It cannot leave the question for the decision of the Magistrate concerned under S. 437 of the Code, as and when an occasion arises. Such a course will defeat the very object of Section 438.
>
> 37. Thirdly, the filing of a First Information Report is not a condition precedent to the exercise of the power under S. 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an F. I. R. is not yet filed.
>
> 38. Fourthly, anticipatory bail can be granted even after in F. I. R. is filed, so long as the applicant has not been arrested.
>
> 39. Fifthly, the provisions of S. 438 cannot be invoked after the arrest of the accused. The grant of "anticipatory bail" to an accused who is under arrest involves a contradiction in terms, in so far as the offences for which he is arrested, are concerned. After arrest, the accused must seek his remedy under S. 437 or Section 439 of the Code, if he wants to be released on bail in respect of the offence or offences for which he is arrested."

11. The Apex Court in ***Savitri Agarwal and others v. State of Maharashtra and another,*** **(2009) 8 SCC 325,** dealing with a post-amendment case, referring Constitution Bench Judgment passed in ***Gurbaksh Singh Sibbia's*** case has observed as under:

> "24. While cautioning against imposition of unnecessary restrictions on the scope of the Section, because, in its opinion, over generous infusion of constraints and conditions, which were not to be found in Section 438 of the Code, could make the provision constitutionally vulnerable, since the right of personal freedom, as enshrined in Article 21 of the Constitution, cannot be made to depend on compliance with unreasonable restrictions, the Constitution Bench laid down the following

guidelines, which the Courts are required to keep in mind while dealing with an application for grant of anticipatory bail:

(i) Though the power conferred under Section 438 of the Code can be described as of an extraordinary character, but this does not justify the conclusion that the power must be exercised in exceptional cases only because it is of an extraordinary character. Nonetheless, the discretion under the Section has to be exercised with due care and circumspection depending on circumstances justifying its exercise.

(ii) Before power under sub-section (1) of Section 438 of the Code is exercised, the Court must be satisfied that the applicant invoking the provision has reason to believe that he is likely to be arrested for a non-bailable offence and that belief must be founded on reasonable grounds. Mere "fear" is not belief, for which reason, it is not enough for the applicant to show that he has some sort of vague apprehension that someone is going to make an accusation against him, in pursuance of which he may be arrested. The grounds on which the belief of the applicant is based that he may be arrested for a non-bailable offence, must be capable of being examined by the Court objectively. Specific events and facts must be disclosed by the applicant in order to enable the Court to judge of the reasonableness of his belief, the existence of which is the sine qua non of the exercise of power conferred by the Section.

(iii) The observations made in *Balchand Jain v. State of M.P.,* (1976) 4 SCC 572, regarding the nature of the power conferred by Section 438 and regarding the question whether the conditions mentioned in Section 437 should be read into Section 438 cannot be treated as conclusive on the point. There is no warrant for reading into Section 438, the conditions subject to which bail can be granted

under Section 437(1) of the Code and therefore, anticipatory bail cannot be refused in respect of offences like criminal breach of trust for the mere reason that the punishment provided for is imprisonment for life. Circumstances may broadly justify the grant of bail in such cases too, though of course, the Court is free to refuse anticipatory bail in any case if there is material before it justifying such refusal.

(iv) No blanket order of bail should be passed and the Court which grants anticipatory bail must take care to specify the offence or the offences in respect of which alone the order will be effective. While granting relief under Section 438(1) of the Code, appropriate conditions can be imposed under Section 438(2) so as to ensure an uninterrupted investigation. One such condition can even be that in the event of the police making out a case of a likely discovery under Section 27 of the Evidence Act, the person released on bail shall be liable to be taken in police custody for facilitating the recovery. Otherwise, such an order can become a charter of lawlessness and a weapon to stifle prompt investigation into offences which could not possibly be predicated when the order was passed.

(v) The filing of First Information Report (FIR) is not a condition precedent to the exercise of power under Section 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an FIR is not yet filed.

(vi) An anticipatory bail can be granted even after an FIR is filed so long as the applicant has not been arrested.

(vii) The provisions of Section 438 cannot be invoked after the arrest of the accused. After arrest, the accused must seek his remedy under Section 437 or Section 439 of the Code,

if he wants to be released on bail in respect of the offence or offences for which he is arrested.

(viii) An interim bail order can be passed under Section 438 of the Code without notice to the Public Prosecutor but notice should be issued to the Public Prosecutor or to the Government advocate forthwith and the question of bail should be re-examined in the light of respective contentions of the parties. The ad-interim order too must conform to the requirements of the Section and suitable conditions should be imposed on the applicant even at that stage.

(ix) Though it is not necessary that the operation of an order passed under Section 438(1) of the Code be limited in point of time but the Court may, if there are reasons for doing so, limit the operation of the order to a short period until after the filing of FIR in respect of the matter covered by the order. The applicant may, in such cases, be directed to obtain an order of bail under Section 437 or 439 of the Code within a reasonable short period after the filing of the FIR."

12. In ***Siddharam Satlingappa Mhetre v. State of Maharashtra and others,*** **(2011) 1 SCC 694**, following ***Gurbaksh Singh Sibbia's*** case, the Supreme Court has pointed out the following factors and parameters, which can be taken into consideration at the time of dealing with anticipatory bail:

"(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice;

(iv) The possibility of the accused's likelihood to repeat similar or the other offences;

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

(vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. The cases in which accused is implicated with the help of sections 34 and 149 of the Indian Penal Code, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the

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

13. In ***Bhadresh Bipinbhai Sheth v. State of Gujarat and another,*** **(2016) 1 SCC 152,** the Supreme Court, in addition to reiterating the factors and parameters, delineated in the judgment in ***Siddharam Satlingappa Mhetre's*** case, has further culled out the following principles for the purpose of dealing with a case of anticipatory bail under Section 438 of the Cr.P.C.:

> **"25.1** The complaint filed against the accused needs to be thoroughly examined, including the aspect whether the complainant has filed a false or frivolous complaint on earlier occasion. The court should also examine the fact whether there is any family dispute between the accused and the complainant and the complainant must be clearly told that if the complaint is found to be false or frivolous, then strict action will be taken against him in accordance with law. If the connivance between the complainant and the investigating officer is established then action be taken against the investigating officer in accordance with law.
>
> **25.2** The gravity of charge and the exact role of the accused must be properly comprehended. Before arrest, the arresting officer must record the valid reasons which have led to the arrest of the accused in the case diary. In exceptional cases, the reasons could be recorded immediately after the arrest, so that while dealing with the bail application, the remarks and observations of the arresting officer can also be properly evaluated by the court.
>
> **25.3** It is imperative for the courts to carefully and with meticulous precision evaluate the facts of the case. The discretion to grant bail must be exercised on the basis of the available material and the facts of the particular case. In cases where the court is of the considered view that the accused has joined the investigation and he is fully cooperating with the

investigating agency and is not likely to abscond, in that event, custodial interrogation should be avoided. A great ignominy, humiliation and disgrace is attached to arrest. Arrest leads to many serious consequences not only for the accused but for the entire family and at times for the entire community. Most people do not make any distinction between arrest at a pre-conviction stage or post-conviction stage.

25.4 There is no justification for reading into Section 438 CrPC the limitations mentioned in Section 437 CrPC. The plentitude of Section 438 must be given its full play. There is no requirement that the accused must make out a "special case" for the exercise of the power to grant anticipatory bail. This virtually, reduces the salutary power conferred by Section 438 CrPC to a dead letter. A person seeking anticipatory bail is still a free man entitled to the presumption of innocence. He is willing to submit to restraints and conditions on his freedom, by the acceptance of conditions which the court may deem fit to impose, in consideration of the assurance that if arrested, he shall be enlarged on bail.

25.5 The proper course of action on an application for anticipatory bail ought to be that after evaluating the averments and accusations available on the record if the court is inclined to grant anticipatory bail then an interim bail be granted and notice be issued to the Public Prosecutor. After hearing the Public Prosecutor the court may either reject the anticipatory bail application or confirm the initial order of granting bail. The court would certainly be entitled to impose conditions for the grant of anticipatory bail. The Public Prosecutor or the complainant would be at liberty to move the same court for cancellation or modifying the conditions of anticipatory bail at any time if liberty granted by the court is misused. The anticipatory bail granted by the court should ordinarily be continued till the trial of the case.

25.6 It is a settled legal position that the court which grants the bail also has the power to cancel it. The discretion of grant or cancellation of bail can be exercised either at the instance of the

accused, the Public Prosecutor or the complainant, on finding new material or circumstances at any point of time.

25.7 In pursuance of the order of the Court of Session or the High Court, once the accused is released on anticipatory bail by the trial court, then it would be unreasonable to compel the accused to surrender before the trial court and again apply for regular bail.

25.8 Discretion vested in the court in all matters should be exercised with care and circumspection depending upon the facts and circumstances justifying its exercise. Similarly, the discretion vested with the court under Section 438 CrPC should also be exercised with caution and prudence. It is unnecessary to travel beyond it and subject the wide power and discretion conferred by the legislature to a rigorous code of self-imposed limitations.

25.9 No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail because all circumstances and situations of future cannot be clearly visualised for the grant or refusal of anticipatory bail. In consonance with legislative intention, the grant or refusal of anticipatory bail should necessarily depend on the facts and circumstances of each case.**"**

14. A three Judges Bench of the Supreme Court of India, for two divergent views in various judgments of the Supreme Court, on the issue that as to whether an anticipatory bail should be for a limited period of time or not, vide judgment in ***Sushila Aggarwal & Others v. State (NCT of Delhi) & another,*** reported in **(2018) 7 SCC 731,** had referred the matter to Larger Bench of the Supreme Court for authoritative decision.

15. In **Special Leave Petition (Criminal) Nos.7281 of 2017 and 7282 of 2017, decided on 19.1.2020,** titled as ***Sushila Aggarwal & Others v. State (NCT of Delhi) & another,*** {**2020 SCC Online SC 98**}**,** a five-Judges Bench (Constitution Bench) of the Supreme Court of

India, at the time of deciding matter referred to Larger Bench of the Supreme Court for authoritative decision, has finally concluded as under:

"FINAL CONCLUSIONS:

139. In view of the concurring judgments of Justice M.R. Shah and of Justice S. Ravindra Bhat with Justice Arun Mishra, Justice Indira Banerjee and Justice Vineet Saran agreeing with them, the following answers to the reference are set out:

(1) Regarding Question No. 1, this court holds that the protection granted to a person under Section 438 Cr. PC should not invariably be limited to a fixed period; it should inure in favour of the accused without any restriction on time. Normal conditions under Section 437 (3) read with Section 438 (2) should be imposed; if there are specific facts or features in regard to any offence, it is open for the court to impose any appropriate condition (including fixed nature of relief, or its being tied to an event) etc.

(2) As regards the second question referred to this court, it is held that the life or duration of an anticipatory bail order does not end normally at the time and stage when the accused is summoned by the court, or when charges are framed, but can continue till the end of the trial. Again, if there are any special or peculiar features necessitating the court to limit the tenure of anticipatory bail, it is open for it to do so.

140. This court, in the light of the above discussion in the two judgments, and in the light of the answers to the reference, hereby clarifies that the following need to be kept in mind by courts, dealing with applications under Section 438, Cr. PC:

(1) Consistent with the judgment in Shri *Gurbaksh Singh Sibbia and others v. State of Punjab*, (1980) 2 SCC 565 , when a person complains of apprehension of arrest and

approaches for order, the application should be based on concrete facts (and not vague or general allegations) relatable to one or other specific offence. The application seeking anticipatory bail should contain bare essential facts relating to the offence, and why the applicant reasonably apprehends arrest, as well as his side of the story. These are essential for the court which should consider his application, to evaluate the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. It is not essential that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest.

(2) It may be advisable for the court, which is approached with an application under Section 438, depending on the seriousness of the threat (of arrest) to issue notice to the public prosecutor and obtain facts, even while granting limited interim anticipatory bail.

(3) Nothing in Section 438 Cr. PC, compels or obliges courts to impose conditions limiting relief in terms of time, or upon filing of FIR, or recording of statement of any witness, by the police, during investigation or inquiry, etc. While considering an application (for grant of anticipatory bail) the court has to consider the nature of the offence, the role of the person, the likelihood of his influencing the course of investigation, or tampering with evidence (including intimidating witnesses), likelihood of fleeing justice (such as leaving the country), etc. The courts would be justified - and ought to impose conditions spelt out in Section 437 (3), Cr. PC [by virtue of Section 438 (2)]. The need to impose other restrictive conditions, would have to be judged on a case by case basis, and depending upon the materials produced by the state or the investigating agency. Such special or other restrictive conditions may be imposed if the case or cases warrant, but should not be imposed in a routine manner, in all

cases. Likewise, conditions which limit the grant of anticipatory bail may be granted, if they are required in the facts of any case or cases; however, such limiting conditions may not be invariably imposed.

(4) Courts ought to be generally guided by considerations such as the nature and gravity of the offences, the role attributed to the applicant, and the facts of the case, while considering whether to grant anticipatory bail, or refuse it. Whether to grant or not is a matter of discretion; equally whether and if so, what kind of special conditions are to be imposed (or not imposed) are dependent on facts of the case, and subject to the discretion of the court.

(5) Anticipatory bail granted can, depending on the conduct and behavior of the accused, continue after filing of the charge sheet till end of trial.

(6) An order of anticipatory bail should not be "blanket" in the sense that it should not enable the accused to commit further offences and claim relief of indefinite protection from arrest. It should be confined to the offence or incident, for which apprehension of arrest is sought, in relation to a specific incident. It cannot operate in respect of a future incident that involves commission of an offence.

(7) An order of anticipatory bail does not in any manner limit or restrict the rights or duties of the police or investigating agency, to investigate into the charges against the person who seeks and is granted pre-arrest bail.

(8) The observations in Sibbia regarding "limited custody" or "deemed custody" to facilitate the requirements of the investigative authority, would be sufficient for the purpose of fulfilling the provisions of Section 27, in the event of recovery of an article, or discovery of a fact, which is

relatable to a statement made during such event (i.e deemed custody). In such event, there is no question (or necessity) of asking the accused to separately surrender and seek regular bail. *Sibbia* (supra) had observed that "if and when the occasion arises, it may be possible for the prosecution to claim the benefit of Section 27 of the Evidence Act in regard to a discovery of facts made in pursuance of information supplied by a person released on bail by invoking the principle stated by this Court in *State of U.P. v Deoman Upadhyaya,* AIR 1960 SC 1125."

(9) It is open to the police or the investigating agency to move the court concerned, which grants anticipatory bail, for a direction under Section 439 (2) to arrest the accused, in the event of violation of any term, such as absconding, noncooperating during investigation, evasion, intimidation or inducement to witnesses with a view to influence outcome of the investigation or trial, etc.

(10) The court referred to in para (9) above is the court which grants anticipatory bail, in the first instance, according to prevailing authorities.

(11) The correctness of an order granting bail, can be considered by the appellate or superior court at the behest of the state or investigating agency, and set aside on the ground that the court granting it did not consider material facts or crucial circumstances. (See *Prakash Kadam & Etc. Etc vs Ramprasad Vishwanath Gupta & Anr*, (2011) 6 SCC 189; *Jai Prakash Singh* (supra) *State through C.B.I. vs. Amarmani Tripathi*, (2005) 8 SCC 21. This does not amount to "cancellation" in terms of Section 439 (2), Cr. PC.

(12) The observations in *Siddharam Satlingappa Mhetre v. State of Maharashtra & Ors*, (2011) 1 SCC 694 (and other

similar judgments) that no restrictive conditions at all can be imposed, while granting anticipatory bail are hereby overruled. Likewise, the decision in *Salauddin Abdulsamad Shaikh v. State of Maharashtra*, (1996) 1 SCC 667 and subsequent decisions (including *K.L. Verma v. State & Anr*, (1998) 9 SCC 348 ; *Sunita Devi v. State of Bihar & Anr*, (2005) 1 SCC 608 ; *Adri Dharan Das v. State of West Bengal*, (2005) 4 SCC 303 ; *Nirmal Jeet Kaur v. State of M.P. & Anr*, (2004) 7 SCC 558 ; *HDFC Bank Limited v. J.J. Mannan*, (2010) 1 SCC 679 ; *Satpal Singh v. the State of Punjab*, 2018 SCC Online (SC) 415 and *Naresh Kumar Yadav v Ravindra Kumar*, (2008) 1 SCC 632 which lay down such restrictive conditions, or terms limiting the grant of anticipatory bail, to a period of time are hereby overruled.

16. It is also settled that for granting or rejecting anticipatory bail, assigning reason(s) for that is must. The Supreme Court has set aside the anticipatory bail granted/ rejected without assigning any reason. {**See: *Fekan Yadav v. Satendr Yadav alias Boss Yadav alias Satendra Kumar and others,* (2017) 16 SCC 775; *Prem Giri v. State of Rajasthan,* (2018) 6 SCC 571;** and ***Prem Giri v. State of Rajasthan,* (2018) 12 SCC 20**}**.**

17. Fundamental of criminal jurisprudence postulates 'presumption of innocence', meaning thereby that a person is believed to be innocent until found guilty and grant of bail is the general rule and putting a person in jail or in prison or in correction home, during trial, is an exception and bail is not to be withheld as a punishment and it is also necessary to consider whether the accused is a first time offender or has been accused of other offences and, if so, nature of such offence and his or her general conduct also requires consideration. Character of the complainant and accused is also a relevant factor. Reiterating these principles, the Apex Court in ***Dataram Singh v. State of Uttar Pradesh and another*, (2018) 3 SCC 22,** has also observed that however it should not be understood to mean that bail should be granted in every case, and 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.

18. While consideration a bail application, it would be necessary on the part of the Court to see culpability of the accused and his involvement in the commission of organized crime, either directly or indirectly, and also to consider the question from the angle as to whether applicant was possessed of the requisite *mens rea*. Interim bail, pending investigation, can be granted, keeping in view the facts and circumstances of the case.

……. ……. …….

22. Section 438 of the Cr.P.C. in itself provides certain factors, referred supra, for taking into consideration at the time of deciding bail applications under this Section, which are inclusive in nature. Some of other such principles, factors and parameters to be taken into consideration by the Court at the time of adjudicating an application under Section 438 of the Cr.P.C. have been elaborated and explained in pronouncements referred supra."

13. In ***Pokar Ram v. State of Rajasthan and others,*** **(1985) 2 SCC 597,** the Supreme Court had observed that relevant considerations governing the court's decision in granting anticipatory bail under Section 438 are materially different from those when an application for bail by a person who is arrested in the course of investigation as also by a person who is convicted and his appeal is pending before the higher Court and bail is sought during the pendency of the appeal. These situations in which the question of granting or refusing to grant bail would arise, materially and substantially differ from each other and the relevant considerations on which the Courts would exercise its discretion, one way or the other, are substantially different from each other. Observations in Para-6, based on ***Gurbaksh Singh Sibbia,*** **(1980) 2 SCC 565**, are as under:

"6. The decision of the Constitution Bench in *Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565: (AIR 1980 SC 1632) clearly lays down that 'the. distinction between an ordinary order of bail and an order of anticipatory bail is that whereas the former is granted after arrest and therefore means release from the custody of the police, the latter is granted in anticipation of arrest and is therefore effective at the very moment of arrest.' Unlike a post-arrest order of bail, it is a pre-arrest legal process which directs that if the person in whose favour it is issued is thereafter arrested on the accusation in respect of which the direction is issued he shall be released on bail. A direction under S. 438 is intended to confer conditional immunity from the touch as envisaged by S. 46(1) or confinement. In Para 31, Chandrachud, CJ clearly demarcated the distinction between the relevant considerations while examining an application for anticipatory bail and an application for bail after arrest in the course of investigation. Says the learned Chief Justice that 'in regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant, on bail in the event of his arrest would generally be made. It was observed that 'it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by mala fides; and, equally, that anticipatory bail must be granted if there is no. fear that the applicant will abscond.' Some of the relevant considerations which govern the discretion, noticed therein are the nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and "the larger interests of the public or the State", are some of the considerations which the court has to keep in mind while deciding an application for anticipatory bail.' A caution was voiced that 'in the evaluation of the consideration whether the applicant is likely to abscond, there can be no presumption that the wealthy and the mighty will submit themselves to trial and that the humble and the poor will run away from the course of justice, any more than there can be a

presumption that the former are not likely to commit a crime and the latter are more likely to commit it'."

14. In ***P. Chidambaram v. Directorate of Enforcement***, **(2019) 9 SCC 24,** the Supreme Court has observed as under:

"*Grant of anticipatory bail in exceptional cases*

69. Ordinarily, arrest is a part of procedure of the investigation to secure not only the presence of the accused but several other purposes. Power under Section 438 CrPC is an extraordinary power and the same has to be exercised sparingly. The privilege of the pre-arrest bail should be granted only in exceptional cases. The judicial discretion conferred upon the court has to be properly exercised after application of mind as to the nature and gravity of the accusation; possibility of applicant fleeing justice and other factors to decide whether it is a fit case for grant of anticipatory bail. Grant of anticipatory bail to some extent interferes in the sphere of investigation of an offence and hence, the court must be circumspect while exercising such power for grant of anticipatory bail. Anticipatory bail is not to be granted as a matter of rule and it has to be granted only when the court is convinced that exceptional circumstances exist to resort to that extraordinary remedy.

70. On behalf of the appellant, much arguments were advanced contending that anticipatory bail is a facet of Article 21 of the Constitution of India. It was contended that unless custodial interrogation is warranted, in the facts and circumstances of the case, denial of anticipatory bail would amount to denial of the right conferred upon the appellant under Article 21 of the Constitution of India.

71. Article 21 of the Constitution of India states that no person shall be deprived of his life or personal liberty except according to procedure prescribed by law. However, the power conferred by Article 21 of the Constitution of India is not unfettered and is qualified by the later part of the Article i.e. "....except according to a procedure prescribed by law." In *State of M.P. and another v. Ram Kishna Balothia*, (1995) 3 SCC 221, the Supreme Court held that the right of anticipatory bail is not a part

of Article 21 of the Constitution of India and held as under: (SCC p.226, para 7)

> "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."

15. 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."

16. At this stage, learned counsel for petitioner Sanjeev Kumar has submitted that the petitioner has also filed a complaint with SHO, Police Station Hamirpur, Himachal Pradesh, on 28.2.2022, but till date FIR has not

been registered in that complaint. Copy of the complaint has been annexed with the present petition.

17. Learned Additional Advocate General is directed to supply a copy of the complaint to the Police Officer present in the Court, enabling him to verify and deal with the same in accordance with law.

18. SHO, Police Station Hamirpur, is also directed to take appropriate necessary action on the complaint filed by the petitioner, as according to law on receipt of a complaint, the police has only two options either to record it in Daily Diary Register or to register FIR. No third way is there for keeping it in file or pending. Therefore, learned Additional Advocate General is directed to communicate this order to the SHO, Police Station Hamirpur, Himachal Pradesh, directing him to take appropriate action, in accordance with law, on the complaint, if any, submitted by petitioner Sanjeev Kumar.

19. 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.

Hence, in view of the above discussion, the bail petitions are dismissed and disposed of.

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

Between:-

1. M/S AKASH GOYAL
THROUGH ITS PROPRIETOR,
SH. AKASH GOYAL, AGED 48 YEARS,
SON OF SH. MADAN LAL GOYAL,

RESIDENT OF G-3, SILVER AVENUE 244,
MODEL TOWN, HISAR, HARYANA.

2. M/S MONICA ROADLINES,
THROUGH ITS PROPRIETOR,
SH. ANOOP SINGH, AGED 55 YEARS,
SON OF SH. BIRKHA RAM,
RESIDENT OF PLOT NO. H-201,
KHATA NUMBER 13/9, BLOCK H,
KUNWAR SINGH NAGAR, NANGLOI,
NEW DELHI.

3. M/S SAJJAN KUMAR,
THROUGH ITS PROPRIETOR,
SAJJAN KUMAR, AGED 56 YEARS,
SON OF SH. DAULAT RAM,
RESIDENT OF HOUSE NO. 10, DURGA
COLONY, HISAR, HARYANA.

....PETITIONERS

(BY MR. KSHITIJ SHARMA WITH MR. PRASHANT SHARMA, ADVOCATES)

AND

1. HINDUSTAN PETROLEUM CORPORATION
LTD. THROUGH ITS CHAIRMAN, 17
JAMSHEDJI TATA ROAD, MUMBAI,
MAHARASHTRA

2. THE DEPUTY GENERAL MANAGER, SHIMLA
RETAIL REGION, HINDUSTAN PETROLEUM
CORPORATION, LTD. 3rd FLOOR, HAMEER
HOUSE, LOWER CHAKKER SHIMLA
HIMACHAL PRADESH.

3. SH. GOPAL DASS,
CHIEF DEPOT MANAGER, NALAGARH
DEPOT, P.O.L. DEPOT, NALAGARH,

BADDI-NALAGARH ROAD, VILLAGE DHADI
KANIA, P.O. NALAGARH, DISTRICT
SOLAN 174101.

..RESPONDENTS

(MR. B.C. NEGI, SENIOR ADVOCATE WITH MR. NITIN THAKUR, ADVOCATE)

CIVIL WRIT PETITION
No. 7873 OF 2021
Decided on: 22.03.2022

Constitution of India, 1950 – Article 226 – Respondent number 1 issued detailed notice inviting tender dated 23.07.2018 for transportation of bulk POL products by road - On the basis of criteria prescribed in DNIT transporters including the petitioners awarded work and the shortfall of tank trucks/ requirement of additional tank truck as may arise during the term of earlier DNIT tender is supposed to fill through existing/ successful transporters including petitioner - Three Transporters who were successful in DNIT, blacklisted for their defaults – The requirement for tank trucks has arisen firstly on account of blacklisting of certain successful transporters in DNIT and secondly on account of additional demand- Held - The court has limited jurisdiction while dealing with the Government contracts - The dispute raised by the petitioners is bereft of any tinge having Public Interest and by all means is in domain of private contractual liability, which cannot be adjudicated in exercise of writ jurisdiction of this court so, the petitioners have remedy by seeking damages if permissible under law - Petition dismissed. [Paras 15,19 & 21]

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

O R D E R

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

"A writ of certiorari to quash the action of the respondent Corporation in issuing a supplementary detailed notice Tender No.: 21000697-HD-

10157 dated 12.11.2021 (Annexure P- 8) to seeks to fill shortfall requirement in the original DNIT dated 23.07.2018, from third parties because firstly, the shortfall of tank trucks/requirement of additional tank trucks as may arise during the term of the earlier DNIT Tender No.: 21000697-HD-10157 dated 23.07.2018 (Annexure P-1) till 30.09.2023 is supposed to filled through existing/successful transporters, including the petitioners; secondly the DNIT No. 2, has been issued to open a back door for contractors who were either unsuccessful in DNIT No. 1 or did not participate at all or have been terminated in DNIT No. 1 because of malpractices; thirdly, the petitioners are not allowed to participate DNIT No. 2; fourthly, the tenderers who are already terminated, or nearing termination were already aware about this DNIT No. 2, much in advance and have got vehicles prepared much before the issuance of the DNIT so that they can participate in the DNIT No. 2 and which reflects the collusion of respondent no. 3 with the said participants; fifthly, the action of the respondent amounts to digression from the deviation from the terms of the DNIT dated 23.07.2018, which is against the law laid down in the case of W.B. S.E.B. V. Patel Engineering Ltd. 2001 2 SCC 451.

And/or

A writ of mandamus/order/direction to the respondent corporation, to issue a notice for filing up the requirement, created on account of shortfall/additional requirement, through the existing transporters, including the petitioners and not through third parties.

And/or

During the pendency stay the consequential proceedings, in reference or pursuance to issuing a supplementary detailed notice Tender No.:21000697-HD-10157 dated 12.11.2021 (Annexure P-8).

2. The facts setting the backdrop of the case are that respondent No. 1 issued Detailed Notice Inviting Tender (for short, 'DNIT') dated 23.07.2018 for transportation of bulk POL products by road Ex-Nalagarh IRD. The working period as proposed in DNIT was 1.10.2018 to 30.09.2023. The anticipated volume to be moved for first three years and balance two years i.e. 4th and 5th years was prescribed as under: -

Sr. No.	Sector	Volume in KL	
		White oils	
		1st to 3rd year	4th& 5th year
1.	Within FDZ ("Free Delivery Zone", that is, upto 39 RTKM)	75284	69601
2.	Beyond FDZ	760996	700946
3.	Polhilly 2	44156	42873
4.	Polhilly 3	343520	347863

3. Similarly, anticipated Tank Trucks (for short, 'TTs') requirement for first three years and last two years i.e. 4th and 5th years was prescribed as under: -

Sr. No.	DESCRIPTION	WHITE OILS	
		1st to 3rd year	4th& 5th year
1.	Tank TRUCKS WITH Capacity of 12 KL & above	48	31

2.	Tank trucks with Capacity of 18 KL and above	135	40
Tender No. 18000298-HD-10157	Hindustan Petroleum Corporation Limited.	Page 4 of 132	
Transportation Ex-Nalagarh IRD	Tender for Road transportation of Bulk POL products: MS/HSD and Branded fuels		

4. On the basis of criteria prescribed in DNIT, various transporters including the petitioners were awarded work. First three years of work period expired on 30.09.2021. During this period, three transporters, who were successful in DNIT, were blacklisted for their defaults. They lost the legal battle also and consequently 'TTs' as provided by such transporters were taken off the work resulting in additional requirement of TTs.

5. In order to fulfill the shortfall caused by the aforesaid exigency and also to cope up with the additional requirement, respondent No. 1 has issued tender for the remaining working period of DNIT on 12.11.2021(for short 2nd DNIT).

6. Petitioners have taken exception to the mode adopted by respondent No.1 for the purposes of meeting its additional requirement of TTs by way of instant writ petition on the grounds which can be broadly categorized as under: -

(i) The shortfall of TTs/requirement of additional TTs during term of DNIT is required to be filled through existing/successful transporters, including the petitioners.

(ii) Fresh tender has been issued to open a back door for the transporters who either were unsuccessful in DNIT or did not

participate at all or had been blacklisted/terminated because of malpractices.

(iii) Petitioners are not allowed to participate in the tender dated 12.11.2021. The already terminated tenderers or those who were nearing termination are in collusion with respondent No.3 and were in the knowledge of tender dated 12.11.2021 beforehand and had thus made preparation accordingly.

(iv) Respondent No.1 is barred from deviating from the terms of DNIT.

7. Respondents have contested the claim of petitioners on the grounds that existing transporters including the petitioners were given an opportunity vide letter dated 04.03.2021 to provide additional TTs in line with the terms and conditions of DNIT. In response, petitioners had submitted their offers, but such offers were not considered as the petitioners were not successful transporters in 18KL and above category in DNIT and as such they could not claim themselves to be successful transporters for said category in DNIT. The process initiated vide tender dated 12.11.2021 is stated to be in terms of the guidelines/circulars adopted by respondent No.1. As per respondents, there is no bar for the petitioners to participate in the tender in question. It has been alleged that petitioners No. 1 and 2 are even participating in the tender dated 12.11.2021. M/s Monica Road lines has submitted its bid and has offered 4 TTs of 12KL category and 1 TT of 18KL category whereas, M/s Ashu Goyal has submitted bid as a sole proprietor offering three TTs under 18KL category. The sole proprietor M/s Ashu Goyal is the wife of Mr. Aakash Goyal, sole proprietor of the petitioner firm.

8. Petitioners in their rejoinder have reiterated their stand taken in the petition.

9. Keeping in view the nature of controversy raised by petitioners by way of instant petition, the petition has been heard at admission stage after

completion of pleadings. We have heard Mr. Kshitij Sharma Advocate for the petitioners and Mr. Bipin Negi Sr. Advocate assisted by Mr. Nitin Thakur, Advocate, for the Respondents

10. Before adverting to the merits of the case, we deem it necessary to reiterate the limited jurisdiction of this Court while dealing with the Government contracts. After taking notice of various precedents underlining the jurisdiction of High Courts under Article 226 of the Constitution of India in the matters of Government contracts, Hon'ble Supreme Court in Civil Appeal No. 1846/2022 titled as ***M/s N.G. Projects Limited Vs. M/s Vinod Kumar Jain and others***, decided on 21st March, 2022 has held as under:-

> *"23. In view of the above judgments of this Court, the Writ Court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present-day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues.* ***The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a malafide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The***

> ***injunction or interference in the tender leads to additional costs on the State and is also against public interest.*** *Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present-day Governments are expected to work."*

11. Keeping in view the existence of restrictive jurisdiction of this Court in matters of Government contracts, we now propose to deal with the respective submissions made by the parties.

12. Petitioners have claimed first right of consideration for the award of work created either as a consequence of blacklisting of successful transporters under DNIT or as a result of additional requirement found to exist by respondent No.1. Petitioners have based their claim by placing reliance on Note No. 'C' appended at page 4 of DNIT as also the Clause No. 14 of the chapter dealing with "price evaluation of the tenders" finding mention at page 113.

13. Note 'C' and clause 14 *supra* read as under:

> *"c) At the time of finalization of the tender, Tank Trucks upto requirement of first three years shall be inducted. The additional Tank Trucks indicated in the subsequent years shall be met by inducting Tank Trucks from the existing transporters, in a phased manner to meet the market demand & as per HPCL discretion."*
>
> *14. In case of shortfall of Tank Trucks receive against the tender or due to non-placement of Tank Trucks by any of the tenderers afterwards, additional Tank Trucks will be inducted from the remaining set of successful Transporters who have been issued LOA in that category (i.e. 12Kl or 18KL). The additional Tank Trucks will be inducted at L1 rate only."*

14. From the reading of aforesaid provisions, it is clear that both have been designed to operate in different situations. Whereas, note 'C' takes care of a

definite foreseen requirement that was to exist at the time of completion of first three years of working period, clause 14 was to deal with somewhat contingent condition.

15. Petitioners are trying to stake claim to fulfill the requirement of Respondent No.1 under clause 14 above by providing additional TTs. Under Clause 14 the existing transporters/remaining set of successful transporters who had been issued LOA in that category (i.e. 12KL or 18KL) only are eligible. In the given facts of the case, the requirement for tank trucks has arisen firstly on account of blacklisting of certain successful transporters in the DNIT and secondly, on account of additional demand. As is evident from the document 'Annexure P-14' relied upon by the petitioners, they were successful in DNIT in respect of less than 18KL category. Petitioners No. 1 and 2 had offered two TTs of 12KL and 5 TTs of 18KL each, but they were successful in respect of 2 TTs each of less than 18KL category only. Petitioner No.3 had offered only one TT of less than 18KL category and same was allotted to him. None of the petitioners were successful in allotment of work for 18KL or above category, therefore, they cannot be allowed to take benefit of Clause 14 supra of DNIT, according to which only those transporters would be eligible to fulfill the shortfall of tank trucks in given exigencies who were successful and had been issued LOA in that category. Since none of the petitioners qualified under aforesaid clause, the claim preferred by them is untenable.

16. Petitioners, in our considered view, cannot take benefit of Note 'C' above in the given facts and circumstances of the case firstly for the reason that it has application in a different situation, as noticed above and secondly the term 'existing transporters' used in note 'c' has to be construed having same meaning as the term "successful transporters who have been issued LOA in that category" used in clause 14.

17. Nothing tangible has been placed on record by the petitioners to prove the allegations regarding opening of back door for allegedly ineligible

transporters or alleged connivance of such transporters with respondent No.3. Mere *ipse-dixit* of petitioners is not sufficient to prove serious allegations as raised by the petitioners.

18. Respondents have categorically submitted that there is no bar for the petitioners to participate in the tender dated 12.11.2021. Respondents have even alleged that petitioner No.1 albeit indirectly and petitioner No.2 directly had already submitted their bids in response to tender dated 12.11.2021. Merely because petitioners are not in a position to compete in process of priority cannot afford them a cause of action to challenge the entire process.

19. The petitioners have also not been able to make out a case of deviation of the terms of DNIT. Respondent No.1 being employer is well within its right to have selection of transporters in the best interest of its works. Petitioners, especially in the given facts of the case, cannot impose their will on the employer. Petitioners have failed to prove any *malafide* or arbitrariness in the administrative action or the decision-making process of the respondents. Keeping in mind the interdict on the jurisdiction of this Court as observed in N.G Projects case supra, we do not find any merit in the case of the petitioners.

20. Further, the dispute raised by the petitioners is bereft of any tinge having public interest. It by all means is in domain of private contractual liability, which cannot be adjudicated in exercise of writ jurisdiction of this Court. Petitioners, if so advised, may have their remedy by seeking damages, if permissible under law. The public contracts cannot be allotted at the whims of private parties.

21. In the light of the discussion made above, we do not find any merit in the petition and the same is dismissed accordingly. Pending applications, if any, also stand disposed of.

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

Between:-

1. THE CHAIRMAN,
ARMY PUBLIC SCHOOL, DAGSHAI,
TEHSIL KASAULI, DISTRICT SOLAN,
H.P. 173206

2. THE PRINCIPAL, ARMY PUBLIC SCHOOL,
DAGSHAI, TEHSIL KASAULI,
DISTRICT SOLAN, H.P.

……APPELLANTS

(BY MR. RAHUL MAHAJAN, ADVOCATE)

AND

1. SMT. URMILA CHAUHAN
D/O SH. JIWAN SINGH CHAUHAN,
R/O CHAUHAN NIWAS, SHOLINI NAGAR,
JAUNAJI ROAD, DISTRICT SOLAN, H.P.

…….RESPONDENT

2. THE MANAGING DIRECTOR,
ARMY WELFARE EDUCATION SOCIETY,
SHANKAR VIHAR BUILDING NO.202,
DELHI CANTT. NEW DELHI 110010

……PROFORMA RESPONDENT

(MR. SERVEDAMAN RATHORE, ADVOCATE,
FOR R-1,

MR. PRAVEEN CHAUHAN, ADVOCATE VICE
MR. VISHAL PANWAR, ADVOCATE, FOR R-2)

2. CWP NO.2693 OF 2021

Between:-

SANGEETA SAHOTA
W/O SH. SURINDER KUMAR SAHOTA,

R/O ARMY PUBLIC SCHOOL DAGSHAI,
HOUSE NO.47/1, GROUND FLOOR,
TEHSIL KASOULI, DISTRICT SOLAN, H.P.

……PETITIONER

(BY MR. SANJEEV BHUSHAN, SENIOR ADVOCATE
WITH MR. RAJESH KUMAR, ADVOCATE)

AND

1. UNION OF INDIA,
THROUGH SECRETARY (MINISTRY OF DEFENCE),
GOVERNMENT OF INDIA, 101-A,
SOUTH BLOCK, NEW DELHI

2. ARMY WELFARE EDUCATION SOCIETY,
BUILDING NO.202, SHANKAR VIHAR,
DELHI CANTONMENT, NEW DELHI-110010,
THROUGH ITS MANAGING DIRECTOR

3. ARMY PUBLIC SCHOOL DAGSHAI,
TEHSIL KASAULI, DISTRICT SOLAN, H.P.,
THROUGH ITS PRINCIPAL

4. CENTRAL BOARD OF SECONDARY EDUCATION,
SHIKSHA KENDRA, 2, COMMUNITY CENTRE,
PREST VIHAR, DELHI-110092,
THROUGH ITS CHAIRPERSON

……RESPONDENTS

(MR. BALRAM SHARMA, ASGI, FOR R-1 & R-2,

MR. RAHUL MAHAJAN, ADVOCATE, FOR R-3,

NONE FOR R-4)

LETTERS PATENT APPEAL
No.97 OF 2021 ALONGWITH
CIVIL WRIT PETITION
No.2693 OF 2021
RESERVED ON:17.03.2022
PRONOUNCED ON:30.03.2022

Army Welfare Education Society Rules and Regulations, 2011- Rule 128- Minimum percentage of regular & Contractual TGTs- Held- That it is evident that contractual TGTs will be appointed for a maximum period of three years in the school- After expiry of this period, the appointment will automatically stand terminated- Rule 128(j) provides that contractual TGTs will be appointed as regular TGT after completion of five year works experience in the same school as contractual TGT in the relevant category- This is, however, subject to the percentage laid down in the SOP for teachers selection- This rule is subjected to percentage laid down for regular and contractual TGTs in the Standard Operating Procedure (SOP)- The SOP for teachers selection were framed vide circular No.8, dated 25.9.2003 (relevant part already extracted above)- A combined reading of the Rules and SOP does not point out any vested right of the TGT (appointed for a fixed term on the basis of a contract) for regularization of his/ her services merely on the strength of having completed five years of contractual service- The rules entail different procedure for regularizations. (Para 4)

Thesematters coming on for admissionthis day, ***Hon'ble Ms. Justice Jyotsna Rewal Dua****,delivered the following:*

J U D G M E N T

Being companion matters, these are taken up together for decision.

LPA No.97 of 2021

Learned Single Judge vide judgment dated 04.05.2021, directed the Army Public School, Dagshai, District Solan, H.P., to regularize the services of the writ petitioner as Trained Graduate Teacher (Music) [in short 'TGT (Music)'] after completion of five years of service on contract basis by taking her appointment on contract basis w.e.f. 19.09.2011, with all consequential benefits. Aggrieved, the Army Public School, Dagshai has filed the instant letters patent appeal.

2. Brief **factual matrix** of the case is as under:-

2(i). The Army Public School, Dagshai (appellants herein) advertised posts of Trained Graduate Teachers in the year 2006. Respondent No.1-Smt. Urmila Chauhan (writ petitioner) applied for the post of TGT (Music). She

participated in the selection process and was appointed as TGT (Music) on temporary basis from 08.04.2006 to 31.03.2007.

2(ii). After expiry of the above period, the appellants again advertised the posts of Trained Graduate Teachers. Respondent No.1 applied for the post of TGT (Music). After going through the selection process, she was appointed as TGT (Music) w.e.f. 09.04.2007 to 31.03.2008 on temporary basis. In the similar manner, respondent No.1 was appointed as TGT (Music) w.e.f. 08.04.2008 to 31.03.2009 on temporary basis.

2(iii). The appellants advertised the posts of TGTs once again. Respondent No.1 applied for the post of TGT (Music). She was appointed as such on contractual basis w.e.f. 03.04.2009 to 02.04.2012. In similar manner, respondent No.1 was engaged on contractual basis w.e.f. 10.04.2012 to 09.04.2015, 17.04.2015 to 16.04.2016 and 25.04.2016 to 24.04.2017.

2(iv). Respondent No.1 submitted a representation praying for her regularization as well as for renewal of her contract. She being in family way, also prayed for maternity leave, which was sanctioned by the appellants w.e.f. 01.02.2017 to 21.04.2017. Her contractual period of service was to come to an end on 24.04.2017. Apprehending that the appellants might employ new TGT (Music) against the post occupied by her and also fearing that the appellants might not extend her service contract, she preferred civil writ petition, bearing CWP No.480 of 2017, inter-alia, praying that her services be regularized as TGT (Music) and her contract of service as TGT (Music) be renewed w.e.f. 25.04.2017. This writ petition was allowed by the learned Single Judge vide judgment dated 04.05.2021. The appellants herein were directed to regularize services of respondent No.1 as TGT (Music) after completion of five years of service on contract basis by taking her appointment on contract basis w.e.f. 19.09.2011 with consequential benefits.

Feeling aggrieved, the Army Public School, Dagshai has preferred the instant letters patent appeal.

3. Contentions:-

Learned counsel for the appellants submitted that respondent No.1 was appointed as TGT (Music) on temporary basis after following the due procedure of selection in terms of the Army Welfare Education Society Rules and Regulations (hereinafter referred to as 'AWES Rules & Regulations') w.e.f. 08.04.2006 to 31.03.2007, 09.04.2007 to 31.03.2008, 08.04.2008 to 31.03.2009 and thereafter on contractual basis w.e.f. 03.04.2009 to 02.04.2012, 10.04.2012 to 09.04.2015, 17.04.2015 to 16.04.2016 and 25.04.2016 to 24.04.2017. The appointment letters issued to respondent No.1 on temporary as well as on contractual basis clearly provided that at the end of the specified period of appointment, respondent No.1 will have no lien on the post. Respondent No.1 had agreed to the terms & conditions of the appointment letter. The claim of respondent No.1 with respect to regularization/renewal of the contract, therefore, is not justified. Learned counsel for the appellants further submitted that the last contractual appointment of respondent No.1 was to end on 24.04.2017. Accordingly, the appellants had issued an advertisement in March, 2017 for the posts of TGTs including TGT (Music). Respondent No.1 was aware of the fresh selection process initiated by the appellants in March, 2017 for the post of TGT (Music), but she did not apply for this post. The interviews were conducted in April, 2017. One Smt. Sangeeta Sahota was selected and appointed as TGT (Music) on 21.04.2017. Despite being aware of the selection and appointment of Smt. Sangeeta Sahota as TGT (Music) in the appellants' school, respondent No.1 did not implead Smt. Sangeeta Sahota as a party to the writ petition. She suppressed material facts from the Court. The judgment was passed without hearing Smt. Sangeeta Sahota, a necessary party to the case. Learned counsel prayed for allowed the appeal.

Learned counsel for respondent No.1 contended that respondent No.1 was initially engaged by the appellants on temporary basis and thereafter

on contractual terms. The letter appointing respondent No.1 on contract basis clearly penned down that her service was to be governed by AWES Rules & Regulations as amended from time to time. Continuation of respondent No.1 on contract basis conferred upon her the right of regularization in terms of Clause 128(j) of Chapter 7 of AWES Rules & Regulations. Respondent No.1 fulfilled the criteria contemplated in the Rules regulating the appointment and regularization of TGT Contract Teachers. Services of respondent No.1, therefore, were required to be regularized upon completion of specified number of years of service on contract basis. Learned counsel defended the impugned judgment, whereby directions were issued to the appellants to regularize services of respondent No.1.

4. Observations:-

Having heard learned counsel for the parties and on going through the material available on record, we are of the view that the instant appeal deserves to be allowed for the following reasons:

4(i). We may first notice the applicable Guidelines and Rules & Regulations followed by the appellants for appointment of teachers in its school.

4(i)(a). Vide Circular No.8/Schools/2006, dated 25.09.2006, guidelines were framed for selection of teachers in Army Schools and Army Public Schools under AWES. These guidelines consist of Clauses 1 to 26, which prescribe detailed procedure for selection of teachers. Clause 25(j) provides for Term Based Appointments as under:-

> *"(j) Term Based Appointments.*
>
> *(i) 50% (Letter No.B/45706/PIAWES, dt 07 Aug 09-AHQ) of TGTs will be at all times be on Term basis for three years, on completion of which the services automatically stand terminated.*
>
> *(ii) Till above percentage is achieved, all TGT appts will be term based.*

(iii) In case a candidate is found suitable, he/she may be appointed on regular basis on completion of the term, provided percentages as mentioned in Sub Para (i) above are not violated.

(iv) Please refer Article 128 of AWES Rules regarding service conditions of Term Based Teachers."

4(i)(b). Rule 128 of AWES Rules & Regulations, 2011 provides for service conditions of Contractual Teachers as under:-

"128. Maximum percentages for regular and contractual TGTs and PRTs are laid down in the Standing Operating Procedure (SOP) for teachers selection forwarded vide HQ AWES letter No.B/45706/SOP/AWES dated 25 Sep 2006 as amended from time to time. The above percentages for regular TGTs and PRTs are maximum. It is not mandatory for the schools to have maximum percentages of the regular TGTs and PRTs. The percentages of regular TGTs and PRTs may be less than laid down percentages depending upon the requirement. In no case regular TGTs and PRTs would be more than the percentages laid down in above SOP for teachers selection. Any violation in laid down percentage for appointing PRTs and TGTs will be deemed unauthorized. The terms and conditions of service of contractual TGTs and PRTs are given below as applicable:-

(a) Contractual teachers will be appointed for a maximum period of three years. After its expiry, the appointment will automatically stand terminated.

(b) There would be a break of minimum seven days if a fresh contract is made.

(c) Last pay drawn as a contractual Teacher would be protected on being appointed as regular teacher provided the gap between the termination of the previous appointment and the appointment as regular teacher is not more than 60 days.

(d) Contractual teachers may be given upto six increments based on work experience at the discretion of School Managing Committee at the time of appointment. Norms of awarding increments would be as given below. Increments should be based not only on years of experience but also on special talent,

competence, skills and other factors. This is also not a right of teachers but a facility to draw better quality. Financial resources of school will be taken into account.

(i) Two years work experience - One
(ii) Three years work experience - Two
(iii) Four years work experience - Three
(iv) Five years to below ten years work experience – Four
(v) Ten years and above work experience - Six

(e) Leave will be entitled to them as given in Article 166 after one year of successful service.

(f) Increment will be entitled to contractual teachers after completion of one year successful service in the school in which appointed.

(g) The service of contractual teachers can be terminated with one month's notice or one month's pay in lieu of notice on either side during initial one year of service. After completion of one year successful service, the service of contractual teachers can be terminated with three month's notice or three months pay in lieu thereof subject to the terms and conditions laid down in the appointment letter.

(h) No contractual teacher would be considered for regular appointment before completion of two years in the same school.

(j) For Contractual TGTs Only. Contractual TGTs will be appointed as regular TGTs after completion of five years works experience in the same school as contractual TGTs in the relevant category subject to the percentages laid down in the SOP for teachers selection. The requirement of one year probation period on their appointment as regular TGTs will be dispensed with provided the gap between ceasation of appointment of contractual TGT and assumption of regular TGT is not more than 60 days in the same school.

(k) For Contractual PRTs Only. The requirement of one year probation on their appointment as regular PRTs will be dispensed with provided the gap between the ceasation of appointment of contractual PRT and assumption of regular PRT in the same school is not more than 60 days."

From reading of above clause, it is evident that contractual TGTs will be appointed for a maximum period of three years in the school. After expiry of this period, the appointment will automatically stand terminated. Rule 128(j) provides that contractual TGTs will be appointed as regular TGT after completion of five years works experience in the same school as contractual TGT in the relevant category. This is,however,subject to the percentage laid down in the SOP for teachers selection.

The above Rules underwent amendment in the year 2019.

4(i)(c). Chapter 7 of AWES Rules & Regulations, 2019 stipulates Classification, Recruitment, Qualification and Terms & Conditions of service in the appellants' school. Clause 116 of this chapter gives 'types of teaching staff' as under:-

> *"116. Teaching Staff would be employed as per requirement of the school, based on the strength of students and the subjects being offered. Since our schools have a peculiar condition of migrating students and numbers keep fluctuating due to movement of parents from one station to another, a portion of the teachers may have to be hired on contractual basis due to revenue constraints. The proportion shall be dictated by the respective BoA based on the forecast of movement of units and formations from respective garrisons. When adopted, the terms shall be as follows:*
>
> *(a) Regular. This category shall be the Nucleus Staff employed through deep selection and shall be the backbone of the School faculty.*
>
> *(b) Fixed-term. These appointments will be made on contract for a term of three academic sessions. The contract will only be for one term and shall not be extendable or renewable. On completion of the term, a teacher of this category will have option to appear in a fresh selection process for regular category, provided a vacancy in the given subject exists. Teachers once completing such a term shall not be allowed to take another term based assignment in the same school in the following session. Exception to this rule of 'only one term' may be given by the Chairman BoA for a specific period or individual.*

(c) *Adhoc. These appointments may be made for a limited period not exceeding 11 months to fill up a leave vacancy or a vacancy which may arise due to midsession resignation/removal of a teacher. Such vacancy may also occur if the management is unable to find a suitable teacher for employment due to remote/peculiar location and as a compulsion a teacher is required to be hired who may not be meeting all the QR and standardas expected. Such employment should not exceed one academic session. On completion ofsuch employment, an adhoc teacher will have option to appear in a fresh selection processfor contractual/regular category provided there is a vacancy and the individual meets theQR for that employment.*

(d) *Casual. A casual employee is an employee whose employment is of a casual/seasonal/daily nature for which a vacancy does not exist in Authorized Establishment. Suchemployment may be given by the Principal with the permission of the Chairman on anurgent emerging situation and later ratified in the SAMC.*

(e) *Part-time. He/She is to be appointed on a part-time basis for specific hours. Suchemployment may be given by the Principal with the permission of the Chairman on anurgent emerging situation and later ratified in the SAMC.*

Notes:-

1. *All regular teachers will be on probation as per Article 132. Their suitabilityfor confirmation shall be assessed within the period of probation. Any extension ofprobation shall only be allowed by the Chairman Board of Administration basedon specific reasons of inability to judge the efficacy of the probationer within thestipulated time.*
2. *The emoluments payable to teachers employed on Fixed-term basis will be atpar with the regular teachers. They shall also be given annual increments at par withregular teachers.*
3. *The salary admissible to Adhoc, Casual and Part-time Teachers may be determinedby the SAMC. In case of Part-time Teachers it will be based on number of days/hoursof engagement per day/week."*

Clause 119 of this Chapter reads as under:-

"119. Teachers. Selection of teachers will be in accordance with SOP in vogue issue by HQ AWES, as amended from time to time. Appointments will be made strictly in accordance with the Authorized Establishment as laid down in Article 115."

4(i)(d). Reliance placed by learned counsel for respondent No.1 upon isolated reading of a few lines of Rule 128(j) of AWES Rules & Regulations, 2011, for regularization of her services, is misplaced. This rule is subject to percentage laid down for regular and contractual TGTs in the Standard Operating Procedure (SOP). The SOP for teachers' selection were framed vide circular No.8, dated 25.09.2006 (relevant part already extracted above). A combined reading of the Rules and SOP does not point out any vested right of the TGT (appointed for a fixed term on the basis of a contract) for regularization of his/her services merely on the strength of having completed five years of contractual service. The rules entail different procedure for regularization. The Rules have also undergone amendment.

Hon'ble Apex Court in the judgment dated 24.03.2022 delivered in ***Civil Appeal No.1951 of 2022***, titled ***The State of Gujarat and others Versus R.J. Pathan and others***, was considering a case, where respondents were appointed on contractual basis on a fixed salary on a particular project for a period of eleven months in the year 2004. They continued to serve as such. On closure of the project, the State Government took a decision to place them in services of Indian Red Cross Society. The respondents approached the High Court for regularization of their services and also challenged their placement in the Red Cross Society. Their writ petition was dismissed by the learned Single Judge, but allowed by the Division Bench. Before the Hon'ble Apex Court, the respondents, relying upon *(2006) 4 SCC 1,*titled *State of Karnataka Versus Uma Devi (3)*and*(2018) 8 SCC 238,*titled*Narendra Kumar Tiwari Versus State of Jharkhand*, defended the impugned judgment of the

Division bench of the High Court, on the ground of their long continuation. The Apex Court held as under:-

> *"6. The order passed by the learned Single Judge dismissing the writ petition was in the year 2011. The order passed by the learned Single Judge was challenged by the respondents by way of LPA. In the year 2011, the Division Bench granted the interim relief and directed to maintain status quo and pursuant to the said interim order, the respondents were continued in service with the Government. In the year 2021, when the said LPA was taken up for further hearing, it was submitted on behalf of the respondents that as by now the respondents have worked for seventeen years, the State may be directed to absorb them in the Government and their services may be regularised. By observing that as the respondents have worked for a long time, i.e., for seventeen years, the Division Bench has directed the State to consider the cases of the respondents for absorption/regularisation and if required, by creating supernumerary posts. However, while issuing such a direction, the High Court has not at all considered the fact that the respondents were continued in service pursuant to the interim order passed by the High Court. The Division Bench has also not appreciated the fact and/or considered the fact that the respondents were initially appointed for a period of eleven months and on a fixed salary and that too, in a temporary unit – "Project Implementation Unit", which was created only for the purpose of rehabilitation pursuant to the earthquake for "Post-Earthquake Redevelopment Programme". Therefore, the unit in which the respondents were appointed was itself a temporary unit and not a regular establishment. The posts on which the respondents were appointed and working were not the sanctioned posts in any regular establishment of the Government. Therefore, when the respondents were appointed on a fixed term and on a fixed salary in a temporary unit which was created for a particular project, no such direction could have been issued by the Division Bench of the High Court to absorb them in Government service and to regularise their services. The High Court has observed that even while*

absorbing and/or regularising the services of the respondents, the State Government may create supernumerary posts. Such a direction to create supernumerary posts is unsustainable. Such a direction is wholly without jurisdiction. No such direction can be issued by the High Court for absorption/regularisation of the employees who were appointed in a temporary unit which was created for a particular project and that too, by creating supernumerary posts.

7. *From the impugned judgment and order passed by the Division Bench of the High Court, it appears that what has weighed with the High Court was that the respondents were continued in service for a long time, i.e., seventeen years. However, the High Court has not considered that out of seventeen years, the respondents continued in service for ten years pursuant to the interim order passed by the High Court. Therefore, even considering the decision of this Court in the case of Umadevi (supra), the period for which the employees have continued in service pursuant to the interim order is to be excluded and not to be counted. The High Court has totally missed the aforesaid aspect.*

8. *Now, so far as the reliance placed upon the decision of this Court in the case of Umadevi (supra) and the subsequent decision of this Court in the case of Narendra Kumar Tiwari (supra), relied upon by the learned counsel appearing on behalf of the respondents is concerned, none of the aforesaid decisions shall be applicable to the facts of the case on hand. The purpose and intent of the decision in Umadevi (supra) was, (1) to prevent irregular or illegal appointments in the future, and (2) to confer a benefit on those who had been irregularly appointed in the past and who have continued for a very long time. The decision of Umadevi (supra) may be applicable in a case where the appointments are irregular on the sanctioned posts in regular establishment. The same does not apply to temporary appointments made in a project/programme.*

8.1. *Even in the case of Narendra Kumar Tiwari (supra) also, it was a case of irregularly appointed employees. Even otherwise, in view the facts and circumstances of Narendra Kumar Tiwari*

(supra), the said decision shall not be applicable to the facts of the case on hand. The case before this Court was with respect to the employees working with the State of Jharkhand which was created only on 15.11.2000 and therefore it was contended on behalf of the irregularly appointed employees that no one could have completed ten years of service with the State of Jharkhand on the cut-off date of 10.04.2006, which was the cut-off date fixed under the relevant rules of the State of Jharkhand.

9. *Even otherwise, it is to be noted that though not required, the State, instead of putting an end to the services of the respondents, graciously placed the respondents in the Indian Red Cross Society. No duty was cast upon the State to transfer them to another establishment in a case where it is found that the employees are appointed in a temporary unit and on a temporary contractual basis and on a fixed term salary and on closure of the temporary unit, their services are not required. However, the State Government was gracious enough to place the respondents in the Indian Red Cross Society, which the respondents did not accept.*

10. *From the impugned order passed by the Division Bench of the High Court it appears that the High Court has observed hereinabove that in the peculiar facts and circumstances of the case, it is directed that the order of absorption and regularisation and if necessary, by creating supernumerary posts, will not be treated as a precedent in other cases. Even such a direction could not have been passed by the Division Bench of the High Court as there were no peculiar facts and circumstances which warranted the above observation. No such order of absorption and/or regularisation even if required for creating supernumerary posts and not to treat the same as precedent could have been passed by the High Court in exercise of powers under Article 226 of the Constitution of India."*

In view of above, in the facts of the case and applicable rules/circulars, services of respondent No.1 engaged on a fixed contractual

period, cannot be ordered to be regularized merely on completion of five years of service.

4(ii). It is not in dispute that respondent No.1 was appointed initially on temporary basis w.e.f. 08.04.2006 to 31.03.2007, 09.04.2007 to 31.03.2008 and 08.04.2008 to 31.03.2009 and thereafter on contractual basis w.e.f. 03.04.2009 to 02.04.2012, 10.04.2012 to 09.04.2015, 17.04.2015 to 16.04.2016 and 25.04.2016 to 24.04.2017. The appointment of respondent No.1 on temporary and contractual basis in different spells was made by the appellants after conducting the selection process as per the then prevailing circulars and Rules & Regulations.

4(iii). In the appointment/engagement letters issued to respondent No.1, be it on temporary or on contractual basis, it was clearly stipulated that after the expiry of the contract, she will have no lien on the post. That after the expiry of temporary/contractual service period, she will automatically cease to be in service of appellants' school. Respondent No.1, at the time of entering into temporary/contractual appointment, was fully aware of the fact that the appointment being offered to her was temporary/ contractual in nature and for a fixed period. That she will have to participate in the fresh selection process after expiry of her temporary/contractual tenure of service. It is for this reason that she had been applying and appearing in the selection process for the post of TGT (Music) year after year and competing with other candidates. Respondent No.1had no lien over the post.

4(iv). The appellants had issued fresh advertisement in March, 2017 for the posts of TGTs including TGT (Music). Respondent No.1, who had been applying and appearing for the post of TGT (Music) in the previous years, did not apply this time for the said post. The appellants went ahead with the selection process as the contractual period of respondent No.1 on the post of TGT (Music) was coming to an end on 24.04.2017. The interviews were held in April, 2017. One Smt. Sangeeta Sahota emerged meritorious amongst the

participating candidates. She was selected and appointed as TGT (Music) on 21.04.2017. In her writ petition, respondent No.1 concealed these material facts. Smt. Sangeeta Sahota was not impleaded as a party in the writ petition. Interim order was passed in the case on 24.04.2017, directing the appellants to allow respondent No.1 to discharge her duties as TGT (Music) on the same terms & conditions. The fact remains that respondent No.1 had not participated in the fresh selection process conducted by the appellants in April, 2017 and further that another person, Smt. Sangeeta Sahota, stood already selected for the post of TGT (Music), which was earlier occupied by respondent No.1. Smt. Sangeeta Sahota was appointed on the post in question on 21.04.2017. Respondent No.1 had automatically ceased to be an employee of the appellants on the expiry of her contractual period of service. She could not be regularized against the post in view of above discussion. Also, Smt. Sangeeta Sahota's rights,who was not a party to the case, had also intermingled and involved on the post in question.

5. For all the forgoing reasons, the direction issued in the impugned judgment to regularize the services of respondent No.1 cannot be sustained. The appeal is accordingly allowed. The impugned judgment dated 04.05.2021 passed by the learned Single Judge in CWP No.480 of 2017 is set aside.

It is, however, clarified that remuneration, if any, paid by the appellants to respondent No.1 for the period after 24.04.2017, i.e. after the expiry of her contractual service period, on account of interim directions passed in her writ petition, shall not be recovered from her.

The issue as to whether the appellants-School is amenable to the writ jurisdiction was not urged before us. We leave this question open for the appellants to be raised in appropriate proceedings.

The appeal stands disposed of in the above terms, so also the pending miscellaneous application(s), if any.

CWP No.2693 of 2021

Heard learned counsel for the parties.

Petitioner in this petition is Smt. Sangeeta Sahota, who was appointed in the respondent-School initially as an ad hoc teacher [TGT(Music)] for a fixed period from 21.04.2017 to 16.03.2018 and thereafter on contractual basis for a fixed tenure of three years, i.e. with effect from 09.04.2018 to 31.03.2021. She has prayed for direction to the respondents (i) to allow her to continue as TGT (Music); (ii) for regularization of her services and (iii) for retention of school accommodation given to her in lieu of her engagement as TGT (Music).

In view of ratio of the above judgment rendered in the connected LPA No.97 of 2021, the writ petitioner, Smt. Sangeeta Sahota, was entitled to discharge her duties as TGT (Music) in the respondent-School only as per the terms & conditions of her appointment letter.Prayers made in the writ petition cannot be accepted. In the peculiar facts of the case, it is ordered that any remuneration paid to the petitioner beyond the tenure of her appointment, pursuant to the interim orders passed in the petition, shall not be withdrawn from her.

No other point was urged.

The writ petition stands disposed of in the above terms, so also the pending miscellaneous application(s), if any.

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

Between:-

DINESH DUTT SON OF SH. SURAJ PRAKASH, RESIDENT OF VILLAGE JHAL, P.O. HINNER, TEHSIL KANDAGHAT, DISTRICT SOLAN, H.P.

…….PETITIONER

(BY MR. SUDHIR THAKUR, SENIOR ADVOCATE
WITH MR. KARUN NEGI, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH, THROUGH SECRETARY HOME, GOVERNMENT OF H.P., SHIMLA.
2. THE HIMACHAL PRADESH STATE ELECTRICITY BOARD, THROUGH ITS ENGINEER IN CHIEF.
3. SMT. MEENA WIFE OF SH. BABU RAM, RESIDENT OF VILLAGE KURGAL, POST OFFICE HINNER, TEHSIL KANDAGHAT, DISTRICT SOLAN, H.P.

.....RESPONDENTS

(M/S SUMESH RAJ, ADARSH SHARMA AND SANJEEV SOOD, ADDL. AGS WITH MR. SUNNY DATWALIA, ASSTT. AG FOR R-1;
MR. VIKRANT THAKUR, ADVOCATE FOR R-2;
MR. AJAY CHAUHAN, ADVOATE FOR R-3)

CRIMINAL MISC. PETITION (MAIN)
U/S 482 CRPC No. 692 OF 2019
Decided on: 29.12.2022

Code of Criminal Procedure, 1973 – Section 482 read with Section 336 Indian Penal Code, 1860 -- Quashing of final report prepared under section 173 of Cr. P. C. - Held - Provisions of section 482 CrPC cannot be invoked by a party at the throw of the hat when there is a procedure prescribed under CrPC which has to be adhered to after lodging of FIR -- In case the High Courts start interfering with this procedure by invoking section 482 of Criminal Procedure Code at any and every stage without permitting the trial courts to exercise the jurisdiction which stands conferred upon them the entire machinery of trial court is likely to collapse as every accused would approach this Court under section 482 of code of criminal procedure asking for quashing of FIR as well as

subsequent criminal proceedings -- Proceedings are ordered to be closed but with the observations that petitioner shall be at liberty to raise the issue before Ld. Trial Court at appropriate stage – Petition stands disposed of. (Para 4 & 5)

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

O R D E R

By way of this petition filed under Section 482 of the Code of Criminal Procedure, the petitioner has prayed for quashing of FIR No. 27/19, dated 03.03.2019, registered at Police Station Kandaghat, under Section 336 of the Indian Penal Code and also for quashing of the final report prepared under Section 173 of the Code of Criminal Procedure.

2. Mr. Sudhir Thakur, learned Senior Counsel appearing for the petitioner has vehemently argued that the proceedings, which are pending before the learned Court below, are nothing but an abuse of process of law as the petitioner is not guilty of the offence alleged against him. He submits that a bare perusal of the FIR demonstrates that there is no allegation of the alleged offence made out against the petitioner, yet, he is being made to undergo/face the agony of the trial. He further submits that even the stand of the complainant is that she has no objection in case this petition is allowed and the FIR is quashed because she has not leveled any specific allegation against the petitioner.

3. I have heard learned Counsel for the petitioner and also gone through the petition as well as documents appended therewith.

4. This Court is of the considered view that the provisions of Section 482 of the Code of Criminal Procedure cannot be invoked by a party at

the throw of the hat when there is a procedure which stands prescribed under the Criminal Procedure Code which has to be adhered to after lodging of the FIR. This Court can safely take note of the fact that very rarely does an accused admits that he is guilty of the offences alleged against him. This Court is also aware of the well settled principle of law that ordinarily in criminal jurisprudence, until the accused is held guilty, he is presumed to be innocent. Yet, after lodging of the FIR, the investigating agency has to carry out the investigation and thereafter challan has to be filed or a closure report has to be presented before the appropriate Court of law whereupon the Court has to take a call as to how the matter has to be further proceeded with. In case, the High Courts start interfering with this procedure by invoking Section 482 of the Criminal Procedure Code at any and every stage, without permitting the Trial Courts to exercise the jurisdiction, which stands conferred upon them and also the duty which stands enshrined upon them, then, the entire machinery of the trial Courts, is likely to collapse, because, as has been observed hereinabove also, then in that eventuality, every accused would approach this Court under Section 482 of the Code of Criminal Procedure asking for quashing of the FIR as well as subsequent criminal proceedings. The Court is not discarding the contention of the petitioner that he is innocent, however this Court is observing that at the first instance all these issues can be and should be raised by the petitioner before the learned Trial Court and this Court has no reason to believe that learned Trial Court will not look into the issues which are being raised by the petitioner in the present petition and take a appropriate call on the matter. The contention of learned Senior Counsel appearing for the petitioner that in case this High Court does not interferes under Section 482 of the Code of Criminal Procedure, then, the provisions of this Section will become otiose, is completely mis-conceived because the provisions of Section 482 which are contained in the Criminal Procedure Code are meant to prevent the abuse of

process of law and the Court exercises these powers where its judicial conscious is satisfied that in case it does not interferes under Section 482 of Cr.P.C, then, same would indeed amount to abuse of process of law. In the given facts of this case, this Court is of the view that no case for interference under Section 482 of the Code of Criminal Procedure is made out and it is purposely that this Court is not referring to the factual matrix involved in this petition so as not to prejudice the case of the petitioner.

5. Accordingly, these proceedings are ordered to be closed but with the observations that the petitioner shall be at liberty to raise all these issues before the learned Trial Court at the appropriate stage.

The petition stands disposed of in above terms, so also pending miscellaneous application(s), if any.

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

Between:-

SH. OM PRAKASH S/O DHYAN SINGH, R/O VILLAGE CHAMION, P.O. PAV MANAL, TEHSIL DISTRICT SIRMOUR, H.P.

.....PETITIONER

(BY MR. DALEEP CHAND, ADVOCATE)

AND

1. THE STATE OF HIMACHAL PRADESH THROUGH ITS SECRETARY (PWD) TO THE GOVT. OF HIMACHAL PRADESH SHIMLA-2.
2. THE ENGINEER-IN-CHIEF, GOVT. OF HIMACHAL PRADESH, NIRMAN BHAWAN, NIGAM VIHAR SHIMLA-2.

3. THE SUPERINTENDING ENGINEER, 12TH CIRCLE, HPPWD, NAHAN, DISTRICT SIRMOUR, H.P.
4. ASSISTANT ENGINEER, HPPWD SUB DIVISION SHILLAI, DISTRICT SIRMOUR, H.P.

……. RESPONDENT

(BY M/S SUMESH RAJ, DINESH THAKUR AND SANJEEV SOOD, ADDITIONAL ADVOCATE GENERALS WITH MR. MANOJ BAGGA, ASSISTANT ADVOCATE GENERAL)

CIVIL WRIT PETITION
No. 5011 OF 2020
Decided on: 05.03.2022

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

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

J E D G E M E N T

The case of the petitioner is that his father, who was serving as *Beldar* with the respondent-department, died in harness on 01.04.2016. The petitioner applied for appointment on compassionate grounds post death of his father on 16.08.2017. His grievance is that his prayer for offering him

appointment on compassionate basis has been rejected by the respondent-department vide order Annexure P-4, dated 03.07.2020, on the ground that the petitioner does not fulfils minimum prescribed educational qualification in terms of instructions dated 07.03.2019 and 01.11.2019 issued by the Finance Department.

2. Mr. Daleep Chand, learned Counsel for the petitioner has argued that the rejection of the case of the petitioner by the respondent-Department is not sustainable in law as the department has erred in not appreciating that the case of the petitioner for compassionate appointment had to be considered on the touchstone of the policy which was prevalent in this regard as on the date when father of the petitioner died and not on the basis of subsequent policy/instructions which came into existence in the year 2019. Learned Counsel has also argued that in terms of previous policy and instructions, i.e. office memorandum dated 24.02.2016, issued by the Finance Department of the Government of Himachal Pradesh, there was power conferred upon the concerned Administrative Secretary to grant relaxation in educational qualification in cases it deemed appropriate to do so. Accordingly, a prayer has been made by the petitioner for quashing of the impugned order and issuance of direction to the respondent-department to appoint the petitioner as a *Beldar* on compassionate grounds.

3. The petition stands opposed by the State *inter alia* on the ground that the right of appointment on compassionate basis is a concession and not a right and same is always subject to availability of sanctioned posts. It is further the stand of the State that as the petitioner was not fulfilling the minimum educational qualification for being considered for appointment as Beldar/ Class-IV employee, therefore, his case was rightly rejected by the department.

4. Mr. Dinesh Thakur, learned Additional Advocate General has argued that the minimum educational qualification as per policy of the

Government in this regard, be it the earlier policy or the subsequent policy, was middle pass as far as the post of Beldar/Class-IV is concerned and the case of the petitioner being strictly in sync with the policy in issue, there is no merit in the same and the same be dismissed.

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

6. It is not in dispute that the father of the petitioner died in harness on 01.04.2016, and thereafter, the petitioner applied for appointment on compassionate basis in the year 2017. The case of the petitioner has been rejected by the competent authority on the ground that the petitioner was not possessing minimum qualification for being appointed as a *Beldar* on compassionate grounds. The minimum prescribed educational qualification for the post in issue is middle pass, and as on the date, when the petitioner applied for the post in issue, admittedly he was not middle pass. His qualification was 7th standard.

7. Hon'ble Supreme Court of India in the **State of Madhya Pradesh and others** vs. **Ashish Awasthi**, Civil Appeal No. 6903 of 2021 and other connected matter, decided on 18.11.2011, has been pleased to hold that the case of a candidate for appointment on compassionate grounds has to be assessed in terms of the scheme/circular prevalent as on the date of death of the deceased- employee. In the present case, the case of the petitioner has been rejected on the basis of instructions dated 07.03.2019 and 01.11.2019. It is not in dispute that vide office memorandum dated 24.02.2016, relaxation in age for joining government job and minimum educational qualification, time limit for submission of compassionate employment cases was redefined in terms whereof the Administrative Secretary was having the power in relation to cases of compassionate appointment to accord relaxation in educational qualification in cases, in which, it deemed appropriate to do so through a reasoned order. This Court is of the considered view that taking into

consideration the date of death of the deceased-employee and the date when the petitioner had applied for compassionate appointment, the case of the petitioner ought to have been considered by the department in terms of the policy in vogue for considering the cases for compassionate appointment, as on the date of death of deceased-employee read with office memorandum dated 24.02.2016. That having not been done and the case of the petitioner having been rejected on the basis of subsequent instructions/circular, which came into existence in the year 2019, the impugned act of the respondent-department is not sustainable.

8. Accordingly, in view of observations made hereinabove, this petition is allowed and impugned order (Annexure P-4) is quashed and set aside, with a direction to the respondent-department to reconsider the case of the petitioner for grant of appointment on compassionate basis in terms of policy in vogue as on the date of death of the deceased-employee read with office memorandum dated 24.02.2016. Taking into consideration the fact that the father of the petitioner was serving as a Class-IV employee and the petitioner himself is seeking appointment against a Class-IV post, the Court hopes and expects that a sympathetic view will be taken by the Administrative Secretary with regard to grant of relaxation in educational qualification, if so required. Let appropriate order on the application of the petitioner for appointment on compassionate ground be passed on or before 30th April, 2022.

The petition stands disposed of in above terms, so also pending miscellaneous application(s), if any.

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

Between:-

DR. ABHISHEK THAKUR, S/O SH. JAGAN NATH THAKUR, VPO BHARMOTI, TEHSIL

NADAUN, DISTRICT HAMIRPUR, (H.P.) PRESENTLY POSTED AS MHA, MEDICAL OFFICER (SPECIALIST) SLBSGMCH, MANDI, AT NER CHOWK (H.P.)

.....PETITIONER

(BY MR. DILIP SHARMA, SENIOR ADVOCATE WITH MR. MANISH SHARMA, ADVOCATE)

AND

1. STATE OF H.P. THROUGH SECRETARY HEALTH TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA-171002.
2. DIRECTOR, MEDICAL EDUCATION AND RESEARCH, H.P. SHIMLA-171009.
3. DIRECTOR HEALTH SERVICES, HIMACHAL PRADESH, SHIMLA-171009.

.....RESPONDENTS

(BY MR. AJAY VAIDYA, SENIOR ADDL. AG)

CIVIL WRIT PETITION
No.4520 OF 2021
Decided on: 24.02.2022

Constitution of India, 1950 – Article 226 – Service matter - Field posting - Candidate has to complete mandatory peripheral service of one year to be eligible to apply for the post of Senior Resident – Held -- There is no serious dispute on the issue that only two incumbents had applied for the post of senior resident in the specialization of hospital administration and the only other candidate was held to be ineligible by the selection committee for want of basic medical educational qualification itself, then, in case this petition is allowed and the petitioner is permitted to join the post of senior resident, no prejudice shall be caused to anyone and rather in turn, State would also be getting a qualified professional to man the post of senior resident in the medical college concerned and his appointment will serve larger interests - The

petition allowed by directing the respondent department to offer appointment to the petitioner against the tenure post of senior resident in the specialization of hospital administration, without insisting upon for no objection certificate on the ground of petitioner having served in the peripheral area / field posting. (Paras 10 & 11)

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

O R D E R

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

> *"(i) That the definition of "field posting" as amended vide office order Annexure P-7 dated 21.8.2019 read with Annexure P-8 dated 9.12.2019; and notification dated 21.1.2020 at Annexure P-9, may be read down to mean that "field posting" after PG would be necessary for "eligibility" and "field posting incentive" only if opportunity has been given to the candidates to serve in a field posting station after doing PG.*
> *(ii) That the rejection of the claim of the petitioner vide Annexure P-10 for Senior Residency on the ground that he is ineligible for Senior Residency for not having completed mandatory "Field posting" for 1 year, may kindly be quashed and set aside.*
> *(iii) That the respondents may kindly be directed to consider the petitioner for the post of Senior Resident in Hospital Administration advertised vide Annexure P-1/A with a further direction to give him posting as Senior Resident as a result of such consideration."*

2. Brief facts necessary for the adjudication of the present petitioner are as under:-

The petitioner herein initially joined the service of the respondent-department as a Medical Officer on contract basis w.e.f. 19.08.2011. Thereafter, he was recruited on regular basis as a Medical Officer on the recommendation of the Himachal Pradesh Public Service Commission

in the month of October, 2013. He was sponsored by the Government for Master's Course in Hospital Administration at PGIMER Chandigarh for session commencing from the year 2018, which he 5completed in December, 2019.

3. Before proceeding further, it is pertinent to mention, as is evident from the service certificate of the petitioner appended with the petition as Annexure P-1, that after the petitioner completed the Post Graduation course on 31.12.2019, he rejoined the respondent-department on 01.01.2020, in the Directorate of Health Services and thereafter w.e.f. 30.01.2020, petitioner was posted as Medical Officer (Specialist) at Shri Lal Bahadur Shastri Government Medical College, Ner Chowk, District Mandi, where he is continuing to serve till date.

4. Vide Annexure P-1/A, applications were invited from eligible candidates for the tenure post of Senior Resident, for which the eligibility criteria was possessing a Post Graduation degree in the concerned specialization by the candidate concerned. Last date for submission of the applications in the advertisement was stated to be 05.04.2021.

5. In the month of March, 2021, the petitioner applied for the tenure post of Senior Resident in terms of advertisement Annexure P-1/A, however, his candidature was not considered by the Counselling Committee on the ground that the petitioner as on the date when he applied for the post in issue, had not completed one year peripheral service after completion of Post Graduation, which was mandatory for the issuance of a no objection certificate in favour of a Medical Officer to apply for the post of Senior Resident.

6. Mr. Dilip Sharma, learned Senior Counsel appearing for the petitioner has argued that the petitioner after completion of his Post Graduate Degree was posted by the respondent-Department as a Medical Officer (Specialist) in Shri Lal Bahadur Shastri Government Medical College, Ner Chowk and the petitioner accepted said posting offered to him and joined as

Medical Officer (Specialist) in the said college. After completion of his Post Graduation, he was not offered any posting in peripheral area of the State of Himachal Pradesh, which he refused to join. Accordingly, it is submitted by learned Senior Counsel that it is not a case where the petitioner despite having been posted in peripheral area refused to serve in that area and got his transfer to a non-peripheral area station. Learned Senior Counsel has further argued that the cooling period of one year required after completion of Post Graduation and applying for the post of Senior Resident was undergone by the petitioner, which is evident from the fact that he completed his Post Graduation on 31st December, 2019 and he applied to the post of Senior Resident in the month of March, 2021 in response to advertisement Annexure P-1/A. Learned Senior Counsel has also submitted that the issue otherwise is also no more res-integra as this Court in CWP No. 2101 of 2020, titled as Dr. Pradeep Kumar Attri and another vs. State of Himachal Pradesh and others and other connected matters, decided on 25.11.2020, has held that an incumbent, who has completed one year service after completing Post Graduation shall be considered eligible for competing to the post of Senior Resident, irrespective of the place where the incumbent has served as such, until and unless he was offered appointment at a place which is termed as 'field posting' and he/she has refused to do so. Accordingly, on these bases, a prayer has been made that the petition be allowed and a mandamus be issued to the respondent-department to offer appointment to the petitioner against tenure post of Senior Resident.

7. The Court stands informed that in response to advertisement Annexure P-1/A, two candidates, including the petitioner, had applied and the other candidate was held to be ineligible by the Committee on the basis of the qualifications possessed by him, therefore, in case the petition is allowed and the respondent-department is directed to offer appointment to the petitioner

against said tenure post of Senior Resident, no prejudice shall be caused to anyone.

8. Petition has been opposed by the State on the ground that for regulating the appointments to the post of Senior Residents in the Department of Medical Education, the government has notified a policy for Residency in the Government Medical Colleges in the State of Himachal Pradesh, vide notification dated 22.06.2019, Annexure P-6, in supersession of all the previous notifications issued in this regard in continuation of PG/Super Specialty Policy notified vide Notification dated 27.02.2019 (Annexure P-5). The same mandates that a candidate has to complete mandatory peripheral service of one year to be eligible to apply for the post of Senior Resident. Learned Senior Additional Advocate General has argued that the rationale behind the said policy is that after a Medical Officer completes his Post Graduation, then he should at least serve the medical department in a peripheral area for a period of one year so that benefit of his superior qualification can be availed by public at large in the health sector. Learned Senior Additional Advocate General has also drawn the attention of the Court to para-4 of the reply filed to the writ petition wherein it stands mentioned that the petitioner had applied for the post of Senior Resident to the office of respondent No. 3 for issuance of no objection certificate but since the petitioner had not completed mandatory one year peripheral service after completion of Post Graduation, therefore, 'No Objection' was not cleared by the Committee constituted for the said purpose. He has further submitted on the strength of averments made in para-5 of the reply that the petitioner cannot take benefit of the judgment passed by this Court in CWP No. 2101 of 2021 mentioned supra as he was not party to the same.

9. I have heard learned Counsel for the parties and gone through the averments made in the pleadings and documents appended therewith.

10. It is not in dispute that the policy in vogue at the time pertaining to appointment of Senior Residents in Government Medical Colleges of the State envisaged that a Medical Officer to be eligible to apply for the post in issue after completion of Post Graduation course must put in mandatory one year service/field posting in peripheral areas. Field posting stands defined in the policy, which has been so formulated by the government. In this case, the petitioner completed his Post Graduation on 31st December, 2019. Thereafter he reported back on duty to the Directorate of Health Services on 01.01.2020. He was posted as a Medical Officer (Specialist) in Shri Lal Bahadur Shastri Government Medical College at Ner Chowk by the department concerned and he joined the said college in his capacity as Medical Officer (Specialist) on 30.01.2020. Thus at the first blush, it appears to be a case where a Medical officer after completion of his Post Graduate degree was posted by the department in a Medical College and he joined the same in compliance to the order of posting. In fact, the reply, which has been filed to the writ petition by the State also does not give any indication that the petitioner after completing his Post Graduation was ordered to be posted at a station which is defined as "field posting" but rather than joining said field posting station, on his request, he was posted as a Medical Officer (Specialist) in the Shri Lal Bahadur Shastri Government Medical College, Ner Chowk. However, during the course of arguments, learned Senior Additional Advocate General informed the Court that the posting of the petitioner as a Medical Officer (Specialist) was on his asking. There is on record, appended with rejoinder filed by the petitioner to the reply of the State, Annexure RJ/1, perusal whereof demonstrates that the posting of the petitioner in the Medical College concerned was on the basis of approval so granted by the Health and Family Welfare Minister, Himachal Pradesh. *Per se* the respondent-department has not been able to place any material on record from which it can be inferred that it was on the basis of some request on behalf of the petitioner that he was posted in the said Medical

College. Be that as it may, even if it is to be assumed that posting of the petitioner in the Medical College concerned was on the behest of the petitioner, then also, this Court is of the considered view that as on the date when the petitioner applied for the post of Senior Resident, he had completed one year of service with the respondent-department, may be in a Medical College of the Government of Himachal Pradesh, he could not have been denied no objection certificate because it is not the case of the department concerned that after completion of Post Graduation, the petitioner was posted at a station defined as 'field posting' but he refused to join there or rather than joining, he got his transfer/posting order modified to the place where he was posted by the department. Otherwise also, this Court is of the considered view that as there is no serious dispute on the issue that only two incumbents had applied for the post of Senior Resident in the Specialization of Hospital Administration and the only other candidate was held to be ineligible by the Selection Committee for want of basic medical educational qualifications itself, then, in case this petition is allowed and the petitioner is permitted to join the post of Senior Resident, no prejudice shall be caused to anyone and rather in turn, State would also be getting a qualified professional to man the post of Senior Resident in the Medical College concerned. This will serve larger interest of the medical college where students admitted would be benefitted of being taught by a Senior Resident in Hospital Administration, who presently are bereft of said benefit. The patients will also be benefitted accordingly.

11. Therefore, in view of what has been discussed in the peculiar facts of this case, this petition is allowed by directing the respondent-department to offer appointment to the petitioner against the tenure post of Senior Resident in the Specialization of Hospital Administration, without insisting upon for a no objection certificate on the ground of petitioner having served in the peripheral area/filed posting. It is again clarified that this order

has been passed in the peculiar facts of this case. Needful be positively done within a period of four weeks from today.

The petition stands disposed of in above terms, so also pending miscellaneous application(s), if any. No order as to costs.

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

Between:-

1) BOEHRINGER INGELHEIM INTERNATIONAL GMBH 55216, INGELHEIM AM RHEIN GERMANY THROUGH ITS POWER OF ATTORNEY HOLDER
2. BOEHRINDER INGELHEIM (INDIA) PVT. LTD. UNIT NO. 202 AND PART OF UNIT NO. 201, SECOND FLOOR, GODREJ 2, PRIOJSHA NAGAR, EASTERN EXPRESS HIGHWAY, VIKHROLI (E), MUMBAI-400079, INDIA THROUGH ITS POWER OF ATTORTNEY HOLDER

.....PLAINTIFFS

(BY M/S ASHOK AGGARWAL AND VINAY KUTHIALA, SENIOR ADVOCATES WITH M/S ATUL JHINGAN, SHILPA SOOD, SANJAY KUMAR, PRIYANSH SHARMA AND HARSHIT DIXIT, ADVOCATES)

AND

DR. REDDY'S LABORATORIES LIMITED KHOL, NALAGARH, SOLAN DISTRICT, NALAGARH ROAD, BADDI, HIMACHAL PRADESH.
ALSO AT
DR. REDDY'S LABORATORIES LIMITED, VILLAGE MAUJA THANA, NALAGARH,

BADDI ROAD, BADDI, SOLAN DISTRICT, HIMACHAL PRADESH 173205.
ALSO AT
DR. REDDY'S LABORATORIES LIMITED, 8K-3-337, ROAD NO. 3 BANJARA HILLS HYDERABAD, TELANGANA 500034.

.....DEFENDANT

(BY MR. BIPIN CHANDER NEGI, SENIOR ADVOCATE WITH M/S JAI SAI DEEPAK, GURUSWAMY NATRAJAN, SHRADHA KAROL, ANKUR VYAS & UDIT KAUSHIK, ADVOCATES FOR THE DEFENDANT)

OMPS NO. 532, 565 AND 692 OF 2021
IN COMS No. 5 of 2021
Reserved on: 07.01.2022
Decided on: 11.03.2022

Code of Civil Procedure, 1908 - Order 8 Rule 1 – Striking of defence in commercial suits – Plaintiff filed application within 120 days - Held - Till the period of 120 days is over the plaintiff cannot call up on the Court to close the right of defendant from filing the written statement – Application without merits – Application dismissed. (Para 34)

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

Cases referred:

Dalpat Kumar and Another vs. Prahlad Singh and Others, (1992) 1 SCC 719;
M/s Bishwanath Prasad Radhey Shyam vs. Hindustan Metal Industries, (1979) 2 SCC 511;

These applications coming on for pronouncement of order this day, Hon'ble Mr. Ajay Mohan Goel, passed the following:-

O R D E R

OMPS No. 532 AND 565 OF 2021

This order shall dispose of OMP No. 532 of 2021, which has been filed by the plaintiffs/applicants under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure praying for interim directions as also OMP No. 565 of 2021, which has been filed under Order XXXIX, Rule 4, read with Section 151 of the Code of Civil Procedure, praying for vacation of ad-interim injunction, dated 20.10.2021.

2. Brief facts necessary for the adjudication of these applications are as under:-

Applicants/plaintiffs in OMP No. 532 of 2021 (hereinafter to be referred as 'the plaintiffs' for convenience sake) have filed a suit for permanent prohibitory injunction for restraining the defendants from infringing the patent owned by plaintiff No. 1 alongwith other ensuing reliefs. The case of the plaintiffs is that plaintiff No. 1 is a company incorporated under the laws of Germany and plaintiff No. 2 is a company registered under the Companies Act. Plaintiff No. 1 is the owner of plethora of patents worldwide, including Indian Patent No. 268846 (hereinafter to be referred as 'subject patent or IN 846' for short). The subject patent was granted in favour of plaintiff No. 1 on 18.09.2015 as per Section 43 of the Indian Patents Act 1970, under 'IN 846' for pharmaceuticals product titled "GLUCOPYRANOSYL-SUBSTITUTED BENZENOL DERIVATIVES, DRUGS CONTAINING SAID COMPOUNDS, THE USE THEREOF AND METHOD FOR THE PRODUCTION THEREOF" for a term of 20 years from the date of filing.

3. When OMP No. 532 was listed on 20.10.2021, the following order was passed:-

> *"Notice in above terms. Till the next date of hearing, the respondent is restrained either itself or through its directors, licensees, stockiest and distributors, retailers, agents, servants and/or anyone claiming through any of it, jointly and severally,*

from infringing the patent rights of plaintiff/applicant No. 1 under Indian Patent No. 268846 by launching, making, using, offering for sale, selling, importing and/or exporting the medicinal product Empagliflozin in any form whatsoever, including Empagliflozin API, the medicinal product "Empagliflozin Tablet" and/or "Empagliflozin + Metformin Hydrochloride Tablets" or any "generic version" thereof or any product sold under the trademark/name "VICRA" or any other trademark/name whatsoever, or any other product covered by the subject patents granted by the Controller of Patents in favour of plaintiff/applicant No. 1. Respondent is further directed to remove the impugned product from its website or any other website(s)/e-portal(s).

This order is subject to compliance of provisions of Order 39, Rule 3 of the Code of Civil Procedure."

4. In the order sheet, the OMP number is mentioned as OMP No. 535 of 2021, which appears to be a typographical error as the OMP in issue is OMP No. 532 of 2021.

5. The arguments on behalf of the plaintiffs were advanced by Mr. Ashok Aggarwal, learned Senior Counsel and Mr. Vinay Kuthiala, learned Senior Counsel. Arguments on behalf of the defendants were advanced by Mr. Bipin Chander Negi, learned Senior Counsel and Mr. Jai Sai Deepak, learned Counsel.

6. Learned Senior Counsel appearing for the plaintiffs argued that for the purpose of grant of interim relief, three primary ingredients, i.e. *prima facie* case, balance of convenience and irreparable loss are all in favour of the plaintiffs. In addition, they argued that as the defendant has not been able to lay any credible challenge to the 'subject patent', therefore, this application be disposed of by confirming ad-interim order dated 20.10.2021.

7. On the other hand, learned Counsel for the defendant have submitted that as the defendant has laid a credible challenge to the 'subject patent' therefore, its prayer for vacation of ad-interim injunction granted on

20.10.2021 be allowed and the application filed under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure be dismissed and the application filed under Order XXXIX, Rule 4 of the Code of Civil Procedure be allowed.

8. To substantiate their contention that all ingredients exist in favour of the plaintiffs for the continuation of interim order, learned Senior Counsel have argued that in the present case, the 'subject patent' was granted to the plaintiffs on 18.09.2015, the international date of filing of the 'subject patent' being 11th March, 2005, the date of expiry of the patent is 11th March, 2025. According to the plaintiffs, the following points demonstrate that there exists a good case in their favour for confirmation of the interim order:

(a) 'subject patent' is old and well established;
(b) 'subject patent' is commercially highly successful and extensively useful;
(c) admittedly, no party, including the defendant, raised any pre-grant opposition, post-grant opposition, including against the quality and strength of the 'subject patent';
(d) the patent was granted in favour of the plaintiffs after following the substantive provisions of the The Patents Act, 1970;
(e) the patent has had a successful commercial run in India for more than six years, without any challenge, including that from the defendant;
(f) the Central Government has not filed any revocation for the 'subject patent' in terms of Section 64 of the Patents Act, 1970;
(g) the Central Government has not made any declaration for revocation of the 'subject patent' in public interest in terms of Section 67 of the Patents Act;
(h) none, including the defendant, applied under Section 84 of the Patents Act for grant of compulsory licence of the 'subject patent' on the grounds as mentioned therein;
(i) no challenge was ever put forth by the defendants to the 'subject patent' except immediately before the commercial launch of its infringing product in the month of October 2021,

when a revocation petition was filed by the defendants under Section 64 of the Patents Act.

9. Learned Senior Counsel appearing for the plaintiffs argued that that above facts clearly and categorically demonstrate that there exists a *prima facie* case in favour of the plaintiffs and balance of convenience is also in their favour and in this backdrop, in case, ad-interim order is not confirmed and the defendant is permitted to infringe the 'subject patent' of the plaintiffs, then, the plaintiffs shall suffer irreparable loss, which cannot be compensated monetarily as all the hard work that has gone into the invention of the product in issue and getting it patented would be washed away. Learned Senior Counsel stressed that admittedly the defendant neither has any patent in its name nor did it lay any challenge at the time when the plaintiffs had applied for the 'subject patent' or even after the patent was granted in favour of the plaintiffs. They further submitted that the filing of revocation petition by the defendant, in close proximity with the launch of the infringing product was nothing but an afterthought to hold out that in lieu of its having filed a revocation petition, it has laid a credible challenge to the 'subject patent'.

10. Opposing the prayer of the plaintiffs, learned Counsel for the defendant submitted that in the present case, the defendants have filed a revocation petition against the 'subject patent', as would be evident from the averments also made in the application filed by it under Order XXXIX, Rule 4 of the Code of Civil Procedure, perusal whereof would demonstrate that there is a credible challenge which has been laid by it to the 'subject patent'. Learned Counsel have submitted that it is settled law that mere grant of patent does not lend a presumption of validity to the patent. The scheme of the Patents Act is to provide multi-layer challenges, which are available to a non-patentee to challenge and question the validity of a patent at any time and such validity has to be tested on the anvil of the provisions of the The Patents Act, 1970. It was argued that the provisions of Section 13(4) of the The

Patents Act expressly set out the absence of any presumption of validity due to mere grant and further, as there has been non-compliance of the statutory provisions of Sections 8 and 64 of the Patents Act, therefore, the patent in issue is not a valid patent and the defendant has laid a credible challenge to the same. They have also argued that in the case of pharmaceutical patents, which have been recognized as a specific species of patent infringement litigation, the overwhelming factor is that of public interest-namely the need to provide for affordable and accessible healthcare products. They also argued that in addition to the settled principles of *prima facie* case, balance of convenience and irreparable loss, the plaintiffs also have to satisfy that there is no **credible challenge** to the 'subject patent' which in the present case, the plaintiffs have not been able to demonstrate and in this view of the matter, the ad-interim injunction granted in favour of the plaintiffs is liable to be vacated and the prayer of the plaintiffs for interim injunction is liable to be dismissed.

11. I have heard learned Counsel for the parties and have also gone through the relevant pleadings and documents appended therewith.

12. Following orders passed by various High Courts disposing of applications filed under Order 39, Rules 1 and 2 of the Code of Civil Procedure as well as appeals thereof, were relied upon by the learned Counsel for the parties:-

(1) Bajaj Auto Limited vs. TVS Motor Company Limited, 2008 SCC Online Madras 121;
(2) Cipla Limited vs. Novartis AG and another, 2017 SCC Online Delhi 7393;
(3) M/s National Research Development Corporation of India, New Delhi vs. M/s The Delhi Cloth and General Mills Co. Ltd and others, AIR 1980 Delhi 132;
(4) Bristol Myers Squibb Company & Ors vs. Mr. J.D. Joshi and another, 2015 SCC Online Delhi 10109;

(5) Communication Components Antenna Inc. vs. ACE Technologies Corporation and others, 2019 SCC Online Delohi 9123;
(6) Merck Sharp and Dohme Corporation and Another vs. Glenmark Pharmaceuticals, 2015 SCC Online Delhi 8227;
(7) FMC Corporation & Another vs. Best Crop Science LLP & Another, 2021 SCC Online Delhi 3646;
Natco Pharma Ltd. vs. Bristol Myers Squibb Holdings Ireland Unlimited Company and others, 2019 SCC Online Delhi 9124;
Ten XC Wireless Inc and Others vs. Mobi Antenna Technologies (Shenzhen) Co. Ltd., 2011 SCC Online Delhi 4648;
Astrazeneca AB and Others vs. Intas Pharmaceuticals Ltd. and Others, 2021 SCC Online Delhi 3746;

13. The pronouncements made by High Courts mentioned hereinabove in the orders passed by them either on the applications filed by the parties concerned under Order XXXIX, Rules 1 and 2 of the Code of Civil Procedure or in the appeals, which were referred to by the parties against the orders passed by learned Single Judge in the applications filed under Order XXXIX, Rules 1 and 2 are not being quoted to by me in extensio for the reason that the orders which were so passed by the Courts were in the backdrop of the factual matrix involved in the cases before them. Suffice it to say that the principles in general being followed for the grant of interim injunction in patent matters by various Courts, as they stand summarized in Ten XC Wireless Inc (supra), are as under:-

(i) The registration of a patent per se does not entitle the plaintiffs to an injunction. The certificate does not establish a conclusive right.

(ii) There is no presumption of validity of a patent, which is evident from the reading of Section 13(4) as well as Sections 64 and 107 of the Patents Act.

(iii) The claimed invention has to be tested and tried in the laboratory of Courts.

(iv) The Courts lean against monopolies. The purpose of the legal regime in the area is to ensure that the inventions should benefit the public at large.

(v) The plaintiff is not entitled to an injunction if the defendant raises a credible challenge to the patent. Credible challenge means a serious question to be tried. The defendant need not make out a case of actual invalidity. Vulnerability is the issue at the preliminary injunction stage whereas the validity is the issue at trial. The showing of a substantial question as to invalidity thus requires less proof than the clear and convincing showing necessary to establish invalidity itself.

(vi) At this stage, the Court is not expected to examine the challenge in detail and arrive at a definite finding on the question of validity of the patent. That will have to await at the time of trial. However, the Court has to be satisfied that a substantial, tenable and credible challenge has been made.

(vii) The plaintiff is not entitled to an injunction, if the patent is recent, its validity has not been established and there is a serious controversy about the validity of the patent.

14. In addition, the parties also relied upon following judgments passed by Hon'ble Supreme Court of India:-

(1) M/s Bishwanath Prasad Radhey Shyam vs. Hindustan Metal Industries, (1979) 2 Supreme Court Cases 511;

(2) Dalpat Kumar and another vs. Prahlad Singh and others, (1992) 1 Supreme Court Cases 719;

15. In **M/s Bishwanath Prasad Radhey Shyam** vs. **Hindustan Metal Industries**, (1979) 2 Supreme Court Cases 511, Hon'ble Supreme Court has been pleased to hold that grant and sealing of the patent, or the decision rendered by the Controller in the case of opposition, does not guarantee the

validity of the patent, which can be challenged before the High Court on various grounds in revocation or infringement proceedings. Hon'ble Supreme Court further held that the 'validity of a patent is not guaranteed by the grant', was also expressly provided in Section 13(4) of the Patents Act, 1970.

16. Hon'ble Supreme Court of India in **Dalpat Kumar and Another** vs. **Prahlad Singh and Others**, (1992) 1 Supreme Court Cases 719 has held that it is settled law that the grant of injunction is a discretionary relief and exercise thereof is subject to the Court satisfying that (1) there is a serious disputed questions to be tried in the suit and that an act, on the facts before the Court, there is probability of his being entitled to the relief asked for by the plaintiff/defendant; (2) the Court's interference is necessary to protect the party from the species of injury. In other words, irreparable injury or damage would ensue before the legal right would be established at trial' and (3) that the comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that would be likely to arise from granting it. In para-5 of the judgment, Hon'ble Apex Court has been further pleased to hold as under:-

> *"5. Therefore, the burden is on the plaintiff by evidence aliunde by affidavit or otherwise that there is "a prima facie case" in his favour which needs adjudication at the trial. The existence of the prima facie right and infraction of the enjoyment of his property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established, on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he*

> *needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition also is that "the balance of convenience" must be in favour of granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject-matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit."*

17. Coming back to the facts of the present case, the plaintiffs in this case filed an international patent application for the subject patent on 11.03.2005 and national phase patent application in India on 23rd August, 2006. The patent was granted in favour of the plaintiffs in India on 18th of September, 2015 under the Patents Act, 1970, which was published under Section 43(2) of the Patents Act on 25th September, 2015. The term of the patent is 20 years and the same is to expire on 11.03.2025.

18. On the other hand, admittedly, the defendant does not has any patent qua the infringing product and no challenge, either to the application filed by the plaintiffs for grant of patent was laid by the defendant nor any post patent challenge was laid by it. Of course, in light of law laid down by Hon'ble Supreme Court in M/s Bishwanath Prasad Radhey Shyam (supra), grant of patent does not guarantee the validity of a patent, which can be challenged before the High Court on various grounds in revocation or infringement

proceedings, but the factum of a patent being there in favour of the plaintiffs and the factum of no pre or post grant challenge to the same by anyone, including the defendant, except now by way of a revocation petition which was filed in close proximity to the launch of the infringing product, does creates a *prima facie* case and balance of convenience in favour of the plaintiffs. The Court is observing so for the reason that as per the plaintiffs, since the patent was granted on 18th September, 2015, the same has had a successful commercial run till date which continues and there is no serious dispute qua the same. The patent is an old patent and it has not been granted recently to the plaintiffs. Therefore, these facts do create *prima facie* case and balance of convenience in favour of the plaintiffs vis-a-vis the defendant, who admittedly does not has any patent qua the infringing product.

19. In the light of what has been discussed hereinabove, if an infringer is not restrained from infringing the patent of patent holder, then, but of course, the patent holder will suffer from irreparable loss and it cannot be said that the infringer stands on the same pedestal on which the patent holder is. Of course, the patent of the plaintiffs is vulnerable. It is open to challenge and now it has also been challenged by the defendant by way of a revocation petition. But mere filing of revocation proceedings cannot be treated to be a "credible challenge" to the old and successful patent of the plaintiffs. As far as the element of public interest is concerned, it may be observed that in the present case, the Central Government has not invoked the provisions of Section 66 of the Patents Act and after following the procedure referred to therein, made a declaration in the Official Gazette to the effect that the patent of the plaintiffs stand revoked in public interest. Not only this, the defendant has not approached the competent authority under Section 84 of the Patents Act after the expiry of three years from the grant of the patent for grant of compulsory licence of patent on the conditions enumerated therein.

20. At this stage, it is relevant to refer to Section 48 of the Patents Act as it stood prior to the amendment and also post amendment, which amendment was carried out in the said section w.e.f. 20.05.2003.

21. Section 48 of the Patents Act, which deals with rights of the patentees, before amendment provided as under:

Section 48. Rights of patentees

(1) Subject to the other provisions contained in this Act, a patent granted before the commencement of this Act, shall confer on the patentee the exclusive right by himself, his agents or licensees to make, use, exercise, sell or distribute the invention in India.

2) Subject to the other provisions contained in this Act and the conditions specified in Section 47, a patent granted after the commencement this Act shall confer upon the patentee---

(a) where the patent is for an article or substance, the exclusive right by himself, his agents or licensees to make, use, exercise, sell or distribute such article or substance in India;

(b) where a patent is for a method or process of manufacturing an article or substance, the exclusive right by himself, his agents or licensees to use or exercise the method or process in India."

22. After amendment, said Section now reads as under:-

Section 48: Rights of patentees.

Subject to the other provisions contained in this Act and the conditions specified in Section 47, a patent granted under this Act shall confer upon the patentee--

(a) where the subject-matter of the patent is a product, the exclusive right to prevent third parties, who do not have his consent, from the act of making, using, offering for sale, selling or importing for those purposes that product in India;

(b) where the subject-matter of the patent is a process, the exclusive right to prevent third parties, who do not have his consent, from the act of using that process, and from the act of using, offering for sale, selling or importing for those purposes the product obtained directly by that process in India:

23. It is evident that though subject to other provisions contained in the Patents Act, including Section 47 thereof, a patent granted under the Patents Act does confers upon the patentee, where the subject matter of the patent is a product, the exclusive right to prevent a third party, who do not have his consent, from the act of making, using, offering for sale etc. of that product in India. Thus, a statutory right, which has been conferred upon the patentee, clothes the patentee with an umbrella of safety qua the infringement of its patent by a third party.

24. In just a few lines if this Court may add, the premise of the defendant that there is "credible challenge" to the subject patent of the plaintiffs is that the subject matter of the subject patent 'IN 846' granted to the plaintiffs was covered by the claim of another Indian Patent i.e. Patent Number 'IN 205147' and further that the priority dates claimed in 'IN147' were 12.10.1999 and 05.04.2000, which patent was granted on 15.03.2007 and has thus expired on 02.12.2020 and the patent of the plaintiffs is nothing but evergreening of the earlier patent. Suffice to say that the holder of the patent, evergreening of whose patent is alleged by the defendant to have been done by the plaintiffs, never filed any

objections, either pre-grant or post-grant, against the application for grant of patent by the plaintiffs and further there is no allegation made by the defendant, as of now, that there was some collusion between the party, which was granted patent 'IN147' and the plaintiffs, who was granted patent 'IN846'. Therefore, on this count, it cannot be said that at this stage, the defendant has rendered the patent of the plaintiffs to be vulnerable so as to lay a credible challenge to it for the purpose of declining interim protection. These observations have been made by this Court only to demonstrate its *prima facie* satisfaction on the point urged and this Court is refraining itself from making any further observation on merit in view of observations made by Hon'ble Supreme Court of India in Special Leave to Appeal C No. 18892/2017, titled as ***Az Tech (India) & Anr. Vs. Intex Technologies (India) Ltd. & Anr***., on 16.08.2017, in which Hon'ble Apex Court has been pleased to observe as under:-

> *"3. In the present Special Leave Petition (No.18892 of 2017) on 31st July, 2017, this Court passed the following order: Having read the order of the High Court of Delhi dated 10th March, 2017 passed in FAO(OS) No.1/2017 we find that it is virtually a decision on merits of the suit. We wonder if the High Court has thought it proper to write such an exhaustive judgment only because of acceptance of the fact that the interim orders in Intellectual Property Rights (IPR) matters in the Delhi High Court would govern the parties for a long duration of time and disposal of the main suit is a far cry.*
>
> *This is a disturbing trend which we need to address in the first instance before delving into the respective rights of the parties raised in the present case. We, therefore, direct the Registrar General of the Delhi High Court to report to the Court about the total number of pending IPR suits, divided into different categories, in the Delhi High Court; stage of each suit; and also the*

period for which injunction/interim orders held/holding the field in each of the such suits.

The Registrar General of the Delhi High Court will also indicate to the Court what, according to the High Court, would be a reasonable way of ensuring the speedy disposal of the suits involving intellectual property rights which are presently pending.

We will expect the Registrar General of the Delhi High Court to report to the Court within two weeks from today, latest by 14th August, 2017."

25. Accordingly, in light of the observations made hereinabove, the ad-interim protection granted to the plaintiffs, vide order dated 20.10.2021, is made absolute during the pendency of the civil suit, of course, subject to any further order(s) which may be passed by this Court and the application filed under Order 39 Rule 4 of the Code of Civil Procedure praying for vacation of ad-interim injunction is dismissed. No order as to costs. Both the applications stand disposed of in above terms.

OMP No. 692 of 2021

26. This order shall dispose of an application filed under Order VIII, Rule 1 read with Section 151 of the Civil Procedure Code, vide which the applicants/plaintiffs have prayed for the following reliefs:-

"*a) Close the right of the Respondent to file its Written Statement and pronounce judgment against the Respondent;*

b) Strike out the defence of the Respondent."

27. The case of the applicants is that they have filed a suit for infringement, i.e. Commercial Suit No.5 of 2021, against respondent/defendant, praying for restraining the respondent from infringing the patent rights of the applicants under the Indian Patent No.268846 by launching, advertising etc. their medicinal products details whereof are

mentioned in the application. It is further averred in the application that when the matter came up for hearing before this Court on 20.10.2021, an ad-interim order was passed in favour of the applicants. As per the applicants, respondent received a copy of order dated 20.10.2021 via e-mail and the entire set of pleadings via post which were forwarded in compliance of order XXXIX, Rule 3 of the Civil Procedure Code on 25.10.2021. Thereafter, on 29.10.2021, respondent filed an application under Order XXXIX, Rule 4 of the Civil Procedure Code, praying for vacation of ad-interim injunction granted on 20.10.2021. According to the applicants, till the date of filing of the present application, the respondent had not filed its written statement, though the statutory period of 30 days provided under Order VIII, Rule 1 of the Civil Procedure Code as amended by Section 16 read with Schedule 1 of the Commercial Courts Act, 2015 to file the same expired on 24.11.2021. The contention of the applicants is that as respondent failed to adhere to the statutory and mandatory time line of 30 days to file the written statement and thereafter its not taking any step to extend such time line, shows complete disregard to the due process of law on its behalf, accordingly a vested right has accrued upon the applicants praying for pronouncement of judgment in their favour. It is further the case of the applicants that in terms of the amendment of the Civil Procedure Code by this Court, Rule 11 has been added to Order VIII, perusal of which demonstrates that it is mandatory to comply with said Rule and failure to comply thereto results in striking off the defence of the respondent. Accordingly, a prayer has been made for striking off the defence of the respondent. It is also the contention of the applicants that the respondent/defendant in the absence of having filed the written statement cannot take the assistance of the averments which have been made in the application filed by them under Order XXXIX, Rule 4 of the Civil Procedure Code and no cognizance of the contents thereof can be taken by this Court. It

is in this background that the application has been filed, praying for the reliefs already enumerated hereinabove.

28. In reply to the application, the defendant has taken the stand that the filing of application is frivolous and a dilatory tactic on the part of the applicants to evade the arguments in the application filed under Order XXXIX, Rule 4 of the Civil Procedure Code by the defendant. The contention of the defendant is that the provisions of Order XXXIX, Rule 4 of the Civil Procedure Code, as they stand after coming into force of the Commercial Disputes Act, 2015, nowhere provide that the application can be filed only subject to the filing of the written statement in terms of Order VIII, Rule 1 of the Civil Procedure Code. As per the defendant, the Civil Procedure Code expressly provides for an application under Order XXXIX, Rule 4 of the Civil Procedure Code to be preferred by an aggrieved defendant so that such a party can quickly knock the doors of the Court which has issued *ex parte* ad-interim order. It is further the stand of the defendant that even otherwise the statutory period which is envisaged in Order VIII, Rule 1 of the Civil Procedure Code as it stands in relation to the Commercial Disputes also, had not elapsed as on the date of filing of the application or on the date of filing of the reply, therefore, the prayer of the applicants to struck of the defence of the defendant was premature and the application was liable to be dismissed.

29. I have heard learned Senior Counsel appearing for the parties and also gone through the averments as they stand contained in the application as well as reply.

30. Chapter-5 of the Commercial Disputes Act, 2015 deals with the amendments to the provisions of the Code of Civil Procedure, 1908. Section 16 of the Commercial Disputes Act, 2015 provides as under:-

> "***16. Amendments to the Code of Civil Procedure, 1908 in its application to commercial disputes***- *(1) The provisions of the Code of Civil Procedure, 1908 (5 of 1908) shall, in their application*

to any suit in respect of a commercial dispute of a Specified Value, stand amended in the manner as specified in the Schedule.

(2). The Commercial Division and Commercial Court shall follow the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act, in the trial of a suit in respect of a commercial dispute of a Specified Value.

(3). Where any provision of any rule of the jurisdictional High Court or any amendment to the Code of Civil Procedure, 1908 (5 of 2908), by the State Government is in conflict with the provisions of the Code of Civil Procedure, 1908 (5 of 1908), as amended by this Act, the provisions of the Code of Civil Procedure as amended by this Act shall prevail."

31. In terms of the Schedule appended with the Commercial Disputes Act, 2015, in Order VIII, Rule 1 of the Civil Procedure Code, for the proviso already existing, the following proviso has been substituted:-

"*Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the written statement on such other day, as may be specified by the Court, for reasons to be recorded in writing and on payment of such costs As the Court deems fit, but which shall not be later than one hundred twenty days from the date of service of summons and on expiry of one hundred twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record."*

32. A perusal of the proviso as it exists in Order VIII, Rule 1 of the Civil Procedure Code and as it exists with regard to the Commercial Disputes Act, 2015, demonstrates that the provisions thereof are almost *pari materia* except that when it comes to a commercial dispute the extra riders which are now contained in the proviso are to the effect that if the defendant is being allowed to file written statement after 30 days from the date of receipt of summons, then the same has to be on payment of such costs as the Court

may deem fit but it shall not be later than 120 days from the date of service of summons and on expiry of 120 days from the date of service of summons the defendant shall forfeit the right to file the written statement and the Court shall not allow the written statement to be taken on record.

33. While interpreting said proviso, Hon'ble Supreme Court of India in *SCG Contracts (India) Private Limited* Versus *K.S. Chamankar Infrastructure Private Limited and Others*, *(2019) 12 Supreme Court Cases 210*, has been pleased to hold that several High Court judgments on the amended Order VIII, Rule 1 of the Civil Procedure Code have held that given the consequence of non filing of written statement, the amended provisions of the Civil Procedure Code will have to be held to be mandatory and said view is correct in view of the fact that the consequence of forfeiting a right to file a written statement: "non-extension of any further time and the fact that the Court will not allow the written statement to be taken on record, all points to the fact that the earlier law on Order VIII, Rule 1 of the Civil Procedure Code on filing of written statement under Order VIII, Rule 1 has been set at naught". The relevant paras of the said judgments are quoted hereinbelow:-

> *"8) The Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 came into force on 23.10.2015 bringing in their wake certain amendments to the Code of Civil Procedure. In Order V, Rule 1, sub-rule (1), for the second proviso, the following proviso was substituted:*
>
> ***"Provided further that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the written statement on such other days, as may be specified by the Court, for reasons to be recorded in writing and on payment of such costs as the court deems fit, but which shall not be later than one hundred twenty days from the date of service of summons and on expiry of one hundred and twenty days from the date of service of summons, the defendant shall***

forfeit the right to file the written statement and the court shall not allow the written statement to be taken on record." Equally, in Order VIII Rule 1, a new proviso was substituted as follows:

"Provided that where the defendant fails to file the written statement within the said period of thirty days, he shall be allowed to file the written statement on such other day, as may be specified by the court, for reasons to be recorded in writing and on payment of such costs as the Court deems fit, but which shall not be later than one hundred and twenty days from the date of service of summons and on expiry of one hundred and twenty days from the date of service of summons, the defendant shall forfeit the right to file the written statement and the court shall not allow the written statement to be taken on record." This was re-emphasized by re-inserting yet another proviso in Order VIII Rule 10 CPC, which reads as under:-

"Procedure when party fails to present written statement called for by Court.- Where any party from whom a written statement is required under Rule 1 or Rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on pronouncement of such judgment a decree shall be drawn up.

Provided further that no Court shall make an order to extend the time provided under Rule 1 of this Order for filing of the written statement." A perusal of these provisions would show that ordinarily a written statement is to be filed within a period of 30 days.

However, grace period of a further 90 days is granted which the Court may employ for reasons to be recorded in writing and payment of such costs as it deems fit to allow such written statement to come on record. What is of great importance is the fact that beyond 120 days from the date of service of summons, the defendant shall forfeit the right to file the written

statement and the Court shall not allow the written statement to be taken on record. This is further buttressed by the proviso in Order VIII Rule 10 also adding that the Court has no further power to extend the time beyond this period of 120 days.

9) In Bihar Rajya Bhumi Vikas Bank Samiti (supra), a question was raised as to whether Section 34(5) of the Arbitration and Conciliation Act, 1996, inserted by Amending Act 3 of 2016 is mandatory or directory. In para 11 of the said judgment, this Court referred to Kailash vs. Nanhku, (2005) 4 SCC 480 referring to the text of Order 8 Rule 1 as it stood pre the amendment made by the Commercial Courts Act. It also referred to the Salem Advocate Bar Association vs. Union of India, (2005) 6 SCC 344, which, like the Kailash judgment, held that the mere expression "shall" in Order 8 Rule 1 would not make the provision mandatory. This Court then went on to discuss in para 17 State vs. N.S. Gnaneswaran, (2013) 3 SCC 594 in which Section 154(2) of the Code of Criminal Procedure was held to be directory inasmuch as no consequence was provided if the Section was breached. In para 22 by way of contrast to Section 34, Section 29-A of the Arbitration Act was set out. This Court then noted in para 23 as under:

"23. It will be seen from this provision that, unlike Sections 34(5) and (6), if an award is made beyond the stipulated or extended period contained in the section, the consequence of the mandate of the arbitrator being terminated is expressly provided. This provision is in stark contrast to Sections 34(5) and (6) where, as has been stated hereinabove, if the period for deciding the application under Section 34 has elapsed, no consequence is provided. This is one more indicator that the same Amendment Act, when it provided time periods in different situations, did so intending different consequences."

10) Several High Court judgments on the amended Order VIII Rule 1 have now held that given the consequence of non-filing of written statement, the amended provisions of the CPC will have to be held to be mandatory. [See Oku

> ***Tech Private Limited vs. Sangeet Agarwal & Ors. by a learned Single Judge of the Delhi High Court dated 11.08.2016 in CS (OS) No. 3390/2015 as followed by several other judgments including a judgment of the Delhi High Court in Maja Cosmetics vs. Oasis Commercial Pvt. Ltd. 2018 SCC Online Del 6698.***
>
> *11) We are of the view that the view taken by the Delhi High Court in these judgments is correct in view of the fact that the consequence of forfeiting a right to file the written statement; non-extension of any further time; and the fact that the Court shall not allow the written statement to be taken on record all points to the fact that the earlier law on Order VIII Rule 1 on the filing of written statement under Order VIII Rule 1 has now been set at naught."*

34. Coming to the facts of this case, admittedly neither on the date of filing of application under Order VIII, Rule 1 of the Civil Procedure Code, nor on the dates of hearing of the arguments on the same the statutory period of 120 days provided under the amended proviso had expired. This Court is of the considered view that whereas the defendant has a statutory right of filing written statement in a commercial dispute as within 30 days form the date of receipt of the notice, it further has a right to file a written statement if not filed within 30 days, then within 120 days of the receipt of the notice, subject to the conditions mentioned in the proviso. In the event of the defendant preferring a written statement beyond 30 days and before 120 days as from the date of receipt of the summons, then it is for the Court to take a call as to whether the written statement has to be permitted to be taken on record or not, by assigning reasons. However, till the period of 120 days is over, the plaintiff cannot call upon the Court to close the right of the defendant from filing the written statement.

35. In a given case, the defendant may file the written statement on the last day and make out a good case justifying the late filing of the same. Therefore, when the statute envisages a specific period, the same cannot be

curtailed by the Court on the mere asking of the other side. In case the Court concedes to such request of the plaintiff the same shall cause irreparable loss to the defendant because the Court shall be extinguishing a right of the defendant which stands conferred upon it by the statute. However, in case the defendant in a commercial dispute fails to file a written statement even within 120 days as from the date of service of the summons, then written statement filed subsequently, cannot be ordered, even by the Court, to be taken on record in terms of the provisions of the amended proviso as interpreted by the Hon'ble Supreme Court of India in SCG Contracts' case (supra). Accordingly, this Court does not concurs with the prayer of the plaintiffs to strike of the defence of the defendant in the application filed under Order VIII, Rule 1 of the Civil Procedure Code at the stage of filing of the present application.

36. Now, coming to the contentions which stand raised with regard to the effect of not filing of written statement vis-a-vis the application which has been filed under Order XXXIX, Rule 4 of the Civil Procedure Code, by the defendant for vacation of the ad-interim order, this Court is of the considered view that when the Civil Procedure Code itself does not expressly provides that an application under Order XXXIX, Rule 4 of the Civil Procedure Code cannot be filed in the absence of a written statement, then such an rider cannot be created by the Court.

37. This Court is of the considered view that a defendant who has suffered an *ex parte* ad-interim order, can always file an application under Order XXXIX, Rule 4 of the Civil Procedure Code for vacation of the ad-interim order on the grounds available under the said provision and for this it is not necessary for it to file a written statement. The effect of an ad-interim order against the defendant may in a given situation demand an urgent re-look upon the same by the Court concerned on an application of the defendant, for which waiting for a written statement also to be filed, may lead to great injustice as far as the defendant is concerned in the given facts of the case.

38. Therefore, this Court does not concurs with the submissions which have been made on behalf of the applicants that the averments made in the application filed under Order XXXIX, Rule 4 of the Civil Procedure Code or the documents appended therewith cannot be gone into by this Court for the purpose of adjudication of the issue of ad-interim relief in the absence of any written statement being filed by the respondent/defendant.

Accordingly, in view of the findings returned hereinabove, this application being devoid of any merit is dismissed.

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

Between:

1. SH. RAKESH SHARMA,
   S/O SH. OM PAL
   BEING MINOR THROUGH
   FATHER AND NATURAL
   GUARDIAN SH. OM PAL
   R/O THANIKPURA,
   MAUJA LOHARA,
   TEHSIL AMB,
   DISTRICT UNA, H.P.

2. SH. MOHIT SHARMA,
   S/O SH. OM PAL,
   R/O THANIKPURA,
   MAUJA LOHARA,
   TEHSIL AMB,
   DISTRICT UNA, H.P.
3. SH. OM PAL,
   R/O THANIKPURA,
   MAUJA LOHARA,
   TEHSIL AMB,
   DISTRICT UNA, H.P.

...APPELLANTS/ DEFENDANTS NO. 2, 3, & 5

(MR. ARSH RATTAN,
ADVOCATE, VICE
MR. ANUP RATTAN,
ADVOCATE, FOR
APPELLANTS NO. 1 & 2,

MR. TARA SINGH CHAUHAN,
ADVOCATE, FOR APPELLANT NO. 3)

AND

1. SH. BHUSHAN LAL,
S/O SH. RULIA RAM,
R/O KANGRA, TEHSIL
AND DISTRICT KANGRA,
H.P.

...RESPONDENT/PLAINTIFF

2. SH. DESH RAJ,
S/O SH. DIWAN CHAND,
S/O SH. DALLU,
R/O VILLAGE THANIKPURA,
MOUZA UPARLA LOHARA,
TEHSIL AMB,
DISTRICT UNA, H.P.
(SINCE DECEASED)
THROUGH LEGAL
REPRESENTATIVES:

a. SMT. UMA WATTI,
WD/O LATE SH. DESH RAJ

b. SH. SHYAM MORARI SHARMA,
S/O LATE SH. DESH RAJ

c. SH. ASHOK KUMAR,

S/O LATE SH. DESH RAJ

ALL RESIDENT OF
VILLAGE THANIKPURA,
MOUZA UPARLA LOHARA,
TEHSIL AMB,
DISTRICT UNA, H.P.

...RESPONDENT/DEFENDANT NO. 1

3. SH. BHAGAT RAM,
S/O SH. DIWAN CHAND,
S/O SH. DALLU,
R/O VILLAGE THANIKPURA,
MOUZA UPARLA LOHARA,
TEHSIL AMB,
DISTRICT UNA, H.P.

...RESPONDENT/DEFENDANT NO. 4

(MR. K.D. SOOD, SENIOR ADVOCATE, WITH MR. RAJ THAKUR, ADVOCATE, FOR R-1,

MR. RISHAB CHANDEL, ADVOCATE,
VICE MS. MEGHA KAPUR GAUTAM,
ADVOCATE, FOR R-2(a) TO 2 (c))

2. REGULAR FIRST APPEAL No. 276 of 2003

Between:

1. SH. DESH RAJ,
S/O SH. DIWAN CHAND,
S/O SH. DALLU,
R/O VILLAGE THAMIPURA,
MOUZA UPARLA LOHARA,
TEHSIL AMB,
DISTRICT UNA, H.P.

(SINCE DECEASED)
THROUGH LEGAL
REPRESENTATIVES:

a. SMT. UMA WATTI,
WD/O LATE SH. DESH RAJ

b. SH. SHYAM MORARI SHARMA,
S/O LATE SH. DESH RAJ

c. SH. ASHOK KUMAR,
S/O LATE SH. DESH RAJ

ALL RESIDENTS OF
VILLAGE THANIKPURA,
MOUZA UPARLA LOHARA,
TEHSIL AMB,
DISTRICT UNA, H.P.

...APPELLANTS/ RESPONDENT NO. 1

(BY MR. RISHAB CHANDEL,
ADVOCATE, VICE
MS. MEGHA KAPUR GAUTAM,
ADVOCATE)

AND

1. SH. BHUSHAN LAL,
S/O SH. RULIA RAM,
R/O M/S. PANEM ENTERPRISES,
WARD NO. 8,
DHARAMSHALA ROAD,
NEAR BUS STAND KANGRA,
TEHSIL AND DISTRICT
KANGRA, H.P.

...RESPONDENT/PLAINTIFF

2. SH. RAKESH SHARMA;

3. SH. MOHIT SHARMA;

SONS OF SH. OM PAUL,
S/O SH. BHAGAT RAM,
S/O SH. DIWAN CHAND,

R/O VILLAGE THANIKPURA,
MOUZA UPERLA LOHARA,
TEHSIL AMB,
DISTRICT UNA, H.P.

DEFENDANTS NO. 2 & 3
MINORS THROUGH
SMT. NEELAM,
W/O SH. OM PAUL,
THEIR MOTHER AND
NATURAL GUARDIAN,
R/O VILL. THANIKPURA,
TEHSIL AMB,
DISTRICT UNA, H.P.

4. SHRI BHAGAT RAM,
S/O SH. DEWAN CHAND,
R/O VILLAGE THANIKPURA,
MOUZA UPERLA LOHARA,
TEHSIL & DISTT. UNA.

5. SH. OM PAL,
S/O SH. BHAGAT RAM,
S/O SH. DIWAN CHAND,
R/O VILLAGE THANAKPURA,
MOUZA LOHARA,
TEHSIL AMB,
DISTRICT UNA, H.P.

...RESPONDENTS/DEFENDANTS

(MR. K.D. SOOD, SENIOR
ADVOCATE, WITH MR. RAJ
THAKUR, ADVOCATE, FOR
R-1,

MR. ARSH RATTAN,
ADVOCATE, VICE MR. ANUP
RATTAN, ADVOCATE, FOR R-2 & 3,

R-4 ALREADY EX-PARTE,

MR. TARA SINGH CHAUHAN,
ADVOCATE, FOR R-5)

REGULAR FIRST APPEAL
No. 272 of 2003 & 276 of 2003
Reserved on: 28.02.2022
Pronounced on: 08.03.2022

Specific Relief Act, 1963 - Section 19(b) - Relief against subsequent purchaser - Held - Specific performance of an agreement to sell, it is not always obligatory for the plaintiff to seek cancellation of sale deed executed in favour of subsequent buyer, however the plaintiff can join such buyer as co-defendant with the original vendor provided that the agreement to sell in favour of plaintiff was executed prior to execution of sale deed in favour of the subsequent buyer - The only exception to sub-section (b) of Section 19 of Specific Relief Act, 1963 is that specific performance of contract can be enforced against any person claiming under either party there to by a title arising subsequently except a transferee for value who has paid his money in good faith and without the notice of original contract there is no need for the plaintiff to seek cancellation of sale deed in favour of the subsequent buyer - Good faith, bonafide purchase and not having notice of earlier contract are all questions of facts which have to be decided on facts of each case on basis of evidence by the parties. (Para 11)

These Appeals coming on for orders this day, ***Hon'ble Mr. Justice Mohammad Rafiq,*** *passed the following:*

O R D E R

These matters have been laid before the Division Bench upon a reference made by a learned Single Judge of this Court vide his order, dated 26th December, 2017, for answering the following questions:

(i) Could the learned Court below decree the suit despite the plaintiff having not specifically assailed the sale deed and sought its cancellation?

(ii) Whether the judgment of this Court in *Rajinder Singh versus Sushil Kumar and others, 2006 (2) Shim. LC 326,* having been impliedly overruled or whittled down by the subsequent judgment of the Hon'ble Supreme Court in *B. Vijaya Bharathi versus P. Savitri and Ors., AIR 2017 SC 3934,* can be said to have laid down the correct law?

2. We have heard Mr. K.D. Sood, learned Senior Counsel, Mr. Arsh Rattan, Mr. Tara Singh Chauhan and Mr. Rishab Chandel, Advocates, appearing for the respective parties.

3. Facts of the case in brief are that the plaintiff (respondent No. 1) filed a suit for possession by way of specific performance of the agreement to sell, dated 19th December, 1997, executed in his favour by defendant No. 1 (appellant in RFA No. 276 of 2003), who agreed to sell his half share in the suit land to plaintiff (respondent No. 1) for a consideration of ₹ 2,50,000/-. A sum of ₹ 10,000/- was paid as an earnest money and rest of the amount was agreed to be paid at the time of execution of the sale deed. The plaintiff averred that he was ready and willing to perform his part of obligation stipulated in the agreement and cooperate for the execution and registration

of the sale deed, but defendant No. 1 was not inclined to fulfill his part of the obligation and he, in fact, left Kangra for his village without executing the sale deed. Not only this, defendant No. 1 in collusion with defendants No. 2 to 5 (appellants in RFA No. 272 of 2003 and proforma respondent No. 3), with an intention to defraud the plaintiff, executed the sale deed dated 23rd December, 1997 in favour of minor defendants No. 2 and 3.

4. In the course of arguments before the learned Single Judge, the question arose as to whether in the absence of specific challenge to the aforementioned sale deed dated 23rd December, 1997, the learned trial Court could have decreed the suit of the plaintiff. Reliance was placed on the decision of the Supreme Court in *B. Vijaya Bharathi's case (supra).*

5. In *B. Vijaya Bharathi's case (supra)*, an agreement to sell was entered into between plaintiff-B. Vijaya Bharathi and defendant No. 1-P. Savitri. Defendant No. 1-P. Savitri, instead of executing the sale deed in favour of the plaintiff, sold the property to defendant No. 2, who, in turn, sold the same to defendant No. 3, both by registered conveyances. The plaintiff served notice on defendant No. 1 expressing her readiness and willingness to perform her part of the obligation and pay the balance amount of sale consideration. Defendant No. 1 in reply thereto stated that the agreement was no longer valid. The plaintiff then filed a suit for specific performance. The trial Court decreed the suit with the finding that the agreement in favour of the plaintiff was prior in point of time to both the registered sale deeds. Defendant No. 3 filed appeal before the High Court challenging the decree passed by the trial Court. The High Court set aside the decree of the trial Court holding that the plaintiff was not ready and willing throughout, as required in terms of Section 16 (c) of the Specific Relief Act, 1963 and the suit was filed more than two years after the repudiation of the agreement. One of the arguments raised by the respondent before the Supreme Court was that despite the fact that it came to the plaintiff's knowledge that there were two

registered conveyances prior to the filing of the suit, the plaintiff did not amend the suit to ask for a decree of cancellation of the sale deeds. Apart from others, the Supreme Court upheld the said argument by holding that though aware of two conveyances of the property in question, the plaintiff did not ask for their cancellation. So, this would stand in the way of a decree of specific performance for unless the sale made by defendant No. 1 to defendant No. 2 and thereafter by defendant No. 2 to defendant No. 3 are set aside, no decree for specific performance could possibly follow. The Supreme Court held that the High Court was right in finding that the bar of Section 16 (c) of the Specific Relief Act, 1963 was squarely attracted on the facts of the case and therefore, the fact that defendants No. 2 and 3 may not be bona fide purchasers, would not come in the way of stating that such suit must be dismissed at the threshold because of lack of readiness and willingness, which is a basic condition for grant of specific performance.

6. In *Rajinder Singh's case (supra),* the decree for specific performance was passed against the defendant, who filed appeal before the District Judge. After setting aside the decree, the case was remanded back to the trial Court for fresh adjudication. The trial Court again decreed the suit and passed decree for specific performance of the contract against the defendant which was affirmed by the First Appellate Court. The argument before the High Court was that such decree could not have been passed because no prayer for cancellation of the sale deed was made in the plaint. The High Court noted that the matter has been dealt with by the First Appellate Court. Section 19 (a) and (b) of the Specific Relief Act, 1963, provides that the specific performance of a contract may be enforced against either party thereto or any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract. The aforesaid provision is clear. The appellant, being a transferee subsequent to the making of the agreement

by the defendant with the plaintiffs, the decree for specific performance was executable against him without even seeking the cancellation of the sale made in his favour by the defendant. In the facts of the case, the High Court recorded that since the appellant did not even file written statement, he cannot be heard to say that he is transferee for value and has paid the money in good faith without notice of the agreement to sell between the plaintiffs and defendant. Moreover, the defendant, while appearing in the witness box, stated that at the time of execution of the sale deed in favour of the appellant, he had shown to the appellant the agreement to sell executed by him in favour of the plaintiffs. Therefore, the sale of the disputed property by the appellant could not be said to have been made in good faith without notice of the agreement to sell between the plaintiffs and the defendant.

7. The judgment of the Supreme Court in *B. Vijaya Bharathi's case (supra)* turned on its own facts. In that case, the finding recorded by the High Court, which was upheld by the Supreme Court, was to the effect that the plaintiff did not make any endeavour to pay the balance sale consideration when defendant No. 1 appeared before the Registering Authority to execute the General Power of Attorney in favour of the husband of the plaintiff and resiled from execution of such General Power of Attorney in favour of the plaintiff and left the office of Sub Registrar without registering the same. Any prudent person, who obtained the registered agreement of sale by paying two-third of the sale consideration, will not keep quiet for a period of nearly one year and eleven months after the vendor repudiated the contract and refused to register the General Power of Attorney to complete the sale transaction, which clearly discloses the total inaction on the part of the plaintiff. Even after such refusal, the plaintiff did not issue any notice to defendant No. 1 to execute the sale deed by offering balance sale consideration and expressing her readiness and willingness to complete the transaction. Thus, the plaintiff waived the right obtained under the agreement of sale and allowed defendant

No. 1 to execute the sale deed in favour of defendant No. 2. It was only thereafter the plaintiff got the legal notice issued to the defendants, which was suitably replied by them. The plaintiff nowhere stated therein about her readiness and willingness to perform her part of the contract all along from the date of the agreement till her deposition in the Court. The Supreme Court in para 17 of the judgment held as follows:

> *"17. It must also be noted that though aware of two conveyances of the same property, the plaintiff did not ask for their cancellation. This again, would stand in the way of a decree of specific performance for unless the sale made by Defendant No. 1 to Defendant No. 2, and thereafter by Defendant No. 2 to Defendant No. 3 are set aside, no decree for specific performance could possibly follow. While Mr. Rao may be right in stating that mere delay without more would not dis-entitle his client to the relief of specific performance, for the reasons stated above, we find that this is not such a case. The High Court was clearly right in finding that the bar of Section 16 (c) was squarely attracted on the facts of the present case, and that therefore, the fact that Defendant Nos. 2 and 3 may not be bona fide purchasers would not come in the way of stating that such suit must be dismissed at the threshold because of lack of readiness and willingness, which is a basic condition for the grant of specific performance."*

8. The finding of the Supreme Court in para 17 of the judgment in *B. Vijaya Bharathi's case (supra)* was based on the satisfaction that bar of Section 16 (c) of the Specific Relief Act would be attracted because the plaintiff failed to prove that she has performed or has always been ready and willing to perform, her part of the contract, which were waived by her and it was, therefore, that the Supreme Court concluded that though aware of two conveyances of the same property, the plaintiff did not ask for their cancellation which would stand in the way of decree of specific performance, for unless the sale made by defendant No. 1 to defendant No. 2 and thereafter

by defendant No. 2 to defendant No. 3 are set aside, no decree for specific performance could possibly follow.

9. This Court in *Rajinder Singh's case (supra)* was dealing with an appeal filed at the instance of the subsequent buyer, who did not even file written statement before the trial Court and therefore, the Court concluded that he cannot be heard to say that he was transferee for value and had paid the money in good faith without notice of the agreement to sell between the plaintiffs and defendant, which was pre-requisite condition as per Section 19 (b) of the Specific Relief Act, 1963, to maintain a suit, which provides that specific performance of a contract may be enforced against any person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract. Not only this, the defendant/vendor in the witness box stated that at the time of execution of the sale deed in favour of the appellant, he had shown to him (appellant) the agreement to sell executed by him in favour of the plaintiffs. The judgment in *Rajinder Singh's case (supra)* thus has been correctly decided on the facts of the case and the findings recorded therein are eminently just and proper.

10. The view taken by this Court in *Rajinder Singh's case (supra)* finds support from the ratio of the judgment of the Supreme Court in *Ram Awadh (dead) by L.Rs. and others versus Achhaibar Dubey and another, AIR 2000 SC 860,* wherein, in para 16 of the judgment, the Supreme Court held that the decree of specific performance may not be granted to a plaintiff who has failed to aver and prove his willingness and readiness to perform his part of the agreement. The plea that the plaintiff is not ready and willing to perform his part of the agreement is available to both vendor/defendant and subsequent purchasers and even to legal representatives of subsequent purchasers. It is open to any defendant to contend and establish that the mandatory requirement of Section 16 (c) of the Specific Relief Act has not been complied

with and it is for the Court to determine whether it has or has not been complied with and depending upon its conclusion, decree or decline to decree the suit.

11. In view of the above, we are inclined to hold that in a suit for specific performance of an agreement to sell, it is not always obligatory for the plaintiff to seek cancellation of the sale deed executed in favour of the subsequent buyer, however, the plaintiff can join such buyer as co-defendant with the original vendor provided that the agreement to sell in favour of the plaintiff was executed prior to the execution of sale deed in favour of the subsequent buyer. The only exception to sub-Section (b) of Section 19 of the Specific Relief Act, 1963 is that specific performance of the contract may be enforced against any person claiming under either party thereto by a title arising subsequently except a transferee for value who has paid his money in good faith and without the notice of the original contract. In that case, the plaintiff has to seek declaration of cancellation of such sale deed. If, however, converse is shown that transferee in paying the money lacked in the good faith and purchased the subject property despite knowledge of the original contract, there is no need for the plaintiff to seek cancellation of the sale deed in favour of the subsequent buyer. Good faith, bonafide purchase and not having notice of earlier contract, are all questions of facts, which have to be decided on facts of each case, on the basis of evidence adduced by the parties.

12. The earliest judgment on this subject is that of the Supreme Court in *Durga Prasad and another versus Deep Chand and others, AIR 1954 SC 75,* wherein it was held that where there is a sale of the same property in favour of a prior and subsequent transferee and the subsequent transferee has, under the conveyance outstanding in his favour, paid the purchase money to the vendor, then in a suit for specific performance brought by the prior transferee, in case he succeeds, the question arises as to the proper form of

decree in such a case. This question was answered by their Lordships in para 37 and 42 of the judgment as under:

> *"37. The practice of the courts in India has not been uniform and three distinct lines of thought emerge. (We are of course confining our attention to a 'purchaser's suit for specific performance.) According to one point of view, the proper form of decree is to declare the subsequent purchase void as against the plaintiff and direct conveyance by the vendor alone. A second considers that both vendor and vendee should join, while a third would limit execution of the conveyance to the subsequent purchase alone.*
>
> *xxx xxx xxx*
>
> *42. In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff. This was the course followed by the Calcutta High Court in - Kafiladdin v. Samiraddin', A. I. R. 1931 Cal 67 (C), and appears to be the English practice. See Fry on Specific Performance, 6th Edn. page 90, paragraph 207; also - 'Potter v. Sanders', (1846) 67 ER 1057 (D). We direct accordingly."*

13. The aforesaid judgment was followed by the Supreme Court in *R.C. Chandiok and another versus Chuni Lal Sabharwal and others, (1970) 3 SCC 140,* wherein it was held that in case where subsequent to the agreement to sell in favour of the plaintiff, the vendor has sold the property to a specific purchaser, the proper form of decree would be to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him in favour of the plaintiff.

14. In view of the above, it must be held that the judgment of this Court in *Rajidner Singh's case (supra)* has been correctly decided on its own

facts whereas the judgment of the Supreme Court in *B. Vijaya Bharathi's case (supra)* turned out in the context of an altogether different fact situation. We are, therefore, inclined to hold that ratio of the judgment of this Court in *Rajinder Singh's case (supra)* cannot be taken to have been impliedly overruled or whittled down by the judgment of the Supreme Court in *B. Vijaya Bharathi's case (supra)* and, therefore, the conclusion to that effect recorded by the learned Single Judge in the referral order that "*it is unequivocally manifest that the ratio laid down in Rajinder Singh's case (supra) has been impliedly over-ruled or whittled down by the subsequent judgment of the Hon'ble Supreme Court in B. Vijaya Bharathi's case (supra) and therefore, the judgment can no longer be said to be laying down the correct law",* cannot be supported in law.

15. Viewed thus, the questions referred to this Court by the learned Single Judge are answered as follows:

(i) Whether or not a suit for specific performance could be decreed in the absence of challenge to the sale deed seeking its cancellation, would depend on the facts of the case especially upon satisfaction of the ingredients of Section 16 (c) read with Section 19 (b) of the Specific Relief Act, 1963.

(ii) The judgment of this Court in *Rajinder Singh's case (supra)* cannot be held to have been impliedly overruled or whittled down by the subsequent judgment of the Supreme Court in *B. Vijaya Bharathi's case (supra)*.

16. The questions referred are answered accordingly. Let the matters be listed before the appropriate Single Bench for further proceedings.

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

Between:-

1. THE STATE OF HP
THROUGH THE SECRETARY (PWD)
TO THE GOVT. OF HP SHIMLA, HP.

2. ENGINEER-IN-CHIEF,
HPPWD, NIRMAN BHAWAN,
NIGAM VIHAR SHIMLA-2.

3. SUPERINTENDING ENGINEER,
HPPWD CIRCLE, KASUMPTI SHIMLA-9, (HP)

4. EXECUTIVE ENGINEER,
ELECTRICAL DIVISION,
HPPWD, MANDI (HP).

.....PETITIONERS

(BY SMT. RITTA GOSWAMI, ADDITIONAL
ADVOCATE GENERAL)

AND

SH. CHAMAN LAL,
S/O LATE SH. GURDAS RAM
R/O VILLAGE, P.O. BHANGROTU
TEHSIL BALH, DISTT. MANDI, H.P.

.....RESPONDENT

(BY SH. RAKESH KUMAR DOGRA, ADVOCATE)

CIVIL WRIT PETITION
No. 2990 of 2016
Reserved on:23.02.2022

Pronounced on:03.02.2022

Constitution of India, 1950 - Article 226 – Extraordinary Jurisdiction - Condonation regarding service gap for purpose of regularization -- State aggrieved with the impugned order passed by the Ld. Tribunal where by the appellant was directed to treat the respondent to be in continuous service onwards – Held -- The respondents have condoned the shortages of many days while regularizing the services of respondents / juniors Nikha Ram, Murari Lal and Shyam Lal, as such the fictional breaks of few days in service of respondent during the year 1999, 2000 and 2001 are required to be condoned -- Respondents as per chart had completed only 78 days in the year 1997 and 179 days in the year 1998 - We modify the order passed by the Ld. Tribunal in T.A. number 4598/2015 dated 17.12.2015 to the extent that shall deemed to have completed 240 days from the year 1999 onwards - Remaining part of directions contained in the impugned order shall remain the same. [Para 5(iii)]

This petition coming on for hearing this day, ***Hon'ble Ms. Justice Jyotsna Rewal Dua,*** *passed the following:*

O R D E R

State has filed instant writ petition against an order passed by the erstwhile Himachal Pradesh Administrative Tribunal on 17.12.2015 in TA No.4598/2015. Under this order shortfall in completion of 240 days in service of respondent in the years 1998 to 2001 was condoned and directions were issued to regularize his services as T-Mate from the date his juniors were regularized with all consequential benefits.

2. **Facts**

Respondent was engaged as daily waged Electrical Beldar (T-Mate) in Himachal Pradesh Public Works Department Electrical Sub Division Kullu w.e.f. 01.10.1997. S/Sh. Nikka Ram and Murari Lal engaged after 1.12.1999 were juniors to the respondent. Services of Nikka Ram and Murari Lal were regularized on 17.11.2008 and 27.11.2008 respectively. Service of one Sh. Jeet Singh, another junior to the respondent, was also

regularized. However, service of the respondent was regularized only on 13.10.2010. TA No.4598/2015 was instituted by the respondent with the assertion that he had completed 240 days of service after the year 1997 onwards in each calendar year. That fictional breaks were illegally given to him to prevent him from completing 240 days w.e.f. 1.10.1997 to 2001. He prayed for regularization of his service with effect from the year 2006. On considerating the facts, learned tribunal allowed the petition vide order dated 17.12.2015 with the observation that the respondent '*will be deemed to have completed 240 days in the years 1998 to 2005*'. The State was directed to regularize his services from the date his juniors were regularized immediately on completion of 8 years service with all consequential benefits. This order has been impugned by the State in the instant writ petition.

3. We have heard learned counsel for the parties and gone through the case file.

4. **Contentions**

4(i). The contention raised by the petitioner-State is that the respondent had not completed 240 days of service in the years 1997 to 2001. He worked for 78 days in the year 1997, 179 days in the year 1998, 237 days in the year 1999, 212 days in the year 2000 and 207 days in the year 2001. He started working for minimum 240 days in each calendar year from the year 2002 onwards. Accordingly, his services were regularized in the year 2010 on completion of 8 years of continuous service. The breaks in his service cannot be condoned.

4(ii). Defending the impugned order, learned counsel for the respondent submitted that (a) respondent was given fictional breaks by the petitioner-employer during the years 1997 to 2001. These fictional breaks are liable to be ignored for computing the period towards regularization of his service; (b) His correct muster-roll was not prepared by the employer. Respondent had served for more than 240 days continuously from the year

1997 onwards, therefore, his entire service from the year 1997 is to be reckoned while computing the period for the purpose of his regularization; (c) Assuming for the sake of arguments that the respondent did not complete 240 work days in each calendar year during the years 1997 to 2001, then also on ground of parity with his juniors, the shortfall in requisite number of completed work days in his service during these years is liable to be condoned. S/Sh. Nikka Ram and Murari Lal, juniors to the respondent had breaks in their services. They were similarly situated as the respondent. However in their cases, the breaks in service were condoned. They were regularized after taking into consideration their entire service right from dates of their first appointments. Similar benefits deserve to be granted to the respondent; (d) CWP No.5900/2010 titled *Shyam Lal Vs. State of H.P.*, decided on 18.12.2012 was a case where the Court took into consideration that Nikka Ram & Murari Lal though were juniors to the petitioner therein, but had been regularized prior in time. These juniors did not have to their credit 240 days of continous service in each calendar from the dates of their engagement. Yet all these years were included for counting the period towards regularization of their services. The Court besides noticing the facts of the case also referred to a letter of the State dated 14.09.2007 to hold that State has been following the practice of giving artificial breaks to the workmen to prevent them from completing 240 days in the calendar year. The writ petition filed by the petitioner Shyam Lal was allowed. Break in his service was ordered to be condoned. State was directed to regularize his service from the date his juniors were regularized. Learned counsel for the respondent submitted that there is no error in the impugned order and prayed for dismissal of the writ petition.

5. **Observations**

On consideration of the case, we observe following:-

5(i). The respondent was admittedly engaged on daily wage basis w.e.f. 1.10.1997. One Shyam Lal was engaged on 1.12.1999. S/Sh. Nikka Ram and Murari Lal were engaged after the engagement of Shyam Lal. S/Sh. Shyam Lal, Nikka Ram and Murari Lal were thus juniors to the respondent. This fact is not denied by the employer/petitioner.

5(ii) The mandays chart of Sh. Nikka Ram available in the case file shows that he had completed 226 days of service in the year 2000 and 211 days of service in the year 2001. He was regularized on 17.11.2008 after taking into consideration the years 2000 and 2001. In both these years, Nikka Ram did not have 240 working days.

Similarly Sh. Murari Lal was regularized on 27.11.2008 after taking into consideration the years 2000 & 2001. As per Mandays chart, he only had 225 and 81 days of service in the years 2000 and 2001 respectively.

Respondent was similarly situated vis-a-vis his juniors Nikka Ram & Murari Lal and could not be discriminated in the matter of computation of period for the purpose of regularization of his service. As per petitioner/employer's stand, the respondent had worked for 237 days of service in the year 1999, 212 days of service in the year 2000 and 207 days of service in the year 2001. In the facts and circumstances of the case the service rendered by the respondent in the year 1999 and onwards was required to be considered for the purposes of his regularization by condoning the shortfall.

5(iii) Sh. Shyam Lal, who was also one of the juniors to the respondent had instituted a writ petition bearing CWP No.5900/2010 seeking his regularization as T-mate from the date his juniors were regularized on completion of 8 years of service. His case was that S/Sh. Nikka Ram and Murari Lal (persons mentioned above) were engaged on daily wage basis after

his engagement. His grievance was that these two juniors were regularized on 17.11.2008 and 27.11.2008 respectively after condoning the break in their service period, whereas his services had not been regularized from due date. The employer-State refuted the claim of the petitioner Shyam Lal on the ground that he had completed only 85 days of service in the year 1999, 214 days in the year 2000, 229 days in the year 2001, 215 days in the year 2002, 219 days in the year 2003, 240 days in the year 2004, 228 days in the year 2005, 227 days in the year 2006, 249 ½ days in the year 2007. The Court while allowing the writ petition vide judgment dated 18.12.2012 observed that there was shortage of 26 days in the year 2000, 11 days in the year 2001, 25 days in the year 2002, 21 days in the year 2003, 12 days in the year 2005 and 13 days in the year 2006 in Shyam Lal's service to complete 240 days in a block of 12 calendar months. Taking note of letter dated 14.09.2007 issued by the Principal Secretary (Public Works) wherein directions were issued to ensure that the 'workmen are permitted to complete 240 days in the year and the persons who were engaged before 2006 on the intermittent break basis, should also be given muster roll for full month in relaxation of policy', it was observed that the contents of the letter established that the State had been following the pratice of giving artifical breaks to the workmen to prevent them from completing 240 days in the calendar year. Shyam Lal's writ petition was accordiongly allowed. It was held that the petitioner Shyam Lal could not be denied regularization by giving him artificial breaks.

During hearing of the case, learned Additional Advocate General informed that the State has accepted the judgment in Shyam Lal's case. Petitioner is senior to Shyam Lal. The case of the respondent is similar to that of Shyam Lal in CWP No.5900/2010. Insofar as, respondent is concerned, there is shortage of 3 days in the year 1999, 28 days in the year 2000 and 33 days in the year 2001. The Courts have always frowned upon

artificial breaks in service. [Reference *(2009) 6 SCC 611* titled *Mohd. Abdul Kadir & Another Vs. Director General of Police, Assam*]

Looking into the facts and circumstances of the case, where the respondents have condoned the shortages of many days while regularizing the services of respondent's juniors S/Sh Nikka Ram, Murari Lal and Shyam Lal as discussed above, the fictional breaks of few days in the service of respondent during the years 1999, 2000 and 2001 are required to be condoned. Learned Tribunal vide impugned order has directed the appellant-State to treat the respondent to be in continuous service with 240 days in the years 1998 onwards. Considering the fact that the respondent as per mandays chart had only completed 78 days in the year 1997 and 179 days in the year 1998, we modify the order passed by the learned Tribunal in TA No.4598/2015 dated 17.12.2015, to the extent that the respondent shall be deemed to have completed 240 days from the year 1999 onwards. The remaining part of the directions contained in the impugned order shall remain the same.

With these observations, the present petition is disposed of alongwith pending miscellaneous application(s), if any.

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

Between:-

1. CR.MP(M) No. 317 OF 2022

SHIVAM SETH
AGED 28 YEARS,
SON OF VIKRAM KUMAR SETH,
RESIDENT OF HOUSE NO. 525 B,
ADARSH NAGAR, PHAGWARA,
KAPURTHALA, PUNJAB 144401.

.....PETITIONER

(BY SH. SARDAVINDER GOYAL
AND SH. NITIN KANT SETIA, ADVOCATES)

AND

STATE OF HIMACHAL PRADESH

.....RESPONDENT

(BY SH. ASHOK SHARMA, ADVOCATE GENERAL,
WITH NARENDER GULERIA, ADDITIONAL
ADVOCATE GENERAL AND SH. RAM LAL
THAKUR, ASSISTANT ADVOCATE GENERAL,

INSPECTOR RAKESH KUMAR, CONSTABLE SUNEEL
KUMAR AND CONSTABLE MANOJ KUMAR,
PS, SV & ACB, UNA,IN PERSON)

2. CR.MP(M) No. 361 OF 2022

CHETAN NEGI
AGED ABOUT 35 YEARS,
SON OF PURAN CHAND NEGI,
RESIDENT OF FLAT NO. X8,
ROYAL VIEW HOMES,
OMAXE ROYAL RESIDENCY,
PAKHOWAL ROAD,
LUDHIANA, PUNJAB.

.....PETITIONER

(BY SH. SARDAVINDER GOYAL
AND SH. NITIN KANT SETIA, ADVOCATES)

AND

STATE OF HIMACHAL PRADESH

.....RESPONDENT

(BY SH. ASHOK SHARMA, ADVOCATE GENERAL,
WITH NARENDER GULERIA, ADDITIONAL
ADVOCATE GENERAL AND SH. RAM LAL
THAKUR, ASSISTANT ADVOCATE GENERAL,

INSPECTOR RAKESH KUMAR, CONSTABLE SUNEEL
KUMAR AND CONSTABLE MANOJ KUMAR,
PS, SV & ACB, UNA, IN PERSON)

3. CR.MP(M) No. 362 OF 2022

SUNITA SETH
AGED 52 YEARS
WIFE OF VIKRAM KUMAR SETH,
RESIDENT OF HOUSE NO. 525 B,
ADARSH NAGAR, PHAGWARA,
KAPURTHALA, PUNJAB 144401.

.....PETITIONER

(BY SH. SARDAVINDER GOYAL
AND SH. NITIN KANT SETIA, ADVOCATES)

AND

STATE OF HIMACHAL PRADESH

.....RESPONDENT

(BY SH. ASHOK SHARMA, ADVOCATE GENERAL,
WITH NARENDER GULERIA, ADDITIONAL

ADVOCATE GENERAL AND SH. RAM LAL
THAKUR, ASSISTANT ADVOCATE GENERAL,

INSPECTOR RAKESH KUMAR, CONSTABLE SUNEEL
KUMAR AND CONSTABLE MANOJ KUMAR,
PS, SV & ACB, UNA,IN PERSON)

4. CR.MP(M) No. 396 OF 2022

PARKASH CHAND RANA,
S/O SHRI SOHAN SINGH,
AGED 73 YEARS,
RESIDENT OF VILLAGE AND POST OFFICE
SALOH BERI, TEHSIL GHANARI,
DISTRICT UNA, H.P.

.....PETITIONER

(BY SH. AJAY SHARMA, SENIOR ADVOCATE WITH
SH. AJAY THAKUR, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

.....RESPONDENT

(BY SH. ASHOK SHARMA, ADVOCATE GENERAL,
WITH NARENDER GULERIA, ADDITIONAL
ADVOCATE GENERAL AND SH. RAM LAL
THAKUR, ASSISTANT ADVOCATE GENERAL,

INSPECTOR RAKESH KUMAR, CONSTABLE SUNEEL
KUMAR AND CONSTABLE MANOJ KUMAR,
PS, SV & ACB, UNA,IN PERSON)

5. CR.MP(M) No. 397 OF 2022

YOG RAJ,
S/O SHRI LACHHMAN DASS,
AGED 65 YEARS,
RESIDENT OF VILLAGE BEATEN,
HAROLI, DISTRICT UNA, H.P.

.....PETITIONER

(BY SH. AJAY SHARMA, SENIOR ADVOCATE WITH
SH. AJAY THAKUR, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

.....RESPONDENT

(BY SH. ASHOK SHARMA, ADVOCATE GENERAL,
WITH NARENDER GULERIA, ADDITIONAL
ADVOCATE GENERAL AND SH. RAM LAL
THAKUR, ASSISTANT ADVOCATE GENERAL,

INSPECTOR RAKESH KUMAR, CONSTABLE SUNEEL
KUMAR AND CONSTABLE MANOJ KUMAR,
PS, SV & ACB, UNA, IN PERSON)

6. CR.MP(M) No. 398 OF 2022

KARNAIL SINGH RANA,
S/O SHRI KANSHI RAM,
AGED 66 YEARS,
RESIDENT OF VILLAGE KANDI,
P.O. BHUGNARA,
TEHSIL NURPUR,
DISTRICT KANGRA, H.P.

.....PETITIONER

(BY SH. AJAY SHARMA, SENIOR ADVOCATE WITH
SH. AJAY THAKUR, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

.....RESPONDENT

(BY SH. ASHOK SHARMA, ADVOCATE GENERAL,
WITH NARENDER GULERIA, ADDITIONAL
ADVOCATE GENERAL AND SH. RAM LAL
THAKUR, ASSISTANT ADVOCATE GENERAL,

INSPECTOR RAKESH KUMAR, CONSTABLE SUNEEL
KUMAR AND CONSTABLE MANOJ KUMAR,
PS, SV & ACB, UNA, IN PERSON)

7. CR.MP(M) No. 399 OF 2022

LEKH RAJ,
S/O SHRI MEHAR CHAND,
AGED 67 YEARS,
RESIDENT OF VILLAGE UPPER BHALWAL,
POST OFFICE TIAMBAL,
TEHSIL DADA SIBBA,
DISTRICT KANGRA, H.P.

.....PETITIONER

(BY SH. AJAY SHARMA, SENIOR ADVOCATE WITH
SH. AJAY THAKUR, ADVOCATE)

AND

STATE OF HIMACHAL PRADESH

.....RESPONDENT

(BY SH. ASHOK SHARMA, ADVOCATE GENERAL,
WITH NARENDER GULERIA, ADDITIONAL
ADVOCATE GENERAL AND SH. RAM LAL
THAKUR, ASSISTANT ADVOCATE GENERAL

INSPECTOR RAKESH KUMAR, CONSTABLE SUNEEL
KUMAR AND CONSTABLE MANOJ KUMAR,
PS, SV & ACB, UNA,IN PERSON)

CRIMINAL MISC. PETITION (MAIN)
Nos. 317, 361, 362,
396, 397, 398 & 399 OF 2022
RESERVED ON:11.03.2022
PRONOUNCED ON:17.03.2022

Code of Criminal Procedure 1973 – Section 438 read with Sections 409, 420, 467, 468, 471, 120 B of Indian Penal Code, 1860 and Section 13(1) of Prevention of Corruption Act, 1988 - Approval of government to conduct detailed enquiry into the allegations that a loan of rupees 19.50 crores was disbursed to a bogus firm by Kangra Central Cooperative Bank –Held - Members of loan committee are facing accusations not only under the Prevention of Corruption Act but also under the provisions of Indian Penal Code - Looking to the nature and graveness of accusations being faced by all the petitioners, their custodial interrogation cannot be refused at this initial stage for the investigation merely because allegation pertains to economic offences or that according to the petitioners the investing agency can carry out further investigation only on the strength of documents collected by it - The prosecution apprehends that there could be many more dubious transactions, there could be many more persons whose dubious role in the matter may come to light on custodial Investigation from the petitioners and other accused persons and further influencing the investigation evidence also cannot be ruled out - Custodial interrogation is necessary for protecting the interest of the bank

as well as public at large whose hard earned money has been deposited in the banks - Petitions dismissed. [Para 5-XI]

Cases referred:

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

These petitions coming on for pronouncement of orders this day, the Court passed the following:

O R D E R

These petitions under Sections 438 of Code of Criminal Procedure are in relation to FIR no.7/2021 dated 10.12.2021 under Sections 409, 420, 467, 468, 471, 120B of the Indian Penal Code and Section 13(1) of the Prevention of Corruption Act, registered at Police Station State Vigilance & Anti Corruption Bureau, Una, Himachal Pradesh.

2. The FIR emanates from an inquiry conducted by the State Vigilance Department on a complaint received through the office of ADGP/SV&ACB HP Shimla vide letter dated 20.12.2018 enclosing therein a letter dated 5.12.2018 of the Principal Secretary (Vigilance) to the Government of HP conveying approval of the Government to conduct detailed inquiry into the allegations that a loan of Rs. 19.50 Crores was disbursed to a bogus firm M/S UR Sinter Pvt. Ltd. Amb District Una (hereinafter referred to as the Company) by the Kangra Central Cooperative Bank (KCCB for short).

The FIR has been registered against ;-**(i)** the loan committee members of KCCB namely S/Sh. Karnail Singh Rana [petitioner in Cr.MP(M) No. 398/22]**,** Lekh Raj Kanwar [petitioner in Cr. MP(M) No. 399/22]**,** Yog Raj[petitioner in Cr.MP(M) No. 397/22]**,** Prakash Chand Rana [petitioner in Cr.MP(M) No. 396/22] **(ii)** the then MD of KCCB Ms Rakhil Kahlon **(iii)** the directors of the Company M/S UR Sinter Pvt. Ltd namely S/Sh. Shivam Seth [petitioner in Cr.MP(M) No. 317/22]**,** Bhuvnesh Uppal**,** Chetan Negi [petitioner in Cr.MP(M) No. 361/22]**,** Pradeep Jamwal **(iv)** owners of concerned firms namely M/S Maa Chintpurni**,** M/S Madan Foundry**,** M/S Supra Enterprises**,**

M/S V.S. Traders & **(v)** valuers S/Sh. Rajinder Dhiman and Narinder Paul Saini.

In the first set of petitions bearing no. Cr.M.P.(M) Nos. 317 & 361, the petitioners are the directors/promoters of the Company and in petition No. Cr.MP(M) No. 362/22, petitioner Sunita Seth is a beneficiary of the loan amount and is mother of Shivam Seth [petitioner in Cr.MP(M) No. 317/22].

In the second set of four petitions bearing Cr.MP(M) Nos. 396-399 of 2022, petitioners are members of the Loan Committee of Kangra Central Cooperative Bank (KCCB) and also the elected directors of KCCB, a cooperative society with Dharamshala as its Head Office.

Being interconnected, with interwoven facts and arising out of same FIR, these petitions have been taken up together for adjudication.

3. Based upon the inquiry conducted thus far, the **prosecution case** is that;-

3.i) Stage A (Loan applied for by the Company for the first time)

3.i)a) M/S UR Sinter Pvt. Ltd (the Company) was registered with the Registrar of Companies Punjab, HP and Chandigarh on 19.10.2012. The registered office of the Company is situated at village Bambloo, Tehsil Amb District Una. It had four directors namely S/Sh. Shivam Seth, Bhuvnesh Uppal, Pradeep Jamwal and Chetan Negi.

3.i)b) On 25.1.2014, the Company applied for a composite loan of Rs. 19.50 Crores [Term Loan(TL) of Rs. 4.50 Crore & Cash Credit Limit(CCL) of Rs. 15 Crores] to the KCCB Amb, Una. Loan was applied for installation of a

unit for sintering and manufacture of grass cutting machines at village Bambloo, Teshil Amb, District Una H.P.

3.i)c) The loan application was turned down by the Loan Committee of KCCB on 26.2.2014 for the reason that majority of the promoters of Company were from Punjab and the immovable properties offered as collateral were also situated outside Himachal. The Loan Committee reasoned that the KCCB had a very restricted area of operation therefore it was not possible to keep a close watch on such securities situated outside the State.

3.ii) Stage B (Company applied for loan the second time)

3.ii)a) Within two months of rejecting the loan application of the Company, the loan committee on 23.4.2014 resolved to refer the Company's proposal for appraisal to NABCONS (NABARD Consultancy Service Pvt. Ltd.).

3.ii)b) NABCONS concluded that the project was technically feasible and financially viable. Based on this report, the Loan Committee in its meeting on 27.3.2015, accorded in principle approval for the loan in favour of the Company.

3.iii) Stage C (Events after the grant of in-principle approval of loan)

3.iii)a) After grant of in principle approval for the loan by the Loan Committee, the Branch Manager KCC Amb scrutinized the documents of the Company and found that the collateral properties offered by the Company were purchased only 3 months back for Rs. 2.29 Crores only, whereas for obtaining the loan the Company's valuers had shown the value for the same properties as Rs. 21.3 Crores and Rs. 16.72 Crores as their distress value. He also mentioned that most of the offered plots did not have either the

boundaries or the numbers and that it would be difficult to realize the value mentioned by the valuer in case of forced sale by the bank. He brought all this to the notice of the KCCB HQ on 22.5.2015 and recommended for obtaining good quality collaterals with higher value, change of securities, guarantors, net worth of guarantors- collaterals-directors, new CIBIL reports and revised viability report from NABCONS.

3.iii)b) On 9.6.2015, the Company intimated the KCCB Amb the names and bank account numbers of 3 firms to which the amount of Rs. 1,63,27,875/- was to be transferred from the loan account of the Company. Accordingly on 9.6.2015 from the loan account of the Company, an amount of Rs. 1,63,27,875/- was transferred to 3 different firms. Out of this amount;-

(a) Rs. 32,71,800/- were credited into the account of M/S VS Traders- a brick kiln company(*bhatha*) owned by Smt Sunita Seth w/o Sh. Vikram Seth and mother of Sh. Shivam Seth. M/S VS Traders further transferred Rs. 16,00,000/- to the bank account of Sh. Suraj Seth s/o Sh. Vikram Seth.

(b) Rs. 45,13,950/- were credited into the account of M/S Supra Enterprises at Kotak Mahindra Bank Phagwara. The same day, Rs. 15,11,000/- and Rs. 30,00,000/- were transferred from the bank account of M/S Supra Enterprises to the account of Sh. Satvinder Singh.

The bank account in the name of M/S Supra Enterprises was opened on 9.6.2015. It remained operative only for 3 days i.e. from 9.6.2015 to 11.6.2015. The registration of M/S Supra Enterprises has been cancelled.

On 11.6.2015, Rs. 25,00,000/- were credited into the bank account of M/S Madan Foundry Works. From the account of M/S Madan Foundry Works, Rs. 24,25,000/- were transferred in installments during 13 to 15.6.2015 to the bank accounts of M/S BL Seth Agro Mills.

Sh Om Parkash- owner of M/S Madan Foundry Works statedly disclosed that he had returned the money in the account of M/S BL Seth Agro Mills Ltd. at the request of Mr Vikram Seth. He also admitted that though he had issued bills amounting to Rs. 18,23,760/- in favour of the Company but did not deliver any material.

In the above manner, a total amount of Rs. 1,88,27,875/- was disbursed from 9.6.2015 to 11.6.2015 as first installment of the loan.

3.iv) Stage D (further events)

3.iv)a) After the disbursal of loan amount of Rs. 1,88,27,875/-, Sh. Gurdyal Singh the then Branch Manager KCCB Amb on 10.2.2016 reported to the KCCB HQ that the loan amount disbursed till that time did not appear to have been utilized in the field. The Loan Committee ignored this report. The Loan Committee also ignored the report dated 31.10.2015 of Sh. S.S. Sachdeva – the professional hired by it. The Loan Committee moved ahead and approved the disbursement of remaining amount of loan as well as CCL to the Company.

3.iv)b) The inquiry revealed that the Company submitted the bills issued by M/S Maa Chintpurni Enterprises Phagwara for Rs. 25,15,525/- & 28,17,600/- for supply of fabrication of plates for chimney and shed allegedly paid by the Company from margin money. However the vehicle numbers from which the material was reported to have been transported were that of two wheelers. Registration of M/S Maa Chintpurni firm was cancelled on 25.2.2016. The bills raised by M/S Maa Chintpurni were found to be false as no material was actually delivered by it to the Company against these bills. The owners of the firms M/S Maa Chintpurni, M/S Madan Foundry, M/S Supra Enterprises, M/S V.S.Traders had issued false bills in favour of the Company without delivering any material. These bills were used by the Company for release of 2nd installment of loan.

3.iv)c) The inquiry also established that empanelled valuers S/Sh. Rajinder Dhiman & Narinder Paul Saini in connivance with the beneficiaries i.e. S/Sh. Animesh Uppal, Shivam Seth, Chetan Negi and Pradeep Jamwal---- the directors of the Company had overvalued the assets of the loanee.

3.iv)d) The inquiry also established that members of the Loan Committee – S/Sh. Karnail Singh Rana, Lekh Raj Kanwar, Prakash Chand Rana, Yog Raj and the then M.D. of the KCCB Ms Rakhi Kahlon in connivance with the beneficiaries had released 2nd installment of the loan despite knowledge that the loanee firm had not even used the 1st installment of the loan for the intended purpose and had diverted the sanctioned amount to other accounts. In order to give undue benefits to the loanee, the Loan Committee members overlooked the expert opinion given by the financial consultant Sh. S.S. Sachdeva.

3.iv)e) During the inquiry, the Naib Tehsildar Gagret reported that according to the revenue record, the factory in the shape of tin shed exists over an area of 00-31-00 Hect. in part of khasra no. 124. No construction whatsoever was carried out over khasra numbers 147-347-348. The land has been attached by the Department of State Taxes & Excise Control Enforcement Zone, Una H.P.

3.v) Stage D (action on inquiry report)

3.v)a) Upon completion of the inquiry, the report was sent to the Vigilance HQ Shimla recommending registration of criminal case. In response, the ADGP, SV&ACB HP Shimla vide office letter dated 11.11.2020 and Superintendent of Police SV&ACB(NR) Dharamshala vide letter dated 25.11.2020 conveyed the permission of the Government of Himachal Pradesh through Principal Secretary (Vigilance) under section 17A of the Prevention of Corruption Act for registration of case against the then members of the Loan Committee.

3.v)b) Requisite permission of the State Government under section 17A of the Prevention of Corruption Act for registration of case against the then M.D. of the bank Ms Rakhil Kahlon was also issued by the Principal Secretary (Vigilance) to the Government of Himachal Pradesh on 18.11.2021. Accordingly the FIR was registered on 10.12.2021.

4. Contentions

4.i) Contentions of Ld. Counsels for the **petitioners** S/Sh. Shivam Seth, Chetan Negi and Sunita Seth[**Cr.M.P.(M) Nos. 317, 361** and **362/2022**]. Ld. Counsels submitted that;-

4.i)a) The matter regarding illegalities and irregularities in sanctioning of composite loan amounting to Rs. 19.50 crores by the KCCB in favour of the Company was raised in HP Vidhan Sabha. Whereafter a fact finding preliminary inquiry was ordered into the matter by the Registrar Cooperative Societies (RCS) on 13.5.2016. The District Inspector Cooperative Societies, Una inquired into the matter and submitted his report on 15.10.2016. On the basis of this report, the Registrar Cooperative Societies in exercise of powers under section 67 of the HP Cooperative Societies Act, on 11.11.2016 ordered for holding statutory inquiry into the entire matter.

4.i)b The Statutory inquiry report was submitted by the Assistant Registrar Cooperative Societies Dharamshala. Major irregularities on part of Loan Committee of KCCB were reported in it. The RCS directed the KCCB to furnish its comments on the report. The MD KCCB submitted a reply to the RCS on 8.2.2017 on the issues pointed out by the inquiry officer. In this reply the MD stated that;- there had been no irregularities in the sanction of loan; physical verification and documentation formalities of securities were carried out; disbursement of loan was withheld on receipt of complaints; loan was disbursed only after further safeguarding the interest of bank; the disbursed amount was utilized by the borrower as per utilization carried out by the empanelled valuer; CCL will be allowed after the compliance of set out pre-

conditions. The bank in its comments prayed for dropping the proceedings. The Company also requested to review the inquiry proceedings.

4.i)c) After examining the Statutory inquiry report, the response thereto of the KCCB, the other related documents, the RCS on 6.3.2017 ordered for immediate recalling of the entire loan amount disbursed to the Company along with interest. Failing which, surcharge proceedings under Section 69 of the HP Cooperative Societies Act were to be initiated against the erring bank officials.

4.i)d) Against the order dated 6.3.2017 passed by the RCS, the Company as well as the KCCB filed revision petitions before the Secretary Cooperation to the Government of Himachal Pradesh under Section 94(1) of the HP Cooperative Societies Act. The Secretary Cooperation vide its order dated 3.5.2017 quashed the order dated 6.3.2017 stating that;- the loan was sanctioned following detailed procedure; the Company has already invested Rs. 6.04 Crores against the bank guarantee of Rs. 4 crores as per the evaluation carried out by the bank evaluators; and left it to the wisdom of the bank to decide as to whether the loan is to be disbursed or not.

4.i)e) In light of facts in paras 4.i)a) to 4.i)d) above, Ld. Counsels for the petitioners Shivam Seth, Chetan Negi and Sunita Seth submitted that the order passed by the Secretary Cooperation on 3.5.2017 had closed the lid on the matter. The order was accepted by the State also. With the change in political guard, the closed matter cannot be opened. It was also argued that there was delay in lodging the FIR. The cause of action, if any, had accrued in the year 2015-16 whereas the FIR was lodged in December 2021. Further it was submitted that the allegations of insufficiency of collaterals and securities offered by the Company in lieu of the loan for safeguarding the KCCB's interest are all ill-founded. The KCCB has no problems with the Company/petitioners/directors etc. The Company had offered 21 sets of immovable properties which till date are mortgaged with the KCCB. The

bank's interests are safe. The Company is a going concern and had in all returned the Term Loan to the extent of Rs. 2.65 Crore and interest on the CCL to the extent of Rs. 2.65 Crores. The loan account of the Company has been declared Non Performing Asset (NPA). The Company has preferred a petition under Section 10 of the Insolvency and Bankruptcy Code before the National Company Law Tribunal, which is pending adjudication. It was submitted that FIR is based upon documentary evidence. The investigating agency is already in possession of the relevant documents. Ld. Counsel emphasized that pursuant to the ad-interim bail order, the petitioners have joined the investigations and their custodial interrogation of the petitioners is not required in the facts and circumstances.

4.ii) Contentions of Ld. Senior counsel for the **petitioners** S/Sh. Karnail Singh Rana, Lekh Raj Kanwar, Yog Raj and Prakash Chand Rana **[Cr.MP(M) Nos. 396-399/22]**---- members of the Loan Committee:

Ld. Senior Counsel reiterated the submissions of the ld. Counsel for the directors/promoters of the Company.

4.ii)a) Ld. Senior counsel additionally submitted that the accusations leveled against the members of Loan Committee are under the Prevention of Corruption Act. But the members of Loan Committee do not fall within the definition of the 'public servant' given in Section 2(c) of the Prevention of Corruption Act. Therefore sanction of prosecution given by the State of Himachal Pradesh in their cases, under Section 17A of the ibid Act, is of no consequence. They cannot be prosecuted under the Prevention of Corruption Act.

4.ii)b) It was emphasized that the petitioners -Loan Committee members had acted on the basis of collective decisions of the House. The House consisted not just of 4 members of the Loan Committee but also of other Directors and Government nominees besides the Managing Director. The other persons have not been named as accused in the FIR. No

investigations have been carried out so far from the then MD even though the then MD has been arraigned as an accused in the FIR. It was also highlighted that it was the Loan Committee which had initially turned down the loan proposal. Thereafter the loan was sanctioned keeping in view the report of NABCONS. The appraisal of documents and adequacy of offered securities was to be seen by the KCCB and not by the Loan Committee. The Loan Committee had no role whatsoever in disbursal of the amount. Ld. Senior Counsel joined the submissions of directors of the Company that pursuant to the ad-interim bail protection, the petitioners have joined the investigations. They are old aged people and still manning the posts of directors of the KCCB. Their custodial interrogation is not warranted.

Prayers were made on behalf of all the petitioners for confirmation of the interim bail orders.

4.iii) Contentions of Ld. Advocate General

Ld. Advocate General vehemently opposed the bail pleas of all the petitioners. According to the ld. Advocate General, loan amount was sanctioned by the Loan Committee in breach of law and procedure. The bank officials, the field staff time and again submitted their reports and objections against sanctioning of the loan amount. Despite their objections, the loan amount was sanctioned. Even at different stages of disbursal of the loan amount, serious concerns were raised against the disbursal. These concerns were also ignored by the Loan Committee. Ld. Advocate General argued that the net result is that at present the entire loan amount has been siphoned off by the Company. The loan amount has been diverted by the Company and not used for the purpose for which it was sanctioned. The members of Loan Committee in connivance with the directors of the Company, the beneficiaries and other accused persons have acted illegally to give undue favour to the loanees and the beneficiaries. It was also submitted that inquiry into the matter was ordered in the year 2018. On completion of the inquiry, the report

was submitted and prosecution sanctions were obtained. Ld. Advocate General also disputed the arguments that the members of Loan Committee are not public servants within the meaning of Section 2(c) of the Prevention of Corruption Act. According to him, they deal with public money and hence are public servants. He also submitted that allegations in the FIR against them are not just under the Prevention of Corruption Act but also w.r.t. various offences under the Indian Penal Code. It was also submitted that custodial interrogation of all the accused is necessitated in the facts and circumstances for further investigation into the matter. Only thereafter, further investigations can be carried out. Based on such further investigations, requisite action in accordance with law will be taken against all those found to be violating the law. Ld. Advocate General prayed for dismissal of the bail petitions.

5. Observations

I have heard at length Ld. Counsel for all the petitioners and the Ld. Advocate General. With their assistance I have also gone through the documents on record as well as the record produced by the respondents.

All the Ld. Counsels relied upon the judgment of Hon'ble Apex Court in **(2019) 9 SCC 24**, titled **P. Chidambaram Vs. Directorate of Enforcement**, wherein following was held in respect of grant of anticipatory bail:-

> *"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 Cr.P.C. 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.

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.

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 Rep. By The CBI v. Anil Sharma (1997) 7 SCC 187, the Supreme Court held as under:-

> *"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:

"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 and Others (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 and another (2012) 4 SCC 379, the Supreme Court held as under:

"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.)"

In light of above parameters in my considered view these petitions for grant of anticipatory bail deserve to be dismissed for the following reasons;-

5.i) According to the prosecution case, the Loan Committee on 26.2.2014 did not deem it appropriate to sanction the composite loan amount of Rs. 19.50 Crores in favour of the Company for the reasons that not only majority of its Promoters were from Punjab but the offered collaterals were also not in Himachal. It was therefore reasoned that having restricted area of operation, it will not be possible for KCCB to keep close watch on such securities and properties. However a couple of months later, the Company again submitted the loan proposal. This time, the same Loan Committee on 27.3.2015 accorded in principle approval to the composite loan in favour of the Company for the given reason that NABCONS had found the proposal technically feasible and financially viable. It is not forthcoming whether NABCONS had affirmed regarding the soundness of the collaterals and immoveable properties offered by the Company. Appraisal of documentation, sanction and disbursal of loan by safeguarding the interests of bank is an aspect different from examining the viability and feasibility of the proposal.

5.ii) From the documents, it appears that field staff of the KCCB had reported that primary & collateral properties offered by the Company against the loan were purchased by it only 3 months ago at the cost of Rs. 2.29 Crores but for the purpose of obtaining composite loan of Rs. 19.50 Crores the Company showed the value of these properties as Rs. 21.3 Crores and distress value of Rs. 16.72 Crores. Prima facie, it appears that these aspects were not given due consideration by the petitioners- - -members of the Loan Committee.

5.iii) The field staff also statedly reported that the most of the plots offered by the Company had neither any boundaries nor the identifiable numbers. That it would be difficult to realize the value mentioned by the

Company's valuers in case of forced sale by the Bank. The staff recommended for taking additional collateral securities from the Company in the shape of immovable properties located within the State. Obtaining good quality collateral with higher value, change of securities, guarantors, net worth of guarantors-collateral-directors, CIBIL reports and revised viability report from NABCONS was also recommended by the field staff. These concerns *prima-facie* appear to have been ignored by the Loan Committee.

5.iv) As per the status report and record, on the asking of the Company, on 9.6.2015 & 11.6.2015 the KCCB transferred an amount of Rs. 1,88,27,875/- in all towards first installment of the loan amount into the accounts of 3 different firms i.e.

M/S VS Traders,

M/S Supra Enterprises and

M/S Madan Foundry Works.

M/S VS Traders, a brick kiln (*batha*) manufacturing firm is statedly owned by Smt. Sunita Seth w/o Sh. Vikram Seth and mother of one of the petitioners -Shivam Seth. M/S VS Traders transferred the amount to the bank account of Suraj Seth, Balbir and Vikram.

M/S Supra Enterprises opened its bank account on 9.6.2015. The account remained operative for 3 days. The registration of the firm was cancelled on 10.9.2015.

The owner of M/S Madan Foundry has statedly disclosed that the loan amount received by his firm on 11.6.2015 from KCCB was transferred in installments from 13 to 15.6.2015 to the bank account of M/S BL Seth Agro Mills at the request of Vikram Seth. He is further said to have stated that he had issued bills worth lacs of rupees to the Company but had not actually delivered any article to the Company.

Further according to the prosecution, some of the loan amount was transferred at the instance of the Company to the account of M/S RS

Traders Bijapur, Gagret. However no such firm could be located at Bijapur, Gagret. Mobile number of one of the petitioners Shivam Seth is statedly registered for this company in the bank account of this firm. Similarly there are other firms in whose accounts the loan amount was transferred by KCCB on the asking of the Company but the amount was retransferred by these firms to the accounts of the Company/directors etc. At present there is no money in these accounts. All this is still being investigated.

5.v) The Company submitted bills dated 24.6.2015 of lacs of rupees issued by M/S Maa Chintpurni Enterprises for supply of fabrication of plates for chimney and shed. The Company showed the payments of these bills from the margin money. Goods were shown to have been transported from M/S Maa Chintpurni Enterprises to the premises of the Company. However as per status report, the inquiry revealed that the registration number of the vehicles used for transportation were that of two wheelers. Registration of M/s Maa Chintpurni is stated to have been cancelled on 25.2.2016.

According to the prosecution, accused Shivam Seth along with his parents Sunita Seth and Vikram Seth are defaulters of various Banks. Sh. Vikram Seth is stated to be in custody of Enforcement Directorate.

5.vi) *Prima-facie* in the face of inquiry conducted, the apprehension of prosecution that the accounts were created by the directors of the Company/beneficiaries/petitioners herein only for the diverting the loan amount and preparation of fictitious bills for securing the disbursal of loan cannot be ruled out at this stage.

5.vii) The field staff of KCCB is said to have reported that 1st installment of loan amount sanctioned by that time did not appear to have been utilized in the field. Another Financial Consultant of the Bank is said to have reported that Seth family has defrauded several banks and their names appear in the caution advice of Reserve Bank of India for Rs. 418 million. AGM KCCB Amb also endorsed these concerns and advised against further

disbursal of loan as the Company had statedly not complied with the terms and conditions of sanction of loan amount. The higher official and the members of Loan Committee *prima-facie* remained unmindful of the concerns voiced and released further installments of the loan.

5.viii) According to the prosecution, during investigations the Naib Tehsildar reported that the factory constructed by the Company is in form of a tin shed over an area on 00-31-00 Hect. over part of khasra number 124 and that no construction whatsoever was raised over khasra numbers 147-347-348. The land has statedly been attached by the Department of State Taxes & Excise Control Enforcement Zone, Una.

5.ix) In a very subtle manner, the comments furnished by the Bank to the Statutory Inquiry Report ordered by the Registrar of Cooperative Societies, also point accusing fingers at the members of the Loan Committee. The comments also state that RBI had also mailed a complaint to the Bank against the Company. The RBI had advised the KCC Bank to re-examine the matter of releasing the credit facilities. However the Loan Committee of KCC Bank in its meeting dated 23.3.2016 resolved that there was no sound reason for the bank to withhold further disbursement. In light of these submissions, serious allegations leveled against all the petitioners in all these petitions cannot be simply brushed aside at this stage. As per status report, even though the irregularities & illegalities, one after the other in the matter, were brought to the notice of the Loan Committee yet no action was taken by the Loan Committee for safeguarding the bank's interest. In view of the facts highlighted in the inquiry report, the apprehension that such acts were carried out with a view to favour the beneficiaries cannot be ignored at this stage. It is a fact that the loan account has become NPA. The Company's land has statedly been attached by the Department of State Taxes & Excise Control Enforcement Zone, Una. In the name of the factory, a tin shed is reported to be there over an area measuring 00-31-00 Hect. over part of khasra number

124 and no construction is stated to have been carried out over the other khasra numbers. The Company has statedly itself approached the NCLT under Section 10 of the Insolvency and Bankruptcy Code. This petition is stated to be pending adjudication there.

5.x) The Registrar of Cooperative Societies (RCS) on 13.5.2016 had ordered for conducting a preliminary inquiry into the matter. The report was submitted by the District Inspector, Una on 15.10.2016 pointing out serious violations. Based on this report, the RCS ordered for holding a statutory inquiry in exercise of powers under Section 67 of the HP Cooperative Societies Act. The statutory report was submitted by the Assistant Registrar Cooperative Societies highlighting major irregularities on part of Loan Committee. Comments upon the report were called from the Bank. After examining entire relevant material, the RCS on 6.3.2017 ordered for immediate recalling of entire loan amount with interest. The matter was carried further in revision petitions by the Bank and the Company before the Secretary Cooperation to the Government of Himachal Pradesh. The Secretary Cooperation allowed the revision petitions on 3.5.2017 and quashed the order passed by RCS on 6.3.2017. However what is significant to notice at this stage is that while quashing the order, the Secretary had not gone into the merits of the matter. He simply observed that it would neither be in the interest of the Bank nor of public at large to restrain the bank from giving loans. On one hand while holding in para 6 of the order that the merits of the revision petitions were not gone into, he, on the other hand held in the same para that the bank had sanctioned the loan in favour of the Company after following detailed procedure and taking due diligence and bank has no doubt or apprehension whatsoever regarding recovery of loan amount. Under the circumstances and in view of the inquiry conducted into the matter by the prosecution, not much importance can be given to the order passed by the Secretary Cooperation at this stage to contend that a matter closed by the

order of the Secretary cannot be opened or that the Secretary had given clean chit for the sanction, disbursal and utilization of the loan amount in question.

5.xi) Allegations leveled by the prosecution are very serious. Irrespective of the issue as to whether the members of the Loan Committee are 'public servants' within the meaning of the Prevention of Corruption Act or not as contended by their Ld. Senior Counsel, fact remains that they are facing accusations at present not only the Prevention of Corruption Act but also under the provisions of Indian Penal Code. Looking to the nature and graveness of the accusations being faced by all the petitioners, their custodial interrogation cannot be refused at this initial stage of the investigation merely because the allegations pertain to economic offences or that according to the petitioners the investigating agency can statedly carry out further investigation only on the strength of documents collected by it. The inquiry into the matter was ordered in December 2018. It was completed in November 2020. The prosecution sanction was granted by the State in November 2021. The FIR was registered on 10.12.2021. Trail of entire loan amount disbursed to the Company is still being investigated by the investigating agency. Various firms linked with the loan amount & their accounts are still being investigated. The extent of the role played by the members of the Loan Committee of the KCC Bank in the entire episode is still being investigated. According to the Ld. Advocate General, no meaningful cooperation has been extended by the petitioners to the investigating agency. As per one of the status reports petitioners Shivam Seth, Chetan Negi and Sunita Seth were not found to be residing at the addresses supplied by them. The matter is still being investigated by the Police. Apprehension of the prosecution that there could be many more dubious transactions, there could be many more persons whose dubious role in the matter may come to light on custodial investigation from the petitioners and other accused persons, is well founded at this stage. The petitioners are all well placed and influential persons. Their influencing

the investigations and evidence also cannot be ruled out at this preliminary stage.

For every single reason of the above observations, in my considered view, the custodial interrogation of the petitioners cannot be denied to the investigating agency at this stage. Their custodial interrogation is also necessary not only for protecting the interests of the bank but in the interest of public at large who deposit their hard earned money in the banks. Hence all these petitions under Section 438 of Code of Criminal Procedure are dismissed.

It is clarified that observations & expressions in this order shall not be construed as an opinion on the merits of the matter and the same shall remain confined only to the adjudication of the instant bail petitions.

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

Between:

MANOJ AGED ABOUT 30 YEARS, SON OF SHRI JAI BHAGWAN, RESIDENT OF 8/4 NEW NETAJI NAGAR, LINE PAR, NIZAMPUR ROAD, BAHADURGARH, JHAJJAR, HARYANA-124507

.....PETITIONER

(BY SHRI VIJENDER KATOCH, ADVOCATE)

AND

THE STATE OF HIMACHAL PRADESH

.....RESPONDENT

(BY SHRI. P.K. BHATTI & MR. BHARAT BHUSHAN, ADDITIONAL ADVOCATE GENERALS)

S.I. HARPAL SINGH, P.S. SWARGHAT, DISTRICT
BILASPUR IS PRESENT IN PERSON WITH RECORD.

CRIMINAL MISCELLANEOUS PETITION (MAIN)
NO.2444 of 2021
Reserved on: 11.03.2022
Decided on:16.03.2022

Code of Criminal Procedure, 1973 - Section 439 Cr.PC read with Sections 20 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985-Bail -- Recovery of 1 kg and 790 gram of charas from vehicle -- Commercial quantity – Held -- Quantity recovered in this case is of commercial quantity therefore rigors of section 37 of NDPS Act are applicable , however, this Court is not precluded from looking into the material placed before it in order to have primafacie assessment of nature and gravity of allegations against the petitioners and the material collected by the investigating agency to substantiate the same -- Complicity of the petitioner in the alleged crime is not prima facie made out and there is no criminal history attributable to the petitioner – Pre-trial incarceration of a petitioner is not going to serve any fruitful purpose -- Bail granted – Petition allowed. (Paras 7 &10)

Cases referred:
Tofan Singh Vs. State of Madras, 2021 (4) SCC 1;

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

O R D E R

Petitioner is an accused in case FIR No. 16/2021, dated 24.02.2021, registered at Police Station Swarghat, District Bilaspur, Himachal Pradesh, under Sections 20 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "ND&PS Act").

2. Petitioner has approached this Court for the grant of bail under Section 439 of the Code of Criminal Procedure in the above noted case, on the grounds that the petitioner is innocent and has nothing to do with the

case. Petitioner is stated to be a young person of 30 years, having no criminal antecedents. It is submitted on behalf of the petitioner that he is a businessman and had a Fast Food business at Model Town Rohtak. He was also running his business at Kasol in District Kullu, H.P. under the name and style of " Daily Chap and Kathiroll". Earlier co-accused Vikas @ Vicky and Hitesh were running the said business from whom petitioner had taken over the same. It is further submitted that there is no legal evidence to connect the petitioner with the alleged crime. Simply because he has business dealings with co-accused Vikas @ Vicky and Hitesh, he can not be said to be a partner in crime, if any, with them. Petitioner has undertaken to abide by all the conditions as may be imposed against him. He has also undertaken not to make any threat, promise or inducement to the prosecution witnesses.

3. The respondent-State has filed status reports from time to time during the pendency of the instant petition. As per the case of the respondent-State, on 24.02.2021, police party had laid 'Nakka' near 'Thakur Bhojnalya', Baner, District Bilaspur, H.P.. A car with registration No. HP49-2697(i-20) approached from the Bilaspur side, which was stopped for checking. The driver of the car got perplexed on noticing police party. Tek Ram was the Driver of the car and another person named Bobby Sharma was sitting besides him on the front seat. Independent witnesses were associated. Car was checked and charas weighing 1 kg 790 grams was recovered. During interrogation, accused Tek Ram and Bobby Sharma disclosed that they were carrying the contraband on the asking of Vikas @ Vicky and Hitesh, who had engaged them to transport the same beyond the Borders of Himachal Pradesh, in lieu of Rs. 20,000/-. It was also disclosed that both these persons (Vikas @ Vicky and Hitesh) had travelled in advance in their vehicle No. DL-8CNA-7974 and were scheduled to meet them near Toll Plaza beyond place known as Garamoura. On this information, Vikas @ Vicky and Hitesh alongwith vehicle No. DL-8CNA-7974, were apprehended near

Garamoura, Toll Barrier. All the accused persons were formally arrested after completion of preliminary investigation.

4. The case of the respondent-State further is that during investigation accused Hitesh disclosed the complicity of petitioner in the crime. As per respondent-State, accused Hitesh disclosed that he alongwith Vikas @ Vicky and petitioner had handed over the contraband to Tek Ram and Bobby Sharma for transportation beyond the Borders of the State. Petitioner was arrested on 03.03.2021. It is alleged that petitioner was found in company of Hitesh and Vikas @ Vicky in a hotel/restaurant near Garamoura sometimes before the apprehension of accused Vikas @ Vicky and Hitesh. Such fact is stated to have been confirmed from CCTV footage of the said hotel/restaurant. Some financial transactions have also been stated to have taken place between Hitesh and petitioner. It is also alleged that petitioner had been making and receiving calls to and from accused Hitesh and Vikas @ Vicky.

5. The challan is stated to have been filed after completion of investigation.

6. I have heard learned counsel for the petitioner and also learned Additional Advocate General for the respondent/State and have also gone through the contents of the status report as well as the record of the investigation.

7. The contraband recovered in the case is of commercial quantity, therefore, rigors of Section 37 of NDPS Act are applicable. However, at this stage, this Court is not precluded from looking into the material placed before it in order to have *prima facie* assessment of the nature and gravity of allegations against the petitioner and the material collected by the investigating agency to substantiate the same.

8. It is borne out from the records that the accused Tek Ram and Bobby Sharma, even as per the case of respondent-State, had not named the

petitioner to be one of the persons who had handed over the contraband to them for transportation. They had named only accused Vikas @ Vicky and Hitesh. It is only on the basis of alleged statement of accused Hitesh made during investigation that the implication of the petitioner came to be known to the police. Such material can not be used as evidence as is held by Hon'ble Supreme Court in ***Tofan Singh*** *Vs.* ***State of Madras, 2021 (4) SCC 1.*** Confessional statement of an accused, during the investigation under NDPS Act has been held to be inadmissible. In ***Bharat Chaudhary*** *Vs.* ***Union of India, Special Leave to Appeal (Crl.) No. 5703 of 2021,*** the three Judges Bench of Hon'ble Supreme Court in almost identical situation has held asunder:-

> "11. In the absence of any psychotropic substance found in the conscious possession of A-4, we are of the opinion that mere reliance on the statement made by A-1 to A-3 under Section 67 of the NDPS Act is too tenuous a ground to sustain the impugned order dated 15th July, 2021. This is all the more so when such a reliance runs contrary to the ruling of Tofan Singh (supra). The impugned order qua A-4 is, accordingly, quashed and set aside and the order dated 2nd November, 2020passed by the learned Special Judge, EC & NDPS Cases, is restored. As for Raja Chandrasekharan (A-1), since the charge sheet has already been filed and by now the said accused has remained for over a period of two years, it is deemed appropriate to release him on bail, subject to the satisfaction of the trial Court."

9. It is not denied that petitioner is running his business at village Kasol, District Kullu, H.P. It is also not denied that he was previously known to accused Vikas @ Vicky and Hitesh. Petitioner, as a matter of fact, is stated to have taken over the business of Fast Food at Kasol which earlier was being run by accused Hitesh. In these circumstances, there is nothing abnormal about the phone calls between petitioner and co-accused Vikas @ Vicky and Hitesh as also some financial transactions in between them. Whether they are related to the matter in issue, is a question that will be

decided during the course of trial. The Constitutional guarantee of personal liberty of an individual can not be curtailed on vague and indefinite allegations. As regards, the allegation that petitioner was in the company of Vikas @ Vicky and Hitesh at hotel/restaurant near Garamoura again cannot be said to be a circumstance pointing towards complicity of petitioner in the alleged crime, especially the Vikas @ Vicky and Hitesh, were known to him.

10. Thus, in the facts and circumstances of the case, this Court is satisfied that the complicity of the petitioner in the alleged crime is not *prima facie* made out. There is no criminal history attributable to the petitioner, therefore, it can also not be said that in case of his release on bail, he is likely to commit the offence again.

11. In the given facts and circumstances of the case, pre trial incarceration of the petitioner is not going to serve any fruitful purpose. Petitioner is permanent resident of 8/4 New Netaji Nagar, Line Par, Nizampur Road, Bahadurgarh, Jhajjar, Haryana and there is no likelihood of his absconding from the course of justice. No such circumstance has been brought to the notice of this Court by the respondent-State which may lead to reasonable inference of petitioner tampering with the prosecution evidence. It is also not the case of the respondent that release of the petitioner on bail is likely to affect the trial of the case adversely.

12. In the peculiar facts and circumstances of the case, the instant petition is allowed and the petitioner is ordered to be released on bail in case FIR No. 16/2021, dated 24.02.2021, registered at Police Station Swarghat, District Bilaspur, Himachal Pradesh, under Sections 20 and 29 of Narcotic Drugs and Psychotropic Substances Act, 1985, on his furnishing personal bond in the sum of Rs. 2 lacs/- with one surety in the like amount, who necessarily will be of a person belonging to the State of Himachal Pradesh, to the satisfaction of the learned Trial Court, This order is subject to following conditions :-

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

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

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

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

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 VIVEK SINGH THAKUR, J.

Between:-

OM PRABHA NEGI W/O SH. SANJAY KUMAR,
RESIDENT OF AKASH DEEP BHAWAN, NORTH
OAK, SANJAULI, SHIMLA-6 PRESENTLY
SERVING AS SECTION OFFICE, H.P. PUBLIC
SERVICE COMMISSION, NIGAM VIHAR,
SHIMLA-2

... PETITIONER

(BY MR. SUNIL MOHAN GOEL, ADVOCATE)

AND

1. H.P. PUBLIC SERVICE COMMISSION
THROUGH ITS SECRETARY,

NIGAM VIHAR, SHIMLA

2. PRINCIPAL SECRETARY (PERSONNEL)
TO THE GOVERNMENT OF HIMACHAL
PRADESH, SHIMLA

3. TRIBAL DEVELOPMENT DEPARTMENT
THROUGH ITS SECRETARY
VIJANI HOUSE, CHOTTA SHIMLA, SHIMLA-2

4. HEMANT KUMAR SON OF LATE SH.RAJESHWAR
NATH UNDER SECRETARY, H.P. PUBLIC SERVICE
COMMISSION, NIGAM VIHAR, SHIMLA-2.

5. SH. TILAK RAJ ATTRI, SON OF SH.P.R.ATTRI,
SECTION OFFICER, H.P. PUBLIC SERVICE
COMMISSION, NIGAM VIHAR, SHIMLA-2.

2. SHRI JASBIR SINGH, SON OF SHRI HARNAM
SINGH, SECTION OFFICER, H.P. PUBLIC SERVICE
COMMISSION, NIGAM VIHAR, SHIMLA-2.

3. SH. BUTESHWAR RAM, SON OF LATE SH.BHADROO
RAM, SECTION OFFICER, H.P. PUBLIC SERVICE
COMMISSION, NIGAM VIHAR, SHIMLA-2.

4. SMT. SOMA SHARMA, WIFE OF SH.AJAY SHARMA,
SUPERINTENDENT H.P. PUBLIC SERVICE
COMMISSION, NIGAM VIHAR, SHIMLA-2

.. RESPONDENTS

(MR. VIKRANT THAKUR, ADVOCATE FOR R-1)
(MR. RAJU RAM RAHI, DEPUTY ADVOCATE GENERAL FOR R-2 & 3)
(MR. DILIP SHARMA, SENIOR ADVOCATE WITH MR.MANISH SHARMA
ADVOCATE FOR R-4 TO 7)
(MR.D.K. KHANNA, ADVOCATE FOR R-8)

CIVIL WRIT PETITION
NO. 4052 OF 2019

Judgment reserved on:February, 2022
DECIDED ON: 29.03.2022

Constitution of India 1950 - Article 226 – Service matter - Seniority - Applicability of Catch Up Rule for the cadre strength of Superintendent Grade-II and Section Officers 13 point roster is applicable and in case eligible candidate is not available against a particular roster point the said roster point is to be reflected as unutilized and the vacancy is to be filled by exhausting next roster point - It is the roster point on the basis of which vacancies to be allotted to a particular category either unreserved or reserved and therefore proper wording, which should have been used in DPC proceedings speaks about roster point availability for reserved category is carried forward and the post is filled by exhausting next roster point - The wording used in DPC sounds that the post of reserve category has been consumed by unreserved category where as the fact is that roster point available category was kept unutilized by carrying forward the next roster point available for unreserved category - Respondent number 7 was promoted after petitioner but, respondent number 7 being senior in feeder cadre was entitled for benefit of catch up rule and to be placed above the petitioner in seniority list of Superintendent Grade-II – Held - The instructions dated 30.10.2013 deals with only issue of consequential seniority in reservation in promotion and there is no other instructions providing reservation in promotion - Instructions also contain principle of catch up rule and private respondents held entitled for benefit of catch up rule - Petition found without merits and dismissed.[Paras 44, 45 , 52 & 54]

Cases referred:

Ajit Singh & others (II) vs. State of Punjab and others (1999)7 SCC 209;
Dharam Pal vs. State of H.P. and another, 2009 (1) Shim.L.C. 140;
Indra Sawhney vs. Union of India (1992) Supp. 3 SCC 217;
Jarnail Singh and others vs. Lachhmi Narain Gupta and others (2018)10 SCC 396;
M. Nagraj and others vs. Union of India & others (2006)8 SCC 212;
Post Graduate Institute of Medical Education & Rsearch, Chandigarh vs. Faculty Association and others with many other connected matters, (1998) 4 SCC 1;
R.K. Sabharwal and others vs. State of Punjab and others, (1995) 2 SCC 745;
R.K. Sabharwal vs.State of Punjab and others, (1995(2) SCC 745;
Union of India and others vs. Virpal Singh Chauhan (1995)6 SCC 684;

This petition, coming on for judgment this day, the court delivered the following:

J U D G M E N T

Petitioner, serving as Section Officer in office of respondent No.1 H.P. Public Service Commission (hereinafter to be referred as Commission), has filed the instant petition for quashing Office Memorandum dated 24.9.2019 whereby Tentative Seniority List of Section Officers, as it stood on 1.9.2019, depicting private respondents No. 5 to 7 senior to petitioner has been circulated, and also for quashing of proceedings of Department Promotion Committee (DPC) dated 1.1.2010 (Annexure P-6), 16.11.2011 (Annexure P-8), 10.5.2012 (Annexure P-9), 28.7.2014 (Annexure P-10) recommending promotion of respondents No. 4 to 7 from the post of Senior Assistant to Superintendent Grade-II, DPC proceedings dated 31.3.2015 (Annexure P-7) recommending promotion of respondent No.4 and another from the post of Superintendent Grade II to the post of Section Officer and also DPC proceedings dated 13.2.2007 (Annexure P-11) recommending promotion of respondent No.8 Soma Devi as Senior Assistant against the post meant for Secheduled Caste category.

2 Ground for aforesaid challenge is that in view of pronouncement of the Supreme Court in ***R.K. Sabharwal vs.State of Punjab and others,*** reported in ***(1995(2) SCC 745***, as well as instructions dated 20.8.1998 and 19.2.2000 issued by Government of Himachal Pradesh dealing with Reservation Roster to the appointment and promotion, various posts of Senior Assistant, Superintendent Grade-II and Section Officers allotted to the reserved category could not have been filled by promoting the candidates from unreserved category but were to be kept vacant till availability of suitable candidate of concerned reserved category and thus, promotion of private respondents belonging to General Category against respective reserved posts is

illegal and invalid and, therefore, despite being senior to petitioner in the entry grade, private respondents are not entitled for benefit of principle of catch-up Rule propounded by the Supreme Court in ***Union of India and others vs. Virpal Singh Chauhan*** reported in ***(1995)6 SCC 684*** and ***Ajit Singh & others (II) vs. State of Punjab and others*** reported in ***(1999)7 SCC 209*** and, accordingly, petitioner being appointed as Section Officer on 25.2.2016, prior in time to promotion of respondents No. 4 to 7 to the post of Section Officer, is to be placed senior to them and has to be considered for further promotion to the post of Under Secretary prior to them. Further that on same analogy, respondent No. 8 Soma Sharma, who was promoted as Superintendent Grade II on 1.4.2015 after the date of promotion of petitioner to the said post i.e. Superintendent Grade II on 31.10.2013, is also to be placed below the petitioner in seniority list of Superintendent Grade-II being not entitled for benefit of Principle of catch up Rule.

3 According to petitioner, benefit of principle of catch-up Rule is available only to those employees who are senior in the feeder category to employee promoted by way of accelerated promotion, however, have been promoted against the post available for unreserved category but not on promotion against the post allotted to reserved category. Referring impugned DPC proceedings, Annexure P-6 to Annexure P-11, learned counsel for petitioner has pointed out the recommendation of DPC with respect to employees belonging to unreserved category against the post meant for SC and ST categories and has contended that instead of doing so, the posts meant for SC & ST categories were to be kept vacant and, in such eventuality, private respondents could not have been promoted against such post(s) and, therefore, their promotions in pursuant to impugned DPC proceedings deserve to be ignored for considering the petitioner above them in seniority list and consequently also for further promotion in terms of pronouncement of the Supreme Court and instructions issued by State Government, referred supra.

4 It has been argued on behalf of petitioner that post meant for reserved category cannot be filled by appointing/promoting candidate from unreserved category without de-reserving the post with prior approval of competent authority, which has not been done in present case and thus, promotions of private respondents made against post meant for reserved category are illegal, and are inconsequential with respect to right of petitioner to consider her senior to them, as they are not entitled for benefit of catch up Rule for their illegal and impermissible promotions made against the post of reserved category.

5 Separate replies on behalf of respondents No. 1, 2 as well as respondents No. 4 to 7 have been filed. Respondent No.8 has adopted the reply filed on behalf of respondents No. 4 to 7, whereas, no independent reply has been filed on behalf of respondent No. 3/respondents/Tribal Development. During hearing instructions dated 26.12.2020, imparted by the Additional Chief Secretary (Personnel) to the Government of HP to learned Additional Advocate General, have also been placed on record along with documents enclosed therewith.

6 As per reply of respondent No.1, placement of Section Officers in Tentative Seniority List has been made in accordance with instructions of Government vide letter No. PER(AP)C-F(1)-1/95 dated 27th May, 1996 by applying the principle of Catch-up as propounded by the Supreme Court in Vir Pal Singh's and Ajit Singh(II)'s cases (referred supra) and promotions under challenge have been recommended and made by applying ratio laid down by the Supreme Court in R.K. Sabharwal's case referred supra.

7 It has been stated in reply of respondent No.1 Commission that petitioner was appointed as daily wages clerk on 5.2.1996 and her services were regularized as Clerk on 10.2.1997 and she was placed as Junior Assistant on 10.2.2002 and promoted as Senior Assistant on 13.2.2007. Thereafter, she was promoted as Superintendent Grade-II on 31.10.2013 and

Section Officer on 26.2.2016 immediately on attainment of eligibility criteria without causing any loss to her at any point of time as she was given due and timely benefit as and when admissible. For promotion from Clerk to Senior Assistant, 10 years service was required and for promotion from Senior Assistant to Superintendent Grade-II, 6 years service was required and petitioner was promoted as Senior Assistant and Superintendent Grade-II immediately after attaining the eligibility criteria by her. Petitioner became eligible for promotion to the post of Section Officer on 26.2.2016, whereas vacancy had arisen on 1.12.2015, but the same was kept vacant till the petitioner attained the eligibility and accordingly she was promoted on the day when she acquired the eligibility. It has also been stated in reply that in the year 2011 cadre strength of Senior Assistant was decreased from 34 to 18 by abolition of 16 posts of Senior Assistant and creation of 8 posts of Clerk and similarly cadre strength of Superintendent Grade-II was decreased to 7 from 11 in the year 2007, by upgrading 4 posts of Superintendent Grade II to the post of Assistant Registrar as a measure personal to the incumbents and as such, on retirement of incumbents posted against those posts, cadre strength of Superintendent Grade-II again became 11 and roster register of these posts remained incomplete because of this increase and decrease in the cadre strength at various times and continuation of some temporary posts.

8 It has been further stated that at the time of recommending promotion of respondent No.8 Soma Devi along with petitioner vide DPC proceedings dated 13.2.2007 18 posts of Senior Assistant were lying vacant and as per reservation roster the roster points No. 15 and 16 were available for the candidates of SC and ST category respectively, but Scheduled Caste candidate was not available and, therefore, Soma Devi, who was senior to the petitioner, was promoted by carrying forward the roster point of Scheduled Caste and thus, as other vacant posts of Senior Assistant were there making the vacancy available against roster point of General/Unreserved category,

Soma Devi was and is to be considered to have been appointed/promoted against the roster point available for General/Unreserved category, but, it has been wrongly mentioned in proceedings that she was promoted against the vacancy available for Schedule Caste reserved category.

9 It has been further stated on behalf of the Commission that cadre strength of Superintendent Grade-II is 11, whereas cadre strength of Section Officers is 7 and therefore, instead of 100 point roster, 13 point model roster for promotion is to be and has been applied in accordance with instructions dated 20.8.1998 and for non-availability of SC/ST candidate against the roster point available for them, promotion has been given to the candidates of unreserved category against next roster point by carrying forward the roster point of reserved category. Further that as per 13 point roster, one roster point each is available to SC and ST category in rotation and therefore, all private respondents cannot occupy single post reserved for SC/ST category as proported by petitioner and therefore, at the most, last candidate can be considered to have been promoted against the post meant for SC/ST category but in view of instructions dated 27.5.1996, after promotion, the said incumbent has also to be placed above the petitioner in seniority list as senior to her in feeder cadre and therefore, it has been contended that no harm has been caused to interest of petitioner on account of DPC proceedings impugned in present petition.

10 During course of hearing, on behalf of respondent No.1 Commission, comparative statement of appointment in the entry grade and thereafter promotion of private respondents viz-a-viz petitioner has been placed on record, which is as under:-

TABLE-A

Sr	**Name of**	**Name of Post and Date of Appointment/Promotion**

No.	Officer/Official					
		Clerk/Entry Grade	Sr Assistant	Superintendent Grade-II	Section Officer	Under Secretary
1.	Shri Hemant Sharma (R-4)	22.01.1987	22.07.1995	02.08.2010	01.04.2015	01.11.2018 (retired on 31.08.2020)
2.	Shri Tilak Raj Attri (R-5)	22.02.1987	16..05.1997	16.11.2010	01.09.2016	_____
3.	Shri Jasbir Singh (R-6)	06.03.1987	15.05.1997	11.05.2012	01.04.2017	_____
4.	Shri Bhuteshwer Ram (R-7)	24.05.1996	26.05.2006	01.08.2014	01.11.2018	_____
5.	Ms.Soma Sharma (R-8)	10.02.1997	13.02.2007	01.04.2015	_____	_____
6.	Ms. Om Prabha Negi	10.02.1997	13.02.2007	31.10.2013	26.02.2016	_____

	(Petitioner)					

11 It has also been canvassed on behalf of Commission that posts of Section Officer and Superintendent Grade-II are functional posts and vacancy therein hampers efficiency of the Commission and, therefore, the post cannot be kept vacant and thus, being the functional posts, these posts, for non-availability of eligible SC and ST candidates in the feeder cadre, were filled by the candidates belonging to unreserved category which is permissible under law i.e. instructions circulated by Government of Himachal Pradesh as well as pronouncements of the Supreme Court.

12 On behalf of respondents No 4 to 7, claim of the petitioner has been opposed for non-joinder of necessary parties, not challenging the promotion order of private respondents, not assailing the Final Seniority List of Superintendent Grade-II dated 17.5.2016, delay and latches, and impermissiblity of reservation in promotion in view of pronouncements of the Supreme Court.

13 It has been contended on behalf of private respondents that in impugned DPC proceedings, employees other than private respondents were also recommended for promotion and were promoted in the same fashion and quashing of these DPC proceedings would definitely harm the interest of those persons also but they have not been arrayed as party and thus, petition is bad for non-joinder of necessary parties. Further that though DPC proceedings have been assailed but promotion orders of private respondents have not been assailed and in absence thereof, writ petition is not maintainable.

14 It has been contended on behalf of private respondents that petitioner was promoted as Superintendent Grade-II on 31.10.2013 whereas private respondents No. 7 and 8 were promoted as Superintendent Grade-II on

1.8.2014 and 1.4.2015 after the promotion of petitioner and thereafter, they were placed senior to petitioner in the seniority list of Superintendent Grade-II circulated on 25.4.2016 which was finalized vide Memorandum dated 17.5.2016 but petitioner did not assail the said Seniority List at any point of time, and therefore, she has no right to assail the Seniority List of Section Officers prepared on the same analogy by applying the same principle and further that DPC proceedings assailed by petitioner were held during the period of 13.2.2007 to 31.3.2015 but petitioner has challenged the same in the year 2019 i.e. after unexplained inordinate delay and for not assailing DPC proceedings within reasonable time, petition deserves to be dismissed on this count also.

15 Referring ***Indra Sawhney vs. Union of India*** reported in ***(1992) Supp. 3 SCC 217; M. Nagraj and others vs. Union of India & others*** reported in ***(2006)8 SCC 212;*** pronouncement dated 18.9.2009 of the Division Bench of this High Court in CWP(T) No. 2628 of 2008; judgment dated 10.1.2017 passed in LPA No. 69 of 2015 whereby the Division Bench of this Court has affirmed the dismissal of CWP 8005 of 2011 passed by learned Single Judge vide order dated 2.4.2015 rejecting claim of petitioner therein for promotion to the post of Senior Assistant in H.P. Vidhan Sabha on the basis of reservation and Instructions No. PER(AP)-C-F(1)-2/2011-Vol.I dated 30.10.2013 whereby it has been communicated that Government is of the opinion that enabling provisions of Constitution (85th Amendment) Act 2001 are not required to be implemented in State, it has been contended that reservation in promotion is not available in Himachal Pradesh.

16 It has also been contended on behalf of private respondents that another petition bearing CWPOA No. 4771 of 2020, titled Himachal Pradesh Samanaya Varg Karamchari Kalayan Mahasangh vs. State of HP is also pending adjudication in this regard whereby promotions made by respondent/State after 15.11.1997 by applying reservation policy, to various

posts have been challenged on the basis of judgment in Indra Sawhney's as well as M. Nagaraj's cases with further prayer to restrain the respondent/State from making any further promotion in violation of provisions of the Constitution read with ratio of law laid down by the Supreme Court.

17 It has been further canvassed on behalf of private respondents that after passing of judgment in M. Nagaraj's case, whereby it was held that power granted to State by enabling provisions of Article 16 (4A) can be exercised by State only after collecting quantifiable data to show backwardness and inadequacy of representation in the services of State, the State Government had issued instructions dated 7.9.2007 making provisions for reservation in promotion along with consequential seniority on promotion against reservation roster in all classes of posts in services of the State in favour of SC and ST. These instructions were assailed in CWP-T No. 2628 of 2008 titled H.P. Samanaya Varg Karamchari Kalayan Mahasangh vs. State of HP and others and were quashed by the Division Bench for want of collection of quantifiable data as directed by Supreme Court in M. Nagaraj' case. Thus, it has been contended that after quashing of instructions dated 7.9.2007, reservation in promotion is not permissible in State of HP.

18 Alternatively, it has been argued that if it is considered that reservation is permissible in promotions also, even then claim of petitioner is not sustainable for the reason that cadre of Superintendent Grade-II and Section Officer consists of 11 and 7 posts respectively and therefore, 13 point roster is applicable to these posts and as explained in ***Dharam Pal vs. State of HP and another*** reported in ***2009(1) Shim.LC 140***, for non-availability of candidate of reserved category, roster point was to be carried forward by reflecting it unutilized and post was to be filled by eligible candidate from the next roster point. It has been further contended that in R.K. Sabharwal's case Court was dealing with 100 point roster wherein allocation of posts to all categories i.e. unreserved and reserved, is possible as per percentage of their

entitlement but in cadre of less than 13 posts such allocation of posts is not possible and therefore, to ensure the representation of all categories in rotation in such cadre, 13 point roster has been evolved in dilution of law laid down in R.K. Sabharwal's case and principles of providing reservation against vacancy instead of posts have been provided under 13 Point Roster by applying running roster and as upto 13 point no post/vacancy will be available to ST, therefore, roster is applied running upto roster point 14 so that post in rotation is available for ST category also.

19 Learned counsel for respondent No. 8 has also contended that petition against respondent No.8 is not maintainable as respondent No. 8 has not been yet promoted as Section Officer and thus, her name is not in the tentative list of Section Officers under challenge. Further that DPC proceedings dated 13.2.2007 have been assailed after 12 years which prayer deserves to be rejected on the ground of delay and latches as after such a long period, settled position cannot be unsettled. Further that in terms of judgment in Indra Sawhney's case, after 15.11.1997 no instruction has been issued by Government of Himachal Pradesh providing reservation in promotion except instructions 7.9.2007 which stands set aside by this High Court in judgment dated 18.9.2009 referred in CWP-T No. 2628 of 2008 titled H.P. Samanaya Varg Karamchari Kalayan Mahasangh vs. State of HP and others.

20 In Indra Sawhney's case it was held that Article 16(4) of the Constitution does not provide for reservation in the matter of promotion and thus reservation in promotion was held impermissible, however, five years time was given to Central as well as State Governments to continue reservation in promotions but, in absence of relevant provisions in the Constitution, not thereafter. It led to an insertion of Article 16(4A) in the Constitution through Constitution (77th Amendment) Act, 1995 w.e.f. 17.6.1995.

21 In ***Vir Pal Chauhan's case*** it was held by Court that benefit of accelerated promotion (on account of reservation in promotion), does not confer consequential seniority and principle of Catch up Rule was propounded whereby candidate of unreserved category, senior to the person promoted through accelerated promotion, left behind in the feeder cadre would be entitled to regain seniority on his promotion, but on promotion before further promotion of candidate of reserved category.

22 For enabling the State to grant consequential seniority to employee of reserved category on promotion through reservation, Article 16(4A) was further amended by Constitution (85th Amendment) Act 2001. Prior to that Article 16(4B) was also inserted through Constitution (81st Amendment) Act 2000 enabling the State not to consider the vacancies of reserved categories of previous year(s) to be filled up in any succeeding year(s) together with vacancies of the said year(s) for determining the ceiling of 50% reservation on total number of vacancies of that year.

23 Constitutional validity of Articles 16(4A) and 16(4B) was assailed in ***M.Nagaraj's case***. Upholding the Constitutionality of the Amendments it was clarified by the Supreme Court that for exercising its discretion under Article 16(4A) in addition to the compliance with Article 335 of Constitution of India, the State has to collect quantifiable data showing backwardness of Class and inadequacy of representation of that Class in public employment. However, in ***Jarnail Singh and others vs. Lachhmi Narain Gupta and others*** reported in ***(2018)10 SCC 396*** the Supreme Court has held that there is no need for State to collect quantifiable data regarding backwardness of SC and ST as they are identified and grouped as such because of prior discrimination and its continuing ill-effects. However, it was reiterated that State has to collect quantifiable data, before making provisions in terms of Article 16(4A), relating to inadequacy of representation of SCs and STs in the services of State if reservation is sought to be provided in promotions.

24 Before judgments in ***Jarnail Singh's case***, State of HP had issued instructions dated 7.9.2007 providing reservation in promotion with consequential seniority, but in absence of quantifiable data in terms of ***M.Nagaraj's case*** the said instructions were quashed by a Division Bench of this Court in judgment dated 18.9.2009 rendered in ***CWP(T) No. 2628 of 2008, titled as H.P. Samanaya Varg Karamchari Kalyan Mahasangh vs. State of HP and others***. This judgment is stated to have been assailed in Supreme Court which is pending adjudication along with Civil Appeal No. 629 of 2022.

25 In addition to reply filed on behalf of respondents/State, on the basis of instructions, learned Deputy Advocate General has submitted that State Government is providing reservation in promotion to Scheduled Caste and Scheduled Tribe to the non-selection posts and selection posts w.e.f. 27.11.1972 and 20.7.1974 and reservation roster in this regard is being followed in accordance with law laid down by the Supreme Court in ***R.K. Sabharwal's case*** by circulating instructions dated 27.5.1996, 27.3.1997 and 20.8.1998 which have been further clarified vide instructions dated 19.2.2000 and 18.11.2004. He has further submitted that aforesaid instructions have never been assailed much less quashed by any Court.

26 He has also referred contents of reply filed on behalf of respondent/State to petition CWPOA No. 4771 of 2020 wherein similar stand, as argued by him, has been taken. He has also submitted that provisions of Article 16(4A) of the Constitution enables the State to make any provision for reservation in the matter of promotion with consequential seniority to any Class or Classes of posts in service under the State in favour of Scheduled Caste and Scheduled Tribe. He has further submitted that on the basis of quantifiable data collected by State showing the overall representation of Scheduled Caste and Scheduled Tribe in services of State and Constitutional provisions thereof, a conscience decision has been taken by State that

reservation in promotion with consequential seniority to the members of Scheduled Caste and Scheduled Tribe categories as per Constitution (85th Amendment) Act 2001 may not be granted and as a result thereof, the State of Himachal Pradesh is providing reservation to SC/STs in promotion but without consequential seniority. He has further submitted that though earlier decision circulated vide instructions dated 7.9.2007 providing the reservation in promotion with consequential seniority to the members of Scheduled Caste and Scheduled Tribe stands quashed by Division Bench of this Court in judgment referred in CWP(T) No. 2628 of 2008 but instructions dated 27.5.1996, 27.3.1999, 20.8.1998, 31.1.1989 and other similar instructions related to provision of reservation in promotion to SC and ST categories, have neither been assailed nor quashed and/or set aside at any point of time and therefore, communication dated 30.10.2013, relating to implementation of Constitutional (85th Amendment in Himachal Pradesh), is to be read along with those instructions and therefore, intent of State in instructions dated 30.10.2013 is that reservation in promotion with consequential seniority is not required to be provided in Himachal Pradesh, however, reservation in promotion in terms of instructions/decisions circulated earlier is to be continued and as such, State Government is continuing with reservation in promotion, except in promotion from Class-I post to Class-I post, but without consequential seniority.

27 It has been further contended by learned Deputy Advocate General that Instructions dated 7.9.2007 were issued in continuation of instructions dated 31.1.1989 and 20.8.1998 and in supersession of instructions dated 27.5.1996 and 27.3.1997 and therefore, on quashing of instructions dated 7.9.2007, instructions dated 27.5.1996 and 27.3.1997 stand revived and these instructions as well as other instructions issued from time to time including instructions dated 31.1.1989, 20.8.1998 and 18.11.2004 have neither been withdrawn by State nor assailed in Court.

Further that though promotions made giving reservation in promotions after 15.11.1997 have been assailed in CWPOA No. 4771 of 2020, but, the said petition is yet to be decided wherein, the stand of State, that reservation in promotion is being provided in terms of instructions dated 27.5.1996 and 27.3.1997 in consonance with pronouncement of Supreme Court and provisions of the Constitution is pending adjudication.

28 In nutshell, ground reality is that reservation in promotion is being extended in State of H.P. but without consequential seniority in terms of Constitution (85th Amendment) Act. Matter related to this issue is pending adjudication in CWPOA No. 4771 of 2020 before Division Bench of this Court and in Civil Appeal No. 629 of 2022 along with connect appeals in the Supreme Court. Further, petitioner was provided reservation in promotion on 13.2.2007, 31.10.2013 and 26.2.2016 when she was promoted to the post of Senior Assistant, Superintendent Grade-II and Section Officer. At the time of promotion of petitioner as Superintendent Grade-II, respondents No. 7 and 8 did not raise any objection despite the fact that they were senior to her and she was promoted prior to them. Similarly on promotion of petitioner as Section Officer on 26.2.2016, prior to private respondents No. 5 to 7, they remained silent spectators despite the fact that they were senior to her in feeder cadre and were promoted subsequent to promotion of petitioner. In fact, promotions of petitioner on the basis of reservation was never assailed by private respondents at any point of time.

29 Plea of State, that vide communication dated 30.10.2013 State has decided not to extend benefit of consequential seniority on the basis of accelerated seniority but not to discontinue the reservation in promotion of SC and ST candidates which is being extended in promotion as per instructions including instructions dated 27.5.1996 and 27.3.1997, is pending adjudication in CWPOA No. 4771 of 2020 before Division Bench of the High Court and also in Civil Appeal No. 629 of 2022 pending adjudication in

Supreme Court. In Civil Appeal No. 629 of 2022, the Supreme Court vide order dated 28.1.2022, in para 23 thereof it has been observed that in Himachal Pradesh, reservation in promotion is being provided by following explanatory notes to the office memorandum issued by Government of India dated 2.7.1997.

30 In these facts and circumstances and also keeping in view the fact that issue regarding reservation in promotion in Himachal Pradesh is pending adjudication, as referred supra, and reservation in promotion extended to the petitioner is not under challenge in this petition, I am of considered view that it is neither necessary nor warranted to give any opinion with respect to legality or illegality in providing reservation to petitioner. Principle of delay and latches is applicable to both sides. Otherwise also, present petition can be decided without going into this question.

31. Instructions dated 20.8.1998, which are in force, contain guidelines with respect to implementation of post based reservation roster in terms of judgment of the Supreme Courtin R.K. Sabharwal's case. Appendix to Annexure D provides modal roster for promotion for cadre strength upto 13 posts which is also known as 13 point roster.

32 In Para-6 of Instructions dated 20.08.1998 (hereinafter referred to as 'the instructions'), which is relevant in present case reads as under:-

> "6. At the Stage of initial operation of a roster, it will be necessary to adjust the existing appointments in the roster. This will also help in identifying the excesses/shortages, if any in the respective categories in the cadre. This may be done starting from the earliest appointment and making an appropriate remark "utilised by SC/ST/OBC/Gen. etc.", as the case may be against each point in the rosters as explained in the explanatory notes appended to the model rosters. In making these adjustments, appointments of candidates belonging to SCs/STs/OBCs which were made on merit (and not due to

reservation) are not to be counted towards reservation so far as direct recruitment is concerned. In other words, they are to be treated as general category appointments."

33 Clauses 1 and 2 of Initial Operation contained in Annexure A appended with aforesaid Instructions, after explanatory note are also relevant in present case, which read as under:-

"1. As the point of initial operation of the roster, it will be necessary to determine the actual representation of the incumbents belonging to different categories in a cadre vis-a-vis the points earmarked for each category viz. SC/ST/OBC and General in the roster. This may be done by plotting the appointments made against each point of roster starting with earliest appointee. Thus, if the earlier appointee in the cadre happens to be a candidate belonging to the Scheduled Castes, against Point NO.1 of the roster, the ramark "utilized by SC" shall be entered. If the next appointee is a general category candidate, the remark "utilized by general category" shall be made against point No.2 and so on and so forth till all appointments are adjusted in the respective rosters. In making these adjustments, SC/ST/OBC candidates on merit, in direct recruitment, shall be treated as general category candidates.

2. After completing the adjustment as indicated above, a tally should be made to determine the actual percentages of representation of appointees belonging to the different categories in the cadre. If there is an excess representation of any of the reserved categories, or if the total representation of the reserved categories exceeds 50%, it shall be adjusted in the future recruitment. Vacancies arising from retirement etc. of candidates belonging to such categories shall be filled by appointment of candidates belonging to the categories to which the relevant roster points, against which the excesses occur, belong."

34 Para-6 of the Instructions provides that in making adjustments, against Roster point, appointments of the candidates belonging to SCs/STs/OBCs, which were made on merit, and not due to reservation, are not to be counted towards reservation so far as "direct recruitment" is concerned. Earlier this principle was not applicable to the promotional Roster. However vide communication No.PER(AP)-C-F(II)-3/98 dated 18.11.2004 issued by Department of Personnel AP-III, as circulated, clarifies as under:-

> "… … …that the Scheduled Caste/Scheduled Tribe candidates appointed by promotion on their own merit and not owing to reservation or relaxation of qualifications will not be adjusted against the reserved points of the reservation roster. They will be adjusted against un-reserved points. Further, it has also been clarified that the Scheduled Caste/ Scheduled Tribe candidates appointed on their own merit (by direct recruitment or promotion) and adjusted against un-reserved points will retain their status of Scheduled Caste/Scheduled Tribe and will be eligible to get benefit of reservation in future/further promotions, if any."

35 Instructions also contain guidelines for initial operation of the Roster for determination of actual representation of the incumbents belonging to different categories in a cadre vis-a-vis the points earmarked for each category i.e. SC/ST/OBC and General in the Roster. Appointments made against each point of Roster may be plotted starting with earliest appointee and if the earlier appointee in the cadre happens to be a candidate belonging to Scheduled Caste against Point No.1 of the Roster the remark "utilized by SC" shall be entered and if the next appointee is a General category candidate the remark "utilized by General category" shall be made against Point No.2 and so on and so forth till all appointments are adjusted in the respective

Rosters. In making these adjustments, SC/ST/OBC candidates appointed/promoted on merit, shall be treated as General category candidates.

36 After completing the adjustment as indicated above, percentage of representation of appointees belonging to different categories in the cadre should be determined and in case there is excess representation of any of reserved category or if total representation of reserved category exceeds 50%, it shall be adjusted in future recruitment.

37 It is also settled that in 13 Point Roster, Principle of Replacement/Replacement Theory is not applicable rather Roster is to be continued rotating it forever on the basis of vacancies.

38 On the basis of pronouncements of the Supreme Court in ***R.K. Sabharwal and others vs. State of Punjab and others, (1995) 2 SCC 745; Post Graduate Institute of Medical Education & Rsearch, Chandigarh vs. Faculty Association and others with many other connected matters, (1998) 4 SCC 1;*** and judgment of Division Bench of this High Court in ***Dharam Pal vs. State of H.P. and another, 2009 (1) Shim.L.C. 140,*** and also taking into consideration instructions/guidelines issued by the Government vide communication dated 20.08.1998 and 18.11.2004 following principles for adjudication of present case have emerged:-

2. There is difference between the "post" and the "vacancy":

i. "Post" denotes the number of posts in the cadre, whether filled or vacant. "Cadre Strength" is equal to the created/existing posts in the cadre.

ii. "Vacancy" means a vacant post available for appointment, through recruitment/promotion, on creation of new post(s) or retirement, death or resignation or for any other reason removal of the incumbent working on the post.

3. There is difference between "Roster Point" and "position" in the seniority list:

(i) "Roster" denotes division/allotment of posts in the cadre to different categories on the basis of quota of reservation notified for each category. In the Roster Register, "Roster Point" reflects availability of post or vacancy for a particular category in the cadre.

(ii) "Seniority list" denotes the position of the incumbent in the cadre assigning his seniority *inter se* the incumbents posted/appointed in the cadre. Seniority list is not to be prepared on the basis of Roster Point, but on the basis of appointment/entry in the cadre subject to other guidelines/instructions related to 'accelerated promotion' and 'principle of catch up'.

4. Accelerated promotion

When a person belonging to reserved category, for allotment/availability of post in higher cadre against the Roster Point allotted to such reserved category, is promoted prior to his seniors, in feeder cadre, of Un-Reserved or other category, by giving preferential treatment, then it is accelerated promotion.

5. Principle of Catch up

When a person of reserved category for vacancy at a Roster Point reserved to his category gets accelerated promotion prior to his seniors, in feeder cadre, of Un-Reserved/other category and lateron his senior also gets promotion but before further promotion of person promoted by accelerated promotion, then senior, in feeder cadre, shall rank senior to him in promoted cadre also, irrespective of date of his promotion vis-a-vis date of promotion of person promoted by accelerated promotion.

6. Replacement Theory/Principle of Replacement

Once all posts are filled as per Roster, then vacancies subsequent thereto are to be filled on the basis of replacement i.e. the post vacated by a person of a particular category i.e. UR/SC/ST/OBC etc., shall be filled from the same category.

7. There are two types of Rosters, one is 100 Point Roster and another is 13 Point Roster.

8. For a cadre of 2-13 posts 13 Point Roster shall be applicable and in such Roster:-

(i) the Roster depicted in the Chart Annexure-D with instructions dated 20.08.1998 is to be read from Entry-1 under the Column "Cadre Strength" till the last post and then horizontally till the last entry in the horizontal row i.e. like 'L';

(ii) All the posts of the cadre are to be earmarked for the categories shown under column "Initial Recruitment";

(iii) While initial filling up will be by the earmarked category, the replacement against any of the post in the cadre shall be by rotation as shown horizontally. After exhausting last Roster Point, Roster shall be rotated again from Point No.1;

(iv) In case of non-availability of candidate of reserved category against the vacancy available for that category in the Roster Point, the said Roster Point shall be carried forward and in case of promotion such post shall be filled by consuming next Roster Point by promoting a person of the category to which next Roster Point is available. As and when eligible candidate of the category shall be available, the Roster Point for that category shall be exhausted by appointing/promoting such candidate on availability of vacancy; and

(v) The relevant rotation by the indicated reserved category could be skipped over if it leads to more than 50% reservation of reserved category.

9. Replacement theory is applicable to 100-Point Roster as percentage of posts available to each category can easily be calculated and maintained in 100-Point Roster. Whereas, in 13 Point Roster, replacement theory is not applicable as for less number of posts in a cadre, where 13 Point Roster is applicable, percentage of reservation

cannot be achieved as per entitlement of the particular category and in case percentage of reserved category is maintained then, percentage of Un-Reserved category shall decrease and in case percentage of Un-Reserved category is maintained, then percentage of reserved category shall decrease. Further all reserved categories may not get adequate chance and, therefore, 13-Point Roster has been evolved by the Government to ensure representation of all categories by rotation. Therefore, in 13-Point Roster, instead of replacement theory, the vacancy is to be filled-in on the basis of Roster Point available in 13-Point Roster by applying it in 'L' shape application of Roster as mentioned supra.

I. In case of single cadre post reservation is not permissible.

J. In the cadre of 2 and 3 posts, in case one post is occupied by reserved category either Scheduled Caste or Scheduled Tribe, another vacancy would not be filled on the basis of reservation to SC or ST candidate despite availability of roster point for such reserved category as it would amount reservation of more than 50% whereas in the cadre of four posts, maximum two posts can be filled on the basis of reservation. However, there shall be no bar on promotion of SC/ST candidate as unreserved candidate, on his own merit, without availing benefit of reservation policy. In case of promotion while applying 13 point roster, vacancy or post is not be carried forward, but, roster point of reservation is to be carried forward.

39 Stand of State of HP is that on the basis of quantifiable data collected by State, consequential benefit of seniority on account of reservation in promotion has been decided not to be extended but reservation in promotion has not been discontinued as there is no binding under Article 16(4A) that reservation in promotion is definitely to be given with consequential seniority. According to respondent/State, there is adequate representation of SC/ST candidate in services of State and thus, benefit of consequential seniority is not warranted to be extended. Even after insertion of Article 16(4A) in the Constitution, it is not binding on the State to give

reservation in promotion or reservation in promotion with consequential seniority as Article 16(4A) is only enabling provision. Depending upon the circumstances to be evaluated from quantifiable data, State may or may not give such reservation in promotion. Therefore, claim of petitioner on this count, for consequential seniority after accelerated promotion on account of reservation is liable to be rejected.

40 Right to be considered for appointment/promotion can only be claimed for the post in cadre and percentage of reservation is to be worked out in relation to number of posts which forms the cadre strength. In case of cadre of less than 14, on the basis of percentage of reservation, no post for ST shall be available. However, to accommodate, to ensure the representation, the Schedule Tribe candidate 13 point roster has been evolved.

41 In 100 point roster all posts can be allotted to each category unreserved and reserved by earmarking the serial number of posts to specific category according to their entitlement as percentage of each category can easily be determined for which it is entitled in 100 point roster and therefore, in the cadre of 100 or more than that, when 100 point roster is applicable, after exhausting the roster, the post vacated by a person is to be filled by candidate of the same category but it is not possible in 13 point roster where upto Serial Number 13, only one seat for reserved category of SC is available at roster point 7 and for providing the post available to ST, 14th point has been made available in 13 point roster and thereafter, roster is to be rotated again from the beginning on availability of vacancy irrespective of category of employee vacating such post and again roster points 1 to 6 and 8 to 13 are to be made available to unreserved category and roster point 7th and 14th are to be made available to SC and ST candidate respectively. However, when roster point available to reserved category is carried forward the same shall be exhausted at any point of time when vacancy is available and candidate from reserved category is eligible to be promoted to such post.

42 Mandate of pronouncement in ***M.Nagaraj and Jarnail Singh's cases*** is that apart from adequacy of representation, administrative efficiency as defined under Article 335 of the Constitution has also to be taken into consideration at the time of providing reservation in promotion. Therefore, in a small cadre where functioning of Institution/department shall be hampered on keeping the post vacant, it is not advisable to keep the post vacant for waiting an eligible candidate from a particular category. Right to consider for promotion may be a Fundamental Right under Equality Clause but right to be promoted during service career is not a Fundamental Right. It is an instance of service which may happen or may not happen depending upon various factors like date of entry in service, number of promotional posts and fulfilling of eligibility criteria etc.

43 Reservation has been provided in the Government jobs for socially and economically backward classes under Articles 15 and 16 of the Constitution of India for social justice and equality amongst all sections of the society. However, as provided under Article 335 of the Constitution maintenance of efficiency of administration is also to be taken into consideration at the time of dealing with claim of the members of Scheduled Caste and Scheduled Tribe. Therefore, whenever, in case of promotion especially in small cadre/establishments, against Roster Point available for reserved category, eligible person of that category is not available, then the vacancy available for filling up such Roster Point is not to be kept vacant, but is to be filled by utilizing next Roster Point. However, for ensuring compliance of reservation, for social justice, the Roster Point meant for reserved category is to be carried forward for utilization as and when candidate of that category is available, but subject to availability of vacancy/post, because on keeping the post vacant, particularly in small cadres/establishments, efficiency of administration would definitely be hampered and suffered. Therefore, a post cannot be kept vacant for indefinite period or long period in anticipation of

availability of a candidate of a particular category, who is not eligible/available on the date of vacancy or date of filling the said vacancy. Promotion is incident of service, which may occur or may not happen in a service career of a person. It is a settled law that right to consider for promotion against available post, is a fundamental right but promotion is not a fundamental right.

44 Post based replacement cannot be made applicable to a cadre of less than 13 as by such application only 7th posts shall go to SC and no post shall be available to ST category and post vacated by SC shall be filled by SC candidate and as such, ST candidate shall never get a chance to be promoted against reserved category and he shall only get the chance of promotion by competing with unreserved candidates against the post available from roster point 1 to 6 and 8 to 13. Therefore, in 13 point roster the roster register shall never be exhausted but shall be repeated and rotated again and again from 1 to 14 by starting roster point 1 after 14 in every cycle.

45 In present case, keeping in view the cadre strength of Superintendent Grade-II and Section Officers, 13 point roster is applicable and in case, an eligible candidate is not available against a particular roster point, the said roster point is to be reflected as unutilized and vacancy is to be filled by exhausting next roster point.

46 On perusal of impugned proceedings of DPC, Annexures P6 to P11, it transpires that at some places erroneously it has been mentioned that post was meant for unreserved or reserved category wherein in 13 point roster, it is the roster point on the basis of which vacancy is to be allotted to a particular category either unreserved or reserved and therefore, proper wording, which should have been used in DPC proceedings, is that roster point available for reserved category (SC/ST) is carried forward and post is filled by exhausting next roster point. As a matter of fact, practically the post has been filled by next roster point. But for wording used in DPC, it sounds

that post of reserved category has been consumed by unreserved category, whereas, the fact is that roster point available for reserved category was kept unutilized by carrying forward and next roster point available for unreserved category was utilized by promoting the employee of unreserved category.

47. Even if for argument sake, it is considered that the post would have been kept vacant for ST then also not all but last one would have to be ousted. But on promotion to the same post, even after promotion of petitioner, but before her further promotion, he would be entitled for benefit of catch up Rule being senior to her in the entry cadre and in present case, petitioner was promoted as Superintendent Grade-II on 31.10.2013 prior to respondents No. 7 and 8. But respondents No. 7 and 8 were promoted as Superintendent Grade-II prior to further promotion of petitioner as Section Officer on 26.2.2016 and therefore, they have been assigned seniority in the cadre of Superintendent Grade-II above the petitioner, which was never objected by petitioner. Similarly, after promotion of petitioner as Section Officer, by way of accelerated promotion on 26.2.2016, respondents No. 5 to 7 who were seniors to her not only in the previous cadre but also in entry cadre, but were left behind due to accelerated promotion of petitioner, have been promoted to the post of Section Officer prior to further promotion of petitioner and therefore, they have rightly been placed above the petitioner in seniority list of Section Officers.

48 Plea of petitioner that respondents were promoted against post meant for reserved category is not tenable and such plea is misconceived on account of faulty recording of minutes noting of DPC proceedings as discussed supra. As a matter of fact, roster point for reserved category was carried forward and private respondents were promoted by exhausting the next roster point which was available for unreserved category. The said exercise was undertaken as no one from reserved category was eligible at the relevant point of time.

49 Promotion of respondents No. 4 to 6 to the post of Superintendent Grade-II was affected during 1.1.2010 to 10.5.2012 as they were eligible to be promoted and post of Superintendent Grade-II was vacant. At that time, petitioner was not eligible though roster point for ST was available. Petitioner gained eligibility to be promoted as Superintendent Grade-II in February 2013 and she was considered and recommended for promotion in DPC proceedings dated 21.8.2013 against the vacancy arisen immediately after acquiring eligibility by her and was promoted on 31.10.2013. Therefore, she has no right to assail the DPC proceedings recommending the private respondents No 4 to 6 and their promotion in consequence thereto as at that time she was not having any right to be considered against the vacancies to which private respondents No 4 to 6 have been promoted for want of eligibility.

50. So far as respondent No.7 is concerned, he was promoted after petitioner on 28.7.2014, but, before her further promotion and therefore, respondent No.7 being senior in feeder cadre was entitled for benefit of catch up Rule and to be placed above the petitioner in seniority list of Superintendent Grade-II.

51 Similarly challenge laid to DPC proceedings dated 31.3.2015 recommending the promotion of respondent No.4 Hemant and Raman Kumar to the post of Section Officer is also not tenable as on that day petitioner was not eligible to be promoted as Section Officer for want of eligibility and roster point available for ST was not exhausted but was carried forward which was made available for her promotion keeping the post vacant for two months to wait gaining of eligibility by petitioner.

52 If it is considered that instructions dated 30.10.2013 deals with only issue of consequential seniority in reservation in promotion then also for quashing of instructions dated 7.9.2007, there is no other instructions except 27.5.1996 and 27.3.1997 providing reservation in promotion. Those instructions also contain principle of catch up. Therefore, right of petitioner,

as claimed by her, is to be governed by such instructions by taking into consideration the same as a whole but not by ignoring the principle of catch up. As discussed supra, private respondents are entitled for benefit of catch up Rule and thus, prayer of petitioner is not sustainable.

53 Considering hypothetically, on applying directions contained in R.K. Sabharwal's case to the cadre of Superintendent Grade-II and Section Officer in present case, after filling up all posts, running roster shall loose its relevancy after applying it upto 7th and 11th posts as the case may be, and thereafter, posts are to be filled on the basis of replacement theory. In such eventuality, the only 7th post shall be available to reserved category of Scheduled Caste and on vacation thereof by incumbent appointed against the said post, the same shall be filled by Scheduled Caste candidate and ST shall get no chance ever. Therefore, it has rightly been observed in ***Dharam Pal's case*** that R.K. Sabharwal's case does not deal with cases of such cadre where13 point roster is made applicable for having cadre from 2 to 13 posts.

54 In view of aforesaid discussion, I do not find any merit in plea raised by petitioner rather I am of the considered opinion that plea on the basis of which petition has been preferred is completely misconceived and contrary to law of land. Therefore, petition is dismissed being devoid of any merit.

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

Between:-

RAHUL DESHWAL, S/O SH. JAGDISH DESHWAL,
R/O HOUSE No. 254/12, TILAK NAGAR, DISTRICT
ROHTAK, HARYANA, PRESENTLY CONFINED IN
MODEL CENTRAL JAIL, NAHAN, DISTRICT
SIRMOUR, H.P., AGED ABOUT 26 YEARS.

……PETITIONER.

(BY MS. RAJVINDER SANDHU, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH, THROUGH PRINCIPAL SECRETARY (HOME) TO THE GOVERNMENT OF HIMACHAL PRADESH, H.P. SECRETARIAT, CHOTTA SHIMLA, SHIMLA-1, H.P.

2. DISTRICT MAGISTRATE, ROHTAK, DISTRICT HARYANA.

3. DIRECTOR GENERAL OF PRISONS, HIMACHAL PRADESH, BLOCK NO. 31, SDA COMPLEX, KASUMPTI, SHIMLA-9.

4. SUPERINTENDENT OF JAIL, MODEL CENTRAL JAIL, NAHAN, DISTRICT SIRMAUR, H.P.

……RESPONDENTS.

(SH.ASHOK SHARMA, ADVOCATE GENERAL WITH SH. VINOD THAKUR, SH. SHIV PAL MANHANS ADDITIONAL ADVOCATE GENERALS, SH. BHUPINDER THAKUR, SH. YUDHBIR SINGH THAKUR, DEPUTY ADVOCATE GENERALS AND SH. RAJAT CHAUHAN, LAW OFFICER, FOR RESPONDENTS-1, 3 AND 4).

CIVIL WRIT PETITION
No.573 of 2022
Decided on: 14.03.2022

Constitution of India, 1950 – Article – 226 - Request made by petitioner for releasing him for parole turned down by the respondents - Grant of the parole

- Antecedents of person seeking parole - Held - Merely fact of acquittal would not suffice for determining the antecedents of an individual, rather it would depend whether the acquittal is one based on total evidence or a criminal jurisprudence requires the case to be proved beyond reasonable doubt - Parameters having not been met, benefit of doubt was granted to the petitioner which by itself is no indicator of an honorable acquittal - Petitioner not entitled to be released on parole on consideration of his antecedents – Petition dismissed. (Paras 10 & 11)

Cases referred:

Commissioner of Police vs. Raj Kumar 2021 (9) Scale 713;

Commissioner of Police, New Delhi and another vs. Mehar Singh (2013) 7 SCC 685;

Deputy Inspector General of Police and another vs. S. Samuthiram (2013) 1 SCC 598;

State of Madhya Pradesh and others vs. Abhijit Singh Pawar (2018) 18 SCC 733;

State of Rajasthan and others vs. Love Kush Meena 2021 (4) Scale 634;

Union Territory, Chandigarh Administration and Others vs. Pradeep Kumar and another (2018) 1 SCC 797;

This petition coming on for admission after notice this day, ***Hon'ble Mr. Justice Tarlok Singh Chauhan,*** *passed the following:*

O R D E R

The request made by the petitioner for releasing on parole has been turned down by the respondents constraining him to file the instant petition for grant of the following reliefs:-

> "(i) Issue the impugned rejection letter dated 19.08.2021 contained in Annexure P-3 may kindly be quashed and set aside by issuing a writ of certiorari.
>
> (ii) That the writ of mandamus may kindly be issued directing the respondents to grant parole to the petitioner, in a time bound manner, as per law laid down therefor."

2. The petitioner was not released on parole due to non-recommendation of his case by the District Magistrate, Rohtak, District Haryana. Even though, the report is not annexed with the petition, however, a copy thereof has been appended along with the reply and the relevant text thereof reads as under:-

> "Please refer to letter No. MCJ/NHN/Pri/N/S-04/3682-84 dated 24/05/2021 from the Superintendent Jail, of Model Central Jail, Nahan on the subject cited above.
>
> The parole case of the convict got inquired through the Superintendent of Police, Rohtak and Tehsildar, Rohtak. The Superintendent of Police, Rohtak in his report stated that convict is undergoing a sentence of 10 years at Model Central Jail Nahan, District Sirmour (H.P.) in Case FIR No. 19/2016, under Section 20 & 29 of the NDPS Act, Police Station, Sundernagar, District Mandi, Himachal Pradesh. Besides this, the following cases are registered against him:-
>
> 1. Case FIR No. 16 dated 13.01.2013 under Sections 394, 397, 307, 34 IPC at Police Station, Bawana, Delhi.
> 2. Case FIR No. 198 dated 16.07.2014 under Section 379 IPC, Police Station Urban Estate, Rohtak.
> 3. Case FIR No. 152 dated 02.12.2014 under Section 342, 392 IPC and 25/54/59 of Arms Act, Police Line Par, Bahadurghar, Jhajjar.
> 4. Case FIR No. 481 dated 03.12.2014, Police Station Sadar, Bahadurghar, Jhajjar.
>
> The convict has a joint family including mother and father. The family members of the convict are able to meet him in Central Jail for interview. The convict may disturb the peace

and tranquility in the locality, if released on parole and there is apprehension that he can jump parole. The parole of the convict is not recommended.

The Tehsildar Rohtak has reported that parents of the convict are about 65 years old and brother is about 34 years old and sister is married. There is 7½ acre of land in the name of convict's father in village Vapur. The convict has no certificate regarding agricultural purpose. The family of the convict has assured that convict will surrender after release on furlough. The convict can be released on furlough.

The Superintendent, Model Central Jail Nahan, District Sirmaur (H.P) has recommended the special parole of convict on the directions of High Power Committee. The convict was sentenced to undergo 10 years imprisonment by the order of Learned Special Judge Mandi, District Mandi, Himachal Pradesh on 27.06.2019. In addition, a case FIR No. 481/2014 was registered at Police Station Sadar, Bahadurghar, Jhajjar, under Section 395 of IPC against the convict which is pending before the learned Additional Sessions Judge, Jhajjar, in which the convict is on bail and a case FIR No. 10/2020 dated 06.01.2020, under Section 174-A IPC which is pending before Learned Judicial Magistrate First Class, Gurugram, in which he is also on bail. This is first parole of the convict. The conduct of the convict is good in jail. The convict is eligible for parole.

Thus, keeping in view the report of the Superintendent of Police, Rohtak and agreeing with the report, the special parole case of the convict is not recommended. This is submitted for your further necessary action please."

3. It would be noticed that the report of the District Magistrate is based upon the information as imparted by the Superintendent of Police, Rohtak vide letter dated 22.07.2021 and the relevant portion whereof reads as under:-

> "Kindly refer to letter No.2209-10 dated 08.06.2021, on the subject cited above.
>
> Subject matter was got verified from the Police Station, Civil Line. During verification, it has come on record that Rahul Deshwal s/o Sh. Jagdish Deshwal is the resident of House No. 254/12, Tilak Nagar, Police Station, Civil Line Shehar, District Rohtak and the convict is undergoing a sentence of 10 years at Model Central Jail Nahan, District Sirmaur, Himachal Pradesh in Case FIR No. 19/2016, under Section 20 & 29 of the NDPS Act lodged at Police Station Sundernagar, District Mandi, Himachal Pradesh. Besides this the following cases are against him. Besides this, the following cases are registered against him:-
>
> 1. Case FIR No. 16 dated 13.01.2013 under Sections 394, 397, 307, 34 IPC at Police Station, Bawana, Delhi.
> 2. Case FIR No. 198 dated 16.07.2014 under Section 379 IPC, Police Station Urban Estate, Rohtak.
> 3. Case FIR No. 152 dated 02.12.2014 under Section 342, 392 IPC and 25/54/59 of Arms Act, Police Line Par, Bahadurghar, Jhajjar.
> 4. Case FIR No. 481 dated 03.12.2014, Police Station Sadar, Bahadurghar, Jhajjar.
>
> Convict wants temporary parole to meet the family members.

> 3. During inspection, it has been found that convict has a joint family including mother and father. The family members of the convict are able to meet him in Central Jail for interview. The convict may disturb the peace and tranquility in the area, if released on parole and he can jump the parole.
>
> 4. Thus, keeping in view the above facts and on the report of the local police, the parole case of the convict is not recommended. The photocopies of the investigation report in the case of the convict are enclosed herewith, for further necessary action please."

4. It would further be noticed that both the authorities after taking into consideration the entirety of facts and circumstances have not recommended the case of the petitioner for grant of parole because of his antecedents. As borne out from the report, four other criminal cases had been instituted against the petitioner, apart from FIR No. 19/2016 in which he has been sentenced to undergo rigorous imprisonment for 10 years and to pay fine of Rs. 1,00,000/-.

5. Learned counsel for the petitioner would argue that all the FIRs as mentioned in the reports submitted by the Superintendent of Police, Rohtak and District Magistrate, Rohtak, are prior to registration of FIR No. 19/2016 and in all these FIRs, he has already been acquitted and after FIR No. 19/2016, there is nothing on record to suggest that the petitioner has indulged in criminal activity.

6. To say the least, the submissions are ill-founded as admittedly the petitioner had been arrested in Case FIR No. 19/2016 and after conviction has been lodged in jail and, being in custody, there was no occasion for him to have indulged in criminal activity and, therefore, the same cannot be an indicator of his good antecedents.

7. Further, it would be noticed from various judgments of acquittal appended with the petition that the petitioner in case arising out of FIR No. 152/2014, dated 02.12.2014, case arising out of FIR No. 688 dated 11.10.2015 and case arising out of FIR No. 198 dated 16.07.2014 was not honourably acquitted, but was acquitted by giving benefit of doubt in his favour.

8. It is more than settled that unless it is honourable acquittal, a person cannot claim the benefit of such acquittal in such a case. What is an "honourable acquittal" was dealt with by the Hon'ble Supreme Court in the case of ***Deputy Inspector General of Police and another*** *vs.* ***S. Samuthiram (2013) 1 SCC 598,*** wherein it was held as under:-

> "Honourable Acquittal
>
> 24. The meaning of the expression 'honourable acquittal' came up for consideration before this Court in Reserve Bank of India, New Delhi v. Bhopal Singh Panchal (1994) 1 SCC 541. In that case, this Court has considered the impact of Regulation 46(4) dealing with honourable acquittal by a criminal court on the disciplinary proceedings. In that context, this Court held that the mere acquittal does not entitle an employee to reinstatement in service, the acquittal, it was held, has to be honourable. The expressions 'honourable acquittal', 'acquitted of blame', 'fully exonerated' are unknown to the Code of Criminal Procedure or the Penal Code, which are coined by judicial pronouncements. It is difficult to define precisely what is meant by the expression 'honourably acquitted'. When the accused is acquitted after full consideration of prosecution evidence and that the prosecution had miserably failed to prove the charges levelled against the accused, it can possibly be said that the accused was honourably acquitted."

9. Similar reiteration of law can be found in ***Union Territory, Chandigarh Administration and Others*** *vs.* ***Pradeep Kumar and another (2018) 1 SCC 797, Commissioner of Police, New Delhi and another*** *vs.* ***Mehar Singh (2013) 7 SCC 685, State of Madhya Pradesh and others*** *vs.* ***Abhijit Singh Pawar (2018) 18 SCC 733, State of Rajasthan and others*** *vs.* ***Love Kush Meena 2021 (4) Scale 634*** and ***Commissioner of Police*** *vs.* ***Raj Kumar 2021 (9) Scale 713.***

10. Thus, what can be taken to be settled from the above conspectus of the legal position is that the mere fact of an acquittal would not suffice for determining the antecedents of an individual, but rather it would depend whether the acquittal is one based on total evidence or a criminal jurisprudence requires the case to be proved beyond reasonable doubt. That parameters having not been met, benefit of doubt was granted to the petitioner which by itself is no indicator of an honourable acquittal.

11. For the reasons stated above and in view of the peculiar facts and circumstances of the case, we are not inclined to accede to the request of the petitioner to release him on parole, more particularly, taking into consideration the antecedents of the petitioner. Accordingly, the instant petition is dismissed along with pending application, if any.

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

Between:-

SUSHIL KUMAR SHARMA,AGED 34
YEARS,
S/O SHRI AJIT KUMAR,
R/O VPO BHATWARA, TEHSIL GHUMARWIN,DISTRICT
BILASPUR,

PRESENTLY WORKING ASJUNIOR
BASIC TEACHER,
GOVERNMENT PRIMARY SCHOOL, JANI, NACHAR BLOCK,
DISTT. KINNAUR-174028, H.P.

……PETITIONER

(BY MR. DILIP SHARMA, SENIOR ADVOCATE WITHMR. MANISH SHARMA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH SECRETARY EDUCATION, GOVERNMENT OF HIMACHAL PRADESH,SHIMLA-2

2. DIRECTOR ELEMENTARY EDUCATION, GOVERNMENT OF HIMACHAL PRADESH,SHIMLA-1

3. DEPUTY DIRECTOR ELEMENTARY EDUCATION,
GOVERNMENT OF HIMACHAL PRADESHAT REKONG
PEO, DISTRICT KINNAUR, HIMACHAL PRADESH.

……RESPONDENTS

(MS. RITTA GOSWAMI, ADDITIONAL ADVOCATE GENERAL)

CIVIL WRIT PETITION
No. 7794 of 2021
Decided on:24.03.2022

Constitution of India 1950 – Article 226 – Service matter -- Regularization-- Writ filed for treatment of petitioner at par with notionally appointed JBT at district Kinnaur and further to treat the petitioner for regularization at par with other candidates so appointed on contract basis and regularized vide order 26.05.2017--Petitioner participated in the counseling held on 17.02.2014 -- Other candidates were offered appointments and were regularized in May, 2017 alongwith other contractual appointees, who were appointed in February/March, 2014 – Held -- The petitioner situated similarly vis-a-vis Shri Sarvender Kumar, Rohit Kumar and Vijay Amrit Raj and is entitled to the same treatment given to these persons -- Issue of considering the petitioner having being appointed notionally from the date of his counterparts were appointed is also covered in his favor – Petition allowed –

Respondent to treat the petitioner as having been notionally appointed as JBT on contract basis in District Kinnaur in February/ March 2014 with other candidate who were appointed at District Kinnaur in February/ March, 2014 on the basis of counseling held on 17.02.2014 --Respondents are directed to consider the case of petitioner for his regulation at par with other candidates who were appointed on contract basis and regularized vide order dated 26.05.2017 -- Petition disposed of in these terms. [Para 4(iv)]

Cases referred:

Hem Chand versus State of H.P. & others, 2014 (3) Him L.R. 1962;

Sanjay Dhar vs J & K Public Service Commission and another, (2000) 8 SCC 182;

This writ petition coming on for admission this day, ***Hon'ble Ms. Justice Jyotsna Rewal Dua,*** passed the following:

O R D E R

The petitioner seeks direction to the respondents (i) to treat him as notionally appointed Junior Basic Teacher (in short 'JBT') on contract basis in District Kinnaur, H.P. at par with the other candidates, who were appointed in District Kinnaur in February/March 2014 on the basis of counselling held on 14.02.2014 and (ii) consequently to consider him for regularization at par with other candidates so appointed on contract basis and regularized vide order dated 26.05.20117.

2. The pleaded factual matrix of the case is that: -

2(i) Respondent No.2, on 12.09.2012, issued orders to fill up 1308 posts of JBT in the State. Out of these 1308 posts, 20 were allotted to District Kinnaur. The process to fill up the posts of JBT was started in some districts, but had to be stopped thereafter due to stay imposed by this Court on making appointments. CWP No.784 of 2014 was

filed in this Court, challenging the conditions imposed by the State in the advertisement to the effect that only those registered in the employment exchanges within the concerned districts, shall be eligible to apply. Subsequently, vide order dated 28.01.2014, passed in CWP No. 784 of 2014, the respondents were directed to allow the petitioners (therein) to participate in the selection process, however, their result was not to be declared, but was to be produced in the Court in sealed cover.

2(ii) Pursuant to the above order, counselling was conducted for the posts of JBT in District Kinnaur on 17.02.2014. The petitioner (herein) was also allowed to participate in the counselling. The candidates, who were registered in the Employment Exchange at Kinnaur and had participated in the counseling on 17.02.2014, were appointed as JBT on 26.02.2014. They joined on different dates ranging from 26.02.2014 to 03.03.2014.

2(iii) S/Sh. Sarvinder, Rohit Kumar and Vijay Amrit Raj were also registered in the Employment Exchange Kinnaur. These three persons had also participated in the counselling held on 17.02.2014 alongwith the petitioner, but were not offered appointment. These three persons filed writ petitions No. CWP Nos. 2421 and 2422 of 2014, seeking notional appointments and seniority as JBT alongwith other candidates, who were appointed on 26.02.2014. S/Sh. Sarvinder and Rohit Kumar (petitioners in CWP No. 2421) were appointed during the pendency of the writ petition as JBT and they joined on 27.08.2014 in District Kinnaur. Sh. Vijay Amrit Raj was appointed on 06.01.2015.

2(iv) CWP No. 784 of 2014 and other similar writ petitions were decided by the erstwhile H.P. Administrative Tribunal (in short 'Tribunal') vide order dated 02.11.2016. The respondents (therein) were directed to consider all the candidates on their own merit irrespective of the fact whether they were registered in the employment exchange of the

concerned district or had applied directly pursuant to the advertisement and in case they were successful, to offer them appointments in accordance with law. As a result of implementation of this order, the petitioner was appointed as JBT on 04.02.2017.

2(v) S/Sh. Sarvinder, Rohit Kumar and Vijay Amrit Raj, who had also participated in the same counselling, in which the petitioner had participated on 17.02.2014, represented to the respondents seeking their regularization as JBT on the basis of their notional dates of appointments as JBT i.e. 26.02.2014. The petitioner alongwith these three candidates submitted representation on 27.08.2017, seeking regularization. The above named three candidates were regularized alongwith other appointees in District Kinnaur w.e.f. 26.05.2017. The petitioner was eventually regularized vide order dated 16.05.2020. It is in the above background, that he had preferred the instant writ petition, seeking following main relief:-

" i) That the respondents department may kindly bedirected to treat the petitioner as having been notionally appointed as JBT teacher on contract basis in District Kinnaur at par with other candidates, who were appointed in District Kinnaur in February/March 2014 on the basis of counselling process held in District Kinnaur on 14.02.2014 and consequently consider him for regularization at par with other candidates so appointed on contract basis and regularized vide order dated 26.05.2017, Annexure P-7, with all consequential benefits."

2. Contentions: -

3(i) Learned Senior Counsel for the petitioner submitted that the petitioner was not considered for the post of JBT at the relevant time because of an illegal condition in the advertisement, which required registration of the candidates in the employment exchange of the

concerned district where the post of JBT was being filled up. It was on the basis of interim direction issued by this Court on 28.01.2014, the petitioner was allowed to participate in the counselling held on 17.02.2014. It was because of the interim order passed in the matter, his result was kept in sealed cover. The other candidates, who were registered in the Employment Exchange of District Kinnaur and had participated in the counselling held on 17.02.2014, were offered appointments in February/March 2014. Even S/Sh. Sarvinder, Rohit Kumar and Vijay Amrit Raj were offeredappointments in the year 2014/2015 after filing of writ petitions by them. These three persons were regularized in May, 2017 alongwith other contractual appointees, who were appointed in February/March 2014.

The gist of the arguments advanced by learned Senior Counsel for the petitioner is that the petitioner is similarly situated like the other three candidates, who have been regularized by notionally treating their dates of appointments at par with the appointees of same selection process held in February 2014. Therefore, it has been contended that the petitioner is also entitled to be given notional appointment and seniority at par with other similarly situated candidates.

3(ii) Learned Additional Advocate General submitted that in compliance to the directions of the Tribunal, the petitioner was given appointment as JBT on 04.02.2017 on contract basis. Accordingly, as per the applicable government policy, his services were regularized as JBT on 16.05.2020 i.e. after completion of threeyears of contractual service. It has further been submitted that in the order passed by the Tribunal on 02.11.2016, there were no such directions for giving notional appointment and seniority to the petitioners (therein) at par with the other candidates appointed in February 2014. Therefore, the petitioner is not entitled to be treated at par with the other candidates, who were appointed in

February/March 2014 on the basis of counselling held in District Kinnaur on 17.02.2014.

Observations: -

3. Having heard learned counsel for the parties, we are inclined to accept the prayer made by the petitioner.

4(i) It is not in dispute that the petitioner was allowed to participate in the counselling pursuant to the order dated 28.01.2014 passed in CWP No.784 of 2014. Accordingly, he participated in the counselling on 17.02.2014 alongwith various other candidates including the ones, who were registered in the Employment Exchange Kinnaur. In the order dated 28.01.2014, this Court though had directed the respondents to allow the petitioners (therein) to participate in the selection process, however, their result was not to be declared, but was to be produced in the sealed cover. Consequently, the petitioner though participated in the counselling held on 17.02.2014 alongwith various other candidates, but his result was not declared. The result of other candidates, who were registered in the Employment Exchange Kinnaur, was declared and they joined in February/March 2014. CWP No.784 of 2014 and other similar writ petitions were eventually decided by the Tribunal on 02.11.2016. In this order, the condition in the advertisement that "only those registered in the employment exchanges within the districts shall be eligible to apply", was held to be bad. The respondents were directed to consider the candidates on the basis of their merit, irrespective of their registration in the employment exchange in the concerned district. It was pursuant to this order dated 02.11.2016, the petitioner was appointed as JBT on 04.02.2017.

4(ii) We also cannot lose sight of the fact that S/Sh. Sarvinder, Rohit Kumar and Vijay Amrit Raj, had also participated in the counselling on 17.02.2014. They were appointed on 27.08.2014,

27.08.2014 and 06.01.2014 respectively, and were regularized w.e.f. May 2017. It is evident that for purpose of regularization of services of these three persons, their initial dates ofappointments were treated at par with that of other candidates.

4(iii) The issue raised in the instant petition is otherwise covered by the decision of this Court in **LPA No.170 of 2014, titled Shri Balak Ram Versus State of Himachal Pradesh & others**, decided on 19.11.2014, wherein it was held that when a candidate is deprived of appointment illegally, he is deemed to have been appointed right from the same date. The relevant part of the judgment is as under: -

" 8. The Apex Court in a case titled as ***Sanjay Dhar versus J & K Public Service Commission and another, reported in (2000) 8 Supreme Court Cases 182,*** *has dealt with the issue and held that when a candidate is deprived of appointment illegally, he is deemed to have been appointed right from the same date. It is apt to reproduce paras 14 to 16 of the judgment herein:*

> *"14. .....As the appellant participated in the process of selection protected by the interim orders of the High Court and was also successful having secured third position in the select list, he could not have been denied appointment. The appellant is, therefore, fully entitled to the relief of his appointment being calculated w.e.f. the same date from which the candidates finding their placein the order of appointments issued pursuant tothe select list prepared by the J&K PSC for 1992-93 were appointed and deserves to be assigned notionally a place in seniority consistently with the order of merit assigned by the J&K PSC.*
>
> *15. We have already noticed the learned SingleJudge having directed the appellant to beappointed on the post of Munsif in the event of hisname finding place in the select list subject to the outcome of the writ petition which order was modified by the Division Bench in LPA staying the order of the learned Single Judge but at the same time directing one vacancy*

to be kept reserved. The High Court and the Government of J&K (Law Department) were not justified in bypassing the judicial order of the High Court and making appointments exhausting all available vacancies. The right of the appellant, if otherwise sustainable, cannot be allowed to be lost merely because of an appointment having been made wittingly or unwittingly in defiance of the judicial order of the High Court.

16. For the foregoing reasons the appeal is allowed. The judgment under appeal is set aside. It is directed that the appellant shall be deemed to have been appointed along with other appointees under the appointment order dated 6-3-1995 and assigned a place of seniority consistently with his placement in the order of the merit in the select list prepared by J&K PSC and later forwarded to the Law Department. During the course of hearing the learned senior counsel for the appellant made a statement at the Bar that the appellant was interested only in having his seniority reckoned notionally in terms of this order and was not claiming any monetary benefit by way of emoluments for the period for which he would have served in case he would have been appointed by order dated 6-3-1995. We record that statement and direct that the appellant shall be entitled only to the benefit of notional seniority (and not monetary benefits) being given to him by implementing this order. The appeal is disposed of accordingly. The contesting respondents shall pay the appellant costs quantified at Rs. 5,000/-."

9. A learned Single Judge of this Court in a case titled as ***Hem Chand versus State of H.P. & others, reported in 2014 (3) Him L.R. 1962,*** *has taken the same view. It is apt to reproduce paras 3 and 4 of the judgment herein:*

"3. Admittedly, the appointment of the petitioner was delayed for no fault of his and came to be appointed only in the year 2009, that too after the intervention of this Court. The result of delayed appointment of the petitioner is that he has been paid less salary and denied the seniority over a long period of time. It has been consistently opined that in case a candidate is wrongly denied appointment for no fault on his part, he cannot be denied appointment from due date and consequential seniority.

Reference in this regard can conveniently be made to 1996 (8) SCC 637, Pilla sitaram Patrudu & others vs. Union of India and others, 2000 (8) SCC 182 Sanjay Dhar vs. J&K Public Service Commission & another, 1991 (6) Vol. 76, Services Law Reporter 753, Hawa Singh Sangwan vs. Union of India & others and 1996 (6) vol. 116, Services Law Reporter, 335, Hawa Singh and others vs. The Haryana State Electricity Board. Moreover, it is not the case of the respondents that the petitioner was not recommended to be appointed on 26.6.2004 but the only ground taken is that it was the Pradhan, Gram Panchayat Sawindhar, Tehsil Karsog, who delayed the appointment of the petitioner. This is the precise reason that the petitioner is entitled for the seniority from the date of offer of appointment, as held by the Division Bench of this Court in similar circumstances, in case titled as ***Chatter Singh vs. State of H.P. & others, CWP No. 188 of 2012-I:-***

> *"3. No doubt, the petitioner joined duty only on 13.5.2003. But in his favour admittedly there is an order by the Appointing Authority on 8.8.2002 to give appointment, as has been noted by the Tribunal in Annexure P-1, order. It is that order, which has been upheld by the Tribunal and the direction issued by the Tribunal is for implementing the said order. Therefore, for all purposes, the petitioner shall be deemed to be appointed on 8.8.2002, on the date admittedly the petitioner was directed to be appointed by the Sub Divisional Magistrate. However, taking note of the fact that the petitioner has joined duly on 13.5.2003 after the order was issued to him, the entitlement of the petitioner for actual monetary benefit shall be only from 13.5.2003. In order to avoid any ambiguity, it is made clear that the petitioner shall be deemed to be appointed in the post of Gramin Vidya Upasak on 8.8.2002 for all purposes; but from 8.8.2002 to 13.5.2003, the benefits shall only be notional and from 13.5.2003,*

the petitioner shall be entitled to all monetary benefits."

4. In view of the exposition of the law referred to above, the petitioner is entitled to be treated as having been appointed as a Part Time Water Carrier at Government Primary School Alyas, Gram Panchayat, Sawindhar, Karsog-II, District Mandi from 30.6.2004, pursuant to the recommendation of the Government of H.P., as per order dated 26.6.2004 for the purpose of seniority. However, the entitlement of the petitioner for actual monetary benefits shall be only from 9.6.2009. In order to avoid any ambiguity, it is made clear that the petitioner shall be deemed to be appointed as Part Time Water Carrier from 30.6.2004 for all purposes, but from 30.6.2004to 9.6.2009, the benefits shall only be notional and
w.e.f. 9.6.2009, the petitioner shall be entitled to all monetary benefits."

4(iv) The petitioner is situated similarly viz-a-viz S/Sh.Sarvinder, Rohit Kumar and Vijay Amrit Raj. He is entitled to the same treatment given to these persons. In the facts of the case, the issue of considering the petitioner having been appointed notionally from the date his counterparts were appointed, is also covered in his favour by the decision referred to above.

Accordingly, the petition is allowed. The respondents are directed to treat the petitioner as having been notionally appointed as JBT on contract basis in District Kinnaur in February/March 2014 at par with other candidates who were appointed in District Kinnaur in February/March 2014, on the basisof counselling held on 17.02.2014. We also direct the respondentsto accordingly consider the case of the petitioner for his regularization at par with the other candidates, who were so appointed on contract basis and regularized vide order dated 26.05.2017. This exercise be completed within three months from the date of

production of certified copy of this judgment before the respondents. The writ petition stands disposed of in the above terms, so also the pending miscellaneous application(s), if any.

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

Between:

SH. S.C. KAINTHLA,
S/O LATE SH. H.N. KAINTHLA,
DISTRICT AND SESSIONS JUDGE,
SIRMAUR AT NAHAN.

...PETITIONER

(BY MR. SHRAWAN DOGRA,
SENIOR ADVOCATE, WITH
MR. HARSH KALTA AND
MR. TEJASVI DOGRA,
ADVOCATES)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH CHIEF SECRETARY
TO THE GOVT. OF HIMACHAL PRADESH,
SHIMLA – 2.

2. HON'BLE HIGH COURT OF HIMACHAL
PRADESH (ADMINISTRATIVE SIDE)
THROUGH ITS REGISTRAR GENERAL,
SHIMLA – 1.

3. SH. SUSHIL KUKREJA,
PRESIDING OFFICER,
LABOUR COURT-CUM-
INDUSTRIAL TRIBUNAL,

SHIMLA – 5.

4. SH. VIRENDER SINGH,
DISTRICT AND SESSIONS JUDGE,
SHIMLA – 171 005.

5. SH. CHIRAG BHANU SINGH,
DIRECTOR,
H.P. JUDICIAL ACADEMY,
GHANDAL,
SHIMLA – 171 021.

6. SH. ARVIND MALHOTRA,
REGISTRAR (VIGILANCE),
HIGH COURT OF HIMACHAL
PRADESH AT SHIMLA – 171 001.

...RESPONDENTS

(MR. ASHOK SHARMA,
ADVOCATE GENERAL,
WITH MS. RITTA GOSWAMI,
ADDITIONAL ADVOCATE
GENERAL, FOR R-1,

MR. K.D. SOOD, SENIOR
ADVOCATE, WITH MS. SHALINI
THAKUR, ADVOCATE, FOR R-2,

MR. R.L. SOOD, SENIOR
ADVOCATE, WITH MR. ARJUN
LALL, ADVOCATE, FOR R-3 & 4,

MR. BIPIN C. NEGI, SENIOR
ADVOCATE, WITH MR. NITIN
THAKUR, ADVOCATE, FOR R-5 & 6.)

2. CWP No. 2292 of 2018

Between:

SH. RAJEEV BHARDWAJ,
S/O LATE SH. A.S. BHARDWAJ,
REGISTRAR GENERAL,
HIGH COURT OF HIMACHAL
PRADESH.

...PETITIONER

(BY R.K. BAWA, SENIOR
ADVOCATE, WITH MR. AJAY
KUMAR SHARMA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH CHIEF SECRETARY
TO THE GOVT. OF HIMACHAL PRADESH,
SHIMLA – 2.

2. HON'BLE HIGH COURT OF HIMACHAL
PRADESH (ADMINISTRATIVE SIDE)
THROUGH ITS REGISTRAR GENERAL,
SHIMLA – 1.

3. SH. SUSHIL KUKREJA,
PRESIDING OFFICER,
LABOUR COURT-CUM-
INDUSTRIAL TRIBUNAL,
SHIMLA – 5.

4. SH. VIRENDER SINGH,
DISTRICT AND SESSIONS JUDGE,
SHIMLA – 171 005.

5. SH. CHIRAG BHANU SINGH,
DIRECTOR,
H.P. JUDICIAL ACADEMY,
GHANDAL,
SHIMLA – 171 021.

6. SH. ARVIND MALHOTRA,
REGISTRAR (VIGILANCE),
HIGH COURT OF HIMACHAL
PRADESH AT SHIMLA – 171 001.

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MR. K.D. SOOD, SENIOR
ADVOCATE, WITH MS. SHALINI
THAKUR, ADVOCATE, FOR R-2,

MR. R.L. SOOD, SENIOR
ADVOCATE, WITH MR. ARJUN
LALL, ADVOCATE, FOR R-3 & 4,

MR. BIPIN C. NEGI, SENIOR
ADVOCATE, WITH MR. NITIN
THAKUR, ADVOCATE, FOR R-5 & 6.)

CIVIL WRIT PETITION
No. 2061 of 2018 ALONGWITH
CIVIL WRIT PETITION
No. 2292 of 2018
Reserved on: 05.01.2022
Pronounced on: 11.03.2022

A. Constitution of India, 1950- Articles 14 and 16- Service matter- Seniority – Appointments of Direct Recruits in excess of cadre strength- Challenged- Representation made by H.P Judicial Service Officers- Officers Association in which petitioner are also member- Rejected- Three –Judge-Committee framed a Draft Post based Roster with the mandate of Supreme Court in 2002 judgment – Not challenged- The petitioners have failed to challenge the seniority lists notified from time to time, from 2005 till date- Held- That the petitioner cannot be permitted to unsettle the settled seniority

since 2005- The petitions are dismissed on the ground of conduct to the petitioner as well as by their waiver and acquiescence. (Para 64)

B. Constitution of India, 1950- Article 226- Writ petition- Maintainability- The petition is withdrawn without any liberty being reserved to petitioner to file fresh-Held- That, the permission to file fresh Writ Petition may not bar other remedies like a suit or a petition under Article 32 of Constitution of India but the remedy under Article 226 of Constitution of India should be deemed to have been abandoned by the petitioner in respect of the cause of action relied in the Writ Petition when he withdraws it without such permission. (Para 54)

C. Constitution of India, 1950- Article 226- Writ petition- Maintainability- Whether fresh writ petition is maintainable if first earlier writ petition is withdrawn unconditionally, with any liberty being reserved to petitioner- Held- No- The new writ petition would not maintainable and liable to be dismissed. (Para 51)

D. Constitution of India, 1950- Article 226- Writ petition- Interlocutory order- Lawfulness- After dismissal/withdrawal of main petition/ proceedings- Held- That once the basis of a proceeding is gone, all consequential act, action orders would fall to the ground automatically. (Para 62).

E. Constitution of India, 1950- Articles 14 & 16- Service matter- Seniority- Computation/ Determination –Held- That once the incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not accordingly to the date of confirmation. (Para 68)

F. Constitution of India, 1950- Articles 14 & 16 – Service matter – Seniority- Whether employee can claim retrospective seniority earlier than his date of appointment- Held- No- The retrospective seniority can not be granted to an employee from a date when the employee was not born in cadre/ service. (Paras 69 &70)

These Civil Writ Petitions coming on for pronouncement of judgment this day, ***Hon'ble Mr. Justice Mohammad Rafiq,*** *passed the following:*

O R D E R

Both these Writ Petitions are founded on identical facts and raise common questions of law. They were, therefore, heard together and are being disposed of by this common judgment.

2. The petitioners have prayed for direction to the respondent Himachal Pradesh High Court to create cadre of Civil Judge (Senior Division) with effect from 01.07.1996 in accordance with directions of the Supreme Court in *All India Judges Association vs. Union of India and Others, (2002) 4 SCC 247*, and order of the Supreme Court dated 24.08.2016 passed in I.A. No. 334/2014 in W.P.(C) No. 1022/1989 and grant them all consequential benefits. Further prayer is made that the respondents be directed to follow the post based roster system with effect from 31.03.2003 in conformity with the report of its two-Judge-committee and declare the petitioners senior to the respondents No. 3 and 4 and grant all consequential benefits to them including one for consideration for elevation as Judges of this Court. Further prayer is made that seniority list circulated with effect from 01.01.2005, particularly seniority list dated 18.01.2018, showing petitioners junior to respondents No. 3 and 4, be quashed and set aside.

Preliminary Facts:

3. Petitioner S.C. Kainthla in CWP No. 2061/2018 was appointed as Sub Judge on 01.02.1984. He was promoted to the cadre of District & Sessions Judge on 26.12.2006. He has upon attaining the age of superannuation retired as District and Sessions Judge on 31.12.2019. Petitioner Rajeev Bhardwaj in CWP No. 2292/2018 was also appointed as Sub Judge on 01.02.1988. He was promoted to the cadre of District & Sessions Judge on 27.10.2009 against Limited Competitive Examination (LCE) quota of 25% after he qualified such examination. Initial appointment of both the petitioners was made under the Himachal Pradesh Higher Judicial Service Rules, 1973 (for short, 'Rules of 1973'), in which ratio of promotees and direct recruits to the Higher Judicial Service was 2:1. Respondent No. 3 Sushil

Kukreja was appointed to the cadre of District & Sessions Judge as a direct recruit on 18.05.2004, respondent No.4 Virender Singh was appointed to the cadre of District & Sessions Judge by way of direct recruitment on 07.12.2006. Respondent No. 5 Chirag Bhanu Singh was appointed to the cadre of District & Sessions Judge by direct recruitment on 17.09.2006, whereas respondent No. 6 Arvind Malhotra was in the same way appointed to the cadre of District & Sessions Judge by way of direct recruitment on 23.10.2009.

4. Civil Writ Petition No. 2061/2018 filed by petitioner S.C. Kainthla and Civil Writ Petition No. 2292/2018 filed by petitioner Rajeev Bhardwaj were dismissed by Single Bench of this Court on 01.05.2019 on the ground of delay and laches, acquiescence, misjoinder of different causes of action and also on various other preliminary objections. Letters Patent Appeals No. 33/2019 and 39/2019 filed against the aforesaid judgment were decided by split verdict vide order dated 11.03.2020. When however the matter was referred to third Judge, petitioner Rajeev Bhardwaj in CWP No. 2292/2018 (subject matter of LPA No. 33 of 2019) filed Writ Petition (Civil) No. 1465/2020 before the Supreme Court seeking direction not to proceed on the recommendation made by the Collegium of the High Court till disposal of LPA No. 33 of 2019. The Supreme Court, vide order dated 15.02.2021 passed in the said petition, directed to transfer LPA No. 33 of 2019 to Supreme Court immediately upon the delivery of the judgment by the learned third Judge but not later than 30.03.2021. The third Judge, by order dated 24.03.2021, partly allowed the LPAs. The High Court of Himachal Pradesh filed SLP (C) No. 13840-13843 of 2021 against the judgments dated 11.03.2020 and 24.03.2021 passed in LPAs No. 33 and 39 of 2019. Respondents No. 5 and 6 in the LPAs also filed SLP (C) No. 8863-8866 of 2021 challenging the judgments passed in both the LPAs. Writ Petition (Civil) No. 1465/2020 was dismissed as withdrawn and the SLPs alongwith TC (C) No. 53/2021 were

disposed of by the Supreme Court vide order dated 16.09.2021 by setting aside the judgment and orders passed by DB in LPAs and by remanding the matter to this Court to hear the Writ Petitions on merits, leaving it open to the parties to raise all issues as permissible in law, except the issue of delay and laches. This is how the matters have been laid before this Court for disposal afresh.

Scope of dispute:

5. Bone of contention between the parties is about correct interpretation and implementation of the directions contained in judgment dated 21.03.2002 of the Supreme Court in *All India Judges Association Vs. Union of India, supra*. It was in that judgment that the Supreme Court directed that recruitment to the Higher Judicial Services in the cadre of District & Sessions Judge shall be henceforth made by three sources, i.e., (i) 50% by way of promotion from amongst Civil Judges (Senior Division) on the basis of "merit-cum-seniority", (ii) 25% by promotion on merit by limited competitive examination amongst Civil Judges (Senior Division) having not less than 5 years qualifying service, and (iii) 25% by way of direct recruitment from amongst eligible advocates on the basis of written and *viva-voce* test to be conducted by respective High Courts. The Supreme Court in that judgment directed all the High Courts to suitably amend the relevant Rules in conformity with its directions as early as possible, by incorporating the Rules for regulation of seniority on the basis of roster point approved by its Constitution Bench in *R.K. Sabharwal Vs. State of Punjab, (1995) 2 SCC 745*. Recruitment and other conditions of service of judicial officers including those in the Higher Judicial Service in the State were earlier governed by two set of Rules;- in respect of Higher Judicial Service, by Himachal Pradesh Higher Judicial Service Rules, 1973 and regarding services of other Judicial Officers, by Himachal Pradesh Judicial Service Rules, 1973. Both sets of the Rules were repealed and replaced by the Himachal Pradesh Judicial Service Rules, 2004

(for short, 'the Rules of 2004') in conformity with the direction of the Supreme Court.

Background leading to present litigation:

6. The Himachal Pradesh Judicial Service Officers Association with some of its members filed CWP No. 61/1999 before this Court assailing appointment of directly recruited Additional District & Sessions Judges till that time. S.C. Kainthla, the petitioner in CWP No. 2061/2018, was petitioner No. 16 and Rajeev Bhardwaj, the petitioner in CWP No. 2292/2018, was petitioner No. 28 therein. That Writ Petition was disposed of by this court vide order dated 18.04.2005 by a consent order in the terms that; as regards the higher placement of directly recruited Additional District Judges in the aforesaid gradation list, it shall be open to petitioner No. 1 as well as other aggrieved officers, if any, to file objections or make representations before the High Court for redressal of their grievances and that the High Court on its administrative side shall examine and dispose of the same on merits as expeditiously as possible and in any case by 31st July, 2005. It was observed that if anyone feels aggrieved by decision of the High Court, it shall be open to such person to approach this Court again on the judicial side. On receiving the representation from the HP Judicial Service Officers Association and various other Judicial Officers, raising the arguments similar to the ones raised herein, the High Court referred the matter to a two-Judge-committee, which upon consideration thereof, recommended rejection of all such representations. The report of two-Judge-committee dated 06.06.2005 was accepted by the Full Court vide its Resolution dated 22.08.2005, which accordingly rejected the representations. The communication about rejection of the representations was sent to all concerned vide letter dated 24.08.2005. The decision of the High Court taken in its Full Court on 22.08.2005, not having been challenged by any of the parties, attained finality.

7. The matter with regard to appointment of Additional District & Sessions Judge by promotion amongst Civil Judge (Sr. Div.) on the basis of LCE was taken up by the Full Court for consideration on 30.03.2006. The issue for reckoning service of five years in the cadre of Civil Judge (Sr. Div.) came up for consideration before the Full Court, which on that day, resolved that for determining the eligibility for promotion against the aforesaid 25% quota of LCE, service of five years rendered only in cadre of Civil Judge (Sr.Div.) in the erstwhile service shall be counted and even though the officers may be concurrently functioning as Additional Chief Judicial Magistrate, but the service rendered as Sub Judge shall not be reckoned for that purpose. As per note submitted by the Registrar General of the High Court on 06.01.2006, S.C. Kainthla, who was placed at serial No. 1 and two judicial officers placed at serial Nos.2 and 3 of the said list, were to become eligible for promotion against 25% quota in July, 2007 and December, 2007. Rest of the Judicial Officers from serial No. 4 onwards became eligible in the year 2008-2009. It was found that only 5 out of 26 officers of Civil Judge (Sr. Div.) cadre are eligible for promotion against 5 vacancies of the 25% quota of LCE. The Full Court took the view that since adequate number of eligible candidates were not available, the posts of LCE could also be filled in by promotion. It was therefore decided in the interest of administration of justice that these posts should not be kept vacant for want of sufficient number of judicial officers against 25% LCE quota. The Full Court therefore took a conscious decision to fill up all such vacancies of LCE by way of regular promotion. Out of available five vacancies, 3 were given to the quota of promotion, 1 was given to the quota of LCE and 1 was given to the quota of direct recruitment. Rajeev Bhardwaj, petitioner in CWP No. 2292/2018, was the first candidate to have been

appointed as Additional District & Sessions Judge through the stream of LCE on 27th October, 2009.

8. The Association of which the petitioners are members filed I.A. No.234/2009 and 235/2009 in March, 2009 before the Supreme Court in W.P.(C) No.1022/1989, *All India Judges Association and Others vs. Union of India, supra,* raising the arguments similar to the ones raised in the present Writ Petitions about direct recruitment being made in excess of their quota and non implementation of roster system as per direction of the Supreme Court in 2002 judgment of *All India Judges Association* case. The Supreme Court vide its order dated 26.03.2009 rejected both the I.As in the following terms:-

> *"In both these applications, the Association of Judicial Officers pray that there should be a roster system in the matter of seniority. If there is any violation of the roster system, the applicants would be at liberty to take any appropriate steps. We do not wish to interfere with the applications.*
> *I.A.s are disposed of accordingly."*

9. Himachal Pradesh Judicial Service Officers Association thereafter on 01.10.2009 filed Writ Petition (Civil) No. 532/2009 before the Supreme Court itself, challenging action of the respondent seeking to make direct recruitment and alleging that such recruitment was being made in excess of quota of direct recruitment in violation of roster system. The Supreme Court, vide order dated 04.12.2009, dismissed the said Writ Petition as withdrawn with liberty to the petitioner to move the High Court. Thereafter the said Association approached this Court by filing CWP No.696/2010 on 03.03.2010 with the same prayer. Eventually however that Writ Petition was also unconditionally withdrawn by the petitioner Association on 04.11.2016.

10. The issue with regard to implementation of the roster system in proportion of the ratio given in 2002 judgment of the Supreme Court in All

India Judges Association case came up for consideration before the Full Court of the High Court in its meeting held on 09.09.2009, which resolved to constitute a three-Judge-committee to examine the applicability of roster system with respect to Himachal Pradesh Judicial Service Rules, 2004 and suggest the mode and modalities about implementation of the decision of the Supreme Court regarding proper placement of selected/promoted officers. The Committee upon consideration of all the past recruitments vis-a-vis position of the Rules of 2004, submitted the report dated 10.9.2009 to the following effect:-

> *"The Full Court in its meeting held on 9.9.2009 resolved to constitute a Committee of the undersigned to scrutinize the roster, total strength of District/Additional District Judges appointed/ promoted, the posts occupied by each category that in 50% by promotion, 25% by limited competitive examination and 25% by direct recruitment. The Committee perused the records of the Registry. It was found that no proper roster register is being maintained and the Registry may be directed to maintain a proper roster register for this purpose.*
>
> *We have gone through the entire seniority list and the appointments made to the Higher Judicial Service right from its constitution in the year 1974. Earlier the H.P. Higher Judicial Service Rules, 1973 were applicable to the cadre of District Judges and Additional District Judges. These Rules came into force on 29.3.1974. As far as the appointments made under the said Rules are concerned the Committee is of the considered view that all disputes under the said rules with regard to the operation of the roster stand settled either by the judgments of this Court or by the decisions taken on the administrative side. The last administrative decision was taken by a Committee consisting of Hon'ble late Justice V.M.Jain and Deepak Gupta, J. This Committee in its report dated 6th June, 2005 dealt with the representations of a large number of Judicial Officers, the junior most of whom was Sh.Ravinder Parkash. The report of this Committee was accepted by the Full Court in its meeting held on 22.8.2005. In view of the acceptance of the report of the*

Committee, we are of the considered view that there is no need to reopen the seniority under the H.P. Higher Judicial Service Rules of 1973 which stands settled.

The H.P. Higher Judicial Service Rules, 2004 came into force w.e.f. 20thMarch, 2004. Sh. Sushil Kukreja was appointed as a direct recruit on 18.5.2004. His appointment has been treated to have been made under the old Rules because the process of selection was started under the old Rules. Therefore, Sh. Sushil Kukreja has been considered to be appointed under the old Rules. Sh. Ravinder Parkash is the first person to be appointed under the H.P. Higher Judicial Service Rules of 2004. These Rules provide for filling up the posts in the following manner:-

50% for promotees

25% for limited competitive examination

25% for direct recruits.

Till 2009 no limited competitive exam was held. However, the Officers belonging to the cadre of Civil Judges (Senior Divisions) did not in any manner suffer because the quota of limited direct recruitment was given to the promotees on the basis of seniority. Resultantly, three promotees were appointed and thereafter one direct recruit was appointed. This roster is being followed and one post of scheduled tribe is still vacant. Therefore, in the selections now made if the roster is followed, the posts should be filled up in the following manner:-

The first vacancy available shall go to the candidate from the limited competitive examination;

The second post shall fall to the category of direct recruits;

The third and 4th posts go to promotees;

The 5th post falls to the share of limited competitive examination (since only one candidate has qualified from this category, this post has to be kept vacant)

The next post that is the 6th post has to go to the direct category and falls to the quota of other backward classes.

Thereafter, the next two posts are to be filled up from promotees.

The names of two promotees have already been forwarded to the State Government for appointment against the quota of promotees. To avoid any dispute of seniority we are of the

considered view that the State Government be requested not to issue the order of appointments of the promotees separately and one order on the same date be passed in respect of all the persons to be appointed so that seniority is governed strictly in accordance with Rule 13(1) of the 2004 Rules.
The Committee recommends accordingly."

Aforequoted report of the Committee was considered by the Full Court of the High Court in its meeting held on 14.09.2009, which resolved to accept the recommendations made therein in *toto.*

11. Considering that not sufficient number of candidates were qualifying the Limited Competitive Examination, the Supreme Court on 30.04.2010 passed an order in *All India Judges Association vs. Union of India, (2010) 15 SCC 170*; by which the quota for recruitment through LCE was reduced from 25% to 10% and quota for promotion was increased from 50% to 65% with effect from 01.01.2011. In this context, the question with regard to filling up of vacancies in the cadre of District Judge/Additional District Judges during 2010-2011 as per directions of the Supreme Court in *Malik Mazhar Sultan versus U.P. Public Service Commission, 2007 (3) SLR 697*, required to be notified by 31st March, 2010 and regarding operation of roster on the principle of posts based roster instead of running account/vacancy based roster, was referred to the three Judge Committee. The said committee in its report dated 30.03.2010 noted that when the Rules of 2004 came into force on 20.03.2004, the cadre of District Judges/Additional District Judges consisted of 30 officers. 19 posts were manned by promotees from judicial service and 10 by direct recruits and 1 post was vacant. The strength of cadre was later increased to 34 and therefore 34 point roster was required to be maintained. It noted that at that time there were 12 direct recruits as against their quota of 8 and therefore excess number of posts to be vacated by direct recruits till it is reduced to 8, have to be filled up either through promotion or on the basis of LCE. The

committee recommended that out of six existing/anticipated vacancies, first three may be filled by LCE from amongst Civil Judges (Sr.Div.) and remaining three by promotion. The report shows that the High Court continued to make recruitment on the basis of vacancy based roster upto 30.3.2010. It then decided to switch over to post based roster w.e.f. 31.3.2010 which is evident from recommendation of the three Judge Committee in its report dated 30.3.2010, accepted by the Full Court of the High Court by its resolution dated 30.03.2010.

12. The Full Court of the High Court vide its resolution dated 27.8.2009 constituted a two Judge Committee to look into the letter dated 19.3.2009, received from the Principal Secretary (Home) Government of Himachal Pradesh, and the issues raised therein. By the aforesaid letter, the Government required the High Court to consider the proposal for making suitable amendments in the Rules of 2004, in the light of various orders passed by the Supreme Court in *Malik Mazhar Sultan's* case. The Committee collated all the orders passed by the Supreme Court in that case from time to time and found that the Rules were required to be suitably amended. The Committee considered the proposal received from the Government and recommended that all the amendments should be carried out at one go and proposed various amendments in the table enclosed with the report. The Full Court of the High Court, vide its resolution dated 27.7.2010, accepted the report of the two Judge Committee to incorporate the amendments in the Rules in conformity with the directions of the supreme Court in *Malik Mazhar Sultan's* case and passed by the following resolution:

> *"Report of the Committee is accepted with a clarification to be incorporated by way of an additional Note No.3 that appointments already made shall not be affected on account of introduction of new roster in Column No.III of the table annexed with the Report."*

13. The Full Court in its meeting held on 7.11.2012 considered several agendas, one of which was with regard to operation of 34 point posts based roster in the cadre of District Judges/Additional District Judges as per order dated 24.4.2010 of the Hon'ble Apex Court passed in I.A. No. 77, i.e., application for modification of order dated 21.3.2002 in W.P. (C) No. 1022 of 1989 titled *All India Judges' Association Vs. Union of India and others*. The Full Court therefore, resolved to authorize the Chief Justice to form a Committee in that behalf. A three Judge Committee was accordingly constituted, which in its report dated 5.12.2012, proposed for adoption of 34 point roster, which was approved by the Full Court in its meeting held on 11.12.2012 with direction to Registry to ensure that 5th vacancy should be filled from Scheduled Tribe category.

14. Thereafter, Rajeev Bhardwaj made another representation on the premise that he was appointed as Additional District and Sessions Judge on the basis of LCE against the quota of that category and that he should be given higher seniority over some of the promotees. This representation was again entrusted to two Judge Committee for examination, which in its report dated 25.6.2014, proposed to reject the same on the premise that earlier representation to this effect made by Rajeev Bhardwaj was already rejected by the Full Court in its meeting dated 30.8.2010 on the recommendation of the three Judge Committee in its report dated 3.8.2010. The Full Court in its meeting held on 15.7.2014 accepted the report of the said Committee dated 25.6.2014 and accordingly rejected the said representation.

15. It was thereafter that the existing table under Rule 5 of the Rules of 2004 was substituted by the Government vide Notification dated 14.6.2016 by adding Explanation-II with Note-3 which reads as under:-

> *"Explanation II- Appointment to the cadre of District Judges/Additional District Judges from categories (a), (b) & (c) shall be in accordance with post based 34 points roster to be maintained by the High Court in this behalf.*

Note 3: The appointment already made shall not be affected on account of introduction of new roster."

16. It may be pertinent to note that petitioner Rajeev Bhardwaj alongwith one J.K. Sharma, filed I.A. No.334/2014 in Writ Petition (C) No. 1022/1989 in All India Judges Association case before the Supreme Court for creation of separate cadre of Civil Judges as per the Rules of 2004 with effect from 01.07.1996 and for implementation of the post based roster in the cadre of District Judges. When however the Supreme Court was informed about the stand of the High Court that 34 point roster shall be followed after 31.03.2010, it vide order dated 28.04.2016 directed the High Court to apply Rule 13 for preparation of seniority after ascertaining roster points from all the three categorizes, viz., promotees, LCE and direct recruits; from 31.03.2003 and place report after carrying out such exercise before the Supreme Court to enable it to pass further orders. However, the Supreme Court in concluding part of the said order put the following rider:-

"We make it clear and reiterate that we only want the outcome of such exercise to be placed before this court before passing further orders as to its implementation."

17. When, however, IA No. 334/2014 came up for consideration again on 14.07.2016, the Supreme Court was apprised of the fact that CWP No.696/2010, titled Himachal Pradesh Judicial Service Officers Association Vs. State of Himachal Pradesh, claiming similar reliefs was already pending before the High Court. The Supreme Court thereupon passed the following order:-

"Since, it is reported that identical prayer is subject matter of consideration in Civil Writ Petition No.696 of 2010, titled H.P. Judicial Service Officers Association v. State of Himachal Pradesh, before the High Court of Himachal Pradesh, we are of the view that the parties should be relegated to work out their remedy in the

said writ petition and await the outcome of the said writ petition."

18. Against the backdrop of these facts, when CWP No.696/2010 came up for hearing before the Full Bench of the High Court on 15.9.2015, the petitioners were required to implead directly recruited candidates as parties to the Writ Petition but they sought recusal of the particular Bench which was declined. When the matter was again taken up for hearing on 04.11.2016 on an application for such impleadment filed in compliance of the earlier order, the petitioners prayed for modification of that order and for withdrawal of the CMP No. 10908/2015 filed for impleadment of direct recruits which prayer was declined. Finally when the Writ Petition was taken up on 04.11.2016, the petitioners instead of pursuing the same, prayed for its withdrawal. The Writ Petition was therefore permitted to be unconditionally withdrawn. Following was the order passed by this Court in that Writ Petition on 04.11.2016:-

> *"On instructions, Sh. Naresh K. Gupta, learned counsel for the petitioners states that he may be unconditionally permitted to withdraw the instant petition.*
> *2. The respondents have opposed this request on the ground that certain rights have accrued in their favour, in view of the orders passed by this Court from time to time.*
> *3. However, without going into these contentions, the petitioners are permitted to withdraw the present petition.*
> *4. Accordingly, the petition is dismissed as withdrawn, along with pending application(s) if any."*

19. Subsequently, when IA No. 334/2014 in W.P.(C) No. 1022/1989 in *All India Judges Association* case again came up for consideration before the Supreme Court on 25.04.2017, it was informed that the High Court has in compliance of the order dated 28.04.2016, supra constituted a Committee, which was deliberating on the issue. The Supreme Court requested the High Court to submit the report through its counsel by second week of July, 2017

and observed that the report of the Committee should be in accordance with the principles of law laid down in 2002 judgment of *All India Judges Association case.* Accordingly, the Committee prepared its report strictly in conformity with the directions issued by the Supreme Court in its order dated 28.04.2016 in I.A. No.334/2014. Report of the committee was placed before the Full Court of the High Court in its meeting held on 21.09.2017, which passed the following Resolution:-

> *"The Report is in compliance with the directions issued vide order dated 28.4.2016, by the Hon'ble Apex Court in I.A. No. 334 of 2014, in pending Civil Writ Petition 1022 of 1989, titled All India Judges Association and others v. Union of India and others, also the Committee has considered the objections filed by the Direct Recruits, who were given an opportunity of being personally hard.*
>
> *The Direct Recruits had relied upon a Five-Judge Bench judgment, rendered by the Apex Court, in Direct Recruit Class-II Engineering Officers Association v. State of Maharashtra, reported in (1990) 2 SCC 715. In the said verdict, it has been propounded by the Apex Court that where the Quota Rule has been breached and appointments have been made to the vacancies, in excess of quotas only from one source, but where appointments have been made after following the prescribed procedure enshrined in the Rules framed for appointment, the appointees be not pushed down below the appointees from the other source inducted in the service at a later date and where the Rules permit the authorities to relax the provisions relating to quota, ordinarily a presumption should be raised that there was such relaxation when there is a deviation from the quota rule.*
>
> *The Committee has in its Report not gone into the merits of the aforesaid submissions made on the basis of the said judgment. It was solitary dealing within the domain and purview of the directions dated 12.08.2016/4.10.2016 issued by the Apex Court in IA No.334 of 2014, during pendency of Civil Writ Petition 1022 of 1989, titled All India*

> *Judges Association and others vs. Union of India and other, besides within the limited reference made therein by the Hon'ble Supreme Court of India, vide order (supra).*
> *The counsel representing the High Court before the Hon'ble Supreme Court to ensure that the aforesaid facts and judgment be brought to the notice of the Hon'ble Apex Court.*
> *Also it be brought to the notice of the Bench that seniority(s) of Shri Dharam Chand Chudhary, Shri P.S. Rana, Sh. Sureshwar Thakur and Shri C.B. Barowalia, whose names are referred in various places of the Report, stands protected, in terms of verdict in All India Judges' Association and others v. Union of India and others, (2002) 4 SCC 247, besides of extantly, of all the aforesaid being elevated as Judges of this Court."*

20. Thereafter, when the IA No. 334/2014 in W.P.(C) No. 1022/1989 came up for consideration before the Supreme Court on 13.03.2018, it was disposed of taking note of the fact that the issues raised in the said IA relates to the dispute *inter se* between the individual/groups, which would not be appropriate for determination in the scope of IA. The Supreme Court, therefore, declined to entertain the IA any further leaving the parties to resort to such remedy as may be available to them in law. The IA was thus decided in the following terms:-

> *"The issue raised in I.A. No.334 of 2014 in Writ Petition (Civil) No.1022/1989, as it appears to us from the materials on record, relates to the disputes inter se between the individual/groups, which, in our considered vie, would not be appropriate for determination by this Court in I.A. (No.334 of 2014) filed in W.P. (C) No.1022/1989 (All India Judges Association v. Union of India).We, therefore, decline to entertain the I.A. any further leaving the parties to have resort to such remedies as may be available to them in law."*

It was thereafter that the petitioners filed the present two Writ Petitions.

21. We have heard Shri Shrawan Dogra, learned Senior Counsel, appearing for petitioner in CWP No. 2061/2018 and Shri R.K. Bawa, learned Senior Counsel appearing for petitioner in CWP No. 2292/2018, Shri K.D. Sood, learned Senior Counsel appearing for Himachal Pradesh High Court, Shri R.L. Sood, learned Senior Counsel appearing for respondents No. 3 & 4, Shri B. C. Negi, learned Senior Counsel for respondents No. 5 & 6 in both the petitions.

Arguments of the petitioners:

22. Shri Shrawan Dogra and Shri R.K. Bawa, learned Senior Counsels appearing on behalf of petitioners have argued that genesis of the dispute in present matters lies in the High Court not implementing the post based roster with effect from 31.03.2003 despite specific direction of the Supreme Court in 2002 judgment of All India Judges Association case, supra. Although the High Court framed the Rules in 2004 which were notified in the official gazette of the State of Himachal Pradesh on 20.03.2004 but it implemented the post based roster with effect from 31.03.2010 instead of 31.03.2003. The High Court in the meanwhile continued to make appointment on vacancy based roster upto 31.03.2010. The High Court also framed regulations for limited competitive examination in 2005 but despite availability of eligible officers to appear in the said examination, the High Court for the first time held such examination in 2009 when petitioner Rajeev Bhardwaj in CWP No. 2292/2018 was appointed to the cadre of District Judge on 27.10.2009 in that quota. Private respondents No. 3 to 5 have, therefore, wrongly been shown senior to the petitioners.

23. It is argued that the High Court set up a Committee of Hon'ble Judges firstly in the year 2010 and thereafter in the year 2017. Both Committees submitted reports with regard to implementation of the post based roster with effect from 01.04.2003 and both these reports were approved by the Full Court of the High Court. In fact, the report of two-Judge-

committee set up in 2017 was placed before the Hon'ble Supreme Court by way of affidavit affirming that the said report was prepared in consonance with directions of the Supreme Court. There was therefore no reason for the High Court not to fully implement the said report in view of the order passed by the Supreme Court on 24.08.2016 passed in I.A. No. 334/2014 in W.P.(C) No. 1022/1989. If this report is implemented, the petitioners would be liable to be shown senior to respondents No. 3 to 5 because this has been acknowledged as a question of fact by the said Committee that appointments of respondents No. 3 to 5 by way of direct recruitment were made in excess of their quota.

24. It is argued that various orders passed by the Supreme Court in I.A. No. 234/2009 and I.A. No. 235/2009, Writ Petition (Civil) No. 532/2009 and I.A. No. 334/2014 are required to be appreciated in the right perspective. These orders were passed taking note of the directions contained in 2002 judgment of All India Judges Association case, supra, whereby the respondent No. 2 – High Court was directed to create cadre of Civil Judge (Junior Division) and Civil Judge (Senior Division) with effect from 01.07.1996 alongwith all consequential benefits from that date. This direction of the Supreme Court has not been complied with yet by the Himachal Pradesh High Court. Specific direction of the Supreme Court to the High Court to follow the post based roster for appointment in the cadre of District Judge with effect from 31.03.2003 is based on enunciation of law propounded in para 29 of its 2002 judgment in *All India Judges Association case, supra*. Appointment of respondents No. 3 to 6, being in violation of the Rules of 2004 and also contrary to the directions contained in aforesaid judgment of the Supreme Court, are liable to be treated ad-hoc till such time vacancies in the quota of direct recruitment become available and their seniority is liable to be pushed down accordingly, argued the learned Senior Counsels.

25. Learned Senior Counsels appearing for petitioners further argued that the Supreme Court in para 30 of the aforementioned judgment

specifically observed that *"…… the roster system will ensure fair play to all while improving efficiency in the service……"* The argument that post based roster cannot be applied on the ground that by its implementation the promotee officers would be getting the seniority from the date when they were not even born in the cadre, would not be available in the present cases because the petitioners herein are not claiming seniority from any back date. They are rather claiming seniority only from the date of their actual appointment in the cadre. It would be, thus, a case of pushing down seniority of direct recruits till the time posts become available for them in the quota of direct recruitment. Respondents No. 3 to 6 would therefore be entitled to get seniority only from the date their appointment stands regularized upon availability of a post in the quota of direct recruitment as per their entitlement.

26. It is argued that the High Court did not conduct the limited competitive examination to fill up the quota of 25% from 2004 till 2009 despite availability of eligible officers in the year 2005 itself when regulations were framed for holding such examination. There were, in 2004 six officers eligible to appear in LCE, in 2005 there were 8 officers, in 2006 there were 5 officers, in 2007 there were 4 officers, in 2008 there were 7 officers available. It is, therefore, not correct to contend that since sufficient number of eligible officers were not available, the examination could not be conducted. In fact, decision not to hold the examination was never notified by the High Court. The High Court on its administrative side could not dilute the directives contained in 2002 judgment of *All India Judges Association case, supra.*

27. As regards Note-3 to Rule 5 under Explanation-II vide Notification dated 14.06.2016 in the Rules of 2004 to provide that appointment already made shall not be affected on account of introduction of new roster, it was argued that this note only implies that legally made appointment against the quota of particular category shall remain protected and will not be disturbed on account of change of quota/roster. Change of

roster from 40 points to 34 also came into effect with effect from 01.01.2011 following creation of four posts in DJ cadre after enforcement of Rules of 2004. Change in the roster and applicability of new roster would not affect the present dispute because it pertains to the period prior to 31.03.2010, therefore, there was no need to challenge the roster prepared after 2010. The Supreme Court in 2002 judgment of *All India Judges case, supra,* merely protected the appointments already made prior to 31.03.2003, as has also been clarified by the Supreme Court in *Maharashtra State Judges Association v. Registrar General, High Court of Judicature at Bombay, AIR 2009 SC 1571*. The aforesaid Note, therefore, does not have effect of extending such protection till 14.06.2016 when the said Note was inserted in the Rules of 2004.

28. As regards CWP No. 61/1999 before this Court jointly filed by many officers including present writ petitioners, it was submitted that dispute involved therein was about the appointment against permanent/temporary/ officiating posts under the Rules of 1973 when vacancy based roster was applicable. However, under the Rules of 2004 distinction between cadre and ex-cadre/temporary post has been done away with and now appointment can be made only by applying post based roster. The petitioners were not aggrieved by report of two-Judge-committee dated 18.04.2005 recommending rejection of representations submitted pursuant to judgment of this Court in the aforesaid Writ Petition, because their placement in the cadre of the then Sub-Judge would not have changed and the appointment on the post of ADJ would not have been declared illegal because of the protection granted by the Supreme Court in 2002 judgment of *All India Judges Association case, supra,* whereby appointments prior to 31.03.2003 were in any case protected.

29. As regards filing of WP (C) No. 532/2009 before the Supreme Court and Writ Petition No. 696/2010 before the High Court, it is argued that petitioners were not party therein either in their individual capacity or as member of Himachal Pradesh Judicial Service Officers Association. This would

be clear from the letters (Annexures P-36 and P-37) filed in Writ Petition No. 2292/2018 that HP Judicial Officers Association and HP Judicial Service Officers Association are different Associations and the latter was an Association of Civil Judges. The High Court has also mentioned that CWP No. 61/1999, I.A No. 234/2009 and I.A. No. 235/2009 were filed by the HP Judicial Service Officers Association, wherein advertisement issued by the High Court to fill the posts in excess of the quota of direct recruitment was under challenge. Even I.As. No. 234 and 235 of 2009 filed in WP (C) No. 1022/1989 before the Supreme Court were filed by the H.P. Judicial Service Officers Association of Civil Judges questioning excess direct recruitment. This fact was very much disclosed in para 12 of WP(C) No. 532/2009.

30. It is argued that there was no provision of holding written examination under the Rules of 1973, which was for the first time introduced in the Rules of 2004. The process for recruitment in which respondent No. 3 Sushil Kukreja was selected, was thus started under the draft Rules of 2004 and therefore, he was the first officer who qualified the said written examination as per Rule 22 of the Rules of 2004. It is trite that appointment under the draft rules could validly be made. Reliance in support of this argument is made on the judgment of the Supreme Court in High *Court of Gujarat vs. Gujarat Kishan Mazdoor Panchayat, AIR 2003 SC 1201,* and *Delhi Judicial Services Association vs. Delhi High Court, (2001) 5 SCC 145.*

31. Relying on the judgments of the Supreme Court in *Anil Kumar Neotia vs. Union of India, (1988) 2 SCC 587* and *T.R. Kapoor vs. State of Haryana, (1989) 3 SCC 71*, learned Senior Counsels appearing for petitioners, argued that when there is mandatory direction of the Supreme Court, it cannot be disobeyed or diluted by the respondents. The Supreme Court in *Rakhi Ray vs. High Court of Delhi, AIR 2010 SC 932,* has clarified that where statutory rules do not deal with a particular subject/issue, so far as the appointment of the Judicial Officers is concerned, directions issued by the

Supreme Court would have binding effect. This view is in conformity with the law laid down by the Supreme Court in *Nand Kishore vs. State of Punjab, (1995) 6 SCC 614.* The High Court has to play the role of impartial employer in the *inter se* dispute between its employees. Reliance in this connection is placed on the judgment of the Supreme Court in *S.I. Roop Lal vs. Lt. Governor through Chief Secretary, Delhi, (2000) 1 SCC 644,* and *Bhupendra Nath Hazarika vs. State of Assam, (2013) 2 SCC 516*.

32. Relying on the judgment of the Supreme Court in *M. Subba Reddy vs. A.P. State Road Transport Corporation, (2004) 6 SCC 729,* it was argued that quota rule cannot be taken to have broken down only by inaction on the part of the employer to fill up the post. The Constitution Bench judgment of the Supreme Court in *S.C. Jaisinghani vs. Union of India, AIR 1967 SC 1427*, is cited to argue that when the quota was fixed for two sources of recruitment, the quota could not be altered and that promotions made in excess of quota would be illegal. The same analogy should be applied in the case of direct recruitment. Relying on the judgments of the Supreme Court in *V.B. Badami vs. State of Mysore, AIR 1980 SC 1561* and in *Keshav Chandra Joshi Vs. Union of India, 1992 Suppl.1 SCC 272,* it is argued that it was not open to the authorities to alter the quota on the ground of administrative exigencies which can be done only by fresh determination of vacancies. Further reliance was placed on the judgment of the Supreme Court in *Maharashtra Vikrikar Karamchari Sangathan vs. State of Maharashtra, (2000) 2 SCC 552*, and in *Sanjay K. Sinha-II vs. State of Bihar, AIR 2004 SC 3460*, wherein it was held that if there is patent violation of the quota rule, the result must follow and the appellants-promotees, who remained in the office for all these years, cannot take the advantage of this situation. The promotees, therefore, could not be given seniority with effect from purported date of their promotion.

33. Reliance was also placed on the judgment of the Supreme Court in *M. Subba Reddy vs. A.P. State Road Transport Corporation, AIR 2004 SC 3517*, wherein it was held that even if the direct recruits were recruited later, their fitment in the order of seniority had to be determined with reference to rota and quota prescribed under the rules. In such a case there was no illegality when promotees were pushed downwards in the order of seniority. Reliance is also placed on the Constitution Bench judgment of the Supreme Court in *Ajit Singh vs. The State of Punjab, AIR 1999 SC 3471*, wherein it was held that any promotions made wrongly in excess of any quota, are to be treated as ad hoc till availability of vacancies in their quota. A Division Bench judgment of this Court in *Pankaj Sharma vs. H.P. State Electricity Board, LPA No. 430/2012,* decided on 29.06.2016, as also a Single Bench judgment of this Court in *Yashwant Singh v. H.P. State Electricity Board, CWP-T No. 2736/2008,* decided on 20.07.2012, were also cited to buttress the same argument. It was argued that by applying the ratio of aforementioned judgments it can be held that while appointment in excess of the quota of promotion or direct recruitment can be saved but such promotees/appointees cannot claim seniority when no post in their quota was available at the time of their promotion/appointment. Applying that analogy, placement of respondents No. 3 to 5 in the seniority has to be pushed down to a future date, till the posts in the quota of direct recruitment would become available to regularize their appointment.

34. Learned Senior Counsels for the petitioners argued that reliance by the respondents on the judgment of the Supreme Court in *Direct Recruit Class-II Engineering Officers Association vs. State of Maharashtra, (1990) 2 SCC 715*, is wholly misconceived. Inviting attention of the court towards para 44 of the aforesaid judgment, it is argued that conclusions (A) and (B) thereof are not attracted to the present case in favour of the respondents No. 3 to 5 as explained by the Supreme Court in later judgment in *Vinod Giri Goswami vs.*

State of Uttarakhand, AIR 2020 SC 5099. In that case, the Supreme Court held that these two paras have to be read harmoniously and that conclusion (B) cannot cover the cases which are expressly excluded by conclusion (A). Further argument of learned Senior Counsels for petitioners is that Rule 20 of the Rules of 2004, which empowers the State Government to grant relaxation in consultation with the High Court and the Himachal Pradesh Public Service Commission, cannot be pressed into service in their favour because such relaxation is available only with respect to condition of service and not to the condition of recruitment. Reliance, in this connection is also placed on the judgments of the Supreme Court in *State of M.P. vs. Lalit Kumar Verma, (2007) 1 SCC 575; Bhupendra Nath Hazarika vs. State of Assam, (2013) 2 SCC 516; and Suraj Prakash Gupta vs. State of Jammu and Kashmir, (2000) 7 SCC 561*.

Arguments of the respondents:

35. Per contra, Shri K.D. Sood, learned Senior Counsel appearing for respondent High Court, Shri R.L. Sood, learned Senior Counsel appearing for respondents No. 3 & 4 and Shri B.C. Negi, learned Senior Counsels appearing for respondents No. 5 & 6, have, at the very outset, raised preliminary objections with regard to maintainability of the Writ Petitions. It is submitted that the earlier Writ Petition filed by petitioners, being CWP No. 61/1999, was disposed of by this Court vide order dated 18.04.2005 requiring them to submit their representation before the High Court. Petitioner Rajeev Bhardwaj was petitioner No. 28 and petitioner S.C. Kainthla was petitioner No. 16 therein. Representations submitted by the petitioners/their Association were considered by a two-Judge-committee, which vide report dated 06.06.2005 recommended rejection of the same. The Full Court of the High Court, vide resolution dated 22.08.2005 accepted the report and accordingly rejection of the representation was conveyed to all concerned. The argument with regard to excessive appointment of the direct recruits, which has been raised in the present case, was also raised in those representations. Representations of the

petitioners having been rejected by the High Court on its administrative side, and the decision having not been challenged any further, has attained finality. The petitioners are, therefore, estopped from agitating the same issue all over again.

36. Second preliminary objection raised by learned Senior Counsels for respondents is that after opportunity was granted by the Supreme Court to the petitioners to approach this Court while allowing them to withdraw WP(C) No. 532/2009, CWP No. 696/2010 was filed by HP Judicial Service Officers Association before this Court, claiming same reliefs with the same arguments which are claimed/raised in present set of Writ Petitions. In fact the Supreme Court vide order dated 14.7.2016 while considering I.A No. 334/2014 again required the HP Judicial Service Officers Association to work out their remedy in the said Writ Petition. Although, the Writ Petition was filed but it was withdrawn unconditionally and was dismissed as such by order of this Court dated 04.11.2016. In view of law laid down by the Supreme Court in *Sarguja Transport Service vs. State Transport Appellate Tribunal, Gwalior and Others, (1987) 1 SCC 5*, and the mandate of Rule 1 of Order XXIII of the Code of Civil Procedure, present Writ Petitions for the same relief would be barred and thus not maintainable.

37. Third objection raised by learned Senior Counsels appearing for the respondents is that the petitioners did not challenge filling of vacancies by direct recruitment at the appropriate time. Neither the appointment of the respondents nor rejection of representations or reports of various committees of the High Court or unanimous decisions of the Full Court of the High Court was ever challenged by them. The petitioners also did not challenge the seniority lists issued year after year, from the year 2005 onwards, which fact was all throughout within their knowledge. Even promotions carried out during the interregnum on the basis of such seniority lists, were never subjected to challenge by petitioners or any other judicial officer. The

petitioners have therefore by their conduct acquiesced in the correctness of the action of the respondents. They cannot be now permitted to unsettle the position which has remained settled for so long. The submission therefore is that Writ Petitions in the present form are not maintainable and are liable to be dismissed.

38. Learned Senior Counsels for respondents argued that as far as direct recruitment of respondent No. 3 Sushil Kukreja, is concerned, the process for recruitment pursuant to which he was selected, was initiated by resolution of the Full Court of the High Court dated 01.08.2003. Consequential advertisement, pursuant to which respondent No. 3 was recruited, was issued under the old Rules of 1973 on 07.09.2003. The Full Court vide specific resolution dated 29.08.2003 decided that written examination shall be held for appointment of direct recruitment in the service even under the Rules of 1973. The process for his recruitment commenced in August/September, 2003 when the Rules of 1973 were in force. The process was completed on 16.03.2004 before promulgation of the Rules of 2004 when a letter was addressed to the Government to appoint respondent No. 3 Sushil Kukreja as an Additional District Judge. The H.P. Judicial Service Rules, 2004 were notified on 20.03.2004. He was however appointed on 18.05.2004. The seniority of respondent No. 3 Sushil Kukreja, therefore, in any case would remain protected in view of mandate of the Supreme Court in 2002 judgment of *All India Judges Association case, supra*. The two-Judge-committee of the High Court in its report dated 10.09.2009, which has been approved by the Full Court of the High Court, has categorically protected appointment of respondent No. 3 Sushil Kukreja having been made under the Rules of 1973. Unlike proviso to Rule 7 B of the Delhi Higher Judicial Service Rules, which clearly stipulated that not more than 1/3rd posts could be held by the direct recruits, there is no such prohibition in the Rules of 1973. Thus the two-Judge-committee of the High Court came to a definite conclusion that

judgment of the Supreme Court in *Delhi Judicial Services Association and Others vs. Delhi High Court and Others, (2001) 5 SCC 145*, would not be applicable in case of any direct recruitment under the Rules of 1973. Even otherwise, appointment of respondent No. 3 has been specifically saved and protected by law laid down by 2002 judgment of the Supreme Court in *All India Judges Asociation case.* Even the three Judge Bench of the Supreme Court in *K. Meghachandra Singh & others versus Nigam Siro and others (2020) 5 SCC 689,* while overruling the two Judge Bench decision in *Union of India and others vs. N.R. Parmar & others, (2012) 13 SCC 340,* held that this judgment will apply only prospectively. Citing the judgment of the Supreme Court in *Union of India versus V.Ramakrishan and others (2005) 8 SCC 394*, learned Senior Counsel for the respondents argued that until the Rules of 1973 were validly repealed, the draft rules could not have been acted upon. The Writ Petitions qua respondent No.3 Sushil Kukreja, thus, deserves to be dismissed on this ground alone.

39. Learned Senior Counsels for the respondents submitted that respondent No. 3 Sushil Kukreja, respondent No. 4 Virender Singh, respondent No. 5 Chirag Bhanu Singh and respondent No. 6 Arvind Malhotra were respectively appointed on 18.05.2004, 07.12.2006, 17.09.2006 and 23.10.2009 in accordance with the procedure prescribed under the Rules of 2004. Petitioner Rajeev Bhardwaj in CWP No. 2292/2018 was appointed on 27.10.2009 against the quota of LCE and therefore, he was born in the cadre of District Judges as late as 27.10.2009. Petitioner S.C. Kainthla in CWP No. 2061/2018 was appointed on 26.12.2006, therefore, even he was not born in the cadre prior to appointment of at least respondents No. 3 to 5. Relying on the judgment of the Supreme Court in *K. Meharchandra Singh's case, (supra),* and in particular, to the discussions made in paras 28, 29, 39 and 40 therein, it is argued that law is well settled that an employee cannot claim seniority from a date he was not even born in service.

40. It is submitted that the petitioners are primarily relying on 2017 report of the two-Judges-committee, which in fact was prepared strictly in conformity with directions issued by the Supreme Court vide order dated 28.04.2016 in IA No. 334/2014. The report of the Committee as well as resolution of the Full Court dated 01.11.2017 clearly notes that contentions of the affected parties, i.e., the direct recruits, in respect of seniority were not considered either by the Committee or the Full Court as it was beyond their power, in view of specific mandate of the Supreme Court in its order dated 28.04.2016 in IA No. 334/2014.

41. Relying on the Constitution Bench judgment in Direct Recruit Class-II Engineering Officers' Association, supra, it was argued that the Supreme Court therein held that if it becomes impractical to act upon rule fixing quota from two sources, it is no use insisting that the authority must give effect to such a rule. Every effort has to be made to respect a rule but if it is not feasible to enforce it, the rule has to be given a practical interpretation. The Supreme Court, therefore, held that interference by the High Court with the seniority given to the promotees above the direct recruits without following the rotation principle cannot be sustained. It was argued that every effort was made by the respondent High Court, which took a conscious decision as per the circumstances prevalent at the relevant time, to apply the post based roster with effect from 31.03.2010. Relying on the judgment of the Supreme Court in *Anand Kumar Tiwari and others versus High Court of Madhya Pradesh and others 2021 SCC OnLine SC 578,* learned Senior Counsels argued that 31.3.2003 cannot be taken as sacrosanct date in every situation and can be allowed to be deviated from for valid reasons. The Supreme Court refused to interfere in that case even though the rules in conformity with *All India Judges Association's* case were amended and enforced w.e.f. 13.3.2018. Reliance is also placed on the judgments of the Supreme Court in *Hon'ble Punjab and Haryana High Court at Chandigarh vs.*

State of Punjab and Others, AIR 2018 SC 5284, and later judgment of the Supreme Court in *Hon'ble High Court of Judicature at Allahabad vs. State of U.P. & Others, (2018) 5 SCC 439,* to argue that a pragmatic view has to be taken despite the judgment in *All India Judges Association case, supra.*

42. Referring to the resolution of the Full Court of the High Court dated 30.03.2006, learned Senior Counsels appearing for the respondents argued that the Full Court came to definite conclusion that in cadre strength of 34, 8 posts were to fall to the quota of LCE. Only 5 officers were fulfilling eligibility criteria of five years of service as Civil Judge (Sr. Div.) for promotion, namely, R.K. Mittal, Pritam Singh, R.L. Azad, S.L. Sharma and K.S. Chandel, but all of them were in fact promoted, albeit against the quota of promotion. No prejudice whatsoever was therefore occasioned to the petitioners or to any other promoted candidate. In fact, the unfilled LCE quota, which should have also been proportionately apportioned between the promotees and direct recruits, was en-bloc given to promotees. As soon as other judicial officers became eligible against the said quota in the year 2008-2009, the High Court notified 1 existing and 2 future vacancies on 30.03.2009 to be filled up by way of LCE. Thereafter, by way of corrigendum, one future vacancy against 10% future vacancies was withdrawn as per direction of the Supreme Court. Out of 15 Judicial Officers, only one Judicial Officer, namely, petitioner Rajeev Bhardwaj could qualify the said test and accordingly he was appointed by promotion on 27.10.2009.

43. Learned Senior Counsels appearing for the respondent further submitted that a three-Judge-committee constituted by the High Court in the year 2009 to scrutinize the roster, the total strength of DJ/ADJ and the post occupied by each category, i.e., 50% by promotion, 25% by LCE and 25% by direct recruitment, after examination of entire record/seniority, recommended that there is no need to reopen already finalized seniority under the HP Higher Judicial Service Rules, 1973, thereby disturbing the settled position. The

Committee in the report dated 10.09.2009 observed that even if no LCE was held till 2009, the officers belonging to the cadre of Civil Judges (Sr.Div.) did not in any manner suffer because the quota of LCE was given to the promotees on the basis of seniority. It was therefore argued that promotions in 25% quota of LCE till 2009 could not be given on account of non-availability of sufficient number of judicial officers. The petitioners are therefore not justified in contending that the High Court deliberately did not implement the said direction of the Supreme Court in its judgment in 2002 judgment of All India Judges Association case, supra.

44. Learned Senior Counsels for the respondents contended that the Full Court of the High Court upon a reference from the State Government, vide its resolution dated 27.7.2010 had taken a conscious decision that a Note should be inserted as Note No. 3 below Rule 5 of the Rules of 2004 in the terms that the appointments already made shall not be affected on account of the introduction of the new roster. The State Government, pursuant to the resolution of the Full Court of the High Court, vide notification dated 14.6.2016 added Explanation-II below Rule 5 to provide that the appointment of the cadre of District Judges/Additional District Judges from all the three categories shall be made in accordance with the post based 34 point roster to be maintained by the High Court in this behalf. However, Note-3 which was simultaneously added thereunder clearly states that the appointments already made shall not be affected on account of introduction of the new roster. The amended Rule and Note 3 have not been challenged by the petitioners or by any other officer as per procedure known to law. The writ petitions are, therefore, liable to be dismissed.

45. Learned Senior Counsels further submitted that H.P. Judicial Service Officers Association and its members belatedly preferred I.A. Nos. 234 and 235 of 2009 before the Supreme Court in W.P.(C) No. 1022/1989. Initially although order dated 26.03.2009 was passed by the Supreme Court requiring

the High Court to work out and place before it the report showing the manner of implementation of the Rules of 2004 with effect from 31.03.2003, however, with a rider that the Supreme Court would itself consider the same before it is ordered to be implemented. Eventually, the Supreme Court disposed of the I.A. Nos. 234 and 235 of 2009 by order dated 26.03.2009 by specifically observing that it did not wish to interfere in the matter of seniority and on the question of introduction and violation of roster system, however, liberty was given to the petitioners to take appropriate steps for redressal of their grievance. It was thereafter that the H.P. Judicial Service Officers Association and its several other members by way of WP (C) No. 532/2009 filed before the Supreme Court sometime in October, 2009 through its President J.K. Sharma prayed for the reliefs similar to these ones claimed in the present set of Writ Petitions. When the matter came up before the Supreme Court on 04.12.2009, it permitted H.P. Judicial Service Officers Association and its members to withdraw the said Writ Petition with liberty reserved to move this Court. It is argued that in all the aforementioned writ petitions/proceedings, the directly recruited candidates were not made parties or arrayed as respondents despite the fact that they were likely to be directly affected by any decision.

46. Learned Senior Counsels for the respondents further submitted that I.A. No. 334/2014, jointly filed by S.C. Kainthla, petitioner in CWP No. 2061/2018, Rajeev Bhardwaj, petitioner in CWP No. 2292/2018, and J.K. Sharma moved before the Supreme Court in 2002 judgment of *All India Judges Association case, supra,* virtually claimed the same reliefs. This was done at a time when CWP No. 696/2010 was still pending before this Court claiming similar reliefs. The petitioners therein failed to disclose in I.A. No. 334/2014 that their earlier I.A. No. 234/2009 and earlier WP (C) No. 532/2009 had already been disposed of by the Supreme Court. The petitioners also did not disclose before the Supreme Court that as per liberty reserved to the Association and its members in terms of order dated 04.12.2009, allowing

them to withdraw WP (C) No. 532/2009, filed before the Supreme Court, they in fact filed CWP No. 696/2010 before this Court. The petitioners also failed to disclose that reliefs claimed in CWP No. 696/2010 were identical to those prayed in I.A. No. 234/2009 and I.A. No. 235/2009. Non-disclosure of order dated 14.07.2016 in I.A. No. 334/2014 virtually set at naught the earlier order dated 28.04.2016 passed by the Supreme Court. This, according to the respondents, amounted to suppression of the material facts.

47. Learned Senior Counsels further argued that after withdrawal of Writ Petition (Civil) No. 532/2009 before the Supreme Court, the Association alongwith its members again filed CWP No. 696/2010 before this Court and did not array the direct recruits as party respondents thereto. In that Writ Petition also, the reliefs, which are similar to present Writ Petitions, were prayed for. This Court required the petitioners to implead the directly recruited officers as parties thereto. Instead of , however, agreeing to comply with the directions of the High Court the petitioners sought recusal of that Bench and prayed for listing of the case before another Bench. The said prayer was rejected by this Court by describing the same as highly improper. This clearly shows that the petitioners were indulging in forum shopping and bench hunting. Pursuant to observations passed by the Full Bench of this Court on 15.09.2015 in CWP No. 696/2010, the H.P. Judicial Service Officers Association filed CMP No. 10908/2015 seeking to implead direct recruits as respondents to the said Writ Petition. However when the matter was taken up by the Full Bench on 21.10.2016, the H.P. Judicial Service Officers Association sought permission to withdraw the CMP No. 10908/2015. Such a prayer was declined. It was thereafter that when the CWP No. 696/2010 was listed before the Full Bench on 28.10.2016, the petitioners sought time to move an application for withdrawal of the Writ Petition itself. However, no application was filed seeking withdrawal of the Writ Petition but finally when the matter was listed before this Court on 04.11.2016, the aforesaid CWP No.

696/2010 was got dismissed as being unconditionally withdrawn and without any liberty being reserved in favour of the petitioners to file fresh Writ Petition. Such conduct of the Association of Judicial Officers and its members, despite the fact that the Supreme Court by specific order dated 14.07.2016 relegated them to work out their remedy in CWP No. 696/2010, dis-entitles them to any relief in the present matter. It was in view of these facts that the Supreme Court vide order dated 13.03.2018 disposed of the I.A. No. 334/2009 declining to entertain the I.A. any further leaving the parties to have resort to such remedies as may be available to them in law. Even at the time of passing of this order, the present petitioners did not disclose to the Hon'ble Supreme Court that CWP No. 696/2010 for the same reliefs had been dismissed as unconditionally withdrawn on 04.11.2016. Even if the Supreme Court while declining to interfere in the matter in the scope of I.A. No. 334/2014, in its order dated 13.3.2018, left the parties to work out their remedy as may be available to them in law, this will not preclude the respondents from objecting to maintainability of the Writ Petitions on valid grounds. In order to buttress this argument, reliance is placed on the judgment of the Supreme court in *Asgar and others versus Mohan Verma and others reported in (2020) 16 SCC 230.*

48. Learned Senior Counsels appearing on behalf of the private respondents argued that the stand of the petitioners that they were not members of the H.P. Judicial Service Officers Association and therefore had nothing to do with CWP No. 696/2010 filed by the said Association, and further that unconditional withdrawal of the said Writ Petition cannot directly affect them, is liable to be rejected. The petitioners never ceased to be members of the said Association which had filed aforementioned Writ Petition for benefit of its members which also included the petitioners. Learned Senior Counsels in this behalf referred to the pleadings and other records, which shall be discussed at the appropriate place hereinbelow.

49. We have given our thoughtful consideration to the rival submissions, carefully examined the records and respectfully studied the cited precedents.

ANALYSIS:

50. We shall first of all examine the question whether orders passed by the Supreme Court in different I.As and this Court in various Writ Petitions would have a bearing on the present Writ Petitions. Argument of the petitioners that they not being the members of the H.P. Judicial Service Officers Association, the orders passed in the Writ Petitions and Interlocutory Applications filed by such Association and some of its members, would not bind them, is noted to be rejected for the stated reasons. Respondents No. 3 to 6 in their reply to the Writ Petition No. 2292/2018 filed by petitioner Rajeev Bhardwaj categorically asserted that the petitioner was a member of H.P. Judicial Service Officers Association. The petitioners failed to satisfactorily substantiate the plea in the rejoinder that the District Judges/Additional District Judges and Presiding Officers of the Fast Track Courts had formed a separate Association named H.P. Judicial Officers Association. He has merely contended that the member of the said new Association disassociated themselves from the earlier Association and that the petitioner was about to apply for his impleadment in that Writ Petition but before that could be done, it was withdrawn. He disassociated himself from the activities of the Union after he became Presiding Officer of the Fast Track Court in 2008. The petitioners failed to substantiate the plea in the rejoinder that the District Judges, Additional District Judges and Presiding Officers of Fast Track Courts had formed a separate Association named "The H.P. Judicial Officers Association", and have merely contended that members of the said new Association had disassociated themselves from the earlier Association. The petitioners could have ceased to be members of the HP Judicial Service Officers Association only if they had resigned from the membership of the said

Association and not otherwise. None of the Judicial Officers, including the petitioners, have been able to show that they withdrew from membership of the said Association. D.K. Sharma, General Secretary of the Association, in his letter dated 15.08.2006 to the Registrar General of the High Court, merely stated that they had disassociated from the aforesaid Association. The petitioners withheld from this Court that on 02.12.2006, D.K. Sharma himself addressed a letter to the Registrar General that *"Therefore, the matter regarding recognition of the Association may kindly be kept pending for the time being".* After 02.12.2006, however, the matter regarding grant of recognition to the newly formed HP Judicial Officers Association was never revived or pressed till date. It is a matter of record that no other Association has been formed nor granted any recognition. The record would also reveal that even before the Supreme Court the petitioners accepted that CWP No. 696/2010 was filed by HP Judicial Service Officers Association in a representative capacity and for the benefit of the petitioners as well, which would be evident from I.A. No. 334/2014 filed by both the petitioners, namely, S.C. Kainthla and Rajeev Bhardwaj along-with J.K. Sharma, wherein the Supreme Court passed a conscious order on 14.07.2016 taking note of the fact that identical prayer is subject matter of consideration in CWP No. 696/2010, supra and observed that the parties should be relegated to work out their remedy in the said Writ Petition and await outcome of the same. The petitioners therefore, cannot be allowed to contend that they would not be bound by the previous order passed by the Supreme Court and this Court in Writ Petitions and I.As filed by their Association.

51. The Supreme Court in para 40 of the 2002 judgment of All India Judges Association case, supra, while holding that any clarification in respect of any matter arising out of this judgment will be sought only from it, observed that "no other court shall entertain them". Therefore, as per para 40 of the said judgment, the Supreme Court itself specifically allowed the HP Judicial

Officers Service Association and its members, which includes the petitioners as well, to approach this Court under Article 226 of the Constitution of India for adjudication of their claims. After the Supreme Court refused to entertain Writ Petition {WP (C) No. 532/2009} directly filed before it, permitting the petitioners to withdraw the Writ Petition with liberty to approach the High Court, the Association along with some of its members filed CWP No. 696/2010 in March, 2010, for the benefit of the petitioners and other officers claiming the same relief and on the basis of same grounds, which have been claimed/raised in the present Writ Petitions. When during the pendency of the said Writ Petition, I.A. No. 334/2014 came up before the Supreme Court on 14.07.2016, the Supreme Court again specifically directed so by relegating the petitioners including S.C. Kainthla, Rajeev Bhardwaj and J.K. Sharma, to workout their remedy in the said CWP No. 696/2010. However, the petitioners did not avail of that remedy. The Full Bench of the High Court directed the petitioners to implead the directly recruited candidates as parties. Initially the petitioners filed application for their impleadment but later sought recusal of the Bench. When such prayer was declined, the petitioners rather unconditionally withdrew CWP No. 696/2010, which was dismissed as withdrawn vide order dated 04.11.2016 by this Court. Unconditional withdrawal of the Writ Petition by the petitioners would therefore preclude them from again invoking writ jurisdiction of this Court as permission granted to them to workout their remedy in the aforementioned Writ Petition by order of the Supreme Court dated 04.12.2009, followed by order dated 14.07.2016, was not availed of by them. It is settled proposition of law that once Writ Petition is withdrawn unconditionally, without any liberty being reserved to the petitioners to again file a fresh Writ Petition under Article 226 of the Constitution of India, for invoking writ jurisdiction of the High Court, new Writ Petition would not be maintainable and would be liable to be dismissed.

52. The Supreme Court in *Sarguja Transport Service vs. State Transport Appellate Tribunal, M.P., Gwalior, and others (1987) 1 SCC 5* held that where a petitioner withdraws a petition filed by him in the High Court under Article 226/227 without permission to institute a fresh petition, remedy under Article 226/227 should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the Writ Petition and it would not be open to him to file a fresh petition in the High Court under the same article, though other remedies like suit or Writ Petition before Supreme Court under Article 32 would remain open to him. It was held that the principle underlying Rule 1 of Order XXIII of the CPC should be extended in the interest of administration of justice to cases of withdrawal of Writ Petition also. The principle underlying that provision is that when a plaintiff once institutes a suit in a court and thereby avails of a remedy given to him under law, he cannot be permitted to institute a fresh suit in respect of the same subject-matter again after abandoning the earlier suit or by withdrawing it, without the permission of the Court to file fresh suit. This principle is founded on the public policy, but it is not the same as the rule of *res judicata* contained in Section 11 of the Code. The Supreme Court further held that it would discourage the litigant from indulging in bench-hunting tactics and there are no justifiable reasons in such a case to permit a petitioner to invoke the extraordinary jurisdiction of the High Court under Article 226 once again.

53. The Supreme Court in *Sarguja Transport Service case*, supra, while examining the principles of public policy envisaged under Order XXIII Rule (1) of the Code of Civil Procedure, held as under :

> *"8. The question for our consideration is whether it would or would not advance the cause of justice if the principle underlying Rule 1 of Order XXIII of the Code is adopted in respect of writ petitions filed under Articles 226/227 of the Constitution of India also. It is common knowledge that very often after a writ petition is heard for some time when the petitioner or his counsel finds that the*

Court is not likely to pass an order admitting the petition, request is made by the petitioner or by his counsel, to permit the petitioner to withdraw from the writ petition without seeking permission to institute a fresh writ petition. A Court which is unwilling to admit the petition would not ordinarily grant liberty to file a fresh petition while it may just agree to permit the withdrawal of the petition. It is plain that when once a writ petition filed in a High Court is withdrawn by the petitioner himself he is precluded from filing an appeal against the order passed in the writ petition because he cannot be considered as a party aggrieved by the order passed by the High Court. He may as stated in Daryao and others vs. The State of U.P. and others,1962 2 SCR 575 in a case involving the question of enforcement of fundamental rights file a petition before the Supreme Court under Article 32 of the Constitution of India because in such a case there has been no decision on the merits by the High Court. The relevant observation of this Court in Daryao's case (supra) is to be found at page 593 and it is as follows:

> *"If the petition is dismissed as withdrawn it cannot be a bar to a subsequent petition under Article 32, because in such a case there has been no decision on the merits by the Court. We wish to make it clear that the conclusions thus reached by us are confined only to the point of res judicata which has been argued as a preliminary issue in these writ petitions and no other."*

9. The point for consideration is whether a petitioner after with-drawing a writ petition filed by him in the High Court under Article 226 of the Constitution of India without the permission to institute a fresh petition can file a fresh writ petition in the High Court under that Article. On this point the decision in Daryao's case (supra) is of no assistance. But we are of the view that the principle underlying Rule 1 of Order XXIII of the Code should be extended in the interests of administration of justice to cases of withdrawal of writ petition also, not on the ground of res judicata but on the ground of public policy as explained above. It would also discourage the litigant from indulging in bench-hunting tactics. In any event there is no justifiable reason in such a case to

permit a petitioner to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution once again. While the withdrawal of a writ petition filed in a High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Article 32 of the Constitution of India since such withdrawal does not amount to res judicata, the remedy under Article 226 of the Constitution of India should be deemed to have been abandoned by the petitioner in respect of the cause of action relied on in the writ petition when he withdraws it without such permission. In the instant case the High Court was right in holding that a fresh writ petition was not maintainable before it in respect of the same subject-matter since the earlier writ petition had been withdrawn without permission to file a fresh petition. We, however, make it clear that whatever we have stated in this order may not be considered as being applicable to a writ petition involving the personal liberty of an individual in which the petitioner prays for the issue of a writ in the nature of habeas corpus or seeks to enforce the fundamental right guaranteed under Article 21 of the Constitution since such a case stands on a different footing altogether. We, however leave this question open."

54. The question about applicability of Order XXIII Rule (1) to the writ jurisdiction again cropped up before the Supreme Court in *Upadhyay & Company vs. State of U.P. and others, (1999) 1 SCC 81*. Therein also it was held that the withdrawal of a Writ Petition filed in the High Court without the permission to file a fresh Writ Petition may not bar other remedies like a suit or a petition under Article 32 of the Constitution of India, but the remedy under Article 226 of the Constitution of India should be deemed to have been abandoned by the petitioner in respect of the cause of action relied in the Writ Petition when he withdraws it without such permission. The relevant discussion to be found in para 13 of the said judgment is reproduced as under :

"13. The aforesaid ban for filing a fresh suit is based on public policy. This Court has made the said rule of public polity applicable to jurisdiction under Article 226 of the Constitution (Sarguja Transport Service v. State Transport Appellate Tribunal, Gwalior, 1987 1 SCR 200). The reasoning for adopting it in writ jurisdiction-is that very often, it happens, when the petitioner or his counsel finds that the court is not likely to pass an order admitting the writ petition after it is heard for some time, that a request is made by the petitioner or his counsel to permit him to withdraw it without seeking permission to institute a fresh writ petition. A court which is unwilling to admit the petition would not ordinarily grant liberty to file a fresh petition while it may just agree to permit withdrawal of the petition. When once a writ petition filed in a High Court is withdrawn by the party concerned he is precluded from filing an appeal against the order passed in the writ petition because he cannot be considered as a party aggrieved by the order passed by the High Court. If so, he cannot file a fresh petition for the same cause once again. The following observations of E.S.Venkataramiah, J. (as the learned Chief Justice then was) are to be quoted here:

> *"We are of the view that the principle underlying Rule 1 of Order 23 of the Code should be extended in the interests of administration of justice to cases of withdrawal of writ petition also, not on the ground of res judicata but on the ground of public policy as explained above. It would also discourage the litigant from indulging in bench-hunting tactics. In any event there is no justifiable reason in such a case to permit a petitioner to invoke the extraordinary jurisdiction of the High Court under Article 226 of the Constitution once again. While the withdrawal of a writ petition filed in High Court without permission to file a fresh writ petition may not bar other remedies like a suit or a petition under Article 32 of the Constitution since such withdrawal does not amount to res judicata, the remedy under Article 226 of the Constitution should be deemed to have been abandoned by the petitioner in respect of the*

> *cause of action relied on in the writ petition when he withdraws it without such permission."*

55. Yet another case in which the controversy at hand was examined by the Supreme Court is that of *Sarva Shramik Sanghatana (KV) vs. State of Maharashtra and others, (2008) 1 SCC 494,* wherein also the Supreme Court placed reliance on the principle enunciated in *Sarguja Tranport's* case (supra) but held that the facts of that case were distinguishable as the court in that case was dealing with an application of the petitioner company filed under Section 25-O (1) of the Industrial Disputes Act which was withdrawn reserving its right to move fresh application as and when necessary and hence in the background of such facts, the Court found that the withdrawal by the petitioner for trying to arrive at an amicable settlement with the workers was a bona fide exercise on the part of the petitioner and it was not a case of bench hunting. The principle of law enunciated in *Sarguja Transport's* case was thus distinguishable. However, the Supreme Court, after quoting paras 8 and 9 of the judgment of the *Sarguja Transport's* case, supra reiterated the same principle of law in para 12 of the said judgment:

> *"12.xxxxxx xxxxxx We are of the opinion that the decision in Sarguja Transport case (supra) has to be understood in the light of the observations in paragraphs 8 & 9 therein, which have been quoted above. The said decision was given on the basis of public policy that, if while hearing the first writ petition the Bench is inclined to dismiss it, and the learned Counsel withdraws the petition so that he could file a second writ petition before what he regards as a more suitable or convenient bench, then if he withdraws it he should not be allowed to file a second writ petition unless liberty is given to do so. In other words, bench-hunting should not be permitted.*
>
> *13. It often happens that during the hearing of a petition the Court makes oral observations indicating that it is inclined to dismiss the petition. At this stage the counsel may seek withdrawal of his petition without getting a verdict on the merits, with the intention*

of filing a fresh petition before a more convenient bench. It was this malpractice which was sought to be discouraged by the decision in Sarguja Transport case (supra)."

56. The Supreme Court again in *Ramesh Chandra Sankla and others vs. Vikram Cement, (2008) 14 SCC 58* after referring to the principles of law laid down in the previous judgment in *Sarguja Transport,* supra and *Sarva Shramik,* supra, held as under :

"61.From the above case law, it is clear that it is open to the petitioner to withdraw a petition filed by him. Normally, a Court of Law would not prevent him from withdrawing his petition. But if such withdrawal is without the leave of the Court, it would mean that the petitioner is not interested in prosecuting or continuing the proceedings and he abandons his claim. In such cases, obviously, public policy requires that he should not start fresh round of litigation and the Court will not allow him to re-agitate the claim which he himself had given up earlier."

57. The Supreme Court in *Avinash Nagra vs. Navodaya Vidyalaya Samiti and others (1997) 2 SCC 534,* while dealing with the similar question held as under :-

"13. The High Court also was right in its conclusion that the second writ petition is not maintainable as the principle of constructive res judicata would apply. He filed the writ petition in first instance but withdrew the same without permission of the Court with liberty to file the second writ petition which was dismissed. Therefore, the second writ petition is not maintainable as held by the High Court in applying the correct principle of law."

58. The Delhi High Court in *Delhi Judicial Service Association Thr. Its President Vinod Kumar DHJS & Anr. versus High Court of Delhi through its Registrar General and others, 2013 (137 DRJ 523 (DB)* while dealing with the similar case noted that the petitioner association had unconditionally and

without any demur withdrawn their Writ Petition. The subsequent Writ Petition was for identical reliefs and based on the same cause of action. Some of the judicial officers, including petitioner No. 2 belonging to Delhi Judicial Service had independently filed a Writ Petition before the Supreme Court, which was dismissed as withdrawn with liberty to move the High Court. The petitioner No. 2 in that case was also the petitioner before the Supreme Court. It was held that the petitioner association could not be permitted to file fresh petition.

59. Even if the Supreme Court while declining to entertain the I.A No. 334/2014, vide order dated 13.3.2018, observed that the parties may resort to such remedies as may be available to them in law, the respondents would not be precluded from raising all such arguments, which may be available to them in law, including objections as to the maintainability of the Writ Petitions. The reliance placed by the respondents in support of this argument on the judgment of *Asgar and others* case (supra) appears to be well placed. In that case, the appellants being stranger to the decree passed in the respondent decree-holders' partition suit, filed an application in execution proceedings seeking declaration of entitlement to possession as lessees. Such application travelled up to the Supreme Court where it was observed that the appellants were free to pursue remedy of compensation for improvements "in accordance with law". The appellants therefore, filed subsequent application for compensation for improvements under Section 151 CPC. Respondent-decree- holders contended that the application is barred by the principle of *res judicata*. The Executing Court upheld that argument. The High Court also upheld the order of the Executing Court by holding that the application was barred by the principle of *res judicata* as the claim of compensation for improvements had not been raised in the proceedings against dispossession by the respondent decree-holders. Before the Supreme Court, it was submitted that under Section 4 (1) of the Kerala Compensation for Tenants

Improvements Act, 1958 they are entitled to possession until adjudication of compensation. The issue before the Supreme Court was whether the claim of compensation could and should have been asserted in earlier proceedings. Dismissing the appeal, the Supreme Court held that the claim sought for by the appellants in present case is intrinsically related to the claim asserted in earlier round of proceedings. The appellants could and ought to have asserted this issue earlier. Hence, it was held that the appellants were barred by the principles of constructive *res judicata* from raising the claim for compensation in the subsequent execution proceedings. An argument was made by the appellant that since the claim of compensation was raised by them pursuant to liberty granted by the Supreme Court to pursue remedy in accordance with law, such objection would not be available. Rejecting the argument, the Supreme Court held that the grant of such liberty does not deprive the other party to raise necessary defences for invocation of remedy.

60. Discussion made in earlier part of this judgment would clearly show that the Supreme Court, vide its order dated 28.04.2016 passed in I.A. No.334/2014, directed the High Court to work out and place before it the report showing the manner in which 34 point roster would be acted upon by applying Rule 13 of the Rules of 2004 with effect from 31.03.2003. However, at the end of the order, the Supreme Court also observed that "We make it clear and reiterate that we only want the outcome of such exercise to be placed before this Court before passing further orders as to its implementation." The two-Judge-committee therefore strictly in conformity with the mandate of the Supreme Court in its order dated 28.04.2016 worked out the implementation of the Rules of 2004 with effect from 31.03.2003 and submitted its report in September, 2017, which was approved by the Full Court of the High Court vide resolution dated 21.09.2017. The report of the two-Judge Committee has to be therefore appreciated in the context of the orders of the Supreme Court. In fact, in Chapter 2-B of the report, the two-Judge-committee clearly

observed in paras 5-7 that there may be many officers who would be adversely affected in view of this exercise and that direct recruits will have opportunity to advance their case before the Supreme Court if an order as to implementation of the report is passed by it. Thus, not only in the report of the Committee but resolution of the Full Court also, it was clearly observed that arguments of the direct recruits have not been considered in preparation of the report in view of specific direction of the Supreme Court in its order dated 28.04.2016. The Supreme Court in that very order had clarified that the High Court was to merely place before it the outcome of such exercise, which shall be considered by them for passing further order for its implementation. Therefore, the said report remained tentative and was not implemented. This explains why the Supreme Court, while disposing of I.A. No.334/2014 vide order dated 13.03.2018 did not give any direction with regard to its implementation. No benefit, therefore, can be derived by the petitioners from such report. In view of these facts, when I.A. No.334/2014 came up before the Supreme Court, their Lordships vide order dated 13.3.2018 ultimately declined to interfere in the matter by observing that *"....we are of the view that the parties should be relegated to work out their remedy in the said writ petition and await the outcome of the said writ petition."*

61. Relied order of the Supreme Court dated 28.04.2016 was virtually overwritten by its subsequent order dated 14.07.2016, whereby the Supreme Court relegated the petitioners to workout their remedy in CWP No. 696/2010 pending before this Court and directed them to await the outcome of said Writ Petition. Argument of the petitioners for implementation of order dated 28.04.2016 cannot be countenanced also because that order finally stood merged in the final order dated 13.03.2018 disposing of the I.A. No. 334/2014. Without giving effect to the said report/exercise undertaken by the Committee, as their Lordships were of the view that the seniority dispute *inter se* between two groups cannot be entertained in the scope of Interlocutory

Application. The Supreme Court therefore declined to entertain I.A. No. 334/2014 leaving the parties to resort to such remedy as may be available to them in law.

62. The Supreme Court in *Kalabharati Advertising versus Hemant Vimalnath Narichania and others (2010) 9 SCC 437*, succinctly summarized the legal position of the interim order passed in a proceedings under Article 226 of the Constitution, after dismissal/withdrawal of the main proceedings. Their Lordships held that no litigant can derive any benefit from mere pendency of a case in a court of law, as the interim order always merges into the final order to be passed in the case and if the case is ultimately dismissed, the interim order stands nullified automatically. It was held that once the basis of a proceeding is gone, all consequential acts, action, orders would fall to the ground automatically. Similar question came up for consideration before the Supreme Court in *Shipping Corporation and India Ltd vs. Machado Brothers and others (2004) 11 SCC 168.* In that case, it was held that interlocutory orders are made in aid of final orders and not vice versa. No interlocutory order will survive after the original proceeding comes to an end.

63. It would be pertinent to recapitulate that the report of two-Judge-committee constituted pursuant to consent order passed by this Court 18.04.2005 in CWP No.61/1999, observed that "*If the plea of the representationists is accepted then till 7 persons from this quota meant for accelerated promotion are appointed, no person from either direct recruits or promotion on normal basis can be appointed as Additional Judge. This will create havoc in the judicial system....*" It was further observed that the rules have to be harmonized and read in such a manner as to do justice to all. Aforementioned report of the Committee was approved by the Full Court and was never challenged by any of the parties on judicial side, despite specific liberty reserved to them by judicial order dated 18.04.2005. In addition to above, it was clearly observed that at the time when the Rules of 2004 came

into force, there were not many eligible officers for appointment by way of LCE and it was resolved to fill five posts available for LCE through promotion from amongst the eligible judicial officers. However, the seniority and appointment of direct recruits already appointed till then, was protected since admittedly they had been appointed in accordance with the Rules in force at earlier point of time. Thereafter, another three-Judge-committee constituted to scrutinize the roster, total strength of District/Additional District Judges in each category, in its report dated 10.09.2009, which was accepted by the Full Court of the High Court on 14.09.2009, observed that no LCE was held till 2009 but the officers belonging to the cadre of Civil Judge (Sr.Div.) did not in any manner suffer because the quota of LCE was given to the promotees on the basis of seniority. It was thereafter that a third Committee was constituted with regard to filling up of vacant/anticipated vacancies during the year 2010-11 and from which source the same were to be filled. The said Committee submitted its report dated 30.03.2010 which was accepted by the Full Court of the High Court. Neither the said reports nor the resolutions of the Full Court were ever challenged by any of the parties.

64. The argument of appointments of direct recruits having been made in excess of the cadre strength, has been repeatedly raised through the H.P. Judicial Service Officers Association, of which the petitioners are also members. In this respect, the Association made representation on 28.07.2007 and 02.09.2007, both of which were rejected by the High Court on 18.01.2008. Thereafter the Association again made representation on 27.07.2009, which was also rejected by the High Court on 07.09.2009. None of the orders of rejecting the representations has been challenged by the petitioners or their Association on judicial side. In fact, Rajeev Bhardwaj, petitioner in CWP No.2292/2018, also submitted several representations, first of which was rejected by the High Court on 18.1.2008. He then submitted another detailed representation dated 27.04.2010 against gradation list as it

stood on 01.01.2010. As per his own admission, the aforesaid representation based on the same ground was rejected by the High Court vide communication dated 09.09.2010. But this rejection was never subjected to challenge by the petitioner till date. Similarly, J.K. Sharma also made several representations dated 09.02.2011, 11.02.2011, 17.09.2011, 03.12.2011, 21.02.2012 and 01.03.2012 on the same grounds, which were duly considered and rejected by the High Court on administrative side. No challenge was ever made to rejection of the representations by anyone of them. Most importantly three-Judge-committee framed a "Draft Post Based Roster" on 05.12.2012 in line with the mandate of the Supreme Court in 2002 judgment of All India Judges Association case, supra, which was later approved by the Full Court of the High Court in its meeting held on 11.12.2012. The said report and resolution have never been challenged by any of them on judicial side. Even though S.C. Kainthla, petitioner in CWP No. 2061/2018, and Rajeev Bhardwaj, petitioner in CWP No. 2292/2018, were appointed long time ago as ADJs respectively on 26.12.2006 and 27.10.2009, in the cadre of District Judge, but, they failed to challenge the seniority lists notified from time to time, from 2005 till date. They cannot be now permitted to question correctness of the gradation list prepared by the High Court without challenging all the aforementioned seniority lists, reports of different Committees and resolutions passed by the Full Court of the High Court. In view of above, the petitioners cannot be permitted to unsettle the settled seniority since 2005 at this distance of time, particularly when they had opportunity to challenge them and also the appointments of the respondents at the earliest available opportunity and claim the reliefs. In fact they filed similar Writ Petition and unconditionally withdrew the same. The Writ Petitions are therefore liable to be dismissed on the ground of conduct of the petitioners as well as by their waiver and acquiescence.

65. It is significant to note here that the Full Court of the High Court vide resolution dated 27.7.2010 while accepting the report of the two Judge Committee dated 23.7.2010 to incorporate the amendments in the Rules of 2004 also proposed for addition of Note No. 3 below the rules relating to seniority that the appointment already made shall not be affected on account of introduction of the new roster in Column No. III of the table annexed with the report. The Full Court again considered this aspect on 7.11.2012 and then a decision was taken to constitute a three Judge Committee which in its report dated 5.12.2012 proposed 34 point roster for direct recruits. The Full Court in its meeting held on 11.12.2014 accepted the draft of the 34 point roster with direction to the Registry to ensure that in future 5th vacancy shall be given to Scheduled Tribe category. It was thereafter that the State Government substituted the existing table under Rule 5 of Rules 2004, vide notification dated 14.6.2016 thereby adding Explanation-II alongwith Note No. 3 by providing that the appointment to the cadre of District Judges/Additional District Judges shall be in accordance with post based 34 points roster to be maintained by the High Court in this behalf. Note 3 below Explanation clearly provides that the appointment already made shall not be affected on account of introduction of new roster. Apparently, the aforesaid amendment has been made taking into consideration the peculiar situation arising after the already made recruitments in the cadre of District Judges/Additional District judges of the State by all the three streams prior to actual introduction of 34 point posts based roster. The High Court, therefore, took a conscious decision that the appointments already made in respect of their seniority shall not be affected on account of introduction of new roster. The State Government accordingly amended the Rules in terms of the above. The aforesaid rule position has continued in the Rules of 2004 since then and has not been challenged by any of the petitioners or by any other officer as per procedure known to law. This was obviously one time deviation aimed at

protecting seniority of those officers recruited directly up to 2009, in excess of quota of direct recruitment as well as those promoted against the quota of LCE when sufficient number of eligible Senior Civil Judges with experience of five years were not available.

66. The contention that the recruitment and consequential appointment of respondents having been made to subsequent to rules of 2004, should be treated to have been made on the basis of the draft rules, cannot be countenanced. Relied judgments of *Gujarat Kishan Mazdoor Panchayat and Delhi Judicial Services Associations cases* (supra) are distinguishable on facts. Moreover, this aspect of the matter has been fully explained by the Supreme Court in later judgment reported in *V. Ramakrishan* (supra) wherein it was held that a rule does not become inoperative till the new rules were given effect to and that no promotion to the post of Chief Engineer could be effected in derogation to the criteria prescribed under the existing Rules. Valid rules made under proviso appended to Article 309 of the Constitution operate so long the old rules are not repealed and replaced. The draft rules, therefore, could not form the basis for grant of promotion, when Rules to the contrary are holding the field. In view of this, the argument that since draft rules of 2004 were already in process of being notified, the appointment of respondent No. 3 Sh. S.C. Kainthla should be deemed to have been made on the basis of draft rules, cannot be countenanced. So far as holding of examination for recruitment is concerned, such decision was taken by the Full Court of the High Court which even otherwise was competent to do so regardless of prescription made in the Rules of 1973.

67. All the four private respondents having been appointed in accordance with the Rules of 2004 and the petitioners having not challenged their appointment at the relevant time, the spacious plea that their appointment should be treated as ad-hoc till vacancies become available in the quota of direct recruitment, is liable to be rejected. The indigenous argument

coined as extension of that plea that their seniority should be pushed down till availability of vacancy in the quota of direct recruitment is therefore liable to be rejected. Respondents cannot be blamed for their appointment as the exercise of the direct recruitment was consciously undertaken by the High Court on administrative side. Undisputedly, respondents No. 3 to 6 applied in response to the vacancies duly advertised by the High Court. They competed along with several other candidates who had applied for such direct recruitments. Their appointment, therefore, cannot be held to have been made *dehors* the rules. Respondents No. 3 to 6 after such appointment have been continuously rendering their services, therefore, their appointment, in any way cannot be treated as ad hoc or stop-gap arrangement on the post which they were holding. This position is reinforced from the proviso to Rule 13 (1) of the Rules of 2004 which provides that "no person appointed to a cadre by direct recruitment shall for the purpose of fixation of his seniority claim any particular place in seniority unconnected with the date of his actual appointment." Therefore, the incumbents appointed by direct recruitment by recourse to procedure envisaged in the relevant rules, cannot be assigned seniority unconnected with the date of their actual appointment as application of the analogy of pushing them down in seniority would in fact actually result in pushing them out of seniority. Such analogy cannot be applied to directly recruited incumbents in the way it can apply to promotees.

68. All the judgments relied upon by the learned Senior Counsel on behalf of the petitioners to argue that the appointment made in excess of quota are liable to be treated ad hoc till availability of the vacancies in such quota arose out of dispute of promotions made in excess of quota and therefore, in those judgments promotees were ordered to be treated ad hoc till availability of vacancies in their quota. Being distinguishable on facts, ratio of all those judgments would not apply to the present matters. In fact, the ratio of the Constitution Bench of the *Supreme Court in Direct Recruit Class II*

Engineering Officers' Association (supra) would squarely apply to the facts of the present case. The supreme Court in sub-para (A) of para 47 of the judgment clearly held that once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. Also it was held in sub para (E) of the said para that where the quota rule has broken down and the appointments are made from one source in excess of the quota, but are made after following the procedure prescribed by the rules for the appointment, the appointees should not be pushed down below the appointees from the other source inducted in the service at a later date. Furthermore, in para (F) it was held that where the rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption should be raised that there was such relaxation when there is a deviation from the quota rule.

69. Undoubtedly, petitioner Rajeev Bhardwaj, was promoted through the mode of LCE on 27.10.2009 and petitioner S.C. Kainthla was promoted to the post on 26.1.2006. As far as respondents No. 3 to 5 are concerned, they were appointed much prior to both of them. The question therefore is whether the petitioners can claim seniority earlier than the date of appointment of respondents No. 3 to 5. Doing so would tantamount to providing them seniority retrospectively earlier than the date of their actual promotion. The Supreme Court in *Ganga Vishan Gujrati and others vs. State of Rajasthan and others (2019) 16 SCC 28* after relying on several previous judgments, including the Constitution Bench judgment in *Direct Recruit Class-II Engineering Officers Association's* case (supra) held that a consistent line of precedent of the Supreme Court follows the principle that retrospective seniority cannot be granted to an employee from a date when the employee was not born in the cadre. Seniority amongst members of the same grade has to be counted from the date of initial entry into the grade. It is trite that any claim of seniority

with reference to the date of accrual of vacancy is unfounded in service jurisprudence.

70. A three Judge Bench of the Supreme Court in *K. Meghachandra Singh's* case, supra overruled the judgment of the two Judge Bench in *N.R. Parmar's case* (supra) by holding that in that case the OM dated 7.2.1986 of the Central Government was not correctly interpreted as the Court did not properly consider the purport of the subsequent clarificatory OM dated 3.3.2008. General principle of law is that a direct recruit cannot get backdated notional seniority earlier than he joined service. *N.R. Parmar's* case, insofar as it confers backdated seniority with reference to initiation of recruitment process, is not sustainable in law. However, the Supreme Court in this case protected the *inter se* seniority which was already fixed by applying the ratio of N.R. Parmar's case and the Central Government OM dated 04.03.2014 thereon. By overruling the judgment of *N.R. Parmar's* case supra, this judgment protected the seniority already assigned. In any case, seniority cannot be claimed as fundamental right but it is merely a civil right. The petitioners therefore cannot be permitted to unsettle the settled seniority of Higher Judicial Service, which is prevailing in the judiciary of the State of H.P., since 2005.

71. The High Court of Andhra Pradesh in *B.S. Jag Jeevan Kumar versus High Court of Judicature at Hyderabad for State of Telangana and State of Andhra Pradesh, Hyderabad, rep. by its Registrar (Vigilance) 2017 SCC OnLine Hyd. 709* was dealing with the similar question with regard to assignment of seniority in the cadre of district Judges. The petitioner in that case claimed seniority in the service rendered on temporary basis. He filed objections to the provisional seniority list contending that the seniority list has been prepared in contravention of the principles laid down in para 29 of the 2002 judgment of the Supreme Court in All India Judges Associations' case. Name of the petitioner was not included in the seniority list for 2010 but his name was

included in the list for the year 2012 because he was appointed on regular basis under the 65% quota reserved for promotion to the post of District Judges on 5.12.2012. Thus, earlier service rendered by the petitioner was not counted for the purpose of seniority. This would have amounted to giving him seniority earlier than he was born in the cadre. The High Court in paras 17 and 20 held as under:

> *"17. At the outset, it should be pointed out that there is a fallacy in the contention of the petitioner. If persons recruited by 3 different methods of recruitment are to be accommodated in the 40-point roster irrespective of the year of recruitment, then a person may gain seniority over and above another person who was appointed 2 years earlier and on which date the former was not even born in the service. It is now well settled that no person can claim seniority with effect from a date on which he was not even born in the service. If the contention of the petitioner is accepted and he is placed at serial No.3 against roster point No.3 in the 1st cycle of the roster, then the petitioner will be gaining seniority over persons appointed in the year 2010, despite the fact that the petitioner was appointed in the year 2012. This is not the purport of the decision of the Supreme Court in All India Judges Association case. This is not also the purport of Rule 13(a).*
>
> *18 & 19. xxxxxx xxxxxxxxx*
>
> *20. Accommodating the petitioner against the first available roster point in the first cycle, irrespective of the year of his appointment, would result in two absurd consequences, namely, (a) giving seniority with effect from a date before the date on which he was born in the service and (b) giving seniority to a person even before the vacancy under that particular stream arose."*

72. The Supreme Court in *Dinesh Kumar Gupta and others versus High Court of Judicature of Rajasthan and others 2020 SCC OnLine SC 420* was dealing with a case of *inter se* dispute of seniority amongst direct recruits, and promotees, i.e., regular and those promoted through LCE. In that case, new

rules after *All India Judges Association's case* judgment came into force in 2010 and thereafter the process of direct recruitment commenced by notification dated 15.4.2010 which was cancelled and after fresh determination of the vacancies was undertaken, a new Notification dated 31.3.2011 for direct recruitments was issued. Argument was made by direct recruits that 47 Judicial Officers promoted to the cadre of District Judges could not be *en block* assigned higher seniority without applying the cyclic order/roster system. Rejecting that argument, the Supreme Court held that it is not the contention of anyone that appointment of the 47 Judicial officers on the relevant date was either beyond the quota meant for regular promotion or that there was any serious infirmity in the process or that any of the candidates was completely ineligible. Since there was a difference of more than 3 years between the promotions of these 47 officers and direct recruitment, the High Court rightly concluded that the Cyclic Order ought not to get attracted. Further argument was made that subsequent recruitment process which commenced by notification dated 26.4.2015 with regard to vacancies of the four years, i.e., 2012-2013-2013-2014, 2014-2015 and 2015-2016 should also be subjected to the Cyclic order with respect to vacancies in respect of each year for the purpose of assigning of the seniority as per roster. The stand of the High Court was that 207 vacancies of all these four years for the purpose of operating the roster system should be taken as the vacancies of the year 2015-2016 and earlier three years for that purpose should be treated as zero recruitment years to make Rule 42 of the relevant Rules workable. Repelling the argument of the petitioners, the Supreme Court while observing that a pragmatic view has to be taken in the matter, upheld the stand of the High Court with the following observations:

> *"41….. It is true that the Cyclic Order and the quota for different streams ensure equitable treatment for three sources. However, the application of the Cyclic Order must depend upon the fact situations. It was precisely for this reason that the expression "as far as*

possible" has been used in the Rule. Other things being equal, certainly the quotas for different streams and the Cyclic Order must be adhered to. However, if such adherence itself is going to cause incongruous situation and inflict incalculable harm, insistence upon applicability of the Cyclic Order in such cases may not be appropriate. The expression "as far as possible" was, therefore, relied upon by this Court in Para 34 of its decision in Veena Verma. It would also be instructive to refer to a decision of this Court in State of M.P. v.Narmada Bachao Andolan and Another26, where the expression "as far as possible" was explained:-

> *""As far as possible"*
>
> *38. The aforesaid phrase provides for flexibility, clothing the authority concerned with powers to meet special situations where the normal process of resolution cannot flow smoothly. The aforesaid phrase can be interpreted as not being prohibitory in nature."*

73. The Supreme Court in *High Court of Judicature at Allahabad through Registrar General versus State of Uttar Pradesh and others (2018) 15 SCC 439* while dealing with the dispute of seniority of the promotes and direct recruits held that quota-rota rule is undoubtedly mandatory requirement but its applicability is to be adjudged in peculiar fact situation of each case. If it becomes impracticable to act upon a rule fixing quota from two sources, it is no use insisting that the authority must give effect to such a rule. It should be given practical interpretation. In that case, no suitability test for promotion as mandated was conducted till 2008. Besides, in absence of determination of vacancies, seniority of promotees also could not be fixed. Thus, application of rota rule would prejudice promotes. Interference by High Court with seniority given to promotees above direct recruits without following rota rule was held to be unsustainable. The relevant observations of the Supreme Court found in para 30 are reproduced as under:

> *"30. With regard to the Quota-Rota rule, there is no doubt that this is a mandatory requirement of the Rules. The said requirement has however to be seen in the peculiar fact situation. The issue of determination of vacancies was embroiled in continuous litigation. The Quota-Rota rule could not be applied in the absence of determination of vacancies. The suitability test though validly laid down could not be held till 2008 for reasons already noted. No promotion could be given in absence of suitability test. The rule provided for seniority of the promotees to be fixed from the date of availability of vacancy but such seniority could also not be given in the present fact situation. If rota rule is applied, it will work serious prejudice to the promotees. Thus, the Rules will have to be given pragmatic interpretation. As laid down by this Court in Direct Recruit Class-II Engineering Officers' Association versus State of Maharashtra, if it becomes impractical to act upon rule fixing quota from two sources, it is no use insisting that the authority must give effect to such a rule. Every effort has to be made to respect a rule but if it is not feasible to enforce it, the rule has to be given a practical interpretation. Thus, interference by the High Court with the seniority given to the promotees above the direct recruits without following the rotation principle cannot be sustained."*

74. In *Anand Kumar Tiwari and others versus High Court of Madhya Pradesh and others 2021 SCC OnLIne SC 578,* one the writ petitions, being WP (C) No. 997 of 2020, was filed by the petitioner who was appointed as District Judge by direct recruitment on 27.5.2008, He submitted representation on 02.08.2010 and thereafter on 31.5.2014 for determination of his seniority as per 40 points roster as per 2002 judgment of the Supreme Court in *All India Judges Association's case (supra).* His representation was rejected by the High Court on 11.09.2019 on the ground that the rules in compliance with the direction of the supreme Court in that judgment, namely the M.P. Higher Judicial Services (Recruitment and conditions of Service) Rules, 2017, were notified on 13.3.2018 and such Rules are prospective in operation. The petitioner was therefore informed that 40 point roster for determination of *inter*

se seniority of the District Judges shall be implemented after 13.3.2018. As for delay in amending the rules in conformity with the judgment of *All India Judges Association's case (supra),* the stand of the High Court before the Supreme Court was that its Administrative Committee had to defer the matter pertaining to amendment/framing of the new Rules in view of the pendency of the Special Leave Petition against the judgment of the Madhya Pradesh High Court wherein proviso to Rule 5 (1) (b) of earlier Rules of 1994 was declared *ultra vires*. The meetings of the Administrative Committee were held on 4.11.2016, 3.12.2016 and 28.2.2017 but no decision could be taken due to pendency of the Special Leave Petition and finally 2017 Rules were framed and notified on 13.03.2018. Even though the Supreme Court did not approve of the reasons of delay given by the High Court in framing of the new rules but at the same time, also rejected the prayer of the petitioner for giving retrospective effect to the rules of 2017. Argument of the petitioner was that the High Court was required to introduce the 40 points roster system for determining *inter se* seniority of the District Judges w.e.f. 31.03.2003 and the delay that occurred cannot be detrimental to the interest of directly recruited District Judges and therefore, the seniority of District Judges has to be re-determined on the basis of roster by retrospective effect being given to 2017 rules. Repelling the aforementioned argument, the Supreme Court in para 9 of the judgment held as under:

> *"9. The delay in the decision taken by the High Court to bring the seniority rule in accord with the directions given by this Court in All India Judges' Association (supra) on the ground of pendency of SLP before this Court is not justified. The subject matter of the decision of the High Court of Madhya Pradesh in Y.D. Shukla's case is the validity of proviso to Rule 5 (1) (b) of the 1994 Rules, according to which recruitment to the post of District Judges shall be made on the basis of vacancies available on the attainment of required percentage. The question of inter-se seniority of*

> *promotees and direct recruits was not directly an issue in the said case. Moreover, the 2017 Rules were made during the pendency of the SLP which was dismissed later on 14.08.2018. However, the Petitioners are not entitled to the relief of the 2017 Rules being given retrospective effect. According to Rule 11 (1) of the 2017 Rules, the relative seniority of members of service working on the date of commencement of the Rules shall not be disturbed. The roster shall be prepared and maintained only after the commencement of operation of the Rules. The Petitioners cannot claim that their seniority has to be reworked on the basis of roster as directed by this Court in All India Judges' Association (supra) case.*

75. It would be therefore, evident from the aforediscussed judgments of the Supreme Court that even though the direction in 2002 judgment in *All India Judges Association's case (supra)* to frame/amend the rules so as to incorporate the roster system for giving seniority was belatedly implemented w.e.f. 13.3.2008, yet the Supreme Court declined to interfere and rejected the prayer of the petitioner for giving retrospective effect to Rule 11 (1) of the said Rules which provided for giving seniority in cyclic order as per the roster system. To use the words of the Supreme Court in *Dinesh Kumar Gupta's case (supra)*, if adherence to cyclic order itself is going to cause incongruous situation and inflict incalculable harm, insistence upon applicability of the cyclic order in such cases may not be appropriate. As would be evident from above referred to judgments, deviation from the schedule for enforcing the amended rules and applying the cyclic order of seniority as per roster point according to direction in the *All India Judges Association's* case has not been interfered with by the Supreme Court in matters coming from different High Courts.

Conclusion:

76. In view of above analysis of rival submissions, we are not persuaded to interfere in the matter. Both the writ petitions are therefore dismissed with no order as to costs.

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

Between:-

PROMILA DEVI W/O SH. VIJAY KUMAR,
RESIDENT OF HOUSE NO.120/08, VILLAGE
AMBEDKARNAGAR, POST OFFICE BHOJPUR,
TEHSIL SUNDERNAGAR, DISTRICT MANDI,
HIMACHAL PRADESH.

……PETITIONER.

(BY SH. SURENDER SHARMA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH
THE SECRETARY (EDUCATION) TO THE
GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA-171002.

2. THE DIRECTOR HIGHER EDUCATION,
HIMACHAL PRADESH, SHIMLA-171001.

3. HIMACHAL PRADESH UNIVERSITY, THROUGH
ITS REGISTRAR, SUMMER HILL, SHIMLA-5,
HIMACHAL PRADESH.

4. UNIVERSITY GRANTS COMMISSION, THROUGH
ITS SECRETARY, BAHADURSHAH ZAFAR MARG,
NEW DELHI-110002.

……RESPONDENTS.

(SH.ASHOK SHARMA, ADVOCATE GENERAL
WITH SH. VINOD THAKUR, SH. SHIV PAL MANHANS
ADDITIONAL ADVOCATE GENERALS, SH. BHUPINDER
THAKUR, SH. YUDHBIR SINGH THAKUR,
DEPUTY ADVOCATE GENERALS AND
SH. RAJAT CHAUHAN, LAW OFFICER,
FOR RESPONDENTS-1 & 2).

(SH. SURENDER VERMA, ADVOCATE,
FOR RESPONDENT-3).

(SH. RAJIV JIWAN, SENIOR ADVOCATE
WITH SH. AJIT SHARMA, ADVOCATE,
FOR RESPONDENT-4).

CIVIL WRIT PETITION
No.2796 of 2021
Reserved on: 15.03.2022
Decided on: 21.03.2022

Constitution of India, 1950 - Article 226 – University established or incorporated by or under the State Act can operate only within territorial jurisdiction allotted to it under the Act or can operate beyond the territory of state or its location - Jurisdiction of High Court ----Held-- The powers under Article 142 is to do complete justice is entirely of different level or of different quality and any professional restriction contained in ordinary laws cannot act as limitation on constitutional power of Hon'ble Supreme Court – Once the Hon'ble Supreme Court is in seisin of a case or matter before it, it has power to issue any order or direction to do the complete justice in the matter and the constitutional power of Hon'ble Supreme Court cannot be limited or restricted by provisions contained in statue law, however, this power has not been conferred not exercisable by High Court in its jurisdiction – The petition found without merits and accordingly dismissed.(Paras 16 & 17)

Cases referred:

Annamalai University Represented by Registrar vs. Secretary to Government, Information and Tourism Department and others (2009) 4 SCC 590;

Business Institute of Management Studies vs. State of Himachal Pradesh and others 2016 ILR (HP) 1410;
Prof. Yashpal and another Vs. State of Chhattisgarh and others, (2005) 5 SCC 420;
Rai University Vs. State of Chattisgarh and others (2005) 7 SCC 330;

This petition coming on for admission after notice this day, ***Hon'ble Mr. Justice Tarlok Singh Chauhan,*** *passed the following:*

O R D E R

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

"(i) That the impugned Annexure-P9, i.e. communication dated 2nd March, 2021, sent by respondent No.2, may kindly be quashed and set aside;

(ii) That the respondent No.2 may kindly be directed to offer appointment to the petitioner as Lecturer (School New) in the subject of English on contract basis on the basis of recommendations made by H.P. Public Service Commission, vide Annexure-P7, forthwith;

(iii) That the respondent No.2 may kindly be directed to grant all consequential benefits to the petitioner as the similarly situated incumbents stood already appointed w.e.f. 06.03.2021."

2. The petitioner after passing her Bachelor of Arts in 2000 pursued her B.Ed Degree which she obtained in the year 2007. Thereafter, she obtained her M.A.Degree in English from Eastern Institute for Integrated Learning in Management (EIILM) University Sikkim through distance education mode. In the year 2018, the petitioner passed Teacher Eligibility Test (TGT Arts).

3. An advertisement was issued by the H.P. Public Service Commission in the year 2019 for filling up various posts Lecturers (School

New) (English) on contract basis. The written objective type examination for these posts was held on 16.02.2020 and after having successfully cleared the same, the petitioner was called for personal test/evaluation on 27.11.2020. However, the candidature of the petitioner was rejected on the ground that Degree of M.A. obtained by the petitioner was not recognized constraining her to file the instant petition for the reliefs as quoted above.

4. Even though respondent No.3. i.e. H.P. University has filed its reply, however, the same has no bearing in this case and, therefore, need not refer to.

5. As regards UGC, it has filed its counter-affidavit wherein it has been stated that the EIILM University, Sikkim, is a State Private University which was recognized by the erstwhile Distance Education Council (DEC), IGNOU, for only one academic year i.e. 2009-2010 to offer three programmes through distance mode, namely (i) B.A. (Hospitality & Tourism), (ii) Bachelors in Computer Applications (BCA) and (iii) Master's in Business Administration (MBA). The copy of recognition letter is dated 09.09.2009. No further recognition has been accorded to above University. The year-wise recognition status of Universities approved to offer education through distance mode along with the approved programmes is already in public domain and can be accessed at UGC website.

6. In addition to the aforesaid, it is specifically averred that a private university is not authorized to open study centre /off campus centre beyond the territorial jurisdiction of the State as per the observations of Hon'ble Supreme Court in the case of Prof. Yashpal and another vs. State of Chhattisgarh and others (2005)5 SCC 420. The Private Universities cannot affiliate any college or institution for conducting courses leading to award of its diploma(s), decrees or other qualifications. Also, the Private University cannot offer their programmes through franchising arrangement with private

institutions for the purpose of conducting courses through distance mode or even for regular mode.

7. It is also averred that Private University cannot open its centre(s) even within the State as per the provision of UGC (Establishment of and Maintenance of Standards in Private Universities) Regulations, 2003 without the approval of UGC. The UGC has issued Public Notice dated 27.06.2013 on territorial jurisdiction of the Universities and other matters related to distance education. The UGC has not granted any approval to the University to open off campus/study centre anywhere. The public notice dated 27.06.2013 was only reiteration of earlier policy of UGC on territorial jurisdiction of Universities. The UGC vide circular D.O. No. F 1-52/99 (CPP-II) dated 09.08.2001 directed all universities as under:-

> "That the Universities can conduct courses through its own departments, its constituent colleges and/or through its affiliated institutions. There is, however, no provision for leaving it to private institutions for conducting courses leading to award of its degrees. As per recent UGC guidelines, the universities are permitted to impart education and award its degrees through their own campuses located elsewhere in the country or even at their own off shore campuses with the approval of the UGC.
>
> Looking into the wide spread menace of franchising the university education through the private institutions, the UGC has decided that any university which propose to enter into collaboration with any private institution, would be required to take prior approval of the UGC. The Commission has also decided that no university should be permitted to go for off campus private educational franchise leading to the award of its degrees. Accordingly, all the universities are being directed to stop franchising their degree education through private agencies/establishments with immediate effect...."
>
> In persuasion to the observations of the Hon'ble Supreme Court of India in case of Prof. Yash Pal vs. The State of Chhattisgarh, UGC issued letter No. F.9-8/2008(CPP-1) dated

16.04.2009 addressed to all the State Governments and letter dated 28.04.2009 addressed to Vice Chancellors of all Private Universities.

Vide letter dated 16.04.2009 addressed to State Governments, it was requested to take immediate action for amending the existing Acts made so as to bring the same in conformity with the observations made by the Hon'ble Supreme Court of India, to stop all the State/State Private Universities in the State from operating beyond the territorial jurisdiction of their State in any manner.

The UGC has also informed the State Governments vide letter No. F.9-8/2008 (CPP-I) dated 16.04.2009 its stand on the issue following the observations of the Hon'ble Supreme Court of India.

> "Keeping in view the above facts, you are requested to please ensure that:
>
> 1. No off-campus/study centre/outreach centre is established by your esteemed university outside the territorial jurisdiction of the state.
>
> 2. If you are a private university, even within the state, the off-campus/study centre outreach/centre should be established with the prior approval of the UGC as mandated in the UGC (Establishment of and Maintenance of Standards in Private Universities) Regulations, 2003.
>
> You are requested to ensure the strict compliance of this letter."

All the Institutions are hereby directed to follow the UGC policy on ODL norms and territorial jurisdiction which are applicable for all academic activities including setting up of examination centres for distance education.

The students and parents are requested to ascertain the territorial jurisdiction of the institutions before seeking

admission in the same and refrain from studying in these institutions which violate the norms of the UGC."

Vide letter dated 28.04.2009 addressed to Vice Chancellors of Private Universities, it was requested to:

> i) ensure that no off campus centre(s) is opened by your University outside the territorial jurisdiction of the State in view of the judgment of Hon'ble Supreme Court of India in case of Prof. Yash Pal vs. Government of Chhattisgarh.
>
> ii) In case your university has already started any off-campus centre outside the State, it must be immediately closed. It may also be ensured that any off-campus centre within the State shall be opened only as per the provisions laid down in the UGC (Establishment of and Maintenance of Standards in Private Universities) Regulations, 2003 and with the prior approval of UGC.

MHRD vide Gazette Notification No.6-1/2013 dated 10.06.2015 (published in Gazette on dated 25.07.2015) has notified that- "all the degrees/diploma/certificate including technical education degrees/diploma awarded through Open and Distance Learning mode of education by the Universities established by an Act of Parliament or State Legislature, Institutions Deemed to be Universities under Section 3 of the UGC Act, 1956 and Institutions of National importance declared under an Act of Parliament stand automatically recognized for the purpose of employment to posts and services under the Central Government, provided they have been approved by the UGC."

Prior to this, the Gazette Notification No. 44 dated 01.03.1995 was effective. As per this the approval of Distance Education Council (DEC), wherever required by AICTE, was necessary for the recognition of qualifications acquired through ODL mode of education. The degrees acquired through distance education mode are recognized for the purpose of employment in central government and also for pursuing

higher education in other educational institutions provided the same has been awarded by the university/institution(s) recognized specifically to offer education through distance mode in conformity with the norms, guidelines and regulations of UGC.

As far as examination centres are concerned, UGC vide public notice F.No.12-9/2016 (DEB-III) dated 19.07.2016, clarified as under:

> "It has come to notice of the UGC that some Institutions/Universities/Institutions Deemed to be Universities are conducting examinations for their Open and Distance Learning (ODL) programmes outside the State of their location or beyond their territorial jurisdiction which is wholly illegal. The policy of the UGC with regard to territorial jurisdiction and campuses/study centres has been clearly articulated in public notice dated 27.06.2013."

UGC had notified UGC (ODL) Regulations, 2017 on 23rd June, 2017. As per Clause (ii) of Sub-Regulation(1) of Regulation 3 of UGC (ODL) Regulations, 2017- the Higher Educational Institution (HEI) shall adhere to the policy of territorial jurisdiction.

UGC had notified UGC (Open and Distance Learning Programmes and Online Programmes) Regulations, 2020 on 4th September, 2020. As per Clause B (i) of Regulation 4 of UGC (Open and Distance Learning Programmes and Online Programmes) Regulations, 2020- The Higher Educational Institution shall adhere to the policy of territorial jurisdiction.

Admissions taken in the approved ODL programme during recognition period stands recognized till the completion of course even if the University does not have recognition for further years provided the programme is offered as per UGC

norms of territorial jurisdiction and in conformity with the extant guidelines and/or UGC Regulations and Regulations of respective Regulatory Bodies.

8. We have heard the learned counsel for the parties and have gone through the records of the case.

9. The moot question is whether the University established or incorporated by or under the State Act can operate only within the territorial jurisdiction allotted to it under the Act or can operate beyond the territory of the State or its location.

10. This issue is no longer *re integra* and has infact been taken into consideration by one of us (Justice Tarlok Singh Chauhan) while adjudicating the same in ***Business Institute of Management Studies*** *vs.* ***State of Himachal Pradesh and others 2016 ILR (HP) 1410*** wherein after noticing the large scale menace of education institutions being commercial shops, it was held as under:-

> "24. Education institution of the petitioner is no less than a commercial shop, where the aspiring needs of the students stand defeated due to the malpractices and frivolous activities of the petitioner. This is a classical example where the petitioner institute has presented an imaginary and illusory picture for making a successful career to the innocent students admitted in their institute, that too, by charging exorbitant fees and thereafter leaving them in the lurch to fend for themselves little knowing that even the courses undertaken by them may probably not even be recognized in the country. This practice is not only to be deprecated, but is also to be handled and dealt with a heavy hand.

25. In **Prof. Yashpal and another Vs. State of Chhattisgarh and others, (2005) 5 SCC 420**, the Hon'ble Supreme Court has expressed its deep anxious and concern about the quality of education. It had also expressed its concern about mushrooming growth of fake education institutions. The relevant portion reads as under:-

> "63. There is hardly any merit in the submission raised. The impugned Act which enables only a proposal of a sponsoring body to be notified as a University is not likely to attract private capital and a University so notified cannot provide education of any kind much less of good quality to a large body of students. What is necessary is actual establishment of institutions having all the infrastructural facilities and qualified teachers to teach there. Only such colleges or institutions which impart quality education allure the best students. Until such institutions are established which provide high level of teaching and other facilities like well equipped libraries and laboratories and a good academic atmosphere, good students would not be attracted. In the current scenario, students are prepared to go to any corner of the country for getting good education. What is necessary is a large number of good colleges and institutions and not Universities without any teaching facility but having the authority to confer degrees. If good institutions are established for providing higher education, they can be conferred the status of a deemed University by the Central Government in accordance with Section 3 of UGC Act or they can be affiliated to the already existing Universities. The impugned Act has neither achieved nor is capable of achieving the object sought to be projected by the learned counsel as it enables a proposal alone being notified as a University."

26. Even otherwise, the issue raised in the present writ petitions is no longer res integra. The Hon'ble Supreme Court in Prof. Yashpal's case supra has clearly held that the State Legislature can only make laws for its own State and not for whole of India. The relevant portion of the judgment is reproduced herein below:-

> "60. Dr. Dhawan has also drawn the attention of the Court to certain other provisions of the Act which have effect outside the State of Chhattisgarh and thereby give the State enactment an extra territorial operation. Section 2(f) of the amended Act defines 'off-campus centre' which means a centre of the University established by it outside the main campus (within or outside the State) operated and maintained as its constituent unit having the university's complement of facilities, faculty and staff. Section 2(g) defines "off-shore campus" and it means a campus of the university established by it outside the country, operated and maintained as its constituent unit, having the university's complement of facilities, faculty and staff. Section 3(7) says that the object of the University shall be to establish main campus in Chhattisgarh and to have the study centres at different places in India and other countries. In view of Article 245 (1) of the Constitution, Parliament alone is competent to make laws for the whole or any part of the territory of India and the legislature of a State may make laws for the whole or any part of the State. The impugned Act which specifically makes a provision enabling a University to have an off-campus centre outside the State is clearly beyond the legislative competence of the Chhattisgarh legislature."

27. That apart, the University Grants Commission (UGC) has framed the UGC (Establishment of and Maintenance of Standards in Private Universities) Regulations, 2003 and the same are

applicable to private universities such as Sikkim Manipal University.

28. Regulation 3.3 of these regulations puts restriction on establishment of an University outside the State by any State. The same reads thus:-

> "3.3. A private university established under a State Act shall operate ordinarily within the boundary of the State concerned. However, after the development of main campus, in exceptional circumstances, the university may be permitted to open off-campus centres, off-shores campuses and study centres after five years of its coming into existence, subject to the following conditions....."

29. It has come in the order impugned herein that the UGC has not granted any permission to Sikkim Manipal University to open its study centre outside the State of Sikkim and therefore, in such eventuality the Sikkim Manipal University could not have extend its arms/activities beyond the State of Sikkim by setting up study centre outside the State. Therefore, what follows is that the Sikkim Manipal University constituted under the State Law passed by the legislature of the State of Sikkim, prima facie, could not have extra territorial authority, i.e. it cannot run, manage or supervise study centres outside the State of Sikkim.

30. Following the decision in Prof. Yashpal case (supra), the Hon'ble Supreme Court in **Rai University Vs. State of Chattisgarh and others (2005) 7 SCC 330** had clarified that "institutions of the erstwhile private Universities, if otherwise eligible, may apply and seek affiliation with any other University which has jurisdiction over the area where the institution is functioning and is empowered under the relevant Rules and Regulations and other provisions of law applicable to the said University to grant affiliation".

31. The issue thereafter came up before the Hon'ble Supreme Court in **Annamalai University Represented by Registrar** versus **Secretary to Government, Information and Tourism Department and others (2009) 4 SCC 590** wherein it was held that the provisions of the UGC Act are binding on all universities

whether conventional or open. They apply equally to Open Universities as also to formal conventional universities. It was further held that in the matters of higher education, it is necessary to maintain minimum standards of instructions and such minimum standards of instructions are required to be defined by the UGC. It is apt to quote relevant observations which read thus:-

> "40. The UGC Act was enacted by the Parliament in exercise of its power under Entry 66 of List I of the Seventh Schedule to the Constitution of India whereas Open University Act was enacted by the Parliament in exercise of its power under Entry 25 of List III thereof. The question of repugnancy of the provisions of the said two Acts, therefore, does not arise. It is true that the statement of objects and reasons of Open University Act shows that the formal system of education had not been able to provide an effective means to equalize educational opportunities. The system is rigid inter alia in respect of attendance in classrooms. Combinations of subjects are also inflexible.
>
> 41. Was the alternative system envisaged under the Open University Act was in substitution of the formal system is the question. In our opinion, in the matter of ensuring the standard of education, it is not. The distinction between a formal system and informal system is in the mode and manner in which education is imparted. UGC Act was enacted for effectuating co- ordination and determination of standards in Universities. The purport and object for which it was enacted must be given full effect.
>
> 42. The provisions of the UGC Act are binding on all Universities whether conventional or open. Its powers are very broad. Regulations framed by it in terms of clauses (e), (f), (g) and (h) of sub-Section (1) of Section 26 are of wide amplitude. They apply equally to Open Universities as also to formal conventional universities. In the matter of higher education, it is necessary to maintain minimum standards of instructions. Such minimum standards of instructions are required to be defined by UGC. The

standards and the co- ordination of work or facilities in universities must be maintained and for that purpose required to be regulated. The powers of UGC under Sections 26(1)(f) and 26(1)(g) are very broad in nature. Subordinate legislation as is well known when validly made becomes part of the Act. We have noticed hereinbefore that the functions of the UGC are all pervasive in respect of the matters specified in clause (d) of sub-section (1) of Section 12A and clauses (a) and (c) of sub- section (2) thereof.

43. Indisputably, as has been contended by the learned counsel for the appellant as also the learned Solicitor General that Open University Act was enacted to achieve a specific object. It opens new vistas for imparting education in a novel manner. Students do not have to attend classes regularly. They have wide options with regard to the choice of subjects but the same, in our opinion, would not mean that despite a Parliamentary Act having been enacted to give effect to the constitutional mandate contained in Entry 66 of List I of the Seventh Schedule to the Constitution of India, activities and functions of the private universities and open universities would be wholly unregulated.

44. It has not been denied or disputed before us that in the matter of laying down qualification of the teachers, running of the University and the matters provided for under the UGC Act are applicable and binding on all concerned. Regulations framed, as noticed hereinbefore, clearly aimed at the Open Universities. When the Regulations are part of the statute, it is difficult to comprehend as to how the same which operate in a different field would be ultra vires the Parliamentary Act. IGNOU has not made any regulation; it has not made any ordinance. It is guided by the Regulations framed by the UGC. The validity of the provisions of the Regulations has not been questioned either by IGNOU or by the appellant - University. From a letter dated 5.5.2004 issued by Mr. H.P. Dikshit, who was not only the Vice-Chancellor but also the Chairman of the DEC of IGNOU it is evident that the appellant - University has violated the mandatory provisions of the Regulations.

45. The amplitude of the provisions of the UGC Act vis-a`-vis the Universities constituted under the State Universities Act which would include within its purview a University made by the Parliament also is now no longer a res integra.

50. The UGC Act, thus, having been enacted by the Parliament in terms of Entry 66 of List I of the Seventh Schedule to the Constitution of India would prevail over the Open University Act.

51. With respect, it is difficult to accept the submissions of learned Solicitor General that two Acts operate in different fields, namely, conventional university and Open University. UGC Act, indisputably, governs Open Universities also. In fact, it has been accepted by IGNOU itself. It has also been accepted by the appellant - University.

55. The submission of Mr. K. Parasaran that as in compliance of the provisions contained in Regulation 7, UGC had been provided with information in regard to instructions through non-formal/distance education relating to the observance thereof by itself, in our opinion, would not satisfy the legal requirement. It is one thing to say that informations have been furnished but only because no action had been taken by UGC in that behalf, the same would not mean that an illegality has been cured. The power of relaxation is a statutory power. It can be exercised in a case of this nature.

56. Grant of relaxation cannot be presumed by necessary implication only because UGC did not perform its duties. Regulation 2 of the 1985 Regulations being imperative in character, non compliance thereof would entail its consequences. The power of relaxation conferred on UGC being in regard the date of implementation or for admission to the first or second degree courses or to give exemption for a specified period in regard to other clauses in the regulation on the merit of each case do not lead to a conclusion that such relaxation can be granted automatically. The fact that exemption is required to be considered on the merit of each case is itself a pointer to

> show that grant of relaxation by necessary implication cannot be inferred. If mandatory provisions of the statute have not been complied with, the law will take its own course. The consequences will ensue.
>
> 57. Relaxation, in our opinion, furthermore cannot be granted in regard to the basic things necessary for conferment of a degree. When a mandatory provision of a statute has not been complied with by an Administrative Authority, it would be void. Such a void order cannot be validated by inaction.
>
> 58. The only point which survives for our consideration is as to whether the purported post facto approval granted to the appellant - University of programmes offered through distance modes is valid. DEC may be an authority under the Act, but its orders ordinarily would only have a prospective effect. It having accepted in its letter dated 5.5.2004 that the appellant - University had no jurisdiction to confer such degrees, in our opinion, could not have validated an invalid act. The degrees become invalidated in terms of the provisions of UGC ACT. When mandatory requirements have been violated in terms of the provisions of one Act, an authority under another Act could not have validated the same and that too with a retrospective effect."

32. At this stage, I may also refer to the Distance Education Council (DEC) guidelines for regulating the Establishment and Operation of Open and Distance Learning (ODL) Institutions in India issued by DEC. The Preamble to these guidelines clearly sets out the mischief that is sought to be remedied by these guidelines. The relevant portion whereof reads as under:-

> "Of late, it has been seen that there is indiscriminate proliferation of Open and Distance Learning (ODL) Institutions in India. Even single-mode conventional universities are becoming dual mode to offer programmes in the distance mode. This has happened due to the fact that the formal system of face-to-face instruction has failed to cope up with the educational requirements of the ever-increasing number of aspiring students after plus two stage. At present more than 20% students of higher

education in the Country are enrolled in the ODL system. What is disturbing to note is that distance mode has become purely commercial venture with little or no attention being paid to the quality of education offered to the learners. Many Universities awarding sub-standard certificate/diploma/degree programmes are not adhering to even the guidelines issued by the concerned regulatory bodies. In order to safeguard the interest of the students in India and to ensure the quality of education, the DEC has framed Guidelines, 2006 for regulating the establishment and operation of Open and Distance Learning (ODL), Institutions in India."

33. It would be evident from the above that the parent institutions shall not establish their study centres/regional centres outside their jurisdiction as specified in the parent institutions Act/MOA. Further in case of "deemed university" offering distance education programmes, the same will be confined to the state in which the main campus of the parent institution is located, except for programmes that are culturally and linguistically relevant even outside their State and for that explicit approval of DEC should be obtained for offering such programmes (guideline 3.3).

34. Guideline 9.2 further states that the Study Centres shall be opened only in affiliated and constituent colleges, and in such other academic institutions which the parent institution may deem fit. The Study Centre should be located only within the jurisdiction of the parent institution after signing MOU. In case of "deemed university", the study centres should be only in the State where its headquarter is located.

35. The blatant compromise with the standards of education by these franchisees/study centres etc. in fact compelled the DEC to issue a public notice dated 27th June, 2013 on courses/study centres/off-campuses and territorial jurisdiction of universities, which reads as follows:-

"Public Notice

On

Courses/Study Centres/Off Campuses & Territorial Jurisdiction of Universities

No.F.27-1/2012(CPP/II) 27th June, 2013

The Commission has come across many advertisements published in National Dailies offering opportunities for the award of university degrees through various franchise programmes conducted by certain private institutions. These private establishments claiming themselves as study centres or learning centres of different universities enroll students for various degree programmes and also claim to be responsible for teaching and conduct of examinations. The faculty and the infrastructure belong to these private agencies. The concerned university except providing syllabus and teaching materials has no mechanism to monitor and maintain the academic standards of teaching being imparted at these centres. This blatant compromise with the standards of education has led to widespread criticism. The Commission has taken a serious view of these misleading advertisements appearing in various newspapers:

It is, therefore, clarified for the information of all concerned, including students and parents that:-

a) a Central or State Government University can conduct courses through its own departments, its constituent colleges and/or through its affiliated Colleges;

b) a university established or incorporated by or under a State act shall operate only within the territorial jurisdiction allotted to it under its Act and in no case beyond the territory of the state of its location;

c) the private universities and deemed universities cannot affiliate any college or institution for conducting courses leading to award of its diplomas, degrees or other qualifications;

d) no University, whether central, state, private or deemed, can offer its programmes through franchising arrangement with private coaching institutions even for the purpose of conducting courses through distance mode.

e) all universities shall award only such degrees as are specified by the UGC and published in the official gazette.

f) the Universities shall conduct their first degree and Master's degree programmes in accordance with the regulations notified by the Commission in this regard.

In this connection, the students and the general public are also hereby informed of the following regulating provisions pertaining to different types of universities;

A. UGC Regulations on Private Universities

A private university established under a State Act shall be a unitary university. A private university may be permitted to open off campus centres, off shore campuses and study centres after five years of its coming into existence subject to the fulfillment of conditions as laid down under UGC (Establishment of & Maintenance of Standards in Private Universities) Regulations, 2003. As of now, the UGC has not granted permission to any Private University to establish off-campus/study centre.

B. UGC Regulations on Deemed Universities

A Deemed University shall operate only within its Headquarters or from those off campuses/off shore campuses which are approved by the Government of India through notification published in the official gazette.

In case of distance education programmes, no institution deemed to be university, so declared by the Govt. of India after 26th May, 2010 (date of publication of UGC (Institutions Deemed to be Universities) Regulations, 2010) is allowed to conduct courses in the distance mode.

The institutions deemed to be universities declared before 26th May, 2010 are not allowed to conduct courses in distance mode from any of its off-campus centres/off-shore campuses approved after 26th May, 2010.

Approval for new courses and extension of approval of the courses already run by the Deemed to be Universities under distance mode would be granted by the UGC subject to the fulfillment of conditions as laid down by the UGC.

The UGC has not granted approval to any deemed to be university to establish study centre.

Any information/clarification with regard to recognition of private Universities/Deemed Universities and the course offered by them may be obtained from JS (CPP-I) UGC, Bahadurshah Zafar Marg, New Delhi.

C. Distance Education programmes of the Central Universities and State Govt. Universities.

The Central/State Govt. Universities can conduct courses through distance mode in accordance with the provisions of their respective Act and after the approval of the UGC.

The information relating to recognized universities, list of specified degrees and all the relevant regulations/instructions/guidelines of the UGC are available on UGC website:www.ugc.ac.in.

The students are advised not to take admission in the unapproved Study Centres, Off-Campus Centres, Franchisee Institutions, Colleges/Institutions claiming to be affiliated with Private Universities or Deemed Universities.

Sd/-
(Akhilesh Gupta)
Secretary"

36. Not only this when the universities/deemed universities began issuing misleading advertisements by stating that their programmes were recognized by the UGC, then the UGC itself had to intervene and issued a public notice cautioning the students, parents and public in general regarding these misleading advertisements by issuing a public notice dated 04.06.2015 which reads thus:-

"**UNIVERSITY GRANTS COMMISSION**

BAHADUR SHAH ZAFAR MARG

NEW DELHI-110 002

****

PUBLIC NOTICE- DISTANCE EDUCATION PROGRAMME

F.No.11-5/2015 (DEB-III) Dated 04.06.2015.

It has come to the notice of the UGC that some Universities/ Deemed to be Universities/Institutions are offering programs through Open & Distance Learning

(ODL) mode in gross violation of the policy of the erstwhile DEC/UGC. These Universities/ Deemed to be Universities/Institutions are issuing misleading advertisements by stating that their programmes are recognized by the UGC.

As per the present policy, State Universities (both Public & Private) cannot set up their off-campus/study centre outside the State where they have been established. And, even within the State, Private Universities are required to take prior permission of the UGC to establish their study centre/off- campus. Similarly, Deemed to be Universities are required to take prior permission of the UGC to establish any off-campus centre/study centre outside their main campus. It is pertinent to mention that No University/Institution Deemed to be University/Institution is permitted to offer Diploma/Bachelor/Master level programmes under ODL mode in Engineering & Technology. The policy of the UGC with regard to territorial jurisdiction and off-campuses/study centres has been clearly articulated in its Public Notice dated 27.06.2013, which is posted on the UGC website for the knowledge of the public. It may also be noted that the UGC has so far not accorded recognition to any university/institution to offer 'online' programmes.

Students, parents and public in general, are hereby, informed that the list of the recognized institutions (alongwith the courses), which are permitted to offer programmes through ODL mode is posted on the UGC's website and can be accessed from www.ugc.ac.in/deb. The qualifications acquired through ODL mode from a non-recognized institution of higher learning shall neither be recognized for the purpose of employment in government service nor for pursuing higher education.

Sd/-
Secretary, UGC"

37. At this stage, I may also take note of a very important development. The Sikkim Manipal University had approached the High Court of Sikkim by filing writ petition No.4 of 2013 challenging therein amongst other things the decision taken by Indira Gandhi National Open University in its 40th meeting dated 08.06.2012 wherein it was decided that State University could not have study centres outside the geographical limits of the State even if the State legislation permitted it to do so. Four questions were framed by the learned Court for consideration which read thus:

> "(a) Does the UGC have supervening position upon the IGNOU, DEC and the Universities, both Private and Government funded, created under the State Acts?
>
> (b) Can it be said that Regulations 2003 was never applied after it was framed and that UGC Regulation, 1985 continued to be in force?
>
> (c) Would the letters issued to the Petitioner-University by the IGNOU and DEC in contravention to letter dated 29-12-2012, Annexure P29, of the Ministry of Human Resource Development, Respondent No.2, amount to abandonment of Regulations 2003?
>
> (d) Can it, therefore, be said that it was permissible for the Universities of all categories to run DEP outside the territorial limits of the State?"

38. After detailed discussion, question No.(a) was answered in the affirmative. Thereafter questions No.(b) to (d) being inter-related were taken up together for consideration and thereafter even questions No.(b) to (d) were answered in favour of the respondents and all the prayers made in the writ petition, save and except prayer No.(a), were rejected by the Court vide its decision dated 26.06.2015. However, the University was granted liberty to approach the concerned UGC and IGNOU for recognition of its programme through ODL mode.

39. Now, insofar as prayer No.(a) is concerned, the same reads thus:-

> "(a) issue an appropriate writ, order or direction directing Respondent No.1 to expeditiously dispose of the Petitioner's application for continuation of recognition dated 10-07-2012;"

Thus, it would be clear that insofar as the substantive relief of the University is concerned, the same was disallowed.

40. For completion of record, it may be mentioned that UGC did assail the aforesaid judgment before the Hon'ble Supreme Court in SLP(C) No.26223/2015 which was, however, dismissed on the ground that since the questions of law raised by the University were decided in favour of the UGC and it was only in the peculiar facts of the case as it had been noted by the High Court that relief had been granted to the students, who had undergone the distant learning courses, the Court declined to interfere. This would be evident from the order passed by the Hon'ble Supreme Court on 21.09.2015 which is reproduced herein under:-

> "Applications for exemption from filing certified copy of the impugned judgment and application for permission to place additional documents on record are allowed.
>
> Insofar as the questions of law raised by the petitioner-University Grants Commission before the High Court were concerned, they have been decided in favour of the petitioner. However, in the peculiar facts of the case as noted by the High Court, relief is granted to the students who had undergone the distant learning courses. We are not inclined to interfere with those directions passed by the High Court on those facts.
>
> The special leave petitions are, therefore, accordingly, dismissed.
>
> Obviously, such an order would not be cited as a precedent in any other case."

41. The petitioner is the so called franchisee of the Sikkim Manipal University based at Sikkim and claims to be running

its study centre at Shimla. It is evident from the decisions of the Hon'ble Supreme Court in Prof. Yashpal's case, Rai University's case and Annamalai's case (supra) as also the guidelines framed by the DEC, the regulations framed by the UGC in 2003 which have also been taken note of in the judgment rendered in Prof. Yashpal's case that a private university established under the State Act can operate ordinarily within the boundaries of the State and it is only after the development of main campus that in exceptional circumstances the university may be permitted to open off-campus centres, off-shores campuses and study centres after five years of its coming into existence that too subject to various conditions.

42. This position has further been clarified in the public notice issued by the DEC on 27.06.2013 (supra) wherein it has again been clarified that a university established or incorporated by or under a State Act shall operate only within the territorial jurisdiction allotted to it under its Act and in no case can it operate beyond the territory of the State or its location. It has also been clarified that the private universities and deemed universities cannot affiliate any college or institution for conducting courses leading to award of its diploma, degrees or other qualifications and lastly it has been categorically made clear that no university, whether Central, State, Private or Deemed, can offer its programmes through franchising arrangement with private coaching institutions even for the purpose of conducting courses through distance mode.

43. This issue stands further clarified in the public notice issued by the UGC on 04.06.2015 wherein it has been categorically brought to the notice of the public that in terms of the prevalent policy, State Universities (both Public and Private) cannot set up their off-campus/study centres outside the State where they have been established."

11. Confronted with the judgment, learned counsel for the petitioner would argue that the degree obtained by the petitioner was valid in terms of the Indira Gandhi National Open University letter dated

09.09.2009 (Annexure AF/1). However, we find no merit in this contention because the UGC only accorded recognition to the EIILM University for a period of one academic year i.e. academic year 2009-10 that too for the following programmes through distance education mode:-

S.No.	Name of the Programme	Duration	Eligibility
1.	B.A. (Hospitality & Tourism)	3 years	10+2 from a recognized Board
2.	BCA	3 years	10+2 or equivalent /3 year Diploma from State Board of Technical Education and Six month Computer Course from reputed Institution OR 3 year Diploma IT/CS from a State Board of Technical Education.
3.	MBA	3 years	BBA/BBM from a recognized University OR 3-year Graduation with 6 months Management Diploma from an Institution and min. 1 year managerial/ supervising experience

			in reputed Organization thereafter OR 3 year graduation and 3 year Managerial/ supervising experience in a reputed Organization thereafter.

12. It would be noticed that the degree as obtained by the petitioner does not figure in the Course/Programme mentioned in the aforesaid letter. That apart, the recognition given by the UGC is only for one academic year i.e. 2009-2010, whereas, the petitioner has obtained her M.A. (English) during the academic years 2010-2012. In such circumstances, obviously, the petitioner cannot take any advantage of the recognition.

13. As a last ditch effort, the learned counsel for the petitioner would place reliance upon the order passed by the Hon'ble Supreme Court on 21.09.2015 in Special Leave to Appeal (C) No. 26223/2015 in case titled University Grants Commission versus Sikkim Manipal University and others, wherein it was held as under:-

> "UPON hearing the counsel the Court made the following
>
> O R D E R
>
> Applications for exemption from filing certified copy of the impugned judgment and application for permission to place additional documents on record are allowed.
>
> Insofar as the questions of law raised by the petitioner-University Grants Commission before the High Court were concerned, they have been decided in favour of the petitioner. However, in the peculiar facts of the case as noted by the High Court, relief is granted to the students who had undergone

> the distant learning courses. We are not inclined to interfere with those directions passed by the High Court on those facts.
> The special leave petitions are accordingly, dismissed.
> Obviously, such an order would not be cited as a precedent in any other case."

14. It is clearly evident from the aforesaid order that the same has been passed by the Hon'ble Supreme Court in exercise of its powers under Article 142 of the Constitution for doing complete justice to the parties. Such powers have not been conferred upon the High Court and the jurisdiction of the High Court while dealing with a writ petition is circumscribed by the limitations discussed and declared by the judicial decisions and it cannot transgress the limits on the basis of whims or subjective sense of justice varying from Judge to Judge.

15. No doubt, the High Court is entitled to exercise its judicial discretion while deciding the writ petitions, but this discretion has to be confined in declining to entertain the petitions and refusing to grant reliefs, asked for by the petitioners on adequate considerations and it does not permit the High Court to grant relief on such a consideration alone.

16. The powers under Article 142(1) to do complete justice is entirely of different level or of a different quality. Any prohibition or restriction contained in ordinary laws cannot act as a limitation on the constitutional power of the Hon'ble Supreme Court. Once the Hon'ble Supreme Court is in seisin of a case, cause or matter before it, it has power to issue any order or direction to do complete justice in the matter. This constitutional power of the Hon'ble Supreme Court cannot be limited or restricted by provisions contained in statutory law. However, as discussed above, this power has not been conferred nor exercisable by the High Court in its writ jurisdiction.

17. In view of the aforesaid discussion, we find no merit in this petition and the same is accordingly dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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

Between:-

1. STATE OF HIMACHAL PRADESH THROUGH
PRINCIPAL SECRETARY (RURAL DEVELOPMENT)
TO THE GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA-171001.

2. THE DIRECTOR (RURAL DEVELOPMENT),
HIMACHAL PRADESH, KASUMPTI,
SHIMLA-171009.

3. THE PRINCIPAL SECRETARY (FINANCE),
TO THE GOVT. OF HIMACHAL PRADESH,
SHIMLA-171002.

.....PETITIONERS

(BY SH. ASHOK SHARMA, ADVOCATE GENERAL WITH SMT. RITTA GOSWAMI, ADDITIONAL
ADVOCATE GENERAL)

AND

1. SH. SURI DASS NEGI S/O SH. GULAB PUR,
HAS, MANAGING DIRECTOR
JOGINDRA CENTRAL CO-OPERATIVE
BANK LTD. HEAD OFFICE, SOLAN,
DISTT. SOLAN, H.P.

2. SH. AJIT KUMAR BHARDWAJ,
S/O SH. ISHWAR DAS BHARDWAJ,
HAS, SUB-DIVISIONAL OFFICER (CIVIL),

PALAMPUR, DISTT. KANGRA, H.P.

.....RESPONDENTS

(BY SH. I.D. BALI, SENIOR ADVOCATE WITH
SH. VIRENDER BALI, ADVOCATE)

CIVIL WRIT PETITION
No. 810 of 2017
Decided on: 22.03.2022

Constitution of India, 1950 – Article 226 – Service law - Payment of arrears - Petitioners appointed as officers approached this Court in respect of all of them, the respondent state took a conscious decision to pay them entire arrears - The office order dated 14.01.1999 which was common to all 14 officers was quashed and set aside by the judgment passed in case of Balbir Singh Thakur - Reliance placed by the respondent state on the judgment in Kulbir Singh Rana case is misconceived because in that case the officers who were petitioners in that case, were initially appointed on the pay scale of Rs. 7000/- – 10980/- but on the basis of the judgment passed in Balbir Singh Thakur's case supra, their pay scale was ordered to be revised and raised to the pay scale of rupees 7880/- – 11660/- from date of their appointments as BDO's with all notional benefits but restricted the arrears to 3 years prior to the date of Institution of the writ petition i.e. 4.5.2012 - Infirmity was not found in the order passed by Tribunal as judgment passed in Kulbir Singh Rana's case relied upon by the petitioners state is distinguishable – Petition disposed off accordingly. (Paras 6, 9 & 10)

This petition coming on for admission this day, ***Hon'ble Mr. Justice Mohammad Rafiq****, passed the following:*

O R D E R

This writ petition has been filed by the State challenging the order dated 22.9.2016 passed by the erstwhile H.P. State Administrative Tribunal.

2. The facts of the case are that the respondents Suri Dass Negi and Ajit Kumar Bhardwaj alongwith twelve others were recommended/selected for the appointment of Block Development Officers through Himachal Pradesh

Administrative Services by the Himachal Pradesh Public Service Commission on 01.09.1997. The pay scale of all fourteen Block Development Officers was fixed on the revised pay scale of Rs. 7800-11660/- from the date of their joining vide order dated 06.05.1998 passed by Director-cum-Addl. Secretary (Rural Development) to the Government of Himachal Pradesh. However, the said authority vide its subsequent order dated 14.1.1999, while superseding the earlier order dated 06.05.1998, reduced and re-fixed the salary of the entire batch of fourteen Development Block Officers in the pay scale of Rs. 7000-10980 from the date of their joining. This order was challenged by twelve officers, out of fourteen, by filing CWP(T) No. 6007 of 2008, titled *Balbir Singh and others versus State of Himachal Pradesh and another*. Respondents herein did not join their batch mates in the aforesaid petition as co-petitioners. Learned Single Judge vide judgment dated 6.8.2010, while setting aside the order dated 14.01.1999, directed the respondents to consider the case of the petitioners strictly as per the principles laid down in the judgments rendered in *Sanjeev Kumar Mahajan and others* versus *State of Himachal Pradesh and another*, passed in CWP(T) No. 4063 of 2008, decided on 8.9.2009 and *Suresh Rana and others versus State of Himachal Pradesh and others*, passed in CWP(T) No. 14084 of 2008, decided on 20.4.2010.

3. It is not in dispute that the respondents while considering the case of twelve Block Development Officers, who had filed the aforementioned writ petition in Balbir Singh Thakur's case supra, granted them the entire arrears. Respondents herein then approached this Court by filing CWP No. 3831 of 2012, which was disposed of by order dated 31.12.2014 on the basis of the judgments in *Balbir Singh Thakur and others versus State of Himachal Pradesh and another,* passed in CWP(T) No. 6007 of 2008, decided on 6.8.2010 as well as in *Prem Raj versus State of H.P. & others and other connected matters* passed in CWP No. 1807 of 2010, decided on 5.5.2010, requiring the petitioners to approach the respondents by means of suitable

representation(s) and calling upon the respondents to decide the same after affording the opportunity of hearing to the petitioners by passing a reasoned order. The respondents-State this time, however, while deciding the representation of the petitioners directed Rural Development Department of the Government of Himachal Pradesh who vide its order dated 25.2.2015 (which is wrongly mentioned as 25.2.2014 in the order) opined that since entire arrears have been paid to the other BDOs of the same batch on the basis of the advise of the Financial Secretary to the Government of Himachal Pradesh. Respondents herein also sought the similar benefits and, therefore, recommended that their matter may be referred to the Finance Department for re-consideration.

4. The respondents herein thereafter approached the State Administrative Tribunal by means of Original Application No. 4178 of 2016, which vide its order dated 22.9.2016 passed the following order:

> "The applicants had been appointed as Block Development Officers alongwith others on the basis of H.A.S. etc. Combined Competitive Examination, 1995, held in July/August, 1996. They were granted higher pay scale in sequel to the directions of Hon'ble High Court of Himachal Pradesh in ***CWP (T) No. 6007 of 2008, Balbir Singh Thakur and others versus State of Himachal Pradesh and another, decided on 06.08.2010, Annexure A-5.*** The applicants were similarly situate and have been granted the pay scale and however, arrears in their cases have been restricted to three years on the basis of a decision in ***Jai Dev Gupta's*** case. The applicants were entitled for payment of arrears from the due dates, at par, with other similarly situate BDOs and restriction of payment to three years, would not be applicable in such cases."

5. Despite the above order passed by the Tribunal the respondent-State, on the representation dated 01.11.2016 of the petitioners, vide order

dated 9.1.2017 again reiterated that as per the opinion of the Finance Department, the arrears have been restricted only for three years in view of the judgment of this Court in *Kulbir Singh Rana & others vs. State of H.P. & another,* passed in CWP No. 3660 of 2012, decided on 20.9.2012. Now the respondent-State has approached this Court by filing the present writ petition challenging the aforesaid order of the Tribunal.

6. Having heard learned Additional Advocate General and learned Senior Counsel for the respondents, we find that the argument of the State that in view of the decision of the Supreme Court in *Jai Dev Gupta versus State of H.P.,* reported in *AIR 1998 SC 2819*, the arrears payable to the petitioners should have been restricted to three years, has been specifically considered by the Tribunal and not accepted by holding that the applicants were entitled for payment of arrears from the due dates, at par, with other similarly situate BDOs and restrictions of payment to three years, would not be applicable to their cases. The respondents also are not in a position to dispute that by virtue of order passed by this Court in Balbir Singh Thakur's case supra. The petitioners, who were appointed as officers, who approached this court in respect of all of them, the respondent-State took a conscious decision to pay them entire arrears. The office order dated 14.1.1999 which was common to all fourteen officers was quashed and set aside by the judgment passed in the case of Balbir Singh Thakur. Yet, the respondent-State forced the petitioners to approach the Tribunal even though the order was applicable to all fourteen officers. And when the Tribunal allowed their petition, the petitioners have approached this Court by filing the writ petition No. CWP(T) No. 6007 of 2008, after having already restricted their arrears to three years.

6. Reliance placed by the respondent-State on the judgment in *Kulbir Singh Rana's* case is mis-conceived because in that case the officers, who were petitioners in that case, were initially appointed on the pay scale of

Rs. 7000-10980 but on the basis of the judgment passed in *Balbir Singh Thakur's* case supra, their pay scale was ordered to be revised and raised to the pay scale of Rs. 7880-11660 from the date of their appointments as BDOs with all notional benefits but restricted the arrears to three years prior to the date of institution of the writ petition i.e. 4.5.2012.

8. Herein the case of the respondents is that the fourteen officers, who were all recommended and selected together by the Public Service Commission and appointed as Block Development Officers and their pay was also fixed in the revised pay scale of Rs. 7880-11660 by common order dated 6.5.1998 and subsequently the pay of all those fourteen officers was reduced to the pay scale of Rs. 7000-10980 by a common order dated 14.1.1999 and it was this order which was quashed and set aside by this Court in the writ petition filed by Balbir Singh Thakur and eleven others. Therefore, there is no reasons for the petitioners-State to give dissimilar treatment to the respondents herein, because all fourteen of them constitute a homogeneous class different than the petitioners in *Kulbir Singh Rana's* case for the reasons aforementioned. Action of the respondents in not paying entire arrears to the petitioners would therefore tantamount to hostile discrimination inviting frown of Articles 14 and 16 of the Constitution of India.

9. In view of above discussion, we do not find any infirmity in the order passed by the Tribunal as the judgment passed in *Kulbir Singh Rana's* case relied upon by the petitioners-State is distinguishable.

10. This writ petition is accordingly disposed of. The compliance of the judgment of the Tribunal may now be made within two months from today. Pending miscellaneous application(s), if any, shall also stand disposed of.

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

Between:-

SUDHA DEVI
S/O SHRI RAMESH LAL,
R/O SET NO. 7, GOEL APARTMENT,
BLOCK-A, KASUMPTI, SHIMLA-9,
DISTRICT SHIMLA, H.P.
PRESENTLY WORKING AS DAILY WAGED
CLASS IV EMPLOYEE IN THE OFFICE
OF DISTRICT STATISTICAL OFFICER,
SHIMLA-9.

……PETITIONER

(BY SMT. RANJANA PARMAR, SENIOR ADVOCATE
WITH MR. KARAN SINGH PARMAR, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH THROUGH
SECRETARY (ECONOMICS & STATISTICS)
DEPARTMENT TO THE GOVERNMENT OF
HIMACHAL PRADESH, SHIMLA-2.

2. ECONOMIC ADVISOR TO THE
GOVERNMENT OF HIMACHAL PRADESH,
SHMLA-9.

…..RESPONDENTS

(BY SH. ASHOK SHARMA, ADVOCATE GENERAL
WITH SHRI ADARSH SHARMA, ADDITIONAL
ADVOCATE GENERAL)

CIVIL WRIT PETITION
No. 1050 of 2017
RESERVED ON:10.03.2022
DELIVERED ON:23.03.2022

Constitution of India, 1950 - Article 226 - Service matter - Regulation - Petitioner filed writ Petition number 6713 of 2014 whereby she claimed regularization as class IV/III employee – In writ petition direction was given to decide it as representation within time schedule - The representation was rejected and feeling aggrieved by the order petitioner filed another writ petition challenging the order, which was transferred to the learned Tribunal, which was dismissed – Held -- There is no clarity with regard to exact nature of work actually performed by the petitioner in addition to her normal duties and the duration thereof during this period, however it is certain that she performed much more work than her normal duty hours from the year 2007 to 06-06-2012 therefore, the balance of scales and in the interest of equity, justice and good conscious, lump sum payment of rupees two lacs is granted in favour of petitioner for additional work performed during the period in question within two months from today failing shall carry interest @ 7% per annum --- Petition disposed of.[Paras 2(ii) 4(iv)]

Cases referred:

State of Punjab and Others versus Jagjit Singh and Others (2017) 1 SCC 148;
Union of India and Others vs. Ilmo Devi and another AIR 2021 SC 4855;

This petition coming on for pronouncement of judgment this day,

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

O R D E R

Petitioner claims that despite having been appointed as a part time employee, she continued to discharge the duties of a whole time worker for many years. She accordingly filed a petition praying for regularization of her services either as Class-III or Class-IV employee and equivalent wages for the duties discharged by her for the period on the analogy of equal pay for equal work. Learned erstwhile Himachal Pradesh Administrative Tribunal ('Tribunal' for short) did not find favour in her claim. Her petition was dismissed. Hence, she has moved instant petition under Article 226 of the Constitution of India.

During hearing of the case, learned Senior Counsel for the petitioner submitted that petitioner's services have been regularized by the respondents during pendency of the instant petition and that the petitioner is

satisfied with her regularization order. Learned Senior Counsel confined her submissions only for grant of wages to the petitioner commensurate to the work taken from her. We have accordingly heard the matter only regarding this issue.

2. Facts

2(i) Petitioner was appointed as part time Class-IV worker/Sweeper in the office of respondent No. 2 on 20.5.2002. On completion of ten years of part time service, she was appointed as a daily waged Class-IV employee on 6.6.2012. As noted earlier, her services now stand regularized.

2(ii) Some facts leading to filing of instant petition may be noticed. Petitioner filed civil writ petition bearing CWP No. 6713 of 2014 in this Court impugning therein the order dated 6.6.2012, whereby she was conferred daily waged status of Class-IV worker. She claimed that she was entitled for regularization as Class-IV/Class-III employee. The writ petition was disposed off on 19.9.2014 with a direction to the competent authority to decide petitioner's representation within a time bound schedule. The competent authority rejected petitioner's representation on 12.12.2014. Petitioner filed another writ petition challenging the order dated 12.12.2014. She also claimed therein relief of her regularization as Class-III/Class-IV employee alongwith consequential benefits. This writ petition was transferred to the learned Tribunal. The petition was dismissed as TA No. 1417/2015 by the learned Tribunal vide order dated 7.12.2015. Taking note of the fact that Smt. Sudha Devi (regular peon) had availed only 214 days' earned leave from 2007 to 2014, learned Tribunal held that the petitioner could not prove her claim of having worked whole time ever since the year 2007. Review petition No. 13/2015 filed by the petitioner was also dismissed by the Tribunal on 17.4.2017. These orders passed by the Tribunal dismissing her main petition as well as review petition have also been assailed in the instant petition.

Petitioner has also questioned the order dated 12.12.2014 passed by the competent authority rejecting her representation.

3. Contentions

3(i) Learned Senior Counsel for the petitioner submitted that the petitioner has been performing the job of a whole time worker w.e.f. the year 2007. Petitioner continued to discharge such duties till 06.06.2012 when she was actually appointed as a daily wager on completion of ten years of part time service. Petitioner, therefore, is entitled to the wages of whole time employee w.e.f. the year 2007 to 06.06.2012.

We have been taken through various documents in support of this factual plea. The documents relied by learned Senior Counsel in support of this plea are as under:-

(a) Office letter dated 07.04.2007 written by the District Statistical Officer, Shimla to respondent No. 2 stating that two Class-IV employees were there in the office, out of which, one employee, namely, Rajpal Chauhan had been deployed in the Secretariat for past about a year and the other employee, namely, Smt. Sudha (not the petitioner) was on medical leave w.e.f. 12.03.2007 on account of disc problem. The letter acknowledges that for the above reason there was no class-IV employee in the office, resultantly entire work was being taken from the petitioner- a part time Class-IV employee. The request was made in the letter to grant daily wages to the petitioner.

(b) Office letter dated 11.5.2007 addressed to respondent No. 2 by the District Statistical Officer, Shimla requesting for taking action on the previous letter dated 07.04.2007.

(c) Office letter dated 18.5.2007 from the District Statistical Officer, Shimla to respondent No. 2 stating that because of non-availability/illness of the two class-IV employees posted in the office, the entire work including

opening and closing of office as well as distribution of dak etc. was being taken from the petitioner. The District Statistical, Officer in the circumstances requested for providing services of a Peon.

(d) Office letter dated 26.9.2014 addressed by the District Statistical Officer, Shimla to respondent No. 2. The letter mentions acute shortage of Peons in the office for years together as a result whereof for the last 7-8 years additional work was being taken from the part time employee i.e. petitioner. The letter requested for deployment of a Peon in the said office. The letter also states that right from the year 2007 onwards repeated communications in this regard viz 07.04.2007, 18.05.2007 etc. have already been addressed by the office to respondent No. 2.

3(ii) The respondents have opposed the factual plea taken by the petitioner. The arguments advanced by the respondents are that the petitioner had claimed the reliefs sought by her at the instance of Senior Assistants and the District Statistical Officer, now re-designated as Research Officer. That Senior Assistants being holder of Class-III posts have no authority to write letters in favour of the petitioner to the higher authority. That there is no documentary record which proves full day's working of the petitioner. That the petitioner has advanced false plea of doing the duties of Peon/whole timer worker w.e.f. the year 2007 as the officer posted in District Statistical Office, Shimla had never issued any order or instructions to extract full day work from her. The petitioner was appointed as part time Sweeper for four hours only and this is the work which she continued to discharge till she was appointed on daily wage basis vide office order dated 6.6.2012. It has further been submitted that the District Statistical Officer, now re-designated as Research Officer, had misrepresented the matter at the behest of petitioner for extending her undue benefit. There was only one post of Peon in the District Statistical Office, Shimla against which Smt. Sudha (regular peon) was posted. The other Class-IV employee posted in the said office was Shri Rajpal

Chauhan, but he was posted against the post of Chowkidar for doing night duties. The petitioner had no concern with night duty of Chowkidar performed by said Shri Rajpal Chauhan. The petitioner had no concern with the duties performed by Smt. Sudha Devi (regular peon), who discharged her duties to the full satisfaction of her superior. The allegations levelled by the petitioner that Smt. Sudha Devi (regular Peon) was not in a position to attend office after March 2007 due to her ailment are incorrect. The leave account maintained in service book of said Smt. Sudha Devi in the office shows no leave entries for long period of leave on medical ground. The fact disproves petitioner's plea for having performed the job of Peon w.e.f. 2007 till 06.06.2012. It was argued that learned Tribunal had rightly dismissed the petition.

4. Observations

4(i) The petitioner has contended that though she was appointed on part time basis as Class-IV employee on 20.5.2002 in the District Statistical Office, Shimla but she was made to do full day work w.e.f. the year 2007 till 06.06.2012 when she was actually appointed on daily wage basis. Therefore, she is entitled to the wages for the work performed by her for the period 2007 to 2012. The contention has been refuted by the respondents.

4(ii) The petitioner might have been appointed as part time class-IV employee/Sweeper in the year 2002 but there is documentary evidence available on record to show that she was actually made to work much more than what was required for the post of part time Sweeper held by her. A part time worker is engaged for about 4 to 5 hours of work daily. The District Statistical Officer, Shimla was the immediate superior officer of the petitioner. Various letters/correspondences exchanged by the District Statistical Officer with his higher ups from the year 2007 onwards as available on record are a clear indicator of the fact that additional office work had been taken from the petitioner for many years. The District Statistical Officer, Shimla had

expressed his helplessness in these office communications (noticed earlier) in taking extra work from the petitioner on the ground that the office had only two class-IV workers; one Smt. Sudha Devi (regular peon), who because of her ailment had not been able to perform duties up to the mark and had also remained on medical leave off and on; the other class-IV employee Shri Rajpal Chauhan was statedly deployed in the H.P. Secretariat. Faced with shortage of class-IV employees, the District Statistical Officer, Shimla has admitted taking additonal work from the petitioner w.e.f. March 2007 to 06.06.2012. This fact has been acknowledged by the District Statistical Officer, Shimla even in the office letter dated 26.9.2014 addressed to respondent No. 2.

4(iii)(a) Hon'ble Apex Court in ***(2017) 1 SCC 148,*** titled ***State of Punjab and Others*** versus ***Jagjit Singh and Others*** summarized following conclusions with reference to claim of pay parity raised by temporary/work charged/daily waged/ casual/ adhoc/contractual employees:-

> "44. We shall first outline the conclusions drawn in cases where a claim for pay parity, raised at the hands of the temporary employees concerned was accepted by this Court, by applying the principle of 'equal pay for equal work', with reference to regular employees:-
>
> 44.1. In the Dhirendra Chamoli case [(1986) 1 SCC 637] this Court examined a claim for pay parity raised by temporary employees, for wages equal to those being disbursed to regular employees. The prayer was accepted. The action of not paying the same wage, despite the work being the same, was considered as violative of Article 14 of the Constitution. It was held, that the action amounted to exploitation–in a welfare state committed to a socialist pattern of society.
>
> 44.2. In the Surinder Singh case [(1986) 1 SCC 639] this Court held that the right of equal wages claimed by temporary employees emerged, inter alia, from Article 39 of the Constitution. The principle of 'equal pay for equal work' was again applied, where the subject employee had been appointed on temporary basis, and the reference employee was borne on the permanent establishment. The temporary

employee was held entitled to wages drawn by an employee on the regular establishment. In this judgment, this Court also took note of the fact, that the above proposition was affirmed by a Constitution Bench of this Court, in the D.S. Nakara case [(1983) 1 SCC 305].

44.3. In the Bhagwan Dass case [(1987) 4 SCC 634] this Court recorded that in a claim for equal wages, the duration for which an employee would remain (- or had remained) engaged, would not make any difference. So also, the manner of selection and appointment would make no difference. And therefore, whether the selection was made on the basis of open competition or was limited to a cluster of villages, was considered inconsequential, insofar as the applicability of the principle is concerned. And likewise, whether the appointment was for a fixed limited duration (six months, or one year), or for an unlimited duration, was also considered inconsequential, insofar as the applicability of the principle of 'equal pay for equal work' is concerned. It was held that the claim for equal wages would be sustainable, where an employee is required to discharge similar duties and responsibilities as regular employees and the concerned employee possesses the qualifications prescribed for the post. In the above case, this Court rejected the contention advanced on behalf of the Government that the plea of equal wages by the employees in question, was not sustainable because the employees concerned were engaged in a temporary scheme, and against posts which were sanctioned on a year to year basis.

44.4. In the Daily Rated Casual Labour case [(1988) 1 SCC 122] this Court held that under the principle flowing from Article 38(2) of the Constitution, the Government could not deny a temporary employee, at least the minimum wage being paid to an employee in the corresponding regular cadre, alongwith dearness allowance and additional dearness allowance, as well as, all the other benefits which were being extended to casual workers. It was also held that the classification of workers (as unskilled, semi-skilled and skilled), doing the same work, into different categories, for the payment of wages at different rates, was not tenable. It was also held that such an act of an employer, would amount to exploitation. And further that, the same would be arbitrary and discriminatory, and therefore, violative of Articles 14 and 16 of the Constitution.

44.5. In State of Punjab v. Devinder Singh [(1998) 9 SCC 595] this Court held that daily- wagers were entitled to be placed in the minimum of the pay-scale of regular employees, working against the same post. The above direction was issued after accepting that the employees concerned were doing the same work as regular incumbents holding the same post by applying the principle of 'equal pay for equal work'.

44.6. In State of Karnataka case [(2006) 4 SCC 1, a Constitution Bench of this Court, set aside the judgment of the High Court, and directed that daily-wagers be paid salary equal to the lowest grade of salary and allowances being paid to regular employees. Importantly, in this case, this Court made a very important distinction between pay parity and regularization. It was held that the concept of equality would not be applicable to issues of absorption/regularization. But, the concept was held as applicable, and was indeed applied, to the issue of pay parity – if the work component was the same. The judgment rendered by the High Court was modified by this Court, and the concerned daily-wage employees were directed to be paid wages, equal to the salary at the lowest grade of the cadre concerned.

44.7. In State of Haryana v. Charanjit Singh [(2006) 9 SCC 321, a three-Judge bench of this Court held that the decisions rendered by this Court in State of Haryana v. Jasmer Singh [(1996) 11 SCC 77], State of Haryana v. Tilak Raj [(2003) 6 SCC 123], the Orissa University of Agriculture & Technology case [(2003) 5 SCC 188], and Government of W.B. v. Tarun K. Roy [(2004) 1 SCC 347], laid down the correct law. Thereupon, this Court declared that if the daily-wage employees concerned could establish that they were performing equal work of equal quality, and all other relevant factors were fulfilled, a direction by a Court to pay such employees equal wages (from the date of filing the writ petition), would be justified.

44.8. In State of U.P. v. Putti Lal [(2006) 9 SCC 337], based on decisions in several cases (wherein the principle of 'equal pay for equal work' had been invoked), it was held that a daily-wager discharging similar duties, as those engaged on regular basis, would be entitled to draw his wages at the minimum of the pay-scale (drawn by his

> counterpart, appointed on regular basis), but would not be entitled to any other allowances or increments.
> 44.9. In U.P. Land Development Corporation case [(2010) 7 SCC 739], this Court noticed that the respondents were employed on contract basis, on a consolidated salary. But, because they were actually appointed to perform the work of the post of Assistant Engineer, this Court directed the employer to pay the respondents wages, in the minimum of the pay-scales ascribed for the post of Assistant Engineer."

Hon'ble Apex Court concluded that it would be fallacious to determine artificial parameters to deny fruits of labour. The principle of 'equal pay for equal work' has also been extended to differently described temporary employees. Relevant paras from the judgment read as under:-

> "57. There is no room for any doubt, that the principle of 'equal pay for equal work' has emerged from an interpretation of different provisions of the Constitution. The principle has been expounded through a large number of judgments rendered by this Court and constitutes law declared by this Court. The same is binding on all the courts in India under Article 141 of the Constitution of India. The parameters of the principle have been summarized by us in paragraph 42 hereinabove. The principle of 'equal pay for equal work' has also been extended to temporary employees (differently described as work-charge, daily-wage, casual, ad-hoc, contractual, and the like). The legal position, relating to temporary employees, has been summarized by us in paragraph 44 hereinabove. The above legal position which has been repeatedly declared is being reiterated by us yet again.
> 58. In our considered view, it is fallacious to determine artificial parameters to deny fruits of labour. An employee engaged for the same work cannot be paid less than another, who performs the same duties and responsibilities. Certainly not, in a welfare state. Such an action besides being demeaning, strikes at the very foundation of human dignity. Any one, who is compelled to work at a lesser wage, does not do so voluntarily. He does so to provide food and

> shelter to his family, at the cost of his self respect and dignity, at the cost of his self worth, and at the cost of his integrity. For he knows, that his dependents would suffer immensely, if he does not accept the lesser wage. Any act, of paying less wages, as compared to others similarly situate constitutes an act of exploitative enslavement, emerging out of a domineering position. Undoubtedly, the action is oppressive, suppressive and coercive as it compels involuntary subjugation."

4(iii)(b) ***AIR 2021 SC 4855,*** titled ***Union of India and Others vs. Ilmo Devi and another,*** decided by the Apex Court on 7.10.2021 was a case where after considering various previous judgments, the Apex Court held that part time employees are not entitled to seek regularization as they were not working against any sanctioned posts. Such employees cannot claim parity in salary with regular employees on the principle of equal pay for equal work.

Article 39 (d) of Constitution of India provides for equal wages for equal work.

4(iv) In the instant case, what comes out is that the petitioner was engaged as part time worker on 20.5.2002 in the office of the District Statistical Officer, Shimla. W.e.f. the year 2007 onwards the office felt acute shortage of class-IV employees. It appears from the record that this office had one regular peon i.e. Smt. Sudha and a Chowkidar i.e. Sh. Rajpal Chauhan. Smt. Sudha, it seems, perhaps because of her illness or otherwise either used to remain on leave off and on or was unable to discharge effective duties. Shri Rajpal Chauhan was also deployed in the H.P. Secretariat and did not discharge duties in the office. Under the circumstancess, the higher officials in this office started taking additional work from the petitioner. Petitioner, as per the official correspondences available on record, performed the duties of diary-dispatch work, opening and closing of office and various other miscellaneous works of the office. This fact of extracting additional work from the petitioner was brought to the notice of respondent No. 2 by her immediate

higher officers with request to pay her wages for the work performed by her. On account of shortage of peons, the District Statistical Officer, Shimla also requested for deployment of one peon in the office. Though correspondence is there on record where the District Statistical Officer was chided by respondent No. 2 for sending such kind of office letters in favour of the petitioner but the fact remains that much more office work had been extracted from the petitioner in addition to the work for which she was employed during the year 2007 to 06.06.2012 when she was actually made a whole time/daily wager. Having said this, we may also observe that there is no clarity with regard to the exact nature of work actually performed by the petitioner in addition to her normal duties and the duration thereof during this period. The only thing certain is that she performed much more work than her normal duty hours from the year 2007 to 06.06.2012. Therefore, to balance the scales and in the interest of equity, justice and good conscious, we deem it appropriate to grant a lump sum payment of Rs. 2,00,000/- (Rupees two lacs) in favour of the petitioner for the additional work she performed during the period in question. We direct the respondents to pay this amount to the petitioner within a period of two months from today, failing which, it shall carry interest @ 7% per annum. Impugned orders passed by the learned Tribunal on 17.12.2015 and 17.4.2017 as well as order dated 12.12.2014 passed by the respondents are set aside to this extent.

With the aforesaid observations, the writ petition is disposed of, so also the pending miscellaneous application(s), if any.

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

Between: -

BHUPINDER KUMAR SON OF LATE SHRI
DIN DAYAL, RESIDENT OF VILLAGE MAUSARI,
POST OFFICE, HARIPUR, TEHSIL MANALI,

DISTRICT KULLU, HP, PRESENTLY WORKING
AS FOREST GUARD, FOREST RANGE PATLIKUHAL,
DISTRICT KULLU, H.P.

……PETITIONER

(BY SH. MAAN SINGH, ADVOCATE)

AND

3. STATE OF HIMACHAL PRADESH,
THROUGH PRINCIPAL SECRETARY (FORESTS)
TO THE GOVERNMENT OF HIMACHAL
PRADESH, SHIMLA-2
2. PRINCIPAL CHIEF CONSERVATOR OF FORESTS,
HIMACHAL PRADESH, SHIMLA-2.
3. CONSERVATOR OF FORESTS, KULLU, DISTRICT
KULLU, HIMACHAL PRADESH.

…RESPONDENTS

(BY SH. ASHWANI SHARMA,
ADDITIONAL ADVOCATE GENERAL,
FOR THE RESPONDENTS/STATE).

CIVIL WRIT PETITION ORIGINAL APPLICATION
No. 2460 OF 2020
Decided on: 21.03.2022

Constitution of India, 1950 – Article 226 – Service matter - Sealed cover proceedings - Petitioner felt aggrieved against the sealed cover proceedings conducted against him due to which he could not get the promotion and the representation made by him was also rejected --Similarly situated persons including Amir Chand were promoted --Held--In view of judgment in K.V. Jankiraman and Rajender Singh versus State of Himachal Pradesh, the petitioner was digested from a right that vested in him without any fault on his part and the petitioner agitating his cause without any delay --All other similar situated persons including Amir Chand, the co accused with the petitioner in FIR number 07 of 2016 were granted financial benefits from date of joining on regular basis -- On opening of sealed cover proceedings the petitioner was held entitled for Promotion --The petitioner held entitled for all

consequential benefits from the date he has been ordered to be promoted - Petition disposed of. (Paras 12 & 13)

Cases referred:

Union of India vs. K.V. Jankiraman and others AIR 1991 SC 2010;

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

ORDER

The petitioner was appointed as Forest Guard in 1991. The meeting of Departmental Promotion Committee (for short 'DPC') was convened in November, 2015 for considering the case of Forest Guards for promotion to the post of Deputy Rangers including that of the petitioner. An FIR No. 07/2012 dated 10.04.2012 under Sections 447, 427, 34 IPC and Section 30 of H.P. Prevention of Specific Corrupt Practices Act, 1983 was under investigation at the time of holding of above said DPC. Petitioner and another Forest Guard named Amir Chand were arrayed as accused in the said FIR. The case of petitioner was kept in sealed cover, whereas Amir Chand was promoted. The promotions to the post of Deputy Rangers, in pursuance of DPC held in November, 2015 were effected w.e.f. 29.02.2016.

2. Aggrieved against the sealed cover proceedings conducted against petitioner, he preferred representation to respondent No.2. The representation of the petitioner was rejected on 24.04.2017 in the following terms:

> *"2. Vide this office Endst. of even No. dated 22.12.2016 you were requested to decide the promotion cases of government servants whom the disciplinary/criminal proceedings are pending and whose cases relating to service matters are pending in the Court of Law after adopting proper procedure as contained in CCS (CCA) Rules CHAPTER 3 Suspension-General Order under para17(2) & (7). Inspite of that you have simply forwarded the representation of Sh. Bhupinder Singh, Forest Guard to this office*

for according permission to open the sealed cover without adopting the procedure contained in CCS(CCA) Rules. Since the official has been facing disciplinary proceedings and case is pending in the court of Sessions Judge, Kullu and prosecution sanction stands granted in his case, hence his sealed cover cannot be opened."

3. Petitioner assailed the communication dated 24.04.2017 rejecting his representation by filing Original Application No. 2897 of 2017, inter-alia, praying for the following reliefs:

> *"(a) That annexure A-2, dated 24.04.2017 may kindly be quashed and set aside.*
>
> *(b) That the respondent may kindly be directed to open the result of applicant qua Department Promotion Committee held in November, 2015.*
>
> *(c) That the respondents may kindly be directed to promote the applicant as Deputy Ranger, from the date of Departmental Promotion Committee/due date, with all consequential benefits."*

4. It is relevant to notice here that the charges against the petitioner and aforesaid Amir Chand were framed by the Court of learned Sessions Judge on 22.08.2016. The Original Application No. 2897 of 2017 was transferred to this Court and registered as CWPOA No. 2460 of 2020 on closure of the State Administrative Tribunal.

5. Official respondents contested the claim of the petitioner on the grounds that the petitioner was an accused in case registered vide FIR No. 07/2012 dated 10.04.2012 and hence sealed cover proceedings against him were in accordance with the CCS (CCA) Rules, 1965. It was, however, clarified that the petitioner faced only the criminal proceedings, as aforesaid, and no departmental proceedings were initiated against him. The factum that Amir hand, Forest Guard had been promoted as Deputy Ranger despite of being accused in the same case, was also not denied.

6. Learned State Administrative Tribunal on 05.04.2018 passed the following interim order in OA No.2897/2017:

> *"Though more than sufficient time has already been granted to the respondents for filing replies, yet as prayed for, another opportunity is granted by way of extreme indulgence in the interest of justice as last chance. Now, be filed within four weeks. M.A. Nos. 2897 of 2017 and 493 of 2018 stand disposed of accordingly.*
>
> *However, since when the Departmental Promotion Committee (DPC) had met in November, 2015, neither any departmental inquiry was pending against the applicant nor charge had been framed against him in the criminal trial pending against him, in view of the law laid down by the Hon'ble Supreme Court in* ***Union of India etc.etc. Vs. K.V. Jankiraman etc. etc., 1991 AIR 2010****, there shall be a direction in the interim to the respondents/competent authority(s) to implement the recommendation of the DPC as expeditiously as possible, but in any case not later than the next date of hearing."*

7. In pursuance to the aforesaid interim orders, respondent No.2 vide communication dated 18.08.2017 issued memo and ordered the opening of sealed cover in respect of petitioner after adopting proper procedure as contained in CCS (CCA). Respondents accordingly complied with the interim orders passed by the State Administrative Tribunal and the petitioner was ordered to be promoted as Deputy Ranger w.e.f. 29.02.2016, subject, however, to the decision in O.A. No. 4152 of 2017 titled Sanjeev Kumar Vs. State of H.P. in which some stay order in respect of promotions to the post of Deputy Rangers, was stated to be operating. It is relevant to reproduce the contents of communication dated 07.06.2018 from respondent No.3 as under:

> *"2. As recommended by you, approval is hereby accorded to promote Shri Bhupinder Kumar, Forest Guard to the rank of Dy. Ranger w.e.f. 29.02.2016 from the date his juniors were promoted. However, his promotion orders may be issued after the decision in OA No. 4152/2017 – Sanjeev Kumar Vs. State of H.P. vide which*

promotion of Forest Guards to the rank of Dy. Ranger has been stayed.

3. All the conditions as laid down in this office memo. of even No. dt. 29.02.2016 (copy enclosed) shall apply mutatis mutandis in the promotion case of the aforesaid official."

8. On 03.07.2018, learned State Administrative Tribunal passed following order in OA No. 2897 of 2017 and cleared the case of petitioner for promotion to the post of Deputy Ranger:

"This matter be delinked from OA No. 4152 of 2017 and listed on 16.07.2018 however, in the facts and circumstances, particularly that admittedly applicant Bhupinder Kumar in O.A. No 2897 of 2017 Is though facing trail under 447,427 read with Section 34 IPC and Section 30(i) of the H.P. Prevention of Specific Corrupt Practices Act, 1983 alongwith other co-accused, namely Amir Chand etc., yet the fact remains that when DPC for promotion to the post of Deputy Ranger was held in November, 2015, charge was yet to be framed against him and other co-accused in the said case and was framed only thereafter and the facts that he said Amir Chand has already been promoted as deputy Ranger despite pendency of the aforesaid criminal case, in which he is one of the accused, but the applicant, who is also similarly situate, is still awaiting promotion, which though stands already approved, but is not implemented due to interim order dated 18.08.2017 against such promotion(s) operating in the concerned O.A. No. 4152 of 2017 despite the facts that the issue involved in both these matters are entirely different, it is clarified that interim order dated 18.08.2017 in OA No. 4152 of 2017 would not come in the way of the applicant Bhupinder Kumar in O.A. No 2897 of 2017 for being considered for promotion to the post of Deputy Ranger and respondents/competent authority(s) may proceed in that matter accordingly."

9. The petitioner was accordingly promoted as Deputy Ranger w.e.f. 29.02.2016. However, his promotion was ordered notionally without affording him actual monetary benefits.

10. In view of the developments, as noticed above, having taken place during pendency of the proceedings of this case, prayers (a) to (c), made by petitioner have been rendered infructuous save and except grant of relief of promotion to the petitioner from due date with consequential benefits.

11. In our considered view, the petitioner cannot be denied the monetary benefits available to the post of Deputy Ranger for the reason that the petitioner cannot be said to be at fault in grant of delayed promotion in his favour. His entitlement to be promoted from due date was on the basis of settled legal principle that the benefit of promotion cannot be denied to an employee unless he was either charged in departmental disciplinary proceedings or in a criminal case on the date of consideration for promotion. Admittedly, in November, 2015 when the DPC was convened to consider the eligible Forest Guards for being promoted to the posts of Deputy Rangers, the petitioner had not been charged for any offence by the Court. The date on which charges were framed against petitioner was 22.08.2016. In addition to above, petitioner was not facing any other proceedings even by way of departmental action. Thus, the petitioner had right to be considered for promotion in DPC convened for the purpose in November, 2015 on the strength of law settled in ***AIR 1991 SC 2010, Union of India vs. K.V. Jankiraman and others***, wherein it was held as follows:

> *"6. On the first question, viz., as to when for the purposes of the sealed cover procedure the disciplinary/criminal proceedings can be said to have commenced, the Full Bench of the Tribunal has held that it is only when a charge-memo in a disciplinary proceedings or a charge-sheet in a criminal prosecution is issued to the employee that it can be said that the departmental proceedings/criminal prosecution is initiated against the employee. The sealed cover procedure is to be resorted to only after the charge-memo/charge-sheet is issued. The pendency of preliminary investigation prior to that stage will not be sufficient to*

enable the authorities to adopt the sealed cover procedure. We are in agreement with the Tribunal on this point. The contention advanced by the learned counsel for the appellant-authorities that when there are serious allegations and it takes time to collect necessary evidence to prepare and issue charge-memo/charge-sheet, it would not be in the interest of the purity of administration to reward the employee with a promotion, increment etc. does not impress us. The acceptance of this contention would result in injustice to the employees in many-cases. As has been the experience so far, the preliminary investigations take an inordinately long time and particularly when they are initiated at the instance of the interested persons, they are kept pending deliberately. Many times they never result in the issue of any charge-memo/charge-sheet. If the allegations are serious and the authorities are keen in investigating them, ordinarily it should not take much time to collect the relevant evidence and finalise the charges. What is further, if the charges are that serious, the authorities have the power to suspend the employee under the relevant rules, and the suspension by itself permits a resort to the sealed cover procedure. The authorities thus are not without a remedy. It was then contended on behalf of the authorities that conclusions Nos. 1 and 4 of the Full Bench of the Tribunal are inconsistent with each other. Those conclusions are as follows:

> *"(1) consideration for promotion, selection grade, crossing the efficiency bar or higher scale of pay cannot be withheld merely on the ground of pendency of a disciplinary or criminal proceedings against an official;*
> *(2) & (3) .....*
>
> *(4) the sealed cover procedure can be resorted only after a charge memo is served on the concerned official or the charge sheet filed before the criminal court and not before."*
>
> *There' is no doubt that there is a seeming contradiction between the two conclusions. But read harmoniously, and that is what the Full Bench has intended, the two conclusions can be reconciled with*

> *each other. The conclusion no. 1 should be read to mean that the promotion etc. cannot be withheld merely because some disciplinary/criminal proceedings are pending against the employee. To deny the said benefit, they must be at the relevant time pending at the stage when charge-memo/charge-sheet has already been issued to the employee. Thus read, there is no inconsistency in the two conclusions.*
>
> *We, therefore, repel the challenge of the appellant-authorities to the said finding of the Full Bench of the Tribunal."*

12. Following the aforesaid judgment in ***K.V. Jankiraman***, a co-ordinate Bench of this Court in CWP No. 11863 of 2011, titled Rajinder Singh vs. State of H.P. and another, decided on 05.08.2014 has held as under:

> *"**6**. It is trite law that it is only when a charge-memo in a disciplinary proceedings or a charge-sheet in the criminal prosecution is issued to the employee it can be said that the departmental proceedings/criminal prosecution is initiated against the employee. The sealed cover procedure is to be resorted to only after the charge-memo/charge-sheet is issued. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure. If the allegations are serious and the authorities are keen in investigating them then ordinarily it would not take much time to collect the relevant evidence and finalise the charges. What is further if the charges that serious, the authorities have the power to suspend the employee under the relevant rules and the suspension by itself permits a resort to the sealed cover procedure. The authorities thus are not without a remedy. But in no event can the promotion be withheld merely because some disciplinary / criminal proceedings are pending against the employee to deny the said benefit, they must be at the relevant time pending at the stage when charge-memo/charge-sheet has been issued to the employee."*

13. In the aforesaid circumstances, the petitioner was divested from a right that vested in him without any fault on his part. The petitioner had been agitating his cause without delay. All other similarly situated persons including Amir Chand, a co-accused with the petitioner in FIR No. 07 of 2012 were promoted vide order dated 29.02.2016 with grant of financial benefits from the date of joining on regular basis. Since, on opening of sealed cover proceedings, the petitioner was held entitled for promotion, the grant of such benefit notionally is harsh and arbitrary especially when the petitioner was not assessory in any manner in grant of delayed promotion to him. The petitioner is thus held entitled to all consequential benefits w.e.f. the date he has been ordered to be promoted. Respondents are directed to accord all due benefits to petitioner within three months from the date of this judgment.

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

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

Between:-

1. DAULAT RAM S/O LATE SH. SHYAMU,
R/O VILLAGE BANOG, P.O. NAUHLI,
TEHSIL JOGINDER NAGAR, DISTT.
MANDI, H.P.

2(A) KAMLA DEVI D/O LATE SH.
CHARUNDU RAM

2(B) NOTA RAM S/O LATE SH.CHARUNDU
RAM

2(C) DESH RAJ S/O LATE SH. CHARUNDU
RAM
(ALL ARE RESIDENT OF VILLAGE

BANOG, P.O. NAUHLI, TEHSIL
JOGINDER NAGAR, DISTT. MANDI, ...PETITIONERS
H.P.)

(BY SH. VIR BAHADUR VERMA, ADVOCATE.)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH ITS PRINCIPAL SECRETARY
(PWD) TO THE GOVERNMENT OF
HIMACHAL PRADESH, SHIMLA-
171002.

2. ENGINEER-IN-CHIEF, PWD, SHIMLA,
H.P.

3. EXECUTIVE ENGINEER, PWD
DIVISION, JOGINDER NAGAR, H.P.

....RESPONDENTS

(BY SH. RAJU RAM RAHI, DEPUTY
ADVOCATE GENERAL.)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
No. 5554 of 2019
Reserved On:7.1.2022
Decided On:7.3.2022

Constitution of India, 1950 – Extraordinary jurisdiction – Grant of work charge status/regularization - Petition preferred by petitioners seeking

directions to the respondents for granting work charge status regularization with effect from date from which petitioners had completed 8 years of continuous service as per policy of government – Held -- That despite having bestowed status of custodian of rights of its citizens State or its functionaries invariably are adopting exploitative method in field of public employment to avoid its liabilities, depriving the persons employed from their just claim and benefits by making initial appointments on temporary basis i.e. contract adhoc tenure, daily wage etc. in order to shirk from its responsibility and delay the conferment of work charge status or extension of benefits of regularization policy of State by notifying policies in this regard in future - Present case is also an example of such practice - Regularization may be given by availability of regular post but work charge status does not hit by such condition and as observed supra, petitioner held entitled for work charge status from the date of completion of 8 years of continuous daily wage service in the department with 240 working days in each calendar year with all consequential benefits - Petition allowed.(Paras 15, 21 & 22)

Cases referred:

Gauri Dutt and others Vs. State of H.P., Latest HLJ 2008 (HP) 366;

Mool Raj Upadhaya Vs. State of Himachal Pradesh, 1994 Supp. (2) SCC 316;

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

J U D G M E N T

Petitioner No. 1 Daulat Ram and petitioner No. 2 late Charundu Ram were engaged in HPPWD Department as daily waged Beldars in August 1991 and November 1991, respectively. As per Mandays Chart, petitioner Daulat Ram continuously completed minimum 240 working days in each calendar year since 1997, whereas petitioner No. 2 Charundu Ram had completed minimum 240 working days continuously in each calendar year since 1998. Both of them had completed 8 years continuous service with minimum 240 working days in each calendar year on or before 31.3.2006, benefit of Regularization Policy dated 18.6.2007, formulated by respondent-

State, was extended to them and their services were regularized vide Order dated 20.7.2007 with prospective effect and they joined as such on 26.7.2007.

2. Instant petition has been preferred by the petitioners seeking direction to respondents for granting work-charge status/regularization with effect from the date from which petitioners had completed 8 years of continuous service as per Policy of the Government as well as law laid down by this High Court in CWP No. 2735 of 2010, titled Rakesh Kumar Vs. State of H.P. and others, with all consequential benefits including arrears of salary, pay fixation etc, as according to petitioners, they were entitled for regularization/work charge status in the year 2005 instead of year 2007.

3. Respondents-State has contested the petition on the ground that on regularization in the year 2007, petitioners had joined their regular service on 26.7.2007 without any protest, but filed the present petition in the year 2015 after a lapse of about 8 years and there is inordinate unexplained delay in filing the petition and, therefore, petition deserves to be dismissed on the ground of delay and laches, as stale claim at a belated stage, i.e. after a period of 8 years is neither legally maintainable nor tenable.

4. Referring observations made in pronouncement of this Court in *CWP No. 2735 of 2010 Rakesh Kumar Vs. State of H.P.*, it has been contended on behalf of respondents-State that question of conferment of work-charge status upon the petitioners does not arise as work-charge status in respondent-Public Works Department for class-IV category has been abolished on 19.8.2005, i.e. prior to completion of 8 years of continuous service by the petitioners, with minimum 240 working days in each calendar year. In this regard reliance has also been placed on judgment dated 27.10.2014 rendered by a single Bench of this Court in *CWP No. 4589 of 2012*, titled *Vinay Kumar Vs. State of H.P.*

5. Apart from contest on aforesaid grounds, it has also been stated in the reply that in view of law laid down by this High Court in Rakesh

Kumar's case supra, after dismissal of Special Leave Petition/appeal, filed by the State in that case, in January 2015, matter was referred to the Finance Department as well as Administrative Department/Government and after obtaining advise from Finance as well as Administrative Departments, the Engineer-in-Chief, HPPWD, vide letter dated 15.5.2015, has issued instructions/guidelines regarding conferring of work charge status upon completion of continuous 8 years service by the workmen with 240 working days in each calendar year. For granting work-charge status as per guidelines, after re-verification of working days of each workmen, case of the petitioners is pending consideration with the Department and thus petition is liable to be dismissed being premature.

6. It has also been contended that petitioners had not completed 10 years continuous service with 240 working days as on or before 31.12.2002, therefore, they were not covered under verdict of the Supreme Court in Mool Raj Upadhyay's case and, therefore, they were directly considered for regularization as per Policy dated 18.6.2007, which provided cut of date of completion of 8 years on 31.3.2006, but regularization with prospective effect against vacant post and for this reason and also for abolition of work-charge establishment in class-IV category w.e.f. 19.8.2005, petitioners' claim for grant of work-charge status on completion of 8 years, is not maintainable as case of a daily wager can be considered for work-charge status or regularization on issuance/formation of subsequent policy by the Government.

7. To rebut the plea raised on behalf of respondent-Department regarding delay and laches, learned counsel for the petitioners has referred pronouncements of this High Court in *CWPOA No. 5748 of 2019, titled Man Singh Vs. The State of H.P.* and others, *CWPOA No. 5660 of 2019, titled Ghanshyam Thakur Vs. State of Himachal Pradesh* and others, and *CWPOA No.*

46 of 2020, titled as Yashwant Singh and others Vs. State of Himachal Pradesh and others.

8. In the light of above referred pronouncements plea of respondents-Department to oust the petitioners on the ground of delay and laches, in my opinion, in present case is not sustainable. Petitioners are Beldars and belong to a lowest rank in their class. As per Policy a duty was cast on the respondents to consider the cases of eligible workmen for conferment of work charge status on completion of required number of years as per Policy. At this stage, it is apt to record that the plea taken in the reply that cases of the petitioner are being reconsidered after dismissal of Special Leave Petition in Rakesh Kumar's case in January, 2015. Therefore, when case is pending consideration before the Department since 2015 and till date nothing has been communicated to the petitioner or to the Court regarding any decision taken with respect to the petitioners in the light of guidelines circulated by Engineer-in-Chief vide communication dated 15.6.2015, it does not lie in the mouth of respondents that petition is liable to be dismissed for delay and laches. Even otherwise, petitioners are eligible for benefits under the Policy and in consonance with pronouncements of the Courts.

9. The issue in this regard also stands settled in the judgment of *Rakesh Kumar's case*, wherein it has been observed as under:-

> *"6. The simple question is whether the delay defeats justice? In analyzing the above issue, it has to be borne in mind that the petitioners are only class-IV workers (Beldars). The schemes announced by the Government clearly provided that the department concerned should consider the workmen concerned for bringing them on the work-charged category. So, there is an obligation cast on the department to consider the cases of the daily waged workmen for conferment of the work-charged status, being on a work-charged establishment, on completion of the required number of years in terms of the policy. At the best, the petitioners can only be denied the interest on the eligible*

benefits and not the benefits as such, which accrued on them as per the policy and under which policy, the department was found to confer the status, subject to the workmen satisfying the required conditions."

10. Similar benefits have been extended to similarly situated employees. Thus, petitioners cannot be discriminated on the ground of delay and laches, particularly when it was duty of respondents to extend such benefits to the petitioners. State should act as a model employer and should extend benefits of its Policies to all eligible persons, in consonance with pronouncements of the Court(s) which have attained finality, without any discrimination particularly when identical objections have already been overruled by the Courts and such pronouncements have attained finality,. Thus claim of the petitioners cannot be refuted only on the ground of delay and laches and for joining on regularization without protest.

11. Though Law of Limitation, is not applicable, however principle of delay and laches is attracted for adjudication of a petition under Article 226 of the Constitution of India. The petitioner may be ousted for delay and laches in appropriate case. For otherwise strong merit in the case, in order to prevent exploitation of victims for omission and commission on the part of mighty State, taking into consideration the circumstances of the petition and incapability of petitioners to approach the Court invariably, delay and laches may be ignored for adjudication of issue raised in the Writ Petition on merits. Therefore, I am of the considered view that petitioners, in present petition, are not liable to be ousted on the ground the delay and laches.

12. In response to plea that work-charged establishment does not exist in the respondent-Department, learned counsel for the petitioner has referred pronouncements of this High Court in cases *CWPOA No. 5748 of 2019*, titled as *Man Singh Vs. The State of Himachal Pradesh and others*, *CWPOA No. 52 of 2019*, titled *Beli Ram Vs. State of Himachal Pradesh and*

another, *CWPOA No. 5566 of 2019*, titled as *Reema Devi Vs. State of H.P. and others* and *CWPOA No. 5660 of 2019*, titled as *Ghanshyam Thakur Vs. State of Himachal Pradesh and others* wherein similar plea of respondent-State did not find favour of the Court. Crux of these pronouncements has been discussed hereinafter.

13. It is undisputed that in ***Mool Raj Upadhaya Vs. State of Himachal Pradesh, 1994 Supp. (2) SCC 316***, affidavit was filed by Chief Secretary to the Government of Himachal Pradesh, formulating a Scheme for granting work-charged status to all daily-waged employees, serving in the State of Himachal Pradesh, in all Departments, irrespective of the fact that Department is/or was having work-charged establishment or not. In judgment dated 10.5.2018 rendered by Division Bench of this Court in *CWP No. 3111 of 2016*, titled as *State of Himachal Pradesh Vs. Ashwani Kumar,* upholding the order passed by erstwhile H.P. State Administrative Tribunal, it has been pronounced that work-charged establishment is not a pre-requisite for conferment of work-charge status nor conversion of work-charged employee into regular employee would make such establishment non-existent. Therefore, abolition of work-charge establishment in the respondent-Department w.e.f. 19.8.2005 has no effect on the rights of petitioners for conferment of work-charged status after completion of 8 years in terms of Policy of the Government as well as verdict of Rakesh Kumar's case.

14. Following observations of this Court made in Beli Ram's case are also relevant to be referred here, which read as under:-

> *"22. In* ***Gauri Dutt and others Vs. State of H.P****., reported in* ***Latest HLJ 2008 (HP) 366****, it has been held that the scheme formulated in Mool Raj Upadhaya's case is applicable to daily-waged employees working in any department of the state of Himachal Pradesh and the employees, who are not governed by the directions given in Mool Raj Upadhaya's case, shall be governed by a Scheme framed by the State in this regard and it*

has also been observed that granting of work-charged status would mean that an employee would get regular scale of pay.
23. Term "work-charged", discussed State of Rajasthan v. Kunji Raman, reported in (1997) 2 SCC 517, is in different context, whereas this term, in Himachal Pradesh, is used in different context. A person, working on daily-waged basis, before his regularization, is granted work-charged status on completion of specified number of years as daily-wager and effect thereof is that thereafter non-completion of 240 days in a calendar year would not result into his ouster from the service or debar him from getting the benefit of length of service for that particular year. Normally, work-charged status is conferred upon a daily-wager, on accrual of his right for regularization, on completion of prescribed period of service, but for non-regularization is for want of regular vacancy in the department or for any other just and valid reason. Therefore, it is a period interregnum daily-wage service and regularization, which is altogether different form the temporary establishment of work-charge, as discussed in the judgment of the Apex Court relied upon by the State and, for practice in Himachal Pradesh, work-charged status is not conferred upon the person employed in a project but upon such daily-wage workers, who are to be continued after particular length of service for availability of work but without regularization for want of creation of post by Government for his regularization/ regular appointment. Therefore, work is always available in such cases and the charge of a daily-wager is created thereon to avoid his disengagement for reasons upon which a daily-wager can be dispensed with from service.
24. .. ..

25. On conferment of work-charged status, sword of disengagement, hanging on the neck of workmen, is removed on completion of specified period of daily-waged service, as thereafter instead of daily-wage, the employee would get regular pay-scale and would be entitled to other consequential benefits for which a daily-waged employee is not entitled."

15. Undoubtedly, a daily wager shall only be regularized against available vacancy. However, for conferring work-charged status availability of vacancies is irrelevant. It is a status to be conferred upon daily-wager on completion of requisite period of service as daily-wager, in terms of Policy, in absence of regular vacancy, so as to safe guard the interest of daily-wager regarding his right to be regularized on completion of specific years on daily wages with requisite number of working days in each calendar year, so that after crossing a bar, a daily-wager may not be ousted to deprive him from regularization by discontinuing his services being daily-wager and for that purpose there is no need of any work-charged establishment in the Department, as work-charge status is to be conferred upon daily wager. Government has power to create or abolish work-charge establishment. In case claim of the workmen for regularization in terms of Policy is to be deferred for want of approval of the Government, availability of the vacancy or for any other action to be performed on the part of State or Department, then conferment of work-charge status on a daily waged cannot be denied for want of work-charge establishment in the Department.

16. Judgment in Vinay Kumar's case relied upon by respondents has been passed by a Single Bench of this Court, whereas thereafter judgment on the same issue, in Ashwani Kumar's case, has been passed by a Division Bench of this Court and the same is binding on this Court as for passing of judgment in Ashwani Kumar's case by Division Bench, verdict of Single Judge is to be considered to have been over-ruled, therefore, grounds taken by respondents-Department that work-charge establishment in Public Works Department to class-IV posts had been abolished w.e.f. 19.8.2005 and thus benefit of conferment of work-charge status upon the petitioners cannot be extended, is not tenable. Hence, objection of the respondents to oust the petitioners in these grounds is not tenable. Judgment in Ashwani Kumar's case has been rendered after pronouncement in Rakesh Kumar's case. Both

the pronouncements are by Division Benches. Thus, present petition is to be adjudicated in terms of ratio of Ashwani Kumar's case read with judgment passed in Rakesh Kumar's case.

17. No doubt petitioners are not covered under the Policy formulated and approved by the Supreme Court in Mool Raj Upadhaya's case, but in terms of pronouncements of the Division Bench of this Court in Rakesh Kumar' case which has attained finality for affirmation from the Supreme Court, read with pronouncement of this High Court in Ashwani Kumar's case, petitioners are entitled for conferring work-charge status immediately on completion of 8 years continuous service as daily waged with 240 working days in each calendar year. These judgments are binding in nature and it is settled law that binding decision should neither be ignored nor be overlooked.

18. Regarding regularization of the petitioners from prospective dates of passing of order after issuance of fresh Policy of the Government and withholding regularization/grant of work-charged status to the petitioners for want of time gap between two Policies, learned counsel for the petitioner has referred pronouncements of this Court passed in *CWP No. 2415 of 2012, titled as Mathu Ram Vs. Municipal Corporation and others*, decided on 31.7.2014, wherein learned Single Judge has made the following observations:-

> *"5. It cannot be disputed that the policy of regularisation has been extended from time to time. The mere fact that there was a time gap in issuance of the policy of regularisation which prescribed different cut off dates cannot be a ground to deny the benefit of regularisation to the of the policy of regularisation which prescribed different cut off dates cannot be a ground to deny the benefit of regularisation to the petitioner on his completion of 8 years of service on daily waged basis in terms of Rakesh Kumar (supra)."*

19. Judgment of Single Bench passed in Mathu Ram's case has been affirmed by a Division Bench in LPA No. 44 of 2015, observing as under:-

"5. Respondent was appointed in the month of November, 1993. He has completed 8 years of service in the year 2001. The workmen, who have completed 8 years of service, were required to be regularized immediately after the completion of 8 years' service. Appellant - corporation is State within the meaning of Article 12 of the Constitution of India. The practice of the respondent-corporation not to regularize the services of the workmen, though they have completed 8 years of service, amounts to unfair labour practice.

6. The issue raised in the LPA is no more res integra in view of the judgment rendered in CWP No.2735 of 2010 decided on 28.7.2010, titled as Rakesh Kumar vs. State of H.P. and others. Relevant portion of the judgment reads as under:

> *"2. The only reference to be made for analyzing the grievance of the petitioners is two orders of the Government. One order is dated 3.4.2000 and other is dated 6.5.2000. Order dated 3.4.2000, reads as follows:*
>
> > *"In partial modification of this Department letter of even number dated 8th July, 1999 on the above subject, I am directed to say that the Government has now decided that the Daily Waged/Contingent Paid workers in all the Departments including Public Works and Irrigation and Public Health Departments (other than work-charged categories)/Boards/ Corporations /Universities, etc. who have completed 8 years of continuous service (with a minimum of 240 days in a calendar year) as on 31-03-2000 will be eligible for regularization. It has further been decided that completion of required years of service makes such daily wager/contingent paid worker eligible for consideration to be regularized and regularization in all cases will be from prospective effect i.e. from the date the order of regularization is issued after completion of codal formalities.*
> >
> > *2. In view of the above decision and in order to avoid any litigation and also any hardship to daily wagers departments shall do the regularization based on*

seniority and they will ensure that senior persons are regularized first rather than regularizing junior persons first.

3. Other terms and conditions like fulfillment of essential qualification as prescribed in R&P Rules, etc. etc. as laid down in this department letter of 8th July, 1999, as referred to above, shall continue to be operative.

4. These instructions may kindly be brought to the notice of all concerned for strict compliance.

5. These instructions have been issued with the prior approval of the Finance Department obtained vide their Dy. No. 852 dated 23-03-2000."

3. Order dated 6.5.2000, to the extent relevant, reads as follows:

"2. During the process of regularization of daily wagers, various issues and problems relating to these workers concerning their regularization have been brought to the notice of the Government. The Government in order to avoid such confusion or problems has decided to streamline the existing procedure/instructions in order to bring uniformity of procedure in various Departments of the Government. It has, therefore, been decided that henceforth:

(i) Daily Waged/Contingent Paid Workers who have completed required years of continuous service (with a minimum of 240 days in a calendar year except where specified otherwise for the tribal areas) which as per latest instructions issued vide this Department letter of even number dated 3-4-2000 is 8 years as on 31-03-2000 shall be eligible for regularization. However, in Departments/ Corporations/Boards, where the system of the work charge categories also exists, eligible daily wagers will be considered first for bringing them on the work charge category instead of regularization. Such eligible daily waged workers/contingent paid workers will be considered for regularization against vacant posts or by creation of fresh posts and in both these events prior approval of

Finance Department will be required as per heir letter No. Fin-1-C(7)-1/99 dated 24-12-1999. The terms and conditions for such regularization shall be governed as per Annexure –'A'."

4. This scheme was in force till a new scheme introduced on 9th June, 2006. The contention of the petitioners is that on completion of 8 years service, as per the scheme extracted above, they are liable to be granted the work-charged status being on a work charged establishment."

20. Conclusion of verdict of Mathu Ram's and Rakesh Kumar's cases, with respect to gap between issuance/formation of two policies, is that previous policy/scheme shall remain in force till issuance/formation/introduction of subsequent policy/scheme, but cut of date for completion of requisite number of years shall be redundant in subsequent years and benefit of policy/scheme shall be extended to employees immediately on completion of continuous service for requisite number of years with minimum prescribed number of working days in each calendar year. In case regularization is not possible for want of availability of vacancy, the work-charge status has to be conferred upon daily wage employee on completion of requisite number of years prescribed in the Policy/Scheme.

21. Despite having bestowed status of custodian of rights of its citizens, State or its functionaries invariably are adopting exploitative method in the field of public employment to avoid its liabilities, depriving the persons employed from their just claims and benefits by making initial appointments on temporary basis, i.e. contract, adhoc, tenure, daily-wage etc., in order to shirk from its responsibility and delay the conferment of work-charge status or extension of benefits of regularization Policy of the State by not notifying Policies in this regard in future. Present case is also an example of such practice where despite stating in the reply that case of petitioners is under

consideration for grant of work charge status in terms of Rakesh Kumar's case, but the same has not been conferred upon the petitioners till date.

22. Consequently, in view of above discussion and pronouncements of the Court, respondents are directed to grant work-charge status to the petitioners from the date of completion of 8 years of continuous daily wage service in the Department with 240 working days in each calendar year along with all consequential benefits including salary, seniority, pay fixation and pensionary benefits, if any, on or before 30th June, 2022. In case admissible benefits are not paid to the petitioners on or before 30th June, 2022, respondents shall also be liable to pay interest thereon from accrual thereof at the rate of 7.50% per annum.

23. Petitioner No. 2 has expired during pendency of petition, therefore, benefits payable to him shall be extended/disbursed to his legal heirs brought on record as petitioners No. 2(a) to 2(c) as per their entitlement in accordance with rules as applicable.

Petition is allowed in aforesaid terms along with pending applications.

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

Between:-

SH.ANIL KUMAR, SON OF SHRI CHET RAM, RESIDENT OF VILLAGE BALHWANA, PO CHANDPUR, TEHSIL SADAR, DISTRICT BILASPUR HP PRESENTLY WORKING AS DAILY WAGE BELDAR IN HPPWD SUB DIVISION RECKONG PEO, UNDER DIVISION NO. 3, SHIMLA HP

....PETITIONER

(BY SHRI ABHYENDER GUPTA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH PRINCIPAL SECRETARY,
(PWD) WITH HEADQUARTERS AT
SHIMLA-2 H.P.

2. THE ENGINEER-IN-CHIEF, HPPWD,
WITH HEADQUARTERS AT NIRMAN
BHAWAN, SHIMLA HP

3. THE EXECUTIVE ENGINEER,
HPPWD DIVISION NO.3,
SHIMLA HP

4. THE SUB DIVISIONAL OFFICER,
HPPWD SUB DIVISION, RECKNONG
PEO, DISTRICT KINNAUR HP

...RESPONDENTS

(BY SH.HEMANT VAID, ADDITIONAL ADVOCATE GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
NO. 6052 OF 2019
RESERVED ON: 3rd DECEMBER, 2021
DECIDED ON: 7th FEBRUARY, 2022

Constitution of India, 1950 – Article 226 – Extraordinary jurisdiction – Purpose of granting work charge status – Held – A daily wager shall only be regularized against availability of vacancy, however for conferring work charge status there shall be availability of vacancy - On completion of requisite period of service as daily wager the status to be conferred on the petitioner and in absence of regular vacancy the daily wager may not be ousted to deprive him from regularization by discontinuing his services being daily wager and for that purpose there is no need of any work charged establishment in the department, as work charge status is to be conferred upon daily wager -- Work charge status on daily wager cannot be denied for want of work charge establishment in the department -- Petitioner has been regularized from 1.9.2011, however regularization may be governed by availability of vacant regular post but work charge status does not inhibited by such condition and as such petitioner is entitle for work charge status w.e.f. 1.1.2008 along with consequential benefits – Petition allowed. (Paras 15, 21 & 22)

Cases referred:

Gauri Dutt and others Vs. State of H.P., Latest HLJ 2008 (HP) 366;

Mool Raj Upadhaya Vs. State of Himachal Pradesh, 1994 Supp. (2) SCC 316;

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

O R D E R

Petitioner was engaged daily wages as Electric Beldar in the respondent department, H.P. Public Works Department (PWD), on 1.3.1999 and during that year, he worked for 164 days only. In the year 2000 petitioner worked for 199 days, whereas, in the years 2001 and 2002, he worked only for 81 and 31 days respectively.

2 Petitioner was engaged in Tribal area where instead of 240 days, requirement of 180 working days is mandatory in each calender year for requisite number of years prescribed in the Policies/Schemes for regularization issued by Government of HP from time to time.

3 Engagement of petitioner as an Electric Beldar in the respondent department w.e.f. 1st March, 1999 is an undisputed fact. As per Mandays Chart, produced on record by respondent Department, as Annexure R-2, in the year 1999, petitioner served only for 164 days whereas in the year 2000 he served for 199 days. In the years 2001 and 2002, he served for 81 and 31 days only. Thereafter, according to the respondents, he left the job and was re-engaged on muster roll on 19.2.2015 in terms of award dated 31.10.2014 passed by H.P. Industrial Tribunal-cum-Labour Court, Shimla in Reference No. 10 of 2012 (Annexure P-2) whereby respondents were directed to reinstate the petitioner in service from the date of termination i.e. 31.1.2002 with seniority and continuity but without back wages.

4 For the aforesaid award, as indicated in the Mandays Chart (Annexure R-2), petitioner was considered in service with minimum 180 required working days since 2002 till his re-engagement in 2015 and as such, in the light of Court orders, he was considered to have completed 8 years upto

31.12.2009 and, thereafter, extending benefits of regularization policy dated 7.5.2010, his service has been regularized, for completion of 8 years, prospectively with cut off date 31.3.2010 and his pay has been fixed on notional basis w.e.f. 1.9.2011 till 17.12.2015 by taking into consideration the date of regularization of his immediate junior Smt. Rama Devi, T-mate and difference of amount on account of his pay fixation has also been paid to him, as evident from office order dated 7.1.2016 in Annexure R-3, by extending actual benefit to him w.e.f. 22.12.2015.

5 Instant petition has been preferred by petitioner seeking direction to respondent department to confer work charge status upon him/regularize his service from the date of completion of 8 years service with all benefits incidental thereto in terms of policy of State and in the light of pronouncements of this High Court vide judgment dated 28th July, 2010 passed in CWP No. 2735 of 2010 titled Rakesh Kumar vs. State of HP and judgment dated 14.12.2009 passed in CWP No. 4489 of 2009 titled Ravi Kumar vs. State of H.P. by claiming that he is entitled for counting his service from the year 1999 and, thus, for conferment of work charge status/regularization on completion of 8 years in the year 2006.

6 Claim of petitioner has been opposed by respondent department on the ground that petitioner did not complete requisite 180 working days in the year 1999 and though, he had completed 180 working days in the year 2000, but, in subsequent years 2000 and 2001, he served only for 81 days and 31 days and thereafter, left the job, and Labour Court has ordered his re-engagement only w.e.f. 31.1.2002 but not from 1999 and therefore, petitioner has no tenable ground for claiming benefit of counting his 8 years service from 1999.

7 It is also contended on behalf of respondent department that work charge status in Public Works Department was abolished on 19.8.2005 whereas conferment of work charge status in term of Rakesh Kumar's case is available only to those Class-IV workmen who were engaged on daily wage basis and were in continue service w.e.f. 1994, 1995, 1996 and 1997 and further that as per this judgment after abolition of work charge establishment, after 2005, no work charge status can be conferred upon daily wages and as in case petitioner who even if considered in continuous service with 180 working days since 1999, his 8 years will be completing in 2006 whereas work charged establishment has been abolished on 19.8.2005.

8 To substantiate plea of bar to confer work charge status, in case of abolition of work charged establishment, judgment dated 27.10.2014 passed by a Single Bench of this High Court in CWP No. 4589 of 2012 titled Vinay Kumar vs. State of HP has also been referred on behalf of respondent-State.

9 Claim of petitioner is that he was engaged in the year 1999, but, he was not allowed to complete 180 days during that year, and despite serving 199 days in the year 2000, he was terminated in the year 2001 and because of that, he could not complete 180 working days in that year.

10 Against his termination in 2001, petitioner had approached Erstwhile H.P. State Administrative Tribunal by filing OA No. 1731 of 2001, titled Anil Kumar vs. State of HP, which was decided on 2.11.2002 with direction to respondent to re-engage the petitioner in the same capacity preferably at the same place or vicinity whereever the work was available with further direction that period of absence between dis-engagement and re-engagement shall be counted from his seniority. Petitioner has placed on record copy of order passed by Erstwhile H.P. State Administrative Tribunal on

record as Annexure P-1, in consequence whereof, petitioner was re-engaged on muster roll during December 2001 but again his services were terminated w.e.f. 31.1.2002.

11 Being aggrieved by his termination in 2002, petitioner had approached the concerned authority whereupon in the year 2012, a Reference Petition No. 10 of 2012 under Section 10 of Industrial Dispute Act, 1947 was referred to the H.P. Industrial Tribunal-cum-Labour Court, Shimla which was decided on 31.10.2014 directing the respondent Department to reinstate the petitioner in service from the date of his termination i.e. 31.01.2002 with seniority and continuity but without back wages. Copy of award dated 31.1.2014 has been placed on record as Annexure P-2.

12. In response to plea that work-charged establishment does not exist in the respondent-Department, learned counsel for the petitioner has referred pronouncements of this High Court in cases *CWPOA No. 5748 of 2019*, titled as *Man Singh Vs. The State of Himachal Pradesh and others*, *CWPOA No. 52 of 2019*, titled *Beli Ram Vs. State of Himachal Pradesh and another*, *CWPOA No. 5566 of 2019*, titled as *Reema Devi Vs. State of H.P. and others* and *CWPOA No. 5660 of 2019*, titled as *Ghanshyam Thakur Vs. State of Himachal Pradesh and others* wherein similar plea of respondent-State did not find favour of the Court. Crux of these pronouncements has been discussed hereinafter.

13. It is undisputed that in ***Mool Raj Upadhaya Vs. State of Himachal Pradesh, 1994 Supp. (2) SCC 316***, affidavit was filed by Chief Secretary to the Government of Himachal Pradesh, formulating a Scheme for granting work-charged status to all daily-waged employees, serving in the State of Himachal Pradesh, in all Departments, irrespective of the fact that Department is/or was having work-charged establishment or not. In

judgment dated 10.5.2018 rendered by Division Bench of this Court in *CWP No. 3111 of 2016*, titled as *State of Himachal Pradesh Vs. Ashwani Kumar,* upholding the order passed by erstwhile H.P. State Administrative Tribunal, it has been pronounced that work-charged establishment is not a pre-requisite for conferment of work-charge status nor conversion of work-charged employee into regular employee would make such establishment non-existent. Therefore, abolition of work-charge establishment in the respondent-Department w.e.f. 19.8.2005 has no effect on the rights of petitioners for conferment of work-charged status after completion of 8 years in terms of Policy of the Government as well as verdict of Rakesh Kumar's case.

14. Following observations of this Court made in Beli Ram's case are also relevant to be referred here, which read as under:-

> *"22. In* ***Gauri Dutt and others Vs. State of H.P****., reported in* ***Latest HLJ 2008 (HP) 366****, it has been held that the scheme formulated in Mool Raj Upadhaya's case is applicable to daily-waged employees working in any department of the state of Himachal Pradesh and the employees, who are not governed by the directions given in Mool Raj Upadhaya's case, shall be governed by a Scheme framed by the State in this regard and it has also been observed that granting of work-charged status would mean that an employee would get regular scale of pay. 23. Term "work-charged", discussed State of Rajasthan v. Kunji Raman, reported in (1997) 2 SCC 517, is in different context, whereas this term, in Himachal Pradesh, is used in different context. A person, working on daily-waged basis, before his regularization, is granted work-charged status on completion of specified number of years as daily-wager and effect thereof is that thereafter non-completion of 240 days in a calendar year would not result into his ouster from the service or debar him from getting the benefit of length of service for that particular year. Normally, work-charged status is conferred upon a daily-wager, on accrual of his right for regularization, on completion of*

prescribed period of service, but for non-regularization is for want of regular vacancy in the department or for any other just and valid reason. Therefore, it is a period interregnum daily-wage service and regularization, which is altogether different form the temporary establishment of work-charge, as discussed in the judgment of the Apex Court relied upon by the State and, for practice in Himachal Pradesh, work-charged status is not conferred upon the person employed in a project but upon such daily-wage workers, who are to be continued after particular length of service for availability of work but without regularization for want of creation of post by Government for his regularization/ regular appointment. Therefore, work is always available in such cases and the charge of a daily-wager is created thereon to avoid his disengagement for reasons upon which a daily-wager can be dispensed with from service.

24. .. ..

25. On conferment of work-charged status, sword of disengagement, hanging on the neck of workmen, is removed on completion of specified period of daily-waged service, as thereafter instead of daily-wage, the employee would get regular pay-scale and would be entitled to other consequential benefits for which a daily-waged employee is not entitled."

15. Undoubtedly, a daily wager shall only be regularized against available vacancy. However, for conferring work-charged status availability of vacancies is irrelevant. It is a status to be conferred upon daily-wager on completion of requisite period of service as daily-wager, in terms of Policy, in absence of regular vacancy, so as to safe guard the interest of daily-wager regarding his right to be regularized on completion of specific years on daily wages with requisite number of working days in each calendar year, so that after crossing a bar, a daily-wager may not be ousted to deprive him from

regularization by discontinuing his services being daily-wager and for that purpose there is no need of any work-charged establishment in the Department, as work-charge status is to be conferred upon daily wager. Government has power to create or abolish work-charge establishment. In case claim of the workmen for regularization in terms of Policy is to be deferred for want of approval of the Government, availability of the vacancy or for any other action to be performed on the part of State or Department, then conferment of work-charge status on a daily waged cannot be denied for want of work-charge establishment in the Department.

16. Judgment in Vinay Kumar's case relied upon by respondents has been passed by a Single Bench of this Court, whereas thereafter judgment on the same issue, in Ashwani Kumar's case, has been passed by a Division Bench of this Court and the same is binding on this Court as for passing of judgment in Ashwani Kumar's case by Division Bench, verdict of Single Judge is to be considered to have been over-ruled, therefore, grounds taken by respondents-Department that work-charge establishment in Public Works Department to class-IV posts had been abolished w.e.f. 19.8.2005 and thus benefit of conferment of work-charge status upon the petitioners cannot be extended, is not tenable. Hence, objection of the respondents to oust the petitioners in these grounds is not tenable. Judgment in Ashwani Kumar's case has been rendered after pronouncement in Rakesh Kumar's case. Both the pronouncements are by Division Benches. Thus, present petition is to be adjudicated in terms of ratio of Ashwani Kumar's case read with judgment passed in Rakesh Kumar's case.

17. No doubt petitioners are not covered under the Policy formulated and approved by the Supreme Court in Mool Raj Upadhaya's case, but in terms of pronouncements of the Division Bench of this Court in Rakesh Kumar' case which has attained finality for affirmation from the Supreme

Court, read with pronouncement of this High Court in Ashwani Kumar's case, petitioners are entitled for conferring work-charge status immediately on completion of 8 years continuous service as daily waged with 240 working days in each calendar year. These judgments are binding in nature and it is settled law that binding decision should neither be ignored nor be overlooked. Therefore, petitioner is entitled to claim work charge status on completion of 8 years service in terms of pronouncement in Rakesh Kumar's case and Ashwani Kumar's case.

18. Despite having bestowed status of custodian of rights of its citizens, State or its functionaries invariably are adopting exploitative method in the field of public employment to avoid its liabilities, depriving the persons employed from their just claims and benefits by making initial appointments on temporary basis, i.e. contract, adhoc, tenure, daily-wage etc., in order to shirk from its responsibility and delay the conferment of work-charge status or extension of benefits of regularization Policy of the State by not notifying Policies in this regard in future.

19 Respondents have treated the petitioner in service by considering his re-engagement w.e.f. 31.1.2002 in terms of award passed by Labour Court. But, they have ignored the order passed on 2.11.2002 by Erstwhile H.P. State Administrative Tribunal in OA No. 1731 of 2002 whereby first dis-engagement of petitioner in the year 2001 was considered void abinitio and illegal and was qushed with direction to respondent to re-engage him by counting his absence between dis-engagement and re-engagement towards his seniority. In view of this order, as considered for the years 2002 to 2015, for the year 2001 also, working days of petitioner are to be taken as 180 working days and thus, petitioner is to be considered to have completed minimum 180 working days service as daily wager since the year 2000 and as such, his 8 years continuous shall be completed on 31.12.2007 instead of 31.12.2009 and thus,

work charge status upon petitioner is to be conferred from 1.1.2008 with all consequential benefit except back wages as his service in terms of order passed by Erstwhile H.P. State Administrative Tribunal and Labour Court is to be considered in continuity from his initial engagement, but without back wages.

20 Labour Court had ordered to reinstate the services of petitioner on 31.10.2014, whereas, as per Mandays chart petitioner has been re-engaged on 19.9.2015, but, as per office order dated 7.1.2016, Annexure R-3, actual benefit has been extended to petitioner w.e.f. 22.12.2015 whereas petitioner shall be entitled for actual benefit from the date of passing of order by Labour Court i.e. 31.10.2014.

21 Petitioner has been regularized from 1.9.2011 and financial benefits have been extended to him by fixing his emolumnts w.e.f. 1.9.2011. Regularization may be governed by availablity of vacant regular post but work charge status does not inhibited by such condition and as observed supra, petitioner is entitled for work charge status w.e.f. 1.1.2008. Therefore, his wages/emoluments as work charge employee are to be calculated w.e.f. 1.1.2008 with all consequential benefits on notional basis in terms of orders passed by Erstwhile H.P. State Administrative Tribunal and Labour Court with actual monetary benefit w.e.f. date of order passed by Labour Court i.e. 31.10.2014.

22 In view of aforesaid discussion and for the reasons stated therein, petition is allowed with direction to respondents to confer work charge status upon petitioner on completion of 8 years service i.e. w.e.f. 1.1.2008 with all consequential benefits including seniority, continuity, fixation of pay etc., however, actual monetary benefits shall be payable after 31.10.2014 i.e. w.e.f. 1.11.2014. The arrears of benefits shall be paid to petitioner on on

before ***30th June, 2022***, failing which petitioner shall also be entitled for interest at the rate of 7.5% thereon from the date of accrual thereof.

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

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

Between:-

SH. CHUNI LAL
S/O SH. MOTI RAM,
R/O VILLAGE & POST OFFICE KUNHO,
TEHSIL KARSOG,
DISTRICT MANDI, HIMACHAL PRADESH.

....PETITIONER

(BY SH. CHANDERNARAYAN SINGH, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
   THROUGH ITS PRINCIPAL SECRETARY (I & PH) TO THE GOVERNMENT OF HIMACHAL PRADESH, SHIMLA.

2. ENGINEER-IN-CHIEF
   IRRIGATION & PUBLIC HEALTH DEPARTMENT, U.S. CLUB, SHIMLA-2

3. SUPERINTENDING ENGINEER
   IRRIGATION & PUBLIC HEALTH DEPARTMENT, CIRCLE SUNDERNAGAR, DISTRICT MANDI, H.P.

4. EXECUTIVE ENGINEER
   IRRIGATION & PUBLIC HEALTH

DEPARTMENT, DIVISION KARSOG,
DISTRICT MANDI, HIMACHAL PRADESH.

....RESPONDENTS

(BY SH.RAJU RAM RAHI, DEPUTY ADVOCATE GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
NO.3438 OF 2020
Reserved on: 07.01.2022
Decided on: 07.03.2022

Constitution of India, 1950 – Article 226 - Limitation Act, 1963-- Section 3-- Bar of limitation --Petitioner's claim for regularization/ work charge status, after completion of 8 years of services work as Inspector in Irrigation and Public Health Department has been rejected and the persons junior to him have already been regularized after completion of 8 years of continuous daily wage service -- Delay and latches in filing the writ petition – Held - Though law of limitation is not applicable to writ petition however principle of Delay and latches is attracted for adjudication of a petition under Article 226 of Constitution of India – The petition may be ousted for delay and latches in appropriate case – For otherwise strong merits in the case to prevent exploitation of victims for omission and commission on part of mighty state, taking into consideration the circumstances of the petition and in-capability of petitioners to approach the Court invariable for adjudication of issue raised in writ petitions on merits - Petition not liable to be ousted on the ground of delay and latches - Petitioner held entitled for work charge status w.e.f. 01.01.2002 with all consequential benefits - Petition disposed of. (Paras 20 & 24)

Cases referred:

Gauri Dutt and others Vs. State of H.P., Latest HLJ 2008 (HP) 366;
Mool Raj Upadhaya Vs. State of Himachal Pradesh, 1994 Supp. (2) SCC 316;

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

O R D E R

Petitioner has approached this Court being aggrieved by the impugned order dated 28.05.2016 passed by respondent No.3-Superintending Engineer, whereby his claim for regularization/work charge status, after completion of eight years of service as a Work Inspector in Irrigation and Public Health Department (in short 'IPH'), has been rejected. It is claim of the petitioner that persons junior to him have already been regularized after completion of eight years of continuous daily wage service.

2. Petitioner was engaged as a daily wage beldar w.e.f. 05.02.1994 and worked as daily wager Work Inspector w.e.f. 17.031994 in IPH Department. Therefore, he continuously served by completing 240 working days in each calendar year and completed 8 years in the year 2001. His services were regularized on 27.12.2006 as Work Inspector.

3. After regularization, petitioner filed CWP No.787 of 2009, titled as *Chuni Lal & others vs. State of Himachal Pradesh & others,* which was disposed of on 18.05.2010 with a direction to respondents to consider case of the petitioner in terms of judgment of the Supreme Court in ***Mool Raj Upadhyaya vs. State of H.P. & Others, 1994 Supp (2) SCC 316.*** However, case of the petitioner was not considered for regularization/grant of work charge status. Whereupon, petitioner again approached the erstwhile H.P. State Administrative Tribunal by filing Original Application No.2097 of 2015, which was disposed of by directing the respondents to consider the case of the petitioner, in terms of law laid down by this Court in CWP No.2735 of 2010, titled as *Rakesh Kumar & others vs. State of Himachal Pradesh & others.*

4. For omission to consider the case of the petitioner, he preferred Execution Petition No.54 of 2017, titled as *Chuni Lal vs. State of Himachal Pradesh,* wherein respondent-Department justified non grant of work charge status/ regularization in terms of *Rakesh Kumar's case* for want of existence of Work Charge Establishment in the Department to Class-III category to

which petitioner belongs, whereupon, the said execution was withdrawn and present petition has been preferred.

5. Claim of the petitioner has been opposed by the respondent-Department on the ground that petitioner has been regularized vide order dated 27.11.2006 as Work Inspector as per Regularization Policy dated 09.06.2006 with prospective effect from the date of joining, and the petitioner accepted offer of regularization without any protest and joined on 28.12.2006 and, filed Original Application No.2097 of 2015 i.e. present case but after lapse of nine years seeking parity in terms of verdict in *Rakesh Kumar's case,* for granting work charge status after completion of eight years of daily wage service and the case of the petitioner was considered in terms of *Rakesh Kumar's case* and as Work Charge Establishment for Class-III category was abolished in the Department on 19.06.2001 i.e. before completion of eight years of service by the petitioner, therefore, petitioner was not considered to be entitled for work charge status on completion of eight years, and further that regularization, in terms of Policy of the Government, is permissible only against vacant post and as and when vacant post was available and Policy was issued by the Government, petitioner had been regularized with prospective date.

6. Respondent-Department has relied upon pronouncement of Division Bench in CWP No.2735 of 2010, *Rakesh Kumar vs. State of H.P.* and also of the Single Bench in CWP No.4589 of 2012, titled as *Vinay Kumar vs. State of H.P.,* decided on 27.10.2014 for justifying rejection of claim of the petitioner to confer work charge status for abolition of Work Charge Establishment in the Department.

7. In response to plea that work-charged establishment does not exist in the respondent-Department, learned counsel for the petitioner has referred pronouncements of this High Court in cases CWPOA No. 5748 of 2019, titled as Man Singh Vs. The State of Himachal Pradesh and others,

CWPOA No. 52 of 2019, titled Beli Ram Vs. State of Himachal Pradesh and another, CWPOA No. 5566 of 2019, titled as Reema Devi Vs. State of H.P. and others and CWPOA No. 5660 of 2019, titled as Ghanshyam Thakur Vs. State of Himachal Pradesh and others wherein similar plea of respondent-State did not find favour of the Court. Crux of these pronouncements has been discussed hereinafter.

8. It is undisputed that in Mool Raj Upadhaya Vs. State of Himachal Pradesh, 1994 Supp. (2) SCC 316, affidavit was filed by Chief Secretary to the Government of Himachal Pradesh, formulating a Scheme for granting work-charged status to all daily-waged employees, serving in the State of Himachal Pradesh, in all Departments, irrespective of the fact that Department is/or was having work-charged establishment or not. In judgment dated 10.5.2018 rendered by Division Bench of this Court in CWP No. 3111 of 2016, titled as State of Himachal Pradesh Vs. Ashwani Kumar, upholding the order passed by erstwhile H.P. State Administrative Tribunal, it has been pronounced that work-charged establishment is not a pre-requisite for conferment of work-charge status nor conversion of work-charged employee into regular employee would make such establishment non-existent. Therefore, abolition of work-charge establishment in the respondent-Department w.e.f. 19.8.2005 has no effect on the rights of petitioners for conferment of work-charged status after completion of 8 years in terms of Policy of the Government as well as verdict of Rakesh Kumar's case.

9. Following observations of this Court made in Beli Ram's case are also relevant to be referred here, which read as under:-

> *"22. In* ***Gauri Dutt and others Vs. State of H.P****., reported in* ***Latest HLJ 2008 (HP) 366****, it has been held that the scheme formulated in Mool Raj Upadhaya's case is applicable to daily-waged employees working in any department of the state of Himachal Pradesh and the employees, who are not governed by the directions given in Mool Raj Upadhaya's case, shall be*

governed by a Scheme framed by the State in this regard and it has also been observed that granting of work-charged status would mean that an employee would get regular scale of pay.

23. Term "work-charged", discussed State of Rajasthan v. Kunji Raman, reported in (1997) 2 SCC 517, is in different context, whereas this term, in Himachal Pradesh, is used in different context. A person, working on daily-waged basis, before his regularization, is granted work-charged status on completion of specified number of years as daily-wager and effect thereof is that thereafter non-completion of 240 days in a calendar year would not result into his ouster from the service or debar him from getting the benefit of length of service for that particular year. Normally, work-charged status is conferred upon a daily-wager, on accrual of his right for regularization, on completion of prescribed period of service, but for non-regularization is for want of regular vacancy in the department or for any other just and valid reason. Therefore, it is a period interregnum daily-wage service and regularization, which is altogether different form the temporary establishment of work-charge, as discussed in the judgment of the Apex Court relied upon by the State and, for practice in Himachal Pradesh, work-charged status is not conferred upon the person employed in a project but upon such daily-wage workers, who are to be continued after particular length of service for availability of work but without regularization for want of creation of post by Government for his regularization/ regular appointment. Therefore, work is always available in such cases and the charge of a daily-wager is created thereon to avoid his disengagement for reasons upon which a daily-wager can be dispensed with from service.

24. .. ..

25. On conferment of work-charged status, sword of disengagement, hanging on the neck of workmen, is removed on completion of specified period of daily-waged service, as thereafter instead of daily-wage, the employee would get

regular pay-scale and would be entitled to other consequential benefits for which a daily-waged employee is not entitled."

10. Undoubtedly, a daily wager shall only be regularized against available vacancy. However, for conferring work-charged status availability of vacancies is irrelevant. It is a status to be conferred upon daily-wager on completion of requisite period of service as daily-wager, in terms of Policy, in absence of regular vacancy, so as to safe guard the interest of daily-wager regarding his right to be regularized on completion of specific years on daily wages with requisite number of working days in each calendar year, so that after crossing a bar, a daily-wager may not be ousted to deprive him from regularization by discontinuing his services being daily-wager and for that purpose there is no need of any work-charged establishment in the Department, as work-charge status is to be conferred upon daily wager. Government has power to create or abolish work-charge establishment. In case claim of the workmen for regularization in terms of Policy is to be deferred for want of approval of the Government, availability of the vacancy or for any other action to be performed on the part of State or Department, then conferment of work-charge status on a daily waged cannot be denied for want of work-charge establishment in the Department.

11. Judgment in Vinay Kumar's case relied upon by respondents has been passed by a Single Bench of this Court, whereas thereafter judgment on the same issue, in Ashwani Kumar's case, has been passed by a Division Bench of this Court and the same is binding on this Court as for passing of judgment in Ashwani Kumar's case by Division Bench, verdict of Single Judge is to be considered to have been over-ruled, therefore, grounds taken by respondents-Department that work-charge establishment in Public Works Department to class-IV posts had been abolished w.e.f. 19.8.2005 and thus benefit of conferment of work-charge status upon the petitioners cannot be

extended, is not tenable. Hence, objection of the respondents to oust the petitioners in these grounds is not tenable. Judgment in Ashwani Kumar's case has been rendered after pronouncement in Rakesh Kumar's case. Both the pronouncements are by Division Benches. Thus, present petition is to be adjudicated in terms of ratio of Ashwani Kumar's case read with judgment passed in Rakesh Kumar's case.

12. No doubt petitioner is not covered under the Policy formulated and approved by the Supreme Court in Mool Raj Upadhaya's case, but in terms of pronouncements of the Division Bench of this Court in Rakesh Kumar' case which has attained finality for affirmation from the Supreme Court, read with pronouncement of this High Court in Ashwani Kumar's case, petitioner is entitled for conferring work-charge status immediately on completion of 8 years continuous service as daily waged with 240 working days in each calendar year. These judgments are binding in nature and it is settled law that binding decision should neither be ignored nor be overlooked.

13. Regarding regularization of the petitioner from prospective dates of passing of order after issuance of fresh Policy of the Government and withholding regularization/grant of work-charged status to the petitioner for want of time gap between two Policies, learned counsel for the petitioner has referred pronouncements of this Court passed in *CWP No. 2415 of 2012, titled as Mathu Ram Vs. Municipal Corporation and others*, decided on 31.7.2014, wherein learned Single Judge has made the following observations:-

> *"5. It cannot be disputed that the policy of regularisation has been extended from time to time. The mere fact that there was a time gap in issuance of the policy of regularisation which prescribed different cut off dates cannot be a ground to deny the benefit of regularisation to the of the policy of regularisation which prescribed different cut off dates cannot be a ground to deny the benefit of regularisation to the petitioner on his completion of 8 years of service on daily waged basis in terms of Rakesh Kumar (supra)."*

14. Judgment of Single Bench passed in Mathu Ram's case has been affirmed by a Division Bench in LPA No. 44 of 2015, observing as under:-

> *"5. Respondent was appointed in the month of November, 1993. He has completed 8 years of service in the year 2001. The workmen, who have completed 8 years of service, were required to be regularized immediately after the completion of 8 years' service. Appellant - corporation is State within the meaning of Article 12 of the Constitution of India. The practice of the respondent-corporation not to regularize the services of the workmen, though they have completed 8 years of service, amounts to unfair labour practice.*
>
> *6. The issue raised in the LPA is no more res integra in view of the judgment rendered in CWP No.2735 of 2010 decided on 28.7.2010, titled as Rakesh Kumar vs. State of H.P. and others. Relevant portion of the judgment reads as under:*
>
> > *"2. The only reference to be made for analyzing the grievance of the petitioners is two orders of the Government. One order is dated 3.4.2000 and other is dated 6.5.2000. Order dated 3.4.2000, reads as follows:*
> >
> > > *"In partial modification of this Department letter of even number dated 8th July, 1999 on the above subject, I am directed to say that the Government has now decided that the Daily Waged/Contingent Paid workers in all the Departments including Public Works and Irrigation and Public Health Departments (other than work-charged categories)/Boards/ Corporations /Universities, etc. who have completed 8 years of continuous service (with a minimum of 240 days in a calendar year) as on 31-03-2000 will be eligible for regularization. It has further been decided that completion of required years of service makes such daily wager/contingent paid worker eligible for consideration to be regularized and regularization in all cases will be from prospective*

effect i.e. from the date the order of regularization is issued after completion of codal formalities.

2. In view of the above decision and in order to avoid any litigation and also any hardship to daily wagers departments shall do the regularization based on seniority and they will ensure that senior persons are regularized first rather than regularizing junior persons first.

3. Other terms and conditions like fulfillment of essential qualification as prescribed in R&P Rules, etc. etc. as laid down in this department letter of 8th July, 1999, as referred to above, shall continue to be operative.

4. These instructions may kindly be brought to the notice of all concerned for strict compliance.

5. These instructions have been issued with the prior approval of the Finance Department obtained vide their Dy. No. 852 dated 23-03-2000."

3. Order dated 6.5.2000, to the extent relevant, reads as follows:

"2. During the process of regularization of daily wagers, various issues and problems relating to these workers concerning their regularization have been brought to the notice of the Government. The Government in order to avoid such confusion or problems has decided to streamline the existing procedure/instructions in order to bring uniformity of procedure in various Departments of the Government. It has, therefore, been decided that henceforth:

(i) Daily Waged/Contingent Paid Workers who have completed required years of continuous service (with a minimum of 240 days in a calendar year except where specified otherwise for the tribal areas) which as per latest instructions issued vide this Department letter of even number dated 3-4-2000 is 8 years as on 31-03-2000 shall be eligible for regularization. However, in Departments/ Corporations/Boards, where the system of the work charge categories also exists, eligible daily wagers

> *will be considered first for bringing them on the work charge category instead of regularization. Such eligible daily waged workers/contingent paid workers will be considered for regularization against vacant posts or by creation of fresh posts and in both these events prior approval of Finance Department will be required as per heir letter No. Fin-1-C(7)-1/99 dated 24-12-1999. The terms and conditions for such regularization shall be governed as per Annexure –'A'."*
>
> *4. This scheme was in force till a new scheme introduced on 9th June, 2006. The contention of the petitioners is that on completion of 8 years service, as per the scheme extracted above, they are liable to be granted the work-charged status being on a work charged establishment."*

15. Conclusion of verdict of Mathu Ram's and Rakesh Kumar's cases, with respect to gap between issuance/formation of two policies, is that previous policy/scheme shall remain in force till issuance/formation/introduction of subsequent policy/scheme, but cut of date for completion of requisite number of years shall be redundant in subsequent years and benefit of policy/scheme shall be extended to employees immediately on completion of continuous service for requisite number of years with minimum prescribed number of working days in each calendar year. In case regularization is not possible for want of availability of vacancy, the work-charge status has to be conferred upon daily wage employee on completion of requisite number of years prescribed in the Policy/Scheme.

16. To rebut the plea raised on behalf of respondent-Department regarding delay and laches, learned counsel for the petitioner has referred pronouncements of this High Court in CWPOA No. 5748 of 2019, titled Man Singh Vs. The State of H.P. and others, CWPOA No. 5660 of 2019, titled Ghanshyam Thakur Vs. State of Himachal Pradesh and others, and CWPOA

No. 46 of 2020, titled as Yashwant Singh and others Vs. State of Himachal Pradesh and others.

17. In the light of above referred pronouncements plea of respondents-Department to oust the petitioner on the ground of delay and laches, in my opinion, in present case is not sustainable. Petitioner is a Work Inspector and belongs to the lowest rank in his class. As per Policy a duty was cast on the respondents to consider the cases of eligible workmen for conferment of work charge status on completion of required number of years as per Policy.

18. The issue in this regard also stands settled in the judgment of Rakesh Kumar's case, wherein it has been observed as under:-

> *"6. The simple question is whether the delay defeats justice? In analyzing the above issue, it has to be borne in mind that the petitioners are only class-IV workers (Beldars). The schemes announced by the Government clearly provided that the department concerned should consider the workmen concerned for bringing them on the work-charged category. So, there is an obligation cast on the department to consider the cases of the daily waged workmen for conferment of the work-charged status, being on a work-charged establishment, on completion of the required number of years in terms of the policy. At the best, the petitioners can only be denied the interest on the eligible benefits and not the benefits as such, which accrued on them as per the policy and under which policy, the department was found to confer the status, subject to the workmen satisfying the required conditions."*

19. Similar benefits have been extended to similarly situated employees. Thus, petitioner cannot be discriminated on the ground of delay and laches, particularly when it was duty of respondents to extend such benefits to the petitioner. State should act as a model employer and should extend benefits of its Policies to all eligible persons, in consonance with

pronouncements of the Court(s) which have attained finality, without any discrimination particularly when identical objections have already been overruled by the Courts and such pronouncements have attained finality,. Thus claim of the petitioner cannot be refuted only on the ground of delay and laches and for joining on regularization without protest.

20. Though Law of Limitation, is not applicable, however principle of delay and laches is attracted for adjudication of a petition under Article 226 of the Constitution of India. The petitioner may be ousted for delay and laches in appropriate case. For otherwise strong merit in the case, in order to prevent exploitation of victims for omission and commission on the part of mighty State, taking into consideration the circumstances of the petition and incapability of petitioners to approach the Court invariably, delay and laches may be ignored for adjudication of issue raised in the Writ Petition on merits. Therefore, I am of the considered view that petitioners, in present petition, are not liable to be ousted on the ground the delay and laches.

21. Learned Deputy Advocate General has contended that petitioner was engaged as a Class-III employee and, therefore, ratio of law laid down for Class-IV Beldars is not applicable in present case. Therefore, pronouncements related to Beldars are not applicable in case of the petitioner.

22. Policies of the State issued from time to time do not differentiate between Class-III and Class-IV employees for regularization of the daily wage as Policies have been issued for conferring work charge status or regularization of employees engaged on daily wage basis irrespective of their category/class and all Policies are applicable to all daily wage employees engaged either as Class-IV or Class-III employees. Therefore, contention of learned Deputy Advocate General in this regard is not tenable. It is also apt to notice that in *Ashwani Kumar's case* also petitioner was Class-III employee.

23. Despite having bestowed status of custodian of rights of its citizens, State or its functionaries invariably are adopting exploitative method

in the field of public employment to avoid its liabilities, depriving the persons employed from their just claims and benefits by making initial appointments on temporary basis, i.e. contract, adhoc, tenure, daily-wage etc., in order to shirk from its responsibility and delay the conferment of work-charge status or extension of benefits of regularization Policy of the State by not notifying Policies in this regard in future.

24. In view of above discussion, petitioner is held entitled for work charge status w.e.f. 01.01.2002 with all consequential benefits, including seniority, pay fixation etc. and accordingly, respondents are directed to ensure grant of work charge status to the petitioner on or before 30.06.2022 alongwith all consequential benefits, including payment of arrears, if any, failing which petitioner shall also be entitled for interest on the arrears @ 7.50% per annum from the date of accrual till final payment thereof from the respondents.

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

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

Between:-

1. SH. ATMA RAM
   S/O SH. DURGA,
   R/O VILLAGE, CHARIDHAR,
   POST OFFICE KUNHOO, TEHSIL KARSOG,
   DISTRICT MANDI, HIMACHAL PRADESH.

2. SH. RAM DASS
   S/O SH. SAGRU RAM,
   R/O VILLAGE DHINGLI,
   POST OFFICE KUNHOO, TEHSIL KARSOG,
   DISTRICT MANDI, HIMACHAL PRADESH. ….PETITIONERS

(BY SH. CHANDERNARAYAN SINGH,
ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH
THROUGH PRINCIPAL SECRETARY
(FOREST) TO THE GOVERNMENT OF
HIMACHAL PRADESH, SHIMLA.

2. CHIEF CONSERVATOR OF FOREST,
TALLAND, DISTRICT SHIMLA,
HIMACHAL PRADESH.

3. DIVISIONAL FOREST OFFICER,
FOREST DIVISION, KARSOG,
DISTRICT MANDI, HIMACHAL PRADESH.

....RESPONDENTS

(BY SH.RAJU RAM RAHI, DEPUTY
ADVOCATE GENERAL)

CIVIL WRIT PETITION (ORIGINAL APPLICATION)
NO.6365 Of 2019
Reserved on:07.01.2022
Decided on:07.03.2022

Constitution of India, 1950 -- Article 226 - Claim of Petitioner for work charged status was rejected on the ground that forest department is not work charge establishment ---Held-- Petitioners are not covered under the policy formulated and approved by Supreme Court in Mool Raj Upadhyay's case but in terms of pronouncement of Division Bench of this Court in Rakesh Kumar's case which has attained finality from the Supreme Court read with pronouncement of this Court in Ashwini Kumar's case petitioner are entitled for continuous works charge status immediately on completion of eight years continuous service as daily wages with 240 working days in each calendar year-- Petitioner held entitled for work charge status w.e.f 1.1.2004 with all consequential benefits including seniority, pay fixation

and pensionary benefits and accordingly respondents are directed to ensure work charge status to the petitioner on or before 30.6.2022 along with all consequential benefits including payment of interest failing which the petitioner shall be entitled for interest @ 7.50% per annum from the date of accrual till final payment thereof from the respondent - Petition stands disposed of. (Paras 12 & 18)

Cases referred:

Gauri Dutt and others Vs. State of H.P., Latest HLJ 2008 (HP) 366;

Mool Raj Upadhaya Vs. State of Himachal Pradesh, 1994 Supp. (2) SCC 316;

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

O R D E R

Petitioners were engaged on daily-wage basis as Beldars in the Forest Department in the year, 1992, but they had completed minimum 240 days in each calendar year continuously w.e.f. 1994 and completed eight years daily wage service as such on 31.12.2002. However, they were regularized vide order dated 10.10.2007 on issuance of Policy by the Government of Himachal Pradesh and availability of vacancies.

2. Petitioners, alongwith others had filed CWP No.3056 of 2009, titled as *Megh Singh & others vs. State of Himachal Pradesh,* which was disposed of with a direction to the respondent-Department to consider the case of the petitioners for regularization in terms of judgment passed in ***Mool Raj Upadhyaya vs. State of H.P. & Others, 1994 Supp (2) SCC 316.*** Claim of the petitioners was rejected in the year 2011 on the ground that petitioners did not complete ten years of requisite continuous daily wage service prior to 31.12.2003, which was precondition for extending benefit in terms of *Mool Raj Upadhayaya's case*. Whereupon, petitioners preferred Contempt Petition (COPC No.527 of 2011) which was disposed of with a

direction to the respondents to consider the case of the petitioners in terms of judgment of the Division Bench of this High Court passed in CWP No.2735 of 2010, titled as *Rakesh Kumar and others vs. State of Himachal Pradesh.* For not taking any decision by the respondents, another contempt petition (COPC No.666 of 2015) was preferred by the petitioners which was disposed of with a direction to consider case of the petitioners within a week from the date of passing of the order i.e. 19.11.2015.

3. After taking into consideration clarification received from the Government, it has been concluded by the respondent-Department that Forest Department is not a Work Charge Establishment and, therefore, as observed in *Rakesh Kumar's case,* petitioners are not entitled for grant of work charge status in terms of judgment in *Rakesh Kumar's case.*

4. Feeling aggrieved and dissatisfied with the rejection of their claim, present petition has been preferred.

5. Petition has been opposed by the respondent-Department on the ground that Forest Department is not a Work Charge Establishment and, therefore, petitioners' claim has been rightly rejected and further that Policies of the State issued from time to time do not provide conferment of work charge status or regularization immediately on completion of requisite years of service prescribed therein, but services of the workmen are regularized or conferred work charge status only on issuance of new Policy with prospective effect, but not on completion of period of service specified in previous Policy. According to respondents, petitioners are working continuously with minimum 240 working days in each calendar year w.e.f. 01.01.1995, but not from 01.01.1994.

6. For substantiating rejection of claim of petitioners for conferring work charge status upon them for want of Work Charge Establishment in Forest Department, respondents have placed reliance on judgment of a

Division Bench in CWP No.2735 of 2010, titled as *Rakesh Kumar vs. State of H.P. and others.*

7. In response to plea that work-charged establishment does not exist in the respondent-Department, learned counsel for the petitioner has referred pronouncements of this High Court in cases CWPOA No. 5748 of 2019, titled as Man Singh Vs. The State of Himachal Pradesh and others, CWPOA No. 52 of 2019, titled Beli Ram Vs. State of Himachal Pradesh and another, CWPOA No. 5566 of 2019, titled as Reema Devi Vs. State of H.P. and others and CWPOA No. 5660 of 2019, titled as Ghanshyam Thakur Vs. State of Himachal Pradesh and others wherein similar plea of respondent-State did not find favour of the Court. Crux of these pronouncements has been discussed hereinafter.

8. It is undisputed that in Mool Raj Upadhaya Vs. State of Himachal Pradesh, 1994 Supp. (2) SCC 316, affidavit was filed by Chief Secretary to the Government of Himachal Pradesh, formulating a Scheme for granting work-charged status to all daily-waged employees, serving in the State of Himachal Pradesh, in all Departments, irrespective of the fact that Department is/or was having work-charged establishment or not. In judgment dated 10.5.2018 rendered by Division Bench of this Court in CWP No. 3111 of 2016, titled as State of Himachal Pradesh Vs. Ashwani Kumar, upholding the order passed by erstwhile H.P. State Administrative Tribunal, it has been pronounced that work-charged establishment is not a pre-requisite for conferment of work-charge status nor conversion of work-charged employee into regular employee would make such establishment non-existent. Therefore, abolition of work-charge establishment in the respondent-Department w.e.f. 19.8.2005 has no effect on the rights of petitioners for conferment of work-charged status after completion of 8 years in terms of Policy of the Government as well as verdict of Rakesh Kumar's case.

9. Following observations of this Court made in Beli Ram's case are also relevant to be referred here, which read as under:-

> *"22. In* ***Gauri Dutt and others Vs. State of H.P****., reported in* ***Latest HLJ 2008 (HP) 366****, it has been held that the scheme formulated in Mool Raj Upadhaya's case is applicable to daily-waged employees working in any department of the state of Himachal Pradesh and the employees, who are not governed by the directions given in Mool Raj Upadhaya's case, shall be governed by a Scheme framed by the State in this regard and it has also been observed that granting of work-charged status would mean that an employee would get regular scale of pay. 23. Term "work-charged", discussed State of Rajasthan v. Kunji Raman, reported in (1997) 2 SCC 517, is in different context, whereas this term, in Himachal Pradesh, is used in different context. A person, working on daily-waged basis, before his regularization, is granted work-charged status on completion of specified number of years as daily-wager and effect thereof is that thereafter non-completion of 240 days in a calendar year would not result into his ouster from the service or debar him from getting the benefit of length of service for that particular year. Normally, work-charged status is conferred upon a daily-wager, on accrual of his right for regularization, on completion of prescribed period of service, but for non-regularization is for want of regular vacancy in the department or for any other just and valid reason. Therefore, it is a period interregnum daily-wage service and regularization, which is altogether different form the temporary establishment of work-charge, as discussed in the judgment of the Apex Court relied upon by the State and, for practice in Himachal Pradesh, work-charged status is not conferred upon the person employed in a project but upon such daily-wage workers, who are to be continued after particular length of service for availability of work but without regularization for want of creation of post by Government for his regularization/ regular appointment. Therefore, work is always available in such cases and the charge of a daily-wager is created thereon to*

> *avoid his disengagement for reasons upon which a daily-wager can be dispensed with from service.*
>
> *24. .. ..*
>
> *25. On conferment of work-charged status, sword of disengagement, hanging on the neck of workmen, is removed on completion of specified period of daily-waged service, as thereafter instead of daily-wage, the employee would get regular pay-scale and would be entitled to other consequential benefits for which a daily-waged employee is not entitled."*

10. Undoubtedly, a daily wager shall only be regularized against available vacancy. However, for conferring work-charged status availability of vacancies is irrelevant. It is a status to be conferred upon daily-wager on completion of requisite period of service as daily-wager, in terms of Policy, in absence of regular vacancy, so as to safe guard the interest of daily-wager regarding his right to be regularized on completion of specific years on daily wages with requisite number of working days in each calendar year, so that after crossing a bar, a daily-wager may not be ousted to deprive him from regularization by discontinuing his services being daily-wager and for that purpose there is no need of any work-charged establishment in the Department, as work-charge status is to be conferred upon daily wager. Government has power to create or abolish work-charge establishment. In case claim of the workmen for regularization in terms of Policy is to be deferred for want of approval of the Government, availability of the vacancy or for any other action to be performed on the part of State or Department, then conferment of work-charge status on a daily waged cannot be denied for want of work-charge establishment in the Department.

11. Judgment in Vinay Kumar's case relied upon by respondents has been passed by a Single Bench of this Court, whereas thereafter judgment on the same issue, in Ashwani Kumar's case, has been passed by a Division

Bench of this Court and the same is binding on this Court as for passing of judgment in Ashwani Kumar's case by Division Bench, verdict of Single Judge is to be considered to have been over-ruled, therefore, grounds taken by respondents-Department that work-charge establishment in Public Works Department to class-IV posts had been abolished w.e.f. 19.8.2005 and thus benefit of conferment of work-charge status upon the petitioners cannot be extended, is not tenable. Hence, objection of the respondents to oust the petitioners in these grounds is not tenable. Judgment in Ashwani Kumar's case has been rendered after pronouncement in Rakesh Kumar's case. Both the pronouncements are by Division Benches. Thus, present petition is to be adjudicated in terms of ratio of Ashwani Kumar's case read with judgment passed in Rakesh Kumar's case.

12. No doubt petitioners are not covered under the Policy formulated and approved by the Supreme Court in Mool Raj Upadhaya's case, but in terms of pronouncements of the Division Bench of this Court in Rakesh Kumar' case which has attained finality for affirmation from the Supreme Court, read with pronouncement of this High Court in Ashwani Kumar's case, petitioners are entitled for conferring work-charge status immediately on completion of 8 years continuous service as daily waged with 240 working days in each calendar year. These judgments are binding in nature and it is settled law that binding decision should neither be ignored nor be overlooked.

13. Regarding regularization of the petitioners from prospective dates of passing of order after issuance of fresh Policy of the Government and withholding regularization/grant of work-charged status to the petitioners for want of time gap between two Policies, learned counsel for the petitioner has referred pronouncements of this Court passed in *CWP No. 2415 of 2012, titled as Mathu Ram Vs. Municipal Corporation and others*, decided on 31.7.2014, wherein learned Single Judge has made the following observations:-

"5. It cannot be disputed that the policy of regularisation has been extended from time to time. The mere fact that there was a time gap in issuance of the policy of regularisation which prescribed different cut off dates cannot be a ground to deny the benefit of regularisation to the of the policy of regularisation which prescribed different cut off dates cannot be a ground to deny the benefit of regularisation to the petitioner on his completion of 8 years of service on daily waged basis in terms of Rakesh Kumar (supra)."

14. Judgment of Single Bench passed in Mathu Ram's case has been affirmed by a Division Bench in LPA No. 44 of 2015, observing as under:-

"5. Respondent was appointed in the month of November, 1993. He has completed 8 years of service in the year 2001. The workmen, who have completed 8 years of service, were required to be regularized immediately after the completion of 8 years' service. Appellant - corporation is State within the meaning of Article 12 of the Constitution of India. The practice of the respondent-corporation not to regularize the services of the workmen, though they have completed 8 years of service, amounts to unfair labour practice.

6. The issue raised in the LPA is no more res integra in view of the judgment rendered in CWP No.2735 of 2010 decided on 28.7.2010, titled as Rakesh Kumar vs. State of H.P. and others. Relevant portion of the judgment reads as under:

"2. The only reference to be made for analyzing the grievance of the petitioners is two orders of the Government. One order is dated 3.4.2000 and other is dated 6.5.2000. Order dated 3.4.2000, reads as follows:

"In partial modification of this Department letter of even number dated 8th July, 1999 on the above subject, I am directed to say that the Government has now decided that the Daily Waged/Contingent Paid workers in all the Departments including Public Works and Irrigation and Public Health Departments (other than work-charged categories)/Boards/

Corporations /Universities, etc. who have completed 8 years of continuous service (with a minimum of 240 days in a calendar year) as on 31-03-2000 will be eligible for regularization. It has further been decided that completion of required years of service makes such daily wager/contingent paid worker eligible for consideration to be regularized and regularization in all cases will be from prospective effect i.e. from the date the order of regularization is issued after completion of codal formalities.

2. In view of the above decision and in order to avoid any litigation and also any hardship to daily wagers departments shall do the regularization based on seniority and they will ensure that senior persons are regularized first rather than regularizing junior persons first.

3. Other terms and conditions like fulfillment of essential qualification as prescribed in R&P Rules, etc. etc. as laid down in this department letter of 8th July, 1999, as referred to above, shall continue to be operative.

4. These instructions may kindly be brought to the notice of all concerned for strict compliance.

5. These instructions have been issued with the prior approval of the Finance Department obtained vide their Dy. No. 852 dated 23-03-2000."

3. Order dated 6.5.2000, to the extent relevant, reads as follows:

"2. During the process of regularization of daily wagers, various issues and problems relating to these workers concerning their regularization have been brought to the notice of the Government. The Government in order to avoid such confusion or problems has decided to streamline the existing procedure/instructions in order to bring uniformity of procedure in various Departments of the Government. It has, therefore, been decided that henceforth:

(i) Daily Waged/Contingent Paid Workers who have completed required years of continuous service (with

a minimum of 240 days in a calendar year except where specified otherwise for the tribal areas) which as per latest instructions issued vide this Department letter of even number dated 3-4-2000 is 8 years as on 31-03-2000 shall be eligible for regularization. However, in Departments/ Corporations/Boards, where the system of the work charge categories also exists, eligible daily wagers will be considered first for bringing them on the work charge category instead of regularization. Such eligible daily waged workers/contingent paid workers will be considered for regularization against vacant posts or by creation of fresh posts and in both these events prior approval of Finance Department will be required as per heir letter No. Fin-1-C(7)-1/99 dated 24-12-1999. The terms and conditions for such regularization shall be governed as per Annexure –'A'."

4. This scheme was in force till a new scheme introduced on 9th June, 2006. The contention of the petitioners is that on completion of 8 years service, as per the scheme extracted above, they are liable to be granted the work-charged status being on a work charged establishment."

15. Conclusion of verdict of Mathu Ram's and Rakesh Kumar's cases, with respect to gap between issuance/formation of two policies, is that previous policy/scheme shall remain in force till issuance/formation/introduction of subsequent policy/scheme, but cut of date for completion of requisite number of years shall be redundant in subsequent years and benefit of policy/scheme shall be extended to employees immediately on completion of continuous service for requisite number of years with minimum prescribed number of working days in each calendar year. In case regularization is not possible for want of availability of vacancy, the work-

charge status has to be conferred upon daily wage employee on completion of requisite number of years prescribed in the Policy/Scheme.

16. Plea of the respondent-Department that petitioners are serving continuously with 240 working days w.e.f. 01.01.1995 has not been controverted in rejoinder filed by the petitioners or otherwise. However, examples of similarly situated persons have been placed on record, wherein respondent-Department has conferred work charge status upon similarly situated workmen in the year, 2006 in compliance of judgment of this High Court in CWP No.4071 of 2012, titled as *Dhani Ram vs. State of Himachal Pradesh,* and there is no rebuttal to these examples placed on record by the petitioners.

17. Despite having bestowed status of custodian of rights of its citizens, State or its functionaries invariably are adopting exploitative method in the field of public employment to avoid its liabilities, depriving the persons employed from their just claims and benefits by making initial appointments on temporary basis, i.e. contract, adhoc, tenure, daily-wage etc., in order to shirk from its responsibility and delay the conferment of work-charge status or extension of benefits of regularization Policy of the State by not notifying Policies in this regard in future.

18. In view of above discussion, petitioners are held entitled for work charge status w.e.f. 01.01.2004 with all consequential benefits, including seniority, pay fixation and pensionary benefits etc. and accordingly, respondents are directed to ensure grant of work charge status to the petitioners on or before 30.06.2022 alongwith all consequential benefits, including payment of arrears, if any, failing which petitioners shall also be entitled for interest on the arrears @ 7.50% per annum from the date of accrual till final payment thereof from the respondents.

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

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

Between:-

1. STATE OF H.P. THROUGH
SECRETARY (EDUCATION) TO THE
GOVERNMENT OF HIMACHAL PRADESH,
SHIMLA-171 001.

2. DIRECTOR OF EDUCATION,
HIMACHAL PRADESH, SHIMLA-171 001.

....APPELLANTS.

(BY MR. RANJAN SHARMA, ADDITIONAL
ADVOCATE GENERAL)

AND

1. PANCHAM BUTAIL,
W/O SH. MANOHAR BUTAIL,
AGED 53 YEARS, PRESENTLY WORKING AS
PA TO DIRECTOR OF SECONDARY EDUCATION,
DIRECTORTAE OF EDUCATION, SHIMLA
R/O THE BUTAILS, KOMLI BANK,
SHIMLA-3 (HP).

...RESPONDENT.

2. SH. R.C. MASTANA,
PERSONAL ASSISTANT C/O DIRECTORATE
OF EDUCATION, DIRETORATE OF EDUCATION,
HP. SHIMLA (HP).

..PROFORMA RESPONDENT

(MR. P.P. CHAUHAN, ADVOCATE FOR RESPONDENT NO.1.)

LETTERS PATENT APPEAL
NO. 62 OF 2012
Decided on: 11.03.2022

Constitution of India 1950 - Service matter – Seniority - Article 226 –In the seniority list of Senior Scale Stenographers respondent No.1 was placed higher in seniority than respondent number 2 by applying "Catch up Principle", however in the seniority list of personal assistant no.2 was given higher placement - Apprehending the promotion of respondent number 2 to the post of Private Secretary before him, respondent number one approached the State Administrative Tribunal and on abolition of Tribunal matter was transferred to this Court - State contested the claim of petitioner in original application on the ground that petitioner had been working as Personal Assistant on ad-hoc basis, therefore she had no claim to the post of Private Secretary - Held - Ad-hoc service or less than 5 years service of respondent No.1 in the feeder category of Personal Assistant could not be an impediment in grant of relief to him - In this case the judgment passed by learnt single Judge was not to be considered as judgment in rem - Appeal has no merits and accordingly dismissed. (Paras 2,3,6,8 & 9)

Cases referred:

Ajit Singh and others (II) v. State of Punjab and others, (1999) 7 SCC 209;
Sub Inspector Roop Lal and another vs. Lt. Governor through Chief Secretary, Delhi and others, (2000) 1 SCC 644;

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

J U D G M E N T

By way of instant appeal, appellants have assailed the judgment dated 11.08.2011 passed by learned Single Judge in CWP(T) No. 14579 of 2008.

2. Brief facts of the case are as under: -

2.1. Both the respondents were appointed to the posts of Steno Typist on the same day i.e. 1.7.1978. Respondent No.1 being elder in age was placed

above respondent No.2 in seniority. Respondent No.1 belonged to "General Category", whereas second respondent was from "Scheduled Caste" category.

2.2 Respondent No. 2 by virtue of availability of roster points in promotional posts of Junior Scale Stenographer, Senior Scale Stenographer and Personal Assistant every time got promoted prior to respondent No.1.

2.3 In the seniority list of Senior Scale Stenographers, respondent No.1 was placed higher in seniority than respondent No.2 by applying "catch-up principle". However, in the seniority list of Personal Assistants, respondent No.2 was given higher placement. Apprehending the promotion of respondent No. 2 to the post of Private Secretary before him, respondent No.1 approached the State Administrative Tribunal by filing Original Application No. 31 of 2007. During the pendency of the said Original Application, respondent No.2 was promoted to the post of Private Secretary.

2.4 Both the respondents have retired since long.

3. On abolition of State Administrative Tribunal, OA No. 31 of 2007 was transferred to this Court as CWP(T) No. 14579 of 2008. Learned Single Judge after placing reliance upon the judgment rendered by the Constitutional Bench of Hon'ble Supreme Court in ***Ajit Singh and others (II) v. State of Punjab and others***, **(1999) 7 SCC 209,** allowed CWP(T) No. 14579 of 2008 and held respondent No.1 entitled to be considered for promotion to the post of Private Secretary after re-drawing the seniority list in accordance with the ratio laid down in Ajit Singh *supra*. Petition of respondent No.1 was allowed in following terms:-

> *"6. In view of the aforesaid instructions and the judgments of the Hon'ble Supreme Court, petitioner, who belongs to general category and was placed above respondent No.3 in the seniority List of Steno typists, or say the initial (lowest) cadre, to which petitioner and respondent No.3 were appointed on the same date, is entitled to be placed above respondent No.3, in the cadre of Personal Assistants, to*

which post respondent No.3 was appointed by promotion, earlier to the petitioner, against a post, reserved for SC candidates.

7. Consequently, writ petition is allowed and respondent No.2 is directed to re-draw Seniority List of Personal Assistants, in accordance with the aforesaid judgments and the instructions issued by the government to implement the said judgments and to consider the petitioner for promotion to the post of Private Secretary, in accordance with the re-drawn Seniority List. Petitioner shall be entitled to all monetary and pensionary benefits (because, by now, she has retired), in case she, on consideration, is found to be entitled to promotion to the post of Private Secretary. The aforesaid direction be complied with by 30.11.2011."

4. Respondents remained contended with the judgment passed by learned Single Judge and none of them came forward to challenge the same. However, the State, for the reasons best known to it, has filed the instant appeal, assailing the judgment passed by learned Single Judge.

5. We have heard learned Additional Advocate General for the Appellant/State and Mr. P.P. Chauhan, Advocate for respondent No1 and have also gone through the record carefully.

6. State contested the claim of petitioner in original application, primarily on the ground that petitioner therein had been working as Personal Assistant on ad-hoc basis, therefore, she had no claim to the post of Private Secretary and her name could not be included in the seniority list of Personal Assistants unless and until her ad-hoc promotion was regularized. However, while addressing arguments at the time of hearing of this appeal, learned Additional Advocate General came up with altogether a new plea that respondent No.1 had no claim for promotion to the post of Private Secretary for the reason that Recruitment and Promotion Rules required minimum five years regular service or regular combined with continuous ad-hoc service rendered, if any, in the grade of Personal Assistants. Since, respondent No.1

did not fulfill such criteria, she was not considered by the Departmental Promotion Committee for the post of Private Secretary.

7. As noticed above, learned Single Judge on the strength of Ajit Singh *supra* held the right of respondent No.1 to be placed in Seniority list of Personal Assistants above respondent No.2. It is evident from the judgment passed by learned Single Judge that neither the ground as taken by the appellant-State in its reply filed to the Original Application nor the stand now canvassed before this Court had ever been agitated before the writ court. In view of this matter, the appellant cannot be allowed to raise any new grievance, which it had failed to raise before learned Single Judge.

8. In any case, the grounds raised by the State in its reply to the Original Application or as sought to be raised in this appeal are not made out from the reading of following provisions of Recruitment and Promotion Rules: -

11. In case recruitment by promotion, Deputation, transfer grade from which Promotion, deputation, transfer is to be made	*By promotion from amongst the Personal Assistants who possess five years regular Service or regular combined with continuous ad-hoc service rendered, if any, in the grade.*

(1) In all cases of promotion, the continuous ad-hoc service rendered in the feeder post, if any, prior to regular appointment to the post shall be taken into account towards the length of service as prescribed in these Rules for promotion subject to the condition that the ad-hoc appointment/promotion in the feeder category had been made after following proper acceptable process of selection in accordance with the provisions of R&P Rules, provided that:

(i) In all cases where a junior person becomes eligible for consideration by virtue of his total length of service (including the service rendered on ad-hoc basis followed by regular service/appointment in the feeder post in view of the provisions rendered to above) all persons senior to him in the respective

category/post/cadre shall be deemed to be eligible for consideration and placed above the junior person in the zone of consideration;

Provided that all incumbents to be considered for promotion shall possess the minimum qualifying service of at least three years or that prescribed in the R&P Rules for the Post, whichever is less:

……"

Thus, the ad-hoc service or less than five years' service of respondent No.1 in the feeder category of Personal Assistant could not be an impediment in grant of relief to him.

9. Additionally, it is not understandable, as to why the State had filed the instant appeal, when the real interested parties had chosen to accept the verdict. Nothing has been brought on record to illustrate any justification for filing the instant appeal by the State. It is not the case where the judgment passed by learned Single Judge was to be considered as a judgment in rem. No specific prejudice has been pleaded by the appellant-State. In ***Sub Inspector Roop Lal and another*** vs. ***Lt. Governor through Chief Secretary, Delhi and others, (2000) 1 SCC 644***, a three Judge Bench of Supreme Court has observed as under: -

"24. Before concluding, we are constrained to observe that the role played by the respondents in this litigation is far from satisfactory. In our opinion, after laying down appropriate rules governing the service conditions of its employees, a State should only play the role of an impartial employer in the inter-se dispute between its employees. If any such dispute arises, the State should apply the rules laid down by it fairly. Still if the matter is dragged to a judicial forum, the State should confine its role to that of amicus curiae by assisting the judicial forum to a correct decision. Once a decision is rendered by a judicial forum, thereafter the State should not further involve itself in litigation. The matter thereafter should be left to the parties concerned to agitate further, if they so desire. When a State, after the judicial forum delivers a judgment, files review petition, appeal etc. it gives an impression that it is espousing the cause of a particular group of

employees against another group of its own employees, unless of course there are compelling reasons to resort to such further proceedings. In the instant case, we feel the respondent has taken more than necessary interest which is uncalled for. This act of the State has only resulted in waste of time and money of all concerned."

10. In the light of the above discussion, we find no merit in the appeal and the same is accordingly dismissed. Pending miscellaneous applications, if any, are also disposed of accordingly.

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

Between: -

1. SMT. PREMI DEVI W/O OF SH.TARA CHAND,
   R/O VILLAGE SADDA, P.O. LAHRU,
   TEHSIL JAISINGHPUR, DISTT. KANGRA, H.P.
2. SH. DEVI SINGH SON OF SH. HARI SINGH,
   R/O VILLAGE SADDA, TEHSIL JAISINGHPUR,
   DISTRICT KANGRA, H.P.

…APPELLANTS

(BY SH. AJAY KUMAR, SENIOR ADVOCATE,
WITH SH. GAUTAM SOOD, ADVOCATE)

AND

1. SH. BHUP SINGH S/O SH. HARI SINGH,
   R/O VILLAGE SADDA, TEHSIL JAISINGHPUR,
   DISTRICT KANGRA, H.P.
2. THE DIRECTOR OF CONSOLIDATION,
   H.P. SHIMLA.
3. SH. BHAGAT RAM S/O SH. HARI SINGH.
4. SH. MEHAR SINGH S/O SH. HARI SINGH
5. SH. RAMDHAN S/O SH. HARI SINGH
6. SMT. ROSSA D/O SH. HARI SINGH,
   ALL RESIDENTS OF VILLAGE SADDA,
   TEHSIL JAISINGHPUR, DISTT. KANGRA, H.P.
7. SH. OM PARKASH S/O SH. LALMAN,

8. SH. PARDEEP S/O SH. LALMAN,
9. SMT. SUDARSHANA D/O SH. LALMAN
10. SMT. SUNITA DEVI D/O SH. LALMAN
11. SMT. KUNTI DEVI WD/O SH. LALMAN
ALL RESIDENTS OF VILLAGE SADDA,
TEHSIL JAISINGHPUR, DISTT. KANGRA,H.P.

....

RESPONDENTS.

(BY SH. RAJINDER PAL SINGH, ADVOCATE,
FOR RESPONDENT NO.1.).
SH. ASHWANI K. SHARMA, ADDL. ADVOCATE
GENERAL, FOR RESPONDENT NO.2.
NONE FOR RESPONDENTS NO.3 TO 11.).

LETTERS PATENT APPEAL
NO. 17 OF 2008
Decided on: 14.03.2022

Limitation Act, 1963 - Section 3 – Limitation - Constitution of India, 1950 – Article 226 – Extra ordinary jurisdiction - Reasonable period to challenge - Held -In absence of prescription of any specific period of limitation in a statute, the remedies cannot be said to be available to a party to assail an order passed under such Act at its whims and the challenge has to be made within reasonable time -- The unjustified and unreasonable delay in making challenge to an order passed by any authority may lead to situation causing grave prejudice to other side - With the passage of time valuable rights are often acquired by the party having favorable order and belated interference therewith may cause in justice -- Appeal found without merits and dismissed. (Paras 8 & 9)

Cases referred:
Kranti Associates Pvt. Ltd. and another vs. Masood Ahmed Khan and Others, (2010) 9 SCC 496;

This appeal coming on for hearing this day, **Hon'ble**

Mr. Justice Satyen Vaidya, deliveredthe following:

J U D G M E N T

By way of instant appeal, appellants have assailed judgment dated 26.12.2007 passed by learned Single Judge of this Court in CWP No. 1632 of 2002.

2. Brief facts, forming backdrop of case are that predecessor-in-interest of appellant No.1 alongwith appellant No.2 had preferred a revision petition before the Additional Director, Consolidation on 12.08.1997, inter alia, challenging the consolidation proceedings finalized in the year 1986-87. The Additional Director, Consolidation, H.P. vide order dated 29.12.2001 allowed the revision petition. The order so passed by the Additional Director, Consolidation, was assailed before this Court in CWP No. 1632 of 2002 broadly on two grounds, firstly, that the Additional Director, Consolidation had exceeded the jurisdiction by entertaining a revision petition after 10 years and, secondly, that the order was non-speaking.

3. Learned Single Judge, by upholding the contention of the writ petitioner, proceeded to set-aside the order dated 29.12.2001 passed by the Additional Director, Consolidation. It was found and held by learned Single Judge that the consolidation in the concerned area stood closed after its finalization in the year 1986-87. The revision petition filed before the Additional Director, Consolidation was clearly beyond limitation. It was held that no limitation was provided under Section 54 of the Himachal Pradesh Holdings (Consolidation and Prevention of Fragmentation) Act, 1971, still the same had to be filed within reasonable time and 10 years could not be said to be reasonable time. Learned Single Judge further held the order passed by the Additional Director, Consolidation to be non-speaking.

4. Sh. Ajay Kumar, Senior Advocate, assisted by Sh. Gautam Sood, Advocate, on behalf of the appellants has argued that the order passed by the Additional Director, Consolidation was perfectly legal in the given facts and circumstances of the case and learned Single Judge has erred in setting aside the same without any basis.

5. We have perused the order dated 29.12.2001 passed by the Additional Director, Consolidation. Its perusal reveals that the said order is bereft of any reasoning whatsoever. The concluding para of said order reads as under:

"……Both the parties were heard in detail and the concerned record has been examined. From the inspection of the record, it is found that the points raised by the counsel of the appellant are based on facts, hence the case of the appellant is accepted and the order for the following *tartim* is passed:

Sr. No.	Name of Share holder	Excluded		Area	Included		Area
		Old Kh. No.	New Kh. No		Old Kh. No.	New Kh. No.	
1	Total share- 48 Devi Singh- Bhagat Ram Bhup Singh- Mehar Singh Ramdhan Son & Roso Devi daughter equal share- 36 share & Smt. Fithi Devi-7 share Widow of Hari Singh son of Kundan Om Parkash- Pardeep Kumar Son & Smt. Sudershana Devi- Sunita Devi daughter & Smt. Kunti Devi Widow of Lalman son of Hari Singh equal Share-5 share Mundarja Khewat No.- 36 Jamabandi for the year 1998-99.	1335 1336 1338	751 Min	0-04-05	912	703	0-02-59
					Discrepancy has been made good after preparing new Katha		

2.	Smt. Premi Devi daughter and Smt. Sahiban Devi widow Khemdi son of Kundan equal share of Mundarja Khewat No. 38 jamabandi for the year 1998-99.	912	703	0-02-59	1335	751/1	0-00-73
					Discrepancy has been made good after preparing new kathta		
3.	Devi Singh etc. Mundarja Khewat No-36 half Smt. Premi Devi etc. Mundarja Khewat No-38 Half	New khata has been prepared.			1336 1338	75/12	0-03-32

Copy of the order be sent to the C.O. Hamirpur for compliance and preparation of Tartim and Tatima. The file be consigned to the record room after compliance and necessary action. Announced.

Place: Jaisinghpur. Sd/-
Dated: 29.12.2001. Additional Director,
Consolidation Department,
H.P. Shimla-9."

Thus, the order passed by the Additional Director, Consolidation cannot be countenanced for the reason that the same is non-speaking on material particulars of the case. It was not a case where no contest was made by the party-respondent. It is trite law that the orders passed by quasi-judicial authorities have to be supported by reasons

6. The necessity of assigning reason has been repeatedly emphasized by the Hon'ble Supreme Court and reference in this regard can conveniently be made to the judgment of the Hon'ble Supreme Court in ***Kranti Associates***

***Pvt. Ltd. and another versus Masood Ahmed Khan and Others*, (2010) 9 SCC 496**, wherein after taking into consideration the entire law on the subject, the position of law was summarized as under:-

(a) In India the judicial trend has always been to record reasons, even in administrative decisions, if such decisions affect anyone prejudicially.

(b) A quasi-judicial authority must record reasons in support of its conclusions.

(c) Insistence on recording of reasons is meant to serve the wider principle of justice that justice must not only be done it must also appear to be done as well.

(d) Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasijudicial or even administrative power.

(e) Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.

(f) Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice by judicial, quasi-judicial and even by administrative bodies.

(g) Reasons facilitate the process of judicial review by superior Courts.

(h) The ongoing judicial trend in all countries committed to rule of law and constitutional governance is in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision making justifying the principle that reason is the soul of justice.

(i) Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose which is to demonstrate by reason that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

(j) Insistence on reason is a requirement for both judicial accountability and transparency.

(k) If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

(l) Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or "rubber-stamp reasons" is not to be equated with a valid decision making process.

(m) It cannot be doubted that transparency is the sine qua non of restraint on abuse of judicial powers. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor,1987 100 HarwardLawReview 731-37).

(n) Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torija v. Spain,1994 19 EHRR 553, at 562 para 29 and Anya vs. University of Oxford, 2001 EWCA(Civ) 405, wherein the Court referred to Article 6 of European Convention of Human Rights which requires, "adequate and intelligent reasons must be given for judicial decisions".

(o) In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law, requirement of giving reasons for the decision is of the essence and is virtually a part of "Due Process".

7. We also do not find any illegality and infirmity in the impugned order passed by learned Single Judge on 26.12.2007 insofar as it held the revision filed before the Additional Director, Consolidation, to be barred by delay and laches.

8. It is more than settled that in absence of prescription of any specific period of limitation in a statute, the remedies cannot be said to be available to a party to assail an order passed under such Act at its whims. The challenge has to be made within reasonable period. The unjustified and unreasonable delay in making challenge to an order passed by any authority

may lead to situation causing grave prejudice to the other side.With the passage of time valuable rights are often acquired by theparty having favourable order and belated interference therewith may cause injustice.

9. In light of the above discussion, we do not find any merit in the instant appeal and the same is dismissed, so also the pending miscellaneous application(s), if any.

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

Between:-

BHUSHAN LAL SHARMA,
SON OF SHRI DULE RAM SHARMA,
RESIDENT OF VILLAGE CHHAPROHAL,
POST OFFICE GAGAL,
TEHSIL SADAR, DISTRICT MANDI,
HIMACHAL PRADESH

.....APPELLANT

(BY SMT. DEVYANI SHARMA, ADVOCATE)

AND

1. STATE OF HIMACHAL PRADESH,
   THROUGH SECRETARY (IPH)
   TO THE GOVERNMENT OF HIMACHAL PRADESH
   SHIMLA-2.
2. HIMACHAL PRADESH PUBLIC SERVICE COMMISSION,
   THROUGH ITS SECRETARY, NIGAM VIHAR,
   SHIMLA-2.
3. SHRI SUMIT SOOD,
   SON OF SHRI KISHORI LAL SOOD,
   R/O HARI KIRPA NIWAS,
   BAAN STREET,

NEAR CHOWK BAZAR,
SOLAN, TEHSIL AND DISTRICT SOLAN (HP)

4. SHRI ANAND BLOURIA
SON OF SHRI KALYAN SINGH,
VILLAGE CHATRI,
POST OFFICE DRAMAN,
TEHSIL DHARAMSHALA,
DISTRICT KANGRA, HIMACHAL PRADESH

.....RESPONDENTS

(BY SH. ASHOK SHARMA, ADVOCATE GENERAL
WITH SH. VIKAS RATHORE, ADDITIONAL ADVOCATE
GENERAL FOR R-1,

NONE FOR R-2,

SH. SUNIL MOHAN GOEL, ADVOCATE, FOR R-3,

SH. GOVERDHAN SHARMA, ADVOCATE, FOR R-4)

LETTER PATENTS APPEAL
No. 486 of 2012
RESERVED ON: 22.03.2022
ANNOUNCED ON: 29.03.2022

Constitution of India 1950 - Article 226 – Service Matter -- Selection/appointment to the post of Assistant Engineers in Irrigation and Public Health Department challenged -- Respondent No. 3 applied for the post in capacity of ward of ex-servicemen – Held -- The format of the application provided that the ward of ex-servicemen applying for the post must be the dependent ward -- Government of H.P., Department of Personnel letter dated 25.07.1983 provides for Eligibility of dependent sons and daughters of ex-servicemen, who full fill the eligibility criteria prescribed for various posts can also be considered on merits against the post reserved for ex-servicemen to the

extent of non availability of suitable ex-servicemen after four years and if no suitable ward is available in fifth year the vacancy will lapse – Held - It is admitted position that Sumit Sood was gainfully employed at the time of applying for the post in question and the gain fully employed children cannot be considered dependent - Respondent number 3 deliberately omitted the word dependent while describing the category in his application form - The selection/appointment of Shri Sumit Sood as A.E. cannot be justified as he being not a dependent ward of ex-serviceman was in-eligible for the post in question - Respondent number 3 is 47 years of age and has become over age for government employment - The claim of the appellant on the post in question is genuine, so, respondents are directed to appoint the appellant as AE(C) against the post held by Shri Sumit Sood and the appellant shall be entitled to seniority from due date with all consequential benefits - Appeal disposed of. [Paras 6(c) (i), 6 (c) (ii), 7(a)]

Cases referred:

A.P Steel, Re-Rolling Mill Ltd. Vs. State of Kerala & Others (2007) 2 SCC 725;
BSNL Vs. Ghanshyam (2011) 4 SCC 374;
Dilwan Singh & Others Vs State of Haryana & others (1996) 8 SCC 369;
H.P. Public Service Commission Vs. Mukesh Thakur, (2010) 6 SCC 759;
Haryana Public Service Commission Vs. Harinder Singh & Another (1998) 5 SCC 452;
State of Kerala Vs Kumari T.P. Roshana & Others, AIR 1979 SC 765;
State of Uttar Pradesh & Others Vs. Arvind Kumar Srivastava & Others (2015) 1 SCC 347;
U.P. Jal Nigam Vs. Jaswant Singh (2006) 11 SCC 464;
U.P. Power Corporation Ltd. Vs. Ram Gopal 2020 SCC Online 103;

This petition coming on for hearing this day, ***Hon'ble Ms. Justice Jyotsna Rewal Dua,*** *passed the following:*

O R D E R

Two separate writ petitions bearing CWP(T) Nos. 6340 & 11665 of 2008 were filed by S/Sh. Bhushan Lal Sharma & Ajay Sharma respectively, questioning the selection/appointment of S/Sh. Rajesh Kumar,

Rakesh Rana and Sumit Sood as Assistant Engineers (Civil) [hereinafter referred as AE(C)] in the respondent Irrigation & Public Health Department. These writ petitions were partly allowed by the learned Single Judge on 03.10.2012. It was noticed in the judgment that Sh. Rajesh Kumar had not joined the post in question. Selection of Sh. Rakesh Rana was set aside, whereas selection of Sh. Sumit Sood was upheld in the judgment. Against the resultant two vacancies created because of non-joining of Sh. Rajesh Kumar and setting aside the selection of Sh. Rakesh Rana, the respondent-department was directed to call for the names of next two meritorious candidates. As a consequence of implementing the judgment passed by the learned Single Judge, Sh. Ajay Sharma-the petitioner in CWP(T) No.11665/2008 and one Sh. Anand Blouria, next in the order of waiting list, were issued the appointment orders. Sh. Bhushan Lal Sharma, [Petitioner in CWP(T) No.6340/2008] at serial No.3 in the waiting list could not be appointed. Aggrieved, he has challenged the judgment passed by the learned Single Judge in the instant appeal.

2. It is not in dispute that Sh. Rakesh Rana, whose selection to the post of AE(C) was set aside by the learned Single Judge, has not questioned the judgment. The judgment to this an extent has become final.

3. Gist of the appeal.

The appellant Sh. Bhushan Lal Sharma has filed instant appeal with two points attack.

The **first** line of attack is against Sh. Anand Blouria. It has been contended that Sh. Anand Blouria was a fence sitter. The torch was ignited and carried by the appellant Sh. Bhushan Lal Sharma and Sh. Ajay Sharma the original writ petitioners. Sh. Anand Blouria cannot be allowed to reap the benefit of the judgment rendered in the cases filed by the appellant

and Sh. Ajay Sharma. Learned Single Judge erred in directing the respondents to give appointment against the resultant two vacancies from next in order in the waiting list.

The **second** line of attack is against the selection/appointment of Sh. Sumit Sood to the post of AE(C). It has been argued that Sh. Sumit Sood was not a 'dependent' ward of ex-serviceman. He was not eligible for the post, which could be filled up only either from ex-servicemen or their dependent wards. Learned Single Judge erred in not setting aside the selection/appointment of Sh. Sumit Sood. In case the selection/appointment of Sh. Sumit Sood goes then one more vacancy of AE(C) would become available. The appellant being next in the waiting list at serial No.3 (after Sh. Ajay Sharma and Sh. Anand Blouria) would then secure appointment as AE(C).

4. Sh. Sumit Sood figures as respondent No.3, whereas Sh. Anand Blouria a non-party to the above numbered two writ petitions has been impleaded as respondent No.4 in the instant appeal. We may now consider the case of the appellant against the selection/appointment of Sh. Anand Blouria and Sh. Sumit Sood.

5. Case against **Sh. Anand Blouria** (respondent No.4)

5(a) As a result of implementation of the judgment dated 03.10.2012 passed by the learned Single Judge, the resultant two vacancies of AE(C) were filled up by the respondents from next in the waiting list. Consequently, Sh. Ajay Sharma and Sh. Anand Blouria figuring at serial Nos.1 & 2 in the waiting list got appointed as AE(C). Sh. Bhushan Lal Sharma, the appellant herein, was at serial No.3 in the waiting list. There were only two resultant vacancies, therefore, he could not get the benefit of the judgment delivered in his writ petition. Appellant's grievance now projected is that Sh. Anand Blouria was in the waiting list. He did not challenge the selection and appointment of the

selected candidates. He was satisfied with his non-selection. He was a fence sitter. Therefore, benefit of the judgment passed by the learned Single Judge in the writ petitions filed by the appellant & Sh. Ajay Sharma could not have been extended to him. Learned counsel for the appellant contended that it was only the appellant Sh. Bhushan Lal Sharma and Sh.Ajay Sharma, who being the writ petitioners before the learned Single Judge, could have been appointed against the resultant two vacancies of AE(C). In support of this contention, learned Counsel for the petitioner placed reliance upon ***(2006) 11 SCC 464*** *titled* ***U.P. Jal Nigam*** *Vs.* ***Jaswant Singh; (2007) 2 SCC 725*** *titled* ***A.P Steel, Re-Rolling Mill Ltd.*** *Vs.* ***State of Kerala & Others; (2011) 4 SCC 374*** *titled* ***BSNL*** *Vs.* ***Ghanshyam; (2015) 1 SCC 347*** *titled* ***State of Uttar Pradesh & Others*** *Vs.* ***Arvind Kumar Srivastava & Others*** *and* ***2020 SCC Online 103*** *titled* ***U.P. Power Corporation Ltd.*** *Vs.* ***Ram Gopal.*** Learned counsel for respondent No.4 defended the judgment highlighting higher merit of respondent No.4 over that of the appellant in the selection process.

5(b). We are not impressed with the argument raised by the appellant against appointment of Sh. Anand Blouria. Irrespective of the fact whether Sh. Anand Blouria was satisfied with his non-selection or with the selection/appointment of other candidates and whether he had himself filed the writ petition against the selection/appointment of other candidates or not, the fact remains that he was at serial No.2 in the waiting list i.e. above the appellant. The judgments cited by learned counsel for the appellant operate in that field, where the affected parties approached the Court and relief was given to them, then it is held that fence sitters who did not approach the Court cannot claim that such relief should also be extended to them. Following legal principles summed up in ***(2015) 1 SCC 347,*** titled as ***State of U.P****. Vs.* ***Arvind Kumar Srivastava*** can be beneficially extracted:-

"22. The legal principles which emerge from the reading of the aforesaid judgments, cited both by the appellants as well as the respondents, can be summed up as under:

22.1. The normal rule is that when a particular set of employees is given relief by the Court, all other identically situated persons need to be treated alike by extending that benefit. Not doing so would amount to discrimination and would be violative of Article 14 of the Constitution of India. This principle needs to be applied in service matters more emphatically as the service jurisprudence evolved by this Court from time to time postulates that all similarly situated persons should be treated similarly. Therefore, the normal rule would be that merely because other similarly situated persons did not approach the Court earlier, they are not to be treated differently.

22.2. However, this principle is subject to well recognized exceptions in the form of laches and delays as well as acquiescence. Those persons who did not challenge the wrongful action in their cases and acquiesced into the same and woke up after long delay only because of the reason that their counterparts who had approached the Court earlier in time succeeded in their efforts, then such employees cannot claim that the benefit of the judgment rendered in the case of similarly situated persons be extended to them. They would be treated as fence-sitters and laches and delays, and/or the acquiescence, would be a valid ground to dismiss their claim.

22.3. However, this exception may not apply in those cases where the judgment pronounced by the Court was judgment in rem with intention to give benefit to all similarly situated persons, whether they approached the Court or not. With such a pronouncement the obligation is cast upon the authorities to itself extend the benefit thereof to all similarly situated person. Such a situation can occur when the subject matter of the decision touches upon the policy matters, like scheme of regularisation and the like (see K.C. Sharma & Ors. v. Union of India). On the other hand, if the judgment of the Court was in personam holding that benefit of the said judgment shall accrue to the parties before the Court and such an intention is stated expressly in the judgment or it can be impliedly found out from the tenor and language of the judgment, those who want to get the benefit of the said judgment extended to them shall have to satisfy that their petition does not suffer from either laches and delays or acquiescence.

23. Viewed from this angle, in the present case, we find that the selection process took place in the year 1986. Appointment orders

were issued in the year 1987, but were also cancelled vide orders dated June 22, 1987. The respondents before us did not chalelnge these cancelleation orders till the year 1996, i.e. for a period of 9 years. It means that they had accepted the cancellation of their appointments. They woke up in the year 1996 only after finding that some other persons whose appointment orders were also cancelled got the relief. By that time, nine years had passed. The earlier judgment had granted the relief to the parties before the Court. It would also be pertinent to highlight that these respondents have not joined the service nor working like the employees who succeeded in earlier case before the Tribunal. As of today, 27 years have passed after the issuance of cancellation orders. Therefore, not only there was unexplained delay and laches in filing the claim petition after period of 9 years, it would be totally unjust to direct the appointment to give them the appointment as of today, i.e. after a period of 27 years when most of these respondents would be almost 50 years of age or above."

The ratio of the judgments relied by the appellant is not applicable to the facts of instant case. Respondent No.4/Anand Blouria was higher in merit to the appellant. Respondent No.4 may not have laid challenge to the selection/appointment of selected/appointed persons on the posts in question. But this fact will not alter his merit position. In ***AIR 1979 SC 765*** titled ***State of Kerala*** *Vs* ***Kumari T.P. Roshana & Others***, Hon'ble Apex Court while considering the admission of students on ground of regional discrimination observed that the root of the grievance and the fruit of the writ are not individual but collective.....the measure is academic excellence, not litigative persistence. Relevant portion from the judgment runs as under:-

"40.....The root of the grievance and the fruit of the writ are not individual but collective and while the 'adversary system' makes the Judge a mere umpire, traditionally speaking, the community orientation of the judicial function, so desirable in the Third World remedial jurisprudence, transforms the court's power into affirmative structuring of redress so as to make it personally meaningful and socially relevant. Frustration of invalidity is part of the judicial duty; fulfilment of legality is complementary. This

principle of affirmative action is within our jurisdiction under Article. 136 and Article 32 and we think the present cases deserve its exercise.

41……..

42. The selection of these 30 students will not be confined to those who have moved this Court or the High Court by way of writ proceedings or appeal. The measure is academic excellence, not litigative persistence. It will be thrown open to the first 30, strictly according to merit measured by marks secured. The apportionment as between graduates and pre-degree students and the application of the communal reservation will apply to these 30 to be selected. The Selection Committee will make its decision on or before the 31st January 1979. The Universities concerned will convey their approval to the Government for the nceessary addition to the student strength in obedience to the direction of this Court on or before the 27th January 1979."

In ***(2010) 6 SCC 759*** titled ***H.P. Public Service Commission*** *Vs.* ***Mukesh Thakur,*** the Apex Court, while rejecting the argument of depriving a meritorious candidate from selection only on the ground that he has not approached the Court, observed:-

"22. Such a direction has been passed apparently in view of the fact that fresh selection proceedings had commenced for the subsequent year. Thus, in such circumstances, it could be possible for the court to reject the same on the ground of delay and laches rather than issuing a direction that no such petition shall be filed, particularly, in view of the fact that candidates having roll numbers 1096 and 1476 had also secured 89 marks in the said paper. Candidate having roll number 1096 had secured 462 marks, i.e., more than 50% in aggregate. Therefore, depriving him only on the ground that he could not approach the court cannot be justified, particularly in view of the fact that Court has competence to grant equitable relief to persons even if they are not before the Court. (See State of Kerala Vs. Kumari T.P. Roshana & Ors., AIR 1979 SC 765; Ajay Hasia etc. Vs. Khalid Mujib Sehravardi & Ors. etc., AIR 1981 SC 487; Punjab Engineering College, Chandigarh Vs. Sanjay Gulati

& Ors., AIR 1983 SC 580; Thaper Institute of Engineering & Technology, Patiala Vs. Abhinav Taneja & Ors.; (1990) 3 SCC 468; Sharwan Kumar & Ors Vs. Director General of Health Services & Ors, AIR 1992 SC 2202; and K.C. Sharma & Ors. Vs. Union of India & Ors., AIR 1997 SC 3588). More so, Court has also power to mould the relief in a particular fact-situation.

Respondent No.4-Anand Blouria was at serial No.2 in the waiting list. Admittedly, the appellant Sh. Bhushan Lal Sharma was at serial No.3 in the waiting list. Therefore, the appellant could not have been appointed ignoring the higher merit of Sh. Anand Blouria simply because appellant was one of the writ petitioners. It is not in dispute that pursuant to the judgment passed by the learned Single Judge, two vacancies of AE(C) had to be filed up by the respondents in the order of merit in the waiting list. Naturally, Sh. Anand Blouria being higher in the merit to the appellant had to be appointed.

For the above reasons, we do not find any fault in the impugned judgment to the extent it directs the respondents to fill up the resultant vacancies from the next meritorious candidates. We also do not find any infirmity in the selection and appointment of Sh. Anand Blouria being at serial No.2 in the waiting list. The point is answered accordingly.

6. Case against **Sh. Sumit Sood (respondent No.3)**

6(a) Bare minimum facts for deciding the challenge laid to the selection/appointment of Sh. Sumit Sood are that an advertisement was issued by the respondents in the year 2003 for filling up six posts of AE(C) Class-I in Irrigation & Public Health Department. All these six posts were meant for ex-servicemen. Out of these, one was reserved for S.C. Ex-Servicemen (backlog) & five were reserved for General Ex-Servicemen. The advertisement stated that '*in case candidates of Ex-serviceman category are not available, posts will be filled up amongst the wards of respective categories as such ward of Ex-serviceman*

may apply.' Advertisement also gave format of application clearly indicating that it would be the dependent ward of Ex-serviceman, who can apply for the post. It would be appropriate at this stage to extract the relevant portion of the application format:-

> *"8. Name of category: (SC/ST/OBC/WFF/Ex-Man/Dependent Ward of Ex-Man/Physical/Visually handicapped."*

Sh. Sumit Sood applied for the post. In his application form against column No.8, he mentioned his category as 'ward of ex-serviceman'. The word 'dependent' was omitted by him in his application against this column. He was eventually selected and appointed as AE(C).

6(b) Learned counsel for the appellant contended that Sh. Sumit Sood was already employed as a Junior Engineer in the Public Works Department at the time of his applying for the post in question. He was not dependent ward of ex-serviceman. In terms of the advertisement, it was only the dependent ward of ex-serviceman, who could apply for the post. Sh. Sumit Sood, therefore, was not eligible for the post. It was for this reason that Sh. Sumit Sood had knowingly did not mention the word *'dependent'* while submitting his application for the post. Learned counsel for the appellant also brought to our notice the memorandum dated 03.06.2007, issued to Sh. Sumit Sood by the respondents, whereby a show cause notice was issued to him for proposed termination of his service for securing his appointment by misleading and giving incorrect information. Learned counsel for the appellant also relied upon the Government instructions to contend that the posts in question were meant for ex-serviceman category and in their absence for their dependent wards. Sh. Sumit Sood being in employment at the time of applying for the post could not be treated as dependent ward of ex-serviceman.

Per contra, learned counsel for respondent No.3 Sumit Sood, submitted that the advertisement did not specifically debar in-service

wards of ex-servicemen from applying for the posts in question. The fact that in case of employed candidates, NOC of their employers was called for in the advertisement, itself shows that it was not necessary for the ward of ex-serviceman to be dependent upon ex-serviceman. Learned counsel also submitted that the memo issued to Sh. Sumit Sood on 03.06.2007 was replied by him. Considering his reply, respondents had dropped the proceedings taken under the memo. Learned counsel further submitted that Sh. Sumit Sood had neither applied nor was he appointed to the post of Junior Engineer as a ward of ex-serviceman. His father also had never availed any benefit as an ex-serviceman. Therefore, there was no bar upon Sh. Sumit Sood to apply for the post in question as ward of ex-serviceman.

Learned Additional Advocate General supported the impugned judgment. He has also placed on record instructions to the effect that 5 posts of AE(C) falling to the category of ex-servicemen are lying vacant in the respondent department.

6(c) For the following reasons, we find considerable force in the contention of learned counsel for the appellant that Sh. Sumit Sood was not eligible for the post in question and, therefore, could not be appointed as AE(C) :-

6(c)(i) The posts were advertised for ex-servicemen. In the absence of ex-servicemen, the posts could be filled up from their wards. The format of the application (partly extracted above) provided that the ward of ex-serviceman applying for the posts must be the dependent ward.

6(c)(ii) Government of H.P. Department of Personnel letter dated 25.07.1983 provides for eligibility of the dependent sons and daughters of ex-servicemen for the pos(s) reserved for ex-servicemen. It refers to the decision of the Government that dependent sons and daughters of ex-servicemen, who fulfill the eligibility criteria prescribed for various posts, can also be considered on merits against the posts reserved for ex-servicemen to the extent of non-

availability of suitable ex-servicemen after four years and if no suitable ward is available in the 5th year, the vacancies will lapse. It was also stipulated that this entitlement would be available only to one dependent ward of ex-serviceman. Relevant part of the instructions is extracted hereinafter:-

> *"2. Keeping in view the position stated above, it has been decided by the Government that the dependent sons and daughters of ex-servicemen, who fulfill the conditions of education age etc. prescribed for various posts may also be considered on merits for the posts reserved for ex-servicemen to the extent of non-availability of suitable ex-servicemen after 4 years and, if no suitable ward is available in the fifth year, the vacancies will lapse. This entitlement would be available to one dependent ward only. In the event of the selection of the wards of ex-servicemen against the reserved vacancies under these instructions, they will not be entitled to the benefits which are available to the ex-servicemen in accordance with the rules regarding recruitment of ex-servicemen in civil services/posts."*

State Government instructions dated 24.09.1983 provided for certificate/affidavit to be produced by the dependent sons/daughters of ex-servicemen for their consideration against the posts reserved for ex-servicemen. The form of certificate/affidavit to be furnished by the wards of ex-servicemen for consideration against the posts reserved for ex-servicemen clearly provides that such applicants applying for the posts reserved for ex-servicemen must testify themselves to be dependent ward of ex-servicemen and that they had not been rehabilitated through employment with H.P. Government/Corporation/Autonomous bodies of H.P.

It is in the above background that the format of application prescribed for the posts in question assumes significance. The format clearly indicated that posts were meant only for ex-servicemen and in their absence the posts will be filled up from dependent wards of the ex-servicemen. Therefore, it was only the dependent wards of ex-servicemen who were eligible

for the posts in question. Learned counsel for Sh. Sumit Sood did not deny the implications of the above referred instructions. He, however, pressed into service a letter dated 15.09.2010 issued by Principal Secretary (Personnel) to the Government of Himachal Pradesh to highlight that practice of appointing wards of ex-servicemen against posts reserved for ex-servicemen, was in vogue, irrespective of dependency of wards. This argument is wholly misconceived. The letter dated 15.09.2010 does not whittle down the rigors of previous instructions issued by the State on the subject on 25.07.1983 & 24.09.1983. Rather it re-inforces the same & deprecates the deviations therefrom.

6(c)(iii) It is admitted position that Sh. Sumit Sood was gainfully employed at the time of applying for the post in question. Hon'ble Apex Court has held that gainfully employed children cannot be considered 'dependent'. Reference in this regard can be made to following judgments;- ***(1996) 8 SCC 369***, titled ***Dilwan Singh & Others*** *Vs* ***State of Haryana & others***. Relevant part of the judgment reads as under:-

> *"3.It is contended by Shri Mahabir Singh, learned counsel for the appellants that the selection Board has adopted a policy of calling the ex-servicemen and the dependent children of the ex-servicemen together to consider their cases for recruitment according to merit which would stand an impediment to the ex-servicemen. We find force in the contention. The object of reservation of the ex-servicemen is to rehabilitate them after their discharge from the defence services. As per the instructions issued by the State Government, in the absence of availability of the ex- servicemen instead of keeping those posts unfilled, the dependent children, namely, son or daughter of ex-servicemen would also to be considered. The object thereby would be that the Selection Board should first consider the claims of the ex-servicemen and have their eligibility considered independently it the first instance before the claims of the dependent children of the ex-servicemen are considered. If they are found eligible and selected, for the balance unfilled posts, the selection should be done from among the dependent children of the ex-servicemen.*

5. Counter-affidavit has been filed on behalf of the respondent-Selection Board contending that the Sainik Board had issued a certificate stating that they are the dependants of the ex-servicemen. On that basis, they had become eligible for consideration. The Board had accepted the same. It did not have any source for independent verification and, therefore, they have accepted them as dependants. We are of the view that the Board is not justified in law to take such a stand. The Board being the recruiting agency, it is its duty to verify and find out whether a candidate who has laid his claim as a dependant son or daughter of the deceased ex-servicemen, fulfilled the criteria referred to earlier for recruitment to the vacancies reserved for unfilled posts of ex-servicemen. On being satisfied, the other consideration has to be looked into and selection process could be made and candidates are selected according to prescribed procedure. It being the primary duty of the Selection Board, it cannot abdicate its function by merely relying on certificate issued by the Sainik Board which is only a recommending authority certifying that the candidate as a dependent of the ex- servicemen It may be accepted only a Prima facie evidence. The certificate does not ipso facto became conclusive nor would it entitle the candidate to be considered as a dependant of the ex-servicemen. It would be for the Board to examine and in case of any doubt, it should call upon the candidate to satisfy the Board that the candidate is dependant and fulfills the requirements prescribed in the guidelines. That was not done in these cases."

In ***(1998) 5 SCC 452*** *titled* ***Haryana Public Service Commission*** *Vs.* ***Harinder Singh & Another,*** following was observed:-

"8. The whole idea of the reservation is that those who are dependent for their survival on men who have lost their lives or become disabled in the service of the nation should not suffer. The public purpose of such reservation would be totally lost if it were to be made available to those who are gainfully employed. There is no justification for construing the words "dependants of ex-serviceman" in any manner other than that in which the appellant has construed them. This is in accord with the reservation policy itself, as shown by the quotation therefrom aforestated."

Sh. Sumit Sood, was aware of the fact that the posts in question could be filled up either from ex-servicemen or from their dependent wards. It is for this reason that he deliberately omitted the word 'dependent' while describing his category in his application form. This is despite the fact that the application form required him to clearly mention his category i.e. either ex-serviceman or dependent ward of ex-serviceman. It was in this very manner the respondent-department had construed the application form at the time of issuing memo to Sh. Sumit Sood on 03.05.2007.

6(c)(iv) The argument raised by respondent No.3 that the in-service wards of ex-servicemen could also apply for the posts since the advertisement required furnishing of employers' NOC for the in-service candidates, does not appeal to us. It was a case where composite advertisement was issued. The advertisement was issued not just for filling up the posts from ex-servicemen category in the respondent-department, but various other posts falling to the share of several other categories were also advertised in different other departments under the same advertisement. The condition of obtaining the NOC from employers for in-service candidates may have implications for the posts advertised in other departments but not for the posts of ex-servicemen advertised in the respondent-department.

7. Conclusion

The sum total of above discussion is that:-

(a) There is no illegality in appointment of respondent No.4/Sh. Anand Blouria to post of AE(C) against the resultant vacancies created due to non-joining of Sh. Rajesh Kumar & setting aside of appointment of Sh. Rakesh Rana. The impugned judgment to this an extent is upheld.

(b) The selection/appointment of Sh. Sumit Sood, as AE(C) can not be justified as he being not a dependent ward of ex-serviceman was ineligible for the post in question. Having held this, we cannot also be oblivious of the fact that Sh.Sumit Sood has actually been serving on the post ever since his

appointment on 26.02.2005. We are now in the year 2022. He is presently around 47 years of age and has become over-age for the Government employment. In the facts of the case, it will be extremely hard to remove Sh. Sumit Sood/respondent No.3 from the service at this stage. However, the rightful claim of the appellant on the post in question can also not be brushed aside, especially when appointments in question are subject to decision of the case. In the peculiar facts and circumstances of the case, we, therefore, direct the respondents to appoint the appellant as AE(C) against the post held by Sh. Sumit Sood. The appellant shall be entitled to seniority from due date with all consequential benefits flowing from such appointment. The financial benefits shall be granted to him notionally till the date of actual appointment. We also order that the benefits given to Sh. Sumit Sood pursuant to his appointment as AE(C) in the respondent-department shall not be withdrawn from him. Henceforth, he shall, however, be considered having been appointed against the post of Assistant Engineer (Civil) falling to the category of ex-servicemen against first vacancy out of total five posts of Assistant Engineer (Civil), presently stated to be lying vacant. Sh. Sumit Sood shall rank junior to the appellant. The necessary action to comply the above directions shall be completed by the respondent-department within two months from today. Present appeal is disposed of in these terms alongwith pending miscellaneous application(s), if any.